(9

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

PEARSE

V.

LANSER AND ANOR.

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on FRIDAY 27th MAY 1960

W. M. Houston, Govt. Print., Melb.

PEARSE

v.

LANSER AND ANOTHER

ORDER

Appeal dismissed with costs.

PEARSE

v.

LANSER AND ANOTHER

JUDGMENT

DIXON C.J.
KITTO J.
MENZIES J.
WINDEYER J.

PEARSE

v.

LANSER AND ANOTHER

This appeal arises from an action brought in the Supreme Court of New South Wales for the recovery of damages for personal injuries caused by the defendant's negligence. The plaintiff who is the appellant is a widow; not much short of six years ago, to be exact on 12th November 1954, as she was crossing Parramatta Road, Croydon, she was run down by an Austin panel van and badly injured. The defendant is the driver of the panel van. At the trial the jury found a verdict for the defendant, and an appeal by the plaintiff from the verdict was dismissed in the Supreme Court. From the order dismissing that appeal the plaintiff now appeals as of right to this Court.

The circumstances of the accident were very simple and it was fully investigated at the trial but it is said for the appellant that a new trial should be ordered because the judge told the jury that the defendant's case was confirmed by the evidence given by an independent witness whom the defendant called, whereas according to the argument of the plaintiff's counsel, that evidence properly considered had no such effect.

The appellant relies on a further point. The learned judge who presided at the trial (Kinsella J.) left to the jury an argument presented to them on behalf of the defendant that, on a certain hypothesis, they should find that the plaintiff was guilty of contributory negligence; at the end of his argument in this court the plaintiff's counsel took the point that in doing so the learned judge misdirected the jury. A brief statement of the facts will suffice to explain how these two points arise.

Parramatta Road, Croydon, runs east to Sydney and west

to Parramatta. It is sixty-six feet wide, a yellow line runs down the middle and on each side of the middle line there are markings for three lanes of traffic. At about eight o'clock on the morning of 12th November 1954 the plaintiff desired to cross from the southern pavement to a bus stop on the northern side. The traffic, particularly to Sydney, was heavy. A considerable distance up the road to the east, that is on her right, there were automatic traffic or crossing-lights, and these of course had the effect of breaking the stream of traffic at intervals. She said that she looked to her right and found the road was clear except that she saw one vehicle coming towards her, a large red truck loaded with tyres. She thought it would be seventy yards away. She crossed the road to the centre line. She does not say that she looked again to her right, but she says that at the centre line or two or three feet short of it she stood for an interval of time which she described as "two or three minutes". She looked to her left at the traffic going towards Sydney. Standing there she was hit from behind by the defendant's panel van and thrown in the air. From other evidence it is clear enough that the panel van had been in the third lane going towards Parramatta, that is the lane nearest the centre, and the big red truck in the second lane. No one disputed the probable fact that when the plaintiff looked to her right, as she began to cross the road, the panel van was hidden from her vision by the truck. The case for the defendant was that the truck had hidden the plaintiff from him altogether until she emerged from in front of it to cross the third lane. She then was only a few feet away walking diagonally and he could do nothing but swerve to his right at the same time applying his brakes. He hit her with the left side of the truck. He had been travelling at twenty-five miles per hour and was overtaking the red truck on his left.

The witness of the accident described as independent was a man named Keyes who had been driving a motor truck in the

opposite direction towards Sydney. The traffic was thick and he was driving at twenty-five miles per hour. He said that as he came down the slight hill he saw the plaintiff leave the kerb and walk quickly across the road, slightly diagonally, towards the centre line. He saw the truck and the panel van coming up the road. They were in adjacent lanes and seemed about abreast. The panel van was travelling two feet or perhaps eighteen inches from the yellow line. The plaintiff walked very sharply across and he saw her hit by the panel van. She was moving. The witness was of course travelling towards the place where the plaintiff would have crossed had she been allowed to go on and by the time she was hit he had come within a few feet of it. In his charge to the jury the learned judge, using various expressions, told them in effect that this evidence confirmed the defendant's account; his Honour's closing statement put it to the jury as substantially supporting the defendant's evidence although there were discrepancies and to some extent contradictions. His Honour left the case to the jury as one where if they accepted the plaintiff's version that she stood near the yellow centre line for an appreciable interval of time in full view of the defendant as his panel van approached, there was a strong case of negligence on his part. If on the contrary the version was accepted that she stepped in view suddenly from the path of the truck, being hidden up to that point, the jury might well say there was no negligence on his part.

There are two decisive answers to the contention that there should be a new trial on the ground that the learned judge told the jury that the evidence of the independent witness, Keyes, confirmed or substantially supported the defendant's case.

The first is that on a fair reading of his evidence it did so. It was inconsistent with the view that the plaintiff had stood in full view of the driver of the advancing panel van

for a substantial interval of time and shewed that she had emerged from in front of the truck.

