Box 3 of 1939

IN THE HIGH COURT OF AUSTRALIA.

Hillman

V.

Carson

REASONS FOR JUDGMENT.

Judgment delivered at Melbourne

on Thursday, 23rd May, 1940

H. J. Green, Govt. Print., Melb.

C.2774

HILLMAN v. CARSON

Order.

Appeal dismissed without costs.

HILLMAN v. CARSON.

Reasons for Judgment — The Chief Justice

This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales (Jordan C.J., Owen and Bavin JJ.) dismissing an appeal against a non-suit. The only evidence upon the issue of negligence was that of the plaintiff himself. He gave evidence that he was riding a pedal bicycle at about four miles per hour and came out from a side street on his proper side into Parramatta Road where, as he was crossing the road with the intention of turning to his right (towards Sydney) he was knocked over by the defendant's motor car at about the middle of the road. There was nothing to obscure the vision of either party. The plaintiff gave evidence that he looked to his right and left and that he saw no vehicle in either direction as he left the side street. His evidence in chief was that he could see for two hundred yards in either direction. He also said that he could see for about two hundred and fifty yards in the direction of Sydney. In cross examination he first denied but then agreed to a suggestion that in the right hand direction towards Sydney he could see for a distance of five hundred yards. He did not see the motor car at any time, and when the accident happened he only knew that something had struck him. There was no evidence as to the direction in which the car was travelling. He said that he heard no warning sounded by the motor car. In cross examination he admitted that he did not know at what point he was on Parramatta Road when he was struck, and said - " I am going on what Mr. Smallwood and Mr. Parkinson told me as to where the accident happened but I know nothing about it except that I got hit".

The distance from about the edge to about the middle of Parramatta Road is about ten yards. If the plaintiff was travelling at four miles per hour, it would take him five seconds to ride from the edge of the road to the middle. None of the ~~disclosures~~ distances to which the plaintiff deposed can be accepted as absolutely accurate. As in most running-down cases, they represent only estimates given by a witness with no special qualifications for accurate observation or calculation, and representing a recollection which, even in the case of a completely honest witness, is affected by lapse of time and disturbed by the excitement and shock associated with the sudden and unexpected injury which he suffered. But it is upon a consideration of such material that judges and juries must, making allowance for inevitable inaccuracies in many cases, perform the duty of ascertaining the rights and liabilities of parties to legal proceedings.

The learned trial judge non-suited the plaintiff upon the ground that there was no evidence upon which an inference of negligence upon the part of the defendant as distinct from a conjecture could be based. He was of opinion that the evidence was equally consistent with the accident having been caused by negligence on the part of the plaintiff as with it having been caused by any negligence on the part of the defendant. In dealing with the suggestion that an inference might be drawn that the motor car was being driven at an extraordinary speed, the learned judge said that the speed would have to be so extraordinary "as to be something beyond the capacity of any vehicle". The Full Court took the same view as the learned trial judge, namely, that the only evidence given was that an accident had happened and that the reasonable inference to be drawn from the facts was

"equally consistent either with the view that the accident was caused by the defendant's negligence, or with the view that it was not so caused". The Full Court thus placed the case in the same category as Wakelin v. The London and South Western Railway Company(1887) 12 A.C. 41 and Fraser v. The Victorian Railways Commissioners 8 C.L.R. 54.

The question which arises is whether there was evidence which, if believed, would entitle the jury to find in favour of the plaintiff. Such evidence must be credible. A plaintiff cannot avoid a non-suit by going through the procedure of giving evidence which, if believed, would make a case for him where that evidence is of such a character as to be incredible, that is to say, to be such as reasonable men could not accept. In the present case it has been held that the evidence of the plaintiff is such that it could not be accepted by reasonable men because, if the plaintiff looked out and the car which hit him was not within the range of his vision, the car must have been so far away at the moment when he emerged into Parramatta Road as to be travelling at a quite incredible speed. Upon the view that the car came from the direction of Sydney, that it was not within five hundred yards of the plaintiff when he began to cross the road, and that within five seconds it struck him, it is true that the speed of the car, about two hundred miles an hour, would, in the circumstances, be an incredible speed. But the jury was not bound to accept as against the plaintiff his statement that he had a clear view for five hundred yards towards Sydney. The jury was entitled to consider the evidence as a whole and to accept the other evidence that the distance that he could see in either direction was about two hundred yards. Further, the evidence was consistent with the car travelling towards and not from Sydney. The plaintiff may have been

careless in looking out. He may not have been speaking the truth in saying that he looked out at all. Such questions are matters for the jury to decide. But the jury was entitled to take the view that he looked out carefully, that he saw no car, and that therefore there was no car to be seen - within about two hundred yards - when the plaintiff began, very slowly, to cross into Parramatta Road. A car would travel two hundred yards in five seconds if it were driven at a speed of eighty miles per hour. This is not an impossible speed. The road was a smooth concrete road and modern cars not infrequently travel on such a road at eighty miles an hour.

