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BACKHOUSE v. LLOYD.

McTiernan J.

nephew's £10,000 is not the same fund as the husband's £10,000, and I think that the fair inference is that the husband's £10,000 sinks into and passes as an item of the residue." That statement, in my opinion, correctly interprets the intention of the testatrix.

The judgment appealed from was, in my opinion, right, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants, *Gordon Cathcart Campbell.*

Solicitors for the respondents, *Baker, McEwin, Ligertwood & Millhouse.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

JOSEPH . . . . . APPELLANT;
PLAINTIFF,

AND

SWALLOW AND ARIELL PROPRIETARY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 11.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Negligence—Contributory negligence—Last opportunity—Young child running across road unattended—To what extent young child capable of negligence.

The plaintiff, a child five years and nine months old, was running across a street unattended when he was knocked down by a motor truck and injured. In an action against the owner of the truck for the negligence of his servant, the driver, the defendant pleaded contributory negligence on the part of the plaintiff, and the driver gave evidence that he first saw the plaintiff when the latter was about four yards away from the truck and it was too late to avoid

the accident. The trial Judge declined to leave to the jury the question whether the defendant had the last opportunity of avoiding the accident. The jury returned a verdict for the defendant.

Held, by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Gavan Duffy* C.J. and *Starke* J. dissenting), that the question whether the defendant had the last opportunity of avoiding the accident should have been left to the jury, and a new trial should therefore be ordered.

The question to what extent a young child is capable of negligence, considered.

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

APPEAL from the Supreme Court of Victoria.

The appellant, David Leopold Joseph, by his next friend, Morris Cedric Clair Joseph, brought an action against the respondent, Swallow and Ariell Ltd., in the County Court at Melbourne, claiming £499 damages for the alleged negligence of the defendant's servant in driving a motor truck in Nelson Road, North Melbourne, on 16th November 1932, as a result of which the plaintiff was struck by the motor truck and sustained severe bodily injuries.

At the time of the accident the plaintiff was five years and nine months old. The plaintiff's evidence showed that at about 6.20 p.m. on the day in question he walked to the kerb, looked up the street, and saw the truck some distance away; he stood at the kerb for not quite a minute, saw his brother on a rockery in the middle of the road, and ran on to the road towards the rockery; he did not see the truck after he first noticed it until he was running, when it was just about touching him; the left mudguard hit him, and the truck went over him. The plaintiff's brother, aged thirteen, gave evidence that at the time of the accident he was on the rockery, and saw the plaintiff about a yard in front of the truck, which was going about as fast as or a little faster than a baker's cart; the truck swerved towards the rockery and stopped, and pulled up twelve yards from the rockery pointing at the rockery; and the plaintiff was lying about the middle of the road, or a little nearer to the kerb from which he had run. The plaintiff's mother gave evidence that after the accident she saw the plaintiff lying in the road, that the truck was ten yards away from the plaintiff, and the plaintiff was seven yards from the kerb. Other

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evidence was given that at the time of the accident the plaintiff was in the centre of the road and there was no other traffic about. Evidence was also given that the distance from the kerb to the rockery was forty feet three inches, that the width of the footpath was twenty feet, and that the gutter was four feet three inches wide and was comparatively deep. The plaintiff put in the defendant's answer to an interrogatory in which the defendant said that when the driver of the truck first observed the plaintiff prior to the collision, the truck was travelling on the eastern side of the road in question in an approximately southerly direction at a speed of approximately twelve to fifteen miles an hour.

The driver of the defendant's truck gave evidence as follows:— Just prior to the time of the accident he was travelling at about twelve to fifteen miles an hour and driving about three feet from the gutter. He saw a crowd of children on the east footpath about twenty yards in front of him. He was going to do a right hand turn further on past the end of the rockery. He dismissed the children from his mind as safe. He first saw the plaintiff running from the direction of the group of children from the edge of the gutter towards the truck at an angle which was meeting him. The plaintiff was then about four yards or so away from him. He applied both brakes (foot and hand brakes) and turned the car to the right. The plaintiff was hit by the car and knocked to the road, and was five or six feet from the rear of the truck when it stopped. The truck was about eighteen feet long, and, counting in the length of the truck, it went about twenty-four feet after he applied the brakes. He did not have time to blow the horn. Both brakes acted on the back wheels. He also deposed that if the plaintiff had been standing on the kerb he would have seen him. The driver's son gave evidence that at the time of the accident he was with his father, that the truck was travelling in the centre of the road, that when he saw the plaintiff the latter was half way from the truck to the kerb, and he did not see the plaintiff leave the kerb.

