[HIGH COURT OF AUSTRALIA.]

NICKELLS AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

THE MAYOR, ALDERMEN, COUNCILLORS AND CITIZENS OF THE CITY OF MELBOURNE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 8, 25.

Latham C.J., Starke, Dixon Evatt and McTiernan JJ.

Negligence—Highway—User—Driving horse-drawn cart in narrow lane—Horse startled—Damage to adjacent property—Evidence of negligence.

The defendant's servant drove a wide horse-drawn cart up a narrow lane which was flanked by glass shop windows. The size of the cart was such that, in order to turn at the end of the lane, the cart had to be brought to within twelve or fifteen inches of one of the windows. While turning, the horse became startled and backed the cart through the window.

Held, by *Latham* C.J., *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that there was sufficient evidence to support a finding that the driving of the horse and cart in the lane in such circumstances constituted negligence on the part of the driver.

Decision of the Supreme Court of Victoria (Full Court) reversed.

APPEAL from the Supreme Court of Victoria.

An employee of the municipality of the city of Melbourne drove a garbage cart, which was eight feet wide, along the roadway of a lane. The width of the roadway was eight feet four inches. The footpath on the eastern side was two feet four inches wide. The

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lane was lined with shops with glass windows. In turning the cart round a corner at the end of the lane it was necessary to bring the back of the cart to within one foot or one foot three inches of the glass windows of the plaintiffs' shop, which was on the eastern side of the lane. As the horse was turning the corner, it became startled and backed into the plaintiffs' window, and damage resulted. The plaintiffs, Donna Nickells and Doris Irene Richards, trading as "Le Rae," brought an action for negligence in the County Court at Melbourne against the Mayor, aldermen, councillors and citizens of the city of Melbourne. The County-Court judge found negligence on the part of the defendant's servant in taking a large horse-drawn vehicle into the narrow lane flanked by glassed-in windows and awarded the plaintiffs £59 12s. 7d. damages. The defendant appealed to the Supreme Court of Victoria, which allowed the appeal and ordered a new trial.

From that decision the plaintiffs appealed to the High Court.

Joske, for the appellants. The County-Court judge's decision was correct. He laid down no new test, but, applying the ordinary principles of negligence to the facts of the case, he found that there was negligence. The County-Court judge found, not that it was negligent to take horses in traffic generally, but only that it was negligent to take the horse and cart up this narrow lane with glass windows along it.

Cohen K.C. (with him *Pape*), for the respondent. The County-Court judge found facts which do not amount to negligence but were merely circumstances which called for the exercise of more than ordinary care. The common-law rule is that persons having premises abutting on a highway must take the damage resulting from the ordinary user of the highway. The plaintiff should have proved some lack of care in the management of the horse in the lane (*Phillips* v. *Britannia Hygienic Laundry Co.* (1); *Gayler and Pope Ltd.* v. *B. Davies and Son Ltd.* (2); *Fletcher* v. *Rylands* (3)). Taking the cart up the lane was an ordinary user of the highway.

(1) (1923) 1 K.B. 539, at p. 552. (2) (1924) 2 K.B. 75.
(3) (1866) L.R. 1 Ex. 265, at p. 286.

Joske, in reply. Taking the cart into this narrow lane with glass windows on either side was an act of negligence.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by special leave from a judgment of the Full Court of the Supreme Court of Victoria ordering a new trial in an action for negligence in which the learned County-Court judge gave judgment for the plaintiff.

The respondent's servant drove a garbage cart which was eight feet wide along the roadway of a lane. The width of the roadway was eight feet four inches. The footpath on the eastern side was two feet four inches wide. The lane was lined with shops with glass shop windows. In turning the cart round a corner at the end of the lane the back of the cart necessarily (or at least normally) came to within one foot or one foot three inches of the glass windows of the plaintiffs' shop, which was on the eastern side of the lane. As the horse was turning the corner, it became startled, backed into the plaintiffs' window, and damage resulted. The acting County-Court judge in giving his judgment said :

" I find that in all the circumstances it was negligent of the driver to go with such a large and comparatively unmanageable vehicle, that is, unmanageable because of its size and the fact that a horse is difficult to manage with precision, into such a narrow thoroughfare flanked by glassed-in windows which presented a peculiar danger in conjunction with such a large vehicle."

