[HIGH COURT OF AUSTRALIA.]

ALFORD . . . . . APPELLANT;
PLAINTIFF,

AND

MAGEE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1951-1952.

MELBOURNE, 1951, *Oct.* 5, 8-10; 1952, *March* 5.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

Negligence—Contributory negligence—"Last opportunity"—Direction to jury.

In the law of negligence there is no rule of law which can be properly stated in terms of "last opportunity."

The rule that contributory negligence is a good defence to an action of negligence is best stated as a general rule which, on the facts of particular cases, may be subject to a qualification; but the qualification cannot be expressed adequately in any universal formula. It is not practicable to state it in terms more precise than those to be found in *Tuff* v. *Warman*, (1858) 5 C.B. N.S. 573, at p. 585 [141 E.R. 231, at p. 236], and *Radley* v. *London & North-Western Railway Co.*, (1876) 1 App. Cas. 754, at p. 759.

No rule can be laid down as to the cases, or classes of case, in which it is proper for a judge to put the qualification to a jury, whether in terms of last opportunity or other terms appropriate to the particular case; but a judge should not put a qualification to a jury unless he feels able to explain exactly how the qualification can be fairly and reasonably applied by the jury to a view of the facts which it is open to the jury to entertain.

In considering whether last opportunity may be an appropriate test to put to a jury on the facts of a particular case, it must be borne in mind that what is in question is an opportunity on the part of the defendant; and it can be relevant only if the failure of the defendant to take advantage of an opportunity amounts to a failure to exercise reasonable care.

Apart from statutes such as the *Wrongs* (*Contributory Negligence*) *Act* 1951 (Vict.) (providing for the application of the rule as to division of loss in common-law proceedings), the qualification does not mean that there is to be a comparison in point of degree as between the negligence of the plaintiff and that of the defendant.

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The idea on which the qualification is founded seems to be that there are cases in which there is so substantial a difference between the position of the plaintiff and that of the defendant at the material time that (although the damage of which the plaintiff complains would not have been incurred if his own conduct had not been negligent) it would not be fair or reasonable to regard the plaintiff as in any real sense the author of his own harm. This position may arise because the defendant had, and the plaintiff had not, a real opportunity, of which a reasonable man would have availed himself, of avoiding the mischief; or because the defendant's negligent conduct is substantially later in point of time than the plaintiff's negligent conduct and a reasonably behaving defendant would have seen the effect of the plaintiff's conduct and avoided its consequences; or because the defendant had an advantage over the plaintiff, in that he was master of the situation, but chose to run a risk; or because the defendant had such an advantage over the plaintiff that he ought to have been master of the situation but unreasonably failed to take advantage of his superior position. The state of affairs last mentioned is likely to exist in many cases in which a pedestrian is injured by a motor vehicle. These examples are, however, merely illustrations of the kind of circumstances which may justify the drawing of a distinction; it is one which should not be drawn on light or trivial or dubious grounds.

The qualification will seldom be appropriate in cases of collision between fast-moving motor vehicles, where everything material usually happens within the space of a few seconds; on the other hand, in cases where a motor vehicle has collided with a pedestrian or a bicycle or a horse-drawn vehicle, it may be important that the jury shall understand that the general rule as to contributory negligence is subject to a qualification.

The burden of establishing that the defendant failed to take advantage of a last opportunity, or that the case otherwise falls under the qualification of the general rule, does not rest upon the plaintiff.

State Electricity Commission of Victoria v. *Gay*, (1951) V.L.R. 104, discussed.

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

APPEAL from the Supreme Court of Victoria.

Kathleen Joyce Alford, the widow of Leslie Campbell Alford, brought an action in the Supreme Court of Victoria against Kevin William Magee. The plaintiff, on behalf of herself and her children, claimed damages under Part III. of the *Wrongs Act* 1928 (Vict.) in respect of the death of her husband. She alleged in her statement of claim that on 5th October 1949 a motor car driven by the defendant came into collision with a motor cycle ridden by the deceased at or near the intersection of Auburn Road and Rathmines Road, Hawthorn, Victoria; the collision was caused by the negligence of the defendant; as a result of the collision the deceased received injuries from which he died on the day after the collision.

The defendant, in his defence, denied negligence and alleged that there was contributory negligence on the part of the deceased.

The plaintiff, in her reply, joined issue and, by par. 2, alleged that, if the deceased was guilty of contributory negligence, the defendant could nevertheless by the exercise of reasonable care have avoided the consequences of such negligence and the collision and had the last opportunity of so doing.

At the trial of the action, before *O'Bryan* J. and a jury, the only evidence of the circumstances of the collision was that of the defendant. The nature of this evidence is shown in the judgment hereunder, in which will be found also a description of material parts of the judge's direction to the jury (in particular, references to and illustrations of the suggested application of " the doctrine of last opportunity ").

The jury's verdict was for the plaintiff, and judgment was entered accordingly.

On appeal by the defendant, the Full Court of the Supreme Court by a majority (*Dean* and *Sholl* JJ.) (*Martin* J. being of opinion that there should be a new trial on the question of damages only) set aside the verdict and judgment and directed a new trial.

From this decision the plaintiff by leave appealed to the High Court.

O. J. Gillard K.C. (with him *J. E. Starke*), for the appellant. In actions of negligence before a jury, the respective functions and responsibilities of the presiding judge and the jury should be constantly borne in mind and the distinction between questions of fact and questions of law should be emphasized: See, per Lord *O'Hagan*, *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1); *Bridges* v. *North London Railway Co.* (2). On issues of fact the sole responsibility of the judge is to determine if there is any evidence from which reasonable men could be satisfied of the facts necessary to prove the issue (*Metropolitan Railway Co.* v. *Jackson* (3), per Lord *Blackburn*). If there is not such evidence, then the judge should either take the issue away from the jury or, alternatively, direct that issue to be found against the party who bears the onus of proving it (*Wakelin* v. *London and South Western Railway Co.* (4) as explained by Lord *Blanesburgh* in *Jones* v. *Great Western Railway Co.* (5) and by *Isaacs* J. in *Cofield* v. *Waterloo Case Co. Ltd.* (6)). It is open to the jury to accept or reject any of the evidence

(1) (1878) 3 App. Cas. 1155.
(2) (1874) L.R. 7 H.L. 213, at pp. 221, 229, 230, 236, 237, 240.
(3) (1877) 3 App. Cas 193, at p. 207.
(4) (1886) 12 App. Cas. 41.
(5) (1930) 47 T.L.R. 39.
(6) (1924) 34 C.L.R. 363, at p. 375.

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given (*Jackson's Case* (1); *Herbert* v. *Benson* (2)) and to draw any reasonable inference from the evidence or the facts so established by evidence. It must not indulge in mere conjecture, but it may infer any fact which is reasonably open on the evidence (*Wakelin's Case* (3); *Jones* v. *Great Western Railway Co.* (4); *Craig* v. *Glasgow Corporation* (5)). The major questions in a running-down case are questions of fact (*Tidy* v. *Battman* (6); *Stewart* v. *Hancock* (7); *Lee Transport Co. Ltd.* v. *Watson* (8)). These questions may be summarized in such a case as follows:—(*a*) What are the surrounding circumstances? Broadly, how did the collision occur; involving (i) a finding on the speed, course and position on the roadway of the plaintiff's vehicle at and prior to the collision; (ii) a finding on the speed, course and position on the roadway of the defendant's vehicle at and prior to the collision; (iii) the conduct of the plaintiff and defendant respectively as affected by such factors; (iv) the conduct of the plaintiff and defendant respectively as affected by the locality of the collision and the rules of the road, local or otherwise, affecting such locality; (v) the proper chronology of events correlative to the conduct of the plaintiff and defendant at each period of time. These facts, may for convenience, be referred to as "the primary facts" when they are finally decided by the jury. (*b*) The next inquiry would be what, having regard to the primary facts, were the respective responsibilities or duties of care of the plaintiff and defendant respectively. A finding on this matter must of necessity be bound up with the chronology of events: See *Roeder* v. *Commissioner for Railways* (*N.S.W.*) (9), per *Dixon* J. (*c*) At what precise periods and in what manner were such responsibilities or duties not performed or observed by either party? Did either party have time to avoid the mischief despite the other's carelessness? (*d*) Did such breach or breaches cause or contribute to the collision? In the great majority of cases owing to the number of hypotheses of primary facts which may be open to a jury on the evidence and which (if found) may have called for evasive action at different periods by different parties, it is rendered practically impossible for judges in running-down cases to take issues from the jury: Cf. *Wheare* v. *Clarke* (10); *Joseph* v. *Swallow & Ariell Pty. Ltd.* (11). Where the primary facts are clearly admitted and the court is

