ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

COOTES AND ANOTHER

V.

LEVERENZ

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 15th August 1956.

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

C.1978/55

COOTES & ANOR.

v.

LEVERENZ

ORDER

Appeal allowed with costs. Discharge so much of the judgment of the Supreme Court as relates to the apportionment of damages and as enters judgment. In lieu thereof order that the damages found be apportioned equally and that judgment in the action be entered for £1375:11:5 with costs.

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JUDGMENT

DIXON C.J.
WILLIAMS J.

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This appeal concerns an accident which occurred as long ago as 24th September 1952. It occurred because the handle on the off side of a motor cycle and side box came into contact with the off side of a motor truck going in the opposite direction. The motor cyclist, who was injured quite seriously, brought an action of damages against the driver and the owner of the truck and by a judgment pronounced by Ligertwood J. on 1st December 1955 recovered £2200:18:2 from the defendants. His Honour assessed the actual damages sustained by the plaintiff at £2751:2:9 and considered that the plaintiff himself had been guilty of some contributory negligence although he was not very blameworthy. Accordingly his Honour apportioned the damages between the plaintiff and the defendants in the proportions of 80% and 20%. The defendants appeal from this judgment on the ground that liability ought not to have been held established and alternatively that the apportionment was too favourable to the plaintiff.

The accident occurred in the Adelaide suburb of Woodville upon a long but not very wide street called Oval Avenue. The general direction of Oval Avenue is from the south-west to the north-east. At the place where the accident occurred the street curves. The motor cycle was equipped with a side box attached to its left-hand side. At about 7.30 in the morning on 24th October 1952 the plaintiff, who is a carpenter, then about twenty-three years of age, was driving the motor cycle in a northerly direction. In front of him was a cream Austin A40 sedan car and he drove closely behind it. He was travelling on a bitumen part of the road which consisted of a strip forming the carriage way 15 feet wide. On either side there was an unpaved earthen surface. The earthen surface between the bitumen and an

earthen kerb or bank at his left side of the road was not very wide and was rough. Down the centre of the road as it approached the curve a yellow line commenced which was carried to the conclusion of the curve at the north and ended shortly after the road straightened out. Coming in the opposite direction was a motor truck driven by the defendant Still. Still, who was an aircraft pilot, had borrowed the motor truck some time before from the defendant Cootes. He was accustomed to driving it. He lived where a street joins Oval Avenue about 150 to 200 yards to the north of the curve. He drove into Oval Avenue but, having had some trouble with the carburettor of the truck, he had not gained any considerable speed as he approached the curve. He was in fact proceeding at about fifteen miles an hour. After he reached the yellow line at some point he passed the cream Austin sedan on his right-hand side safely. It was immediately followed by the motor cycle but unfortunately there was not the same interval between that vehicle and the truck. The off side handle of the motor cycle struck the end of a cross member of the truck immediately behind the cabin. It was one of the cross members supporting the tray of the truck. Apparently the tray itself was high enough to miss the handle but the cross member being somewhat lower came in contact with it. The motor cyclist was thrown from the cycle to the left and ultimately came to rest near the left-hand edge of the bitumen almost opposite the northerly end of the yellow line. The motor cycle was diverted to the right side of the road and ran off the bitumen on to the earthen surface. There it came into contact with a cyclist who had followed the motor truck but, as it seems, on the earth track. The cyclist, whose name was Lockwood, was in a position to see the accident as it occurred and his evidence is of course most material. Some chips or splinters of wood from the cross member of the truck were found about that part of the road through which the yellow line passed but on the northern side of the curve.

The motor truck was run off to the dirt track and eventually took up a position just at the northern side of the curve. The evidence does not say expressly whether it ran directly into this position after the accident and was there stopped or whether it ran further on and was backed.

According to the defendant Still the truck had not reached the commencement of the curve before the impact, that is to say he was on the northern side of it. He said that he was approaching very close to it. His impression was that no part of his vehicle projected beyond the yellow line. The Austin car passed him quite safely. He did not think that it had any of its wheels off the bitumen and he was not conscious of any danger when the car passed him. He heard, however, the sound of the impact of the motor cycle after the motor cyclist passed his driver's cabin. He immediately stopped and got out on the road and saw the motor cycle and push bike on the eastern side of the road. He then saw the injured plaintiff.

