TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND No 3188 of 1981

FULL COURT

DERRINGTON J

AMBROSE J

DOWSETT J

ARTHUR ALFRED HARWOOD (Plaintiff) Appellant

and

LESLIE JOHN ZAHNOW (Defendant) Respondent

BRISBANE

..DATE 20/9/91 9.30 A.M.

JUDGMENT

MR JUSTICE DEERINGTON: In my opinion the appeal should be dismissed with costs. I publish my reasons.

MR JUSTICE AMBROSE: I agree.

MR JUSTICE DOWSETT: I agree with the order proposed. I publish my reasons.

MR JUSTICE DERRINGTON: The order of the Court is that the appeal is dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Writ No. 3188 of 1981

FULL COURT

BETWEEN:

ARTHUR ALFRED HARWOOD (Plaintiff) Appellant

AND:

LESLIE JOHN ZAHNOW (Defendant) Respondent

DERRINGTON J

AMBROSE J

DOWSETT J

Reasons for judgment delivered by Derrington and Dowsett JJ on 20th September 1991. Ambrose J concurring with the reasons of Derrington J. All concurring as to the order.

"APPEAL DISMISSED WITH COSTS."

IN THE SUPREME COURT OF QUEENSLAND No. 3188 of 1981

FULL COURT

Before the Full Court

Mr Justice Derrington

Mr Justice Ambrose

Mr Justice Dowsett

BETWEEN:

ARTHUR ALFRED HARWOOD (Plaintiff) Appellant

AND:

LESLIE JOHN ZAHNOW (Defendant) Respondent

JUDGMENT - DERRINGTON J.

Delivered the 20th day of September, 1991

CATCHWORDS

Negligence - Appellant's vehicle in wheel tracks on wrong side of gravel road on blind curve - Whether respondent negligent in not moving further to left in dangerous conditions to avoid collision - Whether could have moved further to left - Whether collision could have been avoided - Cuasation - Inferences from position of debris - Effect of respondent's failure to give evidence - Quality of response expected by one who creates dangerous emergency

Counsel:	Mr Crooke Q.C. and Mr Keim for appellant Mr Griffin Q.C. and Mr Bocabella for respondent
Solicitors:	Stephen Comino & Cominos for appellant Corrs Chambers Westgarth t/a for Harry G. Smith for respondent
Hearing date:	3 September, 1991

IN THE SUPREME COURT OF QUEENSLAND No. 3188 of 1981

FULL COURT

BETWEEN:

ARTHUR ALFRED HARWOOD (Plaintiff) Appellant

AND:

LESLIE JOHN ZAHNOW (Defendant) Respondent

JUDGMENT - DERRINGTON J.

Delivered the 20th day of September, 1991

This is an appeal by an unsuccessful plaintiff in an action for damages for personal injury alleged to have been caused in September, 1978, by negligence of the defendant in the driving of a motor vehicle. The collision between the vehicles driven by the respective parties occurred in daylight on a country road with a gravel surface. At the point of collision there was a fairly sharp curve to the appellant's right with poor visibility due to the presence of an embankment covered with high grass on the respondent's left-hand side of the road. As with many country gravel roads, there was a distinct single pair of wheel tracks usually used by vehicles travelling in both directions; and grass was growing on the outside of the wheel tracks, even on the gravel surface on each side of the road.

The overall trafficable surface was estimated by the investigating police officer to be about five metres wide, at about the point of impact though the accuracy of this approximate assessment is doubtful because it seems to be made as a distant recollection based upon an estimate made at the time as to a part of the road some little distance from the curve. However, this is largely irrelevant.

The only evidence as to the speed of the vehicles as they first approached was that each was travelling at approximately thirty-five miles per hour but the respondent's vehicle left twenty-six metres of skid mark on the gravel surface and slowed down to about five miles per hour at the point of impact whilst the appellant's vehicle left only five metres of skid marks and was still

travelling at some speed on impact. The plaintiff explains this by acknowledging that he had earlier been looking at cattle on the side of the road and consequently did not see the approaching vehicle until some little time after he could first have seen it if he had been watching and after the respondent had seen his vehicle.

