[HIGH COURT OF AUSTRALIA.]

PENNINGTON . . . . . APPELLANT;
PLAINTIFF,

AND

NORRIS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1956.

HOBART, *Mar.* 14, 15;

MELBOURNE, *June* 6.

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

Negligence—Contributory negligence—Apportionment—Basis—Last opportunity—Applicability since enactment of contribution legislation—Tortfeasors and Contributory Negligence Act 1954 (*No.* 14 *of* 1954) (*Tas.*), *s.* 4.

In determining the extent to which damages recoverable by a plaintiff are to be diminished pursuant to s. 4 (1) of the *Tortfeasors and Contributory Negligence Act* 1954 (*Tas.*) by reason of his share in the responsibility for the damage a comparison is to be made of the respective degrees by which the conduct of the plaintiff and the defendant has diverged from the standard of care of the reasonable man.

Quaere, whether since the *Tortfeasors and Contributory Negligence Act* 1954 (*Tas.*) the doctrine of last opportunity has any operation in that State.

Decision of the Supreme Court of Tasmania (*Crisp* J.), varied.

Appeal from the Supreme Court of Tasmania.

On 20th September 1954 George William Pennington brought an action in the Supreme Court of Tasmania against Roy James Norris claiming damages for personal injuries sustained by him when struck by the defendant's motor vehicle in Marine Terrace, Burnie, on 12th June 1954.

The action was heard before *Crisp* J. who, in a judgment delivered on 29th November 1955, held that the plaintiff should recover the sum of £9,178 8s. 0d. reduced by one-half on account of his own negligence. Judgment was accordingly entered for the plaintiff for the sum of £4,589 4s. 0d.

From this decision so far as it found that the damages should be reduced by reason of his own negligence the plaintiff appealed to the High Court. On 5th January 1956 the defendant gave notice of cross-appeal on the ground that the sum assessed, £9,178 8s. 0d., was excessive.

R. C. Wright and *H. V. O. Bushby*, for the appellant.

J. P. Bourke, Q.C. and *R. R. Barber*, for the respondent.

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

Cur. adv. vult.

June 6.

THE COURT delivered the following written judgment :—

This is an appeal from the Supreme Court of Tasmania (*Crisp* J.). The appellant was the plaintiff in an action in which he claimed damages for personal injuries sustained when he was struck by a motor car driven by the respondent. His Honour found that the damage had been caused by negligent conduct on the part of both parties and that each was equally at fault. He assessed the plaintiff's damages at £9,178 8s. 0d. but, acting in pursuance of the *Tortfeasors and Contributory Negligence Act* 1954 (Tas.), he reduced these damages by one-half and gave judgment for £4,589 4s. 0d. The plaintiff maintains that the learned judge was wrong in finding the plaintiff at fault, or at least in finding him equally at fault with the defendant, and he says that he should have had judgment for the full amount of £9,178 8s. 0d., or at least for a sum substantially larger than one-half of that amount. A cross-appeal instituted by the defendant was abandoned before us.

The accident happened about 10.20 p.m. on 12th June 1954 in Marine Terrace, Burnie. It was not raining at the time, but it had been raining shortly before, and it was a misty night and the streets and roads were wet. Marine Terrace in the vicinity runs roughly north and south. On the east side it is separated by a fence from the railway and beyond the railway lies the sea. On the west side are buildings, which include three hotels : these are (going from north to south) the Bayview Hotel, the Central Hotel and the Burnie Hotel. The Central Hotel is on the corner of Marine Terrace and a side street named Ladbrooke Street. The road consists of a bitumen surface about twenty-seven feet wide, having on the east side, between the edge of the bitumen and the fence, a gravelled strip probably about twenty feet in width.

