[HIGH COURT OF AUSTRALIA.]

THE SOUTH AUSTRALIAN AMBULANCE TRANSPORT INCORPORATED . . DEFENDANT, } APPELLANT;

AND

WAHLHEIM . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1948.

ADELAIDE, *Sept.* 22, 23.

SYDNEY, *Nov.* 29.

Latham C.J., Rich, Dixon and McTiernan JJ.

Negligence—Highway—Collision between motor car and motor ambulance—Intersection—Duty to give way to vehicle on right—Exemption of ambulance from duty to give way—Duties of driver of ambulance—Duty to keep lookout at intersection—Road Traffic Act 1934-1945 (*S.A.*) (*No.* 2183 *of* 1934—*No.* 40 *of* 1945) *ss.* 131, 156*a*.*

Section 131 of the *Road Traffic Act* 1934-1945 (S.A.) provides that at intersections, a driver of a vehicle shall give way to vehicles on his right-hand side by decreasing speed or stopping, while s. 156*a* exempts (*inter alia*) motor ambulances from the application of (*inter alia*) s. 131. On a quiet Sunday morning a collision occurred, at the intersection of two suburban streets, between an ambulance and a motor car which was on the right-hand side of the ambulance. In an action by the motor-car driver against the Company owning the ambulance, the magistrate found that the ambulance driver was negligent in approaching the intersection at an excessive speed; that the motor-car driver was negligent in not keeping a proper lookout to his left; that this negligence was a cause of the collision; that the negligence of each driver was a contributing factor in the effective cause of the damage; and entered judgment for the defendant. On appeal, *Mayo* J. accepted the findings of negligence but did not agree that the motor-car driver's negligence had contributed to his injuries, set aside the judgment and remitted the case to the magistrate for assessment of damages.

* The relevant statutory provisions are sufficiently set out in the judgment of *Latham* C.J. hereunder.

H. C. OF A. 1948.

THE SOUTH AUSTRALIAN AMBULANCE TRANSPORT INCORPORATED v. WAHLHEIM.

Held by *Rich*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting) that the failure of the driver of the motor car to keep a proper lookout led to the collision and that the magistrate's judgment should be restored.

Traffic regulations and duty of drivers to keep lookout at intersections discussed.

Decision of the Supreme Court of South Australia (*Mayo* J.) reversed.

APPEAL from the Supreme Court of South Australia.

On a quiet Sunday morning (7th July 1946) a collision occurred at the intersection of Burnside Road and Godfrey Terrace, Burnside on the outskirts of Adelaide, between an ambulance (conveying a patient to hospital) being driven west along Godfrey Terrace by an employee of the South Australian Ambulance Transport Incorporated and a motor car being driven south along Burnside Road by Murray Emil Wahlheim, the motor car being on the right-hand side of the ambulance. The ambulance was proceeding on a steady but slight downward slope while the motor car was driving on a level street. In an action by Wahlheim in respect of the negligence of the ambulance driver the magistrate found as facts that Burnside Road was, and Godfrey Terrace was not, a main road; that the driver of the ambulance was negligent in proceeding as fast as he did towards Burnside Road; that the mere sounding of the siren did not justify the ambulance driver in maintaining that speed; that Wahlheim had not heard the siren; that Wahlheim had had the opportunity of looking to his left and seeing the ambulance sooner than he did, and that had he done so, he could have accelerated and would have had no difficulty in safely clearing the path of the ambulance; that Wahlheim was negligent in not keeping a proper lookout and that that negligence was a cause of the collision; that the collision was caused by the joint negligence of the two drivers; and that the negligence of each was a contributing factor in the effective cause of the damage. Judgment was entered for the defendant. Upon appeal to the Supreme Court of South Australia, *Mayo* J. agreed with the findings of negligence but was of opinion that it could not safely be said that if the plaintiff had accelerated sooner, he would have passed in front of the ambulance, and therefore it should not have been held that the plaintiff's negligence had contributed to his injuries. Judgment for the defendant was set aside and the case remitted to the magistrate for assessment of damages.

From this decision The South Australian Ambulance Transport Incorporated appealed to the High Court.

