6 OF 1960 7 6

IN THE HIGH COURT OF AUSTRALIA

FIACCHI

V.

MANNION

REASONS FOR JUDGMENT

Judgment delivered at ADELAIDE

on 21ST SEPTEMBER, 1960.

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

FIACCHI

v.

MANNION

JUDGMENT
(ORAL)

JUDGMENT OF THE COURT
DELIVERED BY DIXON C.J.

CORAM: DIXON C.J.
McTIERNAN J.
KITTO J.

FIACCHI

v.

MANNION

DIXON C.J.: This is an appeal from a judgment for the plaintiff in an action for personal injuries suffered in a motor car collision caused by the defendant's negligence.

The appeal is on the ground that negligence on the part of the defendant causing the accident ought not to have been found; on the further ground that the apportionment of blame between the plaintiff and the defendant was too favourable to the plaintiff; and on the still further ground that the amount of damages awarded was excessive.

The accident occurred near Barmera on 27th July 1955 and the trial took place five years afterwards. The action was tried by Mr. Justice Ross.

The plaintiff was a pedestrian, seventy years of age at the time he suffered his injury. He lived in Loveday Road, which goes south from the Sturt Highway, and he lived three-quarters of a mile down the street. We are told that he lived on the eastern side of the street but as the street curves he might nevertheless cross to the west in order to proceed in a direct line by the shortest route.

On the evening of the 27th July, at about 7.15 p.m., he was walking in a westerly direction along the Sturt Highway and approaching the intersection of Loveday Road, the opposite side of which is called Barmera Road, to cross the Sturt Highway and go to his home. It is possible that he crossed diagonally, but that, I think, is not very clearly made out. The width of the bitumen was only twenty-four feet. As he was about to cross he saw the defendant's car travelling in an easterly direction and he made an attempt to cross. The defendant's car struck him, admittedly

with the left side of the car. The car made skid marks from the beginning of the square made by the intersection of the two streets, veering over to the south; that is, to the driver's right.

Mr. Justice Ross found against the defendant. The substantial ground of negligence which he attributed to the defendant, as it seems to me, is that he failed to check his speed when he saw, or should have seen, that the plaintiff was crossing the bitumen, and having got himself into difficulties swerved his car to the right. Swerving to the right as a last effort to avoid the plaintiff would not stand as an item of negligence if considered separately, but his Honour took it as an aggravation of the situation into which he had got. His Honour also thought that the defendant had failed to keep a proper look-out.

Mr. Hogarth, in supporting the appeal, attributed two mistakes to his Honour as shown by his judgment. One was that his Honour appears to have taken the evidence to indicate that the defendant saw the plaintiff in the lights of another car which he was following, when the defendant was 200 yards away, and on an analysis of the evidence Mr. Hogarth says that is an excessive distance and that in fact it was only a comparatively short distance.

The other mistake Mr. Hogarth attributes to his Honour is that his Honour, having said that the left-hand side of the car struck the defendant, subsequently referred to the offside of the car. But in this there seems to be no other error than that of terminology, although, of course, one can understand the appellant's counsel suggesting that there was confusion of thought behind an error of terminology.

We think, however, that this is just another case in which the trial judge was in command of the situation and that the two mistakes referred to, if indeed they be mistakes, are not material to the ultimate conclusion which was clearly made on

evidence which his Honour accepted as showing to his satisfaction the primary cause of the accident, namely, that there was a failure of the car to avoid the pedestrian and that it formed the real cause of the accident.

The pedestrian, however, was not in his Honour's opinion free from blame and he apportioned the damages accordingly. He attributed to the pedestrian a failure to keep a proper look-out. I am not quite clear what his Honour's view was in this respect; he did not expand it, but in all probability he meant that he should have seen the car at an earlier stage, although Mr. Alderman for the plaintiff rather thought his Honour meant at a very late stage. However that may be, it appears to us that this is just an ordinary appeal on facts - a simple attempt to disturb the learned judge's finding of fact. The attack on the finding was carefully made on grounds which can be, so to speak, extracted from a transcript. The grounds are not of real substance and do not represent the picture as his Honour saw it. We do not think that the appeal should succeed; the finding of negligence against the motor car appears to us to be justified.

As to the apportionment of damages, it rests on the negligence attributable to the plaintiff, and the negligence attributed to the plaintiff, as I have said, is not quite clear to me. I myself would have thought that the proportion perhaps went further against the plaintiff than I would have been disposed to go, but I think the attack by the defendant on the apportionment is without sufficient foundation. I recognize, however, that it depends upon giving a somewhat different aspect to the accident from that which his Honour accepted.

As to the quantum of damages, there is always a difficulty. We are faced almost at every sitting in every State with challenges to assessments of damages. I suppose in the majority of cases it is because the damages are said to be too much but in some cases it is because they are said to be too little.

It must be recognized that a trial judge is here again in what may be described as a dominant position. "Dominant", perhaps, is not the best word because, after all, he is subject to control, but his estimate is made as a matter of what is in truth a description of discretionary judgment on a question in which the law's standards are very wide. It is not the duty of a court of appeal to interfere with his determination unless some error appears in the manner in which the amount was arrived at or such a wide disparity appears between the figure and what the facts require that the assessment must be regarded as erroneous. The tendency in the various States appears to me as an observer to be to bring what may be called the various standards prevailing slightly closer together. Years ago I was very much struck by the fact that as one moved westward in Australia damages became lower but that is not so apparent at the present time. In New South Wales, where the great number of these cases come before us, it is the verdict of the jury that is challenged. The protection given to the verdict of the jury is somewhat greater than the protection given by law to the determination of the judge, but nevertheless it is true that we must be clearly satisfied that the damages are excessive before we interfere. I am very far from being satisfied that £6,000 was too great an award to the plaintiff, who had suffered a very great deal of pain and suffering and was in hospital for almost three years.

I think the appeal should be dismissed with costs.

McTIERNAN J.: I agree.

KITTO J.: I agree.