

AUSTRALIA / JUDGMENT

Hyde, S.R. v Jones, D.A. [1987] FCA 610

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IN THE FEDERAL COURT OF AUSTRALIA

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JUDGMENT No. (104, Sa
IN THE FEDERAL COURT OF AUSTRALIA
AUSTRALIAN CAPITAL TERRITORY
No. ACT G85 of 1986
DISTRICT REGISTRY
GENERAL DIVISION
ON APPEAL FROM THE SUPREME COURT OF
THE AUSTRALIAN CAPITAL TERRITORY
BETWEEN: STEPHEN ROBERT HYDE

Appellant

AND: DERRICK ALAN JONES

Respondent

ORDER

Gallop, Sheppard and Neaves JJ.

Judges Making Order

Date of Order 5 November 1987.

Where Made

Canberra.

THE COURT ORDERS
THAT:

(1) The appeal be allowed, the judgment appealed from set aside and the proceedings remitted to the Supreme Court of the Australian Capital Territory for further hearing.

(2) The plaintiff pay the defendant's costs of the appeal and that the costs of the first trial abide the result of the further hearing.

Note: Settlement and entry of orders is dealt with 2D Order 36 of the Federal Court Rules.

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CORAM: Gallop, Sheppard and Neaves JJ.
DATE: 5 November 1987.

REASONS FOR JUDGMENT

THE COURT

This is an appeal by an unsuccessful defendant against an award of damages made by the Supreme Court of the Australian Capital Territory in respect of a claim for damages for personal injuries arising out of a motor vehicle accident on 7 July 1982. The action was heard on 1 December 1986 and judgment delivered the next day. The cause of

action was in negligence and arose out of a collision in

Gladstone Street, Fyshwick.

Particulars of negligence alleged by the plaintiff

were set out in the statement of claim and those of particular importance in the opinion of the trial judge

were:

(a) (b)

(d)

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failing to keep any sufficient look out;

failing to make a lefthand turn with safety; failing to indicate his intention to make a lefthand turn; and

failing to comply with the provisions of the Motor Traffic Ordinance 1936.

The relevant provisions of the Ordinance were

s.136(2) and (7). They prescribe offences for the driver of

a motor vehicle to reduce speed suddenly whether for the Purpose of stopping or otherwise unless he has given the appropriate signal, and for the driver of a motor vehicle to cause the vehicle to turn to or move towards his left unless he has given the appropriate signal.

On the hearing of the action the defendant denied negligence and alleged contributory negligence on the part of the plaintiff, particulars whereof were:

(a) (b)

(c)

(d)

failing to keep any or any proper lookout; failing to maintain proper control of his motor vehicle; driving at a speed which was excessive in the circumstances;

failing to slow down behind the defendant's motor vehicle when it was clear that the defendant's motor vehicle was slowing down and indicating it was about to make a lefthand turn;

failing to stop, to slow down, to swerve, to brake or in any other way so to manage or control the said motor vehicle so as to avoid the said

collision; and

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(f) failing to pay sufficient attention to his driving and perceive that the plaintiff was indicating his intention to make a lefthand turn.

Careful scrutiny of the trial judge's reasons for judgment does not clearly reveal his findings of fact in relation to the circumstances of the subject accident. However, certain basic facts do emerge from those reasons. They are that Gladstone Street is the equivalent of four lanes wide in the relevant section, although not divided by any markings. Both the plaintiff and the defendant were travelling in an easterly direction. The distance travelled by the plaintiff behind the defendant's red Falcon sedan prior to the point of impact was variously estimated but the greatest estimate was 300 metres. The plaintiff had come into the roadway from the driveway of J.B. Youngs Limited on the southern side of Gladstone Street. As the defendant approached Dick Smith's Electrical Store on the southern side of Gladstone Street the defendant veered a couple of feet to the right, travelling at about 15 kilometres per hour, and then turned to the left to enter a parking area on the northern side of the street. In doing so he approached the parking area at an angle of the order of 30 degrees.

The plaintiff, seeing the defendant "turn right", moved to his left but when the defendant crossed his path, as he did when he turned left, the plaintiff was unable to avoid colliding with the rear of the defendant's motor vehicle at a point just to the right of the towbar.

