[HIGH COURT OF AUSTRALIA.]

ALLEN . . . . . APPELLANT;
PLAINTIFF,

AND

REDDING . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1934.

MELBOURNE, *March* 14.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Negligence—Contributory negligence—Last chance doctrine—Running-down case—Pedestrian crossing road—Crossing in front of motor car at night—Error of judgment—Pedestrian not seen by motorist—Whether contributory negligence of pedestrian.

A pedestrian proposed to cross after dark a road having a width of 42 feet. Before crossing he paused and saw to his left a motor car approaching about 100 yards away. The pedestrian proceeded to cross the road with his back slightly turned to the on-coming motorist. When he had got to the middle of the road he glanced at the motor car and judging that he had time to cross in front of it did not look at it again. He was struck by the left hand mudguard of the car near to the far kerb of the road. Though he had passed through the beam of the car lights the motorist did not see him until after he had been hit.

Held, that these facts were sufficient to support findings that the motorist was guilty of negligence, that the pedestrian was not guilty of contributory negligence, and that, if he were, the motorist had the last opportunity of avoiding the accident.

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

APPEAL from the Supreme Court of Victoria.

Alfred Henry Allen brought an action in the County Court at Melbourne, against Allan F. C. Redding, claiming £499 damages for injuries sustained by reason of the alleged negligence of the defendant in driving his motor car in Hampton Street, Garden Vale, at about 7.45 p.m. on 9th March 1933, when the defendant's motor car collided with the plaintiff and injured him.

The plaintiff gave evidence that at about 7.45 p.m. he proposed to cross from the corner of the piece of land at the intersection of Hampton Street and Point Nepean Road to the far side of Hampton Street. Before proceeding to cross Hampton Street the plaintiff looked down Point Nepean Road and there saw a car a long way down the road. He then looked up Hampton Street where he saw the defendant's car about 100 yards away travelling towards him. It had full lights, which were very distinct. The plaintiff saw the car until it approached the far side of Bay Street, which was about 50 yards from the place where the plaintiff was crossing Hampton Street. When the plaintiff was in the middle of Hampton Street the car was on the far side of Bay Street. The plaintiff said he thought it would slow down crossing Bay Street and that he had plenty of time. The plaintiff continued on until he was a few yards from the west kerb of Hampton Street, when he was struck by the car. The car in Hampton Street gave no warning as it approached the intersection. There were plenty of lights in the vicinity. There was a light on the point of the kerbing where the plaintiff stood before starting to cross Hampton Street. The plaintiff saw the car last when he was in the centre of the road. Under cross-examination, the plaintiff said that his back was slightly turned to traffic coming up Hampton Street. Before he left the kerb he looked to the left and saw a car coming north about 100 yards away down Hampton Street, which is about 42 feet from kerb to kerb. The plaintiff had practically completed the crossing when he was struck. The defendant's car was not travelling at an excessive speed. From the time when the plaintiff reached the centre of the road he did not remember glancing again at the defendant's car, which was travelling on the correct side of the road.

The defendant gave evidence that approaching Bay Street he was going between 15 and 20 miles per hour. Approaching the intersection he tooted twice and slowed down to 15 miles per hour. When he had gone 20 or 30 yards along this part of Hampton Street he glanced up Point Nepean Road. At the point of collision he was temporarily blinded by a truck which was coming along Point Nepean Road. The accident occurred about 38 yards from the intersection of Bay Street and Hampton Street. From the evidence it appeared

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that the plaintiff was struck by the left hand mudguard of the car and that the defendant did not see the plaintiff crossing the beam of his lights.

The trial Judge found that if the defendant had kept any proper look out he must have seen the plaintiff, and that the plaintiff was not guilty of contributory negligence: the plaintiff saw the car and did what he thought correct; he had done what was right and was entitled to assume that the defendant was going to do his duty to others, and even if there was some contributory negligence the defendant had the last opportunity of avoiding, and was the sole cause of, the accident.

The defendant appealed from this decision to the Supreme Court, which held that the plaintiff was guilty of contributory negligence, and reversed the decision of the learned trial Judge.

From that decision the plaintiff now, by special leave, appealed to the High Court.

Rogers Thomson for the appellant, opened the facts and was then stopped.

Winneke, for the respondent. The plaintiff saw the car when he was in the middle of the road, and was guilty of negligence in not looking for it again. If he had looked again the accident would have been averted, but the plaintiff crossed the remainder of the road, keeping no look out for the car at all. That conduct on the plaintiff's part is the real and effective cause of the accident. The plaintiff's conduct was not a mere error of judgment on his part. It amounted to a risk which it was quite unreasonable for him to take. The evidence showed that the plaintiff was also negligent, and the whole weight of the evidence tends in this direction.

The following judgments were delivered:—

RICH J. In this case the learned Judge of the County Court found in favour of the plaintiff. He found the defendant guilty of negligence in completely failing to see the plaintiff crossing the road before he hit him. He also found that the plaintiff had not been guilty of contributory negligence. The Full Court of Victoria

reversed the learned Judge's decision on the ground that the plaintiff must be held guilty of contributory negligence continuing up to the impact, because, although he saw the motor car some distance away when he began to cross the road, he took his eyes off it when he got to the middle of the road, proceeding to cross the road in the belief that he would thus avoid it. The learned County Court Judge considered that this was not a want of reasonable care, and that in any case the defendant's negligence was the final cause of the accident. In my opinion there was abundant evidence on which he could so find. The plaintiff is entitled reasonably to suppose that in a good street light the motorist would see him, and at any rate would not go so close to the kerb as to make it impossible to reach it in safety in five paces—the required distance. If the plaintiff had pulled up and stood in the middle of the road waiting for the motor car, he might have been hit by it had the motorist been watching his course across the road and been confused by his sudden stop. There was no evidence in any view that the plaintiff had the last opportunity of averting the accident. The appeal should be allowed.