Ward K.C. (with him *R. H. Ward*), for the appellant. *Mayo* J. was not justified in reversing the special magistrate's finding of fact on the question of lookout, that is the finding that the plaintiff should have seen the ambulance long before he did. Once you admit that the plaintiff's lookout was defective, it is inference, not conjecture, to say that this omission contributed to the accident (*Jones* v. *Great Western Railway Co.* (1)). As to traffic on main roads and subsidiary roads (though I dispute that this applies here) I refer to *M'Nair* v. *Glascow Corporation* (2) ; *Hutchison* v. *Leslie* (3). The doctrine of last chance does not apply (*The Eurymedon* (4) ; *Boy Andrew* v. *St. Rognvald* (5)). There was no justification for finding excessive speed on the part of the ambulance. The urgency of an errand is a factor to be taken into account in deciding what speed is reasonable (*Daborn* v. *Bath Tramways Motor Co. Ltd.* (6)).

Rymill (with him *J. P. Boucaut*) for the respondent. Though not entitled entirely to disregard his left side, the plaintiff's first duty was to his right side (*Robinson* v. *Creaser* (7)). As to the presumption that other drivers will not be negligent see *Hart* v. *Bratchell* (8). Despite the exemption of ambulances from s. 131, the driver thereof must know that other road users will be observing that section and expecting him to observe it. He still has his common-law duty and there are various sections of the Act from which ambulances are not exempted. The policy of the legislation seems to be to exempt ambulances from pettifogging delays but not from provisions aimed primarily at preventing danger. As to the priority of traffic on main roads I refer to *Municipal Tramways Trust* v. *Thomas* (9) ; *Dunn* v. *Beevor* (10) ; *Municipal Tramways Trust* v. *Wallman* (11). *Daborn* v. *Bath Tramways Motor Co. Ltd.* (6) is based on national emergency. With it should be contrasted *Ward* v. *London County Council* (12).

Ward K.C., in reply. *Ward* v. *London County Council* (12) is distinguishable because the driver was explicitly directed to obey road signs.

cur. adv. vult.

(1) (1930) 47 T.L.R. 39, at p. 41.
(2) (1923) S.C. 397.
(3) (1927) S.C. 95.
(4) (1938) P. 41.
(5) (1948) A.C. 140.
(6) (1946) 2 All E.R. 333.
(7) (1948) S.A.S.R. 47.
(8) (1938) S.A.S.R. 141.
(9) (1937) S.A.S.R. 514.
(10) (1937) S.A.S.R. 386.
(11) (1920) S.A.L.R. 325, at pp. 327-329.
(12) (1938) 2 All E.R. 341.

H. C. OF A. 1948.

THE SOUTH AUSTRALIAN AMBULANCE TRANSPORT INCORPORATED v. WAHLHEIM.

Nov. 29.

The following written judgments were delivered :—

LATHAM C.J. On a Sunday morning (7th July 1946) the respondent was driving a Dodge motor car, 1933 model, on the outskirts of Adelaide south along Burnside Road towards the intersection of that road with Godfrey Terrace, which crosses it at a right angle. An ambulance driven by one R. G. Markham, an employee of The South Australian Ambulance Transport Incorporated (the appellant company) was taking an urgent case to hospital. The ambulance was driving west along Godfrey Terrace East towards the intersection. Thus the ambulance was on the left of the motor car and the motor car was on the right of the ambulance. The car and the ambulance came into violent collision at the intersection. The plaintiff was injured and his car was severely damaged. He sued the appellant company in the Local Court. The learned magistrate found that the ambulance was driving too fast, so that the driver could not stop in time to avoid the plaintiff's car, and that the driver was accordingly guilty of negligence ; that the plaintiff was also guilty of negligence in not looking to his left sooner than he did ; that if he had looked sooner he would have been able to avoid a collision by accelerating at an earlier time than that at which he did in fact accelerate ; that therefore, though the defendant's driver was negligent, it was the plaintiff's negligence which brought about the accident, and accordingly the plaintiff could not recover.

Upon appeal *Mayo* J. agreed with the findings of negligence on the part of both drivers, but was of opinion that it could not safely be said that if the plaintiff had accelerated sooner he would have passed in front of the ambulance, and that therefore it should not be held that the plaintiff's negligence had contributed to his injury. He accordingly made an order remitting the case to the local magistrate for assessment of damages.

