6 ORIGINAL OF 1959 6

IN THE HIGH COURT OF AUSTRALIA

SOBEY

V.

HALL

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Monday, 30th November 1959

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

C.1578/55

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ORDER

Appeal allowed with costs. Order that the order of the Full Court of the Supreme Court be set aside and in lieu thereof order that the appeal and the cross appeal be dismissed with costs.

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JUDGMENT DIXON C.J.

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This appeal from the Full Court of the Supreme Court of South Australia raises once again a question of solving by deduction from circumstances the riddle of how a fatal road accident was brought about. The dead man could have explained it if he had survived and, I suppose, if he had exhibited no amnesia. But there is no other direct testimony which can give the explanation. The dead man was riding a motor cycle with a side car attached. The side car consisted only of a box fixed by bolts to the undercarriage. On the pillion seat behind him was a man whose wife rode in the box with her back to the wind, that is to say to the direction in which they were travelling. The motor cyclist ran into some part of the rear of a truck moving in the same direction and was killed. The two passengers survived but can say little or nothing that matters. The truck driver can tell us all about the movements of his truck but with one important exception nothing about the motor cycle.

The hour was about 9.30 p.m. on a dark but fine night; the place Junction Road, Finsbury. The date is now four and a half years ago. The truck had emerged from a gate on the left-hand side of the road. It was driven by a carrier's driver and he is the defendant. The gate was that of the migrants' hostel where he had delivered some luggage and other things. It was a wide enough gate, in line with the fencing, which was about fourteen feet from the gutter. From the gutter to the bitumen surface there was another ten feet of dirt surface. The bitumen roadway was twenty-one feet wide. The truck had head lights, a side light or lights and tail light, all on. The truck driver said in his evidence

that he looked to the right, that is to the east, having come to a stop as he left the gate. About 122 yards in that direction a railway line crosses the road. The driver saw a light advancing which, according to his estimate as it resulted from his cross-examination, was the other side of the railway line. It is his evidence about the advancing light that forms the exception to his inability to speak about the motor cycle. It was the light of the motor cycle. The evidence of the passenger in the side box was that the motor cycle and side box were travelling close to the left-hand edge of the bitumen. She said that they were not going fast. The driver of the truck went forward and turned to his left, that is to the west. When he had travelled far enough to bring the tail of his truck fifty-eight feet down the road, that is fifty-eight feet measured from the point where an imaginary line produced from the gate at right angles to the bitumen would intersect it, the motor cycle hit the rear of the truck. Certain skid marks on the bitumen appear to fix that as the point of impact. The speed the truck had gathered by that time was estimated at fifteen miles per hour. It is possible that the left-hand wheels of the truck were on the soft surface but more probably all four wheels were running on the bitumen.

The side box was torn from its bolts and with the passenger in it, went forward on the dirt surface for a considerable distance. Measured from the skid marks the box travelled forty-seven feet, the passenger not quite so far. Within ten feet of the skid marks lay the motor cycle and the body of the deceased. The cycle was on the dirt surface on the left side of the bitumen, the body a little to the north of it but on the dirt surface. The position of the pillion rider was also on the left but apparently on the bitumen. The only injuries to the truck appear to have been the fracture of a

timber cross-member at the back of the truck and the jamming of the fan under the safety bars of the radiator. The fracture was on the right-hand side about nine inches from that side. The cycle, the side box and the body were all thrown to the left and to reconcile this with the place of fracture of the cross-bar, the fracture, together with the jamming of the fan, was put down to transmitted shock.

