[HIGH COURT OF AUSTRALIA.]

A. G. HEALING & COMPANY PROPRIETARY LIMITED . . . . Appellant;
Plaintiff,

AND

HARRIS . . . . . Respondent.
Defendant,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. of A. 1927.

Adelaide, *Sept.* 22, 23, 26.

Isaacs A.C.J., Higgins and Starke JJ.

Negligence—Contributory negligence—Finding of negligence "causing" the accident—Construction of finding.

A motor-car driven by an employee of the plaintiff, and a motor-car driven by the defendant, came into collision. In an action brought by the plaintiff in a Local Court of South Australia, judgment was given for the plaintiff. The defendant had alleged contributory negligence. The Local Court found that the plaintiff was negligent in being on the wrong side of the roadway, contrary to certain regulations. That Court further found that the cause of the collision was the negligence of the defendant, and that had he taken one of several courses, all of which he might reasonably have been expected to do in the time available and the circumstances of the case, the collision would have been avoided. The Supreme Court made absolute a rule nisi for a new trial, being of opinion that the Local Court had not considered the question whether either party could, by the exercise of ordinary care and diligence, in the circumstances, have avoided the consequences of the other's negligence.

Held, that the finding of the Local Court that the cause of the accident was the negligence of the defendant was a determination of the whole question, and that there had not been any misdirection.

Appeal from the Supreme Court of South Australia.

A. G. Healing & Co. Pty. Ltd. and Charles Harris were the respective owners of two motor-cars which came into collision on a

public road, which runs north and south, between Quorn and Wellington, on 24th August 1926. The Company's car was being driven by an employee named Quirk; Harris was driving his own car. The road in question is a quarter of a mile wide, and has a strip of metal running along it. At the place of collision the metal was in a bad state of repair; and dirt tracks on either side of it, formed by the traffic, were commonly used instead of the metal roadway. Quirk was driving northwards towards Quorn, and Harris was driving in the opposite direction. The metal roadway had not been laid down in the centre of the quarter-mile road; and at the spot in question ran only a few yards from the western side of that road. Quirk was driving on a dirt track on his right hand side of the metal, the defendant on a dirt track on his right side of the metal. Visibility was good, and each party saw the other approaching at a considerable distance. The cars met at a spot where the dirt track on which Quirk was driving crosses over the metal to join the dirt track along which Harris's car was approaching. The latter made for his left hand side of the metal at a high rate of speed; Quirk drew further to his right hand side; Harris turned further to the left, and the cars collided. The Company sued Harris in the Local Court of Quorn, alleging negligence on the part of the defendant. The defendant denied negligence, pleaded contributory negligence, and counterclaimed damages. The defendant relied (*inter alia*) upon reg. 4 of Part II. of the Regulations made under the *Motor Vehicles Act* 1921 (S.A.) (No. 1480), which provides: "Every person riding or driving a motor vehicle in a street or road shall keep such motor vehicle as near as practicable to the left-hand edge of the carriage way of such street or road and every such person shall when meeting any other vehicle or horse pass on his left side of such other vehicle or horse."

The Local Court was constituted by a Special Magistrate and two Justices of the Peace, in pursuance of the provisions of sec. 21 of the *Local Courts Act* 1886 (S.A.) (No. 386). By sec. 25 (1.) of that Act it is provided, with regard to a Special Magistrate: "He shall preside at any Court at which he may be present, and shall decide upon all questions of law, and in jury cases shall direct the jury."

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The Local Court delivered certain findings, as follows:—"(1) Course of Quirk's car.—Quirk travelled north along the eastern track on his right-hand side of the roadway (in between fences) to a point where that track turns to the left to cross the metal, and goes thence to the west side of the metal. He made a slight turn to the right in not following the motor pad but got on to an old track on the east side of the road and then another slight turn to the right when his car was struck about in the centre of his near side by the defendant's car. (2) Course of Harris's car.—He was on the west track; before getting there he had been on the east side after crossing the creek, and while on the east side noticed Quirk coming north on the east side track from the west side, he left the motor pad at three or four yards before it turned towards the metal and turned his car to the left, making his course on the northerly side of the motor pad crossing the metal, then he turned further left after he had crossed the metal and the front of his car struck the plaintiff's car at almost right-angles. (3) Quirk was doing 20 to 25 miles an hour, Harris was travelling over 25 miles an hour, and, in the opinion of the Court, at an excessive speed in the circumstances of the case. (4) Quirk was negligent in being on his wrong side of the roadway. (5) The nature of the western track south of the turning to the metal was such that Harris could have with reasonable safety continued without turning as he did. In any case he had ample width of the road to take without peril and to enable him to pass Quirk's car. (6) Harris was negligent in travelling at a speed which we consider was excessive. He was further negligent in either not continuing on the west of the metal or taking the metal or keeping to the motor pad. He was further negligent in turning to the left of the motor pad. (7) The cause of the collision was Harris's negligence and had he either kept straight, taken the metal, or kept the pad—all of which he might reasonably have been expected to do in the time available and the circumstances of the case—the collision would have been avoided."

