ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

PESKA

V.

FERCAK

ORIGINAL

REASONS FOR JUDGMENT

£1.1.0

Judgment delivered at SYDNEY

on TUESDAY, 25th JULY 1961

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

PESKA v. FERCAK

ORDER

Judgment of the Supreme Court of the Australian Capital Territory varied by substituting the sum of £7,500 for the sum of £10,000. Otherwise appeal dismissed. Respondent to pay the costs of the appeal.

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JUDGMENT

KITTO J.
TAYLOR J.

PESKA v. FERCAK

The appellant in this case was the defendant, and the respondent was the plaintiff, in an action in the Supreme Court of the Australian Capital Territory. The action was for damages for personal injury arising out of a collision which took place between two motor cars, driven by the appellant and the respondent respectively, at the intersection of two roads in the Territory, in October 1958. The respondent was seriously injured. The action was tried by Joske J., who awarded the respondent £10,000. The appellant submits two main contentions. First, he says that on the facts which the trial judge may be supposed to have found some share in the responsibility for the damage should have been attributed to the respondent, and that accordingly the damages recoverable by the respondent should have been reduced under s. 15 of the Law Reform (Miscellaneous Provisions) Ordinance 1955 (No. 3 of 1955). Secondly, he contends that £10,000 was an excessive amount at which to assess the damages.

The collision occurred at the intersection of Canberra Avenue, which thereabouts runs east and west, and a road running north and south called on the south of Canberra Avenue Barrallier Street and on the north of Canberra Avenue Cunningham Street. Canberra Avenue is a main traffic artery leading out of the capital, and consists of two carriageways, separated from one another by a plantation strip which, it is agreed, is about twenty feet in width. The more northerly carriageway is restricted to east-bound traffic only and the more southerly to west-bound traffic only. The incident occurred at about 4.50 p.m. on 13th October, in broad daylight, the weather being fine and the road dry. The collision came about in this wise. The respondent drove his car in an easterly direction along the northerly carriageway of

Canberra Avenue, until he reached the Barrallier Street intersection. There he turned right, intending to enter Barrallier Street. He traversed the twenty feet length of roadway which passed through the plantation strip, and had got about half-way across the more southerly carriageway of Canberra Avenue when the appellant's car, travelling in a westerly direction along that carriageway, struck the near side of his car, overturning it and causing him serious injury.

Joske J. found that the appellant was negligent in failing to keep a proper look-out, failing to give way to traffic approaching from the right, and driving at an excessive speed. He said that he was satisfied that the appellant's negligence was the sole cause of the injuries suffered by the respondent. Unfortunately we have not been assisted by any statement of his Honour's reasons for these conclusions, and we must deal with the appeal on the basis of our own inferences as to what facts his Honour considered to be proved. As it happens, the evidence concerning the collision was within a small compass, and it left little room for alternative conclusions.

The respondent's version of the occurrence, as given in his evidence in chief, amounted to this. Before turning to the right out of the northerly carriageway of Canberra Avenue, he looked both to his right and to his left. He saw on his right a car passing the intersection along the southern carriageway of Canberra Avenue, and behind that car, at a distance which he took to be about 200 feet, he saw two or three other cars following the same course. Then he started to make the turn and pass through the plantation strip. He was travelling at about twenty miles an hour. He had no traffic to watch for on his extreme right, that is to say in the southerly carriageway of Canberra Avenue, because of its being a one-way traffic street. He saw a car in

Barrallier Street, approaching Canberra Avenue; but it was a good way off the intersection and did not require any continued attention. The respondent was free, then, to look to his left to see what was the situation concerning the cars which he had noticed coming from the east along the southerly carriageway of Canberra Avenue. He saw first a car quite close to him; in fact he thought it was only ten feet away. The driver had apparently observed him, and was slowing down to a stop, holding his hand up to indicate to traffic behind him that he was slowing or stopping, and indicating to the respondent that he might pass in front, as was his right. It was his right because, as the intersection of the southerly carriageway of Canberra Avenue and Barrallier Street, which is deemed to be a separate intersection, was not controlled by a member of the police force, vehicles on his left were obliged to decrease their speed, or stop, to avoid a dangerous situation which otherwise would be created: see s. 23 subs.(1)(1) and subs.(3)(b) of the Traffic Ordinance 1937-1955 as amended by No. 2 of 1955. The respondent, while observing this first car, failed to see a second car, behind the first and coming up on its right-hand side. He reached a point approximately in the middle of the intersection of the southerly carriageway and Barrallier Street, when he suddenly became aware of the second car, which was the appellant's, bearing down on him "fast" - the appellant himself put his speed at about 30 m.p.h. - and it struck his car amidships before he could do anything about it.