The customary (and necessary) estimates of speed and distance were made, and the customary (and necessary) calculations, reducing miles per hour to feet per second, were also made. The learned magistrate found that the driver of the ambulance put on his siren about one hundred yards before the intersection, and that it sounded continuously up to the moment of collision. But he also found that neither the plaintiff nor the other persons in the car with him heard the siren. The driver of the ambulance first looked to his left, where he had a clear view of the southern part of Burnside Road, and then to his right, where he saw the plaintiff's car. The magistrate found that the driver of the ambulance saw the car when the ambulance, travelling at the rate of thirty to thirty-five miles an hour, was about a chain away from the eastern

edge of Burnside Road. The driver said that he was only twenty feet from the eastern kerb of Burnside Road when he saw the car —but he must have been wrong, as the skid mark hereinafter mentioned showed. The car was then (the magistrate found) about twenty feet north of the northern building line of Godfrey Terrace East. The driver of the ambulance immediately applied his brakes hard, but could not avoid the collision, which took place on the intersection about fourteen feet into Burnside Road. There was a straight skid mark made by the ambulance fifty-two feet long running almost to the point of impact. The plaintiff's car was struck on the rear door on the near side and was thrown thirty feet from the point of impact, as was shown by the relative positions of the vehicles after the collision. The ambulance must have been travelling at a high speed at the moment of the collision to knock the plaintiff's car thirty feet away and to turn it over and leave it with the bonnet facing north-west instead of south. Thirty-five miles per hour is fifty-two feet per second. The ambulance slowed down from that speed, but the time available from the moment when the driver of the ambulance saw the car to the moment of the collision could not have been more than about two seconds and was probably less, because the result of the impact of the ambulance on the car shows that the ambulance must have had a high speed at the moment of collision. The driver of the ambulance acted promptly and the brakes were in good order, but it was found that he was driving so fast that he had disabled himself from stopping at or before the intersection.

It is pointed out, however, that the ambulance is what is called an exempt vehicle under the *Road Traffic Act* 1934-1945 (S.A.). Under s. 156 (*a*) of that Act fire-brigade vehicles, motor ambulances and police vehicles are, when in use in the course of duty, exempt from certain provisions of the Act. Among these provisions is s. 131. Section 131 provides in substance that at intersections drivers of vehicles shall give way to vehicles on the right by decreasing speed or by stopping. This is a very important rule for procuring safety on the road, but in South Australia it does not apply to an ambulance taking a case to hospital. But s. 131 is a section creating an offence, and the exemption of ambulances from the application of the section, while it prevents any prosecution of the driver of an ambulance for failing to comply with the section, does not entitle an ambulance to drive ahead regardless of other traffic. A duty of care exists in the case of exempt vehicles as well as in the case of ordinary vehicles, though the standard is not the same in each case. The driver of an exempt vehicle must be taken to

H. C. OF A. 1948.

THE SOUTH AUSTRALIAN AMBULANCE TRANSPORT INCORPORATED v. WAHLHEIM.

Latham C.J.

know that drivers on his right will expect to be given the right of way and will not be as prepared to stop as in the case of drivers with traffic on their right. The driver of an ambulance must drive upon the assumption that other people will observe the rules of the road; that they will accordingly look out to their right (s. 131) and that they will expect to be given the right of way by vehicles on their left. Thus the fact that s. 131 does not apply to ambulances does not relieve the defendant of liability for negligence if in all the circumstances there was a failure to exercise due care.

The driver of the ambulance was subject to s. 120 of the Act—not to drive without due care or attention or reasonable consideration for other road users; and to s. 121—not to drive recklessly or at a speed or in a manner dangerous to the public. Another section of the Act which applies to ambulances is s. 43, which provides that a person who drives a motor vehicle at an excessive speed on any road shall be guilty of an offence, and that it shall be prima-facie proof that he drove at an excessive speed if it is proved that he drove on a road in any municipality, town or township at a greater speed then twenty-five miles an hour. The ambulance was being driven at a speed greater than twenty-five miles an hour, and therefore the driver was prima facie committing an offence. This is prima-facie evidence that he was guilty of negligence: *Henwood* v. *Municipal Tramways Trust* (*S.A.*) (1).

I agree with the finding of the learned magistrate, accepted also by *Mayo* J., that the driver of the ambulance was guilty of negligence.

The learned magistrate found that the plaintiff was driving his car towards the intersection at a speed of between fifteen and twenty miles an hour and that this speed was not excessive. The northern edge of Godfrey Terrace West is about fifteen feet further north than the northern edge of Godfrey Terrace East. Accordingly the plaintiff was able to see right along Godfrey Terrace West before he could see along Godfrey Terrace East. At the corner of Burnside Road and Godfrey Terrace East there was a high pittosporum hedge overhanging the footpath and obscuring the view. As the plaintiff approaced the intersection he looked to his right, as he was bound to do, and saw that Godfrey Terrace West was free of traffic. He then turned and looked to his left. But it is evident that he did not do this immediately, because he gave evidence that in fact he saw the ambulance only when it was ten or twelve feet away from him, that is, when he was actually on the intersection. If he had looked to his left sooner he would have

(1) (1938) 60 C.L.R. 438.

seen the ambulance sooner. The plaintiff accelerated when he saw the ambulance but did not succeed in avoiding a collision. The learned magistrate held that the plaintiff failed in his duty because he was too slow in looking to his left, and that if he had looked to his left sooner he could have accelerated sooner and the collision would not have taken place. *Mayo* J., however, was of opinion that it could not be said with a sufficient degree of certainty that if he had accelerated the accident would not have happened.

