ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

ALLAN

V.

MANSFIELD

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REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 20th June 1957.

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

C.1978/55

ALLAN v. MANSFIELD

ORDER

Appeal dismissed with costs

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JUDGMENT

DIXON C.J.

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I have had the advantage of reading the judgment prepared by Kitto J. and agree in it.

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JUDGMENT

FULLAGAR J.

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This case seems to me, as it seemed to Owen J., to be a border-line case. In the end, however, I do not feel able to say that the learned trial judge was wrong in leaving the case to the jury, and I agree generally with the judgment of Kitto J., which I have had the advantage of reading. There are one or two minor points, on which I would be inclined to differ, but these are of no importance.

The case is unsatisfactory from one point of view, because, as Brereton J. observed, there is a "strong case of contributory negligence", and contributory negligence still affords in New South Wales a complete answer to such a claim as that of the plaintiff. The appellant, however, for reasons which are obvious enough, could not rely on contributory negligence on appeal, and the only question before the Full Court and before this Court has been whether there was any evidence on which it was open to the jury to find negligence on the part of the appellant.

Although there is, of course, no rule of law on the subject, one cannot help being pressed by the view that, as a matter of commonsense and accepted practice, a person driving straight ahead along a road at a moderate speed is entitled to assume that persons driving along an intersecting road will not enter the intersection without making sure that the way is clear. But I think it was open to the jury to say that the appellant should have seen the respondent before he did, and that, if he had seen him as soon as he ought to have seen him, either the collision would have been avoided or it would not have caused serious injury to the respondent. They might have been helped to such a conclusion by the appellant's not giving evidence. That is certainly not the view which I should myself have taken, but my view of the facts is not what matters.

On the whole, I think that the appeal should be dismissed.

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JUDGMENT KITTO J.

ALLAN

v.

MANSFIELD

In an action in the Supreme Court of New South Wales the respondent to this appeal sued the appellant for damages for negligence in respect of a collision between a motor cycle ridden by the respondent and a utility motor truck driven by the appellant. The defence was a denial of negligence on the part of the appellant and an allegation of contributory negligence on the part of the respondent. At the trial, before Walsh J. and a jury, the appellant did not go into evidence. At the close of the respondent's case he moved for a verdict by direction, contending that there was no evidence upon which the jury could properly find that he had been guilty of negligence. The learned judge, however, allowed the case to go to the jury, and a verdict was returned for the respondent for £4,080. The appellant then appealed to the Full Court of the Supreme Court. He conceded that he could not successfully challenge the verdict insofar as it rejected the defence of contributory negligence, for on that issue of course the onus of proof lay upon him. His case on appeal was that there was no evidence fit to be submitted to the jury on the issue of negligence on his part, and that the learned trial judge should have directed a verdict in his favour. The Full Court dismissed the appeal, and it is from the order of dismissal that the appeal to this Court is brought.

The collision occurred at the intersection of two streets in Lambton, near Newcastle. It is a T intersection, one street, called Croudace Street, running north and south and the other, called Howe Street, entering it from the east but not crossing it. Croudace Street, from a point some distance north of the intersection, rises slightly as it approaches and crosses the mouth of Howe Street, and then it rises

steeply.

A little after 7 a.m. on 30th July 1953, the appellant was driving his utility along Croudace Street, approaching the Howe Street intersection from the north. The respondent on his motor cycle entered Croudace Street from Howe Street and made to cross in front of the appellant, as if to make a right hand turn and proceed northwards along Croudace Street. That was the route he usually took to his place of employment, which in fact was his destination at the time. Almost in the middle of the intersection, the two vehicles collided. The respondent and his cycle were carried by the appellant's utility about 38 feet along Croudace Street, and the vehicles came to rest, interlocked, by the eastern curb of Croudace Street beyond the intersection.