This account of the incident did not go unchallenged by cross-examination. The respondent was questioned concerning evidence he had given in the Traffic Court in January 1959. He admitted that on that occasion he had made no mention of a first car slowing down and giving a signal encouraging him to enter the intersection. He also

admitted that he had said that, having seen the appellant's car when it was 200 feet away, he knew his turn would take him across its line of travel, that it had seemed to him that he had time to cross the one-way traffic, but that he did not "make it", because the appellant's car was travelling too fast. But notwithstanding what he had said on the former occasion, he would not retract his assertions concerning the car in front; and it seems clear that the judge believed him.

The respondent, as we have said, had what is called the right of way, being on the appellant's right-hand side. That, by itself, did not absolve him from all need to attend to what was happening on his left. A motorist in such a situation is nevertheless in default, in the sense that he is guilty of a failure to act with reasonable caution, if he crosses without allowing for any likelihood, being such that a reasonably careful man in his position would guard against it, that a vehicle on his left may continue on its course notwithstanding the regulations: see The South Australian Ambulance Transport Incorporated v. Wahlheim (1948) 77 C.L.R. 215, at pp. 228, 229, and the cases mentioned in Alldridge v. Mulcahey and Another (1950) 81 C.L.R. 337, at pp. 354-355, and Bybyk v. Wilton and Foote Ltd. and Tooth (1959) S.A.S.R. 112. But the respondent, according to the story which he told and which evidently the judge accepted, did not cross the line of oncoming traffic in blind disregard of what was happening on his left. On the contrary, he paid attention to the leading car approaching on his left, that being the car which most obviously demanded his attention at the moment; and the signal to go ahead which he received from the driver of that car provided its own measure both of distraction and of assurance of safety. No doubt, if the truth were that the respondent saw the second car and deliberately took the risk of being able to pass ahead of it, the proper conclusion might well be that he failed to take reasonable

care; but Joske J. must have concluded that the case was not one of a motorist taking a known risk, that there was no failure of reasonable caution in the respondent's not seeing the appellant's car or not allowing for the possibility of its presence, and, further, that the appellant's failure to observe the respondent's car and the signal and conduct of the driver in front of the respondent in Canberra Avenue, was the sole cause of the collision.

We were pressed with the fact that it was by a change of course that the respondent got to the place where the collision occurred, and that a driver changing course so as to cross in front of traffic travelling in the direction opposite to his original line of travel has a special obligation of care. So, undoubtedly, he has: see Wheare v. Clarke (1937) 56 C.L.R. 715, Worden v. Hislop (1953) S.A.S.R. 104, David v. Hartman (1953) S.A.S.R. 109, Gillespie v. Munro (1959) S.R. (N.S.W.) 200 at p. 208; but the change of course in the present case was very different from a sudden veering across the path of an approaching vehicle. Certainly twenty feet is not a great distance, but the fact that the plantation strip was of that width meant that before the respondent reached the intersection of the southerly carriageway of Canberra Avenue, his change of course was complete, and he had become, in relation to the appellant, as clearly a vehicle approaching from the right as if he had come from Cunningham Street.

The appellant, it may be remarked, did not himself go into the witness box. Having scrutinized the evidence, we see no reason for disturbing the finding of the trial judge that the responsibility for the damage should be attributed to the appellant alone.

Then as to damages. The respondent was twenty-eight years of age at the time of the accident. He was born in Czechoslovakia, and came to Australia in 1950.

His only employment in the ensuing eight years was as an unskilled labourer. He worked for seven months on parks and gardens in Canberra, then as a kitchen hand for three years, and finally as a builder's labourer, occupying for the final six months the position of leading hand. His health was satisfactory. The chief injuries which he sustained in the accident were spinal. He had crushed fractures of the ninth and eleventh thoracic vertebrae, and fractures of the transverse processes in the right side of the first and second lumbar vertebrae. He was in hospital for four months. After another three months, in May 1959, his doctor thought that he was fit to try work, and it was while washing a car soon afterwards that he developed pain at a point remote from the site of the abovementioned injuries, namely at the base of the spine where it joins the sacrum. The doctor, Dr. Wearne, who was a surgeon, gave evidence to the effect that, having regard to the known severity and distribution of the injuries discovered immediately after the accident it was logical to assume that the spine had been subjected to severe forces and strains over its whole length, and that the injuries might have caused some damage to a vertebral disc, which could later have ruptured, extruded a portion of its semi-fluid contents into the spinal canal, and caused pressure on the adjacent nerve roots. An orthopaedic surgeon, Dr. Vance, thought it quite possible that a disc lesion was produced.

