[HIGH COURT OF AUSTRALIA.]

VINES . . . . . APPELLANT;

DEFENDANT,

AND

DJORDJEVITCH . . . . . RESPONDENT.

PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1955.

MELBOURNE, *March* 10, 11.

SYDNEY, *April* 1.

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

Negligence—Unidentified motor car—Liability of nominal defendant—Proviso that judgment not to be obtained unless notice given to Minister—"As soon as possible" after claimant "knew" that the identity of the motor car could not be "established"—Meaning of words—Burden of proof of compliance with proviso—Question of fact for jury—Motor Car Act 1951 (*No.* 5616) (*Vict.*) *s.* 47 (1).

Section 47 (1) of the *Motor Car Act* 1951 provides that "Where the death of or bodily injury to any person is caused by or arises out of the use of a motor car but the identity of the motor car cannot be established any person who could have obtained a judgment against the driver of the motor car in respect of such death or bodily injury may obtain against a nominal defendant to be named by the Minister the judgment which in the circumstances he could have obtained against the driver of the motor car: Provided that no such judgment may be obtained unless such person as soon as possible after he knew that the identity of the motor car could not be established gave to the Minister notice of intention to make the claim and a short statement of the grounds thereof" but if there be evidence it is a question of fact for the jury.

Held, that a condition precedent to the cause of action is imposed by the proviso, the burden of proving compliance with which lies on the plaintiff.

Observations on the meaning of the words in the proviso "*as soon as possible* after he *knew* that the identity of the motor car could not be *established*".

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

APPEAL from the Supreme Court of Victoria.

On 17th March 1954, Olga Djordjevitch commenced an action in the County Court at Ballarat against Ernest Edward Vines, the nominal defendant named by the Minister pursuant to the provisions of the *Motor Car Act* 1951. The plaintiff claimed that while crossing Armstrong Street, Ballarat, on 12th June 1953, she had been struck by a motor cycle the identity of which was unknown to her and had thereby suffered damage.

The action was heard before Judge *Moore* and a jury in the County Court at Ballarat when the following facts, *inter alia*, appeared in evidence. The plaintiff was a married woman of foreign extraction, aged thirty-eight years. Her language was Polish and it was necessary for an interpreter to translate her evidence. On 12th June 1953 at about 7 p.m. she was about to cross the road when she was struck by a motor vehicle which, from the noise of its motor, she thought was a motor cycle. She lost consciousness when she was struck and regained consciousness in hospital. She was in hospital for nine days. She returned home and was in bed for a period upon which there was conflicting evidence. According to her account, she was confined to bed for three weeks, but her son said in evidence that the period was ten weeks. After she left her bed she visited hospital several times and also went to see her doctor, and she was under medical treatment and taking medicines. As late as 26th April 1954, she was in hospital again, where she was given a general anaesthetic and her back was manipulated. According to the plaintiff, after she got out of bed she could not do anything, and even at the time of the hearing she could not do much. When she was in hospital she was seen by the police on at least two occasions, and was told that the police were trying to trace the person who knocked her down. She herself had no idea of the identity of the motor vehicle or its driver. She was seen by the police again when she was in bed at home and was told the police were still looking for the driver. When she was able to get about, she visited the " information office " and asked " what to do to find that person ". Her evidence continued " I was told to get a solicitor. I went the same day to a solicitor—Mr. Byrne. I can't say when I went to see Mr. Byrne. I do not remember. It was warm, it was summer when I went to see Mr. Byrne ". Under cross-examination, she said " The police visited me once or twice in hospital. I can't remember the date ; the first time was four or five weeks ; next time was later. I was told by the police that they could not find that man. I had no idea who he was—or what motor cycle it was—or where to look for him. After last visit from

H. C. OF A. 1955. VINES v. DJORDJEVITCH.

police it was not soon that I came to this court. It was roughly three months—a little more or less—after the accident that I came to see the man in this building. The man in this building did not know who the man was or how I could find him ". Murray Lewis Byrne, who was employed by the plaintiff's solicitor, deposed that shortly before 17th November 1953, the plaintiff and her husband consulted him and that he saw her again on 24th November 1953, with an interpreter, and gave her certain advice, after which he obtained instructions from her. In accordance with those instructions, he gave a notice to the Minister dated 1st December 1953, in pursuance of s. 47 of the *Motor Car Act* 1951. On this evidence counsel for the defendant submitted that the jury should be directed to bring in a verdict for the defendant, on the ground that it was not entitled to find that the plaintiff had given notice to the Minister as soon as possible after she knew that the identity of the vehicle could not be established. The trial judge left the case to the jury, which, on 29th April 1954, brought in a verdict for the plaintiff for £1,200. Judgment was entered accordingly.