Mayo J., who tried the action, found both the deceased motor cyclist and the driver of the truck guilty of negligence causing the accident. As to the motor cyclist his Honour said: "Can the deceased or the defendant, or should both, be treated as failing to act reasonably? It is difficult to understand how the deceased failed to see the truck although it may have moved into his line of vision ahead when he was fairly close up. There must have been something wanting in his lookout, both towards the Hostel and ahead." As to the driver of the truck the learned judge said: "What of the defendant? He saw the headlight of the motor cycle. But where was the cycle when he saw it? . . . He finally came to the point that it was on the east side of the railway crossing. Should that be accepted? I am not at all clear that it should. But I am prepared to believe the light was at least an appreciable distance to his right hand. Nevertheless his scrutiny was but a glance that gave him no idea whatever, no indication of speed. After stopping for some short period of time he went ahead and placed the truck in the pathway of the oncoming motor cycle. His conduct was, I think, in error. I find he was negligent." His Honour proceeded: "It becomes necessary therefore to apportion blame." After making some remarks on this process which he said at the stage of introducing figures ceases to be logical, the learned judge said: "In the present case I assess the

blame attributable to the defendant as slightly in excess of that which the deceased would have borne: I put it in the ratio of 5 to 4."

From this judgment the defendant appealed to the Full Court and the plaintiff, the widow of the deceased motor cyclist, cross appealed. The appeal was dismissed, the cross appeal was allowed, and the Full Court in substitution for an apportionment of four-ninths and five-ninths found that the degree of the deceased's negligence was one-fifth and the degree of the defendant's negligence four-fifths; the damages were apportioned accordingly.

It appears to me that the facts proved are consistent with a number of explanations of the accident. A striking feature of the circumstances is the fact that the motor cycle came to rest on the dirt to the left of the truck and that its side car slid along the dirt for a considerable distance on the same side. It may be that the truck had not completed its turn when the motor cyclist saw it and that it occupied too much of the bitumen road to allow the cycle to pass on the right. It may be that the motor cyclist was too far to the left to enable him at the speed he was travelling to turn to the right. His failure to see the motor truck may have been due to inattention; doubtless he was able to talk to the passenger next to him and facing him as she sat in the box. It may on the other hand have been due to the truck emerging unexpectedly in front of him when he was too close to it. The judgment of the driver of the truck as to the distance of the light of the motor cycle may have been erroneous. The estimate of its speed may be altogether too low. Indeed it is possible to put forward hypothesis after hypothesis which would account for the accident. In a general way one may say that as the truck

was emerging, not from a side street, but from a gate, onto the highway where traffic might be expected, speculation or, if you like, the process of inference may begin by placing the prima facie blame upon him. But for myself I take the view that there is no sound basis for treating one inference rather than another as established upon a balance of probabilities. Nor do I see why it should be supposed that both should be considered at fault rather than one or the other. I think it is all speculation and that a preference for one rather than another of the possible explanations should not form a basis of decision. In cases depending upon circumstantial evidence, once it is seen that there is but a limited number of hypotheses consistent with the facts, the mind is inevitably drawn to choosing between them. To say that the issue is still unproved seems almost confessing defeat. But it does remain unproved until the mind is reasonably satisfied of the truth of the fact. One may be so satisfied on a preponderance of probability but that is quite different from choosing the most probable conjecture. It is not surprising that a difference of opinion between the Full Court and the learned primary judge arose as to the apportionment of blame. It is easy to understand that tribunals of fact, furnished with the powers conferred by sec. 27(a)(3) of the Wrongs Act 1936-1956 (S.A.) of apportioning fault and of finding damages accordingly, in cases where it is clear that the accident must be attributable to the fault of one or other or both of the parties, must be under a strong temptation to cut the matter short and proceed directly to the task of saying how much is due to each. But before the provision can be applied it is necessary to reach the conclusion that the injury has been caused by specific negligence of the defendant and that notwithstanding the negligence of the defendant the negligence of the plaintiff or the party under whom the plaintiff claims has been a contributory cause. It

is only when that is done that the statute has any operation. I find it too difficult to see how in this case a tribunal of fact can be sufficiently satisfied that the truck driver caused this accident by some act of negligence. It may be a very shrewd conjecture that as he came out of the gate he ought to have given the advancing light preference. But such a conjecture is not easily reconciled with the supposition that the motor cyclist exhibiting the advancing light was also guilty of some act of negligence. Notwithstanding the weight of judicial opinion to the contrary, I am unable to regard the case as one where any sound ground is provided by the circumstances for arriving at a definite finding of basal facts. Indeed it seems to me to be one where rival solutions have been put forward of what is essentially a problem to which no affirmative judicial answer should be given.

