[HIGH COURT OF AUSTRALIA.]

ALLDRIDGE . . . . . APPELLANT;
PLAINTIFF,

AND

MULCAHEY AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 15, 16.

SYDNEY, *Aug.* 30.

McTiernan, Webb and Kitto JJ.

Negligence—Contributory negligence—Highway—Accident—Pedestrian walking on roadway at night—Motor car proceeding in same direction—Wet weather—No windscreen wiper—Driver's vision obscured by raindrops on windscreen magnified by bright headlights of approaching car—Knowledge of driver that roadway used by pedestrians—Duty of driver—Duty of pedestrian walking on roadway at night.

A pedestrian walking along a bitumen roadway, two to three feet from the edge thereof, at night, after it had been raining, was knocked down by a motor car proceeding in the same direction. He was aware of the car's approach and also observed another motor vehicle coming in the opposite direction with bright headlights. The driver of the car changed his course from the centre of the road to his left-hand side, reduced his speed from twelve to ten miles per hour and saw the pedestrian when six feet away, but although he then swerved sharply to his right the car struck the pedestrian. There was no windscreen wiper on the car and the driver's vision was obscured by raindrops on the windscreen magnified by the headlights of the approaching vehicle.

In an action against the owner and the driver of the car the trial judge found that the driver drove the car at a time and place when and where he should have known that there was a possibility of pedestrians walking on the roadway. Holding that a pedestrian had a right to walk on the roadway, but was under a duty to take care of his own safety, the trial judge in the result found that the collision was caused by the combined negligence of the pedestrian and the driver and entered judgment for the defendants.

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Held, by *McTiernan* and *Webb* JJ. (*Kitto* J. dissenting), that the driver was guilty of negligence but that the plaintiff in walking on the roadway was not, in the circumstances, guilty of contributory negligence and judgment should have been given for the plaintiff.

Decision of the Supreme Court of Queensland (*Matthews* J.) reversed.

APPEAL from the Supreme Court of Queensland.

The plaintiff in an action in the Supreme Court of Queensland claimed damages, against both the owner and driver of a motor car, in respect of injuries which he alleged were caused by the negligence of the driver. The defendants by their defence denied negligence and set up that the collision was caused by the plaintiff's own negligence or his contributory negligence.

The accident occurred in Wood Street, Warwick about 7 p.m. on the evening of 9th September 1949. The plaintiff was walking along the bitumen surface of the roadway intending to go to St. Mary's Church. The motor car was proceeding in the same direction, the driver having the same church as his destination. During the day there had been heavy rain, which made the footpath very muddy. The footpaths were gravel. The middle of the road was bitumen and the sides were gravel. On the plaintiff's case the footpath was so muddy that pedestrians could hardly use it, so he walked along the bitumen until he saw two cars, one coming from behind him and the other approaching him. He then went off the bitumen and walked on the gravel where he was struck from behind by the defendant's motor car. In his evidence the driver said that he saw an on-coming car with headlights "flashing" at him and he changed his course from the centre to the left-hand side of the bitumen and reduced his speed from twelve to ten miles per hour. Then he saw a pedestrian about six feet away in front of the car. There was no time to sound the horn and he swerved immediately to the right and stopped the car, but the car struck the plaintiff. Asked why he did not see the plaintiff, the driver said that he could not account for it. He also said that he had no windscreen wiper and that there were globules of water on the windscreen, which increased the dazzling effect of the lights of the on-coming car.

The action was tried by *Matthews* J. without a jury who found that the collision was the result of the combined negligence of the plaintiff and the defendant driver and entered judgment for the defendants.

The trial judge found that the plaintiff was walking on the bitumen at a distance of about two or three feet from the edge of

the bitumen when he was struck by the defendant's car; that the plaintiff knew the defendant's car was being driven along the roadway in the same direction and that he knew another car with bright headlights was approaching from the opposite direction; that the driver's vision was obscured by drops of water on the windscreen magnified by the headlights of an approaching car; that the defendant's car had no windscreen wiper and that the driver drove the car at a time and place when and where he should have known there was a possibility of pedestrians walking on the roadway.

From this decision the plaintiff appealed to the High Court.

D. Casey, for the appellant. The trial judge took a wrong view of the duty imposed on the plaintiff as a pedestrian walking on the roadway. His view amounted to a misdirection as he held that the plaintiff could not disregard the negligence of the defendant if the plaintiff walked on the roadway with the knowledge that the motor car was approaching from behind. There was nothing to indicate to the plaintiff any danger from the defendant's car. There was no indication that the driver was driving negligently: *Burston* v. *Melbourne and Metropolitan Tramways Board* (1); *Wheare* v. *Clarke* (2). The driver admitted in evidence that he did not see the plaintiff and could not account for it. He was driving on a wet night with a faulty windscreen which impaired his vision. The doctrine of last opportunity was not considered by the trial judge. Had the car been fitted with a windscreen wiper, the driver by keeping a proper lookout would have seen the plaintiff. By his negligence he deprived himself of the last opportunity: *Joseph* v. *Swallow & Ariell Pty. Ltd.* (3). Even if the plaintiff were walking on the bitumen there would be no negligence on his part, as the footpath was muddy after the heavy rain. If he were negligent, his negligence did not contribute to the collision. The only contributory negligence suggested was that the plaintiff failed to look after his own safety. This Court must make up its own mind on the evidence and give its own decision making any inferences necessary: *Mersey Docks and Harbour Board* v. *Procter* (4).

J. G. Garland, for the respondents. There was negligence on the part of the plaintiff by walking on the roadway on a wet night with knowledge that a car was approaching and paying insufficient attention to the circumstances existing on the road at the time.