The defendant appealed from this judgment to the Full Court of the Supreme Court of Victoria (*Herring* C.J., *Barry* and *Dean* JJ.) which, on 10th September 1954, dismissed the appeal.

From this decision the defendant appealed to the High Court of Australia.

N. E. Burbank Q.C. (with him *Kevin F. Coleman*), for the appellant. Section 47 of the *Motor Car Act* 1951 (Vict.) contemplates that in all cases, including that of a claim by an infant or a person under disability, a notice shall be given before action. The proviso was enacted for the benefit of the authorized insurer, so that he might make his own search for the unascertained driver. If the only test was the plaintiff's knowledge, subjectively, that the identity of the motor car could not be established, so much time might elapse before the plaintiff came to that state, identity might never be established. The Supreme Court interpreted knowledge as equivalent to personal belief. The words " to know " have been frequently taken to mean " to be in possession of facts leading to certainty ". [He referred to *London Computator Ltd.* v. *Seymour* (1); *National Bank of Australasia* v. *Morris* (2); *Roper* v. *Taylor's Central Garages (Exeter) Ltd.* (3); *R.* v. *Broughton* (4); *John T. Ellis Ltd.* v. *Walter T. Hinds* (5).] If a man shuts his eyes

(1) (1944) 2 All E.R. 11.
(2) (1892) A.C. 287, at p. 290.
(3) (1951) 2 T.L.R. 284, at p. 288.
(4) (1953) V.L.R. 572.
(5) (1947) K.B. 475.

to facts he has knowledge. In other words, the test may be an objective one. It was approached in this way by *O'Bryan* J. in *Australian National Airways Pty. Ltd.* v. *Vines* (1) and by *Dean* J. in *Ward* v. *Sarah and Vines* (2). See also *Millar* v. *Miller* (3). When a person has been supplied with the facts he has " notice " which is actual and not constructive. [He referred to *Wise* v. *Whitburn* (4).] The position is analagous with respect to " knowledge ". Section 77 of the *Motor Car Act* 1951 makes it an offence not to stop after an accident. The police accordingly have a duty to find the unknown driver. The plaintiff should have known that the identity of the motor car could not be established when the police could not find the driver. The adoption of the objective test of knowledge does not prejudice infants or persons under disability because it is open to the court to regard any delay between " knowledge " and the time when notice is ultimately given (which may not be until the infant reaches a more mature age or the person under disability has the disability removed) as reasonable and excusable in the circumstances, so that the notice can be said to have been given " as soon as possible ". If the correct interpretation of the proviso is that the requirement as to time merely sets the outside limit beyond which notice shall not be deemed valid, so that an earlier notice is sufficient, then it could be said that during infancy or disability a notice may properly be given by or on behalf of the infant or person under disability even though he could not be yet taken to " know ", but that under this section time does not begin to run against such a person in the sense that he can be taken to " know " while infancy or disability lasts. If however the infant or person under disability appoints an agent to act for him the agent's knowledge is attributed to the principal.

Gregory Gowans Q.C. (with him *J. S. Mornane*), for the respondent. The words " could not be established " in the proviso in s. 47 of the *Motor Car Act* 1951 mean " could not by proof to be given at the hearing be established ". The onus of proving the facts set out in the proviso was on the defendant. The requirements set out in the proviso could not have been intended to have been applicable to all those coming within the main provisions. Take, for example, the cases of persons under disability and those entitled to bring action because of injury to another person. The proviso gives immunity by reason of additional facts not mentioned in

(1) (1950) V.L.R. 510.
(2) Supreme Court of Victoria, 20th July 1950, unreported.
(3) (1940) S.A.S.R. 185, at p. 191.
(4) (1924) 1 Ch. 460, at p. 470.