STARKE J. The question on which I have the most difficulty is whether the special leave to appeal should be rescinded. It is a mere question of fact whether the plaintiff was guilty of contributory negligence or not, and the learned County Court Judge, and the learned Judges of the Supreme Court, dealt with it as such. In my opinion, the plaintiff was not guilty of contributory negligence.

I agree that the appeal should be allowed, but special leave should not, I think, have been given.

DIXON J. I agree that the appeal should be allowed. The circumstances attending the accident are no longer open to dispute. They were settled by the view which the trial Judge took of the evidence. The defendant did not see the plaintiff until his car struck the plaintiff, who then was within four or five feet of the kerb to which he was crossing. The defendant's failure to see him was due to negligence, as the trial Judge found, and as the Full Court conceded. The plaintiff, however, as he left the kerb on the opposite side, saw

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the defendant's car, or its lights. He judged it to be about one hundred yards away and proceeded to cross. He kept it under observation as he was crossing until he got to the middle of the road. He then had about five paces to walk to reach the footpath. He did not remember glancing again at the oncoming car, or seeing the gleam of its headlights on the roadway. He was struck by the left side of the front of the car, which was about to turn to the left. The Full Court decided that in these circumstances the plaintiff must be held guilty of contributory negligence, which continued until he was struck, and was the real cause of the accident. I do not agree in this conclusion, and I am unable to attribute the difference of opinion between this Court and the Full Court to nothing but a disagreement as to what were the facts, or to regard the case as of insufficient importance to make it a proper one for special leave. We are, I think, taking a different view of the operation of the standard of contributory negligence, and of the application of the rule which throws the responsibility upon the party, who, by exercising due care, might finally have averted the misfortune. It cannot be a matter of but small importance that the Full Court has given effect to a view opposed to that which we think correct in the application of rules so confused or confusing as those have become which relate to contributory negligence and final responsibility, and in relation to an occurrence of a class which at present supplies so much litigation.

I think that, in proceeding to cross the street in the manner in which he did, the plaintiff did not show a want of that care for his own safety which a reasonably prudent man would take. By averting his glance during the last five or six paces of his attempt to reach the kerb, he left himself without whatever opportunity of avoiding the car a close watch of its course and speed during the short time remaining might have given him. But it was his judgment at the moment that he would gain the kerb in safety, and this he would have done if it were not that the driver, through negligence, not only entirely failed to see him, but also crossed an intervening street at a greater speed than the plaintiff reasonably anticipated. But, in any event, the consequences of the conduct imputed to the plaintiff as contributory negligence, although persisting up to the

moment of collision, might have been averted by the defendant by a slight deflection of the car up to a time later than that within which the plaintiff might have escaped by any endeavour of his own which it would have been negligence on his part to omit. In other words, the defendant's negligence continued as a reason for his failure to avoid the accident after the further continuance of the conduct imputed to the plaintiff as contributory negligence had ceased to be a material cause of the collision (*McLean* v. *Bell* (1)).

In my opinion, this was a proper case in which to give special leave.

The appeal should be allowed and the judgment of the trial Judge restored.

EVATT J. I agree with the judgment which has just been delivered. But there are one or two matters which I desire to mention.

I disagree with the view that the case is of small importance, and that special leave to appeal should not have been granted. Although, in a general sense, the law of negligence is well settled, it appears clearly from such cases as *Williams* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (2) and *Joseph* v. *Swallow & Ariell Pty. Ltd.* (3) that, not infrequently, the application of the law of negligence is attended with difficulty, especially in relation to the doctrine of the "last clear chance." Had I been a member of the Court to which the application for special leave was made, I should certainly have favoured the granting of special leave.

As it is, there is no need for the application of the doctrine of the "last clear chance" to the facts of the present case. The learned County Court Judge found that there was no negligence on the part of the plaintiff. Mr. *Winneke* has contended with great force that the plaintiff was negligent because, having crossed portion of the road, he should have foreseen that the continuance of his crossing would or might have brought him into collision with the on-coming car of the defendant. But, in considering whether there was any negligence on the part of the plaintiff, one has to pay regard to all the circumstances.

A reasonable person in the plaintiff's position would, I think, have assumed that the driver of the car was keeping a sharp look out

(1) (1932) 147 L.T. 262. (2) (1933) 50 C.L.R. 258.
(3) (1933) 49 C.L.R. 578.

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so that he would be able to approach the corner carefully, and avoid, or try to avoid, the plaintiff if any situation of peril arose. Moreover, some risk of danger was involved if the plaintiff decided to remain standing in the middle of the road. Having regard to all the circumstances, the action of the plaintiff in continuing his crossing of the road was produced by what was, at the most, " a miscalculation which did not, in the circumstances, amount to such imprudence as to constitute carelessness or negligence at all " (*Williams* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (1)).

I quite agree with Mr. *Winneke's* comment to the effect that a supposed " error of judgment " does not necessarily exclude the possibility of negligence on the part of a person who makes such an error. Everything depends upon whether the conduct caused by error or miscalculation is reasonable in all the circumstances. And that question can seldom be determined without considering what a reasonable person would, in the given circumstances, expect others to do.

I am therefore of opinion that the appeal should be allowed, and the judgment of the County Court Judge restored.

McTIERNAN J. I agree with what has been said by my brother *Dixon* and do not wish to add anything.

The appeal should, in my opinion, be allowed.

Appeal allowed.

Solicitors for the appellant, *Home & Wilkinson.*

Solicitors for the respondent, *Gair & Brahe.*

H. D. W.

(1) (1933) 50 C.L.R., at pp. 266, 267.