In charging the jury the trial Judge, in substance, said :—"If you find that the defendant has been guilty of negligence causing the plaintiff's injuries you will find for the plaintiff. If you find that

the defendant has been negligent but the plaintiff has been guilty of contributory negligence, you will bring in a verdict for the defendant. Negligence consists in the failure to take proper care in the circumstances." His Honor then put the defendant's and the plaintiff's version of the accident and read to the jury a passage from *Salmond* on *Torts*, 7th ed. (1928), p. 39 (cited hereunder in the judgment of *Dixon* J.), relating to the negligence of children, and continued :— "To sum up the matter then—If you come to the conclusion that it was the negligence of the defendant which was the whole and sole cause of the collision you will find for the plaintiff, but if on the other hand you come to the conclusion that the plaintiff contributed to the accident by failing to take proper care you should find for the defendant. The onus of proving that the defendant was guilty of negligence rests upon the plaintiff and the onus of proving that the plaintiff was guilty of contributory negligence rests upon the defendant."

After the jury retired, counsel for the plaintiff submitted that his Honor should direct the jury that the defendant might be liable, even if the plaintiff had been guilty of contributory negligence, in accordance with the doctrine of the last opportunity. His Honor stated that he did not propose to redirect the jury on the matter.

The jury returned a verdict for the defendant, and judgment was accordingly entered for the defendant with costs. The plaintiff applied for a new trial, which was refused, his Honor stating :— "The verdict was one at which I would not have arrived but I do not hold that it was unreasonable or perverse. I did not direct the jury on the doctrine of the last chance because I had satisfied myself that the facts did not call for such a direction. The whole accident happened in a few seconds, and neither party had an opportunity to avoid the accident after becoming aware of what was the other's position."

From this decision the plaintiff appealed to the Full Court of the Supreme Court, which dismissed the appeal. The reasons for the judgment of the Full Court were as follows :—" This appeal has to do with the case of a little boy who ran out into the road in front of an approaching motor truck and was injured. In an action against the owner of the motor truck the jury found for the defendant and

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we all think that it was the only reasonable finding upon the evidence. The appeal was upon the ground that the trial Judge did not specifically direct the jury upon what has come to be known as the ' last chance ' view of contributory negligence. Juries should not be left to find a theoretical course of conduct when there is no evidence to support it, even in running-down cases, where so much is commonly left to surmise. In the present case, having had the assistance of a very thorough analysis of the evidence by Mr. *Dethridge*, we are of opinion that there was no evidence which would support a finding that the failure of the driver of the motor truck to avoid the natural consequence of the child's negligent act was due to any want of reasonable care on the part of the driver."

From this decision the plaintiff now appealed to the High Court.

Dethridge, for the appellant. The direction of the trial Judge was wrong in law. On that direction, once the jury found that the plaintiff was negligent, their verdict had to be for the defendant. On the evidence, there should have been a direction on the doctrine of the last opportunity, i.e., on the question whether the defendant could have avoided the accident by the exercise of reasonable care notwithstanding any negligence on the part of the plaintiff. Whether the defendant had an opportunity to avoid the accident is to be tested as at the time when he ought reasonably to have become aware of the plaintiff's negligence. Here, assuming the plaintiff to have been negligent, that was when the plaintiff commenced to cross the gutter, from which time the defendant could by taking reasonable care have avoided the accident by stopping or swerving. The trial Judge appears to have tested the defendant's opportunity from the time when he became aware of the plaintiff's position, apparently relying upon *Swadling* v. *Cooper* (1). That case must be read in the light of the facts, as the defendant could not have seen the plaintiff earlier than he did. Here the jury might have found on the plaintiff's case that the defendant had not seen the plaintiff before the collision. [He referred to *Pearce* v. *Richardson* (2).] It matters not that the plaintiff's negligence is continuing (*McLean* v. *Bell* (3)). Here,

(1) (1931) A.C. 1.
(2) (1925) S.A.S.R. 33.
(3) (1932) 147 L.T. 262, at pp. 263, 264; 48 T.L.R. 467, at pp. 468, 469.

having regard to the age of the plaintiff, the jury might reasonably have found that his negligence ceased after he got on to the roadway. The question approved by the House of Lords in *Swadling* v. *Cooper* (1), as being appropriate for the jury in collision cases, namely, "whose negligence was it that substantially caused the injury?" is more favourable to the plaintiff than the direction of the learned Judge.