Lockwood's account of the accident differed in important respects. He said that he saw the Austin A40 and the motor bike and side car approaching the curve or bend. The sedan was slightly ahead of the motor boke. He saw them first when they were within twenty feet of the corner. The sedan was travelling about twenty miles an hour and the motor bike, of course, at approximately the same speed. The motor cycle was only fifteen feet behind the sedan. He said that the motor bike and side box at no time travelled over the centre of the road. He said that while he followed behind the motor truck its wheels were well to the left of the yellow line. But as it reached the corner its wheels went on the line. He said the road was very narrow there and it was necessary to have your wheels on the centre line to make the bend. He said that he saw the motor cycle come into contact with the truck by the handlebar of the motor bike touching the front part of the truck. That caused the motor bike to slew abruptly to the right and the full impact

was taken about the vicinity of the cabin. The motor cyclist was thrown upwards and towards the truck. His body hit the cabin of the truck on the rear of the driver. The whole length of his body seemed to come into contact with the truck. He was then thrown in a north-westerly direction to the side of the road, which would be about twenty feet from the point of impact. Lockwood placed the point of impact on the curve itself.

There can be no doubt that Lockwood was mistaken in saying that the front handlebar of the motor cycle touched the mudguard of the truck. It is quite certain that what it touched was the cross member behind the driver's cabin. He must also be quite mistaken in saying that the plaintiff's body hit the cabin of the truck. Whether he was also mistaken in saying that the point of impact was on the curve itself is a question but not necessarily a vital question.

The lateral measurements of the two vehicles are, of course important. From the end of the off side handle of the motor cycle to the extreme near side line of the box attachment and wheel is five feet six inches. The measurement between the outside edges of the front tyres of the motor truck is five feet six inches. Between the outside edges of the front mudguards the distance is five feet ten inches. Between the outside edges of the rear tyres the distance is six feet six inches and the measurement between the edges of the tray is seven feet six inches. It may be added that at the rear of the cabin the height of the tray is three feet two inches. It would seem that the extremity of the handle of the motor cycle passed slightly under the tray, obtruding under it a very small distance, and then hit the cross member, the end of which it splintered. The yellow line was not well drawn, but no doubt it kept approximately to the centre of the road. On that footing there was seven feet six inches on each side of it.

The findings of the learned judge appear from the following passage in his judgment, which contains a comparison of the evidence of Lockwood and Still. His Honour said: "Lockwood was definite that the collision occurred at the middle of the curve and that neither the Austin car nor the motor cycle at any time crossed to the east of the yellow line. He said that the plaintiff had about one and a half feet of vacant bitumen to the left of his box outfit. The defendant Still said that his rear twin wheel was not at any time within less than 6 or 9 inches of the yellow line, but his evidence was qualified by such words as 'to my knowledge' or 'I would estimate'. On this point I prefer Lockwood to the defendant Still and I find that the outside rear wheel of the truck was on or touching the yellow line. This means that the tray of the truck was projecting several inches (it may have been as much as six inches) to the west of the yellow line. I find on the evidence that the plaintiff although close to the margin, kept within 'his own territory' as marked out by the yellow line, while the defendant Still encroached several inches upon that territory. The defendant Still had no need to trespass across the yellow line. He had plenty of room on his left and in my judgment seeing that he was taking the curve, he should have made use of the dirt track to take his left hand wheels. I find no difficulty in convicting him of negligence causing the collision. With considerable hesitation I find the plaintiff guilty of some slight degree of contributory negligence. He had room to keep more to his left and travelling on a curve at 25 miles an hour, I think it would have been prudent for him to do so."

The appeal of the defendants attacks the finding of negligence on the part of Still. It is said that there is no really reliable basis for the conclusion that the tray of the truck protruded over the yellow line to a substantial degree and, alternatively, that if there was blame it attached equally to both parties and the apportionment of damages was erroneous.