(1) (1948) 78 C.L.R. 143.
(2) (1937) 56 C.L.R. 715, at p. 723.
(3) (1933) 49 C.L.R. 578.
(4) (1923) A.C. 253, at p. 258.

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In his evidence he said he walked off the bitumen and the trial judge found against him on that fact. This was an acknowledgement by the plaintiff as to what was the duty of a prudent pedestrian walking on the roadway in those circumstances. A person may be guilty of negligence by not paying attention to an oncoming vehicle. As the driver was dazzled by the headlights of another vehicle the real cause of the collision was the negligence of the plaintiff: *Taylor* v. *Main Roads Board* (1). The driver was entitled to assume that a pedestrian would get out of the way of his car. Though the windscreen of the car was defective, the driver was entitled to pay attention to the vehicle proceeding in the opposite direction. The driver did not have the last opportunity of avoiding the accident: *Commissioners for Executing Office of Lord High Admiral of United Kingdom* v. *S. S. Volute (Owners)* (2); *Davies* v. *Swan Motor Co. (Swansea) Ltd.* (3). See also article on *Negligence* by Professor *Paton*, 23 *Australian Law Journal* 158, at p. 166, where the doctrine of "Last Clear Chance" is discussed. The plaintiff was guilty of continuing inattention up to the time of collision with knowledge of danger from two motor cars. There was no negligence on the part of the driver in pulling over to his left-hand side: *Lee Transport Co. Ltd.* v. *Watson* (4). It was the immediate duty of the driver in the circumstances to keep to his proper side of the road: *Smith* v. *Pike* (5). If the plaintiff were not guilty of negligence there was a higher duty of care placed on him, as there was a good footpath for him to walk on: *Cotton* v. *Wood* (6). If both parties were negligent, their negligence continued up to the time of impact and the cause of the collision was the negligence of the plaintiff: *Henly* v. *Cameron* (7); *Admiralty Commissioners* v. *North of Scotland and Orkney and Shetland Steam Navigation Co. Ltd.* (8); *Wheare* v. *Clarke* (9). This Court will not disturb the findings of the trial judge unless they are plainly wrong: *Watt or Thomas* v. *Thomas* (10).

D. Casey, in reply. In *Smith* v. *Pike* (5) and in *Lee Transport Co. Ltd.* v. *Watson* (4) there was no reason to suspect the presence of other objects on the highway which in both those cases was a country road. The effective cause of the collision was the negligence of the driver in having no windscreen wiper, which impaired his

(1) (1930) 33 W.A.L.R. 48.
(2) (1922) 1 A.C. 129.
(3) (1949) 2 K.B. 291.
(4) (1940) 64 C.L.R. 1.
(5) (1949) Q.S.R. 132.
(6) (1860) 8 C.B. (N.S.) 568 [141 E.R. 1288].
(7) (1948) 65 T.L.R. 17.
(8) (1947) 2 All E.R. 350.
(9) (1937) 56 C.L.R. 715.
(10) (1947) A.C. 484.

vision, thus preventing him from keeping a sufficient or proper lookout. The plaintiff was entitled to assume that the driver would not be negligent and would drive reasonably: *Trompp* v. *Liddle* (1).

Cur. adv. vult.

The following written judgments were delivered:—

Aug. 30.

McTIERNAN J. This appeal is made against a judgment dismissing an action for negligence in which the plaintiff sued the defendants for damages for personal injury which he suffered in consequence of a collision with a motor car driven by the defendant, Thomas Mulcahey and owned by the other defendant. The issues in the case were whether the injury was due to the driver's negligence, or to the plaintiff's negligence; or, if the former, whether the plaintiff was guilty of contributory negligence. *Matthews* J., who tried the case without a jury, found both of them to blame and that the injury was caused by their combined negligence.

The learned trial judge made findings showing how the accident happened and the particulars of the negligence of which he decided that the plaintiff and the driver were guilty. It is necessary to refer to a number of facts and circumstances of which evidence was given in order to explain the findings.

The collision occurred in Wood Street, Warwick, between Dragon and Guy Streets, shortly after seven o'clock on an evening. Wood Street is one of the main streets of the town: it is straight and level and has street lights: the frontages are occupied by homes, business premises and a church and a hall.

The plaintiff, who was sixty-five years of age, lived at the corner of Wood and Dragon Streets. The driver was also a resident of Warwick. When the accident occurred the intended destination of both of them was St. Mary's Church, which is at the corner of Wood Street and Palmerin Street, the next street after Guy Street.

During the day there had been heavy rain which temporarily ceased very soon before the accident. The footpaths and roadway of Wood Street were wet.

The footpaths were covered with gravel: the middle of the road was covered with bitumen and the sides of the road with gravel. The width of the bitumen was twenty feet six inches; the gravel extended from the edges of the bitumen to the gutters, a distance of from fifteen to twenty feet.

The motor car struck the plaintiff from behind and knocked him down. The position in which he fell was that his head was on

(1) (1941) 41 S.R. (N.S.W.) 108; 58 W.N. 124.

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the gravel and his body was on the bitumen. There was blood which came from his head on the gravel next to the bitumen. The driver lifted him up immediately after the accident: the plaintiff was almost unconscious. In relation to the direction in which he and the driver were going, the accident occurred on the left side of the road.

The plaintiff called evidence about the state of the footpath: the evidence was to the effect that it was so muddy that pedestrians could hardly use it. For this reason he said that after leaving his front gate he walked along Wood Street on the bitumen until he saw two motor cars, one coming from Dragon Street and the other from Palmerin Street; then, the plaintiff said, he went off the bitumen on to the gravel and walked along that part of Wood Street until he was struck from behind by a motor car. The trial judge accepted contrary evidence adduced for the defendants that the footpaths were fit to be used. It was elicited in the driver's evidence that in the evening pedestrians walked along Wood Street on the bitumen.

