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SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

McGIRR v TULLEMAN

Hardie, Reynolds and Bowen JJ A — 15 November 1973

CIVIL PROCEEDINGS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – RIGHT OF WAY – CLAIM FOR DAMAGES FOR MOTOR VEHICLE COLLISION INVOLVING A MOTOR CAR AND A HEAVY TRUCK – ASSUMPTION BY TRUCK DRIVER THAT OTHER DRIVER WOULD YIELD RIGHT OF WAY – TRUCK DRIVER SOUNDED THE HORN WHICH CAUSED THE OTHER DRIVER TO PROP OR HESITATE – WHETHER OTHER DRIVER GUILTY OF CONTRIBUTORY NEGLIGENCE.

Defendant driving a 13-ton lorry on Princes Highway, Corrimal, claimed that he made the assumption that the plaintiff would stop at the intersection and yield the right of way that was rightfully hers (the plaintiff); and that on this assumption continued at a speed which, having regard to his load and nature of vehicle, made his decision irreversible. Defendant had sounded his horn and it was found that this caused the plaintiff to hesitate or prop before moving into defendant's path. Argued that this prop or hesitation either broke the chain of causation or made possible a finding of contributory negligence. The Court found in favour of the plaintiff. Upon appeal—

HELD: Appeal dismissed. No contributory negligence on the part of the plaintiff.

1. The question was whether the Court should have made a finding of contributory negligence against the plaintiff on the basis that, although warned by the defendant's horns, she went forward across his path making a collision inevitable. This finding was not made. By the time the defendant found it necessary to sound his horns the emergency had arisen. He sounded them from some distance back continuously, and they were apparently very loud. The plaintiff was then in a situation of danger and it would have been difficult for her to assess, even though she was on the western side of the road, what was the best thing to do.

2. In all the circumstances the Court was not satisfied that she was guilty of any want of reasonable care on her own behalf which contributed to the accident.

REYNOLDS JA: The argument for the appellant sought to treat this second stop as if it were of such a nature and such a duration that judgment could be exercised and a conscious decision taken, involving, as I have indicated, either the termination of the initial situation of danger or a failure to take due care thereafter for her own safety. His Honour, however, treated it as but an incident in a continuing situation brought about entirely by the negligence of the defendant, and as I think, rightly.

I am mindful of the principles recently enunciated by the High Court in *Edwards v Noble* [1971] HCA 54; (1971) 125 CLR 296; [1972] ALR 385; (1971) 45 ALJR 682, and *a fortiori*, I do not think it appears that His Honour was wrong. There is no misdirection in law: there is no misapprehension of fact; no important facts have been over-looked. His Honour has indeed favoured the litigants and this Court with careful and detailed reasons, and there is no suggestion of undisclosed or unexpressed error. His important finding is at p91 on the question of contributory negligence and should not be disturbed.

It is in these terms:-

> 'The question is whether I should make a finding of contributory negligence against the plaintiff on the basis that, although warned by the defendant's horns, she went forward across his path making a collision inevitable. I do not think I should make this finding. By the time the defendant found it necessary to sound his horns the emergency had arisen. He sounded them from some distance back continuously, and they are apparently very loud. The plaintiff was then in a situation of danger and it would have been difficult for her to assess, even though she was on the western side of the road, what was the best thing to do. In all the circumstances I am not satisfied that she was guilty of any want of reasonable care on her own behalf which contributed to the accident.'

My view on this aspect of the case is not influenced by any consideration of judicial restraint. I would propose that so much of the appeal as relates to the issue of liability fails.