[HIGH COURT OF AUSTRALIA.]

CAVANAGH . . . . . APPELLANT;
PLAINTIFF,

AND

NOMINAL DEFENDANT . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 28; *Dec.* 1, 19.

Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ.

Insurance—Third party—Accident—Cause—Unknown motorist—Bodily injury—Damages—Action against nominal defendant—"Due inquiry and search"—Evidence—Motor vehicle—Identification—Motor Vehicles (Third Party Insurance) Act 1942-1951 (*N.S.W.*), *s.* 30 (2) (*a*).*

Upon its true interpretation s. 30 (2) (a) of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942-1951 requires a plaintiff to show not that no knowledge of the identity of the alleged offending motor vehicle exists elsewhere, even in public authority, but that no sufficient knowledge of (or perhaps means of establishing) the identity of such vehicle has come home to him or to his servants or agents or to those for whom he is vicariously responsible notwithstanding that all such measures as were reasonable in the circumstances having regard to his situation were taken by him or them to ascertain it.

The words "cannot be established" in s. 30 (2) (a) must be confined in their operation to the plaintiff or those acting for or on behalf of the plaintiff or in his interest. They cannot apply or operate universally.

The word "due" in the sub-section brings with it the circumstances of the case as the test of what inquiry and search will suffice.

A plaintiff in an action against the nominal defendant under s. 30 (2) (a) of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942-1951 led evidence fit to

* Section 30 of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942-1951 provides:—". . . (2) (a) Where the death of or bodily injury to any person is caused by or arises out of the use of a motor vehicle upon a public street but the identity of the motor vehicle cannot after due inquiry and search be established, any person who could have enforced a claim for damages against the owner or driver of the motor vehicle in respect of the death or bodily injury may enforce against the nominal defendant the claim which he could have enforced against the owner or driver of the motor vehicle.

The inquiry and search for the purpose of establishing the identity of the motor vehicle may be proved orally or by the affidavit of the person who made the inquiry and search."

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be left to a jury to establish that she had made due inquiry and search to ascertain the identity of the motor vehicle alleged to have caused her injuries and that she was unable from her inquiries to identify such vehicle. She further sought to give oral evidence of what the police had told her as to the result of their inquiries to identify the vehicle and also to tender a letter from the police department answering her query as to whether the department had succeeded in identifying the vehicle. Both pieces of evidence were rejected. The trial judge directed the jury to return a verdict for the defendant upon the ground that the plaintiff had failed to prove by admissible evidence that the police were unable as a result of their inquiries to identify the vehicle.

Held: (1) that the direction was erroneous in that it laid on the plaintiff an obligation greater than the sub-section on its true construction required; and

(2) that the evidence rejected was admissible to prove the result of the plaintiff's inquiry as to the identity of the vehicle, and that accordingly there should be a new trial.

Decision of the Supreme Court of New South Wales (Full Court): *sub. nom. Brown* v. *Nominal Defendant* (1958) S.R. (N.S.W.) 369; 75 W.N. 403 reversed.

APPEAL from the Supreme Court of New South Wales.

On 11th November 1954 June Clare Brown, then the wife of one John Brown, instituted proceedings in the Supreme Court of New South Wales pursuant to s. 30 (2) (a) of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942-1951 against the nominal defendant to recover damages for personal injury sustained by her on 14th March 1954 as a result of the alleged negligent driving of a motor vehicle the identity of which could not after due inquiry and search be established.

After action brought the plaintiff became a widow and subsequently married one Cavanagh.

The action was tried before *Brereton* J. and a jury of four. At the close of evidence the trial judge directed the jury to return a verdict for the defendant upon the ground that the plaintiff had failed to prove by admissible evidence that the police, to whom certain inquiries had been entrusted, were unable as a result of such inquiries to identify the vehicle alleged to have caused the plaintiff's injuries. A verdict and judgment for the defendant was accordingly entered.

From this decision the plaintiff appealed to the Full Court of the Supreme Court (*Street* C.J., *Owen* J., *Roper* C.J. in Eq.), which court dismissed the appeal: *Brown* v. *Nominal Defendant* (1).

From this decision the plaintiff appealed to the High Court.

The relevant facts and statutory provisions appear in the judgment of *Dixon* C.J. hereunder.

(1) (1958) S.R. (N.S.W.) 369; 75 W.N. 403.