The driver said in evidence that he did not drive off the bitumen before his car struck the plaintiff. The learned trial judge accepted that evidence.

The two motor cars which have been mentioned were the only traffic in the part of Wood Street between Dragon and Palmerin Streets. This part of the street comprises two blocks. There is no evidence as to the course which the on-coming car took after the accident.

Generally the learned trial judge accepted the account of the accident given by the driver. This witness said that he was an experienced driver. He set out from his home at about seven p.m. after a shower had ceased. When he turned into Wood Street from Dragon Street, he saw an on-coming car at Palmerin Street. Its headlights were "flashing" at him; for that reason he changed his course from the centre to the left side of the bitumen and reduced his speed from twelve to ten miles per hour. Then he saw a pedestrian about six feet away in front of the car. He swerved immediately to the right and stopped the car. There was no time to sound his horn. The car struck the pedestrian. The driver immediately alighted and found the pedestrian lying in the position which has been described.

In the course of his evidence the driver admitted that he knew that "when it is wet people make for the bitumen in some parts".

He said that the on-coming car was 250 yards away when he moved to the left: there was no other traffic on the road: his

headlights were good and effective for at least 150 yards: when the on-coming car was 200 yards away it would be a correct estimate that the plaintiff was thirty yards in front of him.

Asked why he did not see the plaintiff the driver said, "I cannot account for that".

The driver further said: He had no windscreen wiper: there were globules of water on his windscreen when he was driving along Wood Street: they increased the dazzling effect of the lights of the on-coming car: if the windscreen had been clear his chance of seeing the plaintiff would have been "much better"; he was conscious of the fact that on that evening people would be walking to the church and other places: that people did walk on the roadway where the accident happened; before the impact the on-coming car was 130 yards away: that the plaintiff was walking in front of the headlights, and that he was so close to the plaintiff when he first saw him that he had no time to sound his horn and was unable to "swing" the car sufficiently to miss the plaintiff.

The driver fixed the distance of the motor car from the edge of the bitumen at one foot or at one foot and a half when he swerved to the right after the collision. He said that he noticed the distance when driving because he could see the roadway ahead; he said "when the bitumen is wet it shows up like glass"; and he could see the road up to the intersection and had a fair vision for one hundred yards. In answer to the question "Yet you failed to see the plaintiff who was directly in front of you?" the driver answered "That is right".

The learned trial judge in the course of his reasons said: "I inspected the street at night and am satisfied bright lights from an on-coming motor car would affect the vision of a driver proceeding in the opposite direction." The finding showing how the accident happened is in these terms:—"On the evidence I find that the plaintiff was at the relevant time walking on the bitumen at a distance of about two to three feet from the edge of the bitumen when he was struck by the defendant's car."

This finding rejects the plaintiff's evidence that he walked off the bitumen before the motor car ran into him. There was no evidence upon which it could be said that the plaintiff was more than three feet to the right of the left edge of the bitumen. The driver of the car said that when he, the driver, swerved he was one foot or eighteen inches from the edge. The finding should be read with the evidence that the motor car ran into the plaintiff from behind and that pedestrians did not keep to the footpath but used the bitumen and that the driver was aware of this practice.

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If walking on the bitumen were not in itself a negligent act, the plaintiff was not walking at such a distance from the edge of the bitumen that his conduct was rash or not that of a prudent man. Taking the finding that he was three feet from the edge of the bitumen, there was ample room for an overtaking motor car to pass him without leaving its proper side of the road.

The trial judge's next finding is in these terms :—" I find that he (the plaintiff) knew the defendant's car was being driven along the roadway in the same direction as he was proceeding and that he knew another car with bright headlights was approaching from the opposite direction ". It is necessary to bear in mind these additional facts. The bitumen was twenty feet six inches wide and the on-coming car was at the time of the impact 120 or 130 yards away. It is also reasonable to infer that the plaintiff knew that there was ample room for the over-taking car to pass him on his own right, and that it would pass him before it passed the on-coming car.

The trial judge said he accepted the evidence given by the driver as to speed, the position of his car on the roadway and the condition of the roadway. This evidence has been mentioned.

The findings which are adverse to the driver are as follows. The trial judge said : " I find that his vision was obscured to some extent by drops of water on his windscreen being magnified by the headlights of the car proceeding in the opposite direction. I find that he had no windscreen wiper on his car and that he drove the car at a time and place when and where he should have known there was a possibility of pedestrians walking on the roadway." From these facts the trial judge drew the conclusion that the driver was negligent. The conclusion is stated in these terms : " He was therefore negligent to that extent." This finding does not completely set out the negligence which the facts establish.

In *Tart* v. *G. W. Chitty & Co. Ltd.* (1), *Swift* J. quoted some observations made by *Rowlatt* J. in *Page* v. *Richards & Draper* (2) which are in point :—" It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be people or animals or things in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he has seen it. If there is any difficulty in the way of his seeing, as, for example, a fog, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the defendant is in this dilemma, either he was not keeping a sufficient look-out, or if he

(1) (1933) 2 K.B. 453, at pp. 457-458. (2) (1920) Unreported.

was keeping the best look-out possible then he was going too fast for the look-out that could be kept. I really do not see how it can be said that there was no negligence in running into the back of a man. If he had had better lights or had kept a better look-out the probability is that the accident would never have happened."