More significantly for present purposes, the respondent's skid marks are entirely or almost entirely on his correct side of the road and running almost parallel with its left-hand edge, if anything veering a little to his left. The police officer in the interpretation of his plan prepared at about the time of the accident thought that the respondent's offside skid mark was in the vicinity of the imaginary centre line of the road although that line is not depicted on his plan, which is not drawn to scale. The appellant's own skid marks begin on his incorrect side of the road, his nearside mark appearing to be in the vicinity of the imaginary centre line. As they progressed they veered a little towards his correct side of the road but the offside mark at least did not reach the centre line prior to impact because the front offside corner of the respondent's vehicle struck the centre pillar of the offside of the appellant's vehicle as it was slightly angled to its left from its former path.

The only ground of appeal pursued by the appellant is that, while he himself was substantially to blame for the accident, the respondent was also at fault. He claims that, taking into account the custom of travellers on country roads carrying a single pair of wheel tracks, and seeing that those tracks on that curve were substantially upon his side of the roadway, the respondent should have foreseen as a real possibility the danger that an approaching vehicle might be travelling on those wheel tracks and therefore substantially on its incorrect side; and accordingly he should have steered further to the left or kept his vehicle so under control by reducing its speed that he could have moved further to the left in order to avoid any danger created by any such negligence of any approaching driver.

This proposition must show that the respondent could reasonably have driven his vehicle further to his left. It must also establish that, even if that were so, the respondent's failure to do so would have made any difference to the result, for if it did not then any negligence in that respect would have had no causal effect.

The location of the respondent's skid marks have already been mentioned. The appellant himself was unable to say precisely where the respondent's vehicle was relevantly located in relation to his extreme left-hand edge of the trafficable surface. However, his passenger, Mr Lankowski, gave very significant evidence on this issue. Apart from indicating that although the gravel surface of the road would have been graded he said that at the time the grass was growing right up close to the wheel tracks of the road. Further he said that in the relevant place the embankment was "only a couple of feet, two feet or so, from the defendant's nearside tyre track". When he was asked if he was able to make any note as to the course of the respondent's vehicle from the time that he first saw it until the point of impact he said:

> "Well, the other vehicle more or less started pulling in a little bit but he couldn't get much further in off the road because of the bank and that, but I just - it was all within a few seconds."

In cross-examination, he said the following concerning the respondent's vehicle:—

> " BY MR. GRANT-TAYLOR: I am not saying it wasn't on the road, I am saying that the car, the other car, was in a position where even though it wasn't touching the embankment, it wasn't practicably speaking possible for it to get any further over when you first saw it: what do you say about that, is that right or not?-- Yes.
>
> When you first saw it?-- First seen, yeah."

He also agreed that from that time the vehicle did not move further away from the embankment.

Because the respondent did not give evidence, this is the only direct eyewitness evidence of the position of his vehicle at the relevant time, and it constitutes a very powerful problem to the appellant's case. He seeks to avoid it by reliance on the location of debris and the defendant's skid marks on the road surface and says that on the principle in Jones v. Dunkel (1959) 101 C.L.R. 298 the defendant's default in giving evidence should lead the court more readily to draw the inference from the location of the debris and skid marks that the respondent was not as far to his left as he could have been, and that Mr Lankowski was in error.

The location of the debris on the roadway is of no significance here and is rarely useful: Hayward v. Brisbane City Council (1960) Qd. R. 585; see also Weal v. Bottom (1966) 40 A.L.J.R. 436 for an example as to how sometimes the location of debris may lead to an inference as to the point of impact.

The position in the present case more strongly defeats the drawing of any such inference because of the movement of the appellant's vehicle towards its correct side of the road, where it became stationary, for that could have carried any falling debris in that direction. This is demonstrated by the final position of the respondent's vehicle which had its front slewed to the right across the imaginary centre line of the road as the result of the impact.