H. C. OF A. 1955. VINES v. DJORDJEVITCH.

the general statement of liability. It is not an added condition of entitlement or a necessary ingredient of the cause of action. The Victorian view that it is stems from a misconception starting with *Whyte* v. *Prouse & Vines* (1) and perpetuated by *Australian National Airways Pty. Ltd.* v. *Vines* (2). [He referred to *Morgan* v. *Babcock & Wilcox Ltd.* (3); *Pye* v. *Metropolitan Coal Co. Ltd.* (4); *Darling Island Stevedoring & Lighterage Co. Ltd.* v. *Jacobsen* (5); *Dowling* v. *Bowie* (6).] The words "to know" mean "to arrive at a firm conclusion, as a result of information or facts observed, as to the future". It must connote some kind of belief. It is not to be read as "ought to know". Constructive knowledge should not be imported into the section. The suggestion that, while an infant of tender years or a person under mental disability must be held to be in a condition where he "knew" that the identity of the car could not be established, when an ordinary reasonable man would have done so, yet a notice might be held to be given "as soon as possible" thereafter if given when the infant reaches "a more mature age" or the person under mental disability has the disability removed, concedes a subjective standard for what is "possible" while denying it to "knowing", but offers no rational basis for the distinction. It also assumes that the person under mental disability will grow out of his disability (as he would grow out of his infancy) and become a competent plaintiff at the time of the notice and action brought. It still denies a right of action to the infant of "less mature age" so long as he remains in that condition, and to the person under mental disability unless and until his condition ceases to exist. The suggestion that notice *can* be given before the immature infant or mentally disabled plaintiff "knew" but *need not* be given so long as he did not "know" during immature infancy or mental disability appears to concede the subjective test for "knew". A person of unsound mind cannot appoint an agent nor can an infant except within certain limits. [He referred to *Halsbury's Laws of England*, 2nd ed., vol. 1, p. 197; vol. XVII. p. 588.] The next friend of an infant or a person of unsound mind is not the plaintiff. [He referred to *Pink* v. *J. A. Sharwood & Co. Ltd.* (7).]

N. E. Burbank Q.C., in reply.

Cur. adv. vult.

(1) (1944) V.L.R. 228.
(2) (1950) V.L.R. 510.
(3) (1929) 43 C.L.R. 163, at pp. 174-175.
(4) (1934) 50 C.L.R. 614; (1936) 55 C.L.R. 138.
(5) (1945) 70 C.L.R. 635.
(6) (1952) 86 C.L.R. 136.
(7) (1913) 2 Ch. 286, at p. 289.

THE COURT delivered the following written judgment:—

This is an appeal as of right from an order of the Supreme Court of Victoria by which an appeal from a judgment of the County Court at Ballarat was dismissed. The appellant is the nominal defendant, appointed under s. 47 of the *Motor Car Act* 1951 (No. 5616) (Vict.), in an action of negligence for personal injuries in which the plaintiff, who is the respondent in the appeal, recovered by the verdict of the jury £1,200 damages.

The plaintiff was knocked down by a motor vehicle about 7 p.m. on the evening of 12th June 1953 as she was attempting to cross a street in Ballarat. She was rendered unconscious. All that she can say is that she heard the noise of an engine of what she took from the sound to be a motor cycle and then remembered no more until she regained consciousness in hospital. The motor vehicle which struck her has not been identified.

Section 47 (1) provides that where the death of or bodily injury to any person is caused by or arises out of the use of a motor car, an expression which includes motor cycle, but the identity of the motor car cannot be established any person who could have obtained a judgment against the driver of the motor car in respect of such death or bodily injury may obtain against a nominal defendant, to be named by the Minister, the judgment which in the circumstances he could have obtained against the driver of the motor car. There follows a proviso, and it is upon the proviso that the appeal turns: "Provided that no such judgment may be obtained unless such person as soon as possible after he knew that the identity of the motor car could not be established gave to the Minister notice of intention to make the claim and a short statement of the grounds thereof".

The nominal defendant objected at the trial that the plaintiff had not complied with the proviso. Although the accident occurred on 12th June 1953 it was not until 1st December of that year that a notice was given by the plaintiff or on her behalf. The defendant said that this could not be as soon as possible after she knew that the identity of the motor vehicle could not be established. The plaintiff, however, relied upon the circumstances of the case as showing that she did not know that she could not establish the identity of the vehicle at such a time as to make it true that the notice was not given as soon as possible. She maintained accordingly that she had complied with the proviso. The issue thus raised was submitted to the jury, with what direction we do not know, for there is no report of the judge's charge. The jury's finding for the plaintiff of course covered the issue.

