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NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M. No. 24/83

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BETWEEN ANDERSON of Hamilton

Appellant

A N D DAY of Te Kuiti, Engineer

Respondent

Hearing: 30th March, 1984.

Counsel: P. R. Heath for Appellant.
D. J. Taylor for Respondent.

Judgment: 30th March, 1984.

ORAL JUDGMENT OF TOMPKINS, J.

The Appellant has appealed against a decision given in the District Court at Hamilton on the 17th January, 1983. The Appellant was the defendant in the court below in respect of a claim for damages brought against him by the Respondent, the plaintiff in the court below, arising out of a motor accident that occurred on State Highway 3 between Hamilton and Te Awamutu on the 13th October, 1981.

As the learned District Court Judge rightly observed, the essential facts are simple and straightforward. The Respondent was driving his Datsun car, accompanied by his wife, south along the highway in the area of the turn-off to the Hamilton airport. The Appellant was driving a Humber Super Snipe car, towing a trailer, north along the highway and approaching a drive that was referred to in the evidence as Russo's driveway. He intended to turn into that driveway but missed it. Realising that he had done so he continued

to drive north along the highway until he was in a position where he could make a 'U' turn with safety. This he did. He was then travelling south along the highway in front of the car driven by the Respondent. There was a suggestion in the Respondent's evidence that there may initially have been some other vehicles between his vehicle and the Appellant's, but whether or not that was so does not seem to be particularly relevant.

The two vehicles continued to travel south along a stretch of the highway that had four lanes. Approaching the scene of the accident both the Appellant's car and trailer and the Respondent's car were being driven in the lane closest to the centre line. There was then a conflict of evidence between the Appellant and the Respondent. It was the Respondent's evidence that the Appellant's car and trailer moved into the left lane. The Respondent continued in the right centre lane and was about to overtake when the Appellant's car and trailer turned to the right across the front of the Respondent. The Respondent applied his brakes, skidded, but was unable to avoid colliding with the side of the trailer. The Respondent said he saw no indication given by the Appellant of the Appellant's intention to make the turn.

The Appellant's version of the events differs in a material respect in that the Appellant said that he did not at any stage move into the left lane but remained in the right centre lane, that he looked in his rear vision mirror, and he also turned and looked out through the rear window of the car. He saw no cars coming from either direction, so he then commenced to make the right hand turn into Russo's driveway, and at the time he commenced the turn he looked out the driver's door window, heard the screaming of tyres, braking, and saw the Appellant's car heading towards him in a skid. He said that before he commenced his turn into the driveway he activated the

traffic indicators on his car. He did not know whether the indicator on the trailer was working.

The approach adopted by the learned District Court Judge in his decision was first, that he expressed some reservations about evidence given concerning distances and times relating to the events that immediately preceded the impact. Shorn of irrelevance he considered that the situation fundamentally was that the Appellant was turning across the path of a vehicle which was proceeding straight ahead. He found the Appellant had been negligent. The specific respect in which he found the Appellant negligent was that the Appellant failed to see the Respondent's car. He considered that the Appellant had the fundamental obligation to ensure that the way was clear before turning. That finding was not challenged on this appeal. Then he considered that either the Appellant did not look to the rear or, if he did, his look was inadequate, because had he looked properly he would have seen the Respondent's vehicle behind him. He discarded, having regard to the evidence and the photographs, a further alternative, namely, that the Appellant looked to the rear in a proper fashion but failed to see the Respondent's car because at that time it was not there to be seen, a submission that would require a finding that the Respondent's car had been driven at a very fast speed so that it came into the position that it was immediately before the accident after the Appellant had looked to his rear. It was the learned District Court Judge's finding that the Respondent was close to the Appellant's vehicle when the latter commenced his turn. He concluded that the evidence established that the Appellant commenced his turn at a time when the way was not clear, and that the Respondent's vehicle was almost on top of his, and that that constituted negligence. For reasons set out in his judgment he negatived any finding of contributory negligence against the Respondent.

At the hearing of the appeal Mr. Heath submitted that the findings were against the weight of evidence. He recognised, as indeed he must, that on a matter that is essentially one of fact it is not easy on appeal to succeed on a submission that findings of fact made by the learned District Court Judge were against the weight of evidence. In support of his contention he made a detailed review of the evidence, and he also emphasised what he regarded was a defect in the learned District Court Judge's judgment, namely, the failure to resolve the conflict of evidence to which I have referred whether, as the Respondent says, the Appellant moved into the left lane, or whether, as the Appellant says, the Appellant remained in the right lane throughout.

It is correct that the learned District Court Judge made no express finding on that point. It is also correct that the learned District Court Judge made no express adverse finding against the Appellant on credibility. However, I believe that it is beyond doubt from a reading of the learned District Court Judge's judgment as a whole that he found that the Appellant did move into the left lane prior to the accident. It could only be on such a premise that the learned District Court Judge could find that the Appellant was turning across the path of the Respondent's vehicle proceeding straight ahead. That is not a description of the accident that could fit in with the account given by the Appellant. Further, the learned District Court Judge did make an express finding that the Respondent and his wife were impressive witnesses. Also, he made a finding that the Appellant made his turn quickly and without warning. All of that indicates to me quite clearly that he accepted the account of the accident as given by the Respondent and his wife.

It was submitted by Mr. Heath that the learned District Court Judge was wrong in not finding excessive speed on the part of the Respondent. Certainly he did not make that finding. On the contrary, he accepted the evidence from the Respondent and his wife as to the speed at which they travelled, which was something in the order of 80 kilometres an hour. There is in the evidence relating to this accident an unusual absence of what is sometimes referred to as the silent evidence, that is, uncontroverted evidence from which inferences such as speed, can be drawn. Although the Respondent's vehicle skidded, there is no evidence of any skid marks, their location or length, nor is there any evidence of the point of the impact between the Respondent's car and the trailer. Nor is there any photographic evidence of the damage to the trailer which might have been of some assistance in resolving the difference between the witnesses as to with what part of the trailer the Respondent's car collided. In the absence of the assistance that would have been given to him by evidence of that kind, the learned District Court Judge was required to resolve the conflict between the witnesses on his assessment of the witnesses themselves in the manner and way in which they gave their evidence. That is certainly not an assessment that I, on the evidence before me and taking due regard of Mr. Heath's submissions, would be prepared to interfere with. Indeed on a reading of the transcript of the evidence it is my conclusion that there was ample evidence for the learned District Court Judge to come to the conclusion that he did, both on the finding of negligence against the Appellant and the absence of a finding of contributory negligence against the Respondent.

The appeal is dismissed. There will be an order for costs in the sum of $200 in favour of the Respondent.

Solicitors:
Stace, Hammond, Grace & Partners, Hamilton, for Appellant.
Swarbrick, Dixon & Partners, Hamilton, for Respondent.