The Full Court held that the facts mentioned were not in themselves sufficient to justify a finding of negligence, and ordered a new trial, evidently upon the ground that it was desirable to have a further inquiry into the possibility of negligence in the management of the horse and cart.

I confine my attention to the question whether the facts stated constitute evidence upon which it can properly be held that there was negligence on the part of the plaintiff. In my opinion this question should be answered in the affirmative. The driver failed to take due care when he drove a cart eight feet wide into a lane so

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narrow that, if anything startled the horse so that it moved backwards suddenly and irregularly, some damage was almost inevitable in the particular circumstances. The horse and cart, it is said, were lawfully in the lane. But this only means that no offence was committed by taking the horse and cart into the lane. It does not mean that such action was necessarily not negligent. Whether the action was negligent or not depends upon all the circumstances of the case, and in this case it is an important element that the windows were shop windows lining a narrow lane which had a very narrow footpath. It is true that the driver of a horse is not bound to anticipate that the horse will be startled, but he is bound not to cut the margin of safety so fine that, if anything untoward should happen, there is hardly any chance of preventing an accident. If a cart eight feet wide were driven down a passage with a clearance of only one inch on each side between the cart and a line of shop windows, an inference of negligence would, in my opinion, be indisputable. The question is one of degree.

In my opinion, there was sufficient evidence in this case to justify the finding of the judge of first instance, and I am therefore of opinion that the appeal should be allowed.

STARKE J. Appeal by special leave of this court in a case in which judgment was entered for the plaintiff for £59, set aside by the Supreme Court and a new trial ordered.

All the case involves is whether taking a large garbage cart into a small alley-way in the city of Melbourne flanked with business premises having plate-glass windows affords evidence of negligence sufficient to sustain the judgment.

It is part of the ordinary function of the city to remove garbage from its streets and lanes, whether placed there in receptacles by its citizens or otherwise accumulating. It was quite entitled to send garbage carts into its streets and lanes for that purpose. It is a lawful use of those streets and lanes, and persons having business premises abutting thereon sustaining damage can only recover such damage upon affirmative proof of some fault or, in other words, want of care and skill causing the damage (*Fletcher* v. *Rylands* (1)).

(1) (1866) L.R. 1 Ex., at p. 286.

The learned judges of the Supreme Court were of opinion that the fact stated did not in itself afford sufficient evidence to sustain the judgment. The alley-way was wide enough to allow the garbage cart to pass safely along it if due care were used, and in fact garbage carts had gone up and down this alley-way for many years without an accident. Apparently an ordinarily quiet horse suddenly took fright at a piece of paper blowing about the alley-way and backed the garbage cart into the window of the plaintiffs. It is quite consistent with the findings of the trial judge that the driver was not guilty of any want of care or skill in handling and controlling his horse, though of course in the narrow lane special care was necessary on the part of the driver, as I am sure, was also the view of the learned judges in the Supreme Court.

The only fault attributed to the city is sending the garbage cart into the narrow lane, and that by itself does not, I think, warrant a finding of negligence against it. It can no doubt be said that the city is not obliged to send so large a cart into so small a lane, but the city is not bound, despite the decision of this court in *Mercer* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (1), to adopt every possible means of obviating danger that legal ingenuity could suggest or "boundless resources supply." Its duty is to act with reasonable care and skill in all the circumstances of the case.

The appeal should be dismissed.

DIXON J. The shop which the appellants occupy is the last but one at the northern end of Centre Court on the easterly side. Centre Court is a narrow street or lane in the city of Melbourne, leading from Flinders Lane to the entrance to a passage or arcade through which pedestrians may pass into Collins Street. Opposite the shop in question the lane turns at right angles to the west and passes at the rear of buildings having frontages to Flinders Lane and Collins Street respectively. Up to the turn Centre Court is lined on both sides with shops the fronts of which are glass windows. There is a narrow footway on each side of the lane and a carriage-way between. On the eastern side, where the appellants' shop faces, the footway is two feet four inches wide. The width of the carriage-way is

(1) (1936) 56 C.L.R. 580.

