[HIGH COURT OF AUSTRALIA.]

KAIN & SHELTON LIMITED AND ANOTHER Appellants; Defendants,

AND

VIRGO . . . . . Respondent; Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. of A. 1956.

Adelaide, *May* 9, 10;

Sydney, *Aug.* 17.

Dixon C.J., Williams, Fullagar and Taylor JJ.

Negligence—Road accident—Collision with stationary vehicle at night—Lord Campbell's Act claim—Contributory negligence of plaintiff—Applicability of legislation providing for apportionment of blame—Wrongs Act 1936-1951 (*S.A.*) (*No.* 2267 *of* 1936—*No.* 50 *of* 1951), *s.* 27*a* (3).*

The plaintiff was driving a motor car at night along a straight, level stretch of country road. The road consisted of a bitumen strip about twenty feet wide, with loose gravel shoulders on either side. The defendant K., the driver of a semi-trailer which was travelling along the road in the same direction as the plaintiff and ahead of him, had occasion to examine one of his tyres and, accordingly, stopped his vehicle for the purpose. He pulled partly off the bitumen, but his offside wheels remained on the bitumen and the tray of his vehicle projected on its offside about two feet nine inches over the bitumen. His rear lights were burning, but the trial judge found that they were partly obscured by dust or sludge and were not visible for 200 yards from the rear, as required by s. 42 (1) (*b*) of the *Road Traffic Act* 1934-1954 (S.A.). As the plaintiff's car approached the point where the semi-trailer was stationary, his vision was affected by the lights of a third vehicle, which was approaching from the opposite direction. The plaintiff, therefore, reduced his speed from about fifty miles per hour to about forty miles per hour and watched the left edge of the bitumen in order to keep his direction. He failed to see the

*Section 27a (3) of the *Wrongs Act* 1936-1951 (S.A.) provides that:—"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be 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 the responsibility for the damage . . . ".

semi-trailer until it was too late to avoid a collision, and his car struck the rear of the semi-trailer. His wife, who was a passenger in his car, was killed in the accident. In an action under the *Wrongs Act* 1936-1951 (S.A.), brought by the plaintiff for the benefit of himself, in which he claimed damages and solatium in respect of his wife's death, the trial judge held that the accident was wholly caused by the negligence of the defendant K. in not having properly illuminated lights on the rear of the semi-trailer.

Held, by *Dixon* C.J., *Williams* and *Taylor* JJ. (*Fullagar* J. dissenting), that the findings of the trial judge, being supported by the evidence, should not be disturbed.

Per Fullagar J.: *Lord Campbell's Act* confers a remedy for pecuniary loss suffered by certain classes of persons through the death of a person killed but makes the remedy subject to the condition that the deceased would have had a cause of action had death not ensued. Accordingly contributory negligence on the part of the deceased affords a good defence to an action brought under the Act. Where not the deceased but the person for whose benefit the action is brought, whether he be actually a plaintiff or not, has been guilty of negligence the common law equally regards such negligence as fatal to the action so brought. Negligence on the part of a personal representative, who has no personal interest in the action brought by him, is, however, regarded at common law as irrelevant.

In the present case, notwithstanding that the plaintiff suing for his own benefit was guilty of contributory negligence which at common law would have proved fatal, the claim falls within s. 27a (3) of the *Wrongs Act* 1936-1951 (S.A.) and the damages awarded should be reduced to accord with the plaintiff's degree of responsibility for the injury sustained.

Decision of the Supreme Court of South Australia (*Mayo* J.), affirmed.

APPEAL from the Supreme Court of South Australia.

Kenneth George Virgo, the widower of Jean Virgo, brought an action in the Supreme Court of South Australia against Kain & Shelton Ltd., Eric Stanley Kenny, and Arthur Edward Cole. The plaintiff brought the action for the benefit of himself, pursuant to Pt. II of the *Wrongs Act* 1936-1951 (S.A.), claiming damages and solatium in respect of the death of his wife.

The plaintiff, in his statement of claim, alleged that on 30th April 1954, on the Duke's Highway near Keith, South Australia, a road accident occurred which resulted in the death of his wife. He alleged negligence against Kain & Shelton Ltd. and Eric Stanley Kenny, the owner and driver respectively of a semi-trailer which was stationary by the roadside and with the rear of which the plaintiff's motor car, driven by himself with his wife as a passenger, collided. He also alleged negligence against Arthur Edward Cole, the driver of a motor car which was travelling in the opposite

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direction. Kain & Shelton Ltd. and Kenny, in their defence, denied negligence on their own part and alleged that the accident was caused by the negligence of the plaintiff or, in the alternative, that, if they or either of them were guilty of any negligence, the plaintiff was guilty of contributory negligence. Cole, in his defence, denied negligence on his own part and alleged that the accident was caused by the negligence of the plaintiff and the other defendants or one or more of them. The plaintiff, in his reply to each of the defences, joined issue and denied that he was guilty of negligence or contributory negligence.