It is always the duty of a driver of a motor car not to drive at a speed which is excessive in the circumstances. When a driver is approaching an intersection his duty is to look to his right and to give way to vehicles on his right. The mere fact that he does not look out to his left does not in itself constitute negligence. It has so been held in two Full Court decisions in Victoria: *McAsey* v. *Lobban* (1); *Huxtable* v. *Williamson* (2); and see *Robinson* v. *Creaser* (3). A driver is entitled to act upon the assumption that other drivers will observe the law and that they will respect the rights which the law gives to him. In the Victorian cases quoted the relevant law required a driver to give way to vehicles on his right. This provision was interpreted as excluding any obligation to look out to his left. In the South Australian section, however, the terms are more explicit and they make it clear that the driver on the right has the right to continue on his course at an intersection without change of speed. Section 131 (1) of the *Road Traffic Act* (*S.A.*) is in the following terms:—"When two vehicles are approaching the junction or intersection of two or more roads in such circumstances that there is a reasonable possibility that they might arrive at the same point simultaneously, or that a dangerous situation might otherwise be created, the rider or driver of the vehicle who has the other vehicle on his right shall either decrease the speed of his vehicle to such an extent, or stop his vehicle for such time, as is necessary to allow the vehicle on his right to continue on its course in front of his vehicle without change of speed: Provided, etc." This provision gives a right of prior passage to the right-hand vehicle. The exercise of such a right does not involve any breach of duty to a driver on the left.

If a driver is held to be bound in all cases to look to his left as well as to his right, even though at a later stage, the value of the rule that drivers should give way to traffic on the right, and that therefore traffic on the left should give way to them, would be greatly reduced, if not destroyed. In the present case the plaintiff

(1) (1938) V.L.R. 140.
(2) (1946) V.L.R. 516.
(3) (1948) S.A.S.R. 47, at p. 55.

H. C. OF A. 1948.

THE SOUTH AUSTRALIAN AMBULANCE TRANSPORT INCORPORATED v. WAHLHEIM.

Latham C.J.

has been found guilty of negligence because he did not look to his left as well as to his right. I do not agree that the fact that the plaintiff did not look to his left after looking to his right is evidence of negligence.

But this explanation of the significance of the rules of the road does not mean that a driver is entitled to ignore traffic on his left and to drive as if it did not and could not exist. If he sees such traffic or has warning of it he is under a duty to exercise care to avoid causing a situation of danger from which injury may arise. He is not entitled to run into danger himself or, by failing to exercise due care, to place others in a position of danger, even if those others are breaking the law.

But is the obligation of the parties changed if the vehicle on the left is exempt from the duty to give way to vehicles on its right ? In such a case the position is in my opinion accurately stated by *Martin* J. in *Huxtable* v. *Williamson* (1) where his Honour said with reference to Victorian regulations requiring a driver to give way to traffic on the right at certain intersections :—" The regulations do not purport to cover all the conduct of a prudent driver but if he observes them and acts in all other respects, other than looking to his left as he approaches an intersection, as a prudent driver should, he will not normally be guilty of negligence towards the driver of a vehicle approaching from his left should the two vehicles collide. This follows from the fact that he is entitled to proceed in the belief that if there is another vehicle on his left its driver will obey the law and give him the right of way, unless he has notice that he is not so doing or that some vehicle, such as a fire engine, ambulance or police patrol car, which is exempted from the particular law, is approaching. If, however, either by looking to his left or by hearing a warning from that quarter, he has reasonable notice that a driver on that side is probably about to disregard the regulation, by driving on without giving him the right of way, he then has to take whatever action is reasonable to avoid the consequences of the other's default and that may entail his permitting that other to have the right of way." If in the present case the plaintiff had had warning of the approach of the ambulance and had ignored it he would have been guilty of negligence, but the magistrate has found that the plaintiff did not hear the siren of the ambulance. There were various reasons which might explain this fact. The plaintiff was slightly deaf ; the windows of the car on the left were closed ; there was an intervening hedge ; and the period of time during which the siren was sounding was very short. The magis-

(1) (1947) V.L.R. 341.

trate found that there was no negligence on the part of the plaintiff in not having heard the siren, and in my opinion this conclusion should be accepted by this Court, as it was by *Mayo* J. When the driver ultimately saw the ambulance only ten or twelve feet away from him he could do nothing. In my opinion no negligence on the part of the plaintiff was established and for this reason the case should be remitted to the magistrate for assessment of damages.