H. C. OF A. 1955. VINES v. DJORDJEVITCH. Dixon C.J. McTiernan J. Webb J. Fullagar J. Kitto J.

The circumstances appearing in evidence upon which the plaintiff relied may be briefly stated. She is a woman thirty-eight years of age of Polish birth, with not enough English to enable her to give evidence without an interpreter. After her accident she was in hospital for nine days and when she returned to her own home she was confined to her bed for a period variously estimated as three or ten weeks. After that she was for a considerable time incapacitated and unable to move about freely. While she was in hospital she was visited by the police, who told her that they were attempting to trace the driver who knocked her down. After she returned to her home and while she was still in bed the police interviewed her again. They said that they were still looking for the person who knocked her down. When she was able to walk she paid a visit to the offices in the Court House at Ballarat or possibly to the police station there—she called it " the information office "—and asked what to do to find the person. She was advised to obtain a solicitor, which she did on the same day. On what date she first saw her solicitors does not appear but it was a little time before a consultation which took place shortly before 17th November. Another took place on 24th November, this time with the help of an interpreter. She gave evidence at the trial but she does not seem to have been asked the direct question when she first reached the conclusion that the identity of the car that struck her could not be established. The following passage, however, occurs in the notes of her cross-examination : " It was roughly three months—a little more or less—after the accident that I came to see the man in this building (*scil.* the court house). The man in this building did not know who the man was. I was only getting information in this building to see who the man was. At that time I did not know who the man was or how I could find him. At that time I knew that I alone could not find him ".

The nominal defendant appealed from the finding of the jury to the Supreme Court on the ground that there was no evidence on which it could be properly found that when the plaintiff's notice was given it amounted to a compliance with the proviso to s. 47 (1). The Supreme Court (*Herring* C.J., *Barry* and *Dean* JJ.) held that upon the evidence it was open to the jury to find for the plaintiff upon this issue.

The first question which arises in considering the correctness of this conclusion is whether the burden of proving facts amounting to a compliance with the proviso rests upon a plaintiff in an action brought under s. 47 (1) against a nominal defendant.

It is said that the form of the sub-section places the burden of disproof on the defendant. For the requirement of prompt notice after the injured party becomes aware of the impossibility of identifying the car inflicting the injuries is expressed in the form of a proviso. "There is a technical distinction between a proviso and an exception, which is well understood. All the cases say, that if there be an exception in the enacting clause, it must be negatived: but if there be a separate proviso, it need not"—per *Abbott* J. in *Steel* v. *Smith* (1). The distinction has perhaps come to be applied in a less technical manner, and now depends not so much upon form as upon substantial considerations. In the end, of course, it is a matter of the intention that ought, in the case of a particular enactment, to be ascribed to the legislature and therefore the manner in which the legislature has expressed its will must remain of importance. But whether the form is that of a proviso or of an exception, the intrinsic character of the provision that the proviso makes and its real effect cannot be put out of consideration in determining where the burden of proof lies. When an enactment is stating the grounds of some liability that it is imposing or the conditions giving rise to some right that it is creating, it is possible that in defining the elements forming the title to the right or the basis of the liability the provision may rely upon qualifications exceptions or provisos and it may employ negative as well as positive expressions. Yet it may be sufficiently clear that the whole amounts to a statement of the complete factual situation which must be found to exist before anybody obtains a right or incurs a liability under the provision. In other words it may embody the principle which the legislature seeks to apply generally. On the other hand it may be the purpose of the enactment to lay down some principle of liability which it means to apply generally and then to provide for some special grounds of excuse, justification or exculpation depending upon new or additional facts. In the same way where conditions of general application giving rise to a right are laid down, additional facts of a special nature may be made a ground for defeating or excluding the right. For such a purpose the use of a proviso is natural. But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special

(1) (1817) 1 B. & Ald. 94, at p. 99 [106 E.R. 35, at p. 37].

H. C. OF A. 1955. VINES v. DJORDJEVITCH. Dixon C.J. McTiernan J. Webb J. Fullagar J. Kitto J.

matter: see *Morgan* v. *Babcock & Wilcox Ltd.* (1); *Pye* v. *Metropolitan Coal Co. Ltd.* (2); *Darling Island Stevedoring & Lighterage Co. Ltd.* v. *Jacobsen* (3); *Barritt* v. *Baker* (4); *Dowling* v. *Bowie* (5).

