B ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

KERR & SWANSTON

V.

KELLER

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 10th September, 1954.

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

C.7163/51

KERR AND ANOR

V.

KELLER

JUDGMENT

DIXON C.J.
KITTO J.

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JUDGMENT

On 3rd February 1952 a collision occurred between a Riley car owned by the appellant Kerr and driven by the appellant Swanston and a Ford Prefect car owned and driven by the respondent Keller. The appellants brought an action against the respondent in the Supreme Court of Queensland, alleging that the collision was caused by negligence on his part and claiming damages. Keller counterclaimed, attributing the accident to negligence on the part of Swanston. The action was tried by Stanley J., who found that "the accident occurred through the contemporaneous and continuing negligence of both drivers each of whom could and should have been master of the situation and lost that opportunity by reason of his own negligence". As the Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act of 1952 was not in force at the date of the accident, the finding meant that the claim and counterclaim both failed as between Swanston and Keller; and as it was admitted on the pleadings that Swanston at the time of the collision was driving the Riley car as the agent of Kerr, who in fact was a passenger in the front seat of the car, the finding meant that the claim and counterclaim failed also as between Kerr and Keller. Accordingly judgment was entered dismissing both claim and counterclaim. From that judgment Kerr and Swanston now appeal.

The collision took place shortly before mid-day, on a highway leading from Lowood to Gatton, and about a mile and a half from Lowood. Swanston, who was a friend of Kerr's

and frequently drove the Riley for him, had driven Kerr and his son on this occasion from Nambour through Lowood, and was heading for Gatton where Kerr intended to put his son to school. Keller, in the Prefect, with a young lady as passenger, was returning home to Lowood after having visited Glenore Grove, some twelve miles out in the direction of Gatton. The cars collided on a straight portion of the highway which extended from the crest of a hill at its Lowood end to a bend veering sharply to the left at the Gatton end. There was a slight downward grade over the whole distance. Beyond the bend, the road descended more steeply.

The roadway consisted of a bitumen strip, 16 feet wide at the point of collision, with a clear space of 25 feet on either side. On the Riley's left hand side as it approached the point of collision, the clear space at the side had a perfectly trafficable surface of gravel for a width of 8 feet from the bitumen. As Swanston drove the Riley over the crest of the hill he observed the bend or corner ahead of him, but no vehicle was in sight. In order to take the corner safely he eased his speed by a slight application of his brakes. Then Keller's Prefect came into view round the bend, cutting the corner by travelling on its wrong side of the bitumen strip. Then, instead of moving across to his correct side after negotiating the corner, Keller continued on his wrong side up the slight incline of the straight section of the road. When Swanston saw this he applied his brakes hard, sounded his horn, and steered his car to the left-hand edge of the bitumen strip but not onto the gravel alongside it. Keller came on at a constant speed, in a straight line and some 3 feet 6 inches from the right-hand edge of the bitumen. The cars collided with considerable force.

That Keller was guilty of negligence in driving to the point of collision on his incorrect side of the road is obvious, and the only question which has been debated on

this appeal is whether the collision was really and substantially caused, wholly or in part, by negligent management of the Riley by Swanston. This question, as has been mentioned, was answered in the affirmative by the learned trial judge, whose view of the facts may be summarised as follows: Swanston saw Keller's car when it was cutting the corner near a telephone pole which was 6 feet from the bitumen on Keller's driving side. Swanston was then, according to his own estimate, some 80 to 100 yards away from Keller's car. The impact occurred not more than 20 yards from the corner. Swanston therefore travelled at least 60 yards while Keller travelled 20 yards. His speed was therefore at least three times that of Keller, and Keller's speed was estimated at about 25 m.p.h. by himself and by Kerr and was worked out at 18 m.p.h. by another witness, Ross, by means of a mathematical process based on the assumption that the Riley's speed at the moment of impact was 10 m.p.h. Swanston, his Honour concluded, was negligent in travelling at an excessive speed in the circumstances, and in not acting with reasonable promptness to slow down and turn to his left off the bitumen at a moderate speed before the impact happened.