Thus there is evidence that the plaintiff, in full view of all other possible traffic, came out from a side road on to a main road travelling at a very slow pace and was knocked down by a motor car travelling at a high speed. If the jury accepts the evidence that the plaintiff looked out in both directions before he crossed the road, that he saw no other traffic, and infers that there was no other traffic at the moment which could be seen, it is, in my opinion, open to the jury to find that the motor car was being driven without due consideration for the safety of other persons using the road. A motor car should not be driven at such a speed or without such a look out that it cannot avoid persons who come slowly and carefully from side streets. In my opinion, therefore, the plaintiff ought not to have been non-suited.

I have expressly left out of account the fact that two companions were with the plaintiff at the time and that they were not called to give evidence. The failure to call these witnesses may be highly important in determining the degree of credit to be given to the plaintiff's evidence, but a failure to call witnesses is not a matter which is relevant upon an application for a non-suit. The appeal, in my opinion, should be allowed.

The Court is, however, equally divided in opinion. The result is that the decision appealed from must be affirmed and the appeal dismissed - Judiciary Act 1903-1939 sec. 23(2) (b).

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JUDGMENT. MR JUSTICE RICH.

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Judgment. Rich J.

The question raised by this appeal is whether the plaintiff in a collision case was rightly nonsuited. Such questions come before judges at nisi prius with great frequency and are dealt with in the light of an experience which unfortunately no judge taking jury actions can escape. For the state of traffic on the highways and the ever increasing toll of accidents supply a volume of collision cases that is not diminished by the greater tendency to bring such claims to litigation rather then settle-ment and compromise. Applications for nonsuit must be dealt with by the trial judge out of hand upon the impression created by the evidence orally given before him and the opening and arguments of counsel. He has all the advantages of the atmosphere of the trial and a true appreciation of the meaning of the witnesses as they speak. But when there is an appeal from his decision the Appellate Court deals with the matter from a quite different point of view. The brief submissions of counsel at the

trial are replaced by lengthy and ingenious expositions of the possibilities of which the divers interpretations of the literal words of the witnesses as recorded on the printed page are capable. These possibilities are explored in relation to plans, calculations and estimates of distances of speed never heard of at the trial. With these building materials a fabric is constructed which the plaintiff standing before the jury, if he ever thought of it, would not present because it would be immediately answered by actual facts which neither party would dream of disputing. In the present case the plaintiff gave evidence himself but called no other witnesses of the accident. He was riding a bicycle out of a side street into a main thoroughfare. His evidence amounts to nothing more than the statement that he was proceeding at a very slow pace on his proper side, that he carefully looked both ways, that there was no traffic in the main street but that notwithstanding the absence of traffic visible or audible to him he was forthwith knocked over by a motor car which it is not disputed was that of the defendant. There is no evidence which way the defendants car was travelling, indeed there is no evidence that it was the

defendant's car although that point is not taken. The assumption is, however, that the defendant's car was travelling from the plaintiff's right hand. In that direction there is a rise the top of which according to the plaintiff's evidence was about 250 yards away but he agreed that a motor car would have been visible for 500 yards. He said "When I looked "both ways I could not see a vehicle of any description within 200 yards "of me. My vision would take in the whole of the hill. I slackened "down to about four miles an hour and I proceeded on. When I was cross-"ing that part of Parramatta Road I was travelling at about four miles an "hour". He was then hit by the unseen presence of the car. On this evidence the judge nonsuited. In my opinion rightly. All the plaintiff's case amounts to, as far as I can see, is that he and a motor car which he never saw came into collision . He leaves the reason why he did not see it inexplicable and the cause of the accident is left unexplained. Against this view it is argued that it must be inferred that at the moment he looked the car was at least 200 yards away and that as he was travelling so slowly sufficient time must have elapsed between the time he

