

No. 44 of 1958 (10)  
**ORIGINAL**

IN THE HIGH COURT OF AUSTRALIA

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EXPRESS FREIGHT PROPRIETARY  
LIMITED

V.

CONSUMERS AMMONIA COMPANY  
PROPRIETARY LIMITED

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**REASONS FOR JUDGMENT**

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**ORIGINAL**

*Judgment delivered at* Sydney

*on* Tuesday, 25th March 1958

EXPRESS FREIGHT PROPRIETARY LIMITED

v.

CONSUMERS AMMONIA COMPANY PROPRIETARY LIMITED

ORDER

Appeal dismissed with costs.

EXPRESS FREIGHT PROPRIETARY LIMITED

v.

CONSUMERS AMMONIA COMPANY PROPRIETARY LIMITED

JUDGMENT

DIXON C.J.  
WEBB J.  
FULLAGAR J.  
TAYLOR J.

EXPRESS FREIGHT PROPRIETARY LIMITED

v.

CONSUMERS AMMONIA COMPANY PROPRIETARY LIMITED

On the 17th January 1956 the appellant, a company carrying on business as a carrier and haulage contractor, agreed with the respondent, for reward, to carry by road transport from Melbourne to Perth some seventy-five cylinders of anhydrous ammonia. On the journey from Melbourne to Adelaide the goods were carried in a vehicle belonging to the appellant. For the completion of its contractual obligations to deliver the goods in Perth, however, the company availed itself of the services of a company known as Southern Freight Limited and that company, in turn, employed one, King to transport the goods on the long journey from Adelaide to Perth. The type of vehicle used by King was a prime mover with a large trailer attached and the respondent's goods were carried by him with a quantity of other goods. In all the loading on his vehicle was some fifteen or sixteen tons. The respondent's goods did not, however, reach Perth for, some 200 miles short of that city and whilst still on King's vehicle, they were destroyed by fire. In subsequent proceedings in the Supreme Court of Victoria to recover damages for the loss of the goods and damage to their containers the respondent obtained judgment for £1,700 and this appeal is brought in an endeavour to set that judgment aside.

Before proceeding to deal more fully with the facts of the case it is not out of place to refer to a number of matters which were not in question upon this appeal. In the first place the appellant did not seek to question the proposition that its responsibility for the loss which occurred was no less than that of a bailee for reward and that it was responsible for any loss of or damage to the goods resulting from failure on the part of King to exercise reasonable care in their carriage and preservation. Secondly, it was common ground that at the trial the onus lay upon the appellant of

establishing that the loss in question did not result from any negligence on its part or on the part of its agent, King. (See Joseph Travers and Sons Limited v. Cooper 1915 1 K.B.73; Brook's Wharf and Bull Wharf, Limited v. Goodman Brothers 1937 1 K.B. 534 and Tozer Kemsley and Millbourn (A/asia) Pty. Limited v. Collier's Interstate Transport Service Limited 94 C.L.R. 384). Finally, it was not disputed that in the discharge of this onus it was not essential that the appellant should establish how the fire originated provided that, in the absence of such proof, it could be shown that the loss occurred without negligence on its part or on the part of its agent (cf. Woods v. Duncan 1946 A.C. 401 and Mummery v. Irvings Pty. Limited 96 C.L.R. 99 at 119 and 121). It should also be said, although it appears to have attracted little attention at the trial, that it was incumbent on the appellant, in the circumstances of the case, to establish that after the fire commenced all reasonable steps were taken by King to preserve the respondent's goods and also, it may perhaps be thought, that there was no failure to equip the vehicle with reasonably adequate fire fighting appliances. The availability of reasonably adequate fire fighting appliances was of unusual importance in the circumstances of this case since, in making the journey to Perth, King's vehicle was required to traverse vast stretches of waterless and desolate country and the journey was undertaken at the height of summer.

At about noon on a day which appears to have been the 31st January 1956 King's vehicle arrived at Southern Cross which is a small town nearly 250 miles east of Perth on the road to that city from Adelaide. The vehicle had already been driven by King for some 1,500 miles from Adelaide. The day was extremely hot the temperature rising<sup>to</sup> about 116° whilst the road surface temperature was said to be about 150°. Having arrived at Southern Cross King decided to rest his vehicle until the evening and he remained there until about 8.00 p.m. At that hour he recommenced his journey but after having

