VARISCHETTI

v.

THE MOTOR VEHICLE INSURANCE TRUST.

JUDGMENT (ORAL)

DIXON C.J.
McTIERNAN J.
KITTO J.

19 October 1954

VARISCHETTI

v.

THE MOTOR VEHICLE INSURANCE TRUST.

DIXON C.J.: This is an appeal by the plaintiff in an action for damages for personal injuries caused by the negligent driving of an autocycle. It is an appeal by the plaintiff against a decision of Jackson J., who entered judgment in the action for the defendant.

The plaintiff in the action is the survivor of the parties to a collision upon the highway in Boulder. He was riding a motor cycle travelling west upon a roadway called Burt Street. The defendant is The Motor Vehicle Insurance Trust, which is the insurer of a man named Trott who was riding an autocycle at a slow pace in the same direction along the same street. Trott lived on the west of Kingsmill Street, which comes into Burt Street from the north. Burt Street is a street in which at one period there had existed a tramway in the middle of the road. The tram lines had been removed but the posts of the tramway remained. On each side of the former tramway was a bitumen strip. The two parties to the collision were travelling upon the southern bitumen strip. Some distance, a little over thirty feet, from a point through which the eastern building line of Kingsmill Street would pass if prolonged there was standing one of the poles of the former tramway. The autocycle carrying Trott was in front. It would be natural for him, if he thought it safe to do so, to swing to the right and perhaps cut the corner to get to his house on the west side of Kingsmill Street or to a lane leading to his house. The plaintiff Varischetti was approaching at a very much faster pace, it would seem, though that is not necessarily material, and was rapidly overtaking the deceased man Trott. He overtook him and hit his autocycle; the autocycle was thrown for a very considerable distance forward but to the right so that it finished near a point at the prolongation of the building line upon the west side of Kingsmill Street, with Trott lying beside it dead. The motor cycle went a very much further distance, about 206 feet in fact, fro m the point which is supposed to be the point of

collision. It appears to have gone very nearly in a straight line, not leaving the bitumen. There are scrape marks at a point approximately opposite the pole I have mentioned near the extension of the eastern building line of Kingsmill Street and those scrape marks with some slight intervals go almost up to the place where the motor cycle was found after the accident.

Of the witnesses to the accident there was, of course, primarily the plaintiff himself. Unfortunately for the plaintiff, he at one stage said that his memory of the accident had completely gone. He made that statement to the police three days after the accident, voluntarily attending the police station to make it. At a later stage he gave an account of the accident in a statement in which he did say that the autocyclist began to turn without a hand signal. Another man coming in the opposite direction might have given evidence of the accident but before the trial he suffered in an accident of a different kind in which his skull was seriously hurt and he professed to have only the vaguest memory of the accident in which the plaintiff suffered. His name was Graham. Before the accident, however, which disqualified him from giving acceptable evidence, although not from giving evidence, Graham had made a statement to the police. Jackson J., who heard the action, said that Graham, as an independent witness who might, but for his own condition, have given some evidence on which reliance could be placed, was a witness upon whom he could not rely. But having before him the original statement to the police given by this witness his Honour interpreted it as meaning that it negatived the idea that the deceased man Trott had begun to make the turn or had made the turn. His Honour perhaps in that observation went too far. A careful reading ofthe statement rather suggests that Graham was assuming that Trott either made the turn or that someone said he did, and on that footing confined himself to saying that he did not see Trott make the turn and did not see him put out his hand because, in any case, the line of tramway poles obstructed his view. But, at all events, his Honour said that he could not rely upon the positive evidence Graham gave on oath. Needless to say, the statement went into evidence only as a prior statement which Graham had made. But the learned judge said that the plaintiff's own evidence was clearly untrustworthy, even omitting his statement

to the police three days after the accident. The statement to the police four days after that as his Honour thought differed materially from his evidence given at the trial and his Honour said that the doctor's evidence showed that the plaintiff could not be expected to remember the facts of the accident and that any version he gave was likely to be unreliable. His Honour said that the only other possible evidence to support the allegation was the damage on the right-hand side of Trott's autocycle, where it was apparently hit. Now the injuries to the autocycle show that it must have been hit on the right-hand side behind the driver, so that it would look as if the angle of the two vehicles was such as to expose, at least to some degree, the right-hand side of the autocycle to the oncoming motor vehicle. As to that fact his Honour said:- "But this is consistent with the autocycle wobbling at the slow speed at which it was travelling or swerving slightly on the road. I am not satisfied that the plaintiff has established negligence against Trott."