The trial judge held that the accident was wholly caused by the negligence of Kenny in not having properly illuminated lights on the rear of the semi-trailer and, accordingly, gave judgment for the plaintiff against Kain & Shelton Ltd. and Kenny and dismissed the action as against Cole. The facts are sufficiently set forth in the headnote and the judgments hereunder.

There was no appeal against the dismissal of the action as against Cole, but Kain & Shelton Ltd. and Kenny appealed to the High Court against that portion of the judgment of the trial judge whereby judgment was entered for the plaintiff against them.

T. E. Cleland (with him *D. M. Brebner*), for the appellants. Appropriate tests of conduct said to be negligent may be (a) to consider the courses of action, or alternatives, which, at the critical time, were available to avoid or reduce a foreseeable risk (*Lee Transport Co. Ltd.* v. *Watson* (1) and (b) to balance the risk against the consequences of not assuming the risk: *Daborn* v. *Bath Tramways Motor Co. Ltd.* (2). [He also referred to *Stewart* v. *Hancock* (3) and *Mazengarb* on *Negligence on the Highway*, 2nd ed. (1952), p. 157.]

E. E. McLaughlin (with him *Miss B. E. Linn*), for the respondent.

T. E. Cleland, in reply.

Cur. adv. vult.

Aug. 17.

The following written judgments were delivered:—

DIXON C.J., WILLIAMS AND TAYLOR JJ. This is an appeal in an action brought in the Supreme Court of South Australia following an accident which occurred at about 9.30 p.m. on 30th April 1954 on the Duke's Highway, the main road from Adelaide to Bordertown and thence to Melbourne. The accident occurred nine miles

(1) (1940) 64 C.L.R. 1.
(2) (1946) 2 All E.R. 333.
(3) (1940) 2 All E.R. 427.

beyond Keith on a level stretch of the road where the surface consisted of about twenty feet of bitumen in the centre with loose gravel shoulders fifteen feet in width on the northern and twelve feet on the southern side. At about that time the plaintiff, now the respondent, was driving a Plymouth car from Keith in a south-easterly direction, that is in the direction of Bordertown, at about 40 m.p.h. when the Plymouth collided with the offside rear of the tray of a stationary semi-trailer which had its nearside tyres and most of its width over the northern shoulder of the road but still had its offside tyres on the bitumen causing its tray to project on its offside about two feet nine inches over the bitumen. The semi-trailer was being driven by Kenny, one of the defendants, and was owned by the defendant company. These two defendants are now the appellants. There was a third defendant, named Cole, the driver of a Jaguar car, the glare from the headlights of which was alleged to be a cause of the accident. But *Mayo* J., the learned trial judge, dismissed the action against this defendant and therefrom there is no appeal. The plaintiff's wife was killed in the accident and the action is one for damages under the provisions of Pt. II of the *Wrongs Act* 1936-1951 (S.A.). His Honour held that the accident was wholly caused by the negligence of the defendant Kenny in not having properly illuminated lights on the rear of the semi-trailer.

At the time of the accident it was dark and overcast but fine. But the day had been wet; it had been raining a short time before; the bitumen was damp and the shoulders of the road were in a soaked condition. A few minutes before the collision occurred Kenny, who was driving in the same direction as the plaintiff, heard air escaping from a tyre of the semi-trailer. He drove the vehicle off the bitumen to the extent already mentioned and got down from his cab to investigate, leaving the engine running. He found the near tyre of the offside wheel of the prime mover was punctured. He thought, it would appear with reason, that the condition of the shoulder of the road was such that there was a serious risk of the vehicle becoming bogged if he drove it right off the bitumen but that he could go a little further to the left provided he still kept his offside tyres on the bitumen. He could then jack up the offside front wheel on the bitumen to repair the punctured tyre. He had just got back into his cab, pushed out the clutch and engaged the gear when the Plymouth ran into his rear. The impact caused his foot to slip off the clutch and the vehicle moved forward a few feet before the engine stalled and the vehicle stopped. About a quarter of a mile before the plaintiff reached the place of the accident,

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he had driven up a slight incline in the road. On reaching the crest he was dazzled but not blinded by the headlights of an oncoming car. He dipped his lights from high to low beam and expected the driver of the other car, which turned out to be the Jaguar, to do the same, but the latter made no change. As the cars approached each other the lights of the Jaguar became brighter and more dazzling. This compelled the plaintiff to look away from his immediate front towards his left to avoid the glare and to steer by the left edge of the bitumen as a guide. By this time he had taken his foot off the accelerator and was running against compression, and this had reduced his speed to 40 m.p.h. when suddenly a dark shape, which turned out to be the semi-trailer, loomed up in front of him. He had not seen any lights ahead of him on his side of the road before the impact. He tried to swerve to the right but he was too close to do so. He was then probably only two feet behind the tray of the semi-trailer. The Plymouth crashed into the offside rear of the semi-trailer where it projected over the bitumen. His wife, who was sitting in the front seat, was killed and the other passengers, a friend and his three children, injured but they subsequently recovered. Shortly after the accident another car, a Buick driven by one Hissey, crashed into the Plymouth and pushed its back round across the middle of the bitumen. The Buick veered right across the bitumen on to the shoulder on its wrong side of the road. There was then nothing behind the semi-trailer.

