ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

HOLT

V.

HARRIS

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 20th August, 1954.

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

C.7163/51

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ORDER

Appeal allowed with costs. Discharge the order of the Full Court of the Supreme Court of South Australia. In lieu thereof order that the appeal to the said Full Court be allowed with costs and that the judgment of Mayo J. be set aside and in lieu thereof there be judgment in the action for the plaintiff for £1250 damages with costs.

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JUDGMENT. DIXON C.J.

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This appeal turns altogether on a question of contributory negligence. The appellant, who was the plaintiff in the action, in the early darkness of a May night rode an autocycle, not a motor bicycle, but a bicycle propelled by power, along a poorly illumintated street in an Adelaide suburb, a street which though not well illuminated carried some traffic. He collided with the rear of a semi-trailer in the dark and was seriously injured. The semi-trailer was a wide vehicle unlighted, parked with its inner side two feet six inches from the kerb and extending well out into that half of the roadway. Its width was eight feet and probably its outer side was somewhat more than ten feet from the kerb. The light of the autocycle was said to throw a beam twenty-three feet ahead. The appellant failed in his action to recover damages from the owner of the semi-trailer, although he left it parked unlighted in the dark, on the ground that he was guilty of contributory negligence in failing to see it. It appeared from the appellant's evidence that just before he collided with the semi-trailer a cyclist had overtaken him and had pedalled past him and that they had exchanged greetings. The cyclist, who by that time was ahead of him but to his right, called "look out", just before he collided with the obstructing vehicle. I am unable to agree in the decision that the appellant was guilty of contributory negligence and that he was on that ground disentitled to succeed in the action.

The respondent in leaving a large unlighted obstruction in the road in the probable path of oncoming vehicles was guilty of gross negligence. In my opinion the facts proved afford no sufficient ground for saying that the appellant was keeping such a bad lookout that he was guilty of contributory negligence. It is perhaps true that it is a not improbable hypothesis that his attention was diverted at the critical moment. But I think it was no more than an hypothesis. He was travelling, however, at a moderate pace,

about ten miles an hour. He was not bound, in order to fulfil the standard of reasonable care for his own safety, to anticipate that an obstruction of the description in question would be left unlighted extending into the path of traffic. He was bound to exercise ordinary vigilance but ordinary vigilance is consistent with reliance to some extent on others fulfilling such basal obligations of care for the safety of users of the highway as the respondent neglected when he parked his unlighted semi-trailer where he did. The distance at which the appellant's own light would show up such an object was one that he would traverse in a second and a half, and even if his exchange of greetings with the passing cyclist had distracted his attention for a very small division of time which proved in the event critical, it is too extreme a conclusion that this necessarily implied a want of due care for his own safety precluding him from recovering in the action. The only facts on which to base such a conclusion are (1) the estimated distance at which the beam from his lamp might enable him to see the obstruction, (2) the fact that he did not see it, and (3) the further fact that the cyclist had just passed him and that they had spoken. Facts amounting to a want of due care must be proved to the satisfaction of the tribunal of fact before contributory negligence is found. In Flower v. Ebbw Vale Steel Iron & Coal Co., 1936 A.C. 206 at p. 221, Lord Alness in making this point was betrayed into saying that the onus is manifestly upon a defendant to establish a defence of contributory negligence beyond all reasonable doubt. This may be regarded as hyperbole. The current which in England has from time to time carried some other civil issues under the temporary operation of the criminal standard of persuasion is hardly strong enough to sweep contributory negligence with it. But there must be some sufficient affirmative reason which upon a balance of probabilities would give rise to a reasonable satisfaction that the defendant had in some ascertained particular exhibited a want of due care for his own safety.