For those reasons I would hold that the action should have been dismissed.

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JUDGMENT McTIERNAN J.

In my opinion, this appeal should be dismissed in so far as it concerns the finding of negligence against the appellant, but the judgment of the Full Court should be varied so as to restore the decision of Mayo A.C.J. as to the apportionment of blame. The Full Court unanimously affirmed his Honour's finding that the appellant was guilty of negligence. The appeal, in so far as it concerns that issue, raises no question of law; it merely involves the question whether a finding of fact should be reversed. There is an adequate and correct survey of the evidence in the reasons for judgment of the learned trial judge, and I respectfully adopt it. I therefore do not repeat the details of the evidence here. The finding that the appellant was guilty of negligence was one which there was substantial evidence to support and the countervailing evidence is not so probative and so preponderating that a court of appeal ought to reverse the finding. The Full Court having affirmed it, Mr. Hogarth's argument for upsetting it was courageous, but in view of all the evidence, hopeless.

I doubt whether it is consistent with the evidence leading to the finding of negligence against the appellant to hold that the rider of the motor cycle was guilty of any contributory negligence at all. I think that a negative finding on that issue would not have been unreasonable, but the question whether the finding should stand is not involved in this appeal. However, the conclusion that the rider of the motor cycle was guilty of negligence contributing to the fatal

accident was affirmed in the two Courts below. I do not carry my doubt so far as to say that the conclusion is incapable of being supported. The apportionment made by the learned trial judge can stand with his view of the facts, involving as it did, that the appellant and the rider of the motor cycle were both to blame. I am of opinion that, in making his apportionment, his Honour did not act upon any wrong principle, and that his apportionment is not in conflict with the evidence upon which he acted.

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JUDGMENT FULLAGAR J.

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In this case I am of opinion that the defendant's appeal should be allowed to the extent of restoring the judgment of Mayo A.C.J., which assessed the degree of the plaintiff's husband's responsibility for the accident at four-ninths, and awarded by way of damages to the plaintiff a total sum of £3866.13.4. My view of the whole case is substantially that expressed by my brother Menzies in his judgment, which I have had the advantage of reading. I agree generally also with what is said by my brother Windeyer, and I wish to add only a few words.

I am, with great respect, unable to accept the view that, because it is impossible to reconstruct with accuracy the events of the few seconds which preceded the fatal collision, the plaintiff must be regarded as having failed to sustain the burden, which rested upon her, of proving that the defendant committed a negligent act which was a proximate cause of the collision. If the action had been tried with a jury, I should not have thought it possible to sustain a direction to the jury to return a verdict for the defendant.

In many cases of this type the direct evidence is very scanty. In the great majority of cases there is conflicting and unreliable testimony. Not only do witnesses for the plaintiff differ from witnesses for the defendant, and from one another, but evidence given in chief is contradicted or qualified in cross-examination. The material events commonly happen in a very few seconds, and take those concerned unawares, so that their observation is necessarily defective. Their memory too is defective, and this handicap is commonly

aggravated by the fact that they are giving evidence long after the event. In the present case the trial of the action took place two and a half years after the accident, and such a lapse of time is by no means rare. The truth is that it is a common characteristic of such cases that a great variety of more or less tenable hypotheses as to matters of detail should present themselves to the tribunal - judge or jury - which has the task of deciding the ultimate issue or issues between the parties. But it is also, I think, the truth that it is not necessary that the tribunal should make - or should be able to make - a selection among all the permutations and combinations of fact and circumstance which are hypothetically possible. In most cases there will emerge certain salient facts about which the tribunal can feel reasonably satisfied, and which it can properly regard as fundamental and ultimately decisive.