But, even upon the magistrate's finding that the plaintiff was guilty of negligence in not looking to the left at an earlier stage, the evidence does not show, in my opinion, that if he had seen the ambulance sooner the exercise of due care on his part would have prevented the collision. The ambulance struck the car about seven or eight feet from the rear of the car. If the car had been another ten or twelve feet further on its course there would have been no accident. If the plaintiff had seen the ambulance at the moment when the driver of the ambulance saw the plaintiff's car, and had immediately accelerated and the car had instantaneously responded, he perhaps could have safely passed in front of the ambulance, though it would have been a near thing. The plaintiff was found by the learned magistrate guilty of contributory negligence because he did not look sooner at a time when he could have accelerated so as to avoid the accident. If, contrary to the opinion which I have expressed, the plaintiff was under a duty to look out to his left, the proper question to ask is not whether the plaintiff could, if he had looked sooner, have accelerated so as to avoid the accident. In my opinion the proper question to ask is what an alert and careful driver would have done in the circumstances. On the findings of the magistrate the plaintiff could have seen the ambulance when he was some twenty feet north of the northern boundary of Godfrey Terrace East. He did see it only when he was four feet south of that boundary. Thus, if he had immediately looked to his left after he saw that Godfrey Terrace West was clear of traffic, he would have had about twenty-four feet of travel in which to act in order to avoid a collision. At twenty miles per hour the speed per second is thirty feet, and at fifteen miles per hour twenty-two feet per second. Thus he had no more than about a second in which to make up his mind and act. The plaintiff might have accelerated and might have missed or been missed by the ambulance. He might have swerved and, again, might have been missed by the ambulance, or might have run into it, or might have turned over. Further, he might have tried to stop and might or might not have succeeded. Accordingly I am of opinion that, while the evidence shows that the plaintiff might have avoided the

H. C. OF A. 1948. THE SOUTH AUSTRALIAN AMBULANCE TRANSPORT INCORPORATED v. WAHLHEIM. Latham C.J.

collision, notwithstanding the negligence of the defendant, it cannot safely be concluded that, if he had seen the ambulance sooner and had done the best that a prudent driver could have done, he would even probably have avoided being hit by the ambulance. Therefore, even if the plaintiff was guilty of contributory negligence, the defendant did not discharge the onus of proving that such negligence was the cause of his injury. In my opinion the appeal should be dismissed upon the grounds that the defendant was guilty of negligence which caused the injury of the plaintiff; that the plaintiff was not negligent; alternatively, that if he was negligent, *Mayo* J. rightly held that his negligence was not the cause of his injury.

RICH J. The opinion I formed at the hearing of this appeal has been confirmed by further consideration of the evidence in the case and I think it a fair conclusion on the facts before the Court that the failure of the plaintiff to keep a proper lookout led to the collision. The customary " rules of the road " and traffic regulations are perhaps material matters to be considered in accident cases, but they cannot be regarded as determining factors.

I adopt with respect the opinion of Lord *Wright* in *Tidy* v. *Battman* (1) " It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts."

In accident cases it is impossible, and I think, improper to lay down hard and fast rules as to what conduct constitutes negligence. If, for example, a plaintiff has been guilty of a breach of a traffic regulation and can be considered therefore guilty of negligence, it would be a sad commentary on the law of negligence that he could not succeed in his claim for damages, where it was obvious that the defendant's negligence was plainly the cause of the plaintiff's damage. I might add in passing that one cannot apply rules of traffic which are considered necessary in city areas to conditions of traffic in country districts.

I feel constrained on the evidence to accept the finding of the learned magistrate in the Local Court and accordingly, in my opinion, this appeal should succeed.