In considering whether this was the correct view to take it is necessary to bear in mind some important facts which were established beyond controversy by the evidence. In the first place, though the loaded weight of the Riley was about 34 cwt. and that of the Prefect was only about 19 cwt., each car was stopped dead by the collision. Each apparently rebounded a little, and they came to rest about a foot apart. Next, the point of collision was definitely fixed at only 20 yards on the Lowood side of the corner round which Keller appeared, the position being fixed by a pool of oil which formed on the roadway beneath the Prefect after the collision. Thirdly, for a distance of 45 feet before the point of impact the brakes of the Riley were so hard on that the wheels were

locked, leaving unmistakeable skid marks on the bitumen for that distance.

Now, if, as the evidence strongly suggests, Keller travelled the 20 yards from the bend to the point of collision at a speed of 25 m.p.h., he cannot have been visible to Swanston for more than about one and two-thirds seconds in all. If his speed was only 18 m.p.h. - and there is nothing to suggest so low a speed except the calculations made by Ross, which depend too much upon unverifiable hypotheses to be regarded as producing a reliable result - Keller was visible to Swanston for only about two and one-third seconds. Some fraction of the time after Keller appeared round the bend must necessarily have elapsed before Swanston could fairly be expected to realise that Keller was not going to get over on to his correct side, and before he could react to his appreciation of the danger which that involved. In what still remained of the two seconds or so, he sounded his horn, braked his car hard, and skidded 45 feet. Let it be assumed, as the trial judge thought, that the accident would have been averted if Swanston had swerved off the bitumen onto the gravel at the left; and put aside as afterthoughts, as his Honour did, the reasons which Swanston advanced in court for not having taken this course. It is obvious that once the application of the brakes had locked the wheels there was no possibility of leaving the bitumen. The question then is whether Swanston should be convicted of a failure of reasonable care or skill in the management of the Riley because, between the point of time when it appeared that Keller might remain on his wrong side and the point of time when Swanston applied full pressure to his brakes, Swanston only got to the extreme edge of the bitumen and did not leave it. The interval was far too brief for an affirmative answer to be given to this question. The trial judge considered that if, when the cars were 60 yards apart - the approximate distance which Swanston

said may have separated them when he sounded his horn - Keller had time to avoid the collision by swinging to his left, Swanston had time to avoid it by similar action. But Swanston's estimate of 60 yards represented nothing better than a somewhat hesitant attempt to recapture the fleeting impression of the moment; and it is by no means clear that when he sounded his horn there was in fact still time for Keller to move over sufficiently to obviate the collision. There cannot have been any substantial time for reflexion on Swanston's part. He had to choose on the spur of the moment between relying on his brakes and incurring the well-known hazards of swerving suddenly onto a loose surface at the side of a road. It would be going a long way to say that the choice he made was certainly wrong; but even if it was wrong, there is no sufficient ground for holding that his error argues a lack either of reasonable care or of reasonable skill.

The more difficult question is whether a cause of the collision is to be found in an excess of speed on the part of Swanston as he approached the scene of the accident. The learned judge's view that the Riley must have been travelling at an average speed which was three times that of the Prefect during the time it took the Prefect to move from the corner to the point of impact was based, as has been mentioned, upon Swanston's admission that when he first saw the Prefect, as it came round the bend, he was 80 to 100 yards from it, that is to say that he was 60 to 80 yards from the point of impact. But if the admission was in accordance with the fact, Swanston's average speed from the time he first saw the Prefect until he collided with it must have been anything from 75 to 100 m.p.h., assuming that Kerr and Keller are right in estimating the Prefect's speed at a steady 25 m.p.h.; and it must have been anything from 54 to 72 m.p.h. if the mathematical calculation of the Prefect's

speed at 18 m.p.h. is correct. The severe application of the Riley's brakes obviously reduced its speed very considerably by the time of the impact, because unless it was then travelling much more slowly than the Prefect its greater weight must inevitably have carried it forward against the opposition of the smaller car. Consequently, if the assumed distances are right, the speed of the Riley up to the moment when Swanston first saw the Prefect must have been, not only well over 50 m.p.h. as the learned judge said, but well over 70 m.p.h. It certainly must have been much higher than is suggested by anything else in the evidence, and there is room for doubt whether the necessary reduction of speed could have been made in the distance without capsizing the car.