This is, I think, precisely the position in the present case. Whatever difficulty one may feel about filling in the details, it is a clearly established fact that the defendant emerged from private premises on to a public highway after he had seen the light of the deceased's approaching motor cycle. After the defendant had been cross-examined, if not before, it was clearly open to his Honour to say, as he did, that he gave but a glance to his right and then "placed his truck in the path of the oncoming motor cycle". And it was clearly open to his Honour to say that that conduct was negligent and was a proximate cause of the collision. Then, so far as the deceased was concerned, it seems to me that, having regard to the violence of the collision and the nature of the impact, it was a perfectly legitimate inference that he was driving dangerously fast or not keeping a proper look-out, and that he too was guilty of negligent conduct which was a proximate cause of the disaster. I think, on the whole, that I should have

reached these conclusions myself on the evidence, if I had been trying the action.

I need only add that, if the common law as to contributory negligence were applicable, the case seems clearly one where a proper direction to a jury would be given without reference to any qualification of the general rule: see Alford v. Magee (1952) 85 C.L.R. 437. As things are, the South Australian statute required an apportionment of responsibility to be made. There is a degree of nicety in his Honour's apportionment into five-ninths and four-ninths, but I think it impossible to say that it was wrong.

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JUDGMENT MENZIES J.

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This is an appeal by the defendant Sobey against a decision of the Full Court of the Supreme Court of South Australia varying a judgment of Mayo A.C.J. for £3,866/13/4 in an action by the plaintiff as administratrix of the estate of her husband, M. J. Hall, for damages for negligence occasioning his death. The defendant appealed to the Full Court, which dismissed his appeal and allowed a cross-appeal by the plaintiff with the result that judgment was entered for her for £5,536/-/- in lieu of the amount awarded by the learned trial judge. Although Mayo A.C.J. and the Full Court considered that the collision in which Hall was killed, between a motor truck driven by the defendant and a motor cycle outfit ridden by Hall, was caused by the negligence of both Sobey and Hall, Mayo A.C.J. attributed five-ninths of the fault to the defendant and four-ninths to Hall, while the Full Court attributed four-fifths of the fault to Sobey and one-fifth to Hall. The appellant now seeks judgment in his favour on the ground that there was no evidence to support the finding that he was guilty of negligence causing or contributing to Hall's death or that the finding was against the weight of evidence and, in the alternative, he seeks to have the judgment of the Full Court set aside and that of Mayo A.C.J. restored.

The collision occurred at Junction Road, Finsbury, at about 9.30 p.m. on the 22nd April 1955. Hall was riding an old Harley Davidson motor cycle with an improvised side car in a westerly direction along Junction Road; there was one passenger riding pillion and another in the side car. The defendant drove an old 3-5 ton Bedford truck about twenty feet in length on to Junction Road from a private roadway leading to the Finsbury Hostel, which was on the south side of Junction Road;

he then proceeded along Junction Road in a westerly direction. Some twenty yards past the western edge of the entrance to the Finsbury Hostel, the motor cycle outfit ran into the rear part of the truck driven by the defendant. The headlights, the tail light and a guide light on the right side of the truck and the headlight of the motor cycle were all burning effectively at all times material. The only damage to the truck that was noticed was a fracture to a timber cross member forming part of the rear of the under-structure of the tray at a point near the right hand corner of the tray, and the jamming of the engine fan under a bar of the radiator. The tray of the truck, it may be said, was about three feet six inches above the ground. The front of the motor cycle was heavily damaged, particularly the front wheel and forks. There was also some damage to the right footplate. The box constituting the side car was torn away from the bolts which secured it to the chassis. After the accident, the motor cycle came to rest on the dirt surface of the road to the south of the bitumen strip and the box was found on the same section of the road some forty-two feet further west. Hall's body was lying near the edge of the bitumen about five feet to the west of the motor cycle. The two passengers were also lying on the road a few feet from the motor cycle. Immediately after the collision, the defendant told police officers that the collision had occurred at a point some five feet east of the position of the side car box, but this was almost certainly wrong. The point of collision fixed by skid marks on the road which probably came from the motor cycle tyres was some thirty-seven feet further to the east than the spot fixed by the plaintiff and, as I have said, only about sixty feet to the west of the entrance to Finsbury Hostel. The skid marks were near the southern edge of the bitumen, indicating the whereabouts of the motor cycle at the time when the collision occurred. The position of the truck

