[HIGH COURT OF AUSTRALIA.]

McCANN . . . . . APPELLANT;
DEFENDANT,

AND

PARSONS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1954.

SYDNEY, *Sept.* 6; *Nov.* 29.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Appeal—New trial—General or limited to damages—Discovery of fresh evidence—Availability and character of evidence—Credibility of plaintiff and defendant—Influence on result—Misled—Third party, but not plaintiff or defendant—Authorized insurer—Liability—Power of court—Motor Vehicles (Third Party Insurance) Act 1942-1951 (*N.S.W.*).

Where a verdict results in an enforceable liability against an authorized insurer who defends in the name of the party on the record within the meaning of the *Motor Vehicle (Third Party Insurance) Act* 1942-1951 (N.S.W.) in considering whether a new trial should be granted on the ground of the discovery of fresh evidence the Court may take into account the true legal effect of the verdict and the reality of the proceedings, which reduce the party on the record to a nominal defendant, although he cannot be treated as a complete stranger to the litigation. For the purpose of deciding whether a trial has miscarried or a verdict should be set aside and the action retried, it was held upon the facts of the case that the question was whether the insurer, not the nominal defendant, discovered fresh evidence; exercised reasonable diligence in preparing for the trial; fell a victim to a contrivance, stratagem or deception; or was aware of the truth or was deceived.

When considering a motion for a new trial on the ground of discovery of fresh evidence, it is proper for the Court to act upon the depositions of evidence given before a magistrate if such depositions are likely to give the Court an opportunity of judging of the effect of the testimony which can be called and of the case which can be made.

Decision of the Supreme Court of New South Wales (Full Court), reversed.

APPEAL from the Supreme Court of New South Wales.

This was an appeal brought in the name of Albert Allan McCann by the Government Insurance Office, which had issued a third-party policy in respect of McCann's motor car, against the decision of the Full Court of the Supreme Court of New South Wales refusing to grant a new trial generally in an action for damages in which Norma Joan Parsons was the plaintiff and McCann was the defendant.

The plaintiff claimed damages for injuries sustained by her, including the loss of her right arm, as the result of McCann's alleged negligence in the management of his motor car.

The jury awarded the plaintiff the sum of £20,000.

Before an appeal by the defendant against the verdict and assessment came on to be heard, both he and the plaintiff were charged with conspiracy based on the allegation that at the time of the accident the plaintiff and not the defendant was driving the motor car. A boy gave evidence to that effect. They were committed for trial. The Attorney-General decided not to file an indictment charging both of them with conspiracy but to indict McCann for false pretences. McCann was tried on that charge and acquitted.

Subsequently to that acquittal the Full Court of the Supreme Court (*Street* C.J., *Herron* and *Kinsella* JJ.) upon the said appeal by the defendant coming on for hearing, ordered a new trial limited to the assessment of damages, and refused to order a new trial on the issue of liability. The ground upon which it was sought to obtain a new trial generally was that the boy's evidence had been discovered after the trial and could not with reasonable diligence, have been discovered earlier.

Further facts appear in the judgments hereunder.

B. P. Macfarlan Q.C. (with him *A. Bagot*), for the appellant. The evidence of the boy witness answers every test which has been propounded with regard to this type of case (*Commissioner for Government Tram and Omnibus Services* v. *Vickery* (1)). Regard should be had to O. XXII r. 1, of the *Rules of the Supreme Court*, There is not any rule that affidavits are necessary.

[DIXON C.J. In the absence of a decision on the point as to affidavits the matter comes down to principle.]

See ss. 15 and 18 (1) (*a*), (3) of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942-1951 (N.S.W.).

[TAYLOR J. referred to *Jonesco* v. *Beard* (2) and *Hip Foong Hong* v. *H. Neotia & Co.* (3).]

(1) (1952) 85 C.L.R. 635.
(2) (1930) A.C. 298.
(3) (1918) A.C. 888.

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The types of appeal, affidavits therefor, fresh evidence, adherence to the strict rules of evidence were discussed by Lord *Buckmaster* in *Jonesco* v. *Beard* (1). Admissibility of fresh evidence was dealt with in *Andrew* v. *Andrew* (2) and *Corbett* v. *Corbett* (3). The court in each of those cases applied the same rules as those laid down by this Court in *Commissioner for Government Tram and Omnibus Services* v. *Vickery* (4). Evidence on oath before a judicial authority is subject to cross-examination before that judicial authority. The evidence in this case does not appear to have been shaken in cross-examination. It was favourably commented upon by the magistrate, and he agreed with the statement given by the defendant to the police. The probative effect of that evidence is high.