(1) (1877) 3 App. Cas., at p. 207.
(2) (1942) 44 S.R. (N.S.W.) 382; 61 W.N. 240.
(3) (1886) 12 App. Cas. 41.
(4) (1930) 47 T.L.R. 39.
(5) (1919) 35 T.L.R. 214.
(6) (1934) 1 K.B. 319.
(7) (1940) 56 T.L.R. 572.
(8) (1940) 64 C.L.R. 1.
(9) (1938) 60 C.L.R. 305, at p. 329.
(10) (1937) 56 C.L.R. 715, at pp. 735, 736, per *Dixon* J.; at pp. 737, 738, per *Evatt* J.
(11) (1933) 49 C.L.R. 578, at p. 587, per *Dixon* J.; and at p. 588, per *Evatt* J.

then in the same position as the jury to draw the inference of negligence or no negligence, then the judge may quite correctly take the issue away or direct a verdict on it against the party sustaining the proof thereof. Even in such a case a judge should act with caution: See *Jackson's Case* (1); *Slattery's Case* (2); "*The Hero*" (3). Having determined for itself the primary facts of the accident, the jury should then, and not till then, proceed to discover by inference from the facts found by them (*a*) whether the defendant was guilty of negligence; (*b*) whether the plaintiff was guilty of negligence; (*c*) if both parties were guilty of negligence, whether the defendant could in the result by the exercise of reasonable care and diligence have avoided the mischief which happened. See *H. and G. Grayson Ltd.* v. *Ellerman Line Ltd.* (4) and the criticism thereon by *O'Connor* L.J. in (1922) 38 *Law Quarterly Review* 17. In this case in the court below, it was admitted that it was open to the jury to find the defendant guilty of negligence. The Full Court of the Supreme Court has found that it was open to the jury to find the plaintiff not guilty of contributory negligence. At the most, he may have been guilty of an error of judgment: See *Allen* v. *Redding* (5); *Williams* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (6). It was held by the majority, however, that the issue of last opportunity should not have been left to the jury and because it was so left there must be a new trial: See *State Electricity Commission* (*Vict.*) v. *Gay* (7). Whether or not the issue of last opportunity should have been left must depend on (*a*) in the first place the ascertainment of the primary facts; (*b*) whether from those facts it could be inferred that the defendant had an opportunity of avoiding the mischief or alternatively by his negligence had precluded himself from doing so although he had time to do so if he had not been careless; (*c*) a proper analysis of the "doctrine of the last opportunity". On the evidence in this case various hypotheses of fact were open to the jury. It could have found negligence by the defendant only. If it found contributory negligence in the deceased, it could have found that the defendant had deprived himself by his negligence from taking evasive action; then, on the doctrine of the last opportunity (as interpreted in *Radley* v. *London & North Western Railway Co.* (8); *Ellerman Lines Ltd.* v. *H. & G. Grayson Ltd.* (9);

(1) (1877) 3 App. Cas., at pp. 202, 207, 210, 211.
(2) (1878) 3 App. Cas., at p. 1167.
(3) (1911) P. 128, at p. 151.
(4) (1920) A.C. 466.
(5) (1934) 50 C.L.R. 476.
(6) (1933) 50 C.L.R. 258.
(7) (1951) V.L.R. 104.
(8) (1876) 1 App. Cas. 754.
(9) (1919) 2 K.B. 514, at pp. 531-537.

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Allen v. *Redding* (1); *McLean* v. *Bell* (2); *British Columbia Electric Railway Co., Ltd.* v. *Loach* (3)), the defendant was liable. See the first rule of *Greer* L.J. in *The Eurymedon* (4); *R. and W. Paul (Ltd.)* v. *Great Eastern Railway Co.* (5); *Anglo-Newfoundland Development Co. Ltd.* v. *Pacific Steam Navigation Co.* (6); article by Professor *Goodhart*, 65 *Law Quarterly Review* 255. If these findings were reasonably open to the jury on the primary facts, some guidance on the doctrine of last opportunity should have been given (*Symons* v. *Stacey* (7); *Loach's Case* (3); *McLean* v. *Bell* (2); *Allen* v. *Redding* (1)). At that stage of the trial, *O'Bryan* J. did not and could not know what the primary facts were to be found by the jury. He attacked the only illustration given by counsel for the plaintiff. It is probable he mis-stated counsel's submission, but in fact he rejected it, and in finally explaining the issues the trial judge did not refer to the doctrine at all. Cf. *A. G. Healing & Co. Pty. Ltd.* v. *Harris* (8); *Swadling* v. *Cooper* (9); *Birt* v. *Robinson (No. 3)* (10). If the primary facts found by the jury admitted of the defendant taking evasive action, then the doctrine of the last opportunity should have been explained to the jury. Any findings on the application thereof are pre-eminently a jury matter: See *Joseph* v. *Swallow & Ariell Pty. Ltd.* (11); *Wheare* v. *Clarke* (12); *McLean* v. *Bell* (2); *Loach's Case* (3); *Commissioner of Railways* v. *Leahy*, per *Griffith* C.J. (13); per *Barton* J. (14); and per *O'Connor* J. (15). In so far as *Gay's Case* (16) decides that the doctrine of last opportunity does not apply to the case where the defendant is aware of the danger created in whole or in part by the plaintiff's negligence and the defendant negligently fails to prevent the threatened accident he alone is responsible, notwithstanding that the plaintiff although unaware of the danger should have known of it had he kept a reasonable look-out and could have himself avoided the accident by taking reasonable precautions, it is erroneous and seems opposed to *Radley's Case* (17); *Sans Pareil* (18); *R. and N. Paul* v. *Great Eastern Railway Co.* (19); *Ellerman Lines, Ltd.* v. *H. & G. Grayson Ltd.* (20); *Municipal Tramways Trust* v. *Buckley* (21); *Symons* v.

(1) (1934) 50 C.L.R. 476.
(2) (1932) 147 L.T. 262.
(3) (1916) 1 A.C. 719.
(4) (1938) P. 41, at p. 49.
(5) (1920) 36 T.L.R. 344.
(6) (1924) A.C. 406, at p. 419.
(7) (1922) 30 C.L.R. 169, at p. 179.
(8) (1927) 39 C.L.R. 560.
(9) (1931) A.C. 1, at p. 11.
(10) (1937) N.Z.L.R. 898.
(11) (1933) 49 C.L.R. 578.
(12) (1937) 56 C.L.R. 715.
(13) (1904) 2 C.L.R. 54, at pp. 62, 63.
(14) (1904) 2 C.L.R., at p. 70.
(15) (1904) 2 C.L.R., at pp. 73, 74.
(16) (1951) V.L.R. 104.
(17) (1876) 1 App. Cas. 754.
(18) (1900) P. 267.
(19) (1920) 36 T.L.R. 344.
(20) (1919) 2 K.B. 514, at pp. 531-537.
(21) (1912) 14 C.L.R. 731.

Stacey (1) and the view of Professor *Goodhart*, 65 *Law Quarterly Review* 255. In so far as facts are admitted or incontrovertible in the evidence and it is clear that no reasonable jury could conclude or infer that the defendant had time to avoid the plaintiff's neglect, then it may be open to the presiding judge to withdraw the doctrine from the jury; but, until the primary facts are found and there is room for several hypotheses, then the court would be bound, not to put the whole of the law of negligence to the jury, but sufficient to instruct them on the possible hypotheses of fact which they could reasonably infer. Even if the doctrine is explained to the jury and the issue left, though not open on the facts, then it is submitted there can be no substantial miscarriage of justice to the defendant because it must be assumed that the jury has decided the case on the evidence. See *Supreme Court Rules*, Order LVIII., rule 6; *Hoyt's Pty. Ltd.* v. *O'Connor* (2); *Nance* v. *British Columbia Railway* (3). In this case there was no substantial wrong or miscarriage of justice because the trial judge in his final direction brought the jury back to the questions they were called upon to answer.

R. A. Smithers, for the respondent. *Dean* and *Sholl* JJ. were right in their conclusion that the trial judge had misdirected the jury in material respects. There was no room, on the evidence here, for any application of a rule or doctrine of "last opportunity"; and in such a case it should not have been put to the jury at all. As to whether there is any such rule, see *Davies* v. *Swan Motor Co. (Swansea) Ltd.* (4), per *Denning* L.J. See also *Clerk & Lindsell* on *Torts*, 10th ed. (1947), pp. 397, 399; *South Australian Ambulance Transport Incorporated* v. *Wahleim* (5); *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.* (6); *Sparks* v. *Edward Ash Ltd.* (7), per *Scott* L.J. Failure of the defendant to keep a proper look-out—if that is what the jury found against him—is not a special kind of negligence; in the circumstances of this case, it could not be used to show that the defendant had "the last opportunity" or to found a suggestion that he had wrongfully put himself in a position in which he was unable to take advantage of an opportunity to avoid the collision. It is not denied that there was evidence on which the jury could have found that the defendant was negligent; but there was also evidence on which—if properly directed—the jury might have been expected

(1) (1922) 30 C.L.R. 169.
(2) (1928) 40 C.L.R. 566, at p. 576.
(3) (1951) 2 All E.R. 448.
(4) (1949) 2 K.B. 291, at p. 323.
(5) (1948) 77 C.L.R. 215, particularly at p. 229.
(6) (1924) A.C. 406, at pp. 420, 421.
(7) (1943) K.B. 223, at p. 235.

