IN THE HIGH COURT OF AUSTRALIA

No. 25 of 1960

KRASTINS

V.

O'HANLON

ORIGINAL.

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 15th November, 1961.

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

KRASTINS

v.

O'HANLON

ORDER

Action dismissed with costs.

KRASTINS

v.

O'HANLON

JUDGMENT MENZIES J.

KRASTINS

v.

O'HANLON

The accident out of which this action arises took place at about 10.30 on the night of Christmas Day 1959 at a point in West Terrace, Adelaide, about 180 yards to the south of Currie Street. The plaintiff was attempting to cross West Terrace from a spot on the footpath a little to the south of Waymouth Street and had nearly reached the centre of the road, which was about 56 feet wide, when there was a collision between him and a motor car driven by the defendant in a southerly direction. The plaintiff suffered a left-side brain injury which caused paralysis on his right side and left him demented. There is no prospect of his recovery and he has not been able to give any account of what happened.

At the time of the accident the plaintiff was 34 years of age. He was active, in good health and, to mention a matter of possible significance later, about 5 feet 9 inches in height. He has, and had, a wife and two young children. He is a Latvian or Lithuanian who came to Australia with his wife and children in 1957. Both husband and wife were industrious and at the time of the accident were together earning between £35 and £40 per week - he £25 to £30 as a presser in a rubber factory; she £11/15/- at Balfours as a helper in the kitchen. They rented a home in Stephens Street and were gathering together furniture and household goods. There is little doubt that but for this untimely accident they would soon have established themselves comfortably in Australia.

The plaintiff and his family had spent the afternoon and evening of Christmas Day with friends - earlier

at their own home watching television; later at a house in Gray Street run by one Sakunovic as a boarding house where a friend of the Krastins, one Pajagic, lived. The plaintiff, his wife and his younger child had the evening meal with a number of others at this house and later talked in the lounge. They had a few drinks. Shortly after 10 o'clock the Krastins left the house in Gray Street to go home. They intended to get a taxi and they were accompanied by Pajagic to West Terrace, where they intended to pick up the taxi. The plaintiff was wearing slacks and a white shirt without a coat. The evidence of Mrs. Krastins and Pajagic was to the effect that they stood on the eastern footpath of West Terrace a little to the south of Waymouth Street for some minutes trying in vain to get a taxi when the plaintiff decided to cross the road to hail any taxi that he might find travelling north on the western side. It is clear that he chose to do this at a time when five to six cars which had been stopped by the traffic lights at Currie Street had on the changing of the lights crossed Currie Street and were bearing down upon him as he left the footpath and made his way across the road. The evidence is not precise, but the picture it conveys is of a number of cars, lights on, about 50 yards away travelling south and spread out across the eastern side of West Terrace. The car which turned out to be the defendant's car was well towards the centre of the road and it was the impression of both Mrs. Krastins and Pajagic that it was the leading car, although their evidence on this point was somewhat indefinite and not altogether consistent. Thus, in answer to the question "When Krastins went out on to the roadway then, he passed in front of some other motor cars, did he, that were coming towards him?", Pajagic answered "Oh, well, I did not see because - I do not think he passed any cars. I see Krastins walk but I did not see he passing other cars.

I just see when he walked on the road but I did not see another car before that." The account these witnesses gave of the accident was that the plaintiff, having started to cross the road walking in an ordinary manner, increased his pace without breaking into a run and was hit by the left-hand front of the defendant's car, but after reading their evidence carefully I have not been able to form any conclusion on the point whether upon their account of the collision the plaintiff did or did not see the defendant's car. Mrs. Krastins indeed said at one point in her evidence she did not see the defendant's car before it hit the plaintiff. Pajagic said he did not know whether or not the plaintiff stopped when he was on the road but that when he saw the defendant's car shortly before the collision, he did think that something could happen to the plaintiff. Both Mrs. Krastins and Pajagic gave evidence that after the plaintiff was hit by the front of the defendant's car, he spun round several times with his arms extended horizontally and fell to the ground where he lay unconscious for some time until he was removed by ambulance. His position on the roadway was measured by Constable Wark as about 20 feet from the eastern kerbline. Pajagic's estimate of the speed of the defendant's car was that it was travelling between 40 and 45 miles per hour when it struck the plaintiff.

The defendant's evidence was that he had dinner at the Centralia Hotel, where he was staying, and then spent a couple of hours in the lounge talking and having a few drinks with an acquaintance that he had made. At about 10 o'clock he decided to go for a drive to get some fresh air. He was driving alone and while travelling south in West Terrace he was stopped at the lights at Currie Street, where a number of vehicles pulled up, some in front and some behind him. When the lights changed, the cars crossed Currie Street, his well

out in the road, and he travelled south behind and upon a course slightly to the right of that of one of the other cars. When he reached Waymouth Street, he was travelling at about 30 miles per hour and while he was pulling out a little further to the right to pass the car in front of him he felt something strike his car towards the rear. He eased over to the eastern kerbline and stopped some 50 yards along the street. On going back he found that there had been a collision between his car and the plaintiff, who was then lying unconscious on the roadway. He gave evidence that he had not seen the plaintiff before the collision nor after the collision until he came back and saw him on the roadway. The lights of the defendant's car were burning on lower beam.