E. S. Miller Q.C. (with him *R. F. Loveday*), for the respondent. The true view of the Full Court's decision is that in the opinion of that court insufficient evidence had been produced to it. It is not correct that the Full Court rejected the application on the ground that the form in which it was put was not satisfactory. There are only two persons before the Court in these proceedings, that is the two persons who were in the motor car. The parties are limited at the hearing to the grounds stated in the notice of motion : see O. XXII, r. 14 of the *Rules of the Supreme Court*. The granting of a new trial is a matter of discretion (*Myerson* v. *Smith's Weekly Publishing Co. Ltd.* (5) ; *Lemaire* v. *Smith's Newspapers Ltd.* (6)). The Full Court in the exercise of its discretion would not allow it. The boy made two diametrically opposed statements. He heard the matter discussed between his mother and his brother and endeavoured to shape his evidence accordingly. It was an important element that the boy gave evidence before the Court of Quarter Sessions. That evidence was disbelieved by the jury. If a fraud had been worked by McCann on the Government Insurance Office action would have been open to that office to recover that money from McCann. It is irrelevant in these matters to consider what McCann's insurer may or may not do. It was not a mere matter of form. The question was : Was the material adequate ? It was inadequate. There should be an end to litigation between parties (*Sanders* v. *Sanders* (7) ; *Leeder* v. *Ellis* (8)). Witnesses who could have given evidence on the point could have been produced.

(1) (1930) A.C., at pp. 300, 301.
(2) (1953) 1 W.L.R. 1453.
(3) (1953) P. 205.
(4) (1952) 85 C.L.R. 635.
(5) (1923) 24 S.R. (N.S.W.) 20, at p. 23.
(6) (1927) 28 S.R. (N.S.W.) 161, at p. 163.
(7) (1881) 19 Ch. D. 373, at p. 380.
(8) (1952) 86 C.L.R. 64, at p. 70; (1953) A.C. 52.

Great caution must be exercised before a verdict is set aside and a new trial ordered on the ground of the discovery of fresh evidence (*Commissioner for Government Tram and Omnibus Services* v. *Vickery* (1)). The appellant should not be allowed to re-litigate the matter (*Jonesco* v. *Beard* (2) ; *Hip Foong Hong* v. *Neotia & Co.* (3)). This Court should not interfere with the exercise by the Full Court of its discretion. There was a lack of diligence on the part of the people who conducted the proceedings on behalf of the defendant. Obvious inquiries were not made.

B. P. Macfarlan Q.C., in reply.

Cur. adv. vult.

Nov. 29.

The following written judgments were delivered :—

DIXON C.J., FULLAGAR, KITTO and TAYLOR JJ. What the Court has to decide in this appeal is whether it is proper, on the ground of the discovery of fresh evidence, to order a new trial of the issue of liability in an action in which a young woman recovered damages for personal injuries caused by the defendant's alleged negligence in the management of his motor car. The injuries she sustained were serious and included the loss of her right arm but the damages awarded by the jury, namely £20,000, were considered by the Full Court of the Supreme Court of New South Wales to be so excessive that their Honours decided that the assessment could not stand. A new trial on the issue of liability was refused and the Full Court ordered a new trial limited to the assessment of damages. The plaintiff does not appeal from the decision that the question of damages must be tried again.

The appeal is on the part of the defendant, or rather in his name, and is against the refusal of a new trial generally so as to cover the question of liability. The appeal is brought in the name of the defendant by the Government Insurance Office which had issued a third party policy in relation to the particular motor vehicle out of the use of which the plaintiff's bodily injuries arose and so must indemnify the defendant if he is liable to the plaintiff and indeed becomes directly responsible to the plaintiff for the satisfaction of a judgment recovered by her.

The accident occurred on 8th January 1951. The defendant Albert Allan McCann, described as a coal-driller of Barton Park, Wallerawang, about twenty-seven years of age, then possessed a Skoda sedan car. On the afternoon of that date he invited the

(1) (1952) 85 C.L.R., at p. 642.
(2) (1930) A.C., at p. 301.
(3) (1918) A.C. 888.

