ORIGINAL 11

IN THE HIGH COURT OF AUSTRALIA

DEVINE

V.

GEEVES

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday 2nd April 1958

J. J Gourley, Govt. Print., Melb.

C.7163/51

DEVINE

v.

GEEVES

ORDER

Appeal dismissed with costs.

DEVINE

v.

GEEVES

JUDGMENT DIXON C.J.

DEVINE

v.

GEEVES

This appeal relates entirely to a question or questions of fact, namely whether the plaintiff appellant was guilty of contributory negligence and if so, what apportionment of damages should be made between the parties. It is not a matter on which a Court of Appeal should interfere with the decision of the trial judge unless very satisfied that an error has been made. The other members of the Court are satisfied that no such error occurred. In face of these considerations the contrary view is very unlikely to be correct. But there still appears to me much to be said for the simple explanation of the accident put for the appellant. That explanation is that a semi-inebriated driver having passed on the right hand of one vehicle travelling in the same direction began to swing out further to pass the next and while thus travelling to some extent on the wrong side of the road struck the oncoming motor cycle. The pictures of the damaged vehicles as well as the circumstances lend support to that theory. It is one which might make it right to decide that the defendant placed himself in the wrong and cannot complain that the plaintiff, who was in the right, failed at the last moment to avoid a collision thus made almost inevitable.

PERCY KENNETH DEVINE

v.

MALCOLM DRYSDALE GEEVES

JUDGMENT

FULLAGAR J.
TAYLOR J.

PERCY KENNETH DEVINE

v.

MALCOLM DRYSDALE GEEVES

On the 21st January 1956 the appellant's motor-cycle came into collision with the respondent's car in Sandy Bay Road, near Hobart. The collision occurred shortly before 8 p.m. when it was still light and visibility was good. The motor-cycle, which carried a young woman as a pillion-rider, was being ridden by the appellant away from the city and the respondent's motor-car was travelling in the opposite direction. The locus of the collision was between the points where Earl Street and Nelson Road debouch into Sandy Bay Road and the impact took place some seventy or eighty yards after the cycle had passed over the crest of a slight rise in Sandy Bay Road. The latter road is constituted by a strip of bitumen in the centre and strips of concrete on each side. According to the evidence the bitumen strip is eighteen feet three inches wide and the concrete strips thirteen feet and fourteen feet nine inches wide respectively. The concrete strip on the river side of the road was the wider and this constituted the major part of the left-hand side of the road for traffic proceeding away from Hobart. The total width of the roadway, it will be seen, is forty-six feet and it was established by evidence relating to marks on the roadway that the two vehicles collided at a point approximately twenty-one feet from the kerb line on the river side of the road. It was the off-side front mudguard of the car which came into collision with the cycle so that it is reasonably clear that the car was at that time travelling with its off-side wheels about two feet over the centre of the road. On the other hand, although the roadway between the kerb line on the river side of the road appears to have been substantially unobstructed

and that the respondent's car must have been visible to the appellant for a considerable distance before the impact, it is clear that the appellant was, at the time of the collision, riding within a few feet of the centre of the road. Indeed so much appears to be common ground.

The learned trial judge made a thorough examination of the evidence and concluded that the accident resulted from negligence on the part of both the appellant and the respondent. In the result he found the parties equally to blame and entered judgment for the appellant in the sum of £2,378. 8. 9, that being one-half of the amount at which he assessed the plaintiff's damage. In this appeal it is now contended that his Honour was in error in attributing any blame to the appellant and, alternatively, that his damages should not, in the circumstances, have been reduced by as much as one-half. A further contention is also advanced that the general damages assessed by his Honour are inadequate and should now be increased.

No suggestion is made by the respondent that the learned trial judge was in error in finding that his car was driven negligently. That it was so driven is beyond doubt, but in considering the conduct of the appellant, it is of some importance to examine a little more closely the manner in which the respondent's car was driven as it approached the scene of the impact.

On this point there was some conflict of testimony and little assistance was obtained by his Honour from the evidence of either party. Little reliance could, he felt, be placed upon the evidence of the appellant and the account given by the respondent was not, he thought, very satisfactory or probable. Consideration of the transcript furnishes not the slightest reason for thinking that these observations were unjustified. But the course taken by the respondent's car was described by a witness, Robinson, who was driving his truck along Sandy Bay Road in the same direction as that in which

the respondent was travelling. This witness was called by the appellant and his evidence, such as it was, commended itself to the learned trial judge.