It is true, as Mr. Stable pointed out, that Swanston's statement that he first saw the Prefect when it was 80 to 100 yards away was made clearly and repeatedly in the course of his evidence; but the improbability of its being correct is so high that Mr. McGill may well be right in suggesting that the 80 to 100 yards was really Swanston's impression of the distance of the Riley from the corner when Swanston first saw, not the Prefect, but the corner, and made a slight application of his brakes whilst the Prefect had yet to appear. But however that may be, the figures Swanston gave produce such improbable results that they cannot be regarded as providing a satisfactory foundation upon which to rest the decision of the case. If they be put on one side, there is nothing whatever in the evidence to suggest that Swanston's speed was out of the ordinary. The highest speed any witness attributed to him was 50 m.p.h., which Keller's sister said that Swanston had mentioned to her as having been the speed to which he slowed the Riley after he came over the hill and saw the corner ahead of him. A police sergeant, Byrne, swore that Swanston said he was travelling at 50 m.p.h. when he reached the rise, that is before he slowed down on

seeing the corner. The witness Althaus, a farmer, who from his home 100 feet off the road near the corner saw the cars approaching one another and collide, could only describe the Riley's speed as pretty fast. Swanston's own evidence was that he was down to somewhere in the vicinity of 35 m.p.h. when he saw the Prefect, and Kerr agreed with him; but neither of these witnesses impressed the trial judge on this point.

The case, however, does not depend upon a determination of the precise speed at which the Riley was travelling when the emergency arose. The important question is whether the speed was greater than Swanston, with the braking power which was available to him, could control sufficiently to avoid colliding with another vehicle being driven in any manner which, as a reasonable man, he should have foreseen. The fact which stands out in relation to this question is that, although Swanston was unable to bring the Riley to a stop 20 yards before the corner, he clearly could have stopped it in another few yards and well before reaching the corner. Whether or not Kerr and he were right in estimating the speed at the point of impact as not more than about 10 m.p.h., the behaviour of the two cars when they collided showed convincingly that the Riley's speed was then very low; and the brakes were still holding the wheels completely locked. What has ultimately to be considered, therefore, is whether Swanston, when regulating his speed between the summit of the hill and the point where he fully applied his brakes, ought to have foreseen as a reasonable probability that a car coming in the opposite direction not only might cut the corner but might continue on its wrong side so long as to be in the path of the Riley while it was still several yards short of the corner. The answer is that there was nothing to be observed at the time, and nothing in general experience, to suggest that such a thing was in the least likely to occur. A car following such a course would be departing so completely and so far from the

normal as to be outside the range of reasonable anticipation.

For these reasons we are of opinion that no negligence on the part of Swanston was established by the evidence, and that the plaintiffs were accordingly entitled to judgment on the claim and counterclaim. The trial judge assessed Kerr's damages at £1400 and Swanston's damages at £150, and no challenge to these amounts has been offered. The appeal should be allowed with costs, and the judgment of the Supreme Court should be set aside. In lieu thereof judgment should be entered for the plaintiffs for £1400 and £150 respectively, with costs, and the counterclaim should be dismissed with costs.

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JUDGMENT. FULLAGAR J.

KERR & ANOR. v. KELLER

JUDGMENT. FULLAGAR J.

I have had the advantage of reading the judgment of Dixon C.J. and Kitto J., and I am in complete agreement with it.

In a case of this kind a court of appeal, where it has before it a carefully reasoned judgment, written after an inspection of the locality, must be cautious about substituting its own opinion for that of the learned trial judge. But in this particular case I find myself unable to accept his Honour's view. I feel convinced that his Honour attached too much importance to Swanston's estimate of distance, and not enough importance to Swanston's estimate of speed. But the decisive consideration to my mind is that the collision took place on what was the right driving side of the road to Swanston, and the wrong driving side of the road to Keller. It is gross negligence, in my opinion, to drive round a corner on the wrong side of the road when one cannot see what lies beyond the corner. The emergency which led to the collision was created by the negligence of Keller, and his negligent driving continued up to the moment of the collision. The duty of Swanston to drive with reasonable care did not, as I think, require him either to anticipate negligence of such a character in an approaching driver, or to take any steps other than those which he did take when a scarcely measurable period of time was available for defensive action. Even if it be assumed that Swanston was, when he first saw Keller's car, driving at a speed which - considered in gross, so to speak - was excessive, it seems to me impossible, having regard to Keller's conduct, to say that the same accident would not have happened if Swanston had been driving at a perfectly reasonable speed. I am unable to avoid the conclusion that the proximate cause of the collision, and the only thing that can fairly be considered a proximate cause, was the negligence of Keller.