OF 1956 No 9

ORIGINAL

9

IN THE HIGH COURT OF AUSTRALIA

TUCKER

V.

TUCKER

ORIGINAL 19/-

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 10th August 1956.

W. M. HOUSTON, Govt. Print., Melb.

1978/55

TUCKER v. TUCKER

ORDER

Appeal dismissed. The defendant appellant to pay the costs of the appeal of the plaintiff respondent and of the third party respondent.

TUCKER

v.

TUCKER & HAWKE

JUDGMENT

DIXON C.J.
WILLIAMS J.
FULLAGAR J.
TAYLOR J.

TUCKER

v.

TUCKER & HAWKE

This is an appeal from a judgment of the Supreme Court of South Australia (Reed J.) in an action for damages for personal injuries. The appellant was the defendant in the action. The first-named respondent was the plaintiff, and the second-named respondent was made a party by third party notice at the instance of the defendant.

Shortly before 6pm. on 8th May 1953 the second-named respondent, Hawke, driving a Singer utility, left Curramulka in South Australia with the intention of driving to his home at Port Julia, some twelve miles away. When he was about half a mile from Currmamulka, the engine of the vehicle broke down. At this place the roadway is approximately 34 feet wide: it consists of a metalled strip about 16 feet wide, with an unmetalled surface about 9 feet wide, on each side of the metalled portion. The whole of the 34 feet is "good usable surface". The roadway is bounded on each side by a low mound or bank. From the point where the plaintiff's engine failed there is a long straight stretch of road in the direction of Port Julia. Hawke (presumably by the failing power of his engine) turned his vehicle completely round so as to face in the direction of Curramulka, and left it on the extreme left of the roadway with its near side right up against the bank. He then walked back to Curramulka for assistance. It was then almost dark, and before he returned it was quite dark.

The plaintiff, who was a member of a firm of garage proprietors at Curramulka, agreed to go out and attend to Hawke's vehicle, and he and Hawke and a mechanic named O'Daniel drove in a Ford Mercury car to the place where Hawke had parked it. It

was found that a torch was necessary, and the plaintiff drove back to Curramulka and obtained a torch. Returning to the scene of the breakdown, he veered his Ford car to the right and then to the left, and stopped it in such a position that it stood facing Hawke's vehicle, though not quite directly, with a space of six to eight feet separating the centres of the bumper bars. The purpose of this was, of course, to have the assistance of the headlights of the Ford in attending to the engine of Hawke's vehicle, the bonnet of which (a vertically lifting bonnet) was raised. The precise position of the Ford car is thus described by Reed J.:- "The car was at an angle of about 15 degrees to the side of the road, its near side front wheel being about eight feet from the bank, and some 18 inches to two feet further towards the centre of the road than the off side of the Singer, and the near side back wheel of the Ford being about 12 feet out from the bank." The near side headlight of the Ford, though possibly not quite the whole of it, would thus be clearly visible to anybody approaching along the road from the direction of Port Julia. The tail light of Hawke's vehicle was not lighted.

The plaintiff and O'Daniel went to work on the engine of Hawke's vehicle. The plaintiff stood between the front bumper bars of that vehicle and those of the Ford, leaning forward and shining the torch on the distributor of Hawke's vehicle, on which O'Daniel was working. O'Daniel was standing on the off side of Hawke's vehicle. Hawke looked on, standing near the front of the near side of his utility. In this state of affairs, a Dodge utility, driven by the defendant (a boy of some sixteen years) from the direction of Port Julia, ran with great violence into the rear of Hawke's vehicle. The force of the impact impelled Hawke's vehicle forward into the front of the Ford. The plaintiff's legs were crushed between the bumper bars of the two vehicles, and both legs had to be amputated.