There was a substantial issue between the parties

about the defendant's position on the roadway prior to

veering slightly to the right and then turning left in towards the parking area. In dealing with that evidence the trial judge traversed the defendant's evidence that he was travelling on the lefthand side of the road close to the gutter. His Honour went on to say, however, that in

answer to an interrogatory numbered 1(d)(1), the defendant had indicated by a sketch that his vehicle was in fact very close to the centre of the road before turning to the right.

As counsel for the defendant pointed out on the hearing of the appeal to this court, his Honour did not deal with the defendant's evidence denying that he was travelling in the lane closest to the imaginary centre line and his explanation about his answer by way of sketch in the interrogatory to the effect that the sketch was not 1n scale and did not accurately depict his position on the roadway at the relevant time. The trial judge made no finding of fact about the position of the defendant's vehicle on the roadway either when he veered to the right or when he commenced to make his left turn. In our view it was critical to the proper determination of liability in the action that a finding of fact be made on this issue.

Even more fundamental to the determination of the question of liability was a finding as to whether the defendant gave the appropriate lefthand indicator signal before turning in towards the car park.

It was submitted on behalf of the appellant that whilst the learned trial judge accepted the evidence of the

plaintiff that he saw no braking lights on the defendant's

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vehicle, nor any hand signal and found as a fact that the defendant did not apply his brakes at or immediately before the point where he turned right, he made no finding whatsoever that he had his left indicator on when he turned left.

In answer to that submission it was submitted on behalf of the respondent that the trial judge had made a finding that the defendant did not give the appropriate lefthand indicator signal before turning in towards the car park. Counsel for the respondent relied upon the following Passages in the trial judge's reasons for judgment:

"The defendant insisted in evidence that at all times when he turned left he had his left indicator on. He did not indicate that he was turning right having regard to the relatively slight distance he proposed to turn. It is common ground that he did turn slightly to the right before veering left to the northerly parking area and this satisfies me that the plaintiff was in fact keeping a proper lookout."

And later where his Honour said:

"As I have already said, I accept that the plaintiff was keeping a proper lookout and it would have been impossible in the circumstances for him to have failed to see, at the distance he was travelling behind the defendant, a lefthand indicator."

If those passages in the trial judge's reasons amount to a finding of fact that the defendant did not have his left indicator on when he turned left, we think it is a very obscure finding. Although the trial judge found that the plaintiff did observe the defendant turn slightly to his right before veering left, we have difficulty with the proposition that it necessarily follows from that finding that the plaintiff was keeping a proper lookout. We fail to

see why any more can be taken from his Honour's acceptance of

this observation of the plaintiff than that it established

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that the plaintiff saw the defendant's vehicle veer to the right. The matter is important because it is on the basis of his Honour's conclusion in this respect that he drew the subsequent conclusion that it would have been impossible for the plaintiff to have failed to see, at the distance he was travelling behind the defendant, a lefthand indicator.

Furthermore, although his Honour referred to the fact that the defendant insisted in evidence that when he turned left he had his left indicator on, he made no specific finding in relation to that evidence. The passages relied upon by the plaintiff may obliquely amount to a finding of fact that the defendant did not have his left indicator on when he turned left. But we are of the opinion that the resolution of that issue was not satisfactory in the circumstances of the trial.

It seems obvious to us that if the defendant failed to indicate his intention to turn to the left as was alleged against him in the statement of claim, such failure would constitute negligence on the part of the defendant and would sufficiently explain how the accident happened. If, on the other hand, he did indicate his intention to turn to the left by using his left indicator and the plaintiff failed to observe it, such a failure on the part of the Plaintiff would at least constitute contributory negligence as alleged against the plaintiff by way of defence.

We have carefully considered what course this Court should take in the circumstances. Section 27 of the

Federal Court of Australia Act 1976 provides that in an

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appeal this Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence. In the exercise of its appellate jurisdiction, the Court may, inter alia, set aside the judgment appealed from in whole or in part and remit the proceeding to the court from which the appeal was brought for further hearing and determination (s.28(1)(c)).

For these reasons the appeal is allowed, the judgment appealed from set aside and the proceedings remitted to the Supreme Court of the Australian Capital Territory for further hearing.

We order that the plaintiff pay the defendant's costs of the appeal and that the costs of the first trial

abide the result of the further hearing.

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Prepared on 27 October 2026 · Esheria