In the meantime the Jaguar had stopped slightly beyond the scene of the accident on its side of the bitumen leaving its lights burning. Hissey said that the glare from these lights had obscured his vision and prevented him from seeing the Plymouth, causing him to run into it. The driver of the Jaguar, the defendant Cole, supported by a passenger, swore that he had seen the lights first of the semi-trailer and then of the Plymouth and was aware that the two vehicles were approaching him. He was then using his fog lights. These were the lights he habitually used when traffic was approaching him. They are lights which diffuse the illumination and throw it on the road. There is no key point of light as there is in other beams. They throw a much wider beam ahead and to each side of the car. Their brightest point would be about thirty yards ahead. These lights were tested by a detective sergeant on a level stretch of road three weeks after the accident when Cole swore that they were still in the same condition. The detective said that at a distance of seventy-five feet a bright beam of light was up to a height of about six inches above the surface of the road and was approximately eight yards across. He said that in his opinion the lights

though bright should not have dazzled the motorist approaching him. But he could not say if they would prevent an oncoming motorist from seeing what was ahead of him. On the other hand Hissey, who was a garage proprietor at Keith, said that at the time of the accident the fog lights of the Jaguar were set too high. They were bright and penetrating and had dazzled him. Otherwise he felt sure that he could have seen the car he struck in time to pull up. Cole said that he had no reason to believe that his fog lights were dazzling the plaintiff. The plaintiff did not give him the usual warning that he was being dazzled by frequently dipping his headlights and he therefore made no change. The plaintiff appeared to think that at the moment of collision the Jaguar was abreast of the semi-trailer but according to Cole he was then at least 100 yards away and the collision had occurred before he reached the semi-trailer. It was not suggested that he was not on his proper side of the bitumen.

There is no finding by his Honour as to where the Jaguar was at the moment of collision or as to what lights Cole was using. But his Honour was not prepared to disbelieve Cole. Hissey said that the headlights of the Jaguar were not illuminated and it was the fog lights that were in use when his accident occurred. It would seem that Cole was, as he said, using his fog lights at the time. His Honour said that he did not accept it as a demonstrated fact that the strength and elevation of the beam Cole was using was contrary to what is accepted as reasonable and proper in the circumstances. In making this finding he appears to have relied on the evidence of the detective that he had seen numerous vehicles driven around with lights of similar candlepower to the fog lights of the Jaguar and that these lights could not be deemed to be dazzling.

His Honour was satisfied, as we understand his reasons, that the fog lights of the Jaguar did dazzle the plaintiff and interfere with his vision but that the interference did not become serious until he was very close to the semi-trailer, too close if he had then seen its lights to have a reasonable chance of avoiding it. If, however, the lights of the semi-trailer had been properly illuminated the plaintiff would have been able to see them before the interference became serious and to realise that there was a vehicle in his path in sufficient time to avoid it by pulling up or swerving to the right. His Honour said: "It is impossible to make findings concerning relative distances between the three vehicles at any particular stage as those in motion approached. The approach was sufficiently coincident to render course and speed of the moving objects a

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matter of concern to both drivers. The testimony of Cole, and of his passenger, is in accord concerning the fact of a collision prior to the Jaguar reaching the actual spot. Whether that be so or not, the Jaguar was certainly an important factor in the situation that had been developing. The headlights, even accepting it that the same were fog-lights and low beam (really fog lights have only one beam), caused an interruption in the clarity and detail of the plaintiff's field of vision, whether the glare was direct by reason of road grade, or due to reflection. Owing to that interference the plaintiff did not observe the semi-trailer until a late stage; too late to extricate the motor car he was driving. If there were any lights on the semi-trailer directed towards approaches from the rear, it is certain that the same were not visible for two hundred yards from the rear, or at anything like that distance: s. 42 (1) (*b*) *Road Traffic Act* 1934-1954. The lights (if any) were not such as to be visible to a motorist approaching from the rear in time and at a distance for him to avoid the semi-trailer, assuming he was travelling at the speed of the Plymouth .... A semi-trailer with its prime mover is a formidable object. The huge vehicle certainly blocked a part of the northern half of the bitumen. That side of the road was invaded to an extent that made a collision quite certain if any vehicle travelling eastwards on its correct side, maintained its course on that side as if no obstruction had been there. The rear lights (if any) were quite inadequate. My belief is that but for this defect in the rear lighting no collision would have occurred." Later he said: "Should Virgo be regarded as partly in fault? If he saw the trailer before colliding (and as he had started to swerve that is probable), it was too late to avoid it by pulling up. Had he not been affected by headlights, and assuming there was room to travel between the trailer and the pathway of the Jaguar, it is likely an earlier veer towards the centre of the road would have been successful. But it must be accepted that his view of the obstruction was too late for a change of course to have been effective. He did reduce speed when he put his headlights on the low beam. Can it be said that in the circumstances he showed a lack of reasonable prudence in what he did, or failed to do? He had no call to apply the brake (as well as releasing the accelerator) to guard against colliding with an obstacle concerning which he had no timely warning. Nothing in his vision, until a late stage, warned him that some obstruction would require a careful manoeuvre. My conclusion is that legal responsibility for the mishap must be imputed to the defendants, Kain & Shelton Ltd. and its driver Kenny. The

