ORIGINAL

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IN THE HIGH COURT OF AUSTRALIA

ELLIOTT

V.

GOLDNER

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Tuesday, 2nd April 1957

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

C.1978/55

ELLIOTT

v.

GOLDNER.

JUDGMENT.

Judgment for plaintiff for £700 with costs.

ELLIOTT

v.

GOLDNER

JUDGMENT WEBB J.

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JUDGMENT WEBB J.

This is an action between residents of different States for damages for breach of a contract to carry yearling colts from Adelaide to Melbourne on the 14th February 1956. The plaintiff resides in Melbourne and the defendant in Adelaide. The plaintiff bought the two colts for racing purposes, one called the Phoibos colt for nine hundred guineas and the other called the Chanak colt for two hundred and twenty guineas, and arranged with the defendant to carry them to Melbourne by road-motor transport for twenty-five pounds each. In the statement of claim the plaintiff alleged that the defendant was a common carrier, but that was not pressed. The plaintiff was aware that the colts would be conveyed in a float containing four other yearlings and probably that the journey to Melbourne would begin early in the morning and end late in the evening of the same day, i.e. 14th February 1956. There was no arrangement, and there appeared to have been no understanding, as to the number of men who would be in the float during the journey, which began at 5 a.m. and ended between 10 and 10.30 p.m. When the float reached Melbourne the two colts were found to be injured, the Phoibos colt severely. The divisions between the colts on the float had been dislodged and one was resting against each horse. I am satisfied that both colts were uninjured when they were received by the defendant for conveyance to Melbourne, although the possibility that the Phoibos colt was injured in the wooden stall in which he was kept on the night of the 13th February was faintly suggested by an expert witness for the defendant.

As the defendant was a bailee for reward he has the onus of proving that the injuries were not due to his failure to exercise reasonable care: see Davis v. Pearce Parking Station Pty. Ltd. 91 C.L.R. 642 at p.648 and

Tozer Kemsley Millbourn v. Colliers 94 C.L.R. 384 at p.397. On the other hand, the plaintiff has the onus of proving the extent of his loss through the defendant's failure to take reasonable care, if there was such failure.

The Phoibos colt on arrival in Melbourne was found to have a punctured wound in the off knee from which fluid was exuding. Two or three days later the near back tendon bowed because the pain due to the injury to the knee made the colt put the greater part of his weight on the near foreleg. The Chanak colt had a small cut on the inside of the near foreleg. Both colts had abrasions. Several months later both developed "splints", exostoses, but I am not satisfied that any of these "splints" was due to the injuries sustained in the float. It is not improbable that the injury to the knee of the Phoibos colt was caused by a rusted screw in a metal cup dislodged from the floor of the float when the colt was startled near Ballarat by noise made by a passing truck and created the disturbance in the float that led to the divisions between the colts becoming loose. Nor is it improbable that this cup had not been properly secured to the floor. It was admitted by the driver of the float that some weeks before one of these cups, which kept the divisions in position on the floor, had been found to be loose with three of its four screws rusted, and that the other cups were not then tested by taking out the screws to see whether they too were rusted, but were left as they were because they appeared to be tight in the floor. As a reasonable precaution I find that these screws should have been removed and examined and replaced with new screws if necessary. When the colts became quiet again after the disturbance the journey was continued to Melbourne, although no close examination of the colts had been made to see whether they were injured and the divisions had not been properly replaced. At that stage the driver had been over fifteen hours on the road and, as he said, was anxious to get to Melbourne. He was alone on the float but said that,

even if he had another man with him, nothing more could have been done. Now the defendant in his examination-in-chief said that on daylight trips the number of men sent depended on how busy he was, but that occasionally he sent only one man. When it was suggested to him that this meant it was the exception to send only one he added that it was usual to do so. However I am not satisfied that with six horses in the float one man could safely be entrusted with the task of conveying them over 400 miles on a main highway between capital cities and that two men could not have done more than one if the horses gave trouble.

I find then that the defendant has not discharged the onus that rests on him of showing that the colts were not injured through his failure to take reasonable care.

Then as to damages, I am not prepared to find that either horse is incapable of racing as the result of the injuries due to the defendant's want of care. The veterinary surgeon who was called by the plaintiff, and also was his only expert witness, said that when he examined the Phoibos colt on the 6th March 1957 during the trial of this action he was not lame, and that he could detect nothing wrong with his gait when he trotted. He added that no veterinary surgeon could tell whether this horse would stand racing; he would have to be tried and that so far as his action was concerned he could not detect anything wrong with him. Two veterinary surgeons were called for the defendant but neither saw the colt for a considerable time after he was injured in the float, whereas this witness had the advantage of seeing him immediately after he was injured and from time to time thereafter. However the injuries to this colt were severe enough to lessen considerably, but not to destroy, his prospects of racing successfully. As to the Chanak horse, he was asked to attend to him just after he was injured but not again. I find that this horse had his racing prospects only slightly diminished.

I find that the value of the Phoibos colt has been reduced by about two-thirds and that of the Chanak horse by about one-fifth, as a result of the injuries sustained in the float. As I am unable to find that either horse is incapable of racing successfully I cannot find that any part of the money spent on agistment, breaking and training has been lost, and I am not satisfied that the preparation of these horses for racing has been prolonged because of anything for which the defendant is responsible. If nothing had happened to them in the float they would still not be ready for racing before October 1957.

I give judgment for the plaintiff for £700 with costs. The veterinary surgeon's fees incurred in consequence of the injuries are included in the amount.