IN THE HIGH COURT OF AUSTRALIA

MAKEHAM

V.

EVANS AND ANOTHER

REASONS FOR JUDGMENT

ORIGINAL

Judgment delivered at Sydney

on Tuesday, 4th February, 1964.

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

MAKEHAM

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ORDER

Appeal dismissed with costs.

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JUDGMENT TAYLOR J.

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I have had the opportunity of considering the reasons prepared by my brother Menzies and I agree with him that the appeal should be dismissed. I have, however, entertained some doubt whether we should interfere with the finding made by the learned judge of the first instance that the rear lights on Makeham's truck were not alight at the time of the collision. Nevertheless on the whole I have come to the conclusion that the finding was so much based on matters of credibility that it would not be proper for an appeal court to reverse that finding. Subject to these observations I agree with the reasons and conclusions of Menzies J.

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JUDGMENT MENZIES J.

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A collision occurred in Ebden Street, Canberra, after dark on 23rd August 1960 when a motor-car driven by one Baulk in a northerly direction ran into the back of a truck which one Makeham had parked on the western side of the roadway. The plaintiff Evans, who was a passenger in Baulk's car, was seriously injured and sued both Baulk and Makeham for damages for negligence. Where the collision occurred the roadway of Ebden Street was 27 feet wide. It was not well lit. The truck, which was about 8 feet wide, was parked about one foot from the kerb, in gear, with its brakes on and facing in the same direction as Baulk was driving.

There was no doubt about the negligence of Baulk. He must have been driving very fast for, after braking his car so severely as to leave a skid mark 27 feet long, the impact moved the heavy truck about 21 feet. Not only was Baulk travelling very fast but he was not keeping a proper look-out for, although his lights were on, his evidence was that he did not see the parked truck until he was within 30 feet of it.

The negligence alleged against the defendant Makeham was that he had left the truck parked without lights burning at the rear. His Honour the trial judge, having disbelieved the evidence of Makeham and a witness Penders that there were rear lights burning before the collision, found that the negligence alleged against Makeham was proved. His Honour said, speaking of Makeham: "While he did not see it in time to avoid it, he did, however, get a view of it before the collision and he saw its lights were not on. I accept his evidence as to this. I am not prepared to accept the evidence

of the defendant Makeham or his witness Penders as to the lights on Makeham's vehicle being lit after Makeham had left the vehicle and it was standing unattended in Ebden Street. Having seen and heard Makeham and his witness, I am not prepared to believe them". It will be noticed that his Honour did not mention the evidence of a witness Krikowa who said there were rear lights burning immediately after the collision but it is quite clear that his evidence was not accepted or it was his Honour's view that the lights had been turned on after the collision.

Judgment was entered for the plaintiff for £17,141 and his Honour, having come to the conclusion that the defendants were equally responsible for that damage, ordered that the defendants should contribute equally.

The defendant Makeham has appealed to this Court on the grounds that he was wrongly found to have been negligent; that, alternatively, he was wrongly found to have been equally negligent with Baulk; and, finally, that the damages awarded were excessive.

I am not prepared to interfere with the learned trial judge's finding that Makeham was negligent because the rear lights of his truck were not burning when it was left parked in Ebden Street. It seems to me that the evidence that there were no such lights burning was slender but there was evidence from which an inference could be drawn and his Honour's rejection of the evidence of Makeham and his witnesses is, as I have read their evidence, not altogether surprising. At any rate, his rejection of their evidence was a decision upon the credibility of witnesses seen and heard by the trial judge and no ground has been shown upon which an appellate court could give credence to evidence which his Honour disbelieved.

The case is, therefore, one of a large truck parked upon a roadway from which trees obscured the street

lighting, without rear lights burning but equipped with three red-glassed rear lights - the tail light and two clearance lights - and two reflectors, being run into by a driver who was driving his car at high speed and without keeping a proper look-out. On his Honour's findings, both defendants were seriously negligent. An appeal court should, of course, alter a trial judge's apportionment of responsibility if it can be seen that some irrelevant circumstance has been taken into account or some relevant circumstance has been overlooked or disregarded or where it must be assumed that something of this sort occurred because the apportionment is clearly erroneous : see Pennington v. Norris (1956) 96 C.L.R. 10, but, as was pointed out there, it is only in rare cases that an apportionment can be successfully challenged since "much latitude must be allowed to the original tribunal in so arriving at a judgment as to what is just and equitable". This, in my opinion, is not one of those rare cases.

The award of damages was unusually high, but the plaintiff's injuries were severe, including some damage to his brain producing a lack of co-ordinated movement on the left side. At the age of 28 the plaintiff was changed from a healthy, active man with a trade and many pleasant recreations, with good prospects of a full life, into a permanent semi-invalid odd-job man whose activities will be very much curtailed and whose capacity and opportunity to enjoy life have been substantially diminished. He has, of course, had a long history of pain and suffering in recovering as far as he has. In these circumstances, where special damages exceeded £3,000, I do not think the award was so high that we should say that it was a totally erroneous estimate of the plaintiff's damages.

I would therefore dismiss the appeal.

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JUDGMENT OWEN J.

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I have felt much doubt about the correctness of the learned trial judge's finding that the lights (including the tail lights) of the defendant Makeham's truck were not alight at the time of the accident. Makeham and a witness named Penders both said that the lights were on immediately before the collision and it is plain that when the police arrived on the scene, a few minutes after the collision occurred, the headlights were on, as was one of two of the tail lights, the other having been hit and broken by the car driven by Baulk.

There was, however, some evidence from which it could be inferred that the lights were not on at the critical time and the issue of fact thus arising was one which the learned trial judge - who saw and heard the witnesses - was in a better position to determine than an appellate court. In these circumstances I think the finding should not be disturbed.

As to the other matters argued I do not wish to add anything to what has been said by Menzies J. and I agree that the appeal should be dismissed.