Before dealing with his Honour's finding it is necessary to say something of the admissibility of two pieces of evidence. It was sought to show that the road exhibited tracks from the pole which I first mentioned, that is the pole close to the prolongation of the east building line of Kingsmill Street, and that the tracks went to the lane on the westerly side of that street, a lane into which the plaintiff would be likely to go to get to his house. It may be that there is some misunderstanding as to what that evidence was pointed at. His Honour's note rather suggests that he thought it was pointing only to tracks of vehicles other than those involved in the collision, but Mr. Carson's view is that the evidence was intended to include all tracks, including those made on former occasions by Trott's autocycle, and the real point to which it was directed was to show that what I may call a beaten track had been made to the house of the deceased man which he was very likely to use in proceeding to his home from about the particular pole. The evidence might tend to make it probable that he was riding according to habit and making a turn at that point. That evidence, I would be inclined to think, might, if properly presented, be made admissible. At all events in dealing with the case I propose to assume that it was admitted to prove the fact I have stated; namely that it was an habitual way of going from that point to the lane and no more.

The other piece of evidence was a deposition in the Coroner's Court, the deposition of the witness Graham, who at the trial of the action swore that his memory of the whole events had been sadly impaired by the accident which he had suffered in the intervening time between giving his deposition at the Coroner's Court and giving his evidence before Jackson J. It was tendered on behalf of the plaintiff but rejected as inadmissible. We have looked at that deposition. It carries the case very little further. I shall not read it, but the most favourable part of it to the plaintiff's case says that Graham saw the autocycle and that he saw it again when it had commenced to turn and was on an angle. This is not the occasion to examine the admissibility in civil proceedings of prior depositions made by witnesses who have since become completely incapacitated to give evidence, either by death, illness or mental aberration. The circumstances of the case of the witness Graham could hardly be brought within any rule allowing the tender of former evidence even when taken between the same parties. In any case it would strike me as a novelty to suggest that such evidence would be admissible unless it had originally been given in litigation between the same parties. But we can put that upon one side. Let it be supposed that the deposition was admissible and had been admitted. The general result is merely to provide additional circumstantial evidence from which it might legitimately be inferred that when the deceased man's autocycle was struck he had begun to make the turn at that point to the right. None of the other circumstances necessary to support a case of negligence are proved. There is no evidence whatever that Trott did not give a hand signal. There is no evidence to suggest that if he failed to see the oncoming motor cycle he failed to do so through any negligence on his part. The pace of the motor vehicle was very considerable. Its noise was very great. Its tracks were probably very close to the course which had already been taken by the autocycle. The whole accident may well have been due to the plaintiff's own negligence and the deceased man may have exhibited no negligence whatever. Conceding to the appellant that the inference might properly be drawn that the deceased had begun to turn before he was struck the state in which the case is left simply is that an overtaking motor cycle travelling at high speed hit with extreme violence an autocycle that had begun to make a right-hand turn prematurely upon the roadway; no more than that appears.

Those circumstances are not enough, we think, to justify us in overturning the conclusion of the learned judge that negligence on the part of the deceased man Trott at that stage has not been proved. It was pointed out to us that, as the law now stands, if it had been merely a case of inferring negligence on both sides it would be a question for apportionment. We are not, however, prepared to reverse the learned judge's conclusion that no negligence on the part of the deceased man Trott was established by any legitimate inference. On that ground the defendant which is his insurer is not liable in this action.

For these reasons I am of opinion that the appeal should be dismissed.

McTIERNAN J.: I agree.

KITTO J.: I agree.