As in so many cases of accidents between moving vehicles, materials may be found in the evidence for constructing this or

that more or less speculative explanation of precisely why the two vehicles came in contact. But it can only be in a very broad conclusion that any confidence can be felt. As to the precise details of an incident of this particular kind the observation of the participants or of bystanders forms a guide that is notoriously insecure. The condition of affairs after the accident contains enough circumstantial evidence to suggest that the contact really took place on the northern side of the curve immediately after the yellow lines, so to speak, straightened out. And yet each of those circumstances is capable of explanation. The body of the injured motor cyclist may have been thrown a greater distance than one would expect, the motor cycle may have done the same before it hit the push bike, the truck may have been put in the position where it was found by reversing, the chips may have been carried or propelled some distance down the road by some means or other. These are logical possibilities. Yet all these things, unless explained in some such way, do combine to lend the support of probability to the evidence of the defendant that the accident occurred before he actually turned into the curve. It is a matter on which the plaintiff was unable to throw any light. All he could recall ended about two hundred yards from the corner, the very concussion he sustained accounting for his inability to give any details afterwards. Lockwood's evidence is plainly that of a man who misinterpreted the greater part of what he visually saw. Why should it be supposed that he made a correct interpretation of the accident in so far as he said that the impact occurred on the curve? Ligertwood J. made no express criticism of the witnesses beyond the observation already quoted as to the qualifications which the defendant Still repeatedly made in giving his evidence. Reading his evidence, however, in type these qualifications rather suggest candour than mistrust.

The one thing quite certain about the accident is that the motor cycle and the truck hit upon the bitumen road through attempting to pass one another without a sufficient interval. The defendant Still said that the first he saw of the motor cyclist was when he appeared out from behind the cream car and then appeared to correct his course on sighting him; that was forty yards away. He came out, Still said, from behind the car, came into his vision and then came in behind the cream car. At no time did the plaintiff cross to the incorrect side of the centre line. In this point Lockwood appears to agree with Still. Lockwood said that when taking the bend the motor cyclist swung out a little bit from his previous course, ever so slightly, but Lockwood assumed that he did not see the approach of the truck because of the cream car. The distance of the cycle behind the cream car must have been very small indeed. Lockwood puts it at ten to fifteen feet. It is true that the driver of the cream car says that from looking through his rear vision mirror he thought that the motor cyclist was ten yards behind. But it seems reasonably certain that there was a very small interval. He says he passed the truck without any sense of danger. He then heard an impact. By glancing into his rear vision mirror he saw a man hurtling into the air. It was the rider of the motor cycle. He said: "I am not able to say how far the motor cycle was behind me at the time of impact."

On the whole of this evidence we think that a positive finding that the accident occurred on the curve has too little to support it. It may have done so or it may have been on the straight line. No doubt Ligertwood J. had all the advantage of watching Lockwood give his evidence. But honest and convinced as Lockwood surely was about his fixation of the point of impact, his observation proved so fallacious in so much that to oppose his opinion on this point to that of Still and the greater degree of probability raised by the circumstances seems unsafe. The

measurements of the truck and of the bitumen do of course raise an a priori probability that the edge of the tray would be on or over the yellow line, and even if one cannot adopt a positive view that the point of impact was upon the curve there is insufficient reason to displace the finding that the driver of the truck in his approach to the curve took his truck too close as it passed the cream car and the motor cyclist behind it. On the other hand, it is impossible to resist the impression that the blameworthiness of the cyclist was as great as that of the driver of the truck. He had less occasion for travelling so close to the yellow line. He either saw or ought to have seen the truck. Certainly his vision was obstructed in some measure by the car he was following. But his travelling so close to the yellow line as he must have done to be hit by the cross member, even if the tray overhung the line six inches, meant that instead of using the extra one and a half or perhaps two feet of bitumen to his left he was taking an undue and unnecessary risk. Where there is fault on both sides no doubt the task set by the legislature of reducing the damages recoverable to such extent as the Court thinks just and equitable is a difficult one and one to be accomplished without much guidance or standard provided by the statute. But prima facie blameworthiness is the starting point and we find it impossible to see how the parties to this action can be considered on the evidence to bear degrees of blame so unequal as his Honour has ascribed to them. We would ascribe half the blame to the plaintiff and reduce the award accordingly. A Court of Appeal must exercise great care in re-examining conclusions of fact arrived at upon oral evidence and particularly in cases of this description. In Paterson v. Paterson, 1953 89 C.L.R. 212, we took occasion once again to go over the rules of practice and the counsels of prudence which have been authoritatively laid down for the exercise of the Court's jurisdiction in respect of questions of fact. Since we did so there is at least one further case to be added to the collection, viz. Benmax v. Austin Motor Co., 1955 A.C. 370.