DIXON J. This appeal concerns a street accident which took place on a quiet Sunday morning in July 1946 at the intersection of two streets or roads in an Adelaide suburb. Two vehicles

(1) (1934) 1 K.B. 319, at p. 322.

collided, an ambulance and a sedan car, a 1933 Dodge. The present respondent, who is the plaintiff in the action, drove the sedan car. Riding in the car with him were his son, another young man, and an infant grandchild. The front of the ambulance struck the left-hand side of the sedan and turned it round and over. The sedan was struck at about the rear door. The plaintiff was hurt but apparently the other occupants of the car escaped injury. The ambulance was conveying a patient to hospital. It was an urgent case and the ambulance approached the intersection at some speed, with the siren sounding, as it has been found. The three grown occupants of the car say that they did not hear the siren and in this they have been believed. The apparent incompatibliity of the two findings is explained upon the ground that all the windows of the sedan were shut except that by the driving seat, which of course was on the opposite side from the direction whence the sound came, and that moreover the hearing of the plaintiff who sat in the driver's seat was defective. Be that as it may, the plaintiff has been acquitted of contributory negligence in failing to hear the siren. The road upon which the plaintiff was driving his car is said to be four or five miles long and, while not a main highway, is regularly used by traffic travelling between distant points, whereas the cross street upon which the ambulance was driving is an ordinary suburban residential street and extends only about six hundred yards from the crossing in one direction and about half a mile in the other. The patient had been picked up at a house in this street about a quarter of a mile from the intersection. There is a steady but not very steep slope down to the intersection. The other road is level. The running surface of both roads is bitumen. The ambulance drove on the crown of the road, and as the driver approached the crossing he had a clear view on his left hand of the the other road over a vacant allotment. But on his right hand, whence the plaintiff's sedan was in fact approaching the intersection, his view was obstructed by some pittosporum trees which grew out over the footpath at the corner. When he did see the sedan he put his brakes on hard. The road showed braking marks for fifty-two feet back from the point where the ambulance came to a standstill, and that was little, if any, further than the point of impact. The ambulance was said to have gone four feet further than the point of impact. It may be assumed that at a standstill the front wheels were not more than six feet beyond it. It seems safe to infer that the driver of the ambulance saw the sedan when he was not less than seventy feet from the point of collision. That point has not been fixed with exactness by the witnesses, but the ambulance

H. C. OF A. 1948. THE SOUTH AUSTRALIAN AMBULANCE TRANSPORT INCORPORATED v. WAHLHEIM. Dixon J.

maintained a direct course while the sedan veered a little to its right, with the result that they met somewhat to the right of the centre of the road upon which the sedan was travelling. The continuation of the street upon which the ambulance was proceeding is not exactly opposite the same street on the other side. The fence lines or building lines of the respective parts of the street would, if produced, lie fifteen feet apart. The fence line of the part on the sedan's right, that is the continuation of the street, would be nearer to the sedan as it approached. That means that the plaintiff would draw level with the fence line of the continuation on his right fifteen feet before he drew level with the fence line of the street on his left, on which the ambulance was driving. As the South Australian rule is that vehicles give way to others crossing from the right, the plaintiff says he looked to his right first. There is a suburban hedge or fence at that corner, so that he could not see across the premises at the corner. He did not look to his left until the ambulance was nearly upon him. In the Local Court, where the action was tried, he said it was only ten or twelve feet away from him. He considered that the front of his sedan had at that instant crossed beyond the line of the edge of the bitumen of the intersection street on his left if that line had been produced or prolonged. He said that it was four feet over it. After a view had been had he was further questioned upon this point, and he firmly adhered to his opinion that his car had proceeded as far as this into the intersection before his glance to his left showed him the oncoming ambulance, then only ten or twelve feet away. It was agreed that the distance of this point or line from the fence alignment of the intersecting street, if produced, is fifteen feet. If the assumption be adopted that the ambulance was seventy feet from the point of collision when the sedan came into the ambulance driver's line or field of vision past the corner and the overhanging pittosporum, it would mean that there was at least forty feet of distance through which it was possible for the sedan to travel with the ambulance within the plaintiff's field of potential vision before the plaintiff became aware of its presence. It is true that if he were hugging the kerb perhaps the distance might be reduced. But he said that he was travelling about four and a half feet out from the kerb, and it is unlikely that it was less. It is of course not possible to estimate with exactness how far the plaintiff had proceeded when the ambulance driver saw him, but it is very probable that he was forty feet at least from the point of collision.

The finding of the Local Court was that the plaintiff had an opportunity, after having looked to his right, to look to his left well

before he did and to see the ambulance approaching at a fast speed and that, if he had done so when he ought, he could have avoided the accident by accelerating. On the ground that his neglect to look to the left earlier amounted to contributory negligence, he was defeated. An appeal to the Supreme Court was allowed by *Mayo* J. on the ground that accelerating would not, so far as appeared, have avoided the accident. But his Honour said that it was beyond the possibility of controversy that the plaintiff was wanting in due care in that he did not observe the ambulance earlier and that the finding of the Local Court to that effect was not criticized by counsel upon the appeal to the Supreme Court. A finding of primary negligence on the part of the ambulance driver in approaching the crossing at too high a speed was made in the Local Court and sustained in the Supreme Court.