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to find contributory negligence on the part of the deceased. That —it is submitted—should have been the determining factor in this case; but the question of contributory negligence was obscured by the judge's summing up. The jury may well have thought —on the direction given—that the question it had to answer was: Who had the last opportunity, the defendant or the deceased? If there could be cases in which that was the test of liability, this case is not one of them. Traffic regulations can throw little light on the question of negligence here. As there was no "through" intersection of roads, the rule as to who shall give way at an intersection seems hardly applicable.

J. E. Starke, in reply, referred to the *Road Traffic Regulations* 1939 (Vict.), reg. 12.

Cur. adv. vult.

1952, March 5. THE COURT delivered the following written judgment:—

This is an appeal from a judgment of the Supreme Court of Victoria. Kathleen Joyce Alford brought an action in the Supreme Court against Kevin William Magee under Part III. of the *Wrongs Act* 1928, which is the Victorian equivalent of *Lord Campbell's Act*. The action was brought in respect of the death of the plaintiff's husband and on behalf of the plaintiff and three infant children. The husband was killed as a result of a collision between a motor cycle ridden by him and a motor car driven by the defendant. The plaintiff alleged that the collision was caused by the negligent driving of his motor car by the defendant. The defendant by his defence denied negligence, and alleged that "there was contributory negligence on the part of the deceased". The plaintiff joined issue, and also alleged, in par. 2 of her reply, that, "if the deceased was guilty of contributory negligence (which allegation is denied) the defendant could nevertheless by the exercise of reasonable care have avoided the consequences of such negligence and the said collision, and had the last opportunity of so doing". This has become a generally adopted, and more or less stereotyped, form of pleading in Victoria. The action was tried by *O'Bryan* J. with a jury. The jury returned a verdict for the plaintiff, and assessed damages at the sum of £3,450, which they apportioned between the plaintiff and the three children. The defendant appealed to the Full Court. The Full Court by a majority (*Dean* and *Sholl* JJ., *Martin* J. dissenting) set aside the verdict and the judgment founded thereon, and ordered a new trial. *Martin* J. was of opinion that there should be a new trial but only on the question of damages

—a matter of minor importance, consideration of which may be postponed. From this judgment of the Full Court the plaintiff appeals by leave to this Court. The ground upon which the Full Court set aside the verdict and judgment was that the learned trial judge had misdirected the jury with regard to contributory negligence, and, in particular, with regard to the matters raised by par. 2 of the reply.

The collision took place shortly before midnight on 5th October 1949 in Auburn Road, Auburn. Auburn is a suburb of Melbourne. At the locality in question two other streets make a junction with Auburn Road. Auburn Road runs north and south, and Rathmines Road enters it from the east and Liddiard Street from the west. Liddiard Street comes in a little south of Rathmines Road, the northern kerb line of Liddiard Street being about thirty feet south of the southern kerb line of Rathmines Road. There is a " traffic button " in the centre of Auburn Road, about ten feet south of the southern kerb line of Rathmines Road. There was no evidence as to its origin or purpose, but it was presumably placed there to suggest to vehicles travelling from Rathmines Road into Liddiard Street that they should steer a course to the south of it, and to those travelling from Liddiard Street into Rathmines Road that they should steer to the north of it. The course of Auburn Road to the north is uphill from a considerable distance south of Liddiard Street to a considerable distance north of Rathmines Road, the slope gradually increasing in steepness. Rathmines Road and Liddiard Street are level. The defendant's car was travelling north along Auburn Road on its correct side of the road. The deceased, who lived in a street which runs off Liddiard Street, was riding his motor cycle in a westerly direction along Rathmines Road. He entered Auburn Road, most probably—though this was, of course, a matter for the jury—with the intention of crossing it and entering Liddiard Street. He collided with the defendant's car at a point in the vicinity of the traffic button, and was thrown from his cycle and killed, his body coming to rest against the kerb on the west side of Auburn Road a little to the north of Liddiard Street.

The defendant being the only living eye-witness of the accident, the plaintiff's counsel launched his case by putting in two statements made before the trial by the defendant himself. The first was a statement made to the police, and the second was the deposition of the defendant at the coroner's inquest on the deceased man. At the close of the plaintiff's case Mr. *Smithers*, for the

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defendant, submitted that there was no evidence of negligence on the part of the defendant, or, alternatively, that on the evidence no reasonable explanation of the accident was open to the jury which would not involve a finding of contributory negligence on the part of the deceased. His Honour refused to rule on the submission unless Mr. *Smithers* elected to call no evidence, and this Mr. *Smithers* declined to do. He thereupon, after opening to the jury, called the defendant as a witness, and he was examined and cross-examined. It was said on the hearing of this appeal, that the jury then had before them four entirely different accounts given by the defendant of the accident, one version given in the statement to the police, another in the deposition at the inquest, another in examination-in-chief, and yet another in cross-examination. We think, however, that *Dean* J. was clearly right in saying that " his general account has not varied ", and we think that that account was intelligently given and conveys a fairly clear picture of what happened. The whole of the material events occurred within the space of two or three seconds, and in such a case doubts and discrepancies in points of detail are inevitable. There was, we think, only one apparent discrepancy which assumes any importance on this appeal.

In his statement to the police the defendant said that he was travelling at twenty-five to thirty miles per hour, that he saw the cycle in Rathmines Road a short distance east of Auburn Road, that it appeared to be travelling at a fast speed and did not appear to slacken speed as it entered Auburn Road. The cycle, he said, turned south-west into Auburn Road, passing the traffic button to the north of it. He applied his brakes " hard on ", but the near side of the front part of the cycle struck the front portion of the car. The rider of the cycle was thrown from the machine and rolled into the western kerb of Auburn Road. The discrepancy referred to above appeared in the defendant's evidence at the inquest. He there said that he first saw the motor cycle when it was at a point which he estimated to be about thirty to thirty-five yards away from his car, and said :—" As soon as I saw the cyclist I applied my brakes. I was somewhere about three yards south of Liddiard Street. It was sufficient emergency for me to apply my brakes but I did not apply them hard. I slowed down . . . Had deceased gone south of the traffic button, there would have been no collision . . . I applied my brakes and attempted to pull up in twenty to twenty-two yards before the point of impact . . . I was doing about eight miles per hour, and I would say the cycle was doing fifteen to twenty miles per hour at the time of impact ".

The apparent discrepancy is between the statement that he applied his brakes "hard on", and the statement that he applied his brakes but "did not apply them hard". Actually we think that the apparent discrepancy was explained in the defendant's evidence at the trial of the action. What that evidence really conveys seems to be this. When the defendant first saw the cyclist, the cyclist was near the centre of Rathmines Road, travelling at a fast speed. The defendant applied his brakes, but not hard. If the cyclist had gone to the south of the traffic button, he would have passed behind the car. It became, however, almost instantly apparent that he did not intend to go to the south of the button. The defendant then applied his brakes hard, and swerved slightly to his left, while the cyclist also applied his brakes and swerved to his right, but these manoeuvres failed to avert a collision. The present importance of the evidence as to the application of brakes lies in the fact that it provided the basis for the dissenting judgment of *Martin* J. in the Full Court. It is not necessary, we think, for present purposes to discuss the evidence in greater detail. It is accurately summarised in the judgment of *Dean* J. The defendant, although (rightly, we think) conceding that there was evidence to go to a jury of negligence on his part, contended before the Full Court that it was not open to the jury on the evidence to find that the accident happened without contributory negligence on the part of the deceased. Although cases where this is so are likely to be rare, there was clearly much to be said for this view in this case. It was, however, rejected by the Full Court, and it was not raised in this Court.