In the present instance we are prepared to accept the view of the case adopted by Ligertwood J. except in two respects. In the first place, it appears to us that his Honour has carried his inferences as to the precise place and manner in which the contact between the two vehicles occurred and was caused further than was warranted by any safe foundation afforded by the evidence considered as a whole. In the second place, we cannot agree in his estimate of the degrees of blameworthiness. Neither of these matters depends on an estimate of the credibility of the witnesses and on each the full examination and discussion of the recorded testimony which has been made in this Court is of great assistance in forming a reasoned conclusion.

For these reasons the appeal should be allowed and the order of the Supreme Court varied by pronouncing that the damages should be apportioned equally. The amount of the damages found was not large in the circumstances but it must be divided equally. There should be, therefore, judgment for half the sum of £2751:2:9, or £1375:11:5.

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JUDGMENT

FULLAGAR J.

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JUDGMENT FULLAGAR J.

I do not think that the appellants have shown sufficient reason why this Court should reverse or vary the judgment under appeal. Two points were argued on behalf of the appellant defendants. It was said, in the first place, that his Honour's finding that the defendant Still had driven his truck negligently could not be supported. It was said, in the second place, that, if it be accepted that both drivers were negligent, then the apportionment of responsibility between the plaintiff and the defendants was too favourable to the plaintiff. A third point, which related to the order as to costs, was raised by the notice of appeal, but was abandoned at the hearing. I would agree that on one point of fact it is difficult, if not impossible, to support the finding of Ligertwood J., but I do not regard that finding as of vital importance, and it should not, in my opinion, be regarded as affecting materially either the question of the defendant Still's negligence or the question of apportionment.

Most of the evidence in the case is set out fully in the judgment of the Chief Justice, and it is unnecessary to repeat it. It is convenient, however, to set out again in full in the passage which Ligertwood J. deals with the question of negligence on the part of Still. His Honour said:- "Lockwood was definite that the collision occurred at the middle of the curve and that neither the Austin car nor the motor cycle at any time crossed to the east of the yellow line. He said that the plaintiff had about one and a half feet of vacant bitumen to the left of his box outfit. The defendant Still said that his rear twin wheel was not at any time within less than 6 or 9 inches of the yellow line, but his evidence was qualified by such words as

"to my knowledge" or "I would estimate". On this point I prefer Lockwood to the defendant Still and I find that the outside rear wheel of the truck was on or touching the yellow line. This means that the tray of the truck was projecting several inches (it may have been as much as six inches) to the west of the yellow line. I find on the evidence that the plaintiff, although close to the margin, kept within 'his own territory' as marked out by the yellow line, while the defendant Still encroached several inches upon that territory. The defendant Still had no need to trespass across the yellow line. He had plenty of room on his left and in my judgment seeing that he was taking a curve, he should have made use of the dirt track to take his left hand wheels. I find no difficulty in convicting him of negligence causing the collision."

There is no reason for supposing that Lockwood was not a perfectly honest witness. But it is clear, I think, that he was mistaken on two points. In the first place, he was mistaken as to the manner in which the impact between the plaintiff's motor cycle and the truck driven by Still took place. He said that the handle-bar of the cycle struck the right front mudguard of the truck. But the whole weight of the evidence is to the effect that the impact took place to the rear of the cabin, and that the handle-bar of the cycle struck the second wooden cross-member of the tray of the truck. I would regard the evidence of Sergeant Lavender as conclusive on this point, and that evidence does not stand alone. In the second place, Lockwood was clearly, I think, mistaken as to the part of the road on which the impact took place. He was "quite sure" that the impact took place "right on the centre of the curve". But Sergeant Lavender produced a carefully prepared plan, which he had made immediately after the accident, and which was put in and marked "Exhibit B". This plan showed the impact as having taken place before the truck had reached the beginning of the curve and after the cycle had

completed the curve. He fixed the approximate point of impact by the presence of pieces of wood which had evidently come from the cross-member of the tray of the truck. On this matter again I would regard the sergeant's evidence as conclusive, and again it does not stand alone.

Now, with regard to the first point on which Lockwood appears to have been mistaken, Ligertwood J. did not accept his evidence. His Honour said:- The physical evidence showed that the collision was between the handle-bar of the motor cycle and the second wooden cross-member of the tray of the truck." With regard, however, to the second point on which Lockwood appears to have been mistaken, His Honour appears to have accepted his evidence. For, after finding that Still at the critical moment had part of his truck over to the west of the yellow line, which marked the centre of the bitumen, he says:- "He had plenty of room on his left, and, in my judgment, seeing that he was taking a curve, he should have made use of the dirt track to take his left hand wheels."