The driver had actual knowledge that it was the practice of pedestrians to walk on the bitumen in Wood Street and were likely to be there about that time. He was negligent in driving along Wood Street with an insufficient look-out, in not sounding his horn when he entered Wood Street or when he moved from the centre to the left of the bitumen; and, although his evidence is that he was driving at ten miles per hour, he was negligent in driving with an insufficient vision at a speed which, as the event shows, prevented him deflecting his course or stopping, in time to avoid the plaintiff after he saw him.

The learned trial judge affirmed the right of a pedestrian to walk on the road and he made some observations as to the care expected of a pedestrian. What was said is this :—" In my view a pedestrian has a right if he so desires to walk on that part of the roadway used by vehicular traffic, but if he does so I think he is under a duty to take care of his own safety. He is not entitled to disregard the possibility of negligent acts on the part of the driver of a vehicle; still less is he entitled to disregard the possibility of the driver of an oncoming vehicle failing to see him on a wet night without being negligent."

It is true that a pedestrian has a right to walk on the part of a road used by vehicles unless it is reserved exclusively for their use. It should be added that the driver of a vehicle owes a duty to take reasonable care to avoid running into a pedestrian who is lawfully using a roadway. The pedestrian must exercise the degree of care which an ordinary prudent man would take in the circumstances. These may be such that the pedestrian would fall short of that standard of care if he ventured to walk on the road. It is a question of fact in each case whether a pedestrian who is injured by a vehicle failed to take due care for his safety.

In *Boss* v. *Litton* (1), *Denman* C. J. said :—" All persons, paralytic as well as others, had a right to walk in the road, and were entitled to the exercise of reasonable care on the part of persons driving carriages along it ". In that case the facts were that the plaintiff was knocked down on the road at ten o'clock at night by a " taxed cart " : the evidence of a police constable proved to the satisfaction of the Chief Justice that the footpath was in a bad state.

(1) (1832) 5 Car. & P. 407, at p. 409 [172 E.R. 1030, at p. 1031].

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In the course of the trial the Chief Justice made this comment :— " A man has a right to walk in the road if he pleases. It is a way for foot-passengers as well as carriages. But he had better not, especially at night, when carriages are passing along ". It was not considered in that case that the plaintiff was in fault because he walked on the road at night.

In *Craig* v. *Glasgow Corporation* (1), Lord *Dunedin* said of a person walking on a road " the man had an absolute right to be there and it was the duty of drivers of vehicles not to run him down ".

In *Pronek* v. *Winnipeg, Selkirk & Lake Winnipeg Railway Co.* (2) the respondents had statutory authority to lay a railway on a highway and run their cars on it. Members of the public were entitled to use that part of the highway but the respondent's cars had the right of way. Lord *Wright* said (3) :—" the respondents were under a legal duty by their servants to be on watch for the safety of people on the track and to equip the car with lights adequate at night to enable the driver to stop in time to avoid wayfarers : . . . No doubt on the part of the wayfarer there was also a reciprocal duty to take reasonable care to avoid the car and not to be guilty of contributory negligence."

In *Maitland* v. *Raisbeck* (4) Lord *Greene* M.R. said :—" Every person who uses the highway must exercise due care, but he has a right to use the highway ".

In *Page* v. *Richards & Draper* (5) the facts were that the plaintiff was walking along the road at ten o'clock at night and a car coming from behind drove into him : the driver of the car never saw the plaintiff until he ran into him : the plaintiff knew nothing material to the case except that he was struck in the back by a motor car. *Rowlatt* and *McCardie* JJ. decided that the facts established negligence on the part of the driver.

The observations made by the trial judge on the care expected of a pedestrian who is lawfully walking on a road, in my opinion, contain a misdirection. It is said that the pedestrian " is under a duty to take care of his own safety ". His duty is to take ordinary care and prudence : he does not walk on the road at his peril. The learned trial judge said that a pedestrian " is not entitled to disregard the possibility of negligent acts on the part of the driver of a vehicle ". The pedestrian would not know before a negligent act was committed what it would be. What is said by

(1) (1919) 35 T.L.R. 214, at p. 216.
(2) (1933) A.C. 61.
(3) (1933) A.C., at pp. 67, 68.
(4) (1944) 1 K.B. 689, at p. 691.
(5) (1920) Unreported.

the trial judge lays down a standard of care which is too onerous for the ordinary pedestrian. It is difficult to reconcile with the principle that the pedestrian is entitled to the exercise of reasonable care by the driver of a vehicle: that is the driver's legal duty to the pedestrian. Drivers of motor vehicles ordinarily take due care to avoid running into pedestrians. A pedestrian on his part is bound to take due care for his own safety: if he must observe the standard laid down in the instant case, he would have only a theoretical right to walk on the road: it could hardly ever not be rash for him to exercise his legal right. The lack of advertence, which the learned trial judge adds, would be an *a fortiori* case of carelessness, does not seem to me to be germane to the question of contributory negligence; in the case which is put, one hypothesis is that the driver is not negligent; the driver then would not be liable for the injury and the question of contributory negligence would not arise; in the instant case the driver of the motor car which ran into the plaintiff was negligent. A pedestrian would not be rash to assume that a driver of a motor car would not fail to observe his duty to be careful unless the circumstances were such that a reasonable man would not make the assumption. In *Toronto Railway Co.* v. *King* (1) Lord *Atkinson* said that "traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic." (Compare *Joseph Eva Ltd.* v. *Reeves* (2).) The observations of Lord *Atkinson* apply to the common law duty of a motor driver to take due and reasonable care not to run into pedestrians.