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plaintiff, a girl of twenty-one years of age, to go for a drive with him. Since the trial she has married, but at the time her name was Norma Joan Parsons. Her father kept the hotel at Cullen Bullen where she assisted in the bar. They drove from Cullen Bullen through Wallerawang to Portland and then proceeded to drive back to Cullen Bullen. At a place where there is a gravel road with an irregular surface the car ran off the road and turned over several times. The defendant was not much hurt but the plaintiff's right arm was almost severed. The defendant did what he could to stop the bleeding and asked a man who came up to go for help. The sergeant of police at Portland came at once and not long afterwards was followed by a doctor. The sergeant asked who was driving the car and McCann, the defendant, answered that he was and that the car got out of control and turned over a couple of times. He asked the plaintiff the same question and she replied "Allan was. I don't know what happened." At the trial, which did not take place until 28th January 1953, the plaintiff gave evidence to the effect that she remembered that the defendant was driving the car on the gravel road and that after that she did not know what happened and next remembered finding herself in hospital. The sergeant of police gave evidence of the statements already mentioned which McCann made to him. He said that McCann had also told him that he was driving at thirty miles an hour, a speed which according to some evidence was excessive for the condition of the road. The police sergeant described the position of the car and the course which the marks on the road showed that it had taken. McCann the defendant was not called as a witness and no evidence was given for the defence. The verdict of £20,000 which the jury found for the plaintiff was attacked by the notice of motion for a new trial only on the ground that it was excessive but although the ground was thus limited there was no limitation of the extent to which on that ground it was asked that the verdict be set aside and a new trial ordered. The motion for a new trial was not heard until 16th February 1954. In the meantime, perhaps in consequence of the public interest aroused by the size of the verdict, information was communicated, apparently anonymously, to the Government Insurance Office which led to an investigation of the facts by the detective police. The person who had come up to the scene of the accident and had been despatched for help was a young man named Noel Bird who had been driving a sulky in the opposite direction and had passed the Skoda car just before it ran off the road. In the sulky were two boys, Noel Bird's brother named Keith James, aged nine years and four months, and Donald

Christian. Keith Bird was sitting in the middle. They heard the sound of the over-turning car and Noel stopped the horse, gave the reins to his brother Keith and ran back. The detectives interviewed these three and found that Keith at least was prepared to say positively that it was the woman and not the man who was driving the Skoda car when it passed the sulky. This interview took place on Thursday, 19th March 1953. Later on the same day the detectives interviewed McCann, the defendant, who made a statement which was reduced to writing and was signed by him. He said in effect that he had been giving the plaintiff lessons in driving on previous occasions and that for the greater part of the drive which resulted in the accident she had been at the wheel. He described the accident saying he did not know what happened. The steering wheel seemed to spin round in her hands and the car went right across the road in turning right, jumped a small bank on the side of the road into the scrub, hit a stump and rolled over twice ending upright on its wheels. He said that he had told the sergeant that he was driving the car only because the plaintiff did not have a licence and that afterwards when he informed the girl's father the latter had told him to stick to the story. Next day, 20th March 1953, the detectives interviewed the plaintiff in the presence of her father. According to the version of one of them the material passage of the evidence she gave at the trial of the action was read to her and she was asked whether she still said that McCann was driving at the time of the accident. She replied that she did. She was then told that McCann had been interviewed and had informed them that she, the plaintiff, was driving. To this she did not reply nor did she reply to a further statement that they had located two witnesses of the accident who had informed them that the plaintiff was driving at the time. Her father, however, denied that McCann had told him so within a few days of the occurrence and that he had told McCann to keep to the story and said that he never had any reason to think that McCann was not driving the car. On 14th May 1953, a letter was addressed to the Commissioner of Police by solicitors instructed by McCann, the defendant, complaining that on a Thursday night about six weeks before (meaning no doubt 19th March) detectives had interviewed McCann for an hour and a half, threatened him with imprisonment, and, in effect, badgered him into signing a statement which he did not read and the contents of which he did not know: he denied any statements he made at the time and anything contained in the statement he signed.

On 25th May 1953, charges of conspiracy were laid against the plaintiff and the defendant and on 22nd July 1953, they were

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committed for trial upon this charge. The chief witness called before the magistrate was Keith James Bird. He swore definitely that the woman and not the man was driving, and through a close cross-examination adhered to it. Evidence was given by a detective of the interviews with the two accused persons. Neither of the other two occupants of the sulky was called. It was decided by the Attorney-General not to file an indictment charging both of them with conspiracy but to indict the defendant McCann for false pretences. This charge was based on the fact that under his insurance, which must have included cover for the risk of damage to his car, he had obtained the cost of the repairs to it and had done so by representing that he was driving it at the time of the accident. Before the motion for a new trial had been heard he had been tried on this charge and acquitted.