Curiously it was not until the cross-examination by respondent's counsel of the investigating police officer, and more curiously it occurred then, that the evidence of the location of the skid marks from the respondent's vehicle, and more particularly that on the driver's side, was described. The witness said that the latter was “on the centre line” and “in the vicinity of the centre line”. He formed this view of the relationship between that skid mark and the centre line from looking at his rough sketch which he made in his police notebook, apparently at the scene of

the accident, in 1978. It is not drawn to scale and the absence of any depiction of the imaginary centre line must also defy any fine precision in matters such as this.

Nevertheless, learned counsel for the appellant has embarked upon a precise mathematical exercise in which he says that .7 of a metre of trafficable road surface was still available to the defendant on his left at the time of the impact. He achieves this result by deducting an assumed width of the respondent's vehicle of 1.8 metres from 2.5 metres, which is half of the five metres which is estimated by the police officer as the approximate width of the road by refreshing his memory as to an approximate measurement taken some little distance away. This proposition has a number of defects. Apart from the absence of any evidence as to width of the vehicle, the police officer's description of the width of the road is a very coarse approximation only. Further he does not place the respondent's driver's-side skid mark on the centre line but only in its vicinity because he made no measurements in that respect. He was at a serious disadvantage in the witness box in trying to describe the relationship between the two because of his lack of memory upon the point. Obviously he did not advert to the specific point at the time that he was making his investigations and drawing the sketch plan upon which he relied.

The appellant's proposition further assumes that the respondent should have known that any road to his left was still trafficable to him. There was clearly an embankment on the edge of the road on that side and it is known that there was grass on the road surface outside the tyre tracks used by traffic though its density at that spot is not mentioned in the evidence. It has therefore not been proved that the respondent could have seen the available width of safe road surface available to him, if any, which would have enabled him to move further to the left with safety.

This concept may conform with the view of Mr Lankowski that the respondent had moved as far as practicable to his

left. He was not expected to put his own life in danger in the expectation that the appellant may have deprived himself of a proper lookout and would continue to approach on his incorrect side of the road. Nor can he be criticised for any failing to select the most perfect response to the emergency which the appellant had inflicted upon him: "It is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger.": per Lord Dunedin in U.S. Shipping Board v. Leadline Ltd. [1924] A.C. 286 at p. 291. See also United Uranium and NL v. Fisher (1965) A.L.R. 99.

Of course, the plaintiff's principal difficulty in his theoretical exercise lies in its conflict with the eyewitness evidence of Mr Lankowski. No doubt the latter had only a fairly short view of the approaching vehicle before the impact, but he was in a good position to see the space between the defendant's approaching vehicle and the embankment to its left because that scene was immediately before his eyes. It is true that they were circumstances of emergency and the events occurred many years ago but he appeared to be a truthful witness. The significant point is that there is no alternative evidence which expressly or by reasonable implication controvert his account of this feature. If anything, the objective evidence supports it.

Not surprisingly the appellant also tried to reduce the effectiveness of the content of the witness' evidence on this point. He attempted this by suggesting that it should be interpreted as meaning that the respondent was as far to the left as he could practically drive while remaining on the beaten car tracks. The difficulty with this proposition is that the words of the question and answer are plain and there is nothing in the context to allow the importation of the suggested qualification. The effect of his evidence to the appellant's case must have been dramatically obvious at the time and yet no attempt was made in re-examination to clarify the point. It can

hardly be read down now by way of a strained interpretation of the simple words used.

Because there is no evidence from which an inference in favour of the plaintiff can reasonably be drawn, there is no room for the application of the Jones v. Dunkel principle: see West v. Government Insurance Office of New South Wales (1981) 148 C.L.R. 62 at 66 where, after citing Dixon C.J. from that report (1959) 101 C.L.R. 298 at 304-305 he said:—

> "In an action of negligence for death or personal injuries the plaintiff must fail unless he offers evidence supporting some positive inference implying negligence and it must be an inference which arises as an affirmative conclusion from the circumstances proved in evidence and one which they establish to the reasonable satisfaction of a judicial mind."