The proposition that a pedestrian is guilty of contributory negligence unless he is prepared to meet the possibility of negligent acts by drivers of motor cars upsets the balance of rights and duties which is a principle underlying the law of the highway. See per Lord *du Parcq* in *Searle* v. *Wallbank* (3). There is no general rule that a person is entitled to assume in all circumstances that other persons will be careful. Lord *du Parcq* pointed this out in *Grant* v. *Sun Shipping Co. Ltd.* (4). His Lordship, however, added:—"The courts have long recognized that in some circumstances an omission to make sure for oneself that others have done what they ought to have done is not negligent"; and reference is made to *Gee* v. *Metropolitan Railway Co.* (5).

(1) (1908) A.C. 260, at p. 269.
(2) (1938) 2 K.B. 393.
(3) (1947) A.C. 341, at p. 361.
(4) (1948) A.C. 549, at p. 567.
(5) (1873) L.R. 8 Q.B. 161, at p. 174.

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The plaintiff was not at fault because he did not assume that the motor car which ran into him did not have a windscreen wiper and that the windscreen was not clear. The negligence found against the driver is that notwithstanding such hindrances to careful driving he drove along a road where he ought to have been prepared for pedestrians. The test of whether the plaintiff was at fault is whether he failed to exercise ordinary care and prudence in walking on the bitumen after he had observed the car coming from Dragon Street and the car coming from Palmerin Street. In *Sparks* v. *Edward Ash Ltd.* (1) *Goddard* L.J. said that pedestrians should be regarded rather as "the public generally" than as a class, and not to say "that negligence ought to be lightly imputed to a pedestrian on a crossing". "He is entitled to expect", his Lordship said, "that a driver will obey the regulation, just as a driver or pedestrian is entitled to expect that another driver will keep to his proper side of the road, but it must also be remembered that the lighting regulations have imposed special difficulties on drivers and pedestrians ought to bear in mind that, while they can see the lights of an approaching car, it is far more difficult, and, perhaps, impossible, for the driver to see them. Whether a pedestrian has exercised the degree of care that an ordinary, prudent man would have done in the circumstances is a question of fact . . ." His Lordship gave a warning against importing into questions of fact, as principles of law, the reasoning in other cases on other facts. It was not negligence for the plaintiff not to assume that the driver's ability to see him on the road was not impaired by the absence of a windscreen wiper.

The negligence found by the trial judge was that the plaintiff knew the motor car was coming from behind and he "neglected to have regard to his own welfare". I apprehend that his lack of care was that he did not go off the bitumen. He was a man of sixty-five years. It was no doubt physically possible for him to do so in time. If he had done so, he would have avoided the danger as the motor car did not drive further to the left than about eighteen inches inside the bitumen. The facts establish that it was a usual and ordinary thing for pedestrians to walk on the bitumen in Wood Street, and the plaintiff was walking in an ordinary and reasonable way on the bitumen, about two or perhaps three feet from the edge. The plaintiff would have observed that the motor car coming from behind had good headlights and that it was travelling slowly: the evidence is that its speed was ten miles per hour. The driver did not sound his horn, no doubt because he did not see

(1) (1943) K.B. 223, at p. 240.

the plaintiff. The driver admitted that if his windscreen were clear that his chances of doing so would have been much better. It would be a reasonable supposition for a pedestrian to make in the circumstances that the driver saw him and would pass the pedestrian on his right-hand side. There was ample space to the right of the pedestrian. The on-coming car was nearly two blocks away.

It is a matter of common experience that the driver of a motor car slowly overtaking a pedestrian often deviates to avoid him without sounding his horn. The plaintiff could reasonably expect the driver to do so. The position in which the plaintiff's body was lying is consistent with the hypothesis that the plaintiff attempted to move out of the way of the car when he realized that it was not deflecting from its course. The finding of the learned judge establishes that the plaintiff was mistaken in thinking that he had got clear of the bitumen; the plaintiff was almost unconcious when he was lifted up from the ground. It is hardly conceivable that the plaintiff did not attempt to get out of the way of the car when he realized he was in danger of being struck by it. The hypothesis that he attempted to do so when it was too late to avoid the car is, on the evidence as to how his body was lying, consistent with the finding of the trial judge that the plaintiff was about two or three feet inside the edge of the bitumen when he was struck.

The fact that the car ran into the plaintiff does not prove the plaintiff was guilty of a lack of care. Taking all the facts which the plaintiff knew, he was not careless in walking on the left-hand side of the bitumen after he observed the two motor cars. He did not know of the negligence of which the driver was guilty. In my opinion it is a misdirection to apply the principle that the plaintiff was not entitled to disregard the possibility of that or any other negligent act by the driver.

The onus of proving that the plaintiff omitted to take due and reasonable care for his safety rests on the defendant. In my opinion evidence does not sustain the onus.

The limitation of the driver's vision was not due solely to conditions over which he had no control, for example, the wet road and the reflection of the headlights of the on-coming car. In this case the danger was introduced by the driver because he neglected to put a wiper on his windscreen and drove along this road used by pedestrians, without being able to keep as good and sufficient a look-out as would have been possible if he had not been negligent. Taking his own evidence it is a reasonable inference that if his

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windscreen had been clear he would probably have seen the plaintiff in time to avoid driving into him.

If the plaintiff were careless in walking on the road after he saw the two motor cars, the driver was solely responsible for the accident because his negligence incapacitated him from taking due care to avoid the consequences of the plaintiff's negligence: *British Columbia Electric Railway Co Ltd.* v. *Loach* (1).

In my opinion the finding that the plaintiff's injuries were caused by the combined negligence of himself and the driver is not, under a proper direction, justified by the evidence. The facts establish that the negligence of the driver was the substantial cause of the accident. There is no question as to the responsibility of the owner of the car for the negligence of the driver.

The learned trial judge assessed the damages which he would have awarded the plaintiff if he had given judgment in his favour at £842 16s. 0d.