Some two hours earlier, about 8.15 or 8.30 p.m., the plaintiff and a man named Wilson had travelled into Burnie in a car driven by

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the plaintiff and had parked the car on the east side of Marine Terrace, facing south, opposite the Central Hotel. Between their arrival in Burnie and the time of the accident the plaintiff and Wilson paid a series of visits to the three hotels mentioned above. They said, however, that they did not have a great deal to drink, and a senior constable of police, who had a good opportunity of observing them shortly before the accident, said that they were "walking normally and gave no signs of being under the influence". His Honour's finding was that "they were not affected by drink". It should be added that the constable said that this part of Marine Terrace was a very busy thoroughfare on the night in question (it was a Saturday), that the hotels closed at ten o'clock, and that there was a considerable number of more or less intoxicated persons in the vicinity.

After buying some fish and chips at a cafe in Marine Terrace the plaintiff and Wilson went to a lavatory at the side of the Central Hotel in Ladbrooke Street. The plaintiff remembers nothing of what happened after this. According to Wilson, when they came out, they turned south into Marine Terrace, and walked a few paces until they were approximately opposite their parked car, when they proceeded to cross the road towards it. Wilson says that he looked both ways before stepping off the footpath, that he saw nothing to the south, but noticed the lights of a car approaching from the north, which he thought was a hundred yards away or more. He did not look again to the north. He thinks that, as they crossed, the plaintiff was about a pace behind him and to his right. When he (Wilson) was about a pace from the edge of the gravel on the east side of the road, the two were struck by the front of the defendant's car coming from the north, the impact apparently being, in the case of Wilson, between the left mudguard and the centre of the radiator, and, in the case of the plaintiff, between the right mudguard and the centre of the radiator. The car continued on a somewhat irregular course for a distance of about one hundred and forty-two feet. Wilson's body came to rest on the gravel about twenty-nine feet from the point of impact and the plaintiff's body on the gravel about twenty-eight feet further on. Wilson's injuries were slight, but the plaintiff's were very severe.

The car was travelling, as his Honour found, at about thirty miles per hour, and this finding is consistent with the defendant's own evidence. His speed may well have been faster. The defendant said that he was travelling with his left wheels close to the edge of the bitumen, that two cars had passed him going in the opposite direction a little to the north of Ladbrooke Street, that he saw

nobody leave the footpath, and that he did not see the plaintiff or Wilson until there was not the slightest possibility of avoiding them. He said: "I saw nothing until we had passed over Ladbrooke Street when all of a sudden, as if from nowhere, I saw a blur: it was so quick I could not even discern for certain, but I did take it to be two men . . . . When they appeared, I knew it was utterly impossible for me to miss them . . . I did not see them and I cannot give any explanation." He said that the night was misty, that the breathing (presumably of the occupants of the car) and droplets of rain had tended to fog the windscreen a little, that the latter was "not as clear as it might have been", and that his "vision was obscured to a degree". He could not remember whether his windscreen wiper was in motion at the time of the impact. He said that he could see to his right (presumably through an open window) and that as he came down Marine Terrace he "noticed quite a number of people about". After the men were struck he swung instinctively to the right, applied his brakes, then swung back to the left and finally stopped his car on the gravel at the point already mentioned.

The material passages in the reasons for judgment of the learned judge (which, by the way, bears the appearance of being imperfectly recorded) are as follows:—"I am satisfied that it was a case of concurrent fault. The driver failed to keep a proper lookout . . . I am satisfied that he was not keeping a proper lookout. I am also quite satisfied that there was contributory negligence on the part of the plaintiff. He failed to observe the car, which he had the opportunity of observing, as it was approaching from seventy-five to one hundred yards away. In crossing and continuing to cross they showed disregard for their own safety. The principle I apply is that in *Admiralty Commissioners* v. *S.S. Volute* (1) and *The Eurymedon* (2), and I read per *Greer* L.J. from his fourth ground on p. 50 of that case. That is the class of case in which I place this case. I find there was continuing negligence in both parties right up to the impact . . . . I find it impossible to apportion more blame to the one than to the other."

The *Tortfeasors and Contributory Negligence Act* 1954 (Tas.) by s. 4 (1) provides: "Where a person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage is not defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant's share in

(1) (1922) 1 A.C. 129. (2) (1938) P. 41.

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the responsibility for the damage". The word "fault" is defined by s. 2 as meaning "negligence, breach of statutory duty, or any other act or omission that gives rise to a liability in tort, or would, but for this Act, give rise to the defence of contributory negligence".