Judgment was given for the plaintiff for £111 4s. 2d. The defendant, on 4th March 1927, obtained a rule nisi, pursuant to sec. 70 of the *Local Courts Act* 1886, calling upon the plaintiff to

show cause why the judgment should not be set aside and a new trial had between the parties, or why judgment should not be entered for, or varied in favour of, the defendant. On motion to make this rule absolute the Full Court of South Australia (*Murray* C.J. and *Stuart* A.J.) ordered, on 8th June 1927, that the judgment of the Local Court be set aside, and that a new trial be had between the parties. The Court held that the Local Court had found both parties guilty of negligence, but had not proceeded to consider the question of the ultimate negligence to which the accident was due.

The *Local Courts Act* 1886 was repealed by the *Local Courts Act* 1926 (S.A.) (No. 1782), which came into operation on 7th March 1927. A point was raised in the Supreme Court as to whether the appeal in this case to that Court was governed by the repealed Act or by the new Act. The point was mentioned on the appeal to the High Court, but no report on this point is considered necessary.

The plaintiff, by special leave, now appealed to the High Court against the decision of the Supreme Court.

Thomson (with him *E. J. Hogan*), for the appellant. The Local Court found that the cause of the collision was the respondent's negligence. The finding in clause 4 that Quirk was negligent is of no avail, for this negligence did not contribute to the accident. The question which the Full Court held had not been considered does not arise. [Counsel was stopped.]

C. T. Hargrave (with him *L. M. Hargrave*), for the respondent. The findings of the Local Court are so extensive as to show that only two questions were considered, and that the question of ultimate negligence was never dealt with. Quirk's negligence in disregarding the regulations continued up to the time of collision. The Court did not consider the question whether Quirk could have avoided the consequences of the respondent's negligence. [Counsel referred to *Erickson* v. *Anderson* (1).]

[ISAACS A.C.J. referred to *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.* (2).]

Thomson, in reply. It was not open to the Supreme Court to draw an inference of fact from the findings that the Local Court

(1) (1923) N.Z.G.L.R. 137.

(2) (1924) A.C. 406.

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had not considered all the questions. There was evidence to support the findings.

[HIGGINS J. referred to *Municipal Council of Sydney* v. *Bourke* (1).

[ISAACS A.C.J. referred to *Symons* v. *Stacey* (2).]

The point of law was not properly taken at the hearing (*East Anglian Railways Co.* v. *Lythgoe* (3)).

Cur. adv. vult.

Sept 26.

The following written judgments were delivered :—

ISAACS A.C.J. This is an appeal brought by special leave from a judgment of the Supreme Court of South Australia, setting aside a judgment of the Local Court of Quorn given on 17th June 1927 and ordering a new trial. The action was one in which the appellant Company sued the respondent for damages for negligently driving his motor-car so as to damage a motor-car of the appellant. The defence was a denial of the negligence, and a counterclaim for damages for the negligence of the appellant's employee driving its motor-car, resulting in injury to the respondent and his wife and in damage to his motor-car. The Local Court entered a verdict for the appellant for £111 4s. 2d. on its claim, and also entered a verdict for the appellant on the respondent's counterclaim. The respondent appealed to the Supreme Court, with the result stated. The Supreme Court held that the appeal was still regulated by the *Local Courts Act* 1886 (No. 386), notwithstanding the repeal of that Act by the new *Local Courts Act*, and this ruling is not challenged. By sec. 70 of the Act No. 386 an appeal lay in such a cause "on a point of law, or upon the admission or rejection of any evidence," but no other appeal was given. The Supreme Court allowed the appeal, holding that, except as to excessive speed, there was no evidence of negligence found against the present respondent. It held also, as to the appellant's employee, that his negligence depended upon facts not stated by the Local Court. But finally it held, assuming the actual findings as to negligence to stand, that they were findings as to primary negligence only, and that