collision is not to be ascribed either wholly, or in part, to a failure of duty by either the plaintiff or by the defendant Cole."

It is therefore clear that the evidence as to the condition of the lights of the semi-trailer is crucial. It had in front the usual headlights and parking lights. Along each side it had five clearance lights about two inches in diameter which showed green ahead and red behind. One of these clearance lights was located on each side of the rear of its tray. There was also the tail light, the principal illumination at the rear of the vehicle, about three inches in diameter, a red light situated just under the tray about eighteen inches from its offside. Accordingly there should have been three red lights showing to the rear of the semi-trailer comprising two clearance lights and the tail light. Kenny swore that he switched on all these lights at Tailem Bend and that they were then in a proper condition. After leaving this town, and before reaching the scene of the accident, the semi-trailer had to go over about thirteen miles of unsealed road near Moorlands which is dusty in dry weather and muddy when it is wet. According to Kenny it was on this occasion wet enough to lay the dust but not wet enough to throw up any mud, an ideal and unusual condition but not one to help Kenny if his lights were in fact obscured by dust or mud. It seems to be reasonably certain that the lights of the semi-trailer were all burning when Kenny pulled up. But there is the very definite evidence of Senior Constable Coonan, who reached the scene of the accident at about 10.20 p.m., that the lights were very faint due, he said, to the fact that they were coated with white sludge. There is also the evidence of Gersch, the driver of another semi-trailer who reached the scene of the accident shortly after it had occurred, which is relied on by the appellants. He said that he inspected the lights and they appeared to him to be quite normal and as good as any on the road. But his Honour refused to accept this evidence. He said that if the witness meant by "quite normal" that the lights fulfilled road requirements (that is that they were clearly visible two hundred yards to the rear) his evidence was certainly incorrect. His Honour pointed out that Gersch later said that he did not see the lights until he was four or five yards away or a little more. But there was nothing behind Kenny's semi-trailer when he arrived. In view of his Honour's remarks little, if any, weight can be attached to Gersch's evidence. It is in any event very vague. Evidence that the lights were quite normal is far too indefinite to have any real probative value. The real question is how far back the lights could be seen by a following

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driver. On the other hand his Honour was fully justified in accepting Coonan's evidence. Thus it all comes back to this evidence coupled with the plaintiff's evidence that he did not see any lights. This was also evidence that his Honour was justified in accepting.

Coonan said that there were three lights across the rear of the semi-trailer; the offside light had been broken. When he got there first the offside rear light was still attached to the semi-trailer. That was facing outwards towards the Buick. The tail light was on. (There is evidence that it was bent.) He believed it was a red light. It was very faint. There were three lights across the rear of the trailer. All were showing to the rear except the offside rear one which was facing west. The lights that were on were covered with white road dust. (Later the witness said white sludge.) "I think that was the cause of their faintness. I approached the trailer from the rear. When I pulled up at the accident, there was a doubt in my mind as to whether the semi-trailer had any lights on it—only because I couldn't see it. I was about twenty yards away when I had that doubt. Twenty yards away I didn't see any lights burning on the offside of the semi-trailer . . . . I subsequently went closer than twenty yards to the trailer and then saw they were alight."

Evidence was given that the tail light and rear offside sidelight were damaged in the accident. It was suggested that their faintness may have been due to this damage. But they were still burning and it is difficult to see why the damage should have caused them to burn less brightly than they would otherwise have done. Gersch did not suggest that the damage to these lights had any effect on their brightness. All that Kenny was prepared to say was that after the accident he saw the lights and they were burning reasonably brightly, whatever that may mean. He had a co-driver with him who was asleep at the moment of impact but he was not called to give evidence as to the condition of the lights although he should have been able to inspect them immediately afterwards. Suggestions were made to us from the bar table that Coonan, who was at the scene of the accident for three and a half to four hours, must have been so busy arranging for the care of the injured, taking statements and seeing that the semi-trailer was moved into a safe position off the bitumen, that it would not have occurred to him to inspect the lights until he had been there for a considerable time, perhaps over three hours, and that, as they were all burning, the battery may have run down and this may have caused the lights to lose the brightness they had at the time of the accident. But there is no evidence to this effect and it is essential, if suggestions

of this kind are to be made, that the foundation should be laid by proper cross-examination.

