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IN THE HIGH COURT OF AUSTRALIA

MAZIA

V.

BRITISH INSULATED CALLENDERS CABLES (AUSTRALIA) PTY. LIMITED AND ANOTHER

REASONS FOR JUDGMENT

ORIGINAL

Judgment delivered at MELBOURNE

on THURSDAY, 6TH JUNE, 1963.

A. C. Brooks, Government Printer, Melbourne
C.7639/60

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ORDER

Appeal dismissed.

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JUDGMENT McTIERNAN J.

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In this case a pedestrian, the appellant, was injured by a motor-car which the respondent, Claxton, was driving. The appellant sued both respondents for damages. He alleged that Claxton caused the accident by negligent driving of the motor-car and that Claxton was then agent or servant of the respondent company. At the end of the appellant's case, Brereton J. held that there was no evidence of negligence against Claxton. A verdict by direction passed for the respondents. On appeal, Hardie and Macfarlan JJ. agreed with Brereton J. Herron C.J. (then Acting Chief Justice) disagreed with him. The plaintiff appeals to this Court.

The accident happened while the appellant was walking across Victoria Road, Gladesville. This is a six-lane highway and is sixty-six feet wide. The motor-car was travelling at the time the accident happened in the third lane from the south side of the road. It hit the appellant after he crossed in front of a motor truck which was travelling in the second lane. Both vehicles were travelling in the same direction. They came from the direction right of the appellant. The accident happened early at night. The locality in which it happened was well lighted: a street light was suspended over it from wires. The appellant began to walk across the road at its south-west corner with Tennyson Road. He had worked overtime that night. His place of employment was a factory in Tennyson Road. The purpose for which he was walking across Victoria Road was to wait for a bus on the north side of the road. The bus stop was opposite the corner of Tennyson Road:

it was in front of a waiting shed for passengers. At the time of the accident the appellant's age was 28 years and he was then a textile worker. He gave his evidence through an interpreter. The only witness he had was a constable of police who arrived on the scene after the accident. The appellant had then been taken to the hospital. The constable said in evidence that the respondent, Claxton, was the driver of the motor-car which collided with the appellant and that its "off-side" headlight was damaged and also the front bumper bar. Pieces of the glass were approximately at the centre of the road. The appellant gave evidence of the circumstances in which he came to be knocked down by the motor-car. His evidence was as follows:

"Q. What did you do when you got to the corner of Tennyson Road and Victoria Road? A. I stopped, looked around, then a motorist came by, and from a distance a truck was visible. The motorist motioned me to cross the road. The truck was - (Objected to) the truck was still, far away.

Q. Did you then proceed to cross the road? A. Yes.

Q. At that time how far was the motorist away from you? A. It was stationary at the corner.

Q. Was it a motor-car that the motorist was driving? A. It was a motor-bike.

Q. Where was that motor-bike in relation to the two roads; was it in one road or the other road? -

HIS HONOUR Q. Which road was it in? A. In Tennyson Road.

Q. Which road did you begin to cross? A. Victoria Road.

MR. TUBMAN, Q. Whereabouts did you cross it; on the corner or some distance from the corner? A. At the corner.

Q. At the time when you commenced to cross it how far was the truck away? A. About 40 or 50 yards.

HIS HONOUR. Q. Which road was the truck in? A. It was coming from Gladesville on Victoria Road.

MR. TUBMAN, Q. Was that from the direction of the city? A. Yes.

Q. What happened then? A. I started to walk towards the bus stop on the other side of the road. I crossed the road right in front of the truck.

The truck passed behind me, and about when I was in the middle of the road then I saw a light on my side.

HIS HONOUR, Q. Which side? A. On my right side; and I was hit by a car.

MR. TUBMAN, Q. When you saw the truck can you tell us how fast it was going? (Objected to; pressed; allowed). Can you say how fast the truck was going? A. About 20 to 25 miles.

Q. That is, 25 miles per hour? A. That is right; 25 miles per hour.

Q. Did the truck have lights on? A. Yes.

Q. When you looked in the direction from which the truck was coming did you see any other traffic? A. Nothing at all.

Q. When you were hit what was the position of the truck? A. It was just about past me.

Q. Do you remember anything that happened after you were hit? A. Only after I woke up from my dizziness.

Q. Where were you then? A. I was lying on the road.

Q. Where were you lying? A. In the middle of the road.

Q. Can you tell us what part of the vehicle hit you? - (Objected to).

HIS HONOUR: Make the question clearer.