The direction of the learned trial judge to the jury was not challenged up to a point at which, after explaining to them what may be regarded as the primary rules relating to negligence and contributory negligence, he concluded by saying: "If he" (i.e., the defendant) "proves the cyclist was negligent and his negligence was a contributing cause of the accident, then, generally speaking, he is exonerated and he is entitled to a verdict". Then follows the passage to which objection is taken, and it is desirable to set this passage out in full. His Honour proceeded: "Mr. *Starke* has relied on a doctrine called the doctrine of last opportunity and that doctrine is that sometimes, although a plaintiff may be guilty of contributory negligence, he does not lose his right to a verdict, if the jury is of the opinion that, although the plaintiff was guilty of contributory negligence, the defendant had a last opportunity of avoiding the accident and should have avoided it. The case in which this doctrine was first announced was the case

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of a man who tethered his donkey to the roadway and left him lying there on the roadway. Another user of the highway came along without seeing the donkey on the roadway when he should have done so and he drove over it. Well, the jury thought that the defendant's driver who ran into the donkey was guilty of negligence. He should have seen it and should have avoided it. The defendant said, 'You were also guilty of negligence, you should not have left your donkey lying there on the roadway'. The plaintiff's reply was and the Court so held, 'That is true enough, but you, the driver, had a last opportunity of avoiding that negligent act of mine. You should have seen that negligent act and you should have avoided. You had that opportunity at a time when I, the owner of the donkey, could not have done anything about the matter.' As I understand Mr. *Starke*, he asks you to apply that rule in this case in this way. At any rate, this was the only illustration he gave of how the last opportunity rule could apply in her favour. Supposing you find that the defendant Magee was guilty of negligence, either through not keeping a proper lookout or by driving too fast north up Auburn Road, and supposing you also think the motor cyclist came too fast out into the intersection, so that you think they were both guilty of negligence which contributed to this accident, still, he says, you might find that the motor cyclist was going too fast to have any chance after he came into the intersection of avoiding the accident. So that, in fact, it was the motor car driver, the defendant, who had the last opportunity of avoiding the action. Now, it is my duty to tell you that there is a further gloss on this doctrine of contributory negligence. It is this. If the plaintiff has, by his own negligent conduct, deprived himself of the opportunity of having a last opportunity in other words if he would have had a last opportunity if he had not deprived himself of it, his negligence is then deemed to continue right up to the moment of collision and, therefore, he cannot recover. Supposing a man, for instance, starts out with defective brakes —that is not this case, but it will illustrate what I mean. He goes out with defective brakes on a motor car or on any vehicle—and he has not got a last opportunity because he started out with these defective brakes, he would have had a last opportunity if he had not started out with defective brakes; in such a case the other man is not said in those circumstances to have the last opportunity. The negligence in driving the motor vehicle with defective brakes continues right up to the moment of collision. And so I suggest to you in this case that, if you did find the facts as Mr. *Starke* has suggested, you might, if you did find them that way—that the

motor cyclist came out too fast and that his fast driving was one of the causes of the accident—you would probably come to this conclusion—'Well, he may not have had a last opportunity, having come out too fast, but it was his own negligence in coming out too fast which deprived him of that opportunity.' And therefore he cannot succeed. One way in which the courts have looked at this matter of last opportunity, and I think it is possibly the clearest way of looking at it, is the way in which the New Zealand courts have approached this problem. They said this—The way you are to assess this matter is to go backwards from the time the accident happened. You have got an accident happening on a roadway at a certain point of time. Now, if you go back from that point of time and you find that there is a period at which one of the parties could have avoided the accident but the other could not, then that person who could have avoided the accident is said to have had the last opportunity. So you can really form this judgment if you say, 'Well, I think it was his negligence which was the real cause of the accident.' Now, I do not think I can put it any clearer than that to you. It is not a very clear doctrine in itself, I think, this doctrine—but I think that it is as clear as I can put it to you, as to what the law is in regard to last opportunity".

At the conclusion of his charge on the question of liability, his Honour said:—"If you are not satisfied that Magee was guilty of negligence there will, of course, be judgment for Magee. If you are satisfied he was guilty of negligence and are not satisfied that the deceased man was guilty of negligence, there will be judgment for the plaintiff. If you are satisfied that Magee was guilty of negligence and that the deceased was also guilty of negligence and that Magee did not have a last opportunity for avoiding that negligence, there will be judgment for Magee".

Finally, after directing the jury on the subject of damages, his Honour said:—"If you find the defendant was not guilty of negligence, you will, of course, find for him. If you find he was guilty of negligence but that the accident was contributed to in the manner which I have described to you by negligence on the part of the cyclist, he the defendant is also entitled to a verdict. If, on the other hand, you find that it was his negligence alone which was the real cause of this accident, then you must find for the plaintiff and you will assess damages in the way in which I have described to you".

At the conclusion of the charge Mr. *Smithers* asked his Honour to direct the jury that the last opportunity rule could not be applied to the facts of the case as disclosed by the evidence. His Honour refused so to direct them.

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The majority of the Full Court, applying *State Electricity Commission of Victoria* v. *Gay* (1), held that it was wrong, in the circumstances of this case, to direct the jury in any manner which left it open to them to say that the so-called " last opportunity rule " applied to the case. There was, in their opinion, no possible view of the evidence which could call for the application of that " rule ". This appeal, therefore, requires some examination of *Gay's Case* (1) and raises notoriously difficult questions, but, in our opinion, even if it was proper in this case to direct the jury as to " last opportunity ", the direction actually given involved a misdirection and was such as to make a new trial unavoidable. For the argument which his Honour (rightly or wrongly) attributes to Mr. *Starke* was an entirely untenable argument, and the jury should have been directed to ignore it. It is true that his Honour discouraged the jury from adopting it, but he did actually leave it to them as a possible view, and they may in fact have adopted it. Stated fully, the argument amounts to this :—" The deceased did not have a last opportunity to avoid the collision because he was travelling too fast when he entered Auburn Road : therefore, the defendant *did* have a last opportunity to avoid the collision, and, not having taken this opportunity, he cannot escape liability by virtue of any negligence on the part of the deceased ". The deceased is thus put as being entitled to rely on his own negligence to exculpate himself and inculpate the defendant. The *non sequitur* is obvious. The direction is also open to more general objections. It does not make it clear that the critical question is not whether the *deceased* had a " last opportunity " but whether the *defendant* had a " last opportunity ". It introduces a view which has been entertained—though not universally—of *British Columbia Electric Railway Co. Ltd.* v. *Loach* (2), in relation to the negligence of the deceased (not the defendant). This could hardly fail to confuse the jury. And it does not make it clear that, on any view of the matter, it is only if a failure on the part of the defendant to take advantage of a " last opportunity " amounted to a failure to exercise reasonable care that the " last opportunity rule " could help the plaintiff. And at this stage it was at least highly desirable to explain to the jury what is sometimes called the rule in *The Bywell Castle* (3). Further, the direction refers to an approach to the problem which has been suggested in New Zealand, without giving any guidance to the jury as to how any such approach might possibly help them

(1) (1951) V.L.R. 104.
(2) (1916) 1 A.C. 719.
(3) (1879) 4 P.D. 219, at p. 223.

in the particular case. It is extremely difficult to see how it could do anything but confuse them.

The combined effect of the above considerations is that the appeal must be dismissed and there must be a new trial. Even if it was right to direct the jury in the particular case in terms of last opportunity, the jury was not properly directed on the subject. Since, however, there must be a new trial, we cannot avoid considering the ground on which the case was decided in the Full Court. The majority of that Court (*a*) assumed, in accordance with *Gay's Case* (1) that there is a rule of law which is properly stated in terms of last opportunity, but (*b*) decided, regarding the case as indistinguishable from *Gay's Case* (1), that that rule could not be applied on any view of the evidence that was fairly open. Large and difficult questions are thus raised. In the whole matter it will be convenient to speak of a plaintiff and a defendant, premising that what is said will, of course, be equally applicable to an action under *Lord Campbell's Act*, where the plaintiff is not the actual person whose " contributory negligence " is in question.

If one thing in this unhappily confused field is clear, it is that the modern common law as to contributory negligence is not—for the purposes, at any rate, of a large class of cases—completely stated by saying simply that, if a plaintiff's negligence has been a cause of the damage of which he complains, he cannot recover from a defendant whose negligence has also been a cause of that damage. For the purposes of very many cases such a statement requires qualification. And here, at the very outset, we are faced with a difficulty which is really a terminological difficulty. *Crompton* J. in *Tuff* v. *Warman* (2) said :—" The word ' contribute ' is a very unsafe word to use : it is much too loose ". And Sir *William Holdsworth* (Hist. Eng. Law, vol. iii, p. 378) speaks of " that miscalled doctrine, ' contributory negligence ' ". But the term has become an everyday legal term, and we should know what we mean by it. There are two possible ways of defining it, one of which was adopted by *O'Bryan* J. in the present case, and the other (so far as one can gather from the report) by *Sholl* J. in *Gay's Case* (1). The one view regards the term as meaning negligence on the part of the plaintiff which has been a cause of damage in the same sense in which it is necessary for the plaintiff himself to prove that negligence of the defendant was a cause of the damage. On this view contributory negligence is sometimes a good defence and sometimes not, and so we state a general rule that it is a good defence followed

(1) (1951) V.L.R. 104.