The second is that the misdirection alleged by the appellant related entirely to the effect of evidence, contained no misdirection of law and therefore prima facie could not amount to ground for a new trial. On matters of fact the jury are to judge for themselves. If they are, as they were in the present case, given to understand this, the court is not warranted in setting aside a verdict for misdirection in fact unless it amounted to something that was very serious in its probable effect or calculated to put the jury altogether off the track or otherwise so imperil the findings as to make it clearly necessary in the interests of justice to set aside the verdict.

The plaintiff's second point, namely the complaint about the judge's treatment of contributory negligence, does not when examined appear to rest on any sound foundation. The direction on the subject was as follows:- "Mr. Woodward" (who was counsel for the defendant) "puts it this way: 'If you accept the plaintiff's version, I surrender. There must be a verdict for the plaintiff', but he asks you to reject the plaintiff's version and accept the version given by Mr. Lanser" (the defendant) "and Mr. Keyes. He said if you do that you should not find the defendant was guilty of any negligence at all, but in case you do on his own version find he was guilty of negligence he says, 'I have a second line of defence, because if the defendant was negligent on his own version then the plaintiff herself must have been guilty of contributory negligence'. And the law is quite plain. If a plaintiff is guilty of contributory negligence she cannot recover against a negligent defendant. I will explain to you what is contributory negligence. The law imposes upon every plaintiff who comes into Court and says she was injured by the negligence of

somebody else a duty to take reasonable care for her own safety, and if by failing to take reasonable care for her own safety she materially helped to bring about an accident, then she is guilty of contributory negligence and is not entitled to recover a verdict in her favour. The contributory negligence which is suggested by Mr. Woodward is this: He says, 'Here is a plaintiff who steps off the footpath and walks across Parramatta Road to the centre line of the road, having looked once to see if the traffic was there she did not bother to look again. Not only that but she walked in such a way that her back was, partly at least, towards the oncoming traffic so it would not be visible to her'; and there is no suggestion, Mr. Woodward puts, that at any stage after she left the kerb did the plaintiff look to the right to see if by any chance some vehicle was coming up to pass or overtake the heavily laden tyre truck. Well, gentlemen, it is a matter for you. Mr. Miller" (who was counsel for the plaintiff) "said, 'What is the plaintiff supposed to do? Is she supposed to turn to see if traffic was coming up in the lane nearest the yellow line?' That is a matter for you. What do you think? Mr. Miller suggests it was not reasonably necessary for her to do so. You may think that a reasonably prudent person, taking reasonable care for her own safety, would be expected from time to time at least to look to see if any traffic was coming up. It brings you to this position, Mr. Miller says, the defendant driver was guilty of negligence because he did not see her in time to stop. If she should have been visible to him presumably his truck should have been visible to her, if she had been keeping a proper lookout, and if she had seen this truck some distance down could she not have stood still some distance in front of him and enabled him to avoid the accident?"

Now it is clear that this direction had no application, and was expressed as having no application to the

case made by the plaintiff's own evidence that she had reached the middle line and was standing still for some appreciable interval of time waiting to cross the other half of the road. That is made clear by the reference to Mr. Woodward's statement that he surrendered if that version were accepted. It relates only to the rather unreal double hypothesis stated in the next sentence, that is to say the hypothesis that the jury accepted the evidence that she moved sharply across the street and had not reached the middle line and that nevertheless the jury considered the defendant negligent.

That hypothesis meant that had the defendant looked he might have seen her crossing. If so, however, she might have seen his vehicle had she looked. And she did not look during the course of her journey across the road. The contention of counsel to the jury was fairly open on the evidence and it is difficult to see why it should be withdrawn from the jury's consideration, unless it be because the hypothesis on which it would arise was too unreal. But the very unreality of the hypothesis adds to the considerations which make this a point forming no foundation for a new trial. For in fact it is an almost certain inference that it played no part in the jury's view which one may be reasonably sure was based on the conclusion that the accident was not due to any negligence on the part of the defendant.

The appeal should be dismissed.

PEARSE

v.

LANSER AND ANOTHER.

JUDGMENT McTIERNAN J.

I am of the opinion that there was no evidence to go to the jury which would show that the plaintiff was guilty of contributory negligence and that for this reason the verdict should be set aside and a new trial held. The defendant founded his defence of contributory negligence upon an allegation that after the plaintiff stepped from the footpath she did not again look in the direction from which the defendant's panel van was approaching. The ground of this allegation is that she deviated so much from a vertical crossing that she precluded herself from looking in the abovementioned direction. Having carefully considered the evidence on which the defendant relies, I have come to the conclusion that it was insufficient to enable the jury to make a finding as to the extent to which the plaintiff did deviate. It is consistent with the evidence that the deviation was but slight and that the plaintiff did not preclude herself as alleged. There is no evidence that she did not look in the direction from which the defendant's panel van was approaching. The defendant's counsel did not cross-examine her about this matter. The plaintiff gave evidence that she did not see the panel van until it struck her. That vehicle was, in fact, travelling either behind or on the right of the truck which was carrying a tall load of tyres and would have been hidden from the plaintiff's view even if she were making a vertical crossing. Indeed, the defendant said in evidence that he did not see the plaintiff until she passed in front of the truck for the reason that until then the truck was obstructing his vision.

I would therefore allow the appeal.