In support of the motion affidavits had been sworn some time earlier than the criminal trial briefly stating the course of events, exhibiting the depositions taken before the magistrate and the documents there put in evidence, asking that the notice of appeal should be amended to include the ground of the discovery of fresh evidence and stating that the plaintiff had been notified of the application to do so. One of the reasons given by the learned judges in the Supreme Court for refusing to order a new trial generally so as to include the issue of liability was that it was an irregular and unsatisfactory course to lay depositions before the court as embodying the fresh evidence instead of filing affidavits by the witnesses themselves as to what evidence they were prepared to give on a new trial. Great weight must be given to their Honours' views as to what is the proper practice in a matter of this kind but, having regard to the peculiar character of this case, it is difficult to see why the course of placing the depositions taken by the magistrates before the court, as the material in support of the application, is so unsatisfactory as to warrant the refusal of the application for a general new trial. There indeed is something to be said for the view that the depositions give the court an unusual opportunity of judging of the effect of the testimony which can be called and of the case which can be made. This is particularly true of the deposition of Keith Bird, which contains a searching cross-examination and includes an estimate by the magistrate of his intelligence and reliability as well as an error or a confusion on which the plaintiff may well be expected to rely. On the hearing of the application in the Supreme Court neither Noel Bird nor Donald Christian, who also were in the sulky, was put forward as a witness who could say that the woman and not the man was driving the Skoda car and the

possibility was not excluded by positive evidence of their saying on a new trial that it was the man and not the woman. The learned Chief Justice regarded this as a consideration telling against the application. What the depositions disclose is not unimportant on this point. When the detectives interviewed McCann on 19th March 1953, it appears that at an early stage McCann was told that they had interviewed Noel Bird and Donald Christian who had told them that they could see that Miss Parsons was driving. When the plaintiff was interviewed she was told that two witnesses had informed the detectives that she was driving—no doubt Noel Bird and Donald Christian. If the detectives were telling the truth, the fact that neither of these occupants of the sulky was called as a witness before the magistrate may be regarded as due to a not unfamiliar phenomenon and even though the part, if any, they would play on a new trial must continue a matter of speculation, a very strong case remains on the question of who drove the Skoda car, a case which seems to call for judicial determination before so large a liability is imposed.

It is a strong enough case to call for a reconsideration of the issue of liability notwithstanding the criticisms of its probative force made on behalf of the plaintiff respondent upon the hearing of this appeal. It may be true that the written statement made by the defendant McCann to the detectives on 19th March 1953, cannot be made admissible against the plaintiff on a new trial. It is possible too that the jury who acquitted McCann of false pretences were not satisfied that the circumstances in which he came to make the statement were such that they could safely rely on the admissions it contains. But the importance of the statement for the purposes of the question before this Court, namely whether it is proper to order a new trial, is that it enables the Court to see where McCann stands as a possible witness upon the issue of liability. It was suggested that an application for a new trial was an inappropriate procedure for setting up, as a ground for relief, what has been discovered with reference to the question of liability. The argument is that it amounts to impeaching the judgment or verdict on the ground that it was obtained by fraud and that such a thing should be done only by a suit in equity brought to have it set aside. The authority upon which the argument is based is a passage in the opinion of Lord *Buckmaster* in *Jonesco* v. *Beard* (1): " It has long been the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars

(1) (1930) A.C. 298.

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of the fraud must be exactly given and the allegation established by the strict proof such a charge requires " (1). This passage is misconstrued if it is regarded as applicable to such a case as the present. In the first place it relates to a completed judgment, not to a verdict already subject to a pending new trial motion. In the next place it refers to fraud as distinguished from the discovery of new evidence. Lord *Buckmaster* was careful to make the distinction in describing the order which was under appeal to the House of Lords. His Lordship said: " On the hearing before the Court of Appeal affidavit evidence was filed in support of the appeal and answered. It is on these affidavits that the new trial was ordered. In part they consisted of statements as to evidence not forthcoming at the trial and in part of allegations of fraud. The former did not form the foundation of the judgment of the Court of Appeal, and indeed they could not have done so, for there was no sufficient explanation of why the evidence had not been available at the trial and why no application for adjournment had been made. These statements do not merit examination and may be disregarded. It is the charge of fraud that is the sole reason supporting the judgment now under appeal " (2). The facts of the case show that the charge was that certain documents produced at the trial were false documents brought into existence for the purpose. Even so his Lordship conceded that there was jurisdiction to deal with the matter upon a motion for a new trial. But if an application for a new trial is based upon the discovery of fresh evidence showing or tending to show that the plaintiff has in truth no cause of action it can be no objection that it also shows or tends to show that at the first trial the plaintiff put forward a false case and knew it. Indeed there was never any hesitation at common law to use the power to grant a new trial, once it appeared from further evidence that the verdict had been obtained by putting forward a false case. It would have been remarkable if the courts of common law had refused the one practical remedy they could give and had turned the complaining party away to file a bill in Chancery to restrain the proceedings at law. It may be remarked that in effect this is what it would mean now in New South Wales.