MR. TUBMAN, Q. Did you see what part of the vehicle hit you? A. No.

Q. Were you taken from the scene to a hospital? A. Yes.

Q. Did you speak to anyone at the scene before you left there? A. No, I did not speak".

There was this cross-examination of the plaintiff:

"Q. As you came up to the corner did you see the bus coming in the distance on your left? A. No, I did not see him.

Q. You had to cross the road to get to the bus stop? A. Yes.

Q. At that time there was a constant stream of traffic going from the direction of Gladesville towards the right? A. There was no traffic at that time because it was seven o'clock.

Q. Did not the man on the motor cycle pull up to let other cars pass? A. Yes. The motorist stopped at the corner, looked around, and motioned me to cross the road.

Q. I did not ask you that. There were vehicles in the first line of traffic nearest to the kerb - a number of them? A. One truck was coming from the direction of Gladesville.

Q. There were other trucks in front of it and behind it? A. I saw only one.

Q. You would agree that there were others there, whether you saw them or not? A. I don't know. I saw only one.

Q. You were in a hurry to get over to catch your bus? A. I was not in a hurry.

Q. I suggest to you that you went out on the road to cross, and then came back? A. I did not come back.

Q. And that you started again and ran across in front of the vehicle you described as the truck? A. I did not run, and I did not come back.

Q. You hurried though, did not you? A. I did not hurry.

Q. This truck was pretty close to you, was it not? A. I could cross in front of it very comfortably.

Q. Did not you say this morning: 'The position of the truck when I commenced to cross - it was just about past me'?

HIS HONOUR: No. When he was hit. 'I started to cross Victoria Road at the corner. The truck was then 40 to 50 yards away, coming from Gladesville in Victoria Road. I crossed in front of the truck. The truck passed behind me'. Then he was asked where the truck was when he was hit, and he said: 'It was just about past me'".

These further questions and answers concluded the plaintiff's evidence:

"MR. McGREGOR, Q. The truck which you described as coming on the inside was just about past you when you were struck; is that the position? A. It already had passed me.

Q. But only just? A. It passed me already.

Q. You said yesterday in evidence, did you not, in answer to this question: 'When you were hit what was the position of the truck' and you answered 'It was just about past me'.

HIS HONOUR, Q. Do you remember saying that? A. I remember, but it was not expressed in metres or yards.

MR. McGREGOR, Q. But you meant to imply that the truck was only just past you when you were struck, didn't you? A. Yes.

Q. The position was that you crossed right in front of that truck, didn't you? A. Yes, in front of it.

Q. You said yesterday: 'I saw a light on my side.

> When I was in the middle of the road I saw a light on my side'. Do you remember saying that? A. Yes
>
> Q. Then you went on to say: 'On my right side, and I was hit by a car'? A. Yes.
>
> Q. And the light that you saw was the light of that car? A. Yes.

It is obvious that the appellant was in a position of danger unless Claxton was attentive to the possibility that a pedestrian might be crossing in front of the motor truck and slowed down to see if such was the case. The jury could find that Claxton ought to have been attentive to the possibility. The accident occurred at a place where a sensible driver would not drive regardless of the rights of pedestrians. The appellant's evidence proves positively that the appellant conducted himself prudently. He said in his evidence that he could cross in front of the motor truck very comfortably. In view of that evidence the jury could find that the evidence of the appellant did not mean that he barely escaped from being hit by the motor truck, rather it seemed to the appellant that the collision of the motor-car with him was about coincident with the truck going behind him. The attempt in cross-examination to get admissions from the appellant that he hurried or doubled back failed. If these questions derived from Claxton, the argument that the jury could infer from the evidence that Claxton was prevented by the motor truck from seeing the appellant leaving the footpath to cross the road appears artificial. The jury would need to have evidence contradictory of the appellant's evidence before it could be predicated that they would think that the appellant ran in front of the motor truck or by some other folly became the author of his injuries.