(2) (1858) 5 C.B.N.S. 573, at p. 584, [141 E.R. 231, at p. 236].

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by a qualification or exception—which may or may not be correctly expressed in terms of a last opportunity of the defendant. The other view regards the term as meaning such negligence of the plaintiff as will disentitle him to succeed against a negligent defendant. On this view, of course, *ex hypothesi* contributory negligence is always a good defence, and so we state a rule *simpliciter*, though it must, of course, incorporate what, from the other point of view, is an exception to a general rule. It appears to have been the latter point of view that *Sholl* J. adopted in *Gay's Case* (1). But the former point of view seems preferable for a number of substantial reasons. The latter point of view may be supported by reference to many cases in which eminent judges have approached the problem as a problem of "causation" and seem to have been asking themselves the question: "What negligence is 'contributory'?" It may also be supported by reference to *Bridge* v. *Grand Junction Railway Co.* (2), in which a special plea of negligence on the part of both plaintiff and defendant was held bad. But, in the first place, if we look at the matter historically, there can be no doubt that Professor *Glanville Williams* (*Joint Torts & Contributory Negligence*, p. 223) is right when he says (as others also have said) that the general rule of the common law was that "if the damage was caused by the fault of both parties, neither could recover from the other". Because this rule "worked hardship", he says, "where one of the two negligent parties sustained the whole of the loss", it was "later modified by a second rule". In the second place, it seems more natural and appropriate to use the term as meaning negligence of the plaintiff which has been a cause of the damage in the above sense and then to consider what circumstances will preclude such negligence from affording a good defence. In the third place, it is a simpler and more practical course to put the position to a jury in the form of a general rule subject to a qualification: in many cases the general rule can be put to them without qualification, as was held in *Gay's Case* (1) to be the proper course. Finally the position was so put in what must still be regarded as the leading authorities, *Tuff* v. *Warman* (3) and *Radley* v. *London & North-Western Railway Co.* (4).

These considerations serve to clear the ground to some extent. But it is in the formulation of the qualification that the great difficulty has been found to lie, and a vast mass of learned discussion, judicial and academic, has accumulated around it. The

(1) (1951) V.L.R. 104.
(2) (1838) 3 M. & W. 244 [150 E.R. 1134].
(3) (1858) 5 C.B.N.S. 573 [141 E.R. 231].
(4) (1876) 1 App. Cas. 754.

difficulty is inherent in the whole conception of contributory negligence as a defence. Sir *William Holdsworth* (op. cit., vol. iii, pp. 378, 379, vol. viii, pp. 459-462) points out that what the law has really been trying to do is to weld together two incompatible notions. After referring to a mediaeval case, in which the defective fencing of the plaintiff's close was held to afford a good defence in an action for trespass by the defendant's cattle, the learned author proceeds :—" It is to be observed that this is exactly the substance and meaning of that miscalled doctrine, 'contributory negligence'. According to this doctrine, when the plaintiff's own act is the " (? an) " effective cause of damage which he has suffered, he cannot recover. But this rule of law arose at a time when the common law had no doctrine of negligence ". At that time the basis of civil liability was conceived to be simply an act causing damage. It was not until the nineteenth century that the idea of negligence (with its connotation of blameworthiness) as a basis of liability was developed, and the original common law rule of contributory negligence does not harmonise with the developed idea. *Holdsworth* elsewhere (op. cit., vol. iii, p. 268) points out that " the Admiralty lawyers, being civilians, naturally grounded liability upon *dolus* or *culpa* ; and the logical consequence of this conception is the modern application of the rule of division of loss to the case where both ships are at fault ". A little later he says that, whatever may be the comparative merits of the Admiralty rule and the common law rule from the point of view of practical utility, " it can hardly be denied that, if liability for wrong is to be founded upon *dolus* or *culpa* the Admiralty rule is the more logical of the two ". And, after citing the judgment of *Lindley* L.J. in *The Bernina* [No. 2] (1) and an article in the *Law Quarterly Review* (13 L.Q.R. 17, at p. 20), which speaks of the Admiralty doctrine as an " advance upon " the common law doctrine, he observes that " we may regard the rule laid down in the Maritime Conventions Act 1911 as a still further advance in the same direction ". In England the *Law Reform (Contributory Negligence) Act* 1945 (8 & 9 Geo. VI., c. 28) in effect provided for the application of the rule as to division of loss in proceedings at common law, and a statute in almost identical terms was enacted by the Parliament of Victoria in the latter part of 1951. The latter Act, however, does not apply to any case where the acts or omissions giving rise to the claim occurred before the passing of the Act, and a large number of cases, including this case, will fall to be decided without reference to its provisions.

(1) (1887) 12 P.D. 58, at p. 89.

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We have said that the modern common law rule cannot be stated in absolute terms, as by saying that a plaintiff cannot recover damages from a negligent defendant if his own negligence contributed to his injury. But the emergence of the idea that a qualification was necessary does not, we think, clearly appear before *Bridge* v. *Grand Junction Railway Co.* (1). In spite of what *Parke* B. says in that case in a judgment which seems, by the way, really to put the matter the wrong way round, the rule was stated in absolute terms by Lord *Ellenborough* C.J. in *Butterfield* v. *Forrester* (2). In *Vanderplank* v. *Miller* (3) we find Lord *Tenterden* saying to the jury : " If there was want of care on both sides, the plaintiffs cannot maintain their action : to enable them to do so, the accident must be attributable entirely to . . . the defendants ". Several other such statements are to be found. When it seems to become regarded as settled that a qualification is necessary if injustice in some cases is to be avoided, some at least of the learned judges who first formulated the qualification seem to have approached the problem as if it raised a question of causation. The term " proximate cause " was used in the direction to the jury in *Davies* v. *Mann* (4). Cf. the well known passage in the judgment of Lord *Campbell* C.J. in *Dowell* v. *General Steam Navigation Co.* (5). In many later cases the question is treated as if it were one of " causation " : a number of these are referred to by Professor *Glanville Williams* in the work already cited at pp. 236-238. The matter has been so treated in this Court by *Barton* J. in *Commissioner of Railways* v. *Leahy* (6) and by *Isaacs* J. in *Symons* v. *Stacey* (7) and *A. G. Healing & Co. Pty. Ltd.* v. *Harris* (8) : see also *Municipal Tramways Trust* v. *Buckley* (9). We seem indeed to see here the very process which *Holdsworth* has observed. Liability has come to depend on negligence, which involves blameworthiness. But, when negligence of the plaintiff is considered as a defence, there is an adherence to the older idea that the basis of responsibility is simply " act causing damage ", and this is accompanied by an express refusal to recognise, in this class of case, " degrees " of negligence, although negligence may obviously in fact be gross or slight—the departure from the norm of the " reasonable man " may be wide or

(1) (1838) 3 M. & W. 244 [15 E.R. 1134].
(2) (1809) 11 East 60 [103 E.R. 926].
(3) (1828) M. & M. 169, at p. 170 [173 E.R. 1119, at p. 1120].
(4) (1842) 10 M. & W. 546 [152 E.R. 588].
(5) (1855) 5 E. & B. 195, at pp. 206, 207 [119 E.R. 454, at pp. 458, 459].
(6) (1904) 2 C.L.R. 54, at p. 57.
(7) (1922) 30 C.L.R. 169, at pp. 175, 176.
(8) (1927) 39 C.L.R. 560, at pp. 565, 566.
(9) (1912) 14 C.L.R. 731, at pp. 739, 740.

narrow. The well known epigram about the " vituperative epithet " (*Rolfe* B. in *Wilson* v. *Brett* (1)) was bound to be quoted again and again and to exhibit a possibly unfortunate vitality. But, however natural in the light of history it may seem to refer the whole question of contributory negligence to a theory of causation, this view has been most effectively criticised on logical grounds by many writers. *Salmond* (*Law of Torts*, 3rd ed., p. 35) took (*inter alia*) the everyday case of a passenger in a vehicle which is being driven by one who is not his servant. The vehicle collides with another vehicle, both being negligently driven. To an action by the driver of the first vehicle his own negligence will be a good defence, but that negligence will afford no defence to an action by the passenger. But it is impossible to say that the negligence of the driver of the first vehicle was a cause (in any sense) of the damage in the one case and not in the other. And see the elaborate analysis of the whole position by *Glanville Williams* (op. cit., s. 62).