The gross negligence of the respondent in leaving an unlighted vehicle after dark so far out from the kerb is quite enough to explain the accident without any failure of reasonable vigilance on the part of the appellant. Neither the general circumstances nor the three facts mentioned give sufficient support to the hypothesis that the appellant's attention must have been distracted in a manner and to a degree amounting to negligence. In my opinion that hypothesis was not established. I think that the finding of contributory negligence should be set aside. I have had the advantage of reading the reasons of Taylor J. and agree in them. In my opinion the appeal should be allowed.

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I am of the same opinion and have nothing to add.

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TAYLOR J.

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JUDGMENT TAYLOR J.

The appellant, a man of 59 years, was on the 11th May, 1948, riding an auto-cycle along Parade Avenue, Rosslyn Park, a suburb of Adelaide, when he came into collision with the rear of the respondent's motor vehicle, described as a semi-trailer. The latter vehicle was stationary in Parade Avenue having been parked there by the respondent some little time before dark at a distance estimated to be between 6 inches and 2 feet from the kerb line. The collision occurred shortly after 6.15 p.m. and the evidence establishes that at this time it was quite dark. The roadway at the point of collision is said to be about twenty nine feet wide and it is common ground that it is poorly lighted. There were no street lights within eighty five or ninety paces of the parked vehicle and there were a number of trees growing either on the edge of the roadway or on the footpath. At the time of the appellant's accident he was returning home from work on his vehicle which carried a headlight about three feet above the ground level. This light was said to be "a good light" and to throw a beam for some twenty three feet ahead. The semi-trailer was approximately eight feet wide and on the table-top of it there were a number of forty-four gallon drums which were painted with aluminium paint. The vehicle, itself, was, however, unlighted.

It was in these circumstances that the appellant collided with the semi-trailer and sustained the injuries in respect of which he sought to recover damages. Upon the trial of the action the learned trial judge found negligence on the part of the respondent but, after reviewing the evidence, he also found that the appellant failed to take reasonable care for his own safety and that this failure directly contributed to the accident. Accordingly, he directed that judgment should be entered for the respondent. The first of these findings is beyond question and was not challenged in the Full Court or upon this appeal. The appellant, however, contends that the finding of contributory negligence is insupportable notwithstanding the concurrence of the Full Court in the finding of the learned trial judge.

For the purpose of examining this finding it is necessary to examine the facts in a little more detail. There is no suggestion that the appellant was travelling at an excessive speed; on the contrary the evidence was that he was travelling at about ten to twelve miles per hour. According to the appellant he was just "letting his engine go down the incline." From where he turned into Parade Avenue the road was straight and, although darkness had set in, there was, according to the respondent's contention, nothing to prevent the appellant's headlight illuminating the rear of the respondent's vehicle and the drums which were upon it in ample time to enable him to see the obstruction and avoid it. The vehicle, as parked, extended some eight feet six inches to ten feet out into the roadway and, it was argued, there is nothing to suggest that it would not have become quite visible to the driver or rider of a slowly approaching vehicle equipped with "a good light". But, notwithstanding this, the appellant did not see the vehicle before colliding with it. He did not profess to see it at a stage when it was too late

to avoid it; on his evidence he did not see it at any time before the collision. No doubt it would have become visible to him a moment or two before the impact if his eyes had been focussed directly ahead and it is not unreasonable to infer that at the critical time he was not looking ahead. It was not, of course, incumbent upon the appellant to keep a look-out ahead to the exclusion of all other precautions which the exercise of reasonable care required but the respondent stresses that at no time after the respondent's vehicle came within the range of his lights did the plaintiff see it before striking it. The reason for this probably was that at no time during this period did the appellant look carefully ahead.

In the course of his evidence the appellant said that as he came slowly down the incline in Parade Avenue a fellow employee, one Goodwin, who was riding a bicycle overtook him and passed him. Immediately after Goodwin passed him he called out to the appellant "Look out" or something similar to that. The appellant agreed in cross-examination that as he approached the semi-trailer the lights of Goodwin's bicycle may have withdrawn his attention momentarily and he said he thought that if his attention had not been so withdrawn he would not have struck the trailer. Goodwin, however, says that he overtook the appellant nearly a quarter of a mile before the scene of the accident and that they passed the time of night as he proceeded. He could not remember just what was said but when he was about two or three feet past the appellant he saw the rear of the semi-trailer directly to his left and called out "look out".