N. D. McIntosh Q.C. (with him *E. Bowen-Thomas*), for the appellant. The trial judge incorrectly took the view that for the appellant to prove that the identity of the vehicle could not be established she had to call all persons who had inquired, and in effect all who had given answers to inquiries. Not only in this Court but in the courts of New South Wales it has always been considered that the person to make the inquiry is the person who could have enforced a claim for damages against the owner or driver. There must be somebody in charge of the inquiries. The inquiries of the police department were admissible in evidence as was the reply of that department. The trial judge wrongly rejected evidence which would have satisfied the deficiency in the appellant's case on the basis of which he directed a verdict against her. The word "ascertain" was used in the Victorian statute under consideration in *Vines* v. *Djordjevitch* (1) and not "established" as in the New South Wales statute. The section does not mean that the fact has to be proved in every case. The plaintiff made due inquiry but notwithstanding such enquiry she was unable to establish the identity of the motor vehicle. [He referred to *Reg.* v. *Inhabitants of Kenilworth* (2); *Grima* v. *Sykes* (3) and *Ex parte Jefferson*; *Re Foster* (4).] If all who gave answers to inquiries must be called, then the section is completely nugatory. The result of the matter is that the plaintiff cannot bring her action against a nominal defendant unless she is satisfied that there has been due inquiry and search, and the vehicle as a matter of certainty not identified. A new trial should be granted.

R. L. Taylor Q.C. (with him *M. E. Warburton*), for the respondent. It was conceded at the trial that there was evidence that the appellant had made due inquiry and search, and that she could give the result of her own inquiries, but it was disputed that she could prove the result of the police inquiries by saying what the police sergeant told her. There was no evidence to establish that the inquiries made had failed to identify the vehicle; and such evidence was vital. It was not a question of proving that some inquiries had failed; it had to be proved that the inquiries that had failed were co-extensive with the inquiries made. The letters to the officer in charge of the Warragamba police would be admissible to show that reasonable inquiry had been made. There was no evidence that the registered number recorded by the appellant was other

(1) (1955) 91 C.L.R. 512, at p. 521.
(2) (1845) 7 Q.B. 642, at pp. 649-652; [115 E.R. 631, at pp. 634, 635.]
(3) (1952) 70 W.N. (N.S.W.) 6, at pp. 6, 7.
(4) (1937) 54 W.N. (N.S.W.) 203, at p. 204.

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than correct, and no evidence that the vehicle bearing such number could not have been identified. There was not any reference to the pleading point at the trial, nor was it taken or mentioned as a ground of appeal. The appellant was not misled in any way. It was taken, for the first time, in the appeal to this Court. The plaintiff having chosen to make her inquiries in a particular fashion was bound to prove, by proper evidence, that those inquiries had failed. "Establish" in s. 30 (2) means ascertain. Involved in the section is that due inquiry and search must be made, and that such inquiry and search as was made failed to identify or ascertain the vehicle involved. [He referred to *Blandford* v. *Fox* (1) and *Grima* v. *Sykes* (2)]. The appellant having proved that portion of the inquiry was undertaken by herself and portion by the police was found to prove that both failed to establish the identity of the vehicle. The jury could not infer that the police had not found the vehicle. The letter received by the appellant from the police department was not admissible to show the result of the police inquiries. The appeal was brought on the ground that the plaintiff was entitled to prove from what an officer of police had told her and from departmental records that the police had been unable to ascertain the identity of the vehicle; that was the dispute between the parties before the trial judge. [He referred to *Ex parte Jefferson*; *Re Foster* (3).] The section means, in effect, that when a plaintiff wants to sue the nominal defendant he must show that somebody, not necessarily himself, has made due inquiry and search and failed to ascertain the identity. If a question is admissible on one basis, the fact that the plaintiff put its admissibility on another basis is no ground for rejecting it. That, however, was not the case here. [He referred to *Blandford* v. *Fox* (4) and *Vines* v. *Djordjevitch* (5).] The judgment under appeal is correct.