Mr. *Wright* submitted first that the finding that the plaintiff had been negligent could not be supported. He said that it was made without due regard to the onus of proof and that the evidence did not justify it. There is undoubtedly considerable force in this argument. His Honour has said: "He", i.e. the plaintiff, "failed to observe the car, which he had the opportunity of observing as it was approaching". There is no direct evidence that the plaintiff did fail to observe the defendant's car: the plaintiff himself, who alone could give direct evidence on the point, had no recollection whatever of what happened after a point of time prior to the two men commencing to cross the road. Moreover his Honour does not mention the possibility that the plaintiff who, according to Wilson, was walking across the road a little behind and to the right of Wilson, had his vision to his left partly obscured by Wilson, or relied on Wilson to keep a look-out to the left.

Although, however, there is considerable force in the argument, we do not think it is possible for this Court to upset the finding that the plaintiff was guilty of negligence. There is clearly evidence to support such a finding, and we are of opinion on the whole that it is the correct finding on the evidence, although obviously a contrary finding by a jury could not have been upset: cf. *Allen* v. *Redding* (1). It was for each man to exercise reasonable care for his own safety, and it is a fair inference that neither man looked to the left during the crossing of the road. This omission was the omission of a very ordinary precaution and this is, we think, in substance the view which was taken by his Honour.

Mr. *Wright* next contended that, even if the plaintiff's conduct was negligent, it was not open to the learned judge to find that the plaintiff's injuries were "the result partly of his own fault" within the meaning of s. 4 of the Act. He referred to the definition of the word "fault" and said that it followed from this definition that s. 4 applied only to a case in which the negligence of the plaintiff was such that at common law it would have afforded a defence to the action. He then said that in the present case the defendant could and would, if he had been driving with reasonable care, have avoided the result of the plaintiff's negligence, or that the case was otherwise such that the plaintiff's negligence would have

(1) (1934) 50 C.L.R. 476.

afforded no defence to the action at common law: see *Alford* v. *Magee* (1). It followed that no reduction of the damages recoverable could be made under s. 4 of the Act.

This argument involves the question discussed by the Court of Appeal in *Davies* v. *Swan Motor Co. (Swansea) Ltd.* (2) and by Dr. *Glanville Williams* in Ch. 10 of Pt. II of his work on *Joint Torts and Contributory Negligence* (1951): see also *Marvin Sigurdson* v. *British Columbia Electric Railway Co. Ltd.* (3). That question is whether the "apportionment" legislation, which has been enacted in England, in the Provinces of Canada and in the States of Australia, and which is embodied in s. 4 of the Tasmanian *Tortfeasors and Contributory Negligence Act* 1954, has removed from the law what Sir *John Salmond* miscalled the rule in *Davies* v. *Mann* (4). It seems unnecessary, however, for present purposes to discuss this question, because, if it be right to characterise the conduct of the plaintiff and his friend as negligent, it would seem that it must be held that they were guilty of such contributory negligence as would at common law afford a defence to an action by either of them. It is true that his Honour has purported to apply a "principle" which he finds in *Admiralty Commissioners* v. *S.S. Volute* (5) and in *The Eurymedon* (6), and he refers to the fourth of the "rules" stated by *Greer* L.J. in the latter case. It was pointed out in *Alford* v. *Magee* (1) that it cannot really be right to attempt to comprehend in "rules" or "principles" states of fact of infinite variety. But it is to be gathered that his Honour's view was simply that, if the plaintiff had at any stage during the crossing of the road —even at the last moment—looked to his left, the accident would probably have been avoided. The correctness of this view of the facts may be open to argument, but it does not seem possible for a court of appeal to say that it was wrong. And, if it is accepted, we think Mr. *Wright's* second argument also fails.

Mr. *Wright*, however, further contended that, if there must be an "apportionment" under the Act, the learned judge took a view altogether too unfavourable to the plaintiff, and that his damages should be reduced by a very much smaller proportion than one-half. He suggested ten per cent as the maximum reduction that could properly be made.

