No 68 of 1939

IN THE HIGH COURT OF AUSTRALIA.

Maxwell

v.

Yellow Cabs of Australia Ltd

REASONS FOR JUDGMENT.

Judgment delivered at Melbourne

on Thursday, 23rd May, 1940

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

C.2774

MAXWELL v. YELLOW CABS OF AUSTRALIA LTD.

Order.

Appeal allowed with costs appropriate to an appeal in forma pauperis. Order of Full Court set aside. Verdict of jury and judgment thereon set aside. New trial ordered. Costs of first trial to abide result of second trial. Respondent to pay to appellant costs of appeal to Supreme Court.

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., Halse Rogers J. and Williams A.J.) dismissing a motion for a new trial in an action for damages for negligence where the jury found a verdict for the defendant. I approach the consideration of this appeal in the light of the important general rule that the verdict of a jury should be supported if possible and that a court of appeal should not be subtle or astute in seeking to displace it. The only substantial question which arises is whether the learned judge was right in directing the jury that there was evidence of contributory negligence. No other objection was taken to the direction and therefore no other objection can now be relied upon (N.S.W. Supreme Court Regulae Generales rule 151 3).

The action was brought under the Compensation to Relatives Act 1897 (N.S.W.) by the widow of George Maxwell who was knocked down by a motor car on the Prince's Highway at Banksia on 19th August, 1938. He died from his injuries on the next day without recovering consciousness. The motor car, driven by a servant of the defendant company, was travelling in a southerly direction on the eastern side of the road. The defendant was struck by the left headlamp of the car and after the accident his body was found on the gutter and kerbstone on the eastern side of the road. The evidence of the

driver was that he did not see Maxwell at all, but that he felt a bump and, thinking that he had run over something, stopped his car and went back to see what had happened. He did not then notice that his headlamp had been broken off the car. He then discovered that the deceased had been knocked down and injured. The plaintiff called evidence designed to show that the deceased crossed the road from west to east. If he had so crossed he would have passed through the beam of the headlights of the car, and the driver's failure to see him would have been some evidence of negligence. One witness deposed to the presence of the deceased on the western side of the road. He gave evidence that he passed him at the kerbstone and that very shortly afterwards he heard a crash and turned around and saw that an accident had happened. He did not know the deceased. He had never seen him before. He aided his identification of the deceased by stating that the latter was carrying a brown paper parcel and that there was such a parcel on the road which had evidently been knocked out of the hands of the man who was run over.

On the other hand the defendant contended that it was more consistent with the evidence to believe that the deceased crossed the road from east to west. He was struck by the left hand side of the motor car and was thrown to the left of the motor car on the eastern edge of the road. It was accordingly argued that it was more probable that he had suddenly stepped from the eastern side of the road into the path of the motor car so that the driver had no chance

of either seeing or avoiding him. The learned trial judge put it to the jury that there was evidence of contributory negligence if they took the view submitted for the defendant that the deceased crossed from east to west.

The defendant had also contended that there was evidence of contributory negligence if the deceased crossed from west to east, because he could easily see the motor car approaching with its headlights on so that he must have crossed the road without looking out properly for approaching traffic. The learned trial judge, however, did not put this case to the jury. In other words the learned judge put the case to the jury in a manner in which, the defendant contended, was unduly unfavourable to the plaintiff. Any objection on this ground could come only from the defendant and not from the plaintiff. If there were evidence of contributory negligence upon the hypothesis that the deceased crossed the road from west to east and the jury found accordingly, the fact that the judge did not put this case to the jury should not deprive the defendant of a verdict which could be supported by properly admissible evidence.

But this question does not arise if there was evidence of contributory negligence upon the hypohtesis, put by the defendant, that the deceased was crossing the road from east to west and if there was evidence to support this hypothesis.

It is not disputed that upon the evidence the jury might properly not have been satisfied that there was any negligence upon the part of the driver or might properly have found that there was no negligence upon the part of the driver. It is equally not disputed that the jury might properly have found negligence on the part of the driver. In the latter event it would be necessary for the jury to make a finding upon the issue of contributory negligence if that issue were properly left to them. The plaintiff contends that there was no evidence of contribuory negligence if the deceased crossed the road from west to east and that therefore the verdict for the defendant leaves it uncertain whether the verdict was properly reached. It is consistent with the verdict that the jury, while finding negligence on the part of the driver, found, without proper evidence (it is said), that there was such contributory negligence as was mentioned in the summing up. A finding of such negligence was impossible unless it was open to the jury to find that the deceased attempted to cross the road from east to west. The question is whether there was evidence upon which the last mentioned finding could be proper. In my opinion there was such evidence. The jury was not bound to accept the evidence of the witness who identified the deceased as the person whom he passed on the kerb of the western footpath. The deceased was not known to