E. Bowen-Thomas, in reply.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered:—

DIXON C.J. By a writ issued on 11th November 1954 the plaintiff, June Clare Cavanagh, sued under the name of Brown to recover from the nominal defendant damages in respect of bodily injury she had suffered arising out of the use of a motor vehicle she

(1) (1944) 45 S.R. (N.S.W.), at p. 244; 62 W.N. 65 at p. 67.
(2) (1952) 70 W.N. 6, at pp. 6, 7.
(3) (1937) 54 W.N., (N.S.W.) 203, at p. 204.
(4) (1944) 45 S.R. (N.S.W.), at p. 246; 62 W.N., at p. 68.
(5) (1955) 91 C.L.R. 512.

had failed to identify. She sustained the injury on Sunday 14th March 1954, near Wallacia where she lived with her husband Brown. According to her evidence she there conducted a riding school but she also ran some cattle on some land that she had leased. She said that she, Brown and a boy were droving about eighty cattle along the Mulgoa road. She was riding in front of the herd ; Brown and the boy behind it. A motor car maintaining too great a speed came through the cattle and frightened them. She rode back and remonstrated but the car persisted. In the midst of an altercation her horse was frightened at the moving car, which she said touched her horse's hock as the horse was " crab-stepping " with the vehicle. The horse jumped to the side of the road, lost its footing on a culvert and came down in the ditch with its rider. She suffered injuries, chiefly to her vertebrae but was quite conscious. The car accelerated and drove off. She said it was similar to an Austin A40 but she was not sure of it. The colour was a dirty green ; she thought she had got the number but it proved incorrect. She asked her husband Brown and the boy whether they had got the number but they had not and she told Brown the number as she thought she had got it. She asked her husband to leave her lying where she was and go to a telephone and tell the police. Apparently an ambulance came and removed her to her own home. She was visited by a sergeant of police on the following Tuesday. The effect of her evidence is that she gave him the number of the car but it proved to be wrong and on a later occasion she asked him what she could do about the car " because we never got the correct number ". At one or other interview she said that there were two men in the car wearing sporting clothes and coloured blazers.

Section 30 (2) (a) of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942-1951 provides for the case of an unidentifiable motor vehicle causing death or bodily injury. The terms of the provision are important and it is necessary to set them out. " Where the death of or bodily injury to any person is caused by or arises out of the use of a motor vehicle upon a public street but the identity of the motor vehicle cannot after due inquiry and search be established, any person who could have enforced a claim for damages against the owner or driver of the motor vehicle in respect of the death or bodily injury may enforce against the nominal defendant the claim which he could have enforced against the owner or driver of the motor vehicle. The inquiry and search for the purpose of establishing the identity of the motor vehicle may be proved orally or by the affidavit of the person who made the inquiry and search."

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It will be seen that an essential condition of the liability imposed upon the nominal defendant is that the identity of the motor vehicle cannot after due inquiry and search be established. But the language in which the condition is expressed is indefinite and impersonal. It is impersonal because it is not stated who must inquire and search. It is indefinite in more than one respect. The word "established" seems to have been employed to convey something more than "ascertained" and something less than "judicially proved by evidence". The two words "inquire" and "search" express a compound idea. "Due" may be taken to mean due in the circumstances. It is apparent that in the case of death the plaintiff may be an executor, a widow, an infant child or a relative who has no knowledge of the matter. In the case of bodily injury the plaintiff may be a sufferer whose very injuries have disabled him from doing anything on his own account by way of inquiry or search.

The words "cannot be established" must be confined in their operation to the plaintiff or those acting for or on behalf of the plaintiff or in his interest. They cannot apply or operate universally. For there may be many, including the driver of the motor vehicle himself, who could "establish" its identity but who do not come forward and are not found or will not speak.

There are two elements in the condition that the identity of the motor vehicle cannot after due inquiry and search be established. One is that there must exist an inability to establish the identity. The other is that there must have been a due inquiry and search. The first relates to the plaintiff and that part of the condition must be satisfied sufficiently if the plaintiff and those acting for him or on his behalf or in his interest in prosecuting the claim are unable to "establish" the identity of the vehicle.