I have said that I think that Lockwood must be regarded as having been mistaken in placing the collision on the curve in the road. It follows that his Honour was, in my view, mistaken in regarding Still as being, at the critical moment, in the course of "taking a curve". But I am unable to regard this as providing any sound ground for attack on his Honour's finding that Still was negligent.

The vital point in the case is that his Honour has found that the tray of Still's truck was "projecting several inches (it may have been as much as six inches) to the west of the yellow line". It is impossible, to my mind, for a court of appeal to say that that finding is wrong or to refuse to accept it. There is no inherent improbability about it. On the contrary the prima facie probabilities are all in favour of it. The tray of the truck was seven feet six inches in width, and that is exactly half of the width of the bitumen strip. The truck, if

driven wholly on the eastern half of the bitumen strip, would occupy the whole of that half. The "dirt track" to the east of that half, while there was no difficulty in travelling on it, was "rough in parts" and such that adriver might well be reluctant to travel with his left-hand wheels thereon. It seems to me to be idle for the appellants to say that, because Lockwood was mistaken on two points, his Honour was not justified in preferring his evidence to that of Still on the question of the position of the truck in relation to the yellow line. Apart from the general probabilities to which I have referred, a witness in Lockwood's position was much less likely to be mistaken about the relation of the truck to the yellow line than about the precise point at which one vehicle struck the other. Moreover, in comparing him with Still, it is important to bear in mind that prima facie the evidence of an outside spectator as to such a matter is likely to be much more reliable than that of a driver. Further, Lockwood was a disinterested witness, and Still was not. The evidence of Wright does not tell against Lockwood. All he could say was that, "as far as he could observe", the truck was always on its correct side of the line, and, as he passed the truck ahead of the plaintiff, he could not see its precise position at the critical period.

It seems clear to me that, if any part of the truck driven by Still crossed the yellow line, it was open to his Honour to find that it was driven negligently. Indeed I am disposed to think that that was the only proper finding. The only difficulty is occasioned by his Honour's use of the words "seeing that he was taking a curve". I have said that I think his Honour was mistaken if he thought (as he apparently did) that the collision took place on the curve. But the quality of the act in question - the "encroachment" over the line - does not seem to depend on whether the driver was driving on a straight part of the road or on a curve, and I cannot regard his Honour as meaning to imply

that he would not have regarded Still's "encroachment" as negligent if he had not been in process of "taking a curve". Still was in fact approaching a curve, and was very close to that curve. I think that Ligertwood J. most probably had in mind the notorious tendency of drivers to "cut corners", and meant to convey that, as he was taking a curve in the face of oncoming traffic, he ought to have been specially careful, by keeping his left hand wheels on the dirt track, to see that his truck was wholly on the right side of the line. This is a perfectly legitimate view, and the same considerations apply to one who is approaching a curve and is as close to the beginning of the curve as Still was. I am unable to regard the reference to "taking a curve" as vitiating, or casting any doubt upon, the clear findings that Still did "encroach" and that this constituted negligent driving on his part.

The remaining question is whether his Honour's apportionment of responsibility under the statute ought to be varied. Complementary to his findings against Still is the finding that the plaintiff "kept within 'his own territory' as marked out by the yellow line". Ligertwood J. nevertheless held the plaintiff guilty of "contributory" negligence. The defendants attack that part of the judgment which apportions the responsibility for the accident as to four-fifths to the defendants and as to one-fifth to the plaintiff. What his Honour said with reference to contributory negligence was: "With considerable hesitation I find the plaintiff guilty of some slight degree of contributory negligence. He had room to keep more to his left, and, travelling on a curve at 25 miles an hour, I think it would have been prudent for him to do so. There are, however, two points which might have told in his favour. First, it is not known to what extent he may have been misled by what one of the witnesses described as the 'waviness' of the yellow line, and he may have assumed that he was quite safe so long as he kept to the left of it. Secondly, according to the witness Lockwood, the Austin car prevented the plaintiff from seeing the approach of the truck. The defendant Still was no

doubt under the same kind of disability in respect of the plaintiff, but he had the warning of a full view of the Austin car rounding the curve and should have instinctively moved to his left. These considerations lead me to find that plaintiff's contributory negligence was in the circumstances slight."