If the lights were in the condition Coonan said they were, they must have become obscured before the semi-trailer pulled up and Kenny should have noticed this when he got down from his cab. The driver of a semi-trailer should certainly examine his lights the moment he has to pull up on the road especially if it is on the part of the road habitually used by traffic, particularly fast traffic. Kenny's semi-trailer was fully loaded, its total weight being seventeen tons. It was a large, heavy, stationary obstacle partly projecting on to the narrow strip of bitumen habitually used by traffic. The road where the accident occurred was a level open straight stretch of road where traffic could be expected to travel fast. Standing there, if it was not properly illuminated, the vehicle was a grave menace to other vehicles using the bitumen. The appeal after all turns on questions of fact. Reading the evidence in print but without the advantage of seeing the witnesses, there is evidence which, if his Honour had accepted it, might have supported a finding that the plaintiff, who had already driven about three hundred miles, was not keeping a proper look-out and that this was the sole cause or at least a cause of the accident. But his Honour did not accept this evidence. He was satisfied that the plaintiff was keeping a proper look-out, and that he was not driving at an excessive speed when he first realised that the lights of the Jaguar were likely to interfere with his view. And it is impossible to say that 50 m.p.h. is excessive on a stretch of straight road in the open country. His Honour was also satisfied that when the plaintiff soon afterwards became seriously dazzled by the lights of the Jaguar it was proper for him to do what is normal for drivers to do in similar circumstances, that is to say to look to the left and use the edge of the bitumen as a guide. It was submitted that at this stage the plaintiff was driving too fast and that he should have done more than take his foot off the accelerator. He should have applied his brakes and slowed right down. But accepting his evidence, it could only have been in the last one hundred yards or so that he found that his vision was being seriously affected by the oncoming lights. If the lights of the semi-trailer had been properly illuminated that is if in compliance with s. 42 (1) (*b*) of the *Road Traffic Act* 1934-1954 (S.A.) it had at the rear a red light clearly visible at a distance of at least two hundred yards to any person approaching the motor vehicle from its rear, the plaintiff should have been able to see at least the tail light of the semi-trailer before this happened and have known that he had to look out for a vehicle ahead of him.

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Having seen nothing he was entitled to believe that his side of the bitumen for a safe distance was vacant. It would appear that, if the Jaguar had not been there at all, he would not have seen the rear lights of the semi-trailer until he was at most twenty yards away and driving at 50 m.p.h. he would have had to be a very skilful driver to have then avoided it. Parties who appeal on questions of fact can, of course, succeed in a proper case. But such appellants carry a heavy burden, the extent of which has been discussed in many cases and recently in this Court in *Paterson* v. *Paterson* (1). More recent still there is the decision of the House of Lords in *Benmax* v. *Austin Motor Co. Ltd.* (2). The present appeal falls entirely within these principles. They need not be re-stated. One thing a court of appeal is not entitled to do is to ignore evidence based on credibility and to consider probabilities on the written material. But this is what we have been invited to do on this appeal.

In the view we take of the facts the question does not arise whether contributory negligence on the part of the plaintiff would be relevant to the amount he is entitled to recover under Pt. II of the *Wrongs Act* 1936-1951 (S.A.) or to his right to recover thereunder. It is a question on which we desire to reserve our opinion.

The appeal should be dismissed with costs.

FULLAGAR J. I need not state the facts of this case in any detail. The essential features of a situation which led to a most tragic accident were these. A semi-trailer owned by the appellant Kenny, who was the company's servant, was travelling on a dark night along a country road on a long straight stretch between Keith and Bordertown in South Australia. Kenny, having occasion to examine a tyre, stopped his vehicle. It then stood stationary with (probably) about half of its width on the bitumen surface of the road. The bitumen is about twenty feet wide, and the tray of the semi-trailer about eight feet wide. The rest of it stood on the earthen surface or " shoulder " at the side of the bitumen. Meanwhile the respondent plaintiff, Virgo, was approaching from the rear in a Plymouth car at a speed of about 50 m.p.h. At the same time the defendant Cole was approaching in the opposite direction in a Jaguar car at a speed of about 45 m.p.h. As the Plymouth and the Jaguar converged, Virgo was dazzled by the powerful lights of the Jaguar. Almost at the moment when the Plymouth and the Jaguar would have passed one another, the Plymouth crashed with great force into the rear of the stationary semi-trailer.

(1) (1953) 89 C.L.R. 212.

(2) (1955) A.C. 370.

Virgo's wife was sitting beside him in the front seat. Her side of the car took the main force of the impact, and she was killed or so injured that she died very shortly afterwards. Virgo brought an action under *Lord Campbell's Act*, for the benefit of himself as the husband of the deceased woman, against the defendant company, Kenny, and Cole. There is no executor or administrator. *Mayo* J., who tried the action, held that Kenny was solely responsible for the accident. He accordingly dismissed the action as against Cole, but gave judgment for the plaintiff Virgo against the defendant company and Kenny.