The second element or part of the condition stands on a different footing. It is not satisfied unless due inquiry and search has been made. Doubtless the failure of the draftsman of the provision to say by whom it is to be done was deliberate. For the situations to which the provision might be expected to apply would vary infinitely in their nature and circumstances. But the word "due" brings with it the circumstances of the case as the test of what inquiry and search will suffice. And it is the circumstances of the case of the person suffering bodily injury or, where death has been caused, of the claimant that must be considered. It is the word "due" which connects the inquiry and search with the person injured where, as here, the claim is for bodily injury. You must look at the circumstances in which he or she was placed

and, bearing in mind that the question is one affecting that person's rights, say whether in those circumstances enough was done by or on behalf of or in the interest of that person to warrant the description " due " inquiry and search. A man picked up by the roadside with a fractured skull who remains unconscious for weeks cannot be denied the application of the provisions because no one has been active on his behalf in looking for the motor vehicle while he lay in that condition. But a very different view might be taken of the case of a man suffering a minor injury in comparatively full possession of his physical faculties. Perhaps the effect of the material part of the provision might be summed up by saying that the condition it imposes is that the claimant is not able to provide any adequate information as to the identity of the vehicle notwithstanding that the claimant and those acting for the claimant with his or her authority have taken such measures to ascertain it as were reasonable in the circumstances of the case having regard to the situation of the claimant.

The judgment of *Jordan* C.J. in *Blandford* v. *Fox* (1) contains an examination of the provisions. What is said above is supported by the views expressed by the learned Chief Justice, at all events unless, which seems unlikely, his Honour meant that to make out a cause of action against the nominal defendant the plaintiff must show that even persons outside the scope of his direct or vicarious responsibility had not obtained knowledge or information of the identity of the motor vehicle.

In the present case the plaintiff's case failed not because she was unable to identify the vehicle, not because she had not made due inquiry but because she did not prove by admissible evidence that the police, whom she had promptly informed, were not able as a result of their inquiries to identify the motor vehicle. The judge at the trial so instructed the jury who, at his direction, returned a verdict for the defendant. His Honour's reasons appear from the following passage from his direction to the jury: " What the Act requires is that the plaintiff should make due inquiry and search for the driver who caused the trouble and that he could not be identified. Now, of course, it does not depend on the plaintiff herself making such inquiries, and you might think in ordinary circumstances if the matter is promptly put in the hands of the police, that would be sufficient. On the plaintiff's evidence that was done here, and so far as due inquiry and search were concerned, I would be disposed to say that there was enough evidence to enable you to hold that the plaintiff had made due inquiry and search.

(1) (1944) 45 S.R. (N.S.W.) 241, at pp. 244, 245; 62 W.N. 65; affirmed (1945) 19 A.L.J. 124.

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But she has to go further and prove that the search was fruitless, that the vehicle was not identified. As I can see it, gentlemen, there is no evidence at all to that effect; there is no evidence of the result of the police inquries; there is no evidence that the police were unable to identify the driver of the car that went through this mob of cattle. The plaintiff herself was unable to identify the vehicle as the result of her own personal inquiry; we know that. But she tells us that she took the number of this car, and she tells us that she gave it to her husband who rang the police, and that being the state of affairs, it becomes obligatory upon her to show how it is that that vehicle was not identified. No doubt the reason is that she got the wrong number; but that is only a guess. There is no evidence to that effect. It is true she says 'I tried to get the number; that is what I thought, but it proved incorrect.' But, gentleman, that is only evidence that someone told her it was incorrect. The only way it can be proved to be incorrect would be by calling the person who made the inquiry, or calling some other evidence to show that the number she took was just not conceivably the number of the car that was out at Mulgoa that day. The position that has arisen is an unfortunate one, but in those circumstances I can only direct you to bring in a verdict for the defendant, and a verdict will be entered accordingly."

Upon the construction given to s. 30 (2) (a) in the foregoing part of this judgment the direction cannot be supported in the light of the evidence. Further, there was much evidence rejected which upon that construction was clearly admissible.

It will be seen that the direction treats direct and distinct proof of the fruitless outcome of the police inquiry as essential. It is not enough that it resulted in bringing no knowledge home to her. The communications of the police to her on the matter can only amount to hearsay as to their state of knowledge and is not admissible evidence of the fact. This seems to put the police in the position of her agents whose knowledge she must exclude independently of her own. If that is not the assumption then the explanation must be that it treats the provision itself as meaning that if knowledge of the fact exists in such a body as the police, though uncommunicated to the plaintiff or her legal advisers, it can never be true that the identity cannot be established, no matter how much the plaintiff might have striven to obtain the information.

But before examining further the correctness of the course taken at the trial in directing a verdict for the defendant it is better to state what facts the evidence admitted discloses and what evidence was excluded.