looked and the time he was hit for the motor car if travelling at a very swift pace to cover the intervening distance and as this could only be done if the motor car was going at 60 or 70 miles an hour the jury might infer that the cause of the accident was the excessive speed of the car. This strikes my mind as a figment of counsel's imagination. I do not see how a jury could reasonably draw such an inference. In the Supreme Court reference was made to the fact that the plaintiff did not call as witnesses two of his companion bicyclists who saw the accident. I do not agree that this consideration is wholly irrelevant. It is a matter a jury would certainly take into account and counsel would press it on their attention. When the a_rgument is that the evidence supports an inference of a highly improbable description I do not know why judges who are called on to consider whether it is a reasonable inference cannot take into account among the matters making up the whole case the fact that if the inference had any relation to reality witnesses were available who could give evidence ~~xxxxxxx~~ ~~xxxx~~ of it. Whatever his reasons the plaintiff conducted his case in such a way as to leave the accident wholly unaccounted for. It nevertheless happen

ed.
/But because the party who has got to prove negligence contents himself xiil with proving facts which standing alone make the accident inexplicable there is no reason for a Court allowing a jury to infer that it must have been the defendant's fault.

In my opinion the appeal should be dismissed.with costs.

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JUDGMENT. STARKE J.

The appellant, a cyclist, was knocked down in the Parramatta Road near Sydney and injured. He brought an action in the Supreme Court of New South Wales, which was tried by jury, alleging that he was injured by reason of the negligence of the respondent. The question is whether there was any evidence given on the trial of the action from which the jury might reasonably have inferred such negligence on the part of the respondent connected with the accident; Metropolitan Railway Company v Jackson 3 A.C. at p.198. The trial judge did not think so and nonsuited the appellant and this decision was affirmed on appeal to the Supreme Court.

The mere occurrence of an accident on a highway raises no presumption of negligence; it is necessary to establish by evidence circumstances from which it may be reasonably inferred that the accident resulted from some want of care on the part of the defendant. Davis v Bunn 56 C.L.R. at p.255. The only evidence in the present case is that the appellant rode slowly - about four miles per hour - out of a side street into Parramatta Road, that he looked both ways and could not see any vehicle of any description within from 200 to 250 yards but he admitted that a motor car would be visible for 500 yards. He heard no warning sounded or horn of any kind. He could not say where the accident happened, though going on what his companions (who were not called) told him it was about the centre of Parramatta Road but he knew "nothing about it except that I got hit".

The exact position on the Parramatta Road where the appellant was struck is thus unknown, the position of the motor car is unknown, and whether a warning was or was not given is equally unknown. It was contended that a jury might reasonably infer that the speed of the car was excessive, that no warning was given, and that no proper "look out" was kept.

It is not enough to conjecture or surmise that there may have been some neglect on the part of the respondent; there must be evidence on which the jury can reasonably and properly conclude that there was negligence. Lord Macmillan in Jones v Great Western Company 47 T.L.R. at p.45 said, "What the Court has to consider is this whether, assuming the evidence to be true and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue". But what national inference can be drawn as to the speed of a motor car, not seen, but which on the evidence may have been distant anywhere from 200 to 500 yards from an unfixed point of collision? Moreover, can it be inferred, whatever distance from the point of collision be assumed, that the car travelled at the same rate of speed for the whole distance and was travelling at that rate of speed when the appellant was struck? To base an inference of speed upon such facts strikes me as the merest guesswork.

Again it is said that the appellant heard no warning from the motor car and that no proper "look out" could have been kept. An accident on a highway may happen from a variety of causes some of which may be imputable to the fault of the person sought to be made liable whilst others may be due to causes for which he is not responsible. Davis v Bunn supra at p.255. It cannot reasonably be inferred from the mere fact that the appellant heard no warning that none was given. A warning may consistently with such evidence have been given though the appellant did not hear it. Indeed the absurdity of such a deduction is manifest when it is remembered that the appellant did not notice a motor car that was undoubtedly within the range of his vision.

The suggestion that no proper look out was kept rests solely upon the fact that an accident happened which, as already

indicated, affords no reasonable basis for inferring fault on the part of the respondent.

In my opinion the decision of the learned judges of the Supreme Court was right and should be affirmed.

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JUDGMENT DIXON J.