At the trial the respondent gave evidence, but the injuries he had received in the collision had so affected his memory that he was unable to give any description of the occurrence. The appellant did not go into the witnessbox at all. The only other person who saw what happened was a man named Harding, who had been following the appellant on a motor cycle for some little time before the collision. The more material portions of Harding's evidence were to the following effect. The weather was fine, and there was no other traffic about at the time. The appellant was driving with his near-side wheels about three feet from the left-hand edge of the bitumen, which in that vicinity was 24 or 25 feet wide. Harding himself was riding in line with the appellant's near-side wheels, and about 30 or 40 yards behind him. They were both travelling at 25 m.p.h., and as the appellant approached the Howe Street intersection he accelerated slightly, bringing his speed up to 30 m.p.h. While the appellant was still 30 to 40 yards from the point of collision, Harding, from his position a similar distance farther back, saw the respondent on his cycle approaching or about to enter the intersection -

"on the corner" as he expressed it - and travelling at 10 to 12 m.p.h., "quite slowly and in a straight line across the road". Harding saw no sign of any application of the appellant's brakes or of any diminution of his speed, and heard no sound of his horn. He did not swerve at any stage, although, as the collision occurred almost in the middle of Croudace Street, he must have turned at some stage very slightly towards his right.

In cross-examination, Harding assented to a suggestion that the distance which the appellant's utility had still to travel to the point of collision when Harding first saw the respondent was only 20 yards or perhaps less. It was open to the jury, however, to accept his earlier estimate of 30 to 40 yards, and, as the appellant's argument conceded, the appeal must be considered on the hypothesis that 40 yards was the proved distance. The argument attempted to demonstrate arithmetically that even on that hypothesis the appellant, if he had seen the respondent as early as Harding saw him, would have had less time available to him, before reaching the point of collision, than was required in order to stop his vehicle by taking the necessary steps with reasonable promptness.

To found the argument, it was submitted that allowance must be made for the time which might fairly be expected to elapse before a driver in the appellant's position would realise that the respondent was taking so foolish a course as attempting to pass in front of the appellant, instead of giving way to a vehicle which not only was on his right but was travelling at 30 m.p.h. with nothing to suggest that the driver had any other intention than to maintain his course up the steep incline of Croudace Street. It was indeed a foolish course, judged by the accepted standards of prudent driving, apart altogether from the positive requirements of

traffic regulations; and, that being so, it may be conceded that the appellant, if he had been watching the respondent, would have been justified at first in thinking it likely that the latter would allow him to pass before entering Croudace Street. The jury, nevertheless, might well consider that he ought reasonably to have contemplated, as a distinct possibility and one calling for close attention, that the respondent might not give way, either through misjudging the situation or through optimistically deciding that he could depend on the appellant's yielding him the right of way if a collision should threaten. It was an inference which might fairly be drawn from Harding's evidence that the respondent's course and speed were constant from the time when he came into Harding's view to the time of the collision; and if that was so the appellant, had he been attentive, must have realised at an appreciable interval of time before the impact, from the fact that the respondent was not slowing down or changing course, that immediate measures to avert a collision were required.

The calculation which the appellant's argument put forward was directed to showing how brief that interval was. The first step in the calculation was to say that the appellant, applying his brakes fully while travelling at 30 m.p.h., would require 45 feet to bring the vehicle to a stop. Next it was said that at least a quarter of a second should be allowed for reaction time, and at 30 m.p.h. the appellant would travel 11 feet in that period. So he needed at least 56 feet in which to stop. This means that, assuming he was 120 feet from the point of impact when he ought first to have seen the respondent, he had, at most, the time required to cover 64 feet in which to realise that the respondent was intending to cross his path. That time, at a speed of 30 m.p.h. or 44 feet per second, would be less than a second and a half. The submission was, in effect, that to expect the appellant in the circumstances to conclude in so short a time that the respondent was not giving way to him as he should have

done would be to demand too close an approximation to perfection, and that therefore the jury could not find against him without treating him as required to exercise more than reasonable care.