In my opinion the appeal should be allowed with costs; the judgment of the Supreme Court set aside and in lieu thereof there should be judgment for the plaintiff for £842 16s. 0d. with costs.

WEBB J. The learned trial judge found that the plaintiff was walking along a street on the bitumen and we are bound by that finding as it depended upon the credibility of witnesses. However, the plaintiff had the right to walk there, although it was a position of danger and required him to be vigilant. The learned trial judge found that the defendant was guilty of negligence: there was no reason why the defendant should not have seen the plaintiff and avoided hitting him. But the defendant contended that the plaintiff was guilty of contributory negligence and the learned judge so found.

The plaintiff admitted in cross-examination that if he had been walking on the bitumen at the time of the impact, as the trial judge found, he was in a very dangerous position.

However, I think that the plaintiff was not guilty of contributory negligence. The defendant's car was moving along the crown of the street and there was no reason why, before reaching the plaintiff, it should have moved over to the left as far as the plaintiff. It is true that a car with bright lights was coming in the opposite direction, but it was a considerable distance away, and there was no need for the plaintiff to anticipate that before passing him the defendant's car would move to the left to pass the on-coming car. Even if the plaintiff had no right to assume that the defendant

(1) (1916) 1 A.C. 719, at pp. 726, 727.

would not delay his move to the left until the last moment, still he was entitled to assume that the defendant would keep a look-out to the left and would see the plaintiff and sound a warning of his approach. There was nothing to suggest that the plaintiff received any indication that the defendant had failed to keep a look-out to the left and to see the plaintiff. The reflection on the road ahead of the plaintiff of the headlights of the defendant's car would not necessarily have given such indication; nor would the noise the car made, if any. I cannot see that the plaintiff was at fault to any extent, as he received no warning of any kind.

If the conditions were such that the plaintiff should not have been on the bitumen at all, e.g., if it was raining at the time, or there was heavy traffic at that place and time, he would have been guilty of contributory negligence in walking along the bitumen; so too if there were only two cars on the street at that place and time but they were about to pass where defendant was walking and he did not step aside to avoid being hit. But to find him guilty of contributory negligence in the circumstances actually existing at the time would, I think, be to find that he should not have been on the bitumen at all. I do not think that would be warranted.

Although the plaintiff was wearing dark coloured clothes the learned trial judge did not mention this as a consideration when finding he was guilty of contributory negligence. That would have been difficult in view of the fact that the defendant's nephew, Murtagh Mulcahey, when both Murtagh and the defendant's car were about thirty yards behind the plaintiff, was able because of the headlights of the defendant's car to see clearly the plaintiff walking on the bitumen.

I would allow the appeal, set aside the judgment of the Supreme Court and enter judgment for the plaintiff for £842 16s. 0d. and costs.

KITTO J. The appellant was the plaintiff in an action in the Supreme Court of Queensland in which he claimed damages in respect of injuries he sustained when he was struck by a motor car. The defendants in the action, who are the respondents in this appeal, were respectively the owner and the driver of the car, and the appellant's case was that his injuries were caused by negligence on the part of the driver. The respondents deny that the driver was negligent in his management of the car, and they allege that the collision and the resulting injury to the plaintiff were caused by the appellant's own negligence, and, alternatively, that the appellant was guilty of contributory negligence.

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The action was tried by *Matthews* J., who held that the appellant's injuries were caused by the combined negligence of the appellant and the respondent driver, and gave judgment for the respondents. At the trial there was a conflict of testimony in respect of some of the relevant facts, but in this Court the findings of the learned judge as to those facts were not challenged by the appellant. It was nevertheless contended on his behalf that on the facts as found he was entitled to judgment.

The collision occurred on a straight, level stretch of road in Wood Street, Warwick, between the intersections of Dragon Street and Guy Street. The roadway consisted of a bitumen strip, twenty feet six inches wide, flanked on either side by a strip of gravel at least fifteen feet wide. There was a footpath at each side of the roadway.

Shortly after seven o'clock on the evening of 9th September 1949 after darkness had fallen, the appellant emerged from his home at the corner of Wood Street and Dragon Street with the intention of walking to St. Mary's Church, which is in Wood Street beyond Guy Street. The appellant crossed the footpath and the gravel strip, and upon reaching the bitumen he turned to his left and walked along the bitumen and from two to three feet from its left-hand edge. When about half way to Guy Street he looked ahead and behind. He saw a car with bright headlights approaching him frontally but at least half way down the next block between Guy Street and Palmerin Street. He also saw a car entering Wood Street from Dragon Street and turning to approach him from the rear. He said at the trial that he thereupon walked off the bitumen on to the gravel, but it was found against him that he continued on his course about two to three feet on the bitumen. He paid no more attention to the car behind him until it overtook and struck him.

The car approaching from the rear was driven by the respondent driver. He entered Wood Street at a speed of twelve miles per hour, and, finding that the bright headlights of the car coming in the opposite direction had a dazzling effect, he moved close to the left-hand edge of the bitumen, slowed down to ten miles per hour and continued to drive at that speed until the collision occurred. His own car had good headlights carrying from 150 to 200 yards, yet he failed to see the appellant until he was only six feet away. He then had no time to sound his horn. He swerved to the right and applied his brakes, but the appellant was struck by the near-side mudguard and sustained severe injuries.