on the roadway when the collision occurred cannot be determined accurately. If the motor cycle struck it where the cross member was fractured, its right hand wheels were not far from the southern edge of the bitumen, but the position of the side car box might be regarded as indicating that the motor cycle struck further to the left. It may be that this is the reason why the trial judge found that the point of impact was further to the left and that the fracture, like the jamming of the fan, was due to transmitted strain. There is no doubt plenty of room for conjecture. The material data about Junction Road is that on the extreme south there was a strip of grass about nine feet wide, then an unmade footpath six feet wide, and between the footpath and the bitumen strip was a dirt surface ten feet wide. The bitumen strip was twenty-one feet wide. There was no lighting in the immediate neighbourhood and, when the accident occurred, the night was dark and clear.

There was no direct evidence of how the collision happened because Hall was killed, the pillion passenger had no recollection of the night's events, and the passenger in the side car was sitting with her back towards the direction in which the motor cycle was travelling and, beyond saying that up to a railway crossing about one-hundred-and-twenty yards east of the Finsbury Hostel entrance the motor cycle had been travelling so that the wheel of the side car was just on the bitumen, she could give no evidence of any value. The defendant's evidence was that when he came out from the Finsbury Hostel entrance, he brought the motor truck to rest before he reached the dirt section of the road. Up to that point, trees and structures would probably obscure any view of a vehicle travelling along the Finsbury Hostel roadway from a vehicle travelling west along Junction Road. When the truck stopped, the defendant said he looked to left and right, and in the distance to the right saw the light of an oncoming vehicle. He gave several estimates of

the distance between his truck and the position of the oncoming vehicle, which was without doubt the motor cycle ridden by Hall, but his evidence as to this distance was not such as to carry much weight, although, as I read it, there is no reason for rejecting his final stand that when, after stopping as aforesaid, he began to move into Junction Road, the motor cycle was still to the east of the railway line. His evidence of speed is also understandably vague : he formed no estimate of the speed of the oncoming motor cycle while he estimated that over the distance between the point from which he started and the point of collision, his average speed was about seven miles per hour. There was no evidence about the speed of the motor cycle and any inference depends upon undetermined variables. The learned trial judge seems, however, to have worked on a speed of about thirty-five miles per hour and before this Court the parties were disposed to work upon much the same basis. In all the circumstances, it remains uncertain just how the accident occurred. As I read the judgment of Mayo A.C.J., he found, though perhaps not expressly, that Hall did not see the defendant's truck unless it was just before he hit it, and not only do I see no reason for departing from such a finding, but I agree with it. In the course of his excellent argument for the respondent, Mr. Bright did suggest that it would be proper to conclude that Hall saw the truck as it emerged from the Finsbury Hostel entrance and, in a prompt but unsuccessful endeavour to avoid it, he swung his motor cycle to the left and struck not its rear but the rear portion of its left hand side. There is no finding that this was so and I do not think there is any warrant for making such a finding, although I would not reject the possibility that the motor cyclist did make a last-second, desperate attempt to swing to the left when he saw the truck just before he collided with it.

One difficulty is whether there was any evidence that the defendant was negligent, not because the evidence exculpates him but because it is insufficient to inculpate him, but, having regard to the short distance between the entrance from which the truck entered Junction Road and the point of collision, I have reached the conclusion that it was open to the trial judge to find that the defendant took the truck on to the road when a careful driver would have waited until the oncoming vehicle, of which he was aware and which had the right of way, had passed and, in entering the road as he did, the defendant created a situation which made necessary some action for his own protection on the part of Hall. It can, I think, be inferred that the front of the truck moved about ninety feet from the point at which it was at rest before entering Junction Road and the point it had reached when the collision occurred. While it travelled that ninety feet at seven miles per hour, the motor cycle, if it was travelling at thirty-five miles per hour, would have travelled four-hundred-and-fifty feet. It seems common ground - for there is no cross-appeal - that the defendant, in entering Junction Road as he did, did not make a collision inevitable, and it follows that Hall might have avoided it. The case was rather that in failing to do so, Hall was negligent only in a minor degree because the emergency which Sobey created left him with but little time to change his course or speed. This occasions the second difficulty and, if it had been a matter for my judgment initially, I might have come to the conclusion that notwithstanding any negligence on the part of the defendant, the accident would never have occurred but for the negligence of Hall in not keeping a proper lookout, so that his negligence was the effective cause of his death. The learned trial judge, however, found that the collision was caused by the negligence of both Hall and Sobey, on the footing that Sobey, by entering