Hudson, for the respondent. There must be evidence of negligence on the part of defendant before the question of the last chance can go to the jury. The rule as to the last chance presupposes that the plaintiff is no longer able to avoid the consequences of his own negligence, but in this case the plaintiff could have looked up and stopped, and so avoided the accident.

[EVATT J. referred to *Holford* v. *Melbourne Tramway and Omnibus Co.* (2).]

This is one of those cases in which the negligence of the defendant, if there be negligence at all on his part, must have occurred at the last fraction of a second before the accident. The Rules of the County Court provide that a new trial should not be granted unless there has been a substantial miscarriage of justice. In the present case, if there was any technical omission of duty on the part of the defendant, it was not material.

The following judgments were delivered :—

GAVAN DUFFY C.J. In my opinion we ought not to disturb the order of the Supreme Court and the appeal should be dismissed.

RICH J. I think there was evidence to be submitted to the jury on the question whether the defendant had an opportunity of avoiding the accident notwithstanding the contributory negligence which the Judge's charge allowed the jury to impute to the plaintiff. That, as Lord *Wright* in *McLean* v. *Bell* (3) says, is the function of the jury and must not be usurped by the Judges. As the learned Judge refused to direct the jury to consider this question, I think there should be a new trial.

(1) (1931) A.C., at p. 8. (2) (1909) V.L.R. 497; 29 A.L.T. 112.
(3) (1932) 147 L.T. 262, at p. 264.

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Starke J.

STARKE J. The point on which I have most doubt is one not made at the trial, namely, whether there was any evidence of contributory negligence on the part of the child at all. Was it proved that the child—five and a half years old— was capable of taking ordinary care of himself in the situation in question ? That is a matter which we may some day have to consider and I say no more about it. But, on the question of the last opportunity or chance of avoiding the accident, I think there was no evidence fit to go to any reasonable jury or any reasonable man that the defendant had any opportunity of avoiding the consequences of the child's act.

I think that the appeal should be dismissed.

DIXON J. I think there should be a new trial in this case.

I propose briefly to state my reasons. The plaintiff was injured in a street accident. Upon the primary issue whether the defendant's servant had been guilty of negligence, evidence was given on the part of the plaintiff which was considered by the County Court Judge to be sufficient. Indeed the learned trial Judge, if he had been sitting without a jury, would have found the defendant's driver guilty of negligence. His Honor submitted the issue of negligence to the jury, and also the issue whether the plaintiff was guilty of contributory negligence. At the time of the accident, the plaintiff was a child five years and nine months old. The law relating to contributory negligence on the part of young children is in an unsettled condition. His Honor, in his charge to the jury, adopted the course of reading the following passage from *Salmond* on *Torts*, 7th ed. (1928), at p. 39 :—" When the plaintiff is a child or other person under some form of personal incapacity, it is sufficient if he shows as much care as a person of that kind may reasonably be expected to show ; and he will not lose his remedy merely because a person of full capacity might by using greater care or skill have avoided the accident. This rule is sometimes expressed in the form that the contributory negligence of a child is no defence. But this is much too absolute a statement. The question in each case is simply whether, having regard to the age of the plaintiff, his conduct amounted to culpable negligence or not." It does not