If the common law had adhered to the simple and absolute rule stated by Lord *Tenterden* in *Vanderplank* v. *Miller* (2), the fact that that rule was not based on a strictly logical theory of liability might not have mattered very much from a practical point of view. But, when it was felt that that rule had to be qualified, it mattered very much indeed. For from it has followed the extreme difficulty which has always been felt in stating the qualification or exception in a form which will not, if literally applied, have the effect of contradicting or nullifying the rule. The two most authoritative statements of it are undoubtedly to be found in the judgment of *Wightman* J. in what Lord *Sumner* called the " classic case " of *Tuff* v. *Warman* (3) and in the speech of Lord *Penzance* in *Radley's Case* (4). It seems a strange thing, as Sir *A. Goodhart* has observed, that *Davies* v. *Mann* (5) should ever have been regarded as a leading case. The passages in *Tuff* v. *Warman* (6) and *Radley's Case* (7) are too well known to need quoting. In neither is there any reference to " last opportunity ", though the use of the word " avoiding ", and, in the latter case, the words " in the result ", do perhaps suggest the possibility of the defendant having an opportunity to do something at a point of time at which the plaintiff had no such opportunity. So far as we can make out, the use of the expression " last opportunity ", which has become so

(1) (1843) 11 M. & W. 113, at pp. 114, 115 [152 E.R. 737, at pp. 738, 739.].
(2) (1828) M. & M. 169 [173 E.R. 1119].
(3) (1858) 5 C.B.N.S., at p. 585 [141 E.R., at p. 236].
(4) (1876) 1 App. Cas., at p. 759.
(5) (1842) 10 M. & W. 546 [152 E.R. 588].
(6) (1858) 5 C.B.N.S. 573 [141 E.R. 231].
(7) (1876) 1 App. Cas. 754.

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common, owes its origin to Sir *John Salmond*, the first edition of whose famous work on the *Law of Torts* was published in 1907. *Salmond* called the " qualification " the " rule in *Davies* v. *Mann* ". He regarded the statement of the " rule " by Lord *Penzance* as " elliptical and insufficient ", and, read literally, as " not merely a limitation of the general rule as to contributory negligence, but the complete negation of it " (3rd ed., p. 39). He then said :— " Subject to certain qualifications, it would seem that the true test is the existence of the *last* opportunity of avoiding the accident ". (The italics are the author's.) After an interesting discussion, in the course of which he claimed support from *Pollock*, *Salmond* concluded (3rd ed., pp. 42, 43) :—" Accepting the foregoing conclusions, the rule in *Davies* v. *Mann* may be formulated thus : The contributory negligence of the plaintiff is no defence if the defendant had a later opportunity than the plaintiff of avoiding the accident by reasonable care, and at the time either knew or ought to have known of the danger caused by the plaintiff's negligence. Combining this rule with the general principle of contributory negligence, we reach the following result : When an accident happens through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care, and who then knew or ought to have known of the danger caused by the other's negligence ".

These two sentences and the whole of the section of *Salmond's* work in which they occur represented, of course, a real contribution to the subject. The principle stated by *Salmond* appeared on its face to be reasonably clear, and capable of being readily explained to a jury in any case which called for its application. The apparent difficulty occasioned by the words " ought to have known " could have been avoided if it had been remembered that they were introduced to meet such a case as *Radley's Case* (1) the essence of which was that the engine-driver, although he did not actually know what was obstructing his progress, had a warning of danger which he unreasonably ignored. In fact the statement commanded widespread attention, and for many years it has been regarded as orthodox practice in Victoria to direct juries on contributory negligence by telling them, in effect, that contributory negligence is a defence *subject to* the " last opportunity rule ", as stated by *Salmond*. That *Salmond's* statement had a profound influence in other jurisdictions can hardly be doubted. One may speculate on the question whether, if it could have been consistently applied without undue refinement and in the light of its author's own

(1) (1876) 1 App. Cas. 754.

observations upon it, it might not have solved for practical purposes the problem which has baffled so many, or at least prevented the creation of what Lord *du Parcq* has " aptly called a maze " (*Glanville Williams*, op. cit., p. 236). In fact it has not solved the problem: it was in truth neither generally adopted nor ignored, and its enunciation has probably " in the result ", as Lord *Penzance* would say, merely produced a multiplication of intricacies. The intended panacea has been almost a poison. It does not follow that *Salmond's* " rule " is necessarily without usefulness.

There are, we think, several reasons why the last opportunity rule has failed of its object. In the first place, the use of the words " *the* last opportunity " in the final statement of the " combined " rule was unfortunate. It would indeed have been better if the " combined rule " had been omitted. It conveyed the impression that one or other of the parties must always have had a last opportunity to avoid the accident, and, though this is clearly remote from what the author meant, it has been one of the factors which have led to juries being directed on the subject of last opportunity in many cases in a misleading way, and in many cases where " last opportunity " ought never to be mentioned at all. The advent of fast moving road vehicles led to particularly unfortunate attempts to apply it. But the chief reason why the last opportunity theory has failed probably goes much deeper. It can hardly be doubted that it did not really represent the whole of what *Wightman* J. and Lord *Penzance* intended to convey. At best it provided a useful test in certain cases—probably a fairly large class of case —but it by no means covered the field. It is almost certainly because the rule did not really represent the spirit of the authorities that, in spite of its influence, the express references to " last opportunity " in cases of high authority have been surprisingly rare and cautious. And it is almost certainly for the same reason that after *Loach's Case* (1) it became—one does not know whether to say encumbered or superseded—by refinements and new analyses, and expounded in varying metaphors. Negligence could be static or dynamic, continuing or non-continuing, initial or ultimate. A very good instance of a case which cannot be brought within the scope of *Salmond's* conception is a case decided in this Court about three years before the publication of *Salmond's* work, the case of *Commissioner for Railways* v. *Leahy* (2). In that case the plaintiff proceeded to cross on foot a level crossing, where there was a double line of railway, immediately after a train had passed on the line which was nearest to her. Passing behind this train on to the other

(1) (1916) 1 A.C. 719.

(2) (1904) 2 C.L.R. 54.

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line she was struck by a train travelling in the opposite direction. The Court held (*Griffith* C.J. *dubitante*) that it was open to a jury to hold that negligence of the plaintiff in walking on to the second line without looking to see if a train was coming was cancelled out, so to speak, by the negligence of the driver of the train in failing to sound his whistle. Here the plaintiff clearly had an opportunity of stopping her progress after the driver had any chance of stopping his train, and the driver could not at any material time have seen her. But, if the driver had whistled when he ought to have whistled, the plaintiff might have stopped in time, and it was open to a jury to say that she would have stopped in time. If the driver had exercised reasonable care, the plaintiff would have exercised reasonable care in time to prevent the accident.

Salmond's original rule, as has been said, might have been adopted as a practical workable rule covering the whole ground, even though it did not represent the whole of what *Wightman* J. and Lord *Penzance* had meant. But the elimination of this possibility, if it ever existed, seems to have come about with *Loach's Case* (1). That case, if it was to be fitted into the last opportunity theory, required the enunciation of a new theory of "*constructive* last opportunity", and, the moment this notion was introduced, we came again face to face with the very difficulty which the last opportunity rule was designed to remove—the difficulty of framing a qualification of the general rule as to contributory negligence which would not simply destroy that rule. Last opportunity had lost its virtue. But in truth *Loach's Case* (1) "cannot be fitted into the doctrine of last opportunity" (*Glanville Williams*, op. cit., p. 234). *Salmond* himself, in effect recognised this. In his fifth edition (1919) he endeavoured to qualify his rule so as to fit *Loach's Case* (1) into the scheme as he saw it, but in his Preface (pp. viii-ix) there is a passage, the first part of which is quoted by *Evatt* J. in *Wheare* v. *Clarke* (2), and the remainder of which is worth quoting in full. The learned author wrote :—"In the last edition I thought it sufficient to formulate the rule without qualification in the form commonly recognised as that of the last opportunity. The recent decision of the Privy Council in *Loach's Case* shows that, if this is indeed the true rule, it nevertheless requires elaboration and qualification. With much hesitation I have endeavoured to indicate what those qualifications are. An endeavour, however, to solve these difficulties leads to the conclusion that the common law rule of contributory negligence is essentially unsound. It seems impracticable to establish any satisfactory doctrine whereby, in

(1) (1916) 1 A.C. 719.

(2) (1937) 56 C.L.R. 715, at p. 737.

cases where an accident happens through the combined negligence of two persons, the total liability is nevertheless cast on one or the other of them exclusively according to the circumstances". He concludes that the only satisfactory rule is the Admiralty rule as modified by the *Maritime Conventions Act* 1911 (Imp.) (1 & 2 Geo. V. c. 57).