Junction Road as he did, created a situation of danger which Hall, by reason of his failure to maintain a good lookout, failed to appreciate until the short time he had for an appropriate manoeuvre to avoid a collision had passed. This finding depended, I think, more upon the impression the evidence as a whole produced upon his mind than upon inference from uncontroverted facts or facts specifically found, and in such circumstances an appeal court will not readily substitute its impressions for those of the trial judge, who had the advantage of seeing and hearing the witnesses and inspecting the locus in quo : Paterson v. Paterson (1953) 89 C.L.R. 212; Benmax v. Austin Motor Co. Ltd. 1955 A.C. 370. The Acting Chief Justice found not only that the defendant was negligent but that the defendant's negligence contributed to the accident, and in this case, I think there ought to be no interference with these findings. This brings me to the decision of the Full Court.

If there was to be any interference with the findings of the learned trial judge, it would, in my judgment, have been to free the defendant truck driver from liability on the ground that the plaintiff had not proved either that the defendant was negligent or that any negligence on his part had contributed to the accident; and not, as the Full Court did, to attribute a larger share of fault to the defendant. The Full Court treated Hall as being in a small measure to blame because he failed to cope with what the Full Court describes as "a sudden emergency in which it was extremely difficult for him either to decide what the course of the truck was likely to be or what he might do to avoid a collision with it". If that was the situation, I think it would really have led to the conclusion that Hall was not negligent, but, for reasons I have already given, I do not think an appellate court justified in departing from the trial judge's finding that Hall was negligent in not

keeping a proper lookout and in failing to see the truck before he was almost in collision with it. As I do not regard this as a case in which this Court should allow the appeal to the extent of setting aside the judgment of the trial judge that there was negligence on the part of the defendant that contributed to the collision, but as I think the Full Court was not justified in interfering as it did with the trial judge's apportionment of the fault as between the defendant and Hall, the result is that the judgment of the Full Court should be set aside and that of Mayo A.C.J. restored.

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JUDGMENT WINDEYER J.

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I have read the judgment of my brother Menzies. I agree in his conclusions, and generally with the reasons he has stated for reaching them, and I agree too with what my brother Fullagar has written. It is impossible in a case like this to come with any firm satisfaction to a conclusion as to how the accident really happened. It is not easy even to decide, by any process of rational inference as distinct from mere conjecture, where on the balance of probabilities the blame for the accident lies. The evidence here was scanty. Such direct evidence as there was came from one side, the driver of the truck; and he could say little more than that the motor cycle unexpectedly ran into the rear of his vehicle. The rest is mainly inference from the positions of the vehicles immediately after the accident, such marks as there were on the road, and the nature of the locality. Theories put forward afterwards about things which ought to have been done and things left undone within a period of a few seconds are very often unsure grounds on which to impute responsibility for an accident, even when all the facts of the occurrence are known. And here all the facts are not known. Some arguments carefully based on speeds and distances were addressed to us; but the data for them were partly assumptions or statements which did not have to be accepted as wholly accurate. The learned Acting Chief Justice of South Australia had the advantage of seeing the witnesses and viewing the locality. His judgment shews that he considered the defendant was negligent in driving out on the highway as and when he did, having seen the light of the motor cycle coming along the road. This I think was a conclusion which on the evidence his Honour could well reach. But he considered that the deceased man, the driver of the motor cy

and sidecar, was also negligent. There was evidence on which he could so find. In my view there was really no ground on which the Full Court could alter his apportionment of the blame in the manner it did. I agree that the appeal should be allowed to the extent of restoring the judgment of Mayo A.C.J.