It is clear that the Act intends to give a very wide discretion to the judge or jury entrusted with the original task of making the apportionment. Much latitude must be allowed to the original

(1) (1952) 85 C.L.R. 437.
(2) (1949) 2 K.B. 291.
(3) (1953) A.C. 291.
(4) (1842) 10 M. & W. 546 [152 E.R. 588].
(5) (1922) 1 A.C. 129.
(6) (1938) P. 41.

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tribunal in arriving at a judgment as to what is just and equitable. It is to be expected, therefore, that cases will be rare in which the apportionment made can be successfully challenged: see *British Fame* (*Owners*) v. *Macgregor* (*Owners*) (1) and *Ingram* v. *United Automobile Service Ltd.* (2). But, giving full weight to these considerations in the present case, we are unable to avoid the conclusion that, in apportioning the responsibility equally, his Honour must have overlooked certain features of the case, and that the amount by which he reduced the assessed damages cannot really be supported.

The only guide which the statute provides is that it requires regard to be had to "the claimant's share in the responsibility for the damage". As to the effect of this see generally an article by Mr. *Douglas Payne, Reduction of Damages for Contributory Negligence* (3). What has to be done is to arrive at a "just and equitable" apportionment as between the plaintiff and the defendant of the "responsibility" for the damage. It seems clear that this must of necessity involve a comparison of culpability. By "culpability" we do not mean moral blameworthiness but degree of departure from the standard of care of the reasonable man. To institute a comparison in respect of blameworthiness in such a case as the present seems more or less impracticable, because, while the defendant's negligence is a breach of duty owed to other persons and therefore blameworthy, the plaintiff's "contributory" negligence is not a breach of any duty at all, and it is difficult to impute "moral" blame to one who is careless merely of his own safety.

Here, in our opinion, the negligence of the defendant was in a high degree more culpable, more gross, than that of the plaintiff. The plaintiff's conduct was *ex hypothesi* careless and unreasonable but, after all, it was the sort of thing that is very commonly done: he simply did not look when a reasonably careful man would have looked. We think too that in this case the very fact that his conduct did not endanger the defendant or anybody else is a material consideration. The defendant's position was entirely different. The learned judge found only that he was negligent in not keeping a proper look-out, but there were several other important elements in the case, as Mr. *Wright* pointed out. We think, indeed, that the equal allocation of responsibility by his Honour must have proceeded from an overlooking of these elements. The first matter is his speed. It could not on the evidence have been found to be less than thirty miles per hour. Again, there was a large number of people in the

(1) (1943) A.C. 197.
(2) (1943) K.B. 612.
(3) (1955) 18 Mod. L.R. 344.

vicinity,—the defendant himself says that he noticed " quite a number of people about ". The hotels, of which there were three in the immediate vicinity, had closed a very short time previously. It was a misty night, and the road was wet. Visibility must have been impaired by these factors, and it was further impaired by mistiness on the inside and outside of the windscreen. To drive at thirty miles per hour in a town at night under these circumstances seems to us to have been to do an obviously dangerous thing, and to have amounted to negligence of far greater culpability than anything that can possibly be attributed to the plaintiff.

Having regard to these factors, and to all the circumstances of the case, we are of opinion that a fair and reasonable allocation of the responsibility for the damage done is to attribute it, as to eighty per cent to the defendant and, as to twenty per cent to the plaintiff. The appeal should be allowed, and the judgment of the Supreme Court of Tasmania varied so as to give effect to this apportionment.

Appeal allowed with costs.

Discharge so much of the order as finds under the provisions of the Tortfeasors and Contributory Negligence Act 1954 *that the degree of the plaintiff's negligence was one-half and of the defendant's negligence was one-half and that judgment be entered for* £4,589 4s. 0d. *and substitute a finding that the respective degrees were one-fifth and four-fifths and an order that judgment be entered for* £7,342 14s. 5d.

Solicitors for the appellant, *Harold Bushby*, Launceston, by *Crisp & Wright.*

Solicitors for the respondent, *Simmons, Wolfhagen, Simmons & Walch.*

R. D. B.