appear what precise conduct on the part of the plaintiff his Honor considered might, on the evidence, come within that rule, and it does not appear that his Honor in his charge adverted to the greater degree of care which the presence of children calls upon drivers of motor vehicles and others to exercise. In *Beven* on *Negligence*, 4th ed. (1928), vol. I., pp. 182, 183, the matter is stated in these terms :—" The duty of the adult is so to conduct his affairs that he is not negligent. Children of very tender years are not to have negligence imputed to them. If they are injured by negligence, conduct that in an adult would disentitle him to recover, works them no disability. In intercourse with them adults are to use a greater than ordinary care, because of their greater volatility and the infirmity of their judgment. To be free from liability where young children are concerned, adults must show that they have not failed to attain the standard of duty the circumstances demand. If they have so failed, their default in duty is not condoned by conduct conducing to the injury, which would be contributory negligence, but for the fact that the injury is inflicted on a young child, to whom contributory negligence is not imputable." Mr. *Beven* himself appears to have taken the view that a child under seven years of age was not open to a charge of contributory negligence ; that a child so young could not be considered a responsible agent upon whom the ordinary duty of care rested. But, in deference to some Scottish cases, the editors of his work are disposed to abandon so definite a rule and to allow that a child is under a duty to exercise such a degree of care for his own and others' safety as might reasonably be expected from one of his age and capacity. I refer to, in particular, *Plantza* v. *Glasgow Corporation* (1), and *Cass* v. *Edinburgh and District Tramways Co.* (2), which are two only of a number of Scottish cases on the subject. In Canada, there still seems to be a lack of any authoritative rule on the subject. There are some authorities in the Supreme Courts of the Provinces, which appear to deal with the matter, but, unfortunately, they are not available. But the question does not seem to be settled in the Supreme Court of Canada. I refer to *Winnipeg Electric Railway Co.* v. *Wald* (3), and particularly to the judgment of *Idington* J., at p.

(1) (1910) S.C. 786. (2) (1909) S.C. 1068. (3) (1909) 41 Can. S.C.R. 431.

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Dixon J.

439. If a child of such tender years be capable of contributory negligence, the degree of care must only be that which could reasonably be expected of childhood. It must be difficult to find in so young a child negligence of this order in relation to street traffic. But I assume that his Honor was of opinion that the child, in making up his mind suddenly and without heed or thought and without looking at the traffic to cross the road, was guilty of an act which the jury might consider to be contributory negligence. The condition of the place was that a rockery with a grass plot stood in the middle of a broad highway where children were likely to play. It was opposite the house where the plaintiff lived. On the footpath in front of this house some children were gathered to play. The driver of the defendant's lorry approached that place at about fifteen miles per hour, intending to make a right hand turn. The facts show that, after the accident, the child was found lying seven yards from the footpath line. The evidence does not show with precision at what place the child crossed, where he stood before he was about to cross, and how long before the accident he was plainly visible to the driver. But it was open to the jury to find that he stood for a moment or so on the edge of the kerb in full view of the driver before running across the road, and that this occurred when the motor was twenty or thirty yards away. In my opinion there was no evidence of contributory negligence on the part of the child, at any rate, after he had been guilty of the initial indiscretion, to which children are so liable, of forgetting or disregarding traffic and starting across the road. If there was any evidence of contributory negligence on his part at all, and, for myself, I do not think that there was, his negligence must consist in forming a heedless and sudden decision to run across the street to the rockery. Possibly it may be considered negligence in a child of five and three-quarters to forget all cautions and warnings about crossing streets in traffic and to respond to the undisciplined impulses of his childish nature. I should have thought not, but some such view appears to find support in Scottish decisions. But if it be so, the child committed the act of contributory negligence when he made the initial movement. From that time forward nothing further, which he did or omitted, could in the case of such a child be imputed to

him as negligence. For myself, I should have thought that there was no evidence of contributory negligence on the part of the child at all. But, adopting his Honor's view, and conceding that so much of the child's conduct should be put to the jury as evidence of contributory negligence, it appears to me that these circumstances raise definitely a case for the application of the rule that, notwithstanding the plaintiff's negligence, he is entitled to recover if the defendant might by the exercise of reasonable care have averted the consequences, the so-called last chance doctrine. For it is clear from the speed at which the motor truck was travelling, and the relative speeds of the truck and the plaintiff, that had the child been seen at or about the moment when he hesitated upon or stepped off the footpath, it would have been possible for the driver of the truck to give some warning attracting the child's attention and thus either drive him back or at least divert the child's course. Indeed, it was open to the jury to find that, even if its attention was not attracted, the child might have been avoided by the truck if the driver had seen him at that time. These circumstances, therefore, rendered the case one in which the principle of last opportunity was open for application. The learned Judge, however, refused to leave such a question to the jury. In the present case no point was made at the trial that a child of the plaintiff's age could not in law be guilty of contributory negligence. The notice of appeal complains of misdirection in unlimited terms, but in the Full Court the objection does not appear to have been raised by the appellant's counsel. Although I should have been prepared to hold that no issue of contributory negligence should have been left to the jury, inasmuch as that objection was not taken I confine my decision to a ground which adopts the assumption that it might be thought that there was evidence of contributory negligence on the part of the plaintiff.