The plaintiff sued the driver of the Dodge utility only The defendant issued a third party notice against Hawke, claiming that, if negligence on his part should be held to have caused the accident, negligence on the part of Hawke should be held also to have been a cause of the accident, and that he was therefore entitled to contribution from Hawke under sec. 25 of the Wrongs Act 1936-1951 (S.A.). The learned trial judge gave judgment for the plaintiff for £18,068:5:10, and he dismissed the claim of the defendant against the third party, Hawke. The defendant appeals. He does not by his notice of appeal challenge the finding of negligence against himself, but he claims (1) that the amount of the judgment should be reduced under sec. 27a of the Wrongs Act by reason of "contributory" negligence on the part of the plaintiff, and (2) that the third party should be ordered to contribute to the amount of the judgment under sec. 25 of the Act. There is a cross-appeal by the third party. The purpose of this, of course, is only to guard against the possibility of the judgment in his favour being altered on the defendant's appeal. In this event he asks that the amount of the judgment be reduced under sec. 27a on account of "contributory" negligence on the part of the plaintiff, and that it be further reduced on the ground that the assessment of damages failed to take into account the fact that the plaintiff would have had to pay income tax on his earnings.

We are clearly of opinion that the decision of the learned trial judge, both on the plaintiff's claim and on the claim of the defendant against the third party, was right. With great respect, however, we do not entirely agree with the process of reasoning by which his Honour reached his conclusion. His Honour took the unusual course of considering first the question whether the plaintiff had been guilty of negligence. He found that he had been negligent in three particulars. He next considered the conduct of Hawke, and found that he too had been negligent. It was not until he had determined these two matters that he gave attention to the

conduct of the defendant, which he also found to have been negligent. This course then led his Honour to consider questions of law which, as we think, do not really arise in the case. It seems preferable to begin by considering the conduct of the defendant. No question of negligence on the part of the plaintiff can arise unless and until it has been found that negligence on the part of the defendant was a proximate cause of the accident. And, if and when that fact has been found, we are in a better position to consider the conduct of the plaintiff, its character and its bearing on the accident.

His Honour's finding of negligence against the defendant was not challenged, and clearly could not be challenged. No other finding seems possible on the evidence. But it is of importance to see precisely what was found against the defendant. It was found that his windscreen was in a very dirty condition, and this may well have had a bearing on the accident. But the main point made against him seems very clear. The near headlight of the Ford was showing brightly and conspicuously down the road in the direction of Port Julia. It is highly probable that some reflected light from the other headlight was also showing, and one would gather that this was so from the evidence of E.T. Blythman. The evidence of that witness and of his son, D. Blythman, is not without importance. Each of them - the one in a Renault car, and the other on a motor bicycle - travelling towards Curramulka very shortly before the accident, saw the light a considerable distance away, and picked up Hawke's vehicle in their own headlights in ample time to pass without mishap and without difficulty. The defendant was travelling, as Reed J. found, at a speed between 35 and 40 miles per hour. He said that he actually saw the light when he was 400 yards back from the scene, but his evidence was confused and clearly not reliable. The finding of Reed J. that he ought to have seen the light 100 to 150 yards away seems a most reasonable finding. Clearly, as his Honour said, he had the plainest warning of something unusual, and he had the warning in ample time. If he had been keeping a proper look out

through a clean windscreen, the actual situation must have been apparent to him, as it was to the Blythmans, well before he reached the scene. If he was, as he said, puzzled by the position of the light, any reasonably intelligent and competent driver must have greatly reduced his speed and been in a position to stop almost instantaneously if occasion required. Obviously, as Reed J. said, "the least he should have done was to get the situation well in hand, so as to be prepared for any eventuality". Instead of which, whether handicapped by his dirty windscreen or from sheer inattention or stupidity, he careered on, swerved the wrong way at the last moment, and caused disaster.

It is necessary now to consider the findings of his Honour with regard to the conduct of the plaintiff. He found the plaintiff at fault in three respects. He said:- "...although the plaintiff had placed his Ford in a position to facilitate the performance of the work he had undertaken, his action was a breach of the provisions of at least two sections of the Road Traffic Act. In the first place, he left the vehicle stationary on the carriage way of the road, and not being drawn in as near as practicable to the left hand side of the road, contrary to s.125. Secondly, he caused his car to remain at rest on the road in such a position and in such circumstances as to be likely to cause danger to other persons using the road, contrary to s. 136(a). Furthermore, the unlighted Singer standing in front of the Ford created an additional hazard for the drivers of vehicles travelling towards Curramulka. As well as being unlit, it obscured to a considerable degree the light from the Ford's headlamps." The third respect in which the plaintiff was held at fault was that he "should have ensured that the tail light of the Singer was switched on, or that some other warning was given to oncoming traffic".

