IN THE HIGH COURT OF AUSTRALIA

PARKINS

V.

McDONALD

REASONS FOR JUDGMENT

Oral

Judgment delivered at Sydney

on Monday 25th August 1969

PARKINS

v.

McDONALD

ORDER

Application for leave to appeal refused. No order as to costs except that the Solicitors for the applicant pay to the respondent the whole of the costs incurred by the respondent on Friday, 15th August, 1969 and also pay the whole of the applicant's costs of that day.

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JUDGMENT

(ORAL)

BARWICK, C.J.

PARKINS

v.

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The applicant for leave obtained a verdict in an action at law, tried in the Supreme Court of New South Wales by a Judge sitting without a jury. The cause of action was negligence in the management of a motor car on a public road, the appellant being a passenger in the car not being the car of the respondent.

The trial Judge found that negligence in the circumstance that the respondent had driven his car on a dusty road past the car in which the applicant was riding as the two cars at a high speed approached a bend in the road of the proximity of which the respondent was aware.

In the Judge's view this action of the respondent, as might have been foreseen, so raised the dust that the driver of the car in which the applicant was travelling became unable to see, with the consequence that his car ran off the road at the bend.

The Supreme Court, Court of Appeal division, set this verdict aside, as well as I can understand from its judgment, on the ground that there was no sufficient evidence to support the version of the incident which the trial Judge had found in fact and on which he had acted. The actual expression used by the Court is that the conclusion of fact was not justified by the evidence; but a verdict was not entered for the respondent. Although the notice of appeal asked only for a new trial we are told by the respondent's counsel that at the hearing of the appeal he asked for a

verdict to be entered. Of course, the notice of appeal, even if it controlled the situation, was amendable. However, a new trial was granted. I have not found any reason which convinces me of the propriety of this course taken by the Court of Appeal, a course which, in the result, has, I think, possibly carried some disadvantage to the applicant.

The applicant based her application for leave firstly on a submission that the Court of Appeal made a fundamental error of approach in the appeal in that it ought not to have disturbed the trial Judge's findings of fact if there were any evidence to support them; but to this there are two answers: first, the approach on appeal to the verdict of a Judge is not the same as that to the verdict of a jury. The Court on appeal is not precluded from overturning the verdict of a Judge simply because there is evidence to support it.

I have elsewhere expressed myself as to the proper attitude to be adopted on appeal to the findings of fact of a trial Judge that was in Whiteley Muir and Zwanenberg v. Kenn and Another (1966) 39 A.L.J.R. 506. There I endeavoured to emphasise the restraint which a Court of Appeal must needs exercise when considering whether a case exists for reversing such findings of fact. The Court of Appeal must be satisfied that the trial Judge was wrong in his conclusion of fact.

The second answer to the plaintiff's submission is particular to this case in that the Court of Appeal did not say that the trial Judge was wrong on the basis of the facts as he found them, but that there was no sufficient evidence to support that view of the facts.

The applicant then says that this decision of the Court of Appeal was demonstrably erroneous and that plainly there was evidence to support the trial Judge's findings of

fact. This aspect of the matter has given me considerable concern, for there is great weight in the submission of the applicant. However, I have come to the conclusion, perhaps with some reluctance, that granted that there is sound reason to doubt both the Court of Appeal's view and its treatment of the evidence and the propriety of the course it has taken in ordering a new trial, the case is not one in which leave to appeal should be granted.

If there is error, it is particular to this case and basically it is error of fact. There is no principle of law or of practice for which the decision the decision of the Court of Appeal can be regarded as a precedent. Accordingly, consistently with the respective roles of this Court and of the Supreme Court in matters of fact particular to the parties themselves, a case for leave is not made out.

In my opinion the application should be refused.

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JUDGMENT McTIERNAN J.

I agree.

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JUDGMENT
(ORAL)

KITTO J.

I agree. I am not to be taken as endorsing the judgment of the Court of Appeal, nor yet the judgment of the trial Judge, but after a good deal of consideration I have come to the conclusion that we should not grant leave to appeal against the order for a new trial.

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JUDGMENT
(ORAL)

MENZIES J.

PARKINS

v.

McDONALD

I agree.

PARKINS

v.

McDONALD

JUDGMENT
(ORAL)

WINDEYER J.

I have reached a different conclusion. I concur entirely in what the Chief Justice has said as to the general principles to be applied in a case of this sort, but for myself, I would have granted leave to appeal in this case.