It appears that the plaintiff remained in bed until 23rd May 1954, that is, apart from visits to the hospital for treatment. In this period she again saw the sergeant of police. Her counsel sought to obtain from her evidence of what she asked him and what he replied. It appeared that she had asked him what she could do about the car because, as she said, she had never got the correct number. But except for this the evidence was rejected and indeed so much as is stated above seems to have got in or been left in by chance, inconsistently with the judge's ruling. In deference to the ruling what he told her was not led and so with the replies or responses of a plain-clothes policeman with whom she had an interview. The evidence too was rejected of what her husband Brown reported as to the inquiries he had made and what he had done. The plaintiff deposed to the fact that she had herself inquired of one hundred to one hundred and fifty people. Their responses were not tendered but presumably she obtained no information.

In December 1954 her husband Brown died. She remarried on 15th June 1955. On 11th August 1954 the plaintiff's solicitor wrote to the officer in charge at the appropriate police station. His letter ended : " Would you kindly supply us with any particulars you may have as to the identity of the driver or the owner of this motor vehicle. We understand that the police from Warragamba were called to the scene of the accident." A letter of inquiry to the Superintendent of Police and one to the Superintendent of Traffic and a reply dated 25th October 1954 were all rejected. The last-mentioned letter was marked for identification and in that way is available for our reading. It contains the paragraph : " I am directed by the Commissioner of Police to inform you that this Department has no knowledge of the identity of the vehicle alleged to have been indirectly concerned in this occurrence." The plaintiff was recalled and allowed to say that she was not able from her own inquiries to identify the vehicle but she was not allowed to go further and state what the police told her of the result of their inquiries. The sergeant of police was recalled. He was permitted to say what was the system in the police department of recording inquiries and the result and he said that if a vehicle was located it would appear in the record. An " occurrence sheet " was in court but a police witness claimed privilege for it. The learned judge looked at the file and said there was nothing in it having any bearing upon the matter. Apart from the police file and whatever document therein it was desired to tender, all the evidence described which was rejected must surely have been admissible on the issue of due inquiry and search and of the plaintiff's ability

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to fix the identity of the vehicle. It is said in support of the rejection of the evidence that the question to which attention really was directed was whether the police inquiries had " established " the identity of the car. In fact the defendant by cross-examination and evidence suggested that there had not been any car responsible for the plaintiff's injury and that the plaintiff's claim against the nominal defendant was not an honest one. One may safely suppose that the nominal defendant would be aware of the result of the police inquiries. In other words it was quite plain that there was no substance in the defendant's objection that the police department might have identified the car and that this possibility had not been excluded by admissible evidence. One may agree entirely in the statement made by *Owen* J. for the Full Court of the Supreme Court that " in a case of this description due inquiry and search could seldom if ever be established unless it was shown that the assistance of the police had been sought to identify the motor vehicle " (1). But it is in the next two sentences that the ground of the decision upholding the directed verdict is stated : " The plaintiff properly invoked the assistance of the police to make due inquiry and search. Having done so, evidence must be given by appropriate means that that inquiry and search failed to establish the identity of the vehicle " (1). To this ground there are two answers which appear to be decisive. In the first place admissible evidence was excluded which when added to the evidence admitted might have warranted the inference. In the second place, on the true interpretation of the provision what it requires the plaintiff to show is not that no knowledge of the identity of the vehicle exists elsewhere, even in public authority, but that no sufficient knowledge of (or perhaps means of establishing) the identity of the vehicle has come home to the plaintiff or to the plaintiff's servants or agents or to those for whom he is vicariously responsible, notwithstanding that due inquiry and search has been made. That of course means " due inquiry and search " in the sense described in the earlier part of this judgment.

For these reasons the appeal should be allowed with costs. The order of the Full Court of the Supreme Court should be set aside. In lieu thereof it should be ordered that the appeal to that court be allowed with costs and a new trial ordered. The costs of the first trial should abide the event of the second trial.

KITTO J. I am of the same opinion and for the same reasons. I wish to add that I entirely concur in the additional observations of my brother *Windeyer*.

(1) (1958) S.R. (N.S.W.), at p. 374 ; 75 W.N., at p. 407.