The court continued:—

> "His Honour went on to say that the law 'does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonable be satisfied' and see also T.N.T. Management Pty. Ltd. v. Brooks (1979) 53 A.L.J.R. 267, at p. 269 per Gibbs J."

To some extent, the delay of over twelve years from the time of the accident to the hearing of this present matter may provide some explanation for the defendant's failure to give evidence upon the point though this has not been established as the reason.

If the trial Judge intended to find that the tender by the appellant of two answers by the respondent of interrogatories administered by the appellant affects the Jones v. Dunkel principle, then that conclusion was erroneous, for it misses the point of the whole principle that the defendant's failure to give evidence upon matters

which are within his knowledge tends to fortify inferences favourable to the plaintiff which could be explained away by such evidence. However, that is as far as the principle goes and the respondent's failure to give evidence does not provide the appellant with evidence of his negligence. There must still be evidence advanced by the appellant from which some inference supporting his cause can be drawn. As it has been shown, that has not been provided.

As it was explained above the appellant also faced another serious difficulty, that is, proving that even if the respondent had negligently failed to move .7 metres to his left his negligence was a cause of the appellant's loss. This is because it is not shown that even if he had moved over for that distance the collision would not still have occurred with undiminished violence. It is correct that the respondent's vehicle struck the side of the appellant's vehicle about half-way along its length and that the latter was moving out of the former's path at less than a right angle so that the lateral measurement of the obstruction formed by the appellant's vehicle was less than it would have been if the vehicle was moving at a right-angle across the road. However, the reduced angle of travel meant that, in respect of any small further distance which the respondent's vehicle had to travel to the point of impact, the appellant's vehicle was at the same time escaping from its path at a rate which was less than if it was travelling at a right angle. Further, unless the angle at the time of impact were known it is impossible to say whether it would have escaped the respondent's vehicle. In addition, it could not have been required of the respondent to have moved the whole distance represented by the calculation because to have done so would have placed his vehicle dangerously near the embankment. At least, it was not proved to be safe to do so.

As the appellant cannot show that the collision was caused by a particular feature of negligence, then the respondent is not liable for that feature. This is different from the principle discussed in March v. E. &

M.H. Stramare Pty Ltd (1991) 65 A.L.J.R. 334 where the negligent act was a cause contributing to the collision.

For these reasons the appellant has failed to establish any error in the result below and the appeal must be dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND No. 3188 of 1981

FULL COURT

Before the Full Court

Mr Justice Derrington

Mr Justice Ambrose

Mr Justice Dowsett

BETWEEN:

ALFRED ARTHUR HARWOOD Plaintiff/Appellant

AND:

LESLIE JOHN ZAHNOW Defendant/Respondent

JUDGMENT - DOWSETT J.

Delivered the Twentieth day of September, 1991

Counsel: Crooke Q.C. with Keim for Appellant
Griffin Q.C. with Boccabella for Respondent
Solicitors: Stephen Comino & Cominos for Appellant
Corrs Chambers Westgarth T/A Harry G. Smith for Respondent
Hearing Date: 3rd September, 1991.

IN THE SUPREME COURT OF QUEENSLAND No. 3188 of 1981

FULL COURT

BETWEEN:

ALFRED ARTHUR HARWOOD Plaintiff/Appellant

AND:

LESLIE JOHN ZAHNOW Defendant/Respondent

JUDGMENT - DOWSETT J.

Delivered the Twentieth day of September, 1991.

This is an appeal by an unsuccessful plaintiff against a finding that the respondent had not caused or contributed to an accident in which a Mazda motor vehicle driven by the appellant collided with a Holden sedan motor vehicle driven by the defendant on 8th September, 1978 in which accident the appellant suffered injury.