For these reasons, I think a new trial should be ordered, and, under the *County Court Act* 1928, before a Judge of the County Court other than the Judge who heard the trial.

EVATT J. In my opinion there should be a new trial in this case.

Dealing first with the Full Court's main reason for dismissing the appeal, that upon the evidence the plaintiff could not have recovered

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even if a full direction as to the " last opportunity " doctrine had been given to the jury, the general rule is that the question whether, notwithstanding the plaintiff's negligence, a defendant could yet, by the exercise of reasonable care, avoid injury to the plaintiff, is pre-eminently a question for the jury. This is pointed out by Lord *Wright* in *McLean* v. *Bell* (1), where he utters a warning against usurping the functions of the jury on such a question. This case is no exception to the general rule, and therefore the question whether there was sufficient time or distance available so as to enable a reasonable driver to avoid the accident, was itself a matter which his Honor ought to have left to the jury with an appropriate direction.

I read the direction of the learned trial Judge in this case as amounting to a ruling that the plaintiff could only succeed if the defendant was the " whole and sole " cause of the collision. This direction was too favourable to the defendant. For one thing, it denies the possibility of the plaintiff's succeeding though his negligence was merely a *causa sine qua non* or an inducing cause of the accident. I am not aware of any case in which a direction has been given in such terms. Even in *Swadling* v. *Cooper* (2), where the " last chance " doctrine seems to have been excluded by the facts, the presiding Judge used words which were much less unfavourable to the plaintiff.

Upon the further question whether the plaintiff, a little child of five, could be held to be guilty of negligence, I find great difficulty in seeing how negligence could reasonably be attributed to him in the absence of something much more than is to be found in the evidence in this case. It may well be that it is impossible to attribute negligence to a child of such tender years. But that question may arise in the new trial and I say no more about it at present.

The appeal should be allowed.

McTIERNAN J. I agree that there should be a new trial. In view of the course which the trial took on the question whether a child can be guilty of contributory negligence, I say nothing on this question. I think it is sufficient to say that, upon the evidence, it

(1) (1932) 147 L.T. 262; 48 T.L.R. 467. (2) (1931) A.C. 1.

was, in my opinion, a case for the application of the doctrine of the last chance.

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Judgment of the Supreme Court and of the County Court set aside and a new trial ordered.

Solicitor for the appellant, *Dudley A. Tregent.*
Solicitors for the respondent, *Bullen & Burt.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN WORKERS' UNION . APPLICANT;

AND

THE COMMONWEALTH RAILWAYS COMMISSIONER . . . . . } RESPONDENT.

Industrial Arbitration—"Basic wage"—Conditions precedent to alteration—Award of single Judge—Commonwealth Railways—Employees—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Commonwealth Conciliation and Arbitration Act 1904-1930 (*No.* 13 *of* 1904—*No.* 43 *of* 1930), *sec.* 18A (4) (i) (*b*) —*Arbitration* (*Public Service*) *Act* 1911 (*No.* 11 *of* 1911)—*Arbitration* (*Public Service*) *Act* 1920 (*No.* 28 *of* 1920), *sec.* 11.

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An award of the Commonwealth Court of Conciliation and Arbitration fixed a minimum wage for employees of the Commonwealth Railways Commissioner. The amount of the wage was computed by reference to an index figure for Port Augusta in a statistical table relating to the cost of living, and by the addition of two sums of money. The award also provided for the adjustment of this amount according to the variations of an index figure for certain towns in South Australia. By an award made in a dispute which subsequently arose, a single Judge of the Court awarded that the minimum wage should be determined, for employees residing in a defined area, by relation