During the last thirty years the expression "the last opportunity rule" has come to be used in at least three different senses. It is used sometimes as meaning the rule stated by *Salmond* in his first edition and later modified by him in the hope of accommodating *Loach's Case* (1). When so used, it has carried the implication that the rule *so stated* expresses *the whole* of the qualification which it is (as is always recognised) necessary to impose on the broad general rule that contributory negligence is a good defence to an action for negligence. It is not improbable that there has been a greater tendency in Victoria than elsewhere—at least in the everyday direction of juries—to adopt this view. It is in this sense that the existence of the rule has been denied in the report of the English Law Revision Committee, and by Viscount *Simon* L.C. in *Boy Andrew* v. *St. Rognvald* (2), and has been described as fallacious and "dead" by *Denning* L.J. in *Davies* v. *Swan Motor Co.* (3): see also *Grant* v. *Sun Shipping Co. Ltd.* (4) (per Lord *du Parcq*). It is in this sense that *Glanville Williams* (op. cit., c. 9) effectively criticises it, when he says that what he calls the "stalemate rule" has been "modified by a second rule, known as the doctrine of last opportunity—in the United States as the doctrine of last clear chance, and in Canada as the doctrine of ultimate negligence". (See *Loach's Case* (5) as to the Canadian distinction—criticised by Lord *Sumner* as "not precise"—between "initial" and "ultimate" negligence, and the interesting dissenting judgments to which it led in the Supreme Court of British Columbia.) The rule in this sense has never been unequivocally adopted as a universal rule—at any rate until *Gay's Case* (6)—in any case of high authority in England or Australia. In this sense the "last opportunity rule" may be truly said to be a rule which has never existed.

The expression is used in a second and different sense when it is used as a summary description of the rule laid down in *Tuff* v. *Warman* (7) and *Radley's Case* (8). It is, of course, legitimate to describe that rule, for convenience in reference, by any term

(1) (1916) 1 A.C. 719.
(2) (1948) A.C. 140, at p. 149.
(3) (1949) 2 K.B. 291, at pp. 321, 324.
(4) (1948) A.C. 549, at p. 563.
(5) (1916) 1 A.C. 719, at pp. 723-725.
(6) (1951) V.L.R. 104.
(7) (1858) 5 C.B.N.S. 573 [141 E.R. 231].
(8) (1876) 1 App. Cas. 754.

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which may be chosen. But the objection to the expression used in this sense is that it is extremely misleading and confusing, because it describes a rule which may be applicable in favour of a plaintiff although the test of last opportunity is wholly inappropriate. The third sense in which the expression "last opportunity rule" is used is as describing one test which may in a certain class of case, but only in a certain class of case, be used in determining a question of fact—the question whether a particular case is within the qualification laid down in *Tuff* v. *Warman* (1) and *Radley's Case* (2). This use of the expression is less objectionable than either of the others, but it is still open to objection, because the "rule" is not really a rule of law, and it is unlikely that there will be agreement as to its content. It is a sound "rule", only if it is framed in the terms in which it was originally framed by *Salmond*, and if it is recognised that it does not cover the whole ground. If it is expanded in a hopeless attempt to meet cases to which it is inappropriate, and subjected to innumerable refinements, it becomes not merely unsound but unintelligible.

What has been so far said is doubtless of a negative character. But, having regard to all the cases and to what has been said by *Holdsworth*, *Salmond* (in the preface to his fifth edition) and most recently by *Glanville Williams*, it seems unsafe, and indeed hardly possible to state what has been, for convenience, called the "qualification" in terms more precise than those used by *Wightman* J. and Lord *Penzance*. As matters stand, it is probably undesirable to attempt to be more precise. Translation having failed, interpretation remains open. In many cases, as in *Wheare* v. *Clarke* (3), it is not fairly open to the jury to find contributory negligence at all. The really difficult question does not arise unless and until it is found that there has been negligent conduct on both sides and that the negligent conduct of each party has been a proximate cause of the damage. And even then it does not arise unless there is some ground for drawing a distinction in favour of the plaintiff between his negligent conduct and that of the defendant. *Evatt* J. in *Wheare* v. *Clarke* (4), after observing that a "comparison" between the negligence of the plaintiff and that of the defendant has never been admitted in English Law, says:—"None the less, I think that, albeit not openly, it plays some part in the attribution of legal responsibility for injury". Apart from the new statutes, it is not, of course, legitimate to enter upon any comparison in

(1) (1858) 5 C.B.N.S. 573 [141 E.R. 231].
(2) (1876) 1 App. Cas. 754.
(3) (1937) 56 C.L.R. 715.
(4) (1937) 56 C.L.R., at p. 743.

point of degree. But most probably the fundamental idea behind all the cases from *Davies* v. *Mann* (1) and *Tuff* v. *Warman* (2) onwards is that there are cases in which there is so substantial a difference between the position of the plaintiff and the position of the defendant at the material time that (although the accident could not have happened if the plaintiff's conduct had not been negligent) it would not be fair or reasonable to regard the plaintiff as in any real sense the author of his own harm. This position may arise because the defendant had, *and the plaintiff had not*, a real opportunity, of which a " reasonable man " would have availed himself, of " avoiding the mischief " (as in *Radley's Case* (3)). It may arise because the defendant's negligent conduct is substantially later in point of time than the plaintiff's negligent conduct, and a reasonably behaving defendant would have seen its effect and avoided its " consequences " (as in *Davies* v. *Mann* (1), the facts of which are made clearer by the report in the *Jurist* (4) than by that of *Meeson and Welsby*. It may arise because the defendant had an advantage over the plaintiff, in that he was " master of the situation ", but chose to run a risk (the view which was, in effect, held to be open to the jury in *Williams* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (5) and the view which was open in *Tuff* v. *Warman* (2) itself, a case of collision between a steamship and a sailing barge). It may arise because the defendant had such an advantage over the plaintiff that he ought to have been " master of the situation " but unreasonably failed to take advantage of his superior position (as in *Municipal Tramways Trust* v. *Buckley* (6)). This position is likely to arise in many cases in which a pedestrian is injured by a motor vehicle. Mr. *Smithers* indeed, in the present case, more or less invited us to say that the real test in all cases was found by asking whether the defendant was, while the plaintiff was not, master of the situation. This question may provide a useful test in some cases, but to adopt Mr. *Smithers*' suggestion would be to propound a new formula, and the fate of formulae has been sad. The above examples are merely illustrations of the kind of circumstances which may justify the drawing of a distinction, which should not be drawn on light or trivial or dubious grounds. As *Isaacs* J. said in *Symons* v. *Stacey* (7), " no single formula is possible for placing the necessary facts before the jury ".

(1) (1842) 10 M. & W. 546 [152 E.R. 588].
(2) (1858) 5 C.B.N.S. 573 [141 E.R. 231].
(3) (1876) 1 App. Cas. 754.
(4) (1842) 6 Jur. 954.
(5) (1933) 50 C.L.R. 258.
(6) (1912) 14 C.L.R. 731.
(7) (1922) 30 C.L.R. 169, at p. 179.

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Before the decision of the Full Court in *State Electricity Commission* v. *Gay* (1), it is safe to say that juries in Victoria were directed with regard to "last opportunity" in a number of cases in which not merely was it not reasonably open to a jury to say that the defendant had had a last opportunity and negligently failed to avail himself of it, but the qualification laid down in *Tuff* v. *Warman* (2) and *Radley's Case* (3) could not, on any reasonable interpretation, be applied at all. In other words, juries have been so directed in many cases in which, if both parties were found to have been negligent, the only proper verdict was for the defendant. This position is very likely to arise in cases of collision between fast moving motor vehicles, though very different considerations are likely to arise in cases of collision between a motor vehicle and a pedestrian or a slowly moving horse-drawn vehicle: see e.g., *Joseph* v. *Swallow & Ariell Ltd.* (4), *Williams* v. *Commissioner of Road Transport* (5), *Allen* v. *Redding* (6), *Municipal Tramways Trust* v. *Buckley* (7), *Symons* v. *Stacey* (8), *A. G. Healing & Co. Pty. Ltd.* v. *Harris* (9), and *Dellamana* v. *Gibbs* (10). The great importance of *Gay's Case* (1) is that it recognises that there may be many cases in which, if the plaintiff's negligence is found to have been a cause of the accident, the jury's only proper verdict is for the defendant, and in which accordingly no reference should be made to the qualification of the general rule as to contributory negligence. This seems undoubtedly correct, and the decision that the particular case was such a case seems also undoubtedly correct. One or two observations, however, should be made on the judgment of the Court, which was delivered by *Gavan Duffy* J.