TAYLOR J. I agree that the appeal should be allowed and, substantially, I agree with the construction placed by the Chief Justice upon s. 30 (2) (a) of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942-1951. I should add that, to my mind, this view of the meaning of the section does not involve any departure from its accepted construction and that the fate of this appeal does not depend upon giving to the section any novel meaning.

Upon the trial a verdict was directed for the respondent because the learned judge considered the evidence incapable of establishing that the identity of the motor vehicle which was said to have caused the appellant's injuries could not, after inquiry and search, be established. Upon this aspect of the case two issues arose, firstly, whether there had been due inquiry and search and, secondly, whether notwithstanding such inquiry and search, the identity of the vehicle could not be established. It is unnecessary to recount the steps said to have been taken by the appellant to ascertain the identity of the vehicle in question for the learned trial judge held that there was evidence to go to the jury on the first of these issues and directed a verdict for the respondent only because of a deficiency of evidence in relation to the second. But when the transcript is examined it is seen that this deficiency resulted from the exclusion of evidence concerning the result of the appellant's inquiry and search.

According to the appellant's evidence she reported the alleged accident to the police authorities and part of the inquiry and search made by her included subsequent inquiries both orally and by letter, to find out whether the police were in a position to give her any information concerning the identity of the vehicle. In the main, objection was taken to questions designed to prove what information, if any, these inquiries elicited. The objection was taken on the ground that the steps, if any, taken by the police authorities could not be proved in this manner. Such a proposition is, of course, unassailable but this does not mean that the appellant should have been debarred from proving what information, if any, resulted from her inquiries of the police. In proving this she was doing no more than proving the result of that part of her inquiry and search. Indeed, the answers to her requests for information were, literally, the result of her inquiries and should have been admitted on this ground. It need scarcely be said that when it is necessary to consider whether the identity of a motor vehicle cannot after inquiry and search be established, the vital matter for examination must be the results produced by the inquiry and search.

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But as already stated the answers made by the police authorities could not prove what steps were taken by them to ascertain the identity of the unknown vehicle. Accordingly if a plaintiff, in order to establish that due inquiry and search has been made, wishes to prove that inquiry and search has been made by the police authorities or, indeed, by any other person, the steps taken must be proved by appropriate evidence. However, in the present case it was open to the appellant to attempt to make out her case by proving that she, herself, had made due inquiry and search and that, notwithstanding, the identity of the motor vehicle could not be established. It need hardly be said that if the evidence in the case was capable of supporting findings in her favour on these issues her right to have them determined by the jury could in no way be affected by any neglect or failure on the part of the police to make any, or any exhaustive, inquiry and search.

Subject to one matter, therefore, I am of the opinion that there should be a new trial. To the above observations one qualification is necessary and it involves a matter which has given me some concern. The appellant claims that after the accident she thought she had ascertained the offending vehicle's registration number and this, she says, she gave to the police. Early in the case she was asked whether she thought she had " got a look at the number " and she answered " Yes. I tried to get the number ; that is what I thought, but it proved incorrect ". She claims now to have forgotten the number and her statement that " it proved incorrect " appears to be based on information supplied to her by the police. It was apparent that, if strict proof had been required, it was not competent for her to prove, by evidence of this character, that the number was incorrect. But no objection was taken to her answer at the time and the later objections and discussions during the course of the evidence were concerned with the substance of answers to subsequent inquiries made by her of the police authorities. Of course, if it is proper to disregard her evidence that the number which she said she gave to the police had " proved incorrect ", there would be a serious gap in the case. In that event, the case would appear as one in which there had been no inquiry and search based upon the apparently observed registered number and the inevitable conclusion would be that due inquiry and search had not been made. But having regard to the fact that on at least two occasions in the course of her evidence the appellant said that the number had proved to be incorrect, that on those occasions no objection was raised and strict proof was not then insisted upon, it would be wrong now to dispose of the case on that single

ground. If, as the learned trial judge thought and as was virtually conceded before us, there was evidence of due inquiry and search by the plaintiff the only appropriate course for us to follow is, in my opinion, to direct a new trial.

MENZIES J. I agree with the order proposed by the Chief Justice. I also agree with the Chief Justice about the meaning of s. 30 (2) (a) of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942-1951. This sub-section and the relevant facts are set out fully in the judgment of the Chief Justice and it is unnecessary for me to repeat them.

