IN THE SUPREME COURT OF QUEENSLAND Appeal No. 43 of 1979

FULL COURT

BEFORE:

The Chief Justice

Mr. Justice Matthews

Mr. Justice Andrews

BRISBANE, 10 DECEMBER 1979

BETWEEN:

DENNIS JOHN HINCKSMAN (Plaintiff) Appellant

- and -

FREDERICK ALEXANDER HUSBAND (Defendant)

- and -

FIRE AND ALL RISKS INSURANCE COMPANY LIMITED (Defendant by election) Respondent

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JUDGMENT

THE CHIEF JUSTICE: In my opinion the appeal should be dismissed, and I agree with the reasons prepared by my brother Matthews, and the cross-appeal should also be dismissed, both with costs.

MR. JUSTICE MATTHEWS: I publish my reasons.

THE CHIEF JUSTICE: I am authorised by my brother Andrews to say that he agrees with the reasons and the orders proposed by my brother Matthews. The order of the Court is that the appeal and the cross-appeal are dismissed with costs.

In relation to the appeal the $200 in Court will be paid out to the solicitors for the respondent. In relation to the cross-appeal the $200 security will be paid out to the solicitors for the appellant.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 43 of 1979

BETWEEN:

DENNIS JOHN HINCKSMAN (Plaintiff) Appellant

AND:

FREDERICK ALEXANDER HUSBAND (Defendant)

AND:

FIRE AND ALL RISKS INSURANCE COMPANY LIMITED (Defendant By Election) Respondent

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Wanstall C.J.

Matthews J.

Andrews J.

Judgment delivered by Matthews J. on the 10th December, 1979 with The Chief Justice and Andrews J. concurring with those reasons.

"THE APPEAL IS DISMISSED AND THE CROSS-APPEAL IS ALSO DISMISSED. BOTH WITH COSTS."

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 43 of 1979

BETWEEN:

DENNIS JOHN HINCKSMAN (Plaintiff) Appellant

- and -

FREDERICK ALEXANDER HUSBAND (Defendant)

- and -

FIRE AND ALL RISKS INSURANCE COMPANY LIMITED (Defendant by election) Respondent

JUDGMENT - MATTHEWS J.

The respondent is the third party insurer of the defendant who, in a running down action brought by the appellant, was found by the trial judge not to have been guilty of negligence in respect of a collision between a motor vehicle driven by him and a motor cycle being ridden by the appellant. His Honour dismissed the action but assessed the appellant's general damages in the sum of $60,000. A cross-appeal on the basis that this sum was too great was shortly urged before us and may be shortly disposed of by the statement that the amount of general damages assessed was not so disproportionate to the plaintiff's loss as to justify the interference of an appellate court.

The appeal on liability was more stoutly argued before us but, in the event, is deserving in my opinion of the same fate as the cross-appeal although, perhaps, with more explanation. The defendant was admittedly, at the time of the relevant collision, under the influence of alcohol and subsequently in that behalf pleaded guilty to a charge under the Traffic Acts 1949 to 1974. A blood alcohol test had given the not insignificant reading of .2 percent. However in circumstances in which the appellant riding his motor cycle intended to and did turn into and across the path of the defendant's oncoming motor vehicle, His Honour the trial judge accepted the evidence of the defendant as to the important and relevant details of the resulting collision. His Honour said in the course of his reasons in speaking of the defendant:—

> "He said that he recalled the events leading up to the accident, and I must say he did seem to me, notwithstanding the fact that he had taken liquor, to have a far clearer recollection than the plaintiff. He expressed the opinion that at the time the accident occurred his ability to control the car was not impaired. I don't share that opinion, but having regard to the facts which I shall find, I don't regard that circumstance as relevant."

Thereafter His Honour in a precise way dealt with the evidence of the defendant to explain his conclusion that the defendant had not been negligent. There was evidence of a subsequent conversation between the defendant and the appellant (in which the defendant's wife played a small but perhaps prominent part) which was quite properly used by His Honour to support the view he took in respect of the evidence of the defendant as to the way the collision occurred.

For the appellant and apart from submissions based, naturally enough, on the defendant's lack of sobriety at the relevant time, counsel referred us to a statement which, according to an investigating police officer, was made to him by the defendant shortly after the collision. The police officer said that the defendant had said to him

that he had been travelling north along the Cook Highway at 30 to 35 miles per hour when the accident occurred. His Honour explained and again, it seems to me, in terms and for reasons quite open to him, why he did not accept the statement literally. The defendant indeed gave evidence that at a time prior to the collision he had been travelling at 30 to 35 miles per hour but this was up to the stage when he saw approaching motor cycles, one of which was being ridden by the appellant. In the circumstances, in my opinion, there is no basis for interference with His Honour's findings on credibility and on facts and that on the facts, as found, His Honour correctly concluded that the defendant had not been negligent. For these reasons I think that the appeal should be dismissed.