An interesting example from the eighteenth century of the use of the remedy of a new trial for such a case is to be seen in *Fabrilius* v. *Cock* (3). In an action of trover for foreign money (6,000 pagodas) tried before Lord *Mansfield* the jury found a verdict for the plaintiff. He was a Dane and his case at the trial was that he had escaped from a Danish settlement in the East Indies and come aboard an

(1) (1930) A.C. 298, at p. 300.
(2) (1930) A.C., at p. 300.
(3) (1765) 3 Burr. 1771 [97 E.R. 1090].

East Indian ship of which the defendant was mate. The plaintiff said that he had 6,000 pagodas " quilted about his body " and he deposited them with the defendant. The report says : " He was present in court ; walked to and fro, with great agility ; and then shewed he had 6,000 pieces of lead, of the size of pagodas, concealed and fastened about his body " (1). Some Danish sailors swore to his having the pagodas and putting them in the defendant's hands. The defendant, who of course was not a competent witness, denied the story but could not contradict it by evidence. So the jury, to the satisfaction of Lord *Mansfield*, found a verdict for the plaintiff for £2,400, the value of the pagodas. The defendant moved for a new trial, upon the ground, " that the whole was a fiction, supported by perjury, which he could not be prepared to answer. That since the trial, many circumstances had been discovered, to detect the iniquity, and to show the subornation of the witnesses." The court granted a new trial " after a very strict scrutiny " and " the plaintiff never dared to try it again " (2).

Another example may be taken from the present day, one bearing some resemblances to the present. It is *Robinson* v. *Smith* (3) where the fact concerning which fresh evidence had been discovered, though an essential element in the cause of action sued upon, had not even been put in issue by the defendant who obtained the new trial. It was an action for breach of promise in which the plaintiff had recovered a verdict. After the trial the defendant received information tending to show that the plaintiff was married already. *Buckley* L.J. said : " The ground of the application is that the defendant has since the trial obtained fresh evidence which shows that the plaintiff deceived the Court in the conduct of her case by representing that she was a single woman, whereas in fact she was a married woman. One of the grounds on which a new trial may be granted is that the verdict was obtained by fraud, and if the plaintiff at the date of the promise was in fact a married woman it is clear that she did obtain the verdict in her favour by fraud. The question to be considered is whether the evidence adduced by the defendant in support of the allegation that the plaintiff was a married woman at the date of the promise of marriage is sufficiently strong to justify this Court in granting a new trial " (4). His Lordship considered that the evidence of the prior marriage was sufficiently strong and in this view *Bankes* L.J. concurred, although *Pickford* L.J. thought otherwise. So clear is it that fraud may be comprised in the ground consisting in the discovery of fresh evidence that a

(1) (1765) 3 Burr., at p. 1771 [97 E.R., at p. 1090].
(2) (1765) 3 Burr., at p. 1772 [97 E.R., at p. 1091].
(3) (1915) 1 K.B. 711.
(4) (1915) 1 K.B., at p. 713.

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distinction is taken, depending on its presence, of the degree of probative force which the fresh evidence may have upon the relevant facts in issue. In *Warham* v. *Selfridge & Co. (Ltd.)* (1), *Vaughan Williams* L.J. expressed the criterion in such a case thus : " . . . in order to justify the granting of a new trial on the ground that fresh evidence had been discovered, the evidence must be of such a character as to justify one in saying that the verdict could not in the interests of justice be relied on, because it was based on mistake, surprise, or fraud " (2). In *Turnbull & Co.* v. *Duval* (3) in giving the reasons of the Privy Council for refusing a new trial applied for on the ground that an important document had been discovered, Lord *Lindley* said : " A new trial ought never to be lightly granted. No case of fraud or surprise is made out " (4). Lord *Buckmaster* in *Hip Foong Hong* v. *Neotia & Co.* (5) dealt with the effect of fraud and surprise in a passage which in the headnote is reduced to the proposition : " To obtain a new trial upon the ground that fresh evidence has been discovered, if no charge of fraud or surprise is brought forward, it must be shown that the fresh evidence would be conclusive ; but that consideration does not apply to a case of surprise, much less to one of fraud " (6). Of course the case must be made out so as to satisfy the court that the interests of justice demand that the matter in question should be tried afresh.

