IN THE HIGH COURT OF AUSTRALIA

WILKINSON

V.

MAREK

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on THURSDAY, 1ST JUNE 1961

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

WILKINSON

v.

MAREK

ORDER

Appeal dismissed with costs.

WILKINSON v. MAREK

JUDGMENT

DIXON C.J.
KITTO J.
TAYLOR J.
MENZIES J.

WILKINSON v. MAREK

This appeal is brought from an order of the Full Court of the Supreme Court of New South Wales which dismissed a motion by the appellant for a new trial of an action in which the respondent claimed damages for personal injuries which were alleged to have been caused by the appellant's negligence. Upon the trial of the action the respondent had secured a verdict for £13,000 and the grounds relied upon in support of the motion were, first of all, that the verdict was against the evidence and the weight of evidence and, secondly, that the amount of damages awarded was excessive.

The respondent's injuries were caused when a motor cycle which he was riding came into collision at a point where two streets - Copeland and Elizabeth Streets, near Liverpool - intersected at right angles. Copeland Street runs from north to south and Elizabeth Street from east to west and the respondent was riding his bicycle in a northerly direction along the former street. Upon these matters there was common agreement between the parties but their unanimity extends no further and there were no eye-witnesses to the collision. According to the respondent he was travelling at about twenty miles an hour but as he approached the intersection he made a signal to indicate his intention of slowing down and he says that in fact he slowed down to about five miles an hour. Then just as he came to the intersection, he observed the approach of the appellant's utility truck in his rear vision mirror and almost immediately it struck his cycle in the rear and then ran over him and his cycle.

The difference between the respondent's version of the incident and that of the appellant is such that it cannot

be accounted for by honest mistake. The appellant says that at no time was he travelling along Copeland Street. In fact, he says, he was driving his vehicle in a westerly direction along Elizabeth Street and as he came from the east towards the intersection it was clear of traffic and he proceeded to cross. But when he was more than half way across the intersection the respondent's motor cycle appeared on his left like a flash and struck his vehicle on the left-hand side.

It was, of course, for the jury to decide between these conflicting stories and it is not suggested that if there were nothing more in the case there would be any ground for intervention by an appellate court. But the appellant asserts that there is a body of circumstantial evidence which clearly points to the truth of his account and which is of such weight that a jury acting reasonably was bound to reject the respondent's evidence. The matters relied upon by the appellant were:

(1) that the damage to his vehicle was confined to the left-hand side;

(2) that the principal damage to the motor cycle was to the front wheel;

(3) that both vehicles after collision came to rest in Elizabeth Street a little west of the intersection;

(4) that the account given by the appellant at the trial was consistent with a written statement made to a police officer immediately after the collision. This statement was admitted in evidence after counsel for the respondent had completed his cross-examination of the police officer;

(5) that the fact that the respondent's <u>right</u> shoulder and <u>right</u> leg were fractured tended to support the appellant's account of the incident;

(6) that this account of the incident was also supported by the position in which glass was found on the

roadway; and

(7) that the appellant's ordinary route from his work to his home took him in a westerly direction along Elizabeth Street, and there was evidence that at the time of the collision he was, in fact, proceeding from his work to his home.

The significance of these matters was pressed upon us on the appeal and there may be much to be said for the proposition that if the matters mentioned in (1), (2) and (3) above can be said to have been established they gave considerable support to the appellant's case. But it is impossible to see how the statement referred to in (4) could carry the matter any further. Apparently the written statement referred to was admitted in evidence for the purpose of re-establishing the credit of a police officer after it had been suggested in cross-examination that he had not attended at the scene of the accident. But in no way did it constitute evidence which was capable of corroborating the appellant's testimony. Again, although the matters referred to in (5), (6), and (7) above might have been urged as matters for the consideration of the jury they are by no means of sufficient weight either taken by themselves or in conjunction with the other matters advanced to justify an order for a new trial. The fact that the respondent's right shoulder and right leg were fractured throws no light on the manner in which the two vehicles came into collision and the position of the glass on the roadway was, we think, consistent with either version of how the mishap occurred. Moreover, it should be borne in mind that these matters and the evidence concerning the route which the appellant usually took from his place of work to his home were the subject of oral evidence which the jury was entitled to accept or reject as it chose. But even if the truth of the evidence be assumed it is impossible to say that they were of such weight as to require a jury acting reasonably to reject the evidence given by the respondent. They did

not demonstrate the truth of the appellant's evidence; at the most they were argumentative and it was for the jury to attach such weight to them as they thought fit.

The matters referred to in (1), (2) and (3) above were also the subject of oral evidence but at the trial they seemed to us, when taken together, to provide some substantial ground for thinking that, if accepted, they demonstrated the truth of the appellant's version of the incident. But in the final result, it seems to us, it was for the jury to say how much weight it attached to the evidence by which it was sought to prove these facts. Yet at the conclusion of the argument we entertained some doubt whether the matters referred to were not sufficiently substantial to justify our interference. Our doubts, however, have been put at rest. We were asked to examine the motor cycle and observe for ourselves the nature of the damage which had been done to it. It was an exhibit in the case and was produced for our inspection after the conclusion of the argument. Upon seeing the bicycle we observed that there was some distortion to the front fork but did not see any damage to the front wheel which would indicate that it had collided head on with the side of the appellant's vehicle. That being so we are left with the matters mentioned in (1) and (3) above which, even if they be taken to have been established as salient facts in the case, are quite insufficient to justify an order for a new trial. The only evidence concerning these matters, however, was that which was given orally and it was, again, for the jury to say whether they accepted the evidence that the damage to the appellant's vehicle was confined to its left-hand side. It may well be that the jury discounted the evidence concerning the damage to the appellant's vehicle when they observed that the oral evidence concerning the damage to the motor cycle was not borne out by their inspection of it. On the whole we agree with the observations made by the Full Court with respect to the several matters which we have mentioned and, accordingly, the appeal on this ground must fail.

We have given anxious consideration to the submissions made concerning the second ground of appeal and, although we think the verdict was high, we are not prepared to disagree either with the reasons or conclusions of the Full Court on this aspect of the matter.