The trial judge directed a verdict for the defendant on the ground that there was no evidence to show that inquiry and search on the part of the police to whom the occurrence alleged had been reported by the plaintiff had not identified the motor vehicle. An appeal to the Full Court failed, hence this appeal.

At the trial the defendant did not contest that without any evidence of police search there was evidence of inquiry and search by the plaintiff, her husband and her solicitors from which the jury could find that there had been due inquiry and search. These inquiries included inquiries from the police but the police answers were treated as inadmissible. The explanation of this would seem to be that the plaintiff led the evidence expecting to use the answers to prove affirmatively that any police search that there was had not established the identity of the vehicle. I agree with the trial judge that this fact could not have been proved by hearsay but I differ from him in thinking that this means that evidence of the police replies was inadmissible. The answers were admissible to show whether or not inquiries to which they were a reply had succeeded in establishing the identity of the vehicle. This, apart from anything else, would follow from the last part of s. 30 (2) (a) which as I read it enables a person making inquiries to prove the result of the inquiries which he makes and to do so orally or by affidavit. The ruling that the answers were inadmissible was wrongly based upon a sound view that they amounted to no more than evidence of the result of inquiries made to, but not by, the police. Evidence was therefore wrongly rejected at the trial.

Upon the hearing of the appeal Mr. *Taylor* conceded that the police answers that the vehicle had not been identified were admissible to show the result of the inquiries made by the plaintiff and her solicitors but contended that their admission would not provide any evidence that the police had not identified the vehicle and without any evidence of this the verdict for the defendant directed by the trial judge should stand.

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I do not accept the latter part of this contention because neither proof of inquiry and search by the police nor the result of such inquiry and search was in the circumstances an essential part of the plaintiff's case. The absence of evidence of these matters had significance in relation to the question whether there had been due inquiry and search but, as Mr. *Taylor* stated, it was not argued that, without proof of either of them, there was no evidence for the jury of due inquiry and search. On the point whether the plaintiff had been unable to identify the vehicle, what the police had in fact done or found out was immaterial. All that was material was that the police had, rightly or wrongly, told the plaintiff that they had not identified the vehicle.

Mr. *Taylor* contended, however, that it was not sufficient for the plaintiff to give evidence warranting the conclusion that she had been unable to establish the identity of the vehicle because the real question was whether due inquiry and search had failed to establish the identity of the vehicle. For this he relied upon the judgment of the Full Court of New South Wales in *Blandford* v. *Fox* (1), affirmed by this Court (2), and particularly upon a statement of *Jordan* C.J. (3). This statement was as follows: "The conditions of the coming into existence of the new cause of action against the nominal defendant are—(1) there must have been death or bodily injury arising out of the use of a motor vehicle, (2) this must have occurred in such circumstances that some person could have enforced a claim for damages against the owner or driver in respect of the death or injury, (3) there must have been due inquiry and search for the purpose of identifying the motor vehicle, and (4) it must have been impossible thereby to establish its identity." (3). If, as it was argued, this statement means that proof that the identity of the vehicle cannot be established involves proof step by step of the result of each inquiry that lay behind the answer to the plaintiff's inquiries from the police, I regard it as inconsistent with that part of the judgment of the Chief Justice in this case which points out that the first element in the condition that the identity of the motor vehicle cannot after due inquiry and search be established relates to the inability of the plaintiff and those identified with her to establish the identity of the vehicle before action brought. In this case it has been sought to make proof of the result of the police inquiries necessary for proof of the element that there exists inability to establish identity. This, for the reasons given by the

(1) (1944) 45 S.R. (N.S.W.) 241; 62 W.N. 65.
(2) (1945) 19 A.L.J. 124.
(3) (1944) 45 S.R. (N.S.W.), at pp. 244, 245; 63 W.N., at p. 67.

Chief Justice, is not what the section requires. Furthermore, in this case where it was not in issue that there was evidence fit to go to the jury of due inquiry and search notwithstanding the absence of any evidence of police inquiry and search it cannot be correct to treat the result of the police inquiry and search as something the plaintiff had to establish to make a case that the identity of the vehicle had not, after due inquiry and search, been established.

WINDEYER J. I agree with what the Chief Justice has said about the construction of the statute, and with the order he proposes. I wish only to add a few words about the course taken at the trial.