This Court has twice recently described the conditions which must ordinarily be fulfilled before a new trial will be granted on the ground of the discovery of fresh evidence and there is no need to restate them : see *Orr* v. *Holmes* (7) ; *Commissioner for Government Tram and Omnibus Services* v. *Vickery* (8). There can be no question that the Government Insurance Office was misled in the present case if in fact the plaintiff was not, and the defendant was, driving the Skoda car at the time of the accident, and no complaint can be made by the plaintiff of the failure to discover and bring forward the evidence of Keith Bird at the first trial. As to the cogency of the evidence it is better to say little, but in view of the gravity of the case which the depositions disclose it is impossible to feel satisfied that the verdict should stand and the question whether the plaintiff in truth drove the car, as an issue on which liability depends, should go undetermined.

But there remains the most difficult question in the appeal. It was the Government Insurance Office, not the defendant, that was misled, if the plaintiff was the driver of the car ; and it was that Office, not the defendant, who discovered the fresh evidence. Can

(1) (1914) 30 T.L.R. 344.
(2) (1914) 30 T.L.R., at p. 345.
(3) (1902) A.C. 429.
(4) (1902) A.C., at p. 436.
(5) (1918) A.C., at p. 894.
(6) (1918) A.C., at p. 888.
(7) (1948) 76 C.L.R. 632.
(8) (1952) 85 C.L.R. 635.

the Government Insurance Office, litigating in the name of the defendant, obtain a new trial of an action against him because it has discovered a fact affecting that liability to the plaintiff which the Office is bound to satisfy, though the defendant himself knew all about it and joined in the supposed attempt to conceal it from the Office ?

This must depend upon the application of general principles to the situation created by the *Motor Vehicles (Third Party Insurance) Act* 1942-1951 (N.S.W.). By that Act it is an offence to use, or cause, permit or suffer to be used, an uninsured motor vehicle upon a public street : s. 7 (1). A motor vehicle, apart from the exceptional case of one bearing a trader's plate, is uninsured unless the Government Insurance Office or some other authorized insurer has issued in relation to it a policy in a prescribed form insuring the owner or any other person driving it against all liability that he may incur in respect of the death or bodily injury of third parties arising out of the use of the motor vehicle : s. 10 (1) and definitions in s. 5 (1). There is an overriding provision that an authorized insurer issuing such a third party policy shall, in respect of any liability which it thus purports to cover for the death or bodily injury of third parties, be liable to indemnify the owner or such other person as may drive the car : s. 10 (7). If judgment is obtained in any court in respect of the death of or bodily injury to any person caused by or arising out of the use of an insured motor vehicle and the third party policy insures the judgment debtor against liability in respect of such death or bodily injury and the judgment is not satisfied within thirty days the court or a judge of the court shall upon the application of the judgment creditor, direct that the judgment be entered against the authorized insurer : s. 15 (1) (a). It is no answer to such an application that the authorized insurer is not liable under the third party policy by reason of any act committed or omission made by the owner or driver of the insured motor vehicle : s. 15 (3). And according to the decision of the Supreme Court in *Robinson* v. *McPherson* (1), it does not matter that the insurer was never notified of the proceedings. But although the court or the judge must direct the entry of judgment against the insurer if the judgment recovered is of the required description the application may not be made *ex parte* : it must be made on seven days' notice to the insurer : s. 15 (1) (a). When a direction is given the judgment must be entered as a judgment against the insurer and may be enforced accordingly : s. 15 (1) (b).

(1) (1947) 48 S.R. (N.S.W.) 1 ; 64 W.N. 170.

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In the present case it is of course clear that as a result of these provisions McCann is not and has never been under any risk of any personal liability falling upon him as a result of the plaintiff recovering a judgment in these proceedings for damages for the injuries she has sustained, that is, of course, unless the authorized insurer were able, notwithstanding s. 15 (1), to obtain relief in equity against the judgment on the ground of fraud. " Nor law nor duty bade him fight ". Recognizing the unreality of the position of a defendant sued for damages for bodily injuries caused to a plaintiff by the management of a motor vehicle the legislature placed the authorized insurer in such a case in the position of *dominus litis*. The authorized insurer who has issued a third party policy may take over during such period as he thinks proper the conduct on behalf of such person of any proceedings taken or had to enforce a claim against any person in respect of a liability against which he is insured under the third party policy and he may defend such proceedings in the name and on behalf of such person : s. 18 (1) (b) and (c).