The medical witnesses agreed that at the time of the trial the respondent was not, and they thought he never would be, fit for heavy work of any sort; and Dr. Wearne feared that there was no job that he could hold, though it might be hoped, with some confidence, that he could carry out light work of a sedentary nature at some future time. Dr. Sturrock, an orthopaedic surgeon called by the appellant, thought that it was possible that some form of light duty

might be found which he would be capable of carrying on. He expressed the opinion that the respondent could do manual labour, provided he was not required to bend in the one position for a long time or to do heavy lifting. Dr. Andrea, a general surgeon, took a similar view, saying that the respondent would be able to do light sedentary work, but for what continuous periods of time he did not know. Dr. Vance was uncertain about the future: he thought it was a matter of trial and error to see how long the respondent could stand a particular job.

Prior to the accident the respondent had been earning about £16. 4s 0da week (after tax) plus £6 extra for some Saturday work. At the time of the trial he had not yet got any permanent work, and consequently his probable future loss of earnings was difficult to assess. The appellant was willing to concede before us that the respondent's earning capacity was probably reduced by about £5 a week for the rest of his life. His proved out-of-pocket expenses amounted to £257, and the appellant conceded that he might fairly be supposed to have lost wages at the rate of £23 a week over the period during which but for the accident he would have worked in the two years which elapsed between the accident and the trial. For the whole period this would amount to about £2,300. In assessing damages it would not be correct to treat this as a figure of ascertained loss, for to do so would require the assumption that if the accident had not happened there would not have been any interruption or reduction of the capacity or opportunity to earn full wages. On the other hand, the respondent might possibly have earned more. The appellant suggested that £2,500 be taken as covering the whole of the damages in respect of expenses and loss of wages up to the trial. This seems reasonable. The present cash value of the amount of £5 a week for thirty-five years (if that be taken as the respondent's expectation of working

life) was agreed to be £4,200, and the appellant contended that £2,500 would be a proper amount to take as the balance of that sum after making allowance for the contingencies of life during the thirty-five years. That would bring economic loss to £5,000, and an addition would have to be made in respect of pain and suffering. For that item the appellant suggested £1,000 or £1,500, bringing the total damages to £6,000 or £6,500.

On the question of damages, as on that of liability, we are without the assistance of any statement of reasons by the learned trial judge, except some general comments which suggest that the problem was considered as one for the selection of a single round figure to cover everything, and that the figure selected was not supported by any reasoning as to individual matters admitting of separate consideration. His Honour was undoubtedly right in not treating the assessment of damages as an arithmetical exercise. At the same time, some specific attention to distinguishable aspects of the damage suffered is apt to provide a valuable check in cases like this, and may well reduce, though nothing can completely remove, the element of arbitrariness in the final adoption of a money figure to provide fair and reasonable compensation for the whole of the damage sustained.

It seems to us that in two respects, but in two only, the appellant's suggestions as to damages should not be accepted. In the first place, it seems likely that £5 a week is somewhat too low a figure at which to assess the respondent's loss of future earning capacity; for not only is the field of heavy work, for which he was most suited, henceforth closed to him, but a good deal of light work also is beyond his reach, either because it may involve prolonged stooping or heavy lifting or because it lies outside the range of his very limited qualifications. And in the second place the element of pain and suffering seems underrated at

£1,500. We have not given in this judgment a detailed account of the respondent's sufferings, but they have been very considerable, and they are not yet over. In addition, there is a definite possibility, and Dr. Vance thinks a likelihood, of osteoarthritis developing from the spinal injuries in about ten years' time.

In our view there should be added to the £2,500 which is fairly attributable to expenses and past loss of earnings, an amount in the region of £3,000 for future loss of earnings, and of £2,000 for pain and suffering and loss of amenities of life. Consequently, if the learned trial judge had awarded a total sum anywhere near £7,500 we should not have considered that his assessment should be altered. But £10,000 seems to us clearly to be unduly high; and in view of the fact that we cannot ascertain from his Honour's judgment how the sum was arrived at we must, we think, give effect to our own view. In our opinion the damages should be reduced to £7,500.

The judgment of the Supreme Court should therefore be varied by reducing the amount awarded to the plaintiff to £7,500. Otherwise the appeal should be dismissed.