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between eight feet two inches and eight feet five inches. The footway on the opposite side is four feet one and a half inches.

Shortly after eight o'clock a garbage dray belonging to the respondent municipality went up Centre Court from Flinders Lane and proceeded to turn opposite the appellants' shop, where the lane runs to the west. Suddenly it backed into the window. The window was broken, and the goods there on show were damaged. The garbage cart was a two-wheeled dray drawn by one horse. Its width was eight feet.

According to the driver he was at the horse's head when the cart began to turn, but the horse took fright at a piece of newspaper lying round the corner about six feet away. The record of the driver's evidence contained in the judge's notes goes on from this point as follows :—" Horse as soon as saw it went back. Dray then on the angle. Back of dray would be away from window about 1 foot or 1 foot 3 inches. I tried to straighten him up to back him out. Tried to push him across. Falling glass made him worse. Horse was pulling back as I tried to turn him back. Right hand bumper bar at back of dray hit window. I don't think wheels got on path." The learned County-Court judge did not say whether he accepted this evidence. His Honour gave judgment for the appellants and awarded them damages, but he confined his finding that the respondents were negligent to one ground only. That ground is briefly, but sufficiently, expressed by one sentence from his reasons: " I find that in all the circumstances it was negligent of the driver to go with such a large and comparatively unmanageable vehicle, that is, unmanageable because of its size and the fact that a horse is difficult to manage with precision, into such a narrow thoroughfare flanked by glassed-in windows which presented a peculiar danger in conjunction with such a large vehicle."

The finding of negligence was set aside by the Supreme Court, and a new trial was ordered. The learned judges (*Mann* C.J., *Macfarlan* and *Gavan Duffy* JJ.) delivered separate judgments giving reasons which, although not identical in all respects, coincided in the conclusion that in holding it negligent to take a wide horse-drawn vehicle up such a lane the County-Court judge had imposed too high a degree of duty upon the municipality.

In supporting the judgment of the Supreme Court, counsel for the respondent municipality began with the position that, by constructing glass-fronted shops along such a lane as that in question, the frontagers could not impose a different degree of care upon traffic seeking to use the lane or exclude any vehicle which in other respects might be taken along a highway as of right. It may at once be conceded that no course adopted by the frontagers can abridge the use which may be made of a highway as of right by any member of the public. But to concede this is to throw no light upon the character and extent of the public right of user of a highway. It is not an unlimited right or a right which is independent of the nature of the place constituted a highway. It is a right of passage, and the mode of its enjoyment must accord with the fitness of the place. There are highways and highways, and the public right extends only to a reasonable use according to the character and purpose of the particular way. Wheeled traffic cannot be taken over footways. No one can insist on driving a vehicle of exceptional weight over a way manifestly incapable of supporting it. A narrow lane cannot be used as of right for the purpose of vehicles which are so wide or so clumsy that they unreasonably obstruct the way or unreasonably endanger the adjoining buildings or erections. In other words, it is a right to but a reasonable enjoyment of the highway such as it is.

To break and enter another's close is trespass to land, and the user of a highway has no right to invade the possession of a frontager. But involuntary trespass to land is not always an actionable wrong. Just as in trespass to the person and in trespass to goods it has come to be the law that an unintentional injury to or interference with another's person or property on the part of the user of a highway is not actionable in the absence of negligence, so, if, in the course of any reasonable use of a public way, a man unintentionally damages neighbouring premises, the law does not hold him liable as a trespasser unless he has been guilty of negligence (See *Gayler and Pope Ltd.* v. *B. Davies & Son Ltd.* (1)). In the development of the law by which older doctrines of absolute liability for the invasion of possession or the violation of personal

(1) (1924) 2 K.B. 75.