If these findings are to be regarded - and it would appear from a later part of the judgment that they are to be regarded -

as findings of negligence on the part of the plaintiff, we do not think that they can be supported. They leave out of account the vital fact that a bright light was shewing, clearly visible some distance away to the driver of any vehicle approaching from the direction of Port Julia.

With regard to the first two matters, breaches of a statute of this character do not of their own force afford a defence to the action, though in many, perhaps in most, cases they afford prima facie evidence of negligence: Henwood v. Municipal Tramways Trust (S.A.) (1938) 60 C.L.R. 438, at pp. 449 (Latham C.J.), 453 (Starke J.) and 465 (Dixon and McTiernan JJ.). Here the breaches of the statute must be viewed in the light of the situation with which the plaintiff was dealing. He was called upon to discover and remedy a fault which had caused the engine of Hawke's Singer utility to break down. That vehicle could have been left where it was until daylight, or it could have been towed back to the garage at Curramulka. But the course adopted seems to have been a perfectly reasonable course. The statutory provisions in question were not framed to deal with such a situation, and, although the plaintiff was doubtless committing technical breaches of them, no lack of reasonable care can, in our opinion, fairly be attributed to him on that ground. It may be said that he ought not to have placed his vehicle at an angle of 15° to the line of the road, but should have brought the whole of it up against the bank so as to face Hawke's vehicle squarely. If he had done this, the whole of the Ford would have been off the metalled portion of the road. But, if he had done this, his near-side headlight, though there would most probably have been some reflected light, would have been obscured by Hawke's vehicle. In any case, the accident cannot be regarded as having been caused by any fault in the precise positioning of the Ford.

The third respect in which his Honour held the plaintiff to have been negligent was in his not "ensuring that the tail light of the Singer utility was switched on". But this can hardly be

regarded as the responsibility of the plaintiff. Even if it be assumed that the accident would not have happened if the tail light of Hawke's vehicle had been switched on, surely it was Hawke's responsibility to see that this was done. Looking at the matter in retrospect, we may say that the plaintiff would have been wiser if he had seen that Hawke had done what he ought to have done. But it does not seem reasonable to impute fault to him for a failure by Hawke to do what he ought clearly to have done before he left his vehicle to walk back to Curramulka.

For the above reasons we are of opinion that contributory negligence on the part of the plaintiff was not established, and that no question of apportionment under sec. 27a(3) of the Wrongs Act 1936-1951 (S.A.) arose.

The defendant's claim against Hawke, as third party, for contribution under sec. 25 of the Wrongs Act may be very shortly dealt with. The negligence found against him lies in his failure to switch on the tail light of his Singer utility. It seems clear enough that this failure was rightly held to constitute negligence on his part, but we think it impossible to say that this failure had any bearing on the accident. In the light of the evidence, and of the findings against the defendant, the only reasonable inference seems to be that it was in no real sense a cause of the accident, that it had really nothing whatever to do with it. It is not, of course, enough to say that it might possibly not have happened if the tail light had been alight. But it is difficult in this case to say even that. The overwhelming probability, the defendant driving as he has been found to have driven, seems to be that the presence of a tail light would have made no difference.

It should perhaps be mentioned in conclusion that there is a suggestion in the judgment under appeal that either the plaintiff or Hawke should have seen that someone was stationed in the road to wave a torch or in some other way give a warning to drivers approaching from the direction of Port Julia. Only Hawke himself

was available for this duty, since the plaintiff and O'Daniel were engaged over the engine of the Singer utility. But we do not think that there is any substance in this suggestion. The simple truth of this case seems to us to be that the headlight of the Ford car gave ample warning of an unusual situation to any approaching driver, and that no real danger existed for anybody except an extremely careless or incompetent driver.

In the view which we take, it is not necessary to consider the question, which his Honour considered, whether the so-called doctrine of Davies v. Mann (1842) 10 M. & W. 546 is to be regarded as having survived the "apportionment" legislation which is contained in sec. 27a of the Wrongs Act 1936-1951 (S.A.). On this question we express no opinion.

The defendant's appeal should be dismissed, and it therefore becomes unnecessary to consider the appeal of the third party. The defendant should pay the costs of the plaintiff and of the third party.