The speed ascribed to the ambulance before the brakes were applied was between thirty and thirty-five miles per hour. The sedan was found to be travelling at between fifteen and twenty miles per hour. The ambulance was limited by a governor to forty miles per hour, so it was said in evidence, but it seems likely that the speed of the vehicle was greater than thirty to thirty-five miles per hour. Apart from *a priori* probabilities, the length of the braking marks suggests it. It was a modern Ford chassis with four-wheel brakes.

On the other hand it is difficult not to be sceptical about the siren being unheard though sounded. The evidence that it was switched on and was sounding is strong. Of course the wail of a siren rises and falls and it may not have been long switched on. Indeed, a by-stander said that the distance through which the ambulance travelled with the siren sounding was one hundred yards from the corner. That might mean only five seconds. But a not unattractive explanation of the accident is that the plaintiff looked longer than he might up the street to his right because the noise of the siren seemed to come from that direction, as it would or might if it entered the car only from the open window on his right. That would not necessarily mean negligence on the plaintiff's part. No doubt he might have stopped, but it would depend on the stage at which he heard the siren whether he did wrong in not attempting to stop. In placing the plaintiff's speed at fifteen to twenty miles per hour the Local Court may have been guided by what an inspection of the road revealed as well as by the literal testimony, but it seems a lower rate of speed than might have been expected. However, these are speculations in which it is perhaps unwise for a second court of appeal to enter.

H. C. OF A. 1948. THE SOUTH AUSTRALIAN AMBULANCE TRANSPORT INCORPORATED v. WAHLHEIM. Dixon J.

Both the Local Court and the Supreme Court held that the speed at which the ambulance approached the intersection, notwithstanding the use of the siren, amounted to actionable negligence. They both found that the plaintiff had failed in due care in his approaching the crossing without looking earlier to his left. I think that in our turn we should accept these conclusions of fact. An ambulance occupies a special position under the traffic laws and under the common law of negligence the nature of the services an ambulance performs may enable the driver to do what the drivers of other vehicles could not do without incurring liability. But even so the finding that the speed at which the ambulance approached the crossing was unduly dangerous is supported by all the circumstances. As for the plaintiff's want of vigilance I have felt more doubt. If he did not hear the siren, his reliance on other traffic not entering the busier street from the side street and his neglect to look earlier do not strike my mind as so obviously negligence. But upon this point, which after all is one of fact, the conclusions of both courts below concur. The learned special magistrate had viewed the place where the accident occurred and must be taken to have considered such features disclosed by a view as might make it reasonable for a driver proceeding along the more important thoroughfare to maintain an ordinary lookout ahead without definitely turning his gaze into the two parts of the intersecting street or with a glance to the right only. *Mayo* J. treated the negligence of the plaintiff in failing to look earlier to his left as incontrovertible. In these circumstances I think that we should accept the conclusion.

In the same way I think that we must accept the very definite finding of the special magistrate that the occupants of the car did not hear the siren notwithstanding that it was sounded.

I cannot agree in the view that s. 131 (1) relieved the plaintiff of responsibility for exercising a degree of vigilance with reference to possible traffic emerging on his left. No doubt in determining whether a lack of vigilance in this respect amounts to negligence it is proper to take into account the effect of that section. For under its provisions a vehicle, unless it is a fire engine or the like or a police car or an ambulance, must as it comes to an intersection give way to a vehicle on its right hand. But it does not follow that a driver of what may be called the right-hand vehicle always behaves reasonably in assuming without looking that in view of the common behaviour of motorists in consequence of this provision he may safely drive over the intersection. In any given case that must depend upon the circumstances. Whether a particular act

or omission is unreasonable and amounts to contributory negligence will doubtless often depend upon the rules, conventional or statutory, which other traffic may safely be expected to observe. What traffic uniformly does may be dictated by statute; but whether conduct arising from reliance on the expectation that all traffic will so behave is reasonable must depend less upon the state of the law than upon the practice which is in fact set up by the law. For laws may speak in vain. In the present case *Mayo* J. treated s. 131 (1) read with s. 156*a* as provisions the effect of which must be taken into account in considering the reasonableness of what the plaintiff did and omitted to do, but not as relieving the plaintiff altogether of the need of exercising vigilance as to what might happen on his left hand. I am not sure whether his Honour's judgment in *Robinson* v. *Creaser* (1) proceeds upon this view of the matter but if not I prefer his Honour's treatment of the question in the present case. If the decisions of the Supreme Court of Victoria in *McAsey* v. *Lobban* (2) and *Huxtable* v. *Williamson* (3) are understood as holding that upon the facts of those cases it was not incumbent upon the party charged with contributory negligence or negligence to look to his left because it was reasonable for him to expect that his passage would be left clear, that would be a view consistent with the opinion I have expressed. The finding of both courts that in the circumstances of the present case the plaintiff was wanting in proper vigilance in failing to see the ambulance earlier, though on his left, is not inconsistent with s. 131 (1), as qualified by s. 156*a* and it is one with which I think this Court ought not to interfere.