the witness and there was room for criticism of the evidence of this witness in that he admitted that he had said in the Coroner 's Court that he had only travelled five or six feet before he heard the crash and had so travelled at an ordinary walking pace, whereas, if the man whom he saw was the deceased, the latter would have had to travel between thirty and forty feet, also at an ordinary walking pace, in order to be struck by the car at the tine when the witness heard the crash. The jury was entitled, if it thought proper, to accept the driver's evidence that, though he was keeping a look out, he did not see the deceased cross in front of the car through the beams of the headlights, and to find that the deceased was attempting to cross the road from east to west, but that the driver was not looking out as carefully as his evidence alleged, particularly on his left hand side, and was therefore gulty of relevant negligence. The jury was also entitled to find that the deceased, without looking out properly, stepped off the eastern footpath into the truck of the car and was injured owing to his own carelessness, though the driver also had been careless. Upon this view of the facts there was evidence of contributory negligence and accordingly the principal objection of the plaintiff, in my opinion, fails.

The plaintiff also complains that the learned trial judge should have allowed a second re-opening of the plaintiff's case

in order to allow the plaintiff to call evidence which had been available to the plaintiff at all times. I agree with the Full Court that there is no ground for interfering with the exercise of his discretion by the learned judge upon this matter.

In my opinion the appeal should be dismissed.

MAXWELL V YELLOW CABS OF AUSTRALIA LIMITED.

JUDGMENT. STARKE J.

This is another appeal from the Supreme Court of New South Wales arising out of a motor accident. The plaintiff's husband was knocked down on a public highway by a motor car driven by an employee of the respondant and unhappily killed. The jury found a verdict for the defendant and this verdict was sustained on appeal to the Supreme Court. The main challenge is to the charge of the trial judge to the jury.

The deceased, according to the plaintiff's case, was crossing Princes Highway from the western side to the eastern side which necessarily required that he should travel across in front of the car and through the beam of its light and that the driver of the car did not see him. "On that," said the learned trial judge, "you have been asked to draw this inference, that the deceased must have passed through the beam of light from the headlights of the car, and if he did so and the driver failed to see him, then he must have been guilty of negligence in failing to keep a proper look-out and that caused the accident". No objection is taken to that portion of the direction. But the respondent insisted that the jury might reasonably infer from the evidence that the deceased was crossing the highway from the eastern to the western side. On this the learned judge observed that in addition to the defendant's contention that there was no negligence on the part of the driver of the car it was suggested that in the circumstances of the case it was possible and proper to draw an inference that if there was any negligence on the part of the car driver the deceased man himself was guilty of contributory negligence. "The evidence on which that depends," said the learned judge, "seems to me to be this, first of all it is said that the driver did not see the pedestrian at all, therefore it is suggested it is proper to infer that the defendant did not come across the road from west to east, otherwise he would have been seen as he

crossed through the beam of light. He, it is suggested, more probably came from the side of the road on which the car was travelling, that is to say from east to west, and in those circumstances it is suggested the proper inference to be drawn is that the pedestrian coming from the footpath on the side of the road on which the car was travelling stepped off into the path of the car or at least, seeing a car approaching, failed to take reasonable care to avoid any injury to himself. The onus of proving that defence of contributory negligence is on the defendant, and of course it arises only if you think there was some carelessness on the part of the driver of the car."

As I follow the charge, the learned judge dealt first with the case of the deceased crossing from west to east as suggested by the plaintiff. All that the jury were asked to consider on this aspect of the case was whether the driver of the car was guilty of negligence and the jury was not invited to consider any question of contributory negligence in relation to such a crossing. If this be the charge, as I think it clearly was, then the plaintiff has no cause of complaint on the case suggested by her, though the defendant might possibly have complained, though it did not, that there was some evidence of contributory negligence in the deceased crossing the road from west to east with the lights of a moving car in full view. But the learned judge next dealt with the suggestion of a crossing by the deceased from east to west. The jury was also directed to consider the question of negligence in this aspect of the case and if they found negligence on the part of the driver of the car whether the deceased had not been guilty of contributory negligence if he stepped off a footpath on to the highway in front of a fast moving car on the right side of the road with its head lights burning and within a comparatively few feet of the point where he stepped off the footpath.