Apart from medical evidence concerning his injuries, the plaintiff's case consisted in his own evidence and a plan of the place where the accident occurred. The plan shows the opening into Parramatta Road of a side street called Francis Street. Parramatta Road at this point runs from South East to North West and is a concrete roadway 56 feet wide from kerb to kerb with foot ways of 12 feet. Francis Street enters it at right angles from the South West and consists in footpaths also of 12 feet and of a roadway 42 feet wide of which a centre strip of 12 to 14 feet is tarred. The tarred strip broadens out to the full

width of the road at the mouth. There is a slight fall there to Parramatta Road. According to the plaintiff's evidence at about seven o'clock of a morning in December 1937 he was riding a pedal bicycle to his work, a journey which took him along Francis Street and then, by a turn to his right, up Parramatta Road to the South East, that is in the direction of Sydney. He was riding with two companions who fell back and rode behind him as they reached Parramatta Road. He says that when he was three feet off that Road he looked towards Sydney, both ways in fact, and saw no vehicle. He entered the main road at a pace of four miles an hour from the correct or left hand side of

Francis Street, he went straight across to the centre of Parramatta Road and then made his turn, when a motor car, the defendants, hit him; he thought it hit the handle bars or front wheel of the bicycle, but he was not sure; nor could he say what part of the motor car hit the bicycle, whether the front of the car or the side of the car. He was thrown down and could give no account of what then happened.

He stated that towards Sydney the Parramatta Road rises, the road disappears over the top of the grade, the top being, he thought, about 250 yards fron the mouth of Francis Street.

In cross examination he agreed that there was not a hill which would obstruct his view of a motor car. But to questions

to the effect that from Francis Street a motor car could be seen 500 yards away he first answered that he could not see the car that morning and then he gave what, at all events literally, was a denial, but later he said that he agreed that you can see a motor car for 500 yards.

He reiterated in various forms his claim that he looked both ways, At one place, in chief, he said " When I looked both ways I could not see a vehicle of any description within 200 yards of me. My vision would take in the whole of the hill." In cross examination he said that he did not see the car; that he always looked both ways and he never saw it until it hit

him; that there was no doubt he looked towards Sydney and the road was absolutely clear. Then he was asked "Don't you agree with me that the motor car was to be seen if you looked?" He answered " I did look". "Q. And you agree the car was there? A. Not coming down the hill. Q. Is it not a fact that there is no place in that road where a motor car could get behind not to be seen, no hill which would obscure a motor car? A. I never saw the motor car when I looked." He had stated that except for a few sign posts and an advertisement board about 50 yards down on the right, the place of the accident was open.

No evidence was given as to the direction in which the car was travelling and no admissible evidence that it was the

defendant's car. But it appears to have been common ground that the car was driven by the defendant and that it was travelling from the direction of Sydney.

I think the foregoing summary of the evidence includes all that is material to the question whether the plaintiff made out a case fit to be submitted to the jury. Maxwell J. at the trial held that he had made no case and granted a nonsuit and his decision was affirmed by the Full Court.

In my opinion the nonsuit was right. It appears to me that the plaintiff's account of the accident simply left it unexplained. It provided no circumstances from which a reasonable

inference could be drawn as to why or how the accident occurred. I am unable to agree with the view that the jury might properly infer that the defendant was travelling at an excessive speed and thereby caused the accident. This view is founded upon the four statements of the defendant; (1) that he could see no vehicle within 200 yards of him when he looked, (2) that he looked when within three feet from Parramatta Road, (3) that he was riding at four miles an hour, and (4) that he reached the centre of the road. It is said that the jury could adopt the view that the car was at least 200 yards away when he looked and therefore must have travelled at a very high speed to reach the plaintiff.

The standard by which the sufficiency of evidence to

support an affirmative finding is to be judged has long been settled. The whole evidence must be considered and the inquiry is not whether this or that passage in the testimony contains a scintilla or fragmentary expression which tends to the conclusion or whether, by selecting and arranging some of the circumstances and ignoring the rest, a plausible foundation may be constructed, but whether on the whole evidence a reasonable man might be affirmatively satisfied of the truth of the allegation. "When we say that there is no evidence to go to a " jury, we do not mean that there is literally none, but that " there is none which ought reasonably to satisfy a jury that

" the fact sought to be proved is established" per Maule J. Jewell v. Parr(1853)13 C.B. 909 at p. 916: 138 E.R. 1460 at p. 1463, Ryder v. Wombwell (1868) L.R. 4 Ex. 39, Banbury v. Bank of Montreal (1918) A.C. 626 at p. 670.