The evidence satisfied me that West Terrace was reasonably well lit and that the night was clear and the roadway dry.

There was important evidence given by the defendant and Constable Wark about the damage to the defendant's car, which was a 1938 Ford V8 sedan of a dark green colour. That evidence satisfies me that there was no damage done to the front of the car, but the collision with the plaintiff caused at least one and probably two noticeable dents. The first was a dent at the rear of the left-hand front door just where the door turns in to form the window frame and this was at a height of about 5 feet from the ground. This dent was described by the constable and the defendant as being upon the pillar between the front and back doors, but what is clearly visible in the police photograph that was taken next day is that the doors fit over that pillar and it was the door itself that was dented. The second dent was a mark towards the bottom of the forward portion of the rear mudguard on the left-hand side. I accept the defendant's evidence that these marks were not on the car before the accident in question and that the dent in the rear

mudguard was noticed immediately afterwards. The damage which I have described does support the defendant's evidence that the plaintiff was not struck by the front of the car and favours the inference that the plaintiff bumped into the side of the defendant's car as it was passing him, and this is so notwithstanding that the plaintiff's superficial injuries, as they were described, seem oddly slight if his contact with the car caused the dent in the door to which I have referred. This was not a matter to which any evidence was directed and I should say that even if it was only the dent in the rear mudguard that was caused in the accident, I would still take the view that the plaintiff was not hit by the front of the car but that he walked into the side closer to the rear than the front. It was argued by Mr. Travers that the damage to the car was quite consistent with the plaintiff having first been hit by the front of the car and then striking the car a second time as he spun round and then again as he fell. Even if this is so (and I doubt it) I do regard the damage to the car as tending to support the evidence of the defendant rather than that of Mrs. Krastins and Pajagic. The car is an old-style one with a wide running board and it seems to me highly unlikely that, had the plaintiff been hit by the front of the car, there could have been contact between him and the rear part of the car sufficiently violent to cause the dents that appear in the photograph. A further consideration, though one of little weight in the circumstances, is that there was no evidence of injury to the plaintiff's body such as might have been expected had he been hit by the front of the car while he was on his feet. Finally, the evidence of Mrs. Krastins and Pajagic about the part of the car that first came in contact with the plaintiff did not carry conviction, particularly when it appeared that in the first place they had both given statements to Constable Wark that the plaintiff was struck by the near-side

front headlight - a version which, had it been adhered to, would have made it even more difficult to reconcile their account with the damage that I find was done to the defendant's car and with their own account of what they saw the plaintiff do after he was hit.

For the reasons which I have given, I consider that the question whether the defendant was negligent has to be decided on the footing that the plaintiff bumped into the side of his car.

My conclusion that the plaintiff walked into the defendant's car leads me to infer that the plaintiff did not see the car before he struck it and leaves the case that the defendant was negligent to rest upon the fact that he did not see the plaintiff at all. On the view I have taken, it seems to me that the speed at which the defendant's car was travelling is a matter of small importance, but I should say that in all the circumstances I am not prepared to accept Pajagic's estimate that it was between 40 and 45 miles per hour. The car was an old one, it had been stationary about 200 yards back and it was travelling in a group of cars with one at least in front of it. The defendant's estimate of 30 miles per hour seems to me one that is probably closer to the mark.

My inference that the plaintiff did not see the defendant's car with its headlights burning and the fact that the defendant did not see the plaintiff crossing a well-lighted road seem to me to indicate that there was something to obscure one from the other and this likelihood makes me the more ready to accept the defendant's evidence that there was a car travelling in front of him at a slightly slower speed and slightly to his left. If this were so, then it is possible that the plaintiff passed behind that car so that the defendant would not have much opportunity to see him and the plaintiff would have

less opportunity of seeing the defendant's car than if there were no other car. I am not, of course, satisfied with this as a complete explanation why neither saw the other at all, but I think it is probably a part of the explanation, and I have then to determine whether the fact that the defendant did not see the plaintiff after the car in front had passed him should lead to the conclusion that the defendant was guilty of negligence causing or contributing to the collision. I am not prepared to find that he was. If, as I find was the case, the defendant was driving as one of a group of cars and a little to the right of the course of a car just in front of him, he would have no occasion to expect anyone to be crossing from his left to his right, and so in the instant that there would be in which the defendant could see the plaintiff, he might well have missed doing so without any negligence. Moreover, in such an instant it is not easy to see what the defendant could have done to have prevented the collision.

I have therefore reached the conclusion that the accident was caused by the negligence of the plaintiff himself and that his action must fail.

This decision is a hard one but I cannot in deciding, as I must, whether the defendant was at fault, allow my judgment to be swayed either by my sympathy for the plaintiff, his wife and children, or by my own conviction that it would be better if the law were to provide for some compensation in a case like this as a community responsibility and independently of the proof of fault on the part of another.