Conditions were not ideal for driving. The bitumen was wet with recent rain, and the respondent driver described it as shining like glass. The street lighting was fair. There were lights at the Dragon Street and the Guy Street intersections, which were 220 yards apart, but there were no lights between those points. The car coming from the opposite direction had bright headlights which the respondent driver said kept flashing at him. The appellant was dressed in a khaki military overcoat and fawn trousers. Nevertheless the respondent driver said he could see as far ahead as the intersection of Guy Street, he did not concentrate on the lights of the approaching car, he was taking an over-all view of the roadway and he was conscious of the fact that people do walk on the roadway. When asked why he did not see the appellant, he said that he could not account for it. Assuming that he was keeping as sharp a look-out as the difficult driving conditions demanded, there was only one possible explanation of his failure to see the appellant before he did, and that is that his car was not equipped with a windscreen wiper, it had been in rain, and the windscreen, although partially protected by a sun visor, had globules of water on it which the driver admitted would make the dazzling effect of on-coming headlights much greater. Although he would not admit that the globules of water caused his failure to see the appellant, he did admit that if they had not been there he would have had a better chance of seeing him.

The learned judge found that the respondent driver was guilty of negligence in driving the car at a time when and in a place where he should have known that there was a possibility of pedestrians walking on the roadway and with his vision to some extent obscured by the drops of water on his windscreen, magnified by the headlights of the car approaching in the opposite direction. His Honour's finding that the appellant's injuries were caused by the combined negligence of the appellant and the respondent driver amounted to a finding, so far as it referred to the respondent driver, that his negligence was a substantial cause of the collision. So far I have no doubt that the learned judge was right.

There remains the question whether the appellant was guilty of contributory negligence. The word "negligence" in the expression "contributory negligence" connotes, not a breach of any duty to take reasonable care in the interests of another or others, but an omission to take reasonable care for one's own safety: *Davies* v. *Swan Motor Co. (Swansea) Ltd.* (1). The learned judge in the present case found that the appellant failed to take reasonable

(1) (1949) 2 K.B., at pp. 308, 309, 316, 324.

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care of himself, and I cannot think that he was wrong. The appellant placed himself in a position in which a reasonable man would feel the need for constant vigilance. He walked at night, inconspicuously clad, along a wet and shining bitumen roadway knowing that a car was approaching from his rear, and that the driver had to contend with the headlights of a car coming the opposite way. He must have realized, if he had thought of it, that as rain had been falling a car's windscreen might not be perfectly dry and clear. He walked on the left-hand side of the bitumen strip and substantially in from its edge; and in this situation of obvious risk he took no precautions whatever for his own safety. He asserted in evidence that he left the bitumen; that was one step which a reasonably prudent person might have taken, but the trial judge disbelieved the assertion, and there was ample evidence to discount it. The appellant did not look round again after seeing the respondent's car entering Wood Street. He maintained a complete indifference to what was happening.

But it was urged on his behalf that all this is of no consequence, because every one is entitled to proceed on the assumption that others will act without negligence and that, as the accident would not have happened without the negligence of the respondent driver, the appellant cannot be held to have been neglectful of his own safety in reposing implicit faith in the driver's carefulness.

But there is no rule or principle of law that a person is entitled to act on the assumption that others are not negligent. Counsel for the appellant relied upon the statement of *Latham* C.J. in *Wheare* v. *Clarke* (1), that "as a general rule, a man is entitled to assume that others will act in a non-negligent manner". But this cannot mean more than that, in most sets of circumstances, to rely upon the probability that others will act in a non-negligent manner is consistent with taking reasonable precautions for one's own safety. Such a statement, accurate though no doubt it is, affords no guidance in considering whether, in a particular set of circumstances, it was reasonable for a person to depend upon another to conduct himself without negligence. As *Latham* C.J. said in the very next sentence: "in any case where negligence is the issue, the real question is whether, in all the circumstances, the person charged with negligence exercised the degree of care which those circumstances required". The emphasis is on "those circumstances". *Starke* J. (2) recognized that if another's want of care is manifest, it is unreasonable to rely upon his acting with

(1) (1937) 56 C.L.R. 715, at p. 723. (2) (1937) 56 C.L.R., at p. 727.

due care; and Lord *du Parcq* in *Grant* v. *Sun Shipping Co. Ltd.* (1) said that a prudent man will guard against the possible negligence of others when experience shows such negligence to be common: see also the observations of *Mayo* J. in *Kiely* v. *W. Angliss & Co. Ltd.* (2).

In my opinion where a plaintiff against whom contributory negligence is alleged is shown to have acted in a manner which was not reasonably careful unless he was justified in expecting that the defendant would not be negligent, the reasonableness or otherwise of the plaintiff's conduct must be decided upon a consideration of all the circumstances which he knew or which he might reasonably be expected to know, including any degree of probability which common experience may suggest that persons in the position of the defendant might fall short of proper standards of carefulness.

In the present case *Matthews* J. said that a pedestrian walking on that part of the roadway used by vehicular traffic "is not entitled to disregard the possibility of negligent acts on the part of the driver of a vehicle; still less is he entitled to disregard the possibility of the driver of an on-coming vehicle failing to see him on a wet night without being negligent". (By "is not entitled to disregard" the learned judge obviously meant "is not acting with reasonable care for his own safety if he disregards".) In my opinion his Honour was quite right in his statement. The submission of the appellant's counsel that the second part of the statement was irrelevant because the defendant was in fact negligent misses the point which his Honour was making. That point was that, in a situation such as that in which the appellant had placed himself, a reasonable man would be alert to avoid the consequences of either a lapse in carefulness or of imperfect vision on the part of a driver approaching from behind. Both are of such common occurrence that to ignore the possibility of either is to invite disaster, especially where a pedestrian dressed in dark clothing is walking at night on a wet bitumen roadway, knowing that behind him is a car the driver of which has to cope with the dazzling effect of approaching headlights, and not knowing anything as to the vigilance of the driver or the state of his windscreen. The appellant, not knowing, or apparently caring, whether he was seen or not, took what any ordinary person would regard as a foolish risk. It seems to me impossible to acquit him of neglect of his own safety.

