IN THE HIGH COURT OF AUSTRALIA

Hc. 16./59.

RYDZEWSKI

V.

CUMMINS

REASONS FOR JUDGMENT

7/6

Judgment delivered at Sydney

on Wednesday 30th March 1960

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

C.1978/55

Court Below

RYDZEWSKI

v.

CUMMINS

ORDER

Appeal dismissed with costs.

RYDZEWSKI

v.

CUMMINS

JUDGMENT

FULLAGAR J.
MENZIES J.
WINDEYER J.

KYDZEWSKI

v.

CUMMINS

The defendant, a motorist, while driving in a northerly direction along Park Street, Hobart, ran into the plaintiff, a pedestrian, walking along Park Street in the same direction. The accident happened late on a dark night on a badly lit section of the street. It had been raining and the street was wet. The roadway consisted of a strip of bitumen about twenty feet wide flanked on either side by a gravel strip. The gravel strip on the west was about twenty feet wide, of which the last six feet were overgrown with rough grass upon which it was not practicable to walk. The plaintiff's case was that he was walking on the gravel about two feet away from the western edge of the bitumen and that while so doing he was run down from behind by the defendant's car without knowing anything of it before he was hit. The defendant's case was that he was driving at about twenty five to thirty miles an hour, with his lights on and with his left-hand wheels about two feet in from the western edge of the bitumen, and that when he was twenty five to thirty feet away he saw the plaintiff directly in front of him on the bitumen, that he then attempted to pass to his left but could not avoid hitting him. The learned trial judge accepted neither account completely. He found that the plaintiff was walking on the bitumen some six feet from the western edge and not on the gravel, that the defendant was driving at about twenty five to thirty miles per hour with his lights on, and that the defendant did not see the plaintiff until he was a good deal closer to him than twenty five feet. In these circumstances, his Honour found that the accident was caused by the negligence of the defendant in not

keeping a proper lookout and by the negligence of the plaintiff in walking on the bitumen without paying attention to traffic coming up behind him, and that both were negligent substantially up to the point of impact. On these findings the case was one for the application of Section 4 of the Tortfeasors and Contributory Negligence Act 1954, and in accordance with that provision his Honour apportioned the responsibility for the damages between the defendant and the plaintiff in the proportion of sixty five per cent. and thirty five per cent. respectively. Damages were assessed at £3,730. 3s. 5d., made up of £1,480. 3s. 5d. special damages and £2,250. 0s. 0d. general damages. Judgment was entered for the plaintiff for that sum reduced by thirty five per cent., i.e., £2,424. 12s. 2d.

From this judgment the plaintiff appealed to the Full Court, on the grounds that he had not been in any degree responsible, either because he had not been negligent at all or, if he had, the damage was caused entirely by the negligence of the defendant; in any event, he claimed that his share of the responsibility was less than thirty five per cent. and that the general damages were assessed at too low a figure.

This appeal was dismissed. In the joint judgment of Crisp and Crawford JJ., their Honours examined the findings of the learned trial judge and came to the conclusion, for the reasons which they gave, that those findings both as to responsibility and damages should not be disturbed. Burbury C.J. agreed with the analysis of the facts made in the joint judgment and said that, because the findings did establish that the defendant had no opportunity to avoid the consequences of the plaintiff's negligence, the plaintiff "could only escape some reduction in his damages upon the footing (1) that the facts are susceptible of the application of the 'complex doctrine of constructive last opportunity' (Winfield, Law of Tort (6th Edn.) p. 514); (2) that if this subtle refinement of the so-called

last opportunity rule is applicable to the facts, it remains as an ultimate decisive test of legal causation so that the Plaintiff's damage is suffered only as a result of the Defendant's fault within the meaning of the Tortfeasors and Contributory Negligence Act, 1954". Having regard to the character of contributory negligence and to the fact that "in Pennington v. Norris 96 C.L.R. 10 and Tucker v. Tucker (unreported) the High Court has abstained from deciding whether the qualification of the defence of contributory negligence sometimes expressed in terms of a defendant's last opportunity has survived the Act" his Honour expressed the opinion that "the determination of the present case does not require this Court to express its view upon these difficult questions and I think it undesirable that it should do so". The Chief Justice then concluded by saying - "Upon the basis of the learned trial judge's findings I think his decision that the Plaintiff's damages should be reduced by 35% was justified". He also said that "it is impossible to say that the damages were manifestly inadequate".

We agree with the Full Court that the appellant can succeed only by the appellate Court disturbing the findings of the trial judge, and that here this should not be done, for the reasons given by the members of the Full Court. We also agree with the Chief Justice that in this case it is not necessary to enter upon the questions of law to which he referred. In these circumstances, it would serve no good purpose for us to state in other language the reasons for not departing from the findings at the trial that are so clearly and convincingly expressed in the joint judgment of Crisp and Crawford JJ., with which, as we have said, the Chief Justice expressed his agreement.

The appeal must be dismissed with costs.