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IN THE HIGH COURT OF AUSTRALIA

TODISCO

V.

FINNEY

ORIGINAL

REASONS FOR JUDGMENT

46 fr
28/-

Judgment delivered at MELBOURNE

on FRIDAY, 2nd JUNE 1961

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

TODISCO

v.

FINNEY

ORDER

Appeal allowed with costs. Discharge the order dated the twenty-first day of September 1960 of the Supreme Court of the Australian Capital Territory. In lieu thereof order that judgment be entered for the plaintiff in the sum of four thousand two hundred and sixty pounds (£4260) with the costs of the action and that the said sum of four thousand two hundred and sixty pounds (£4260) be apportioned as follows:- Two thousand eight hundred pounds (£2800) for the benefit of the plaintiff, two hundred and seventy-five pounds (£275) for the benefit of the infant Alessio, three hundred and thirty-five pounds (£335) for the benefit of the infant Angiolina, four hundred pounds (£400) for the benefit of the infant Rosina and four hundred and fifty pounds (£450) for the benefit of the infant Giuseppina. So much of the said sum of four thousand two hundred and sixty pounds (£4260) as has been apportioned for the benefit of the aforesaid infants to remain in or to be paid into Court. Cause remitted to the Supreme Court of the Australian Capital Territory to make such further order or orders as may be just, consistently with this judgment, with liberty to apply to the said Supreme Court with respect to the monies paid into Court and to the sums held or to be held in Court as aforesaid for the benefit of the said infants, and generally.

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JUDGMENT

KITTO J.
TAYLOR J.
MENZIES J.

TODISCO

v.

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The judgment with which we are concerned upon this appeal was given in an action which arose out of an accident that took place on 27th April 1959 at about 4.30 in the afternoon at the intersection of University Avenue and Ellery Circuit, Canberra, when a Holden motor-car driven by the respondent in a westerly direction along University Avenue towards the intersection collided with a bicycle ridden in a northerly direction along Ellery Circuit towards the intersection by the husband of the appellant. The cyclist was killed and his widow, on behalf of herself and their four children, brought an action in the Supreme Court of the Australian Capital Territory claiming that her husband's death had been caused by the negligence of the respondent. Joske J. found that the accident was caused by the negligence of both the cyclist and the car driver and decided that the cyclist's share of responsibility was seven-tenths and the car driver's three-tenths. Having assessed damages at £7,600, his Honour reduced this amount by seven-tenths to £2,280, which he apportioned as follows:

The widow:	£1,404.
The infant Alessio, aged nine years:	£165.
The infant Angiolina, aged eight years:	£201.
The infant Rosina, aged six years:	£240.
The infant Giuseppina, aged four years:	£270.

The appellant is the plaintiff, and on her behalf it was contended that his Honour's findings upon the question of liability were wrong and that in any event the assessment of damages was too low.

The intersection where the accident occurred was quite open except for trees lining the streets some distance back from the roadway and forming no obstruction to a clear view. At the intersection University Avenue was rising slightly to a crest to the east of the intersection and Ellery Circuit was rising slightly to the north. At the time of the accident the sun was shining brightly from the west, the direction in which the car was travelling.

The defendant's case was that as he approached the intersection at a speed of about thirty miles per hour and was about fifty feet from the intersection, he looked to his left and the only traffic he saw was a large vehicle like an army truck approaching the intersection along Ellery Circuit and about fifty yards (later reduced to fifty feet) away from the intersection; that he accelerated to pass in front of the truck to save the driver from having to go down through his gears; that this acceleration was from about five to ten miles per hour; and that as he reached the intersection a man on a bicycle suddenly appeared about twenty-five feet away straight in front of him and although he attempted to do so he was unable to avoid a collision. He denied that the sun interfered with his vision.

The other evidence relating to liability was that of one Baulch, an eyewitness who was driving a car along University Avenue in the opposite direction to that in which the defendant was driving, and police officers who were summoned after the collision had occurred. Baulch said, in effect, that he first saw the cyclist approaching the intersection riding north along Ellery Circuit, that he then saw the defendant's car travelling towards him at quite a good speed (well over thirty miles per hour) and that, when the cyclist was in the middle of the intersection, the car struck him. Baulch also gave evidence that between the time of his first seeing the cyclist and the time of the collision the cyclist looked to his right

and then "stood up on the pedals". This, he said, happened when the cyclist was well out into the intersection about a quarter of the way across. Baulch said he had a clear view to his right along Ellery Circuit and that he did not see any truck there or at all. The police evidence was to the effect that the point of collision was fixed, upon information given by the defendant, as at the centre of University Avenue and three feet east of the prolongation of the western edge of the bitumen in Ellery Circuit. (This would lead to the conclusion that when the collision occurred the motor-car had travelled practically across Ellery Circuit and the cyclist had travelled half way across University Avenue.) Skid marks led from the neighbourhood of this point to the place where the defendant's car was at rest and they measured one hundred and two feet for one set of wheels and ninety feet for the other. The bicycle was lying in University Avenue fifty-one feet to the west of the western edge of the intersection. The cyclist was lying six feet from the northern edge of University Avenue and ninety feet from the centre of the intersection.