Such a charge, in the circumstances stated, is not open to objection. It sufficiently explains to the jury what the facts were to which they had to apply their minds and what was the law applicable to those facts. But it was then contended that there was no evidence that the deceased had in fact crossed from east to west. There was only one witness who deposed to the fact that the deceased crossed from west to east and there were circumstances brought out in cross examination which suggested that the witness was mistaken. The circumstances were not strong but the question was for the jury. And if the jury were not satisfied that the deceased crossed from west to east then the inference was open that he crossed from east to west and also the question of contributory negligence on his part arising from the proximity of the motor car explained to the jury by the trial judge.

It was lastly contended that a new trial of the action should be granted because the trial judge refused to reopen the evidence a third time so that the plaintiff's counsel might lead evidence of a passenger in the motor car which was within their knowledge from the beginning of the trial but which they did not call. The plaintiff must abide by the action of her counsel, however unfortunate and mistaken may have been the course which they pursued.

The appeal should be dismissed.

But it will be allowed by a majority of this Court, which means by three judges, against the opinion of six other judges, four in the Supreme Court and two in this Court. The result is unfortunate. Confidence in the administration of justice is not enhanced. Litigation becomes but a game of chance, though a very expensive one to litigants.

The trouble in these accident cases is in this Court which enters all too frequently upon microscopic examinations of the facts of cases disposed of, or which should be regarded

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JUDGMENT DIXON J.

M A X W E L L

v

Y E L L O W C A B S O F A U S T R A L I A L T D.

This is an appeal from an order of the Full Court dismiss-ing a motion for a new trial after a verdict for the defendant. The action was brought under Lord Campbell's Act by a widow for compensation for the death of her husband. He died from injuries received through being run down by a taxi cab of the defendants. The place of the accident was upon the Princes Highway were it runs through Rockdale. The time was shortly after seven o'clock in the evening of 19th.

August 1938. The night was overcast and some rain had fallen earlier , perhaps a couple of hours before, but the road was drying. A street lamp hung over the road about eighteen to twenty yards north from the probable point of impact. The taxi cab, a 1936 Plymouth car, was travelling South on the left hand side of the highway, a bitumen road fortytwo feet wide from Kerb to kerb. The deceased was crossing on foot. The car hit him, apparently with some force. The left hand head lamp of the car was broken off. Bystanders who heard the noise hurried across and found the deceased lying across the Eastern gutter and the head lamp rolling some ten feet further South . The car drew up some thirty or

forty yards further on and the driver came back to the scene of the accident. The place where the deceased was crossing lay upon a route which he might be expected to follow when going on foot between his house, which was to the East, and the railway station, which was to the West, of the highway. A witness was called who said that just before hearing the sound of the collision he saw the deceased, who was a stranger to him, leave the Western kerb to cross the road from West to East. The taxi driver was called for the plaintiff and said that he was keeping a proper look out but that he did not see the deceased and that he pulled up because he heard a bump and felt that he had come in contact with something, which he thought might possibly be a dog

and that otherwise he "did not know a thing about it." He said that he was following another car which was thirty feet or so in front of him and that his own car travelled about ten feet from the left hand or Eastern kerb.

The learned judge in his charge to the jury directed them that to find for the plaintiff they must be satisfied that the defendant's driver failed in the exercise of due care and that his negligence brought about the accident. He left the plaintiff's case to the jury as one confined to negligence on the part of the driver in failing to keep a proper look out. He said that her case depended on the evidence that the deceased crossed the road from West to East and was struck by the left

side of the car so that he must have passed through or across the beam of the head lights, and upon the evidence of the driver that he had not seen the deceased at all. The learned judge then presented the defendant's case to the jury as depending on two things, viz. first a de-nial of negligence supported by the driver's evidence that he was keeping a proper look out and following another car, and secondly upon a contention that contributory negligence on the part of the deceased should be inferred. His Honour explained this as follows:- " A "pedestrian, of course, is bound himself to take reasonable care " for his own safety. If a car driver is guilty of negligence " but notwithstanding that negligence a pedestrian by exercising

" reasonable care to look after himself could avoid the result
" of the defendant's negligence and fails to do so then he is
" guilty of what is called contributory negligence , and if
" in such a case the real cause of the accident is the negligence
" of the pedestrian himself he cannot recover, he is really the
" author of his own injuries. The evidence on which that
" depends seems to me to be this, first of all it is said that
" the driver did not see the pedestrian at all, thereforeit is
" suggested it is proper to infer that the pedestrian did not
" come across the road from West to East, otherwise he would
" have been seen as he crossed through the beam of light. He,
" it is suggested, more probably came from the side of the road
" on which the car was travelling, that is to say from East to
" West, and in those circumstances it is suggested the proper
"inference to be drawn is that the pedestrian coming from the
" foot path from the side of the road on which the car was trav-
" elling stepped off into the path of the car or at least seeing
" a car approaching failed to take reasonable care to avoid any