The final question to be answered is whether the appellant's "negligence" was "contributory" to the collision, that is, whether

(1) (1948) A.C. 549, at p. 567.

(2) (1944) S.A.S.R. 87, at p. 91.

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it was a substantial cause of the collision. The matter must be dealt with " somewhat broadly and upon common-sense principles as a jury would probably deal with it " (*Commissioners for Executing Office of Lord High Admiral of United Kingdom* v. *S.S. Volute (Owners)* (1)). If the negligent conduct of the appellant had no further result than to create a situation which was static in the sense that nothing the appellant could do when collision threatened would have avoided the result, the respondent driver's neglect, continuing as it did right up to the moment when the collision became inevitable, operated as the only substantial cause of the accident, and the appellant could not be held guilty of contributory negligence: cf. *Boy Andrew (Owners)* v. *St. Rognvald (Owners)* (2). But this conclusion could be reached only if " the consequences of the conduct imputed to the plaintiff as contributory negligence, although persisting up to the moment of collision, might have been averted by the defendant by a slight deflection of the car up to a time later than that within which the plaintiff might have escaped by any endeavour of his own which it would have been negligence on his part to omit " : per *Dixon* J., *Allen* v. *Redding* (3). The case would then fall within the principle of *Davies* v. *Mann* (4), of which examples may be found in *British Columbia Electric Railway Co. Ltd.* v. *Loach* (5), and *McLean* v. *Bell* (6). But in such cases " the critical moment comes only when the negligence of the (plaintiff) is spent—i.e. when it has brought him into a position from which no subsequent care for his safety could extricate him even if he ceased to be negligent " : *Brott* v. *Allan* (7) ; *Matterson* v. *Commissioner for Railways* (8). The negligence of the defendant must be subsequent and severable : *Boy Andrew (Owners)* v. *St. Rognvald (Owners)* (9).

In my opinion the present case is not of this type. The respondent's car was proceeding in a straight line at the very slow speed of ten miles per hour, and if the appellant had been paying any reasonable attention to what was happening he could have escaped up to a moment of time which I see no reason for thinking was earlier than the latest moment at which the respondent driver could have taken effective action to avert the collision. If there was any margin between them, they came so closely together that there was " no clear dividing line between the operation of one act

(1) (1922) 1 A.C., at p. 144.
(2) (1948) A.C. 140, at p. 149.
(3) (1934) 50 C.L.R. 476, at pp. 480, 481.
(4) (1842) 10 M. & W. 546 [152 E.R. 588].
(5) (1916) 1 A.C. 719.
(6) (1932) 147 L.T. 262.
(7) (1939) N.Z.L.R. 345, at p. 359.
(8) (1943) 45 S.R. (N.S.W.) 110, at p. 113 ; 62 W.N. 18.
(9) (1948) A.C., at p. 154.

of negligence and the other " : *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*) (1) ; and the negligence of the appellant was practically, if not precisely, concurrent with the negligence of the respondent driver, so that they constituted joint causes of the injury : *Glasgow Corporation* v. *Taylor* (2).

In *The Eurymedon* (3), *Greer* L.J. stated certain propositions of which the fourth was " If the negligence of both parties to the litigation continues right up to the moment of collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both ". This proposition was approved by Viscount *Simon* in *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*) (4). Its true import is brought out only if the words " which is the result " are read as meaning " provided it is the result " : see the report of the Law Revision Committee referred to on this point by *Jordan* C.J. in *Pilloni* v. *Doyle* (5). The speech of the Lord Chancellor in *Commissioners for Executing Office of Lord High Admiral of United Kingdom* v. *S.S. Volute* (*Owners*) (6), establishes in my opinion that where a defendant is negligent up to the moment when a collision is inevitable, and the collision would not have occurred if either party had not been negligent, but it is not possible without resort to fine distinctions to conclude that the plaintiff's negligence had brought about a state of things in which there would have been no damage but for the defendant's subsequent and severable negligence, the damage must be held to be the result of the continued negligence of both, and the defence of contributory negligence must succeed.

That is, in my view, the situation in the present case. The category into which this case falls appears to me to be that which *Latham* C.J. illustrated in *Wheare* v. *Clarke* (7), in these words : " Let it be supposed that the defendant was driving with his eyes shut, though the plaintiff did not know that this was so. Let it be further supposed that the defendant kept his eyes shut up to the very moment of the collision. What is the position in such a case ? There is negligence of the defendant up to the moment of the accident. But further facts may show that the plaintiff, notwithstanding the continuing negligence of the defendant could, having his own eyes open, have avoided the collision by taking due care. In such a case the plaintiff cannot succeed in his action."

(1) (1948) A.C., at p. 155.
(2) (1922) 1 A.C. 44, at p. 65.
(3) (1938) P. 41, at p. 50.
(4) (1948) A.C., at p. 150.
(5) (1948) 49 S.R. (N.S.W.) 13, at p. 17 ; 65 W.N. 239, at p. 241.
(6) (1922) 1 A.C., at p. 136.
(7) (1937) 56 C.L.R., at p. 724.

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In the result I agree with the conclusion of the learned trial judge and I would dismiss the appeal.

Appeal allowed with costs. Judgment of Supreme Court set aside and in lieu thereof judgment for plaintiff for £842 16s. 0d. *with costs.*

Solicitor for the appellant : *R. J. Leeper,* Warwick by *McSweeny & Leeper.*

Solicitors for the respondents : *Neville & Lees,* Warwick by *Neil O'Sullivan & Whitehouse.*

B. J. J.