Read as a whole I do not think that the plaintiff's evidence could reasonably satisfy a tribunal of fact that the plaintiff was less than 45 feet from the centre of Parramatta Road when he looked, as he says, both ways, nor that his glance took in any exact length of roadway or for that matter any minimum length which, when used with the other integers of the calculation, would support a reasonable conclusion in favour

of a speed which would be neither so great as to be absurd or so common-place as not to be improper in the conditions obtaining at the time.

However much the plaintiff's evidence is analysed it really comes back to a statement that he looked up the road where in fact the car was within eyesight and did not see it. As he was riding a bicycle and therefore possibly ~~xxxxx~~ not in an erect posture, it is quite conceivable that he did not lift his eyes to the horizon and so took in a limited amount of the view open to him. This may be the explanation of the statement that he took in 200 yards. But however this may be, the explanation of his not seeing the car that hit him is a matter of speculation

and the cause or causes of the accident remain undiscoverable upon the evidence, which really throws no light on what happened.

I think that the appeal should be dismissed with costs.

This appeal relates to an action for personal injuries suffered by the plaintiff as a result of a collision between his push bicycle and a motor car admittedly driven by the defendant. A non-suit was entered by the trial Judge, Maxwell J., and that was affirmed on appeal to the Full Court of the Supreme Court. As a sum of £300 or more was claimed in the action, an appeal has been brought to this Court as of right. (Coroneo v. Kurri Kurri and South Maitland Amusement Co. Ltd. ((1934) 51 C.L.R. 328)).

The question is one of law. Was the non-suit right? Was there evidence from which the jury could infer that the injuries to the plaintiff were caused by negligence on the part of the defendant. The plaintiff was called as a witness, and gave evidence of the following facts:-

1. That he was riding his bicycle from a side street, Francis Street, into the Great Western Highway in order to cross that highway, turn to the right in the Highway, and resume his journey towards his work.

2. That, prior to entering the Great Western Highway proper, he (the plaintiff) looked carefully along it and in both directions, and there was no vehicle in his sight within a distance of 200 yards either way.

3. That, thereafter, he (the plaintiff) proceeded across the highway at a very slow speed - a "crawl" - braking his wheels, and travelling at a speed of about four miles per hour.

4. That he (the plaintiff) had reached the centre of the Great Western Highway or a little over the centre when "a motor car hit me, the defendant's motor car".

During cross-examination, the plaintiff was persuaded to agree that the limit of vision along the highway might have extended to five hundred yards. Further, when he was questioned as to the exact position in the highway where the collision occurred, he stated that he was relying upon what was told to him by the two

cyclists who were following him down Francis St. to the Great Western Highway.

From the plan of the locality, it appears that if the plaintiff's account of the accident is accepted, his bicycle, travelling at four miles per hour, would have taken between six and seven seconds to reach the centre of the Great Western Road. During this interval of time - again assuming that the plaintiff's account is accepted - the defendant's motor car must have travelled a distance of about 200 yards. Upon that footing, the average speed of the defendant was about 70 miles per hour. Of course the jury was not bound to accept the 200 yards estimate, still less that of 500 yards. But it was entitled to find that the motor car travelled such a considerable distance along the Great Western Highway that the speed must have been very considerable and quite excessive in the circumstances.

In my opinion, the jury was entitled to infer from the evidence which I have summarized above that the collision was caused because the defendant was travelling along the highway at an unreasonable speed or because the defendant was failing to keep a reasonable look out for the plaintiff or other users of the road, or because of a combination of both these factors.

The contention which succeeded was that the facts and the reasonable inferences from the facts were "equally consistent" with negligence and absence of negligence. The well known phrase occurs frequently in the Wakelin type of case (Wakelin v. London and South Western Railway Company ((1887) 12 App. Cas. 41)).

A conclusion that one inference is "equally consistent" with another involves the prior finding that, in the proved circumstances, the probability of negligence is no greater than the probability of due care. It has, I think, been insufficiently recognized that the type of case to which Lord Halsbury was applying the phrase "equally consistent" was one where he thus described the state of the evidence: "In this case I am unable to see any evidence of how this unfortunate calamity occurred". (at p.45) In other words, all that was known in Wakelin's case was that a

"collision" had occurred between the man and the train, and that the man was killed. For want of evidence, the crucial question "how did the accident occur" was unanswerable.

