Original

IN THE HIGH COURT OF AUSTRALIA

Brandenburg

V.

Bowra

Original

REASONS FOR JUDGMENT

Judgment delivered at .....

on 7 JULY 1959

(18)

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

C.1978/55

BRANDENBURG

v.

BOWRA

ORDER

Appeal dismissed with costs. Application to strike out the appeal as incompetent refused with costs. Order that the costs of the application be set off against the costs of the appeal.

BRANDENBURG

v.

BOWRA

JUDGMENT
(ORAL)

JUDGMENT OF THE COURT
DELIVERED BY DIXON C.J.

CORAM: DIXON C.J.
FULLAGAR J.
TAYLOR J.
MENZIES J.
WINDEYER J.

BRANDENBURG

v.

BOWRA

This is an appeal from a judgment in favour of the defendant in an action for personal injuries heard by the present Chief Justice, Sir Albert Wolff. The plaintiff is a child who at the time of the accident was three and a half years of age. He lived in a small house in Lord Street opposite which there was a park, a sports ground; a row of large Moreton Bay fig trees lined the edge of the park and the branches overhung the street. Lord Street is forty-four feet wide from kerb to kerb; the footpaths on either side are about ten feet wide. The plaintiff's father possessed a car which, on the day in question, was pulled up in Lord Street on the opposite side of the road from the house, that is, on the park side of the road; it was on the greensward just off the road, or partly off the road. It was a summer's day, about five in the afternoon. The father proposed to take his eldest son, who was about eleven years of age, down the street in the car to do some shopping. The child of three and a half years, the plaintiff, wished to go with them but he was told that he could not.

The father said in evidence that he and his eldest son went over to the car and got into it prepared to drive off; he said that the child was left inside the fence of the house at first but later came out on to the footpath. When he had got into the car there came up on the left-hand side of the road, moving in the same direction as his car was facing, that is to say to the north, a somewhat debilitated car with its engine in bad order travelling possibly at 25 m.p.h. He decided to let that car pass while he was starting his own car. While all this was going on the child was apparently crying

and anxious to go with him, but according to his evidence at the hearing of the action he thought that the child was standing on the footpath by the gate of the house and that the mother would look after him.

A man named Evans was driving the car that has been described as debilitated and, as Evans drew level with the father's car, the defendant's car drove up at a faster pace - not a very fast pace, but about 30 m.p.h. - and proceeded to pass Evans' car. At this juncture, the child ran across the road and when he reached the middle of the road he was struck by the defendant's car and very seriously injured.

The issue of liability was tried by Wolff, S.P.J., as he then was, and he found for the defendant on the simple ground that the defendant was guilty of no negligence. The appeal to us is on the question of fact whether in all the circumstances his Honour ought to have found that there was negligence.

There was scant evidence, as might have been expected, for the plaintiff. The defendant gave personal evidence and called the evidence of other persons. It is not necessary to go into all the facts of the case, because in substance we think that it is a typical case of a question to be decided on evidence in which the judge was master of the situation. It is quite true, as Mr. Burt said, that it is not a case depending upon the personal credibility of witnesses but a case depending upon the inferences to be drawn from evidence. But the facts are not precisely fixed and the impression of the judge is one which must be formed with all the advantage of seeing the witnesses and assessing the whole facts of the case on the evidence as the case was presented.

The case that can be made for the unfortunate boy cannot, as it appears to me, be put more clearly and with more strength than upon the basis of a short passage from the evidence

given by the defendant himself. In this passage the defendant says: "As I was about to pass" - that is, about to pass Evans' car - "I may have had my front mudguard level with his back mudguard. I suddenly saw a small boy on the right side of the road running across the road. He was running to the west side" - that is to say, from right to left across the path of the defendant's car as the defendant was proceeding north. "He was about quarter way across when I first saw him. I was about 35 to 40 feet south of him when I first saw him. I was going between 25 to 30 m.p.h. when I first saw him. The car having the engine trouble was three to four feet to my left. I swung left to try and avoid him. I applied the brake. I hit the rear right mudguard of the car I was passing" - that is, Evans' car - "with my front left mudguard. I did not avoid the boy. I hit him with the front right mudguard and headlamp of my utility". The boy was thrown a distance to the right front, so to speak, of the defendant's car, and that distance is estimated at twenty feet, an estimate which the judge has adopted but which cannot perhaps be treated as more than an attempt to estimate an unascertainable distance. The importance of the fact is that the child was thrown through the air, and that is some indication that the impact was a severe one. But to my mind the case for the plaintiff child really goes back to the question whether the admission by the defendant that he first saw him when he was a quarter of the way across - that means a quarter of the way across the entire distance of 44 feet - discloses a situation in which we might legitimately say that he was unreasonably late in seeing him, that he was negligent in not seeing him before, that is when or soon after he first stepped off the kerb and began to run.

Needless to say, all sorts of difficulties might arise if we reached the conclusion that seeing the plaintiff so late as that involved some degree of want of care in the

lookout which the defendant was keeping. Perhaps the most we could say is that, if he had seen the plaintiff a fraction of a second earlier the accident would not have happened precisely as it did. But on the whole such a conclusion does not seem to be proper even if it were possible in circumstances such as these for an appellate court to say that it amounted to evidence of want of due care in the lookout being kept. The pace at which the defendant was proceeding was not great, there was no question of excessive speed, he was passing a car on his left in a perfectly proper manner and he was entitled to give that car due attention as the object most in view, which he did. He looked up the road, which was perfectly straight, just before he proceeded to overtake the car and the child ran at right angles across in front of him. In all those circumstances we think it is quite impossible for us to hold that the learned judge was not reasonably entitled to find that there was no negligence on the part of the defendant which brought about this accident, and for that reason we think that the appeal must be dismissed.

The appeal is dismissed with costs.