The learned trial judge found that "in his approach to the semi-trailer the appellant could, and would have seen it in time, and turned aside, had not his attention been attracted by the cyclist Goodwin" who "passed the

plaintiff shortly before reaching a position alongside the stationary vehicle". It seemed probable, his Honour said, "that neither the plaintiff nor Goodwin discerned the semi-trailer at an earlier stage because each of them had their attention drawn towards the other during the period that the latter was engaged in passing" and "the difference in speed was such that Goodwin did not forge in front quickly". It is apparent that his Honour formed the view that the appellant's attention was withdrawn from the path his vehicle was taking for a relatively substantial period for, his Honour said, their attention was drawn to one another during the period that Goodwin was engaged in passing and "Goodwin did not forge in front quickly". This was the basis of his Honour's finding of contributory negligence and it was on the same basis that the Full Court decided the matter. Napier C.J. and Reed J. in the course of a joint judgment observed: "It seems to us that, if the plaintiff's attention was momentarily attracted by the fact that Goodwin was passing him that would not necessarily amount to failure to use due care, having regard to the speed of the cycle. But, if the distraction was more than momentary - if the two men were riding together, and not looking where they were going - then, plainly, the plaintiff was not riding with a due regard for his own safety". Thereafter their Honours referred to the fact that the learned trial judge had found that "in not looking where he was going the plaintiff was riding without due regard for his own safety" and they thought that it was impossible to say that that finding was against the evidence. I find myself, however, in disagreement with this view. It was, of course, necessary that contributory negligence on the part of the appellant should have been established by evidence. Now, whilst it is probable that the appellant's attention may have been attracted by Goodwin, there is no direct evidence that this distraction occupied any substantial

period of time. Any finding that it did must be the result of inference from the facts that the appellant did not see the semi-trailer at any stage, that Goodwin overtook him and first spoke to him some little time before the accident, that he was some time in passing the appellant and that he had passed him just a moment before the appellant struck the semi-trailer. Of these facts the most significant is that the appellant did not see the semi-trailer at all. But it is not suggested that in this poorly lighted street with the nearest, but yet distant, light "hidden", as the learned trial judge found, "by the foliage of trees", that the failure of the appellant to see the semi-trailer before it came into the range of his headlight established that he was not keeping a proper look-out up to that point. Indeed, the evidence appears to suggest that a reasonable look-out might well have failed up to this point to disclose the presence of the semi-trailer. The critical period therefore is the period which elapsed after that vehicle was within range of the appellant's headlight. In terms of time it is clear that this was probably somewhere between one and two seconds and it was the appellant's failure to see the semi-trailer during this period that is the critical matter. Now, the evidence establishes that at the end of this period Goodwin had passed the appellant by a matter of a few feet only and it is quite possible - and indeed probable - on the evidence that the attention of the latter was attracted by Goodwin during the second or two immediately before he called "look out". Such a distraction would account for the appellant's failure to see the semi-trailer, and that this was the reason for such failure is equally consistent with the hypothesis that the appellant and Goodwin had ridden a substantial distance without observing where they were going. That being so, I do not think the inference is open that the two men were riding together for some distance and not looking where they were

going.

In these circumstances I am of the opinion that the finding of contributory negligence was not justified. Proof that the appellant permitted his attention to be diverted from the roadway ahead by a passing cyclist for little more than a second in an apparently unobstructed roadway and in circumstances such as those related does not, in my opinion, amount to evidence of contributory negligence. Accordingly I am of the opinion that the appeal should be allowed, the verdict and judgment set aside and judgment entered for the appellant in the sum assessed by the learned trial judge.