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IN THE HIGH COURT OF AUSTRALIA

FOXCROFT

V.

DUNCAN

REASONS FOR JUDGMENT

Judgment delivered at Brisbane

on 4th August, 1954.

J. J. Gourley, Govt. Print., Melb.

C.7163/51

FOXCROFT v. DUNCAN

ORDER

Appeal allowed with costs. Judgment of Hanger J. discharged and in lieu thereof judgment for the defendant in the action with costs.

Delivered in Court

FOXCROFT v. DUNCAN

JUDGMENT (ORAL)

DIXON C.J.
FULLAGAR J.
KITTO J.

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JUDGMENT (ORAL)

DIXON C.J.
FULLAGAR J.
KITTO J.

This is an appeal from a judgment of Hanger J. It is an action of damages for personal injuries caused by negligence and it arises out of a collision between a motor cycle and sidecar and a Customline Ford Sedan. The accident took place on 11th June 1952. The date is important because it was before the Law Reform (Tort-feasors Contribution & Contributory Negligence and Division of Chattels) Act of 1952 came into force. Apparently the Act came into force on 12th January 1953.

Hanger J. found for the plaintiff, and awarded him damages. The plaintiff was the motor cyclist. He was proceeding along the street now called Coronation Drive outward bound. The defendant was driving a Customline Ford Sedan and was proceeding on his left-hand side along Coronation Drive. The collision between them took place at the entrance of Tank Street to Coronation Drive. The defendant was found guilty of negligence by Hanger J. on the ground that he did not keep a sufficient look out to enable him to see the approaching plaintiff in due time. The accident took place at 8pm. at night. It was a dark drizzly evening. When the defendant was approaching the junction of Tank Street with Coronation Drive he appears to have been driving at a proper speed and the negligence which has been imputed to him would have been immaterial if it had not been that the plaintiff's motor cycle turned to go into Tank Street. The defendant relied upon contributory negligence in the plaintiff in making that manoeuvre but his Honour negatived contributory negligence on his part.

The question which we have to decide is whether on a proper view of the facts as found by his Honour, the learned judge should have held that what the plaintiff did amounted to contributory negligence which was an effective cause of the accident. I shall read what his Honour said occurred, premising it with this observation, that the defendant gave an entirely different account of the accident which his Honour rejected. It is, we think, necessary to be clear that the whole case depends on the plaintiff's evidence and not upon the defendant's account of the accident which, if accepted, would have exonerated him in a different way. His Honour says:-

> "I accept the evidence of the plaintiff as given honestly. Confusion appears in places, but I find the facts as follows: The plaintiff about 30-40 yards from the intersection changed into second gear and continued on at about 10 miles per hour; he was then travelling near the left-hand kerb of Coronation Drive. At about this time, he extended his right hand making the signal of his intention to turn right - he gives his distance from the junction at this time as about 20 yards. Ahead of him, beyond a palm tree which he has since ascertained was about 70-75 yards from the further kerb of Tank Street, he saw the headlights of the defendant's vehicle approaching; the headlights of the vehicle shone on the palm tree: This vehicle was on its correct side of the road. Plaintiff kept his right arm extended and came to the definite conclusion that he had room to turn into Tank Street before the other vehicle reached Tank Street: When the plaintiff was about 10 yards from the junction the defendant's car was about 75 yards from the junction. Plaintiff begun his turn about 10-15 yards back from the kerb line of Tank Street, having first moved out to the centre of Coronation Drive. In his turn, he travelled at about 10 miles per hour; without fixing his attention on the approaching vehicle, he remained conscious of its approach, and when he was half way round his turn, he noticed that it seemed to be travelling at a faster pace than he had judged; the car was then much closer than he had expected it would be. He then swerved more to his right expecting to complete his turn before the car reached him, but a collision took place, the front off-side of the car striking the side-car of the plaintiff's cycle. At that time the front wheel of the cycle was very close to the kerb line [that means the extended kerb line] of Coronation Drive, i.e. the plaintiff had just about completed his turn and was just about to enter Tank Street; his distance from the kerb of Tank Street on the Victoria Bridge side was about 15 feet."

It will be noticed that what his Honour describes amounts to a mistake in the plaintiff's judgment of the speed at which the advancing motor car would reach the point which proved to be the

point of impact. And it further may be noticed that in the sentence "He then swerved more to his right expecting to complete his turn before the car reached him ...", another error is imputed to the plaintiff, an error at least of judgment. The statement that the "Plaintiff had begun his turn about 10-15 yards back from the kerb line of Tank Street, having first moved out to the centre of Coronation Drive" puts the plaintiff in the position of having performed the first manoeuvre that a driver should do in making a turn, but it will again be perceived that he did not observe the rules of the road in making the turn from that point. What he should have done is governed by Regulations 13(2)(a) and 15(1)(c).

The material regulation, the main part of which is headed "Duty when turning", says that:-

> "(a) The driver of any motor vehicle, tram or animal making a turn upon any road shall yield right of way to any approaching vehicle, tram or animal not making a turn....."

It seems to us to be clear enough that the oncoming motor car was the approaching vehicle within the application of that regulation, and it is certainly clear that the plaintiff did not yield the right of way to it.

Regulation 15(1)(a), which it is perhaps desirable to read before turning to the more material sub-regulation (1)(c) of Regulation 15, says that the driver must, subject to an immaterial exception, "so drive such vehicle or animal that when it arrives at the intersection or junction it will be as near as practicable to, but to the left of, the centre-line of the carriage-way ". That the plaintiff did, but he did not comply with paragraph (c) of Regulation 15(1). That regulation refers to the entrance of the intersection. The intersection is the rectangle which is notionally created by the production of the kerb lines of Tank Street into Coronation Drive. The paragraph says:-

> "(c) Upon entering the intersection or junction drive such vehicle or animal parallel with the left side of the carriage-way of the road which he is leaving until it is as near as practicable to the left side of the carriage-way of the road which he is entering, and if there is upon or near such intersection or junction any vehicle, tram or animal with which his vehicle or animal, if it so turned, might collide, shall reduce the speed of, and if necessary stop, his vehicle or animal until it may turn with safety:"

He was, of course, going at a moderate speed but he does not appear to have reduced it. What he failed to do was to proceed to the left side of the carriage-way of the road which he was entering before he left the road from which he was intending to turn. The plaintiff, therefore, was in the position of having broken two regulations. It is clear enough that the accident took place because of the course which each of the vehicles took. Had either of them taken a substantially different course they would not have collided. Had either of these regulations, if they can be separated for this purpose, been observed the accident would not have taken place. It has been urged, and it is the view which his Honour adopted, that in the circumstances of this case the conclusion of contributory negligence should not be drawn. They are important regulations which regulate the duty of the person making a turn such as this, upon the performance of which any other vehicle is entitled, in the first instance, to rely. We are not prepared to take the view that a breach of these regulations can, in the circumstances of this case, be treated as negligence on the part of the plaintiff. If he had judged differently the distance and speed of the approaching vehicle he might not have acted as he did, and no doubt his view of that matter determined him in neglecting to observe the regulations. But his judgment was wrong. The error of judgment cannot alter the fact that he began by being in the wrong and he continued to be in the wrong until the actual collision. In these circumstances we think that it was established that he was guilty of contributory negligence and that the combined negligence of the two parties resulted in the accident, that is accepting the learned judge's view that the defendant was guilty of negligence.

We therefore think that the appeal must be allowed.