The position of the broken glass on the road - "approximately centre", as the constable said - and the plaintiff's evidence that when he woke up from his dizziness after being hit he was lying in the middle of the

road would enable the jury to infer that after crossing in front of the motor truck, the appellant walked at least the width of the third lane, eleven feet, before the motor-car collided with him. On his evidence he was not hurrying. Walking with due expedition, say at three miles per hour, it would take, perhaps, two and one-half seconds to go eleven feet. The motor truck having run on and the appellant having come into the beam of the motor-car - he said he saw its light to his right - it would have been reasonable for Claxton to attempt to deviate to his left, or to have instantly applied his brakes. As he did not give evidence it is not known whether he did either of these things. In the absence of evidence to the contrary it can be presumed that he just drove on. If the motor-car was travelling at a speed exceeding twenty-five miles an hour (the speed which the appellant attributed to the motor truck) the jury could reasonably think it was carelessness to drive so fast without being able to see whether a pedestrian was walking in front of it in the course of crossing the road. If the motor-car was not exceeding twenty-five miles an hour it would probably have travelled some thirty or more yards between the time the appellant emerged and reached the middle of the road. As I apprehend the reasons of Hardie and Macfarlan JJ. in their view "the crucial fact" was that the appellant crossed in front of the motor truck and it was not important whether Claxton was prevented from seeing the appellant any time before the collision because Claxton could not avoid hitting him. It was argued before us that Claxton could not be blamed because the more probable inference was that he never saw the appellant. What is relied upon is the appellant's evidence that he did not see the motor-car when he looked towards his right before crossing the road and saw only the motor truck. It is argued that it must be presumed that Claxton would not therefore

be able to see the appellant leaving the footpath or at any time subsequently. But how is this to be presumed without evidence from Claxton that he did not see the appellant. It would be a conjecture to say so. But even if the relative positions of the motor-car and the motor truck when the appellant left the footpath were such that Claxton was prevented from seeing the appellant, there is nothing in the evidence to raise an inference that this state of affairs continued until the appellant had crossed in front of the motor truck. To say that it was blocking Claxton's view of the appellant all the time is a mere conjecture. Claxton himself could have proved that his view was obstructed, if that were the fact. I agree with Herron C.J. that a jury might reasonably find against Claxton that he failed to keep a proper look out at a place where it was his duty to do so and did not drive with reasonable care and attention. In my opinion the appeal should be allowed and a new trial granted.

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JUDGMENT KITTO J.

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In my opinion the appeal should be dismissed. I agree in the judgments to be delivered by Menzies J. and Owen J.

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JUDGMENT TAYLOR J.

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I have had the opportunity of considering the reasons prepared by Owen J. in this matter and I agree that for the reasons given by him the appeal should be dismissed.

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JUDGMENT

MENZIES J.

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At the trial of an action by an injured pedestrian against the owner and driver of a Holden utility which struck him for damages for negligence in the driving of the utility, the learned presiding judge at the end of the plaintiff's case directed a verdict for the defendants on the ground that there was no evidence of negligence on the part of the driver of the utility. The Full Court (Hardie and Macfarlan JJ.; Herron C.J. dissenting) dismissed an appeal and it is from that order that an appeal has been brought to this Court.

The evidence showed that the appellant set out to cross Victoria Road, Gladesville, from south to north towards a bus stop and shelter on the far side on 8th September 1958 at about seven o'clock at night after looking to his right and seeing a truck with its lights on about forty or fifty yards distant travelling west but not seeing any other traffic travelling in that direction. He crossed in front of the truck and then became aware of lights to his right. These were the lights of the defendant's car which was travelling west and which hit the plaintiff as the truck was just about past him and when he was about the middle of the road, which was a six lane highway sixty-six feet wide. I agree with the trial judge and the majority of the Full Court that no inference that the utility was driven negligently could be made from this evidence. It is probable that the plaintiff did not see the utility which struck him until the collision was imminent because the truck was between him and that utility

and it could not, therefore, be inferred as a matter of probability that the driver of the utility either saw or should have seen the plaintiff before he crossed in front of the truck and when for the first time he himself became aware of other lights to his right. Furthermore, it could not be inferred that the driver of the utility was negligent in not avoiding the collision in the moment that there was between when the plaintiff emerged from the path of the truck and when he was struck, that is, in the time it took for a truck travelling at about twenty-five miles an hour to pass the plaintiff.