Even if every step in the calculation were well-founded, the conclusion could hardly be held to be self-evident that a period of nearly a second and a half would be insufficient for a reasonably careful driver in the appellant's situation to decide that he needed to take active measures to avert a collision. But however that may be, the calculation will not serve the appellant's purpose, for it is open to criticism in several respects. In the first place, it is not possible to say with any certainty at what point of time the appellant should reasonably have perceived a need to take steps to avoid a collision. He must have been in a position to see the respondent approaching the intersection before Harding saw him, for he was well ahead of Harding. In the second place there was nothing in the evidence to suggest any particular period as being required to allow for a reasonably quick reaction when a need for precautions became apparent. Reliance was placed on a statement in a text-book that a body called the National Safety Council of Australia had asserted that a very good reaction time varies from three quarters of a second to a quarter of a second. But this was not and could properly not/have been placed before the jury, and it is not material which can be taken into consideration on this appeal. Thirdly, the time reasonably required to stop such a vehicle as the appellant's was not proved. A police constable was allowed to say, without objection, that a distance of 45 feet was "the standard stopping distance for a vehicle travelling at 30 m.p.h. an hour", but this was too vague and general a statement to provide a figure upon which such a calculation as was offered could satisfactorily be based. And over and above all this is the fact that the calculation was of a kind which, if appropriate enough to a case where a vehicle on rails approaches a fixed object, fails to allow for all the means

which exist for obviating a collision in a case where two vehicles, each capable of altering both speed and direction, are moving along converging paths and the driver of one, upon seeing the other, not only can alter his own speed and direction but may by sounding his horn induce the driver of the other to take evasive action also.

But in truth mathematical calculations in cases of this description are often more misleading than helpful, for they are apt to wear an appearance of precision where precision is unattainable. The jury in the present case were entitled to consider the matter on much broader lines. In particular, they might well have founded themselves on some evidence which so far has not been mentioned. The police constable to whom reference has been made deposed to a conversation he had had with the appellant which, if accepted as accurately reported and as reflecting the actual course of events at the intersection, provided ample ground for a conclusion that the appellant was not keeping the lookout which was appropriate to the speed of his vehicle and the topographical situation in which he was driving. According to the constable the appellant said, "I was travelling down this street (indicating a southerly direction in Croudace St.) at about 25 miles an hour and as I came on to the intersection I saw the head and shoulders of a man in front of me. I applied my brakes immediately but hit the person and the utility came to a standstill where it is now". He further said: "I did not see the cyclist until just before I hit him". Understood literally, as it might reasonably be understood by the jury, this means that, although Harding, driving well behind the appellant, saw the respondent at a point of time when the appellant had still a distance of perhaps 40 yards to go before reaching the point of collision, the appellant himself failed to see him until he was so close upon him that only his head and shoulders could be seen in front

of the utility.

If that were considered by the jury to be the truth of the matter, as it well might be in the absence of any attempt by the appellant to put another complexion on what he had said, they might legitimately attribute the collision to a careless omission by the appellant to give due attention to his driving. Being so far ahead of Harding as he approached Howe Street, the appellant must have been able to see the respondent well before Harding saw him. The intersection, in the nature of things a place for particular vigilance, lay open to his view. There was no traffic either to obscure his vision or to distract his attention. There being no road entering Croudace Street on his right, he was free to concentrate on the roadway immediately ahead of him and the mouth of Howe Street. Accelerating as he approached the intersection, no doubt in order to take more easily the steep rise on the farther side, he gave himself additional cause for watchfulness. Yet he failed completely to see the respondent, until he was so close that even the motor cycle was not visible over the bonnet of the utility.

In such a case a jury is entitled to take the view that it is all very well to work out neat sums giving answers which suggest that the collision would have occurred just as it did even if a carefulness proportioned to the speed and the other factors in the situation had been duly observed. But they may legitimately reflect that it does not ordinarily happen, save by carelessness in regard to look-out or speed or both, that a motorist runs down a motor cyclist in a situation such as was proved in this case; and that, when a motorist who has done so and who has made out of court such an admission as the constable swore that the appellant made to him in this case, comes into court but stays out of the witness-box, it is not unreasonable to draw the strongest inferences against him which the evidence will fairly support. A verdict against the motorist in such a case is one which is open on the evidence, and not one which depends on speculation; it is a verdict

which, though it uses the motorist's silence as throwing light upon the proper interpretation of the evidence, is not open to the criticism that it treats that silence as supplying a deficiency of evidence in the cyclist's case.

For these reasons, the learned trial judge was right in leaving the case to the jury. The appeal should be dismissed.