The plaintiff's declaration alleged, *inter alia*, that " the plaintiff has made due inquiry and search to establish the identity of the said motor vehicle but notwithstanding such inquiry and search has been unable to establish its identity ". The defendant's second plea was a specific traverse of this allegation. The plaintiff joined issue. At the trial the plaintiff gave evidence of inquiries she had made. The learned trial judge said he was disposed to say that there was enough evidence to enable the jury to find that the plaintiff had made due inquiry and search. And the plaintiff, in answer to the question " Were you yourself, from your own enquiries, able to identify the vehicle ? ", answered " No ". There was therefore a case to go to the jury on the issue raised by the pleadings. The plaintiff had given evidence, considered by his Honour to be sufficient, that she had made due inquiry and search. She had given evidence that, notwithstanding such inquiry, she had been unable to establish the identity of the vehicle. It was a mistake to approach the question of the admissibility of evidence as if the issues for trial were other than they were. If the parties did so approach the matter, as it was suggested to us they did, this may have created some embarrassment for the trial judge. It is said that the pleadings were disregarded at the trial. They should not have been. This issue joined between the parties was one of the issues which the jury were empanelled to try, and which they were sworn to try. It was quite explicit. And, although this issue was apparently lost sight of, no other issue was formulated. As a result, confusion occurred ; and in it the defendant's counsel was successful in certain objections to evidence, which could not have properly been sustained even if the relevant issue had been formulated according to the impersonal form of the statute. The order of this Court for a new trial of the cause will not prejudice the right of either party to move the Supreme Court for a repleader. The defendant may thus, if so advised, contend that the

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declaration to which he pleaded is defective and seek belatedly to demur. I would, however, add that, in my view, on a declaration alleging due inquiry and search, but not alleging by whom the inquiry and search were made, it might often be proper to require particulars to be given; for the statutory provision can obviously lend itself to false claims. In the present case, however, as I read the declaration, it gave some particulars, in that it stated who made the inquiry and search. I do not follow the view that because it descended to this particularity it became demurrable.

The motive of defendant's counsel in taking his objections to evidence was apparently a hope that he would somehow force the plaintiff to call a particular policeman, whom he wished to cross-examine, and from whom he hoped to get some evidence tending to support a contention that the plaintiff's story that a motor vehicle caused her fall from her horse was fictitious. But, even if the pleadings had taken a different form, the plaintiff ought to have been allowed to prove the result of her inquiries of the police. A plaintiff relying on the section must establish that there was due inquiry and search. He can prove the result of any inquiries he himself made. But a plaintiff who employs an agent, for example a solicitor or a private inquiry agent, to make inquiries for him, cannot give evidence of the result of his agent's inquiries. The agent must do that himself. He may be called, or he may, in accordance with the section, make an affidavit. In this case anyone who had inquired on behalf of the plaintiff or in the plaintiff's interest would have had to prove the result of his own inquiries. But no policeman was the plaintiff's agent or acting in her interest. Police officers may properly refuse, and sometimes do refuse, to concern themselves with purely civil disputes. In cases like this, where it is alleged that a motor vehicle did not stop after an accident, the police conduct inquiries because an offence is alleged to have been committed. They are then acting as policemen, not as inquiry agents for an intending plaintiff. I entirely agree with *Owen* J. that, in a case such as this, the making of a due inquiry and search must ordinarily involve an inquiry of the police and a communication to the police of all relevant information; and I think too that this may be appropriately expressed as seeking "the assistance of the police". Nevertheless, the plaintiff inquired *of* the police, not *by* the police; and certainly not by any particular policeman. Furthermore, if inquiries be made of the police—in the general sense of the police force or organization, as distinct from a particular individual policeman—an official written reply from the police department sent to the querist is admissible to prove the result of

his inquiry. If a nominal defendant wishes to prove any facts on which he relies, including information given to the police, he must do so by admissible evidence, not by the hearsay evidence of a policeman. Some confusion seems to have arisen in this case between hearsay evidence, properly so called, and direct evidence the result of inquiries made by the plaintiff in the course of the inquiry and search required by the Act.

Appeal allowed with costs. Set aside the order of the Full Court of the Supreme Court and in lieu thereof order that the appeal to that Court be allowed with costs and a new trial ordered. The costs of the first trial to abide the event of the second trial.

Solicitors for the appellant, *S. J. Bull, Son & Schmidt.*
Solicitors for the respondent, *J. W. Maund & Kelynack.*

J. B.