The defendant company and Kenny appeal. They do not, however, attack the judgment so far as it dismisses the action as against Cole. The grounds of appeal are, in substance, (1) that the finding of negligence against Kenny cannot be supported, and (2) that, if Kenny was guilty of negligence, the plaintiff Virgo " was guilty of contributory negligence and at fault within the meaning of s. 27a of the *Wrongs Act* 1936-1951 ". If the latter ground were to succeed, the result of an application of s. 27a of the *Wrongs Act* would be that there must be an apportionment of responsibility as between the appellants on the one hand and Virgo on the other hand.

With regard to the first ground, the judgment of the learned trial judge may be open to some of the criticism to which Mr. *Cleland* very properly subjected it, but it is clearly not, in my opinion, open to successful attack in a court of appeal. His Honour, as I understand his judgment, thought that Kenny was negligent in two respects. He thought that the rear lighting of his vehicle was inadequate and that Kenny ought to have seen that it was adequate. And he thought that Kenny, if he had to stop his vehicle on a road on which there was a considerable amount of fast moving traffic, ought to have taken it wholly off the bitumen on to the earthen " shoulder ".

As to the first finding, there can be no doubt that it is fully supported by the evidence of Senior Constable Coonan. Three comments may be made upon it. In the first place, the lights were only examined after the Plymouth had crashed into the back of the semi-trailer, and after a second car, a Buick, had crashed into the back of the Plymouth. One cannot feel very sure that one has reliable evidence of the actual condition of the lighting equipment when Kenny stopped the vehicle. As against this it may be said that Coonan's evidence was that the defectiveness of the lights was due to the glass being obscured by mud or dust—a condition which would hardly be affected by the crash. The second comment

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is that it is very far from improbable (for reasons which I will consider later) that the accident would have happened with the same results if the rear lighting of the semi-trailer had been irreproachable. The third comment is that it is not clear that Kenny, who said that he examined his rear lights at Tailem Bend, could fairly be held to have been negligent by reason of a condition which might quite possibly have come into existence during the last few miles.

As to the second finding, Kenny said that he did not run his vehicle altogether off the bitumen because he feared that by doing so the vehicle might become bogged. On the reasonableness of this fear he is supported by the evidence of Coonan and Gersch. Moreover, the vehicle would only have remained where it was for a very short time, for Kenny, after inspecting the surface of the " shoulder ", was in the very act of moving it further off the bitumen when the crash occurred. The whole thing was, indeed, the outcome of an extremely unfortunate combination of circumstances.

But, when these things have been said, I do not think it is possible for this Court to upset a finding that one of the causes of the disaster was a negligent act or omission on the part of Kenny. His Honour's view may have depended to some extent on the credibility or reliability of witnesses. He may not have believed Kenny's statement that he examined his lights at Tailem Bend. I do feel a good deal of doubt with regard to the finding as to the rear lighting of the semi-trailer, but it is impossible to feel satisfied that it was wrong. In any case, I can see no real ground of attack on a finding that Kenny ought at least to have placed his vehicle considerably further off the bitumen than he did. The first ground of attack on the judgment, in my opinion, fails.

Coming now, however, to the second of the two substantial grounds of appeal, I take a very different view of his Honour's findings. These are concerned with the conduct of the other two actors in the drama, the plaintiff Virgo and the defendant Cole. I have, with the greatest respect, difficulty in understanding the exoneration of Cole. Dazzling headlights are a notorious danger of the road, and, if it was Kenny's business to see that his rear lighting was adequate, it may be said to have been Cole's business to see that his front lighting did not dazzle. This, of course, is a matter of no direct importance, because there is no appeal from the judgment so far as it affects Cole. His Honour's finding with regard to Cole is, however, important because of its relation to the conduct of the plaintiff Virgo. His Honour said : " The Jaguar was certainly an important factor in the situation that had been developing."

He also said: "The headlights of the Jaguar certainly had a part in the disaster."

The plaintiff, of course, relied on the dazzling effect of Cole's lights in two respects—first, as giving him a cause of action against Cole, and secondly, as helping to excuse his not seeing the semi-trailer in time to take any step to avoid disaster. But his own evidence as to what he did when he became dazzled affords, in my opinion, the clearest proof of negligence on his part. He said: "As it" (i.e. the Jaguar) "got nearer, I was so dazzled that I was obliged to look away from the lights towards the left edge of the bitumen." He also put his headlights on low beam and took his foot off the accelerator, so as to "brake on compression", with the result (as he thought) that his speed had been reduced from about 50 m.p.h. to about 40 m.p.h. at the moment of impact. In cross-examination he said: "I took my eyes from the centre—away from the lights as they approached, and looked along the edge of the bitumen as a guide. My eyes were on the left hand side of the bitumen up until the car" (i.e. the Jaguar) "got abreast of me". A little later he was asked: "When you avert your eyes to the edge of the bitumen, there is a possibility of running into anything that happens to be stationary on the road? You can't tell if there is anything ahead with the bright lights approaching you, and you looking at the edge of the road?" He answered: "Not far ahead you can't."