travelled about twenty miles he observed, by means of the rear vision mirror, that smoke was issuing from near the rear of the trailer. He says that he stopped immediately and found that the tyre on the inside wheel of the dual wheels at the rear of the offside of the trailer was smouldering. He thereupon removed the outside wheel and then the inner wheel and, according to his evidence, as soon as the latter wheel fell to the roadway the tyre burst into flames. With the aid of steel bars he and his assistant then moved the wheel to the roadside on the near side of the truck and left it in a position about ten feet away from the trailer. They did not attempt to move it further for there were flames to the height of five or six feet and the heat was too intense. But, unfortunately, the wheel had been moved to a position adjacent to dry stubble and scrub on the side of the roadway and inevitably, one might think, this caught fire. This fire King and his assistant commenced to beat out. They had just completed this task when a member of the fire brigade of a nearby township arrived and he kept the roadside under observation while King proceeded to substitute a spare wheel on the rear of the trailer. He and his assistant had, he said, "just about got the thing mobile again" and were "picking up" their gear when the assistant noticed smoke issuing from the top of the load on the trailer. At this stage the assistant climbed to the top of the load and emptied the contents of a fire extinguisher through the hole in the tarpaulin covering from which the smoke was coming. It seemed, said King, "to put out the flame, but there was still a terrific amount of smoke". King then climbed to the top of the load and emptied the contents of a four gallon bucket of water through the hole. But by this time the fire must have obtained a considerable hold and the trailer "broke out then from stem to stern in flames". The fire extinguisher which had been used by King's assistant was one which was carried on the truck; it was the only fire fighting appliance carried on the

vehicle and the conflagration was ultimately subdued by the use of a number of fire extinguishers <sup>after an interval</sup> provided by the local fire brigade.

At the trial several possible causes for the overheating of the tyre were suggested. These were the surface temperature of the road, under-inflation of the tyre and overloading of the trailer. There is, however, no evidence that the first of these factors could, alone, have resulted in the ignition of the tyre; on the contrary King's evidence itself disposes of this factor as the sole originating cause. On the other hand King deposed that all of the tyres on the trailer were properly inflated and <sup>that</sup> the load which the trailer carried was not excessive.

The learned trial judge disposed of the matter briefly. In speaking of King he said "He has told us in evidence and I see no reason on this point to disregard it that a fire broke out when the goods were about 200 miles short of Perth. In cross-examination he said that the fire arose from a fire originating in his wheel, one of the back wheels of the trailer, and in cross-examination he said that there were three possible causes, in his view, of the wheel taking fire. One was under-inflation, another was overloading, and the third was ground heat. The third he eliminated and we are left with the other two. Now either one of those two causes would be in my opinion due to negligence on the part of King, but if those are not the causes then there is some other unexplained cause which brought about the fire which prevented the delivery in accordance with the bailment. Consequently I am left in the position that I am not satisfied that the defendant has discharged the onus of explaining that the non-delivery occurred through something for which they were not legally responsible, and the result is that the defence fails".

This finding is attacked mainly on the ground that it fails to deal adequately with the possibility that, without negligence on the part of King, the tyre may have been so

damaged as to become partly inflated after leaving Southern Cross and before its smouldering condition was observed. But the attack which is made assumes the acceptance by the trial judge of the evidence given by King to the effect that the load was not excessive and that he had taken all reasonable precautions to check the state of his tyres before leaving Southern Cross. It is perhaps a little unfortunate that the learned trial judge did not expressly indicate his views concerning this evidence but it is reasonably apparent that he did not accept it implicitly. Had he done so he would no doubt have made an affirmative finding disposing of the second and third factors as possible causes of the fire and would have exonerated King from any personal negligence in the matter. Clearly enough his Honour was not satisfied either that the load was not excessive or that all reasonable precautions had been taken by King before proceeding on his journey to ensure that all tyres were adequately inflated.

Such a conclusion provides ample ground for dismissing this appeal but further justification for this course is to be found in the evidence relating to what occurred after the tyre was found to be smouldering and after it had burst into flames upon falling to the roadway. What King then did has already been described and it would seem that the moving of the burning tyre to the roadside created, in the circumstances, a grave fire risk to the nearby stubble and scrub. A further fire, in fact occurred and the beating out of this fire must have resulted in the dispersal of sparks and burning matter with grave danger to the trailer and its load. King himself is of the opinion that the fire on the trailer originated in this manner. No doubt it was wise to move the burning tyre from the vicinity of the trailer but in doing so it was, to say the least, foolish to move it round to the near side of the trailer and to a position adjacent to the stubble and scrub. It would have been a simple matter to have moved the wheel away



from the trailer and still to have allowed it to remain more or less in the centre of the road where the fire might, at that stage, have been subdued by the use of the fire extinguisher carried on the truck. Perhaps it did not occur to King to use the extinguisher at this stage but it may well be thought that it was intended for use in just such an emergency. It was a comparatively small extinguisher and, one might think, designed for the purpose of dealing with fire immediately upon its outbreak. In all the circumstances King's evidence fails to establish that he was not negligent in dealing with the burning tyre; on the contrary it may be thought to provide grounds for an affirmative finding that he was.

For the reasons given the appeal should be dismissed with costs.