In Owners of Kitano Maru v. Owners of Otranto (1931) A.C. 194, at p. 204, Lord Buckmaster said:- "Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the judge at the trial, and, unless there is some error in law or in fact in his judgment, it ought not to be disturbed." In The Umtali (1938) 160 L.T. 114, at p. 117, Lord Wright said:- "It would require a very strong and exceptional case to induce an appellate court to vary the apportionment of the different degrees of blame which the judge has made, when the appellate court accepts the findings of the judge." These passages were quoted and approved in Owners of British Fame v. Owners of Macgregor, (1943) A.C. 197. It is, I think, important to bear these passages in mind. The comparison in respect of culpability, which the statute requires to be made, is pre-eminently a matter upon which individual opinions are likely to differ, and therefore pre-eminently a matter in which a court of appeal should be cautious about substituting its own view for that of the tribunal to whose discretion the task of making the assessment is primarily entrusted.

In Pennington v. Norris (not yet reported) this Court altered the apportionment made by the learned trial judge. But in that case his Honour had regarded the defendant as guilty of negligence in only one respect, and this Court was of opinion that the evidence clearly established negligence in other respects, which his Honour had not taken into account. The whole basis of his assessment was thus undermined, and the whole matter thrown open. No such element exists in the present case, but it is said that the reasons given by Ligertwood J. for

finding that the plaintiff's contributory negligence "was in the circumstances slight" cannot be supported. It is also said that the apportionment made was in any case so unreasonable that it cannot stand.

Again we find his Honour apparently thinking that the collision took place on the curve, and the reasons given for finding as he did are perhaps, as stated, open to some of the criticism to which they were subjected. But, when they are analysed, I do not think that they reveal any material misapprehension, or that they are either irrelevant or misguided.

The respect in which the plaintiff was held to have been negligent was that, although he was at all material times on his correct side of the yellow line, he had room to keep more to his left and travelled unnecessarily close to the line. His Honour said that, "travelling on a curve at 25 miles per hour", it would have been prudent for him to keep more to his left. Here the "travelling on a curve" seems to be used as enhancing the plaintiff's culpability, but it appears to me to be here again really an immaterial consideration. If the plaintiff took an unnecessary risk by travelling too close to the line, I cannot see that it matters whether he was on a curve or on a straight stretch of road. So far, the error, if error there be, is favourable to the defendants, but I would regard it in any case as an entirely immaterial error. The essential finding is that the plaintiff fell short of the standard of reasonable care in that he did not keep more to his left than he did.

His Honour then proceeds, obviously having it in mind that the burden of proving contributory negligence lay upon the defendants, to state two considerations which he regards as mitigating the culpability of the plaintiff. There is, in my opinion, much force in the first. I would think it very unsafe to attach any importance to the suggested inaccuracy in the placing of the yellow line, but I would think it highly probable

that the plaintiff did assume throughout that he was "quite safe so long as he kept to the left of it". Up to a point he was entitled to make the assumption, and I think that this is an important element in the case. The second point made by Ligertwood J. in the plaintiff's favour is perhaps a little more speculative, but it cannot be said to be improbable that at a critical moment Wright's Austin car prevented the plaintiff from seeing that the truck was, if not over the yellow line, at least so close to it as to involve danger to him. Both of the considerations mentioned as inducing his Honour to take a lenient view of the plaintiff's culpability seem to me to be relevant and legitimate considerations, and, although I am not sure that I should have made the same apportionment of responsibility, the apportionment made does not appear to me to be by any means unreasonable.

The whole basis of his Honour's view of the case was that at the critical moment the plaintiff's cycle wholly was/on its correct side of the yellow line, whereas the truck was not wholly on its correct side of the yellow line. The line was a single line, and there is apparently nothing in the Road Traffic Act 1934-1954 (S.A.) which requires a vehicle to keep to the right of the line. But the line is placed there under the authority of the Act, and its purpose is undoubtedly to make it easier for a driver to obey the statutory provision which requires him generally to keep to his left hand side of the road. It marks the centre of the road for him, and drivers approaching in the opposite direction are entitled to expect that he will not (to use his Honour's word) "encroach" over the line. When this is borne in mind, there is much to be said for the view that a much higher decree of culpability attaches to the driver who is not, than to the driver who is, wholly on his correct side of the line. It is material also, I think, that the defendant Still was driving a wide and heavy vehicle, which was a much more potentially dangerous thing than the vehicle driven by the plaintiff. I

think that the plaintiff was rightly found guilty of negligence. He drove his cycle very close to the yellow line, when there was ample room for him to keep further over to his left, and he thus exposed himself to unnecessary risk. But it seems to me that it was quite open to the learned trial judge to hold that his negligence was much less culpable than that of the defendant Still, and I am not prepared to say that his Honour's apportionment ought to be varied.

