

FULL COURT

BEFORE:

Mr. Justice Lucas, S.P.J.

Mr. Justice Douglas

Mr. Justice Sheahan

BRISBANE, 14 MARCH 1980

BETWEEN:

BRIAN JOHN WIFFEN

(Plaintiff) Appellant

-and-

MIRO VASILJ

Respondent (Defendant)

JUDGMENT

MR. JUSTICE LUCAS: This is an appeal from a decision of Mr. Justice Dunn in an accident case which arose out of an accident which happened on 13 May 1975 very early in the morning. The plaintiff was riding his motor cycle in an easterly direction along Vulture Street and the defendant was driving his car in a westerly direction along that street. The learned judge found that the headlights of both vehicles were on. The vehicles were in the vicinity of the junction between Vulture Street and Merivale Street. The defendant was intending to turn into Merivale Street, which involved a turn of about 45 degrees to his right.

I need only refer to the learned judge's findings of fact which led him to the conclusion that both drivers had been guilty of negligence. The learned judge found that both drivers had failed to keep a proper lookout and that the plaintiff motor cyclist had been travelling at an excessive speed.

In this situation he was faced with the fact that there was a vehicle turning across the path of another and that other vehicle travelling at an excessive speed. The learned judge said that had it not been for the speed at which the plaintiff's vehicle was travelling he would have thought that the defendant should bear a greater share of the blame than the plaintiff. "But", he said, "having regard to the fact that both failed to give proper attention to the road ahead, that one turned across the path of the other and that the other was driving too fast, I think that the appropriate apportionment of responsibility is fifty-fifty." That meant that the learned judge was unable to distinguish between the degrees of fault of either the plaintiff or the defendant, and for myself I would not have disturbed his apportionment.

In my opinion the appeal should be dismissed.

MR. JUSTICE DOUGLAS: The facts have been outlined in the judgment delivered by my brother Lucas and I do not intend to repeat them. So far as I am concerned I do not dispute the findings of fact on negligence as they have been made by the learned trial judge, nor do I think that they can be attacked. In argument they were attacked, but I do not subscribe to the arguments put forward by counsel for the appellant in that behalf.

So far as the apportionment is concerned, I have the misfortune to disagree with my brother the presiding judge and with the trial judge. In my opinion the major causative factor of the accident which occurred was the turning by the defendant of his vehicle across the path of the plaintiff's vehicle. I realise that it is not lightly that an appellate court interferes with the findings of

apportionment made by a trial judge. I think that this is a case where that should occur, and I accordingly think that the apportionment made should have been of the order of eighty-twenty instead of the apportionment made at the trial.

I therefore am of the opinion that the appeal should be allowed, the order as to damages made by the learned trial judge set aside, and in lieu thereof judgment entered for the appropriate amount according to the judgment I have just delivered.

MR. JUSTICE SHEAHAN: I agree with the reasons given by Mr. Justice Douglas for interfering with the apportionment made by the learned trial judge. I agree that it is something that is not lightly done, and in my opinion I think I can say that I think the judge was clearly wrong in the apportionment which he made, and I say that with the greatest respect to His Honour. I agree also with the apportionment which Mr. Justice Douglas suggested. It seems to me on my calculations that 80 per cent of \$15,905 is \$12,724.

MR. JUSTICE LUCAS: The order of the Court then is as follows: the appeal is allowed with costs. The judgment of the learned trial judge is varied (1) by substituting the figure of \$12,724 for \$7,952.50, the amount for which judgment was given for the plaintiff; and (2) by ordering the defendant to pay the plaintiff's costs of the action.