(1) (1895) A.C. 433.
(2) (1922) 30 C.L.R. 169.
(3) (1851) 10 C.B. 726.

the ultimate negligence to which the accident was due, as indicated by *Admiralty Commissioners* v. *Owners of s.s. Volute* (1), had not been considered. Therefore it was thought that there had been a mistrial owing to misdirection, and that a new trial was necessary.

On this appeal the appellant contended that the specific findings of the Local Court were sufficient to entitle the appellant to judgment, and that no objection contemplated by sec. 70 of the Act existed to affect them. The respondent maintained that there was no finding of what was called ultimate negligence, and that, as one of the findings was that the appellant by its employee was guilty of negligence in driving on the wrong side of the road, that continued negligence necessarily entered into the causal origin of the accident and was an answer to the appeal, and generally that the view taken by the Full Court should be sustained. With the utmost deference to those views, I have come to the opinion that the appeal should succeed.

So far as the findings themselves are concerned, they appear as they stand to form a conclusive foundation for the judgment of the Local Court. They describe with precision the movements of the parties, both with respect to the locality and to each other, the speed of each so far as material, the opportunities of the respondent to avoid collision, the fault of the appellant's employee, and, after bringing, so to speak, into the balance all the circumstances, including what is termed the primary negligence of each, the concluding paragraph does exactly what is rightly considered essential. It proceeds to a final evaluation of all the circumstances so as to ascertain the true responsibility for the accident. The seventh paragraph says that "the cause of the collision was Harris's negligence and had he either kept straight, taken the metal, or kept the pad—all of which he might reasonably have been expected to do in the time available and the circumstances of the case—the collision would have been avoided." The words are "the cause." They are clear and definite. That is just what is required to be done by cases of the highest authority, such as the *Volute Case* (1). Even if we assume initial negligence on the part of the plaintiff, the question is whether the defendant's negligence,

(1) (1922) 1 A.C. 129.

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notwithstanding the initial negligence of the plaintiff, was "the cause" of the plaintiff's injury; and unless in the result a plaintiff's initial negligence is at all events a proximate cause of the damage he sustained, it is not in the legal sense "contributory" to that damage, and, further, it cannot be regarded as proximate if the defendant by the exercise of reasonable care on his part could have avoided the consequences of the plaintiff's initial neglect.

The latest recognition of these principles is found in the case of *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.* (particularly per Lord *Atkinson* (1), per Lord *Shaw* (2), per Lord *Blanesburgh* (3)). An apposite instance of their application is seen in *Beal* v. *Marchais* (4), a case of collision. There a sailing vessel ran into a steamer, with serious consequences to both vessels. The Vice-Admiralty Court at Gibraltar held both vessels to blame, because both were negligent, the steamer for breach of a regulation requiring it to keep out of the way of the sailing vessel, and the sailing vessel for invisibility of lights. On appeal the Privy Council held the steamer solely responsible, even assuming the sailing vessel negligent in respect of her lights. Sir *Robert Phillimore* for the Judicial Committee said (5): "Upon the assumption that the lights were not visible, it was still the duty of the steamer not to take that decided course which she did take, in perfect ignorance, according to her own statement, as to which way the sailing vessel was proceeding; that it was very imprudent, rash, and careless navigation, and was *the real cause* of the collision; and even assuming that the lights were placed in a wrong position, and therefore were not visible, their Lordships are of opinion, upon the particular circumstances of this case, that it would not be right to come to the conclusion, that the invisibility of those lights could, in any legal sense of the term, and according to the judgments upon the question of contributory negligence, properly be said to have contributed to this collision." Therefore their Lordships held the steamer alone to blame. The Local Court in the present case expressly found what in their opinion was "the cause," and, as

(1) (1924) A.C., at pp. 415, 417.
(2) (1924) A.C., at pp. 420, 421.
(3) (1924) A.C., at p. 430.
(4) (1873) L.R. 5 P.C. 316.
(5) (1873) L.R. 5 P.C., at p. 325.

that involves the considerations adverted to, the objection of misdirection disappears.