The action had been brought under *Lord Campbell's Act*. The plaintiff's husband was killed as a result of a head-on collision between a motor car driven by him and a tram driven by a servant of the defendant. The tram was being driven on a single line of track near the centre of the road. The accident took place at night. The action was tried before *Sholl* J. with a jury. The first ground on which the learned Judge's direction to the jury was held to be defective appears to have been that he did not make clear to the jury that the primary rule of the common law was that (to put it shortly) contributory negligence is a good defence. When one reads the whole of the passages quoted from his charge, it is not difficult

(1) (1951) V.L.R. 104.
(2) (1858) 5 C.B.N.S. 573 [141 E.R. 231].
(3) (1876) 1 App. Cas. 754.
(4) (1933) 49 C.L.R. 578.
(5) (1933) 50 C.L.R. 258.
(6) (1934) 50 C.L.R. 476.
(7) (1912) 14 C.L.R. 731.
(8) (1922) 30 C.L.R. 169.
(9) (1927) 39 C.L.R. 560.
(10) (1940) S.A.S.R. 282.

to see why he did not do so. He had decided to explain contributory negligence to the jury in terms of " real cause " and " decisive cause ". Adopting thus a theory of contributory negligence (which has much authority to support it ranging from Lord *Campbell* to Lord *du Parcq*), he conceived it to be his task to explain to the jury *what* negligence could be regarded as " contributory ", and from this point of view there was simply a rule to be expounded—not (1) a general rule and (2) a qualification of, or exception to, that rule. If the Full Court had approached the matter from this point of view, they would doubtless have said that, if the jury found negligence on the part of the plaintiff, they could not reasonably regard it as otherwise than " contributory ", and ought to have been so directed. But, although it does not appear to be expressly stated, it seems clearly implicit in the judgment that the Full Court thought it preferable that the position should be put to the jury (in cases in which the qualification is relevant) in the form of a general rule which is subject to a qualification. Reasons have already been given for thinking that the view of the Full Court is to be preferred. It should perhaps be added here that the choice between the two ways of putting the position does not affect the burden of proof. The defendant must always establish such contributory negligence as will amount to a defence. We are unable to agree with *Dean* J. that the burden of establishing that the defendant failed to take advantage of a last opportunity, or that the case otherwise falls within the qualification of the general rule, rests upon the plaintiff.

The second observation to be made is this. The Full Court appears to have been of opinion that, if the case had been one in which it was open to the jury to hold that the qualification of the general rule was applicable, the learned Judge ought to have directed the jury in terms of last opportunity and not of " decisive " or " real " cause. This amounts to an adoption of the view that for the purposes of all cases in which a qualification is relevant, the whole of the qualification laid down in *Tuff* v. *Warman* (1) and *Radley's Case* (2) can be stated in terms of a " last opportunity " or " last clear chance ". This is not really so, and there is no real authority for such a proposition, apart from the fact that a practice of directing juries along these lines has grown up in Victoria. The idea that " decisive cause " affords a universal test is an extremely dangerous idea—even more dangerous that the idea that " last opportunity " affords a universal test. In *Gay's Case* (3)

(1) (1858) 5 C.B.N.S. 573 [141 E.R. 231].

(2) (1876) 1 App. Cas. 754.

(3) (1951) V.L.R. 104.

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itself, even if a qualification of the general rule ought to have been put to the jury, reference to " decisive cause " would have been extremely inappropriate and likely to be most misleading. But there may be cases in which a reference to " decisive cause " will be likely to be helpful to a jury which is being invited to consider the applicability of the qualification of the general rule : see again *Wheare* v. *Clarke* (1). If in *Leahy's Case* (2) the trial judge had, after explaining adequately the factors in the case to the jury, told them that they should find for the plaintiff if they thought that the enginedriver's failure to whistle was the decisive cause of the damage, no fault could have been found with the direction either on the ground that " decisive cause " *was* mentioned or on the ground that " last opportunity " was *not* mentioned.

The final observation to be made on *Gay's Case* (3) is this. The judgment contains several references to a " subsequent and severable " act of negligence on the part of the defendant as essential if the " last opportunity " rule is to be attracted. This expression is not, of course, used here for the first time : it has the high authority of Lord *Birkenhead* in the *Volute Case* (4), and of Lord *Shaw* and Lord *Blanesburgh* in *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.* (5). In the later case the words are clearly used with reference to the facts of the particular case, which seems to have afforded a perfect illustration of what Lord *Birkenhead* had in mind in the passage in the *Volute Case* (6) (which is quoted by Lord *Shaw*). It is not easy to appreciate the significance of the word " severable ", but this is perhaps not of great importance. What is important is that the language is appropriate only to a limited class of case, of which the *Anglo-Newfoundland Co.'s Case* (7) is an example, cases in which the defendant was actually aware of the plaintiff's negligence and was actually able by the exercise of reasonable care to " avoid the mischief " but failed to do so.

In the present case the jury should, on the evidence, have been directed that, if they found that the collision was brought about partly by negligence on the part of the defendant and partly by negligence on the part of the plaintiff, their verdict should be for the defendant. A jury is not, of course, bound to accept the whole of any evidence before it, even when that evidence is entirely consistent and clear, as it rarely is in these cases. It has undoubtedly the function of drawing inferences, and this means that it commonly

(1) (1937) 56 C.L.R. 715, at p. 741.
(2) (1904) 2 C.L.R. 54.
(3) (1951) V.L.R. 104.
(4) (1922) 1 A.C. 129, at p. 136.
(5) (1924) A.C. 406, at pp. 420, 430.
(6) (1922) 1 A.C. 129.
(7) (1924) A.C. 405.

has a wide latitude in arriving at its own reconstruction of what actually happened. But the question whether it could in a particular case reasonably draw a particular inference is a question which will constantly arise, and courts and judges will often be called upon to rule on that question. These cases must be regarded realistically, though attempts are often made by counsel to carry them into the realm of fantasy. Here, as has been said, everything material happened in the space of two or three seconds. No substantial period of time can have elapsed between the moment when the defendant saw the motor cycle and the moment of impact. Particulars were given by the plaintiff of the negligence alleged against the deceased. It is unnecessary to set these out here. If it be assumed that it was open to the jury to find, and if the jury did find, that none of those things was done, or that the doing of any of those things that was done did not constitute negligence, *cecidit quaestio*. But, if they found that any of those things was done and was negligent, they could not fairly or reasonably find on the evidence that the defendant had an opportunity of avoiding the accident which the deceased did not have, or occupied any position of advantage over the deceased, or that there was any fair or reasonable ground for distinguishing in any way, in favour of the deceased, between his negligence and that of the defendant.

It is obvious that no rule can be laid down as to cases, or classes of case, in which it is proper to put to the jury a qualification of the general rule as to contributory negligence whether in terms of last opportunity or in some other terms appropriate to the particular case. Two things, however, should be said. In the first place, we think that the qualification will seldom be appropriate in cases of collision between two modern fast-moving vehicles. Within this class it is likely to be an exceptional case in which there will be any substance or reality in a suggestion that any qualification of the general rule is applicable. It will often happen, of course, that only one vehicle is negligent. But, if both are negligent—and, unless this is so, the question under consideration does not arise —it will seldom be possible to say, with any regard to reality, that one vehicle had an opportunity which the other had not, or that the one had, or should have had, an advantage that the other had not—still less that it was an opportunity or advantage which it was negligence not to exploit successfully. The exceptional case will occur, but, generally speaking, such cases are utterly remote from any such situation as arose in *Davies* v. *Mann* (1) or in *Radley's Case* (2). They are equally remote, generally speaking, from the

(1) (1842) 10 M. & W. 546 [152 E.R. 588].

(2) (1876) 1 App. Cas. 754.

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maritime cases. It is equally obvious that no rule can be laid down as to cases where a motor car has collided with a pedestrian or a bicycle or a horse-drawn vehicle. But this class of case is just as likely, as the other is unlikely, to require that the jury should understand that the general rule as to contributory negligence is subject to an important qualification.

The second observation to be made is this. We are in complete agreement with what was said by *Owen* J. in *Commissioner for Road Transport and Tramways* v. *Prerauer* (1). And it may be recalled that the late Sir *Leo Cussen* insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are. If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the *asportavit*, probably no judge would dream of instructing the jury on the general law of larceny. He would simply tell them that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny. It may be that the issues in a civil case tend, generally speaking, to be more complex than in a criminal case. But the same principle is applicable, and looking at the matter from a practical point of view, the *real* issues will generally narrow themselves down to an area readily dealt with in accordance with Sir *Leo Cussen's* great guiding rule. These considerations lead to the conclusion that a judge should not put to the jury the qualification on the general rule as to contributory negligence unless he feels himself able to explain clearly to them exactly how the qualification can be fairly and reasonably applied by them to a view of the facts which it is open to them to entertain.

The appeal should be dismissed.

Solicitor for the appellant, *A. J. McNamara.*
Solicitors for the respondent, *Gillott, Moir & Ahern.*

E. F. H.

(1) (1950) 50 S.R. (N.S.W.) 271, at p. 277; 67 W.N. 228.