Thus the appeal should be decided on the footing that the plaintiff did not hear the warning of the ambulance and did negligently fail to look to the left at a time when he ought to have done so. I shall deal with it on these hypotheses.

The case comes back then to the question whether if he had looked in due time towards his left, the plaintiff would still have been in such a position that by the proper management of his car he might have avoided the accident. I say by the proper management of the car because in an emergency brought about by the defendant's negligence a plaintiff is not required to exhibit more than ordinary skill and judgment. On the other hand, when by unreasonable inattention a plaintiff has disqualified himself from taking any measure to avoid the consequences of the defendant's negligent act, the defendant in order to make out a plea of contributory

(1) (1948) S.A.S.R. 47.
(2) (1938) V.L.R. 140.
(3) (1946) V.L.R. 516.

H. C. OF A. 1948.

THE SOUTH AUSTRALIAN AMBULANCE TRANSPORT INCORPORATED v. WAHLHEIM.

Dixon J.

negligence need not prove more than that the situation was such as to admit of remedy by exertions on the part of the plaintiff which a reasonable man might be expected to put forward or by skill he might be expected to show.

Between them the courts below have decided that it did not sufficiently appear that, had the plaintiff kept a proper lookout, he could, by any reasonable course open to him, have avoided a collision. In the Local Court it was held that by attempting to stop the plaintiff could not have prevented the sedan coming into the path of the ambulance. But the learned special magistrate who constituted that court said that he was quite certain that, had the plaintiff looked at a time when it was his duty to look, the plaintiff could have accelerated on seeing the ambulance and would have had no difficulty in safely clearing its path. In the Supreme Court, however, *Mayo* J., after a careful examination of the factors of distance, speed and rate of acceleration involved in this hypothesis, rejected it. His Honour did so on the ground finally that the reasoning (to which that examination gave rise) led him to think that the defendant had not proved that if the plaintiff had maintained a proper lookout and had acted reasonably in relation to what he saw he would have avoided a collision. His Honour, substantially on grounds of want of proof of the material factors, had rejected also the hypothesis that the plaintiff might have avoided a collision by swerving, or turning the car, with or without an application of the brakes or with or without accelerating.

The result of these views is to establish judicially that a driver of a 1933 Dodge sedan travelling at twenty miles per hour, which, if it maintains its course and speed, will be hit over the rear door upon reaching a point forty feet ahead, cannot avoid a collision by any management of his car that can reasonably be expected. I suppose that the ambulance would have cleared the car altogether had the car travelled ten feet less or seven feet more even without an outward swerve. To absolve the plaintiff in this way from any responsibility for the collision it is necessary to conclude that the driver of such a vehicle can do nothing to avoid another vehicle which he sees pursuing a course that will cross his course forty feet ahead of him and is being brought to a standstill with brakes hard on. The conclusion must be that he can do nothing to avoid it notwithstanding that the other vehicle is in the result brought to a standstill with its front wheels not more than six feet beyond the path the first car was taking.

It seems to me that this conclusion is inconsistent with common experience of what can be done in the management of a car by a

driver of ordinary skill and reasonable alertness whose instinctive responses to a traffic situation are normally developed. The plaintiff's failure to keep a proper lookout disabled him from doing anything to avoid a collision. I think that there is no sufficient reason for holding that nevertheless the situation was such as to make it impossible to say that he could have avoided the collision if his want of vigilance had not disqualified him from trying.

I would therefore allow the appeal and restore the judgment of the Local Court.

McTIERNAN J. I agree with the judgment of my brother *Dixon*.

Appeal allowed with costs. Order of Supreme Court discharged and in lieu thereof judgment of Local Court restored. Plaintiff to pay costs of defendant in Supreme Court.

Solicitors for the appellant, *Ward, Mollison, Litchfield & Ward.*
Solicitors for the respondent, *Browne, Rymill & Stevens.*

C. C. B.