The facts of the case appear sufficiently from the judgment of Derrington J. which I have read. The collision occurred at a curve in an unsealed country road in which vehicles travelling in either direction customarily followed one set of wheel marks which had been formed in the road surface by constant use. The learned trial Judge found at p. 172 of the record that:—

> "... the road was such that two approaching vehicles with the drivers exercising reasonable care and skill and slowing down could safely pass with each driver being required to have his passenger side wheels off the gravel surface and on to the verge on his side of the road.
>
> I find that at the instant of collision and for some undefined distance before the collision the defendant's Holden was travelling in a position where it was not touching the embankment on its left and that it was not practically speaking possible for the Holden to move any further to its left without touching the embankment."

His Honour also found that the respondent had been travelling at about 35 m.p.h. until the moment when he first saw the Mazda and that by the point of impact he had slowed to about 5 m.p.h..

As to the Mazda, the learned trial Judge found that it was travelling at about 35 m.p.h. towards the curve and continued at that speed until the moment of collision. The learned trial Judge also found that the Mazda was, "if not totally, very substantially on its incorrect side of the road ...", at the stage at which the appellant became aware of the oncoming vehicle and swerved to the left. His Honour found that the collision occurred slightly to the respondent's side of the road. Derrington J. has demonstrated that all of these findings were open to his Honour.

It was the duty of both drivers to travel at such a speed as to be able to slow their vehicles and move to the extreme lefthand edge of the roadway in time to allow passage to any vehicle coming from the opposite direction. It is quite clear that the appellant failed to do this. That, of course, does not exclude the possibility of negligence on the part of the respondent. However it is clear that prior to the point of impact, the respondent was able to reduce speed very substantially to what must be described as a very slow speed. According to the findings, he was also as far to the left as was reasonably practicable. It follows from the other findings made by his Honour that the position so adopted was one which would have allowed the appellant to pass safely had he also slowed and moved to the left.

His Honour's findings exclude any assertion that the respondent failed to keep a proper lookout. Also excluded is the possibility that the respondent was not driving sufficiently close to the lefthand edge of the carriageway. It might have been possible to argue that the respondent should have been travelling more slowly than 35 m.p.h. prior to sighting the oncoming vehicle . There was probably good reason for the appellant not to take this line in view of the fact that he, too was found to have been travelling at that speed. In any event, counsel for the appellant expressly disavowed reliance on the question of excessive speed as against the respondent.

I wish only to add a remark about the decision of the High Court in Jones v. Dunkel (1959) 101 C.L.R. 298. It was submitted that because the respondent did not give evidence, the inference of negligence might be drawn more readily against him upon the authority of that decision.

At p. 312, Menzies J., observed that three things flowed from the failure of a defendant to give evidence in that case, namely:—

> "(i) That the absence of the defendant, Hegedus as a witness cannot be used to make up any deficiency of evidence;
>
> (ii) That evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence;
>
> (iii) That where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference."

His Honour was discussing appropriate directions to be given to a jury. Whilst it may be necessary to explain to a jury the way in which they might use a failure by one party to give evidence, it does not follow that an appellate court should upset a trial Judge's finding simply because he found for the defendant who had not given evidence. There is no reason to believe that his Honour was other than aware of the fact that the defendant had not given evidence.

Whilst Jones v. Dunkel (supra) establishes that where an inference of fact from proven facts might have been contradicted by the defendant, that inference may be more comfortably drawn where the defendant chooses not give evidence, I do not think that the decision in any way

establishes that the inference of negligence, as the consequence of the application of the duty of care to established facts, should be drawn more easily where the defendant has not given evidence. The appellant's argument before us really went to that latter point. Such submission is clearly incorrect. Jones v. Dunkel (supra) is concerned with inferences as to facts about which the absent party could have given evidence, not the application of legal principles to established facts. I agree in the order proposed by Derrington J..