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security have been supplanted by the conceptions of neglect and default, the now established principle has been justified and explained on the ground that those who go upon a highway or occupy premises which adjoin it must be taken to assume the risk of such injuries by others as are incidental to the ordinary exercise of the right of user, but not of the risk of negligence (See, for example, per *Bramwell* B. in *Holmes* v. *Mather* (1) and per *Blackburn* J. in *Fletcher* v. *Rylands* (2)). A better foundation for the now accepted rule is, perhaps, the general view that, where harm arises out of the simultaneous enjoyment or exercise of coexisting rights, absolute responsibility is unjust and no reconciliation of the conflicting interests can be satisfactory unless by reference to neglect or default. It is almost unnecessary to say that the rule supposes that the person who causes harm is properly upon the highway and has not unreasonably increased the risk of injury to others by the manner in which he is using the highway or by the objects which he has brought upon it. It does not mean that no liability for unintentional harm can be incurred in the course of a not positively unlawful use of a highway except on the ground that actual movement has been governed with want of care or skill.

In the present case, the learned County-Court judge found that in such a narrow street so wide a dray drawn by a horse was the source of so much danger to the windows of the frontagers that it was unreasonable to take it there. His finding must be considered with the purpose of the journey of the dray, namely, the collection of garbage after turning the corner, and with the fact that to turn the corner involved bringing the back of the vehicle within a foot or fifteen inches of a shop window. In determining whether it was a reasonable course to take or an unwarrantable introduction of an unnecessary risk to the property of others, it is proper to take into account the kind and degree of damage likely to arise as well as the size of the vehicle, the difficulty in controlling its movements with very great precision, and the likelihood of a horse from one cause or another moving it to some extent contrary to the desires of the driver. These matters must be considered with the very small margin allowed between the tail of the dray and the shop window.

(1) (1875) L.R. 10 Ex. 261, at p. 267. (2) (1866) L.R. 1 Ex., at p. 286.

The evidence is open to the interpretation that, owing to the size of the dray, no greater clearance could be allowed than the foot or fifteen inches stated by the driver. The question whether to take such a vehicle into such a place amounted to an undue and unreasonable use of the alley is one of fact. Many of the considerations affecting its decision are matters of degree, and I do not think that a finding upon such a question should be set aside unless it appears clearly to be wrong. It was, in my opinion, fairly open upon the evidence to conclude that an unreasonable risk of serious injury was involved in turning the dray in front of the appellants' shop, and with such a foundation the learned judge's finding should, I think, be supported.

The case might have been approached by treating the nature of the casualty as sufficient evidence of negligence and as reasonably requiring an explanation (See *Ellor* v. *Selfridge & Co. Ltd.* (1); *Halliwell* v. *Venables* (2); *McGowan* v. *Stott* (3); *Mercovich* v. *Mullaney* (4); *Findlater and Bigham* v. *Dwan* (5); *Guntrip* v. *Cawood* (6)). An explanation can scarcely be regarded as excluding negligence when it involves an admission that the tail of a large and clumsy vehicle drawn by a horse is moved round within a foot or fifteen inches of a glass window. This view of the case is not, in my opinion, inconsistent with the views expressed by the majority in *Galbraith* v. *Busch* (7), the judgments in which case deserve attention.

In my opinion the appeal should be allowed and the judgment of the County Court restored.

EVATT J. The Full Court's judgment seems to have been based upon the principle that, inasmuch as it was not unlawful for the defendant's driver to enter Centre Court, Melbourne, and to remain therein, such an entrance could not constitute evidence of negligence. In my opinion it is possible for a plaintiff to establish negligence where a defendant has driven into a courtyard a horse-drawn vehicle of such large dimensions that, in the event of an accidental fright to the horse or even of negligent conduct of a third party, so little room for manœuvring and so little margin of safety are left that, despite all attempts to avoid damage, the horse or vehicle comes into collision with shop fronts bordering on the courtyard. A

(1) (1930) 46 T.L.R. 236.
(2) (1930) 143 L.T. 215.
(3) (1923) 143 L.T. 217.
(4) (1934) V.L.R. 285.
(5) (1932) N.Z.L.R. 204.
(6) (1937) N.Z.L.R. 76.
(7) (1935) 267 N.Y. 230.