In putting his headlights on low beam and looking along the edge of the bitumen on the left side of the road "as a guide", the plaintiff was, of course, taking a wise precaution and acting quite properly. What he did was, indeed, the only thing that a driver, dazzled by approaching lights, can do, if he is to keep moving without risk—one might say, practical certainty—of going off the road to his left or on to his wrong side of the road. But the inevitable result of taking this course, wise in itself, is that the driver is not looking ahead, and, if he is travelling at any substantial speed, will not see any obstruction in his path until it is too late to do anything about it. Here the plaintiff was travelling at 50 m.p.h. It seems to me very clear that ordinary care and prudence required the plaintiff, at the instant when he ceased to be able to keep a look-out directly in front of him, to apply his brake strongly and greatly reduce his speed. At the speed at which he was travelling, merely to take his foot off the accelerator seems to me to have been plainly a quite inadequate precaution. If he had taken the proper precaution, the accident would most probably never have happened at all. If it had happened, it is very unlikely that it would have had the

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calamitous consequences which did in fact follow. The plaintiff continuing as he did, the accident was inevitable, and would, in my opinion, have been inevitable even if there had been no fault or defect in the rear lighting of the semi-trailer.

For the above reasons, I am of opinion that the plaintiff must, on his own evidence, be held to have driven negligently, and his negligence must be regarded as a proximate cause of the accident. This view, however, is not the end of the case. It is by no means obvious that it follows that the appeal should be allowed. Questions of law of very considerable difficulty arise.

The defence of the defendant company and Kenny alleges "contributory" negligence against Virgo, and they maintain that, Virgo being held guilty of negligence which contributed to the accident, s. 27a of the *Wrongs Act* 1936-1951 (S.A.) applies to the case, with the result that the damages payable to Virgo by them must be reduced. Sub-section (3) of s. 27a provides:—"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be 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 the responsibility for the damage." This case, however, is not the simple case where A is found to have suffered damage through the negligence of B and is found also to have been negligent himself. The position is complicated both by the fact that the action is an action under *Lord Campbell's Act*, and by the fact that it is the plaintiff and not the deceased, who has been guilty of "contributory" negligence.

It is convenient to consider first what the position would be in the absence of the legislation contained in Pt. III of the *Wrongs Act* 1936-1951 (S.A.) which includes (though not in identical terms) the provisions both of the *Law Reform* (*Married Women and Tortfeasors*) *Act* 1935 (Imp.) and of the *Law Reform* (*Contributory Negligence*) *Act* 1945 (Imp.).

In *Senior* v. *Ward* (1) a court, over which Lord *Campbell* himself presided, decided that contributory negligence of the deceased person was a good defence to an action under *Lord Campbell's Act*. Lord *Campbell* said:—"We conceive that the Legislature, in passing the statute on which this action is brought, intended to give an action to the representatives of a person killed by negligence only where, had he survived, he himself, at the common law, could have

(1) (1859) 1 El. & El. 385 [120 E.R. 954].

maintained an action against the person guilty of the alleged negligence " (1). The decision has not been immune from criticism, but its correctness has been assumed and acted upon, and juries have been directed in accordance with it, for nearly a hundred years. It seems in harmony with the curiously anomalous character of *Lord Campbell's Act*, which gives a remedy for pecuniary loss suffered by certain classes of persons through the death of the person killed, but makes the remedy subject to the condition that the deceased would have had a cause of action if death had not ensued.

In the present case the deceased person was, of course, guilty of no negligence. The question is whether at common law " contributory " negligence on the part of the plaintiff, or of any person for whose benefit the action is brought, affords a defence to an action under *Lord Campbell's Act*. That plaintiff may be an executor or administrator, who may or may not be the person, or one of the persons, for whose benefit the action is brought. Or he may be the person, or one of the persons, for whose benefit the action is brought. In the present case there is no executor or administrator, and the plaintiff sues for his own sole benefit.

It is strange that there is apparently no English or Australian authority on the question. One might argue, taking one's stand on *Senior* v. *Ward* (2), that the only thing that matters is that the deceased should have been able to maintain an action if he had not been killed, and that the " contributory " negligence of the plaintiff, or of any person for whose benefit the action is brought, is immaterial. But such a view by no means necessarily follows from *Senior* v. *Ward* (2), and it would seem to run counter to the traditional doctrine of the common law that, when the plaintiff's own act is an effective cause of damage which he has suffered, he cannot recover : see *Alford* v. *Magee* (3). It would seem that, on broad general principle, the common law should regard negligence on the part of a personal representative, who has himself no personal interest in the action, as irrelevant, but should regard negligence on the part of any person for whose benefit the action is brought, whether he be actually a plaintiff or not, as affording a defence so far as that person is concerned. This is, in my opinion, the correct view.