The fact that in s. 47 (1) the requirement of notice takes the form of a proviso gives some support for the claim that the plaintiff need not affirmatively establish compliance and that the burden of proving non-compliance is upon the defendant. But the operative words express a negative co-extensive with the affirmative imposition of liability in the main provision. In terms the proviso makes it incumbent upon everybody claiming under the main provision to give the notice and to do so as soon as possible after knowledge of the impossibility of establishing the identity of the car responsible for his injury. It is expressed as a statement of a further requirement to be fulfilled by all before the main provision can be availed of. For the plaintiff, however, it is said that though the requirement is expressed as applicable to all coming within the main provision, it cannot so intend. For there are classes of people who could not be expected to comply with it, e.g. children of tender years or other persons rendered incapable of action or of knowledge by their injuries or by their mental or bodily condition. It is pointed out too that the remedy given by the main provision of s. 47 (1) is not confined to the injured person. If as a result of the death or injury of the victim of an accident, any other person becomes entitled to actionable rights against the driver of the unidentified car he may sue the nominal defendant under s. 47 (1). There is, for example, the case of an employer suing for loss of services of his employee or under s. 62 (*b*) of the *Workers' Compensation Act* 1951 (No. 5601) (Vict.) or a husband suing for special damages suffered by him in consequence of the injury to himself or of a person suing under Pt. III of the *Wrongs Act* 1928 (Vict.) (No. 3807) or under the *Survival of Actions Act* 1942 (Vict.) (No. 4918). In the case of young children and incapacitated persons it may be that the requisite "knowledge" under the proviso cannot be imputed to them and that they are not precluded by failure on the part of those who represent them, whether in the suit or generally, to give a notice as soon as possible after the representatives obtain knowledge of the impossibility of establishing the identity of the car causing the injury. But that is a matter that does not arise in this case and one about which no opinion need be expressed. There is, however, no reason to doubt that other intending plaintiffs may obtain such a knowledge and must then give notice.

(1) (1929) 43 C.L.R. 163.
(2) (1934) 50 C.L.R. 614; (1936) 55 C.L.R. 138.
(3) (1945) 70 C.L.R. 635.
(4) (1948) V.L.R. 491, at p. 495.
(5) (1952) 86 C.L.R. 136.

In any case it is evident that the legislature did not mean that the necessity of notice should be exceptional and did not advert to the contingency of a plaintiff's having no knowledge of the very fact which the main provision of s. 47 (1) makes essential to his statutory cause of action.

The substance of the proviso and its general tenor show that it means to impose a condition precedent to the cause of action. Accordingly the burden of proof lies on the plaintiff.

The question whether the evidence is sufficient to enable the jury to find that the burden was discharged can hardly be answered without some consideration of the meaning of the sub-section. Is it clear what the fact is which the plaintiff is to " know " so that as soon as possible he must give notice to the Minister ? In other words what is meant by the expression " the identity of the car cannot be established " ? The word " established " does not seem to mean " proved by admissible evidence to the satisfaction of a court ", although doubtless it is capable of that meaning. Cases may be imagined where the identity of the car is known but there is a lack of admissible evidence to prove it. Rather the word seems to mean, " ascertained definitely or with reasonable certainty".

The provision which in Victoria began as s. 13 (1) of the *Motor Car (Third-Party Insurance) Act* 1939 (No. 4688) was suggested by the South Australian enactment, s. 70d (3) of the *Road Traffic Act* 1934-1936. There the word " ascertain " is used. It is not easy to understand why in Victoria it was changed to " establish " but if it was intended that possession or the existence of evidence to prove the issue of identity should be the test, it surely would have been definitely stated. The word " knew " seems to have caused difficulties. The person who must " know " is the person referred to in the main part of the sub-section as a person who could have obtained judgment against the driver. It is urged for the nominal defendant that the word " knew " does not require an actual state of mind on his part ; it is enough if the facts brought to his notice would satisfy a reasonable man that the identity of the car could not be established. For this reliance is placed upon what was said by *O'Bryan* J. in *Australian National Airways Pty. Ltd.* v. *Vines* (1), though it is not certain that his Honour meant to go so far as to say that the ultimate fact was not the plaintiff's actual knowledge. Of course the plaintiff's state of knowledge must be judged from his means of knowledge, that is to say excepting any direct evidence of his own state of mind which the plaintiff may give if the tribunal of fact sees fit to prefer it to natural inferences from more objective facts. But when the proviso says " knew "

(1) (1950) V.L.R. 510, at pp. 513-514.