His Honour's findings were that the defendant's speed after he accelerated was in the neighbourhood of forty miles per hour, which was ten miles in excess of the thirty miles per hour permitted by the traffic ordinance; that the position of the sun and its effect upon the defendant's eyes and vision demanded the exercise of a considerable degree of care; and that the defendant contributed to the accident by negligence in travelling too fast and not keeping a proper lookout. His Honour also found that the cyclist was not only in breach of the traffic ordinance but was negligent in entering the intersection and not giving way to the motor-car on his right. His Honour's conclusions were expressed as follows:- "It seems to me under these circumstances that both parties are to blame, and that both

are negligent as that term is understood in law. But it does seem to me that the greater negligence was on the part of the deceased. Clause 1 of the ordinance imposes a very stringent requirement with regard to giving way to vehicles on the right, and I am quite satisfied that the deceased was in disobedience of that regulation. It seems to me that his was considerably the greater responsibility for this collision, and I think that the proper measure of division of liability is that I should find that the deceased was seven-tenths responsible for the collision and the the defendant was three-tenths responsible for the collision." His Honour made no finding about the presence of the truck which the defendant said he saw nor did he indicate his opinion of the credibility of any of the witnesses.

The foregoing summary of the evidence and statement of his Honour's findings requires the rejection of the appellant's first submission, that is, that the deceased cyclist was not negligent. His Honour's express refusal to accept the contentions that the defendant's car was so far back from the intersection at the time of the cyclist's entry thereto that it could reasonably be disregarded and that the defendant's excessive speed was the only factor that created a situation of danger left it open to find that the cyclist was not keeping a proper lookout and that he entered the intersection when he should have given way to the defendant. The finding of contributory negligence must, therefore, stand.

The question whether the learned trial judge's apportionment of liability should stand is a more difficult question. The apportionment that his Honour made was, of course, the exercise of a discretion with which a court of appeal will be slow to interfere. As was said in Pennington v. Norris (1956) 96 C.L.R. 10, at pp. 15 and 16, "it is clear that the Act intends to give a very wide discretion to the judge or jury entrusted

with the original task of making the apportionment. Much latitude must be allowed to the original tribunal in arriving at a judgment as to what is just and equitable. It is to be expected, therefore, that cases will be rare in which the apportionment made can be successfully challenged : see British Fame (Owners) v. Macgregor (Owners) 1943 A.C. 197 and Ingram v. United Automobile Service Ltd. 1943 K.B. 612." The same principle was expressed by the court in A. V. Jennings Construction Pty. Ltd. v. Maumill 30 A.L.J.R. 100. However, in both cases the court did think it necessary to revise the trial judge's apportionment of responsibility. We think we should adopt the same course in this case. When regard is had to the point of collision, to the fact that the cyclist must have entered the intersection before the motor-car, to the defendant's acceleration to a speed of forty miles per hour through an intersection, to the position of the car, cycle and cyclist upon the road after the collision, to the car's skid marks on the road and to the fact that the defendant did not see the cyclist until just before the collision, it seems to us that his Honour's finding that the cyclist was more to blame than the defendant must have proceeded from an overlooking of some of these elements. His Honour naturally laid stress upon the carelessness of the cyclist in entering the intersection when a vehicle was approaching it from his right and referred to the fact that the ordinance "imposes a very stringent requirement with regard to giving way to vehicles on the right"; but in view of the defendant's serious negligence in driving into an intersection as fast as he did and in failing to see the cyclist who was plainly there to be seen by anybody keeping a proper lookout, it is difficult to draw nice distinctions as to blameworthiness. Having regard to the evidence as a whole, we are of opinion that a proper allocation of the responsibility

for the damage done is to attribute it to the defendant and to the deceased cyclist equally.