In the present case, the Court is in a very different position. Here we have positive testimony that, having taken ordinary precautions for his own safety, the plaintiff proceeded on a permissible manoeuvre at a reasonable speed, and in a proper manner. There is also evidence from which it can be inferred as a fact that, in a comparatively short space of time, the defendant's car travelled a considerable distance at an excessive speed, failed to sound any warning, and ultimately collided with the plaintiff.

From the above facts, the jury could reasonably infer that, in the circumstances, the defendant was driving his car at far too rapid a speed. A further permissible inference is that, notwithstanding the ever present danger of collision when vehicles enter a highway from a side street, the defendant failed to keep a proper look out on a main highway.

I fail to see how, in facts such as the above, so different from those in Wakelin's case, it could be said that the inference of careful driving of the car is just as probable as that of careless driving. The probability of any particular inference is to be measured in relation to the probability of all competing inferences. What are the competing inferences here? What are the inferences which are consistent with the evidence and the absence of negligence on the defendant's part? Counsel for the respondent suggested one possible inference, viz. that, when the plaintiff entered the Great Western Highway, he was mistaken in supposing that the defendant's car was so far along the highway, and that, on the contrary, it is quite possible that the car was very close to him, almost on top of him. This very interesting explanation of the accident is a possible one, and if and when it is supported by sworn evidence, a jury might accept it. But, in its present state, the evidence, read as a whole, is entirely inconsistent with the explanation. It follows that this competing hypothesis (assuming in the defendant's favour that it would

exonerate him from the imputation of negligence) is not "equally" as probable as the inferences of excessive speed and failure to keep a look out. Taking the factual situation as it is, not as it might be, the competing hypothesis is so little probable that there is nothing to support it except guesswork.

I have not set out in detail such portion of the evidence as would warrant the jury in finding that, as the plaintiff entered the Great Western Highway proper, the defendant's vehicle must have been distant at least 200 yards along the Highway. But, as I understand the judgment appealed from, it affirms the non-suit upon the ground that the evidence of the plaintiff meant only that the plaintiff failed to see the defendant's vehicle. But the plaintiff said:

> "When I looked both ways I could not see a vehicle of any description within 200 yards of me. My vision would take in the whole of the hill. I slackened down to about four miles an hour, and I proceeded on. When I was crossing that part of Parramatta Road I was travelling at about four miles an hour".

It seems to me that this evidence cannot be reduced to a mere statement that the plaintiff failed to see the defendant's vehicle. It means, or the jury might regard it as meaning, that (1) the plaintiff looked to see, (2) that he looked in both directions, (3) that his vision took in a distance of 200 yards in either direction, and (4) that the road was clear for that distance in each direction.

If so, there was evidence that the defendant's car must have travelled a distance of at least 200 yards while the plaintiff was crossing to the point of collision.

With respect, I think some confusion has been caused because the plaintiff was endeavouring to prove something like a negative, i.e. that the defendant's car was not within an estimated length of road. Such a negative may be proved in various forms of expression. Thus a witness may say "the defendant's car was not in my sight, and my sight extended for at least 200 yards". On the other hand, a witness might say "the defendant's car was at least 200 yards from me, because, although I looked, I did not see it, and my vision extended for at least 200 yards". Between

such statements there is no difference in substance. The respondent's argument before us seemed almost to suggest the impossibility of proving that a person was not present within a certain area (e.g. a paddock or field) at a certain point of time. If a witness who was present within such area at the particular time swears that, although he looked, he failed to see the person, it can always be said that he proves no more than failure to see. But in considering whether a prima facie case is made, it is of no assistance to say that the jury might not have been satisfied with the accuracy of the witness's observation. In the present case, the jury might have been satisfied; the matter was essentially for them.