Want of evidence remains as an objection. But when the circumstances as detailed in testimony are examined, it appears there is abundant evidence to sustain the ultimate finding. There was clear daylight, visibility is conceded, the position and direction of the appellant's motor could not be mistaken, its speed was apparent and was not altered, and there was ample material for determining whether the respondent, in the stated circumstances, took, or failed to take, reasonable care with reference to the appellant's motor.

It follows, therefore, that the findings must stand; and, so standing, they lead inevitably to the judgment given by the Local Court. The appeal should, therefore, be allowed, the order of the Full Court discharged, and the judgment of the Local Court restored. Costs in Full Court and this Court to be paid by respondent.

HIGGINS J. In my opinion, this appeal turns on the true construction of the written findings of fact announced by the Local Court: Is there in those findings a finding of negligence, which caused the accident? After carefully weighing the language used, I am unable to doubt that there is such a finding in clause 7—that "*the* cause of the collision was Harris's negligence."

It is true that the Local Court, after finding (clause 3) that Harris was travelling "at an excessive speed in the circumstances of the case," finds also (clause 4) that Quirk (the plaintiff's driver) was "negligent in being on the wrong side of the roadway." That is all that there is against Quirk. On the other hand, as against Harris, the Local Court finds that Harris could have with reasonable safety continued without turning as he did, and in any case had ample width of the road to take without peril and to enable him to pass Quirk's car; that Harris was negligent in travelling at a speed which was excessive, negligent in either not continuing on the west of the metal or taking the metal or keeping to the motor pad, negligent also in turning to the left of the motor pad. Then it sums up as to the cause of the collision—"the cause of the collision was Harris's negligence." I do not think that sufficient

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weight has been given to the form of expression—"*the cause*" of the collision. It was the function of the Local Court to find the cause of the collision, and it has found the cause expressly. It has not found that the negligence of Harris *plus* the negligence of Quirk caused the collision, but that Harris's negligence—and that alone—caused the collision; and it adds these details—"and that had he" (Harris) "either kept straight, taken the metal, or kept the pad—all of which he might reasonably have been expected to do in the time available and the circumstances of the case—*the collision would have been avoided.*"

I need not consider laboriously the question, whether the Local Court was justified even in finding negligence on the part of Quirk because he was on his wrong side of the road. By the regulations made under the *Motor Vehicles Act* 1921 (Part II., reg. 4), it is provided that "Every person riding or driving a motor vehicle in a street or road shall keep such motor vehicle *as near as practicable* to the left-hand edge of the carriage way of such street or road." The cars were moving in opposite directions on a country road a quarter of a mile wide, with dirt tracks on part of each side of a strip of difficult metal; and it might be argued that Quirk did not even break the regulation, much less was negligent in being on the right side as distinguished from his left. For the purpose of this case, it is sufficient to say that even if Quirk was negligent in not running on his left side, it has not been found that this negligence was the cause of the collision. The Supreme Court has set aside the judgment of the Local Court as on the ground of misdirection. The misdirection alleged is that the Local Court was not directed to consider a third question, which may be appropriate where both parties were guilty of *negligence that contributed to cause the collision* —the question, "Could either, by the exercise of ordinary care and diligence, in the circumstances, have avoided the consequences of the other's negligence?" This question, is not, in my opinion, appropriate where the Local Court has found that one only of the parties was guilty of the negligence which was the cause of the collision.

I am accepting the ruling of the Chief Justice which has not been attacked by either party before us, that sec. 70 of the *Local*

Courts Act of 1886 applies to this case. The Supreme Court has not under this section a general appeal jurisdiction, but only (in this case) an appeal against the determination of the Local Court on a point of law.

I am of opinion that the appeal must be allowed and the judgment of the Local Court restored.

STARKE J. I agree that the appeal should be allowed.

Appeal allowed. Order of Full Court discharged and judgment of Local Court of Quorn restored. Respondent to pay appellant's costs of this appeal and in the Supreme Court, less the sum of £1 1*s., respondent's costs of a notice of appeal wrongly given.*

Solicitors for the appellant, *E. J. C. & L. M. Hogan.*
Solicitors for the respondent, *Knox & Hargrave.*

G. S. R.