This brings us to the question of the quantum of damages, the assessment of which is a matter of particular difficulty owing to the peculiar circumstances of the case. The course the learned trial judge followed was to ascertain first what the deceased would have been likely to have contributed for the benefit of his wife and family had he lived. This his Honour took to be £12 per week and based this upon a finding that from his wages of £20 per week he had been contributing £8 per week for their benefit. His Honour considered that the deceased's wages would increase to £30 per week and from this he would contribute a proportionate amount (i.e. £12 per week). One half of this £12 per week (i.e. £6 per week) his Honour regarded as for the benefit of the plaintiff, and so arriving at a sum of £312 per annum he "turned" this "into a lump sum by taking a certain number of years purchase". This number of years his Honour fixed at fifteen and proceeded to multiply £312 by fifteen to arrive at the sum of £4,680. Then assuming that the deceased would provide for his children until each was sixteen years of age or thereabouts by the provision of 30/- a week each, his Honour calculated the following further sums:

Alessio:	£550. 0. 0.
Angiolina:	£670.10. 0.
Rosina:	£800. 0. 0.
Giuseppina:	£900. 0. 0.

What his Honour did can be seen by looking at the case of Giuseppina. She was born on 15th April 1956, so when her father died on 2nd May 1959 she was about three years of age. Upon his Honour's view she therefore lost support at the rate

of 30/- per week for about thirteen years, which aggregates approximately £1,000, which his Honour presumably discounted to £900. The amounts so calculated for each of the children totalled £2,920, and this sum, added to the £4,680 for the benefit of the plaintiff, totalled £7,600, which was his Honour's assessment of the damages.

It seems to us that his Honour was quite right in endeavouring to ascertain the contribution that the deceased husband and father would have been likely to have made had he lived for the benefit of his wife and family but in basing his calculation upon the past contribution of the deceased of £8 per week we think his Honour was in error. The wife and children were living in Italy whence the deceased had emigrated to Australia in 1956. The deceased sent money to his family in Italy in unequal amounts at uneven intervals, but there was evidence that during the two years prior to his death he had transmitted to Italy sums which averaged £8 per week. The last considerable transmission was, however, the sum of £500 in August 1958 and it was not to be supposed that another sum would not have been sent before very long, because at the time of the collision the deceased had upon him £582 in notes. Furthermore, what was transmitted to Italy was probably not the limit of what the deceased was doing or prepared to do for his family because the plaintiff gave evidence upon commission in Italy to the effect that the deceased was urging her to come to Australia with the children and, had this eventuated, the deceased would have been put to additional expense for the benefit of his family. Taking these things into account, it seems to us that his Honour's starting point of £12 per week should not have been less than £15 per week, that is, one half of what his Honour considered would be his future weekly earnings. The sum of 30/- per week to each of the children until the age of sixteen is not challenged by the

appellant and in the special circumstances of the case we are prepared to accept the capital figures that his Honour reached for the children, totalling, as we have said, £2,920. Turning now to the sum his Honour assessed for the plaintiff herself, it seems to us that the appropriate method of assessment in the present case was to assess the present value of an annual sum for a number of years chosen because of the likelihood that the deceased would support his wife with such a sum of money during that time. Once this sum had been arrived at, it would in this case, we think, have been necessary to discount it because of contingencies not taken into account in arriving at the period for which support could be expected and in particular for the reasons that we will refer to hereafter. The annual sum that was appropriate in this case is, for the reasons we have already given, £9 per week (i.e. £15 less £6) or £450 per year approximately. The deceased was thirty years of age when he died and the plaintiff was about thirty-two. The deceased was in good health but the plaintiff had a duodenal ulcer. In all the circumstances we think the number of years during which the deceased, apart from special circumstances, would have been likely to support his wife to the extent mentioned should be taken as thirty. The present value of £450 per annum for thirty years is £7,000 approximately, but this is a case where we consider there should be a substantial reduction because the deceased was in Australia and his wife and family in Italy and there was no certainty either that they would come to Australia or that he would remain here and continue to have the advantage of his high Australian rate of earnings. Taking this into account with other relevant contingencies, we consider that the sum of £7,000 should be reduced by twenty per cent to £5,600 which, with the addition of £2,920 for the children, gives the proper assessment of damages at £8,520. However, because the deceased was equally

to blame with the defendant for this damage, judgment should be for one half of £8,520, namely £4,260. We would therefore vary the judgment appealed from by increasing the damages from £2,280 to £4,260 apportioned as follows:-

£2,800 for the benefit of the plaintiff;
£275 for the benefit of the infant Alessio;
£335 for the benefit of the infant Angiolina;
£400 for the benefit of the infant Rosina;
£450 for the benefit of the infant Giuseppina.

The defendant should pay the whole of the costs of the action.