The appeal should, in my opinion, be dismissed.

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JUDGMENT

TAYLOR J.

Immediately before the respondent's motor cycle and side box came into collision with the truck driven by the appellant the latter vehicle had safely passed the motor car driven by the witness Wright. This witness said that the truck was on the left hand side of the bitumen strip when he passed it and that he was able to pass it without any sense of danger. I do not understand this evidence to be in question for, although the witness Lockwood said that before the truck had reached the bend in the road it was well to the left of the centre line and that its nearside wheels were then on the unmade portion of the roadway on the left hand side of the strip, his evidence does not suggest that the truck materially altered its lateral position in the roadway after passing Wright's car and before colliding with the respondent's motor cycle. His impression was that the cycle was following the car at a distance of 15 feet or less and he does not suggest that there was any sudden movement to the right on the part of the truck after it passed the car. On the contrary his statement that "the outside of the offside rear wheel of the truck was just touching the yellow line" may fairly be taken as descriptive of the position of the truck when abreast of both the car and the cycle. The car, he said, passed the truck quite safely. The former vehicle he said "kept a little more to its left hand side of the road than the motor bike, but still on the bitumen" whereas the cycle "swung out a little bit from his previous course, ever so slightly".

I doubt whether Lockwood's evidence is meticulously accurate in every detail but it was accepted by the learned trial judge as the evidence of an honest and reliable witness and I therefore accept it as substantially accurate for the purposes of disposing of this appeal. His account of the accident is, of

course, that which gives the most favourable complexion to the respondent's case. It suggests that on a narrow bitumen strip the appellant in a comparatively wide vehicle - and with an adequate width of useable though unmade road to his left - invaded the respondent's side of the roadway to some slight extent and in doing so somewhat crowded the respondent on the road. But it is not suggested that it was negligence on the part of the appellant to occupy the whole of that portion of the bitumen strip primarily allocated, in effect, to southbound traffic by the provision of a centre traffic line; the negligence alleged is that he drove in such a position that the tray of the truck overhung the centre line by some inches and possibly by as much as six inches. Nevertheless it is difficult to understand how, in the circumstances, the accident happened at all. It was broad daylight, both vehicles were proceeding at slow speeds, Wright's car had no difficulty in passing the truck safely and I fail to understand why the respondent could not have done the same. No doubt the portion of the strip available to him was narrow but there was sufficient room in the circumstances for a competent driver exercising reasonable care to pass safely. Whether the respondent, by following too closely behind Wright's car, had put himself in a position where he was unable to obtain a good view of approaching traffic and whether such a situation may have accounted for the slight movement to the right which Lockwood said his vehicle made is a matter for speculation. If this was so the respondent would, in my view, be substantially blameworthy. But I doubt whether, upon all the evidence, this was so. The rejection of this hypothesis, however, cannot avail the respondent much for if he had a clear view of the truck there was no reason why he should not have passed it safely. Indeed since the cycle struck the second wooden cross-bar supporting the tray of the truck it is apparent that it did pass an appreciable portion of the truck without coming into contact with it and I find difficulty in understanding why, having progressed safely so far, it did not

continue on clear of the side of the truck. There is nothing in the evidence to suggest any conduct on the part of the appellant which had the effect of bringing his vehicle closer to that of the respondent after they commenced to pass one another and the collision is explicable only upon the view that there was a failure on the part of the respondent to control his vehicle properly at that stage. It does not clearly appear at what stage the respondent, as Lockwood said, allowed his cycle to swing out a little to the right. Whether it occurred at this stage it is impossible to say but I am quite at a loss to understand why he allowed his vehicle to swing to the right at any stage.

In all the circumstances I am not prepared to dissent from the finding of the learned trial judge that the appellant was negligent but in my view the respondent was at least equally so. While I fully subscribe to the warnings that have been given concerning the functions of a court of appeal in relation to the apportionment of damages the circumstances of this case are, in my opinion, such that the damages should be apportioned equally.