Robinson said that as he approached the Nelson Road corner and was about one hundred yards distant from that point the respondent's car passed him. At this stage Robinson's truck was travelling at approximately twenty-five miles per hour and when the respondent's car passed him it was travelling between thirty and thirty-five miles per hour. After passing him the respondent's car continued on with his off-side wheels over the centre of the roadway. He did not pull in towards the left and apparently continued on a straight course with a view to passing another car a little further on which was being driven by one, Ramsden. But just after the respondent's car passed Robinson the latter saw the appellant's motor-cycle coming over the crest of the rise in Sandy Bay Road and it appears to have been obvious to Robinson that if both vehicles continued to maintain their respective courses a collision was inevitable. If this was so - and there is no reason upon the evidence for thinking otherwise - it is beyond doubt that the risk of collision should have become manifest to the respondent at the same time, that is to say when the cycle was more than a hundred yards away for the cycle was then some seventy or eighty yards short of the point of impact. Yet the respondent made no attempt to move to his left or to take any other step to avoid a collision. The plain inference from his own statements at the time is that he did not observe the appellant's cycle before the collision or, if he did, that he did so when it was far too late to take any such step. The reason for his default in this respect may well be that he had consumed some liquor and though, as the learned trial judge said: "he was not grossly intoxicated ... he was under the influence of intoxicating liquor, and ... it affected his capacity to drive properly".

The latter circumstance was emphasised by the appellant and the question posed whether it is proper to hold a plaintiff to blame for a road accident, either equally or at all, where it is shown that the defendant, driving to some extent under the influence of liquor, has exhibited a disregard for such an elementary safeguard as the keeping of a proper lookout. The answer is that neither the manner of the defendant's driving nor his impaired capacity to drive safely can, alone, be conclusive; the question whether the plaintiff's conduct in such a case has contributed to the accident can only be answered after an examination of his conduct in the light of the proved circumstances.

Those circumstances in the present case, it seems to us, indicate a degree of fault on the part of the appellant which was no less than that of the respondent. Just as it may be said that the respondent should have observed the possibility of a collision when the motor-cycle was still something well over a hundred yards distant, so it may be said that the appellant should, with the exercise of reasonable care, have had a like opportunity for avoiding the collision for, upon the findings of the learned trial judge there was an abundance of room in which, with elementary care, the motor-cycle might have passed the respondent's car safely. But the vehicles did not pass safely and the picture presented by the evidence is of two vehicles, after having become visible to one another a considerable distance away, colliding within a few feet of the centre of the road when to the left of each vehicle there was ample roadway available. It is, we should think, clear beyond doubt that neither the respondent nor the appellant was at the time paying adequate attention to oncoming traffic and that this was the prime cause of the accident. In the case of the respondent this default may well have resulted wholly or partly from his drinking activities and, though the same thing may not be said of the appellant, his default

cannot be dissociated from some form of youthful exhilaration or exuberance. In evidence he maintained that he was proceeding carefully at about twenty-eight miles per hour and that the respondent's car moved suddenly to the right and struck him. His pillion-rider, who remembers nothing else of the accident, fixes the speed of the cycle also at "about twenty-eight miles per hour". But the appellant's evidence concerning the sudden movement of the respondent's car is inconsistent with Robinson's testimony and the evidence concerning the speed of the cycle is quite untrue. There can be no doubt that he was travelling much faster and there was ample evidence to support the finding of the learned trial judge that the speed of the cycle was about fifty miles per hour. Indeed, consideration of the cross-examination of the appellant, so far as it was material, and of the evidence of the witness, Horton - who impressed the trial judge as a reliable and observant man - leads to the conclusion that such a finding represented no more than a reasonable estimate of the appellant's speed. In the circumstances of the case we are of the opinion that the learned trial judge was right in holding that the appellant, whilst travelling at an excessive speed, failed to keep an adequate lookout as he proceeded. This was a substantial cause of the accident and we see no reason to disagree with his finding that both parties should be held equally to blame.

The remaining matter to be considered is the assessment of damages. Special damage to the extent of £1,756. 17. 6 was proved and to this sum the trial judge added £3,000 as general damages. It is to the latter item that exception is now taken but after giving full weight to the submissions of counsel we are satisfied that no case has been made out for the exercise of the power of this Court, as an appellate court, to review the assessment of the learned trial judge. Accordingly the appeal should be dismissed with costs.