In the present case it is unnecessary to say that from the beginning the defence to the action was entirely conducted by the Government Insurance Office. It will be seen that McCann occupies the position of a mere nominal defendant. But for most purposes a party on the record is the only person whom the courts will regard as a responsible party in an action. An exception of course existed at common law in actions of ejectment but that was a consequence of the fictional character of the action. When an assignee of a chose in action desired to sue in the assignor's name he received some recognition and protection at common law. He was allowed to use the assignor's name notwithstanding his and the defendant's objection, subject to certain terms. A plea of release by the nominal plaintiff was set aside, if given in fraud of the real party, the assignee. But on the trial of the action, apart from any question of interest rendering the assignee incompetent as a witness, the parties on the record were alone regarded.

The jurisdiction to grant a new trial was asserted at an earlier date than once was thought : *Holdsworth, History of English Law*, vol. 1, p. 225 : cf. *Thayer, Preliminary Treatise on Evidence*, pp. 170 et seq. But however it began it came to be regarded as a remedy used by the court *in banc* to relieve against a verdict when it would be unjust to allow it to stand as a determination of liability. The grounds upon which the court proceeds in granting the remedy have been settled by practice but they have never become completely stereotyped ; they have always possessed some flexibility and have been governed by the overriding purpose of reconciling the demands

of justice with the policy in the public interest of bringing suits to a final end. In principle it is not easy to see why the court, in getting at the justice of the case on the question whether the verdict should stand, may not look to the true legal effect of the verdict and of the judgment which would ensue therefrom and to the reality of the proceedings, more especially when they are the intended consequences of statute. Once the court takes into account the legal truth that the verdict results in an enforceable liability upon the authorized insurer and that, as of statutory right, he defends in the name of the party on the record who is reduced to the situation of a nominal defendant, then for the purpose of considering whether the trial has miscarried or the verdict should be set aside and the action retried, logic and justice alike seem to require that the question should be whether the insurer, not the nominal defendant, discovered fresh evidence ; exercised reasonable diligence in preparing for the trial ; fell a victim to a contrivance, stratagem or deception ; or was aware of the truth or was deceived. The true conception of the principles which govern the authority to grant a new trial and of their proper application appears to warrant the conclusion that the fact that McCann, the nominal defendant, was aware of the supposed deception, if it be established, is no ground for refusing to set aside the verdict and order a new trial. This does not mean that the nominal defendant's knowledge and conduct are to be left out of account. He is the first person to whom the insurer must look for information and help. What occurs in relation to him is of course likely to be of primary importance. It is hardly necessary to say that the insurer cannot treat him as a complete stranger to the litigation and set up some unexpected neglect or failure on his part to disclose information as a ground for a new trial. The measures taken by the insurer to ascertain the facts, the sources of information and in truth the whole circumstances of the case must be taken into account. The power of the Court to order a new trial is based on the substantial requirements of justice and no court would exercise the power in favour of an insurer unless it were satisfied that notwithstanding due diligence on its part a situation had arisen in which, weighing the interests of the plaintiff against those of the real defendant, justice demanded that there be a retrial or a further investigation.

For the foregoing reasons the appeal should be allowed. The order of the Supreme Court should be discharged and in lieu thereof it should be ordered that the notice of appeal be amended and that the verdict be set aside and a new trial ordered. The costs of the application or appeal to the Supreme Court and of the former trial

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should abide the event of the new trial. The costs of the appeal to this Court should be paid by the respondent but there should be a stay of the order with respect to the costs of this appeal until the action has been retried or until further order.

McTIERNAN J. The fresh evidence upon which the Supreme Court was asked to order a new trial of the issue of liability was presented to the Court in an unusual way. Mr. Lionel Alexander, a solicitor attached to the Government Insurance Office of New South Wales, made an affidavit by means of which he brought before the Court the depositions of the witnesses who gave evidence for the prosecution in the proceedings in which the appellant and respondent appeared before the magistrate upon the charge of conspiracy. It is not necessary for me to repeat the charge and the evidence contained in the depositions. Mr. Alexander referred generally to the depositions as containing the fresh evidence, although it is not apparent how much of it could be relevant in a new trial of the action. But he referred in particular to the deposition of one witness. What Mr. Alexander said about that evidence is this: "The fresh evidence upon which it is sought to rely is, *inter alia*, that of Keith James Bird"; and he added that this evidence shows that the respondent was the driver of the motor car at the time of the accident. If that were the fact it would be conclusive that the plaintiff herself was the driver of the motor car at the time of the accident. It is true that Bird said that she was the driver. But the cross-examination recorded in his deposition shows an important inconsistency and other weaknesses in his testimony. It is a question whether a jury would say upon the whole of his evidence that it does show really that the respondent was the driver of the motor car.