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similar principle is illustrated by the difference between parking a car on level ground and doing so on a steep hill. In the latter case negligence may be imputed to the driver so parking, although the car is projected down the hill by something which in itself is either an accident or caused by negligence on the part of a third party.

Whether driving into such a courtyard does in fact establish negligence is a question of fact depending upon whether in the particular circumstances which existed a reasonable driver should have foreseen the possibility of danger or damage. In the present case County-Court Judge *Stretton* dealt with the question of principle correctly and applied the principle to the facts of the case. He said :—

> " It has been given in evidence—and I accept this—that a horse, no matter how quiet, is likely to take fright if it suddenly sees something unusual, and one must have room to manœuvre, and to attempt to control a horse once it becomes affrighted. The driver should not have taken the horse into such a place where he would have no room to act if any sudden emergency arose. To take the horse up there was dangerous, for no matter how good a horse is it may become frightened at any moment. I am of opinion that negligence is proved."

It has been said by the respondent that the method of reasoning adopted by the County Court was a " very dangerous " one because it set up a standard " that drays of a particular width should not enter narrow lanes of this kind as they have been accustomed to do." But " custom " is not in itself an answer to the plaintiff's claim. In my opinion the learned judge of first instance not only applied the right principle but reached a sound finding that the commencing point of the defendants' negligence was the entry into the courtyard.

The appeal should be allowed and the County Court's judgment restored.

McTIERNAN J. I agree that the appeal should be allowed.

The appellants had the right to have their shop front facing the street known as Centre Court, and the respondent had the right to send vehicles on that street in the performance of its lawful functions. But the law does not give any superiority to one right over the other. " Where one man's sphere of activity impinges on another man's, a conflict of interests arises. The debatable land where these collisions may occur is taken possession of by the law, which lays down the rules of mutual intercourse. A liberty of action which

is allowed therein is called a right, the obligation of restraint a duty, and these terms are purely relative, each implying the other" (*Beven* on *Negligence*, 4th ed. (1928), vol. I., p. 8). The law imposed upon the respondent the duty of taking reasonable care not to injure the appellants' shop front in exercising its right to use the street for vehicular traffic. The question therefore is whether the respondent failed in that duty. *Willes* J. said: "Negligence is the absence of care, according to the circumstances" (*Vaughan* v. *Taff Vale Railway Co.* (1)). *Bramwell* B. said: "There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person" (*Degg* v. *Midland Railway Co.* (2)). It cannot be said baldly that it is negligent to drive a wide cart along a narrow street. But what is to be said of the act of driving a cart into a street where there is barely room for it to pass and, although carefully driven, it scrapes and damages the shop fronts? If the facts do not show that it was a malicious act, they might well establish that it was a default amounting to negligence. The present case is not one of that enormity. But the learned County-Court judge found as a fact that the driver had no room to manoeuvre the dray when the horse became restive, however skilfully he controlled the horse. In my opinion it was negligent for the respondent's driver to take that cart into that street, because, however carefully he drove, he should have foreseen that, if any ordinary thing of the kind which would cause a horse to jib or become restive were encountered, it was inevitable that any such jibbing or restiveness would cause the cart to bump the appellants' shop front and damage it. To quote from an old pleading, the gist of the negligence is in driving *absque debita consideratione ineptitudinis loci* (*Mitchil* v. *Alestree* (3)).

Appeal allowed with costs. Judgment of the Full Court set aside. Judgment of the County Court restored. Respondent to pay the costs of appeal to Full Court.

Solicitors for the appellants, *Joske & Burbidge.*

Solicitors for the respondent, *Malleson, Stewart, Stawell and Nankivell.*

H. D. W.

(1) (1860) 5 H. & N. 679, at p. 688; 157 E.R. 1351, at p. 1355.
(2) (1857) 1 H. & N. 773, at p. 781; 156 E.R. 1413, at p. 1416.
(3) (1676) 1 Vent. 295; 86 E.R. 190.