Counsel for the respondent also contended that there was no evidence that the negligence of the defendant was causally connected with the collision. What are the facts? The evidence of the plaintiff accounts for ~~the~~ all his manoeuvres up to the moment of the collision, and accounts for it on the basis of due care on his part. The same evidence (that of the plaintiff) accounts for the conduct of the defendant, not with certainty, but with probability, upon the footing of excessive speed and a failure to keep a proper look out. It may be that, before the actual impact, the defendant's speed was very considerably reduced; but the defendant cannot segregate these last moments from his antecedent manoeuvres, and, even if the inference of reduced speed is drawn, the question whether the defendant caused the accident is one for the jury. (Toronto Railway Co. v. King (1908) A.C. 260))). Commenting on that case, Isaacs J. said:

> "A tram car, negligently as it was held, came into collision with a delivery van crossing the intersection of two streets and at right angles to the direction of the tramcar. The driver of the van was killed. Apart from the nature of the negligence, undue speed, and not keeping a proper look-out, there was no connection proved between the negligence and the death. Yet it was evidently self-connecting; and the Privy Council held there was evidence of negligence causing the damage". (~~Fraser~~ v. Victorian Railways Commissioners ((1909) 8 C.L.R. 54 at p.84)).

Similarly, it was said by Lord Buckmaster in Craig v. Glascow Corporation (referring to Wakelin's case):

> "In that case a man was found dead on a railway by a level crossing, and there was nothing to show how the man had met with his death, but it was suggested that the train had not whistled at the crossing. It was found by this

House that there were no sufficient facts from which the inference could be deduced that the negligence of the railway company had caused the accident. That was far away from the present case, where the negligence was closely connected with the accident which had occurred". ((1919) 35 T.L.R. at p.216).

On the point of causation, this case resembles Craig's case rather than Wakelin's.

It is unnecessary to add that the fact that the plaintiff did not call other persons who were witnesses of the accident has no bearing whatever on the question of law involved in the appeal.

This appeal should be allowed. As the costs of the first trial have been entirely thrown away through the defendant's erroneous contention of law, a special order should be made as to such costs. (cf. Halliwell v. Venables (143 L.T. 215), Sims v. Grose ((1940) W.N. (Eng.) 63)).

JUDGMENT McTIERNAN J.

Important parts of the plaintiff's evidence, which was the only evidence given about the circumstances of the accident, were impeached on the ground that such evidence was derivative or hearsay evidence and for that reason not fit to be left to the jury. I cannot agree that this objection to those parts of the evidence is well founded. The objection depends upon an answer which the plaintiff gave to a question he was asked in cross-examination. It is said that the answer shows that the plaintiff did not know apart from what he was told by other persons whether the motor car hit his bicycle or his bicycle ran into the motor car. The answer taken literally appears to me to show quite clearly that the plaintiff knew that the motor car hit his bicycle. Besides, it seems to me from an examination of the whole of the plaintiff's evidence that he professed to give his own recollection of the manner and place of the accident. Indeed he expressly said on more than one occasion that his evidence was his own recollection of what he did and saw. The substantial question is whether, if the jury believed the plaintiff's evidence, which apart from the medical evidence was the only evidence given in the case, it could reasonably find on that evidence and the plan of the locality and the inferences of fact which could be fairly drawn therefrom that the plaintiff was injured as the result of negligent driving by the defendant.

The evidence has been reviewed and it is unnecessary to review it in detail again. The plaintiff said that when he was coming out of Francis Street he did not see the defendant's car approaching. But whether this was due to negligence on the part of the plaintiff or not and caused or contributed to the accident was a question of fact for the jury. Cf. Ruddy v London and S.W. Railway 8 T.L.R. 658. For the plaintiff said that at this point he looked both ways and saw no car, that there was a rise in the road to his right about 200 yards away and he could see along the road to the right for

500 yards. The plaintiff then proceeded from Francis Street across the middle of Parramatta Road at four miles per hour and had just turned to ride along his proper side when his bicycle was struck by the motor car. The jury could, have reasonably inferred as a fact that the defendant could have seen the plaintiff riding from Francis Street across Parramatta Road, if the defendant was keeping a proper look-out. Plainly it was his duty to do so. Moreover, the jury could reasonably, in my opinion, have found that the defendant's failure to keep a proper look-out was the cause of the accident; the jury could have come to this conclusion although it might also have considered that the plaintiff was guilty of negligent conduct some moments before in not seeing the defendant's car at the time when he came out of Francis Street. Therefore, the jury could, in my opinion, have reasonably found on the evidence that the accident was due to the combined negligence of the plaintiff and defendant or to the negligence of the plaintiff or, what is the material question now, to the negligence of the defendant. I think, therefore, that the non-suit was wrong.