The bundle of documents described by Mr. Alexander as the depositions include the depositions of other witnesses besides Bird, exhibits, addresses by counsel, and the magistrate's reasons for committing the nominal appellant and respondent for trial. At the hearing of the motion for a new trial only two pieces of fresh evidence were put forward. These were Bird's evidence as recorded in the depositions and one of the exhibits, a statement which the nominal appellant made to the police. The judges of the Supreme Court had no other means of determining the probative value of this new evidence for themselves than by reading the copy of Bird's depositions and of the nominal appellant's statement. In the case of *Commissioner for Government Tram and Omnibus Services* v. *Vickery* (1) there appears this observation: "It may be remarked that no

(1) (1952) 85 C.L.R. 635.

attempt was made to sift the proposed evidence before the Supreme Court" (1). I apprehend that what underlies the criticism which the judges of the Supreme Court made of the form in which the new evidence was presented to them is that their opportunities for testing it were very limited. Lord *Loreburn* said in *Brown* v. *Dean* (2), that one of the things necessary for new evidence put forward as the basis for a new trial is that "it must at least be such as is presumably to be believed". The Attorney-General declined upon the materials contained in the depositions to file a bill against the nominal appellant and the respondent upon the charge of conspiracy. Subsequently the nominal appellant was indicted for false pretences and upon that charge the jury acquitted him. Presumably the jury in that case were not disposed to think that the evidence which constitutes the fresh evidence put forward in this case was of high probative value. The fact that the fresh evidence had received the test of the jury's verdict in the trial of the nominal appellant upon the charge of false pretences influenced the learned judges of the Supreme Court not to order a new trial upon the basis of such evidence. The reading of the depositions was the only means available to their Honours of estimating the credibility of the evidence for themselves. They were clearly right in taking notice of the fact that the jury acquitted the nominal appellant and in taking that fact into consideration in exercising their discretion by refusing the application for a new trial of the issue of liability. From the depositions it appears that there was a serious contest as to whether the statement made by the nominal appellant to the police was voluntary. As regards the witness, Bird, it appears it was about two and a half years after the accident that he gave to the police a statement which was the basis of his evidence in the criminal proceedings. At the time of the accident he was about eight and a half years of age. According to his deposition he swore that a woman, not a man, was driving the motor car involved in the accident when the sulky in which the deponent and two other persons were riding passed the motor car shortly before the accident. The cross-examination shows that there were weaknesses in his testimony upon which a jury could seriously doubt the accuracy of his recollection of who was driving the motor vehicle. He could not recollect circumstantial details which were no less likely to impress him than the identity of the driver. It appears that he only observed the motor car for the few moments it took to pass the length of the horse in the sulky. The evidence given by Bird about the positions respectively of

(1) (1952) 85 C.L.R., at p. 645. (2) (1910) A.C. 373, at p. 374.

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himself in the sulky and the woman in the motor car was demonstrably wrong if she were the driver. There were, as has been said above, two other persons, besides Bird, in the sulky. The depositions show that the police interrogated them. The fresh evidence includes no statement of any evidence which these persons would give at a new trial. If either of them had made a statement to the police confirming Bird's evidence he would no doubt have been called as a witness in the criminal proceedings. The fresh evidence in the present motion contains no statement from either of them and there is no explanation of this fact. *Street* C.J. took the foregoing matters into consideration in these proceedings. I agree with the conclusion at which the Full Court arrived that the fresh evidence is not shown to be of sufficient probative value to warrant a new trial of the issue of liability.

The notice of motion specified one ground only, namely that the damages were excessive. The general *Rules of the Supreme Court*, by r. 155, provide that the hearing of a motion for a new trial must be restricted to the ground specified in the notice of motion. Leave was sought from the Supreme Court to add the ground of the discovery of fresh evidence. Apparently the court refused leave to amend the notice of motion. In my opinion it is not shown that in refusing leave to amend the court exercised its discretion erroneously.

In the view which I take of the case, which was that adopted by the Full Court, it is not necessary to deal with the question of the rights of the authorized insurer.

In my opinion the appeal should be dismissed.

Appeal allowed. Order of the Supreme Court discharged. In lieu thereof order that the application of the defendant to amend the Notice of Motion to the Full Court of the Supreme Court dated 9th February 1953 *by adding the ground that fresh evidence has been discovered be allowed and order that the verdict be wholly set aside and that there be a new trial generally. Order that the costs of the appeal to the Full Court and of the former trial abide the event of the new trial. Order that the respondent to the appeal to this Court pay the costs of such appeal but that there be a stay of execution of the order in respect of such costs until the new trial of the action has been had or until further order of this Court or a judge thereof.*

Solicitors for the appellant, *Alfred J. Morgan & Son.*
Solicitor for the respondent, *W. H. Luchetti.*

J. B.