Dr. *Glanville Williams* (*Joint Torts and Contributory Negligence* (1951), pp. 443, 444) discusses the question, and reaches the same conclusion. He says that it accords with the weight of opinion in

(1) (1859) 1 El. & El., at p. 393 [120 E.R., at p. 957].

(2) (1859) 1 El. & El. 385 [120 E.R. 954].

(3) (1952) 85 C.L.R. 437, at p. 453.

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the United States, and refers to an " influential article " by *Wigmore* (1), which is not available here. He also refers to a note in the *Harvard Law Review* (2), from which it would appear that the courts of a great majority of the States " refusing to allow the wrongdoer to profit from his own wrong, award damages only to the innocent " (3). Dr. *Williams* also cites the Canadian case of *Trueman* v. *Hydro Electric Power Commission of Ontario* (4). The essential facts of that case were identical with those of the present case. The husband having been found guilty of negligence, the Appellate Division of the Supreme Court of Ontario held that he could not recover from a defendant who had also been guilty of negligence. *Magee* J. said : "As to his claim for loss by the death of his wife, that depends upon the effect of our *Fatal Accidents Act*. If he and her children and mother really stand in his wife's place, claiming damages in her right and as her representatives, then, as she was not a contributory to her injury, and as she would not have been disentitled to damages against the defendants because of her husband's fault if she had survived, it is argued that, equally, he, as one of her representatives, should not be disentitled. If he be entitled, the anomalous result will accrue that he can recover for her death, of which he was a cause, but cannot recover for his motor car, though as to it no more in fault " (5).

The question remains whether the case falls within s. 27a of the *Wrongs Act*. If it does, there must be an " apportionment " of responsibility, and the damages awarded by *Mayo* J. reduced accordingly. If it does not, the plaintiff's negligence is a defence to the action, and his claim fails. Dr. *Glanville Williams* (*op. cit.*, p. 443) thinks that the former view is correct. On the whole, I am of the same opinion.

The case does seem to fall within the literal terms of s. 27a (3). The plaintiff is a person who has suffered damage (*scil.* the loss of his wife) as the result partly of his own fault and partly of the fault of Kenny. It is true that the language does not strike one as altogether appropriate to an action under *Lord Campbell's Act*, and it seems probable that the draftsman really intended to deal exhaustively with actions under that Act in sub-s. (8) of s. 27a. That sub-section provides :—" Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under the *Survival of Causes of Action Act* 1940, the damages recoverable would be reduced

(1) (1908) 2 Ill. L. Rev. 487.
(2) (1930) 44 Harv. L.R. 294.
(3) (1930) 44 Harv. L.R., at p. 295.
(4) (1924) 1 D.L.R. 405.
(5) (1924) 1 D.L.R., at p. 410.

under sub-s. (3) of this section, any damages recoverable in an action brought for the benefit of the dependants of that person under Pt. II of this Act and any amount recoverable by way of solatium under that Part shall be reduced to a proportionate extent." Part II of the Act contains the South Australian equivalent of *Lord Campbell's Act*. It is very unlikely that the draftsman thought of the case where it was not the deceased but the plaintiff, or some person for whose benefit the action is brought, who is guilty of " contributory " negligence. But these considerations provide, to my mind, insufficient reasons for not giving full effect to the literal terms of s. 27a (3). The general intention to cover the whole field of liability in tort certainly seems plain enough.

It should perhaps be mentioned that s. 27a contains a provision which is not found in the English Act of 1945. That provision is contained in sub-s. (9), which reads:—" Where—(*a*) a person (in this sub-section called ' the injured person ') suffers damage as a result partly of his own fault and partly of the fault of any other person or persons; and (*b*) by reason of the damage to the injured person a third person suffers damage (whether by way of the loss of the society or services of the injured person or otherwise), then, in any claim by the third party for the damage so suffered by him the fault of the injured person shall be taken into account under sub-section (3) of this section for the purpose of reducing the damages recoverable by the third party as if the said fault were the fault of the third party." This sub-section, however, does not appear to apply to cases of death, and in any case it is again the " contributory " negligence of the injured person that is alone envisaged.

The damages, then, must, in my opinion, be apportioned. I cannot see any sound reason for distinguishing, in point of culpability, between the negligence of Kenny and that of the plaintiff, and I think that the damages awarded by *Mayo* J. should be reduced by one-half. The appeal should be allowed, and the judgment varied accordingly.

Since writing the above judgment my attention has been called to the decision of *Gavan Duffy* J. in *Carstein* v. *Locco* (1). I regret that I had not that case before me when I was preparing my judgment.

Appeal dismissed with costs.

Solicitors for the appellants, *C. C. & D. M. Brebner*.
Solicitors for the respondent, *McCann, McLaughlin & Linn*.

B. H.

(1) (1941) V.L.R. 245.