The learned Chief Justice reached his conclusion that it was open to the jury to infer that there had been some want of care somewhere on the part of the defendant by the following course of reasoning which I state substantially in his Honour's own words. The plaintiff was lawfully upon the road; he was crossing a busy road at a point where the lighting was good and any motorist might reasonably anticipate that pedestrians would cross; the position of the plaintiff before he left the kerb on the southern side of Victoria Road was one that ought to have been observed by the defendant; if the defendant was following the same course as the motor-truck which the plaintiff saw, he ought to have seen the plaintiff at some point in his going across the road and have taken steps to avoid striking him; if the defendant had no opportunity of seeing the plaintiff because he was blanketed, as it were, behind the motor-truck, that should have been given in evidence; if the defendant did not see the plaintiff, he ought to have done so because the plaintiff was in clear sight when the defendant was fifty yards away. Finally his Honour said:- " . . . there is no explanation in this case as to why the defendant ran into the plaintiff in the middle of the road. The plaintiff, by crossing from the south to the middle

of the road, had reached a point of refuge where he was entitled to believe he was safe from western-bound traffic, and in my opinion this circumstance required an explanation from the defendant as to how he came to run him down in that place. In the absence of such explanation, in my view it was open to the jury to infer that there has been some want of care somewhere on the part of the defendant".

With great respect to the Chief Justice, I do not think that there was any evidence either that the plaintiff was in view of the driver of the utility at any time before he passed in front of the truck - let alone his being in clear sight when the utility was fifty yards away - or that the plaintiff ever reached what could accurately be described as "a point of refuge". The fact that the defendant did not give some explanation in evidence was wholly immaterial in deciding the question whether there was any case for the defendant to answer.

I consider that this appeal should be dismissed.

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JUDGMENT OWEN J.

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The appellant was injured on 8th September 1958 when he was struck by the offside front headlamp of a utility truck owned by the respondent company and driven by one of its employees, the second-named respondent. He brought an action for damages alleging that the accident had been caused by the negligence of the driver and at the close of his evidence the learned trial judge directed the jury to return a verdict for the respondents on the ground that no evidence of negligence had been given.

An appeal to the Full Court of the Supreme Court of New South Wales was dismissed by a majority (Hardie and MacFarlan JJ., Herron A.C.J. dissenting), and from that order of dismissal the appellant has appealed to this Court.

The accident happened at about 7 p.m. in Victoria Road, Gladesville. It is a main highway, about 66 feet in width, and runs approximately east and west. The plaintiff said that he had walked up a street called Tennyson Road to its intersection with the southern side of Victoria Road, intending to cross Victoria Road to a bus stop at which stood a shelter shed. The area was apparently well lighted by an overhead lamp hanging above the centre of Victoria Road. He said that before leaving the footpath to make his crossing he looked to his right and saw the headlights of an approaching truck about 40 or 50 yards away and travelling at 20 to 25 miles per hour. There was no evidence to show how far out from the curb it was being driven. He saw no other traffic coming on his right. He began to walk across Victoria Road

and passed in front of the oncoming truck and it "was only just past" him when he saw a light on his right-hand side and was hit by a car. He was then, he said, about the centre of the road. A police officer who arrived at the scene soon afterwards, after the plaintiff had been taken to hospital and the respondent company's truck had been moved to the side of the road, said that the glass of its offside headlamp was broken and the offside front mudguard was damaged. Broken glass from the headlamp was lying about the centre of the road.

There was no evidence to show where the driver of the respondent company's truck was when the appellant left the footpath or when he emerged from in front of the truck which passed behind him, nor was there any evidence that the driver saw or could have seen the appellant when he left the footpath, and it is beyond question that the appellant's view of the truck which collided with him and its driver's view of the appellant must have been obscured for some period of time by the truck immediately in front of which the appellant passed. All that is known is that immediately or almost immediately after he had passed in front of it the collision occurred.

In these circumstances negligence on the part of the driver of the respondent company's truck could not reasonably be inferred and the learned trial judge rightly directed the jury to return a verdict for the defendant.

It should perhaps be added that, in the course of the argument for the appellant, his counsel referred on a number of occasions to the fact that no evidence was called by the defendant. But in a case in which no evidence of negligence is led for the plaintiff, the fact that the defendant calls no evidence cannot supply the deficiency in the plaintiff's case.

The appeal should be dismissed with costs.