H. C. OF A. 1955.

VINES v. DJORDJEVITCH.

Dixon C.J. McTiernan J. Webb J. Fullagar J. Kitto J.

it is very difficult to substitute some external or objective fact for the state of mind that the word signifies as a matter of English. It goes without saying that a strong presumption of fact arises that knowledge exists of a fact, whether a negative or a positive fact, when the circumstances would convey to a reasonable man that the fact exists. But that is a different thing from saying that the plaintiff is conclusively presumed to know the fact. The distinction is of much importance in the present case where the plaintiff relies on her ignorance of the English language and of her environment and on the duration and extent of her incapacitation as countervailing the inference which otherwise would almost inevitably be drawn.

The fact to be known is not a physical event or thing. It is negative in character, namely the impossibility of establishing what car it was that caused her injuries. It is therefore a question of opinion or belief. The word "know" is used in the provision in an ordinary sense, without any intention that it should be analyzed or refined upon. But of course there are gradations of knowledge or belief upon such a matter. The gradations extend from a slight inclination of opinion to complete assurance. Here it seems to amount to an awareness or consciousness that no reasonable probability exists of ascertaining the identity of the car satisfactorily or with any certainty. Complete assurance is by no means necessary. When the plaintiff has come to think that the identity cannot be established that is enough. If the expression "think" must be refined upon, it may be said to mean that the steady preponderance of his opinion or belief is that it cannot be done.

But there is a further difficulty in the proviso. What does "as soon as possible" mean or imply? It is to be noticed that under the analogous proviso to s. 46 (1) the notice must be given within a reasonable time after knowledge arose. Presumably "as soon as possible" requires a higher degree of expedition. Perhaps the most satisfactory paraphrase is to say with all reasonable expedition of which the circumstances allow.

Finally it may be desirable to add that an issue under the proviso must be decided as a matter of fact, and therefore by the jury and not by the court, when the trial is with a jury: see *Leeder* v. *The Mayor, etc., of the Town of Ballarat East* (1). This is so notwithstanding the use in the provision of the word "judgment". The test laid down by the proviso is of an indefinite character, depending as it does upon "knowing" a negative state of things and then upon taking the time when that state of mind began and requiring

(1) (1908) V.L.R. 214.

that the plaintiff should act " as soon as possible " after that point of time. Perhaps it was thought better that a somewhat indefinite criterion should be provided so that it might be applied in a flexible way by the tribunal of fact. But even so there must be some ground disclosed by the facts in evidence for a jury's finding that the test laid down by the proviso was satisfied. In the present case the time that elapsed from the date of the accident before a notice was given is a long one, five months and eighteen days. From the day when the plaintiff received her injuries it must have appeared to any man who acquainted himself with the circumstances of the accident, as known to the plaintiff, her husband and son, that only by some unexpected chance could the identity of the car that threw her down ever be discovered. The plaintiff's success on this issue must therefore depend on a combination of the few factors which may make her case a special one. There is her ignorance of the language and inferentially of the means of profitable inquiry open in this country to police and others in such a case. There is the length of time during which she was completely incapacitated and the degree of her subsequent incapacity. There are the observations made by the police to her and her own account of her visit to what she called the " information office " in or near the court house. To these matters may legitimately be added the estimate which the jury may have formed as they saw her of her intelligence and understanding and of the effect of her physical and linguistic disabilities.

When all this is put together it remains very unconvincing. But we are not entitled to assume the functions of the jury. The question we must ask ourselves is whether a reasonable man could on this material say that she did not know that the identity of the car could not be discovered until, for example, the day of the visit to the " information office " and to her solicitors and that afterwards the notice was given as soon as possible.

In the Supreme Court *Herring* C.J., *Barry* and *Dean* JJ. considered that so to find was not unreasonable and, although the plaintiff's case on the issue may fairly be described as very thin, their Honours' conclusion is not one with which we are prepared to disagree.

Appeal dismissed with costs.

Solicitors for the appellant, *Oswald Burt & Co.*
Solicitors for the respondent, *T. E. Byrne & Co.*, Ballarat.

R. D. B.