" injury to himself . The onus of proving that defence of
" contributory negligence is on the defendant, and of course
" it arises only if you think there was some carelessness on the
" part of the driver of the car. "

It will be seen that, though the summing up authorized the jury to find negligence against the defendants on one ground only, namely, that the jury might find that the deceased crossed in front of the car from West to East so that he ought to have been seen, yet, when they came to contributory negligence, they were invited to adopted the inconsistent conclusion that he came from East to West. It was explained, correctly enough, that the question in contributory negligence was whether the plaintiff might, by the exercise of due care,

have avoided the consequence of the plaintiff's negligence. But under the direction such a question could only arise upon the assumption that the jury did find that the deceased crossed from West to East within the field of the head lights and this assumption is inconsistent with the contributory negligence left to them. At the trial neither counsel pointed out this error, at all events specifically. The plaintiff's counsel said; "Even if he was coming from the Western side there might " have been contributory negligence in running across the road " or not stopping." ; to which the Learned Judge replied, " I think I have covered that." In so thinking His Honour was mistaken unless he meant that it was covered by the effect of his direction on causation, namely, that if the jury found xx

a failure on the part of the driver to keep a proper look out, the nesessity still remained for them to be satisfied that it caused the accident.

The plaintiff's counsel submitted that there was no evidence of contributory negligence. To this submission His Honour said, " Only in the way I put it I think. If the " driver was keeping a look out and he did not see him it seems " to me an inference is open that the man came from the " left hand side." Counsel then submitted that there was no evidence that the deceased went otherwise than from West to East and there was no evidence of contributory negligence on his part.

In my opinion these contentions are correct. There

is the very positive evidence of the independent witness who said that the deceased left the Western kerb as the witness gained it, and against that there is nothing which would, as it appears to me, give a foundation for a finding that the deceased from East to West. The suggestion that on the driver's evidence it might be concluded that the deceased had not crossed in front of the car is too speculative. There are so many reasons why a driver who supposed that he was watchful might yet fail to see a pedestrian dressed in dark clothes, that it would not be reasonable for the jury, not merely to refuse to give positive effect to the very clear and definite evidence that the deceased did cross from West to East but to

go further and find affirmatively that he crossed from East to West. On any hypothesis, some part of the deceased's person must have struck the left hand head light from the front.

More generally, I am unable to see no evidence of contributory negligence. Contributory negligence has no meaning unless the defendant has been negligent and his negligence formed a cause of the accident. "Contibutory negligence arises when "there has been a breach of duty on the defendant's part, not "where ex hypothesi there has been none. It rests upon the "view that though the defendant has in fact been negligent, yet "the plaintiff by his own carelessness severed the causal "connection between the defendant's negligence and the accident "which has occurred; and that the defendant's negligence "accordingly is not the true proximate cause of the injury."

per Bowen L.J., Thomas v. Quartermaine 1887 18 Q.B.D. 685 at 697

We are not concerned here with the correctness of Lord Bowen's rationale for the rule, viz. that the causal connexion is severed; but it is clear, as he says, that contibutory negligence supposes initial negligence on the part of the defendant. It follows that the contributory negligence alleged must be considered in relation to the initial negligence found or assumed. The burden of proof of the plaintiff's contributory negligence lies on the defendant and without evidence the issue cannot be submitted to the jury. Here there is evidence of initial negligence because the driver who ran the deceased down says that he did not see him from beginning to end. But as to the deceased's

conduct nothing is known, except that he set out to cross the road from the West. Once it is found that the driver's failure to see the deceased was negligent and formed a cause of the accident, there is nothing amounting to affirmative proof of any contributory negligence on the part of the deceased.

It would have been quite legitimate to put before the jury the possibility of the deceased's having done some rash or incautious act as a reasonable hypothesis or explanation of the accident which ought to make them hesitate or decline to find affirmatively that any omission of the driver caused the accident. For instance there could be no objection

to suggesting as something that ought to be taken into account on the question whether initial negligence was established as a cause of the accident the possibility of the deceased's having attempted to pass between the defendant's taxi and the car said to be thirty feet ahead of it. But it is a different thing to assume a finding that a cause of the accident was in fact the negligence of the driver and then to invite the jury to consider whether another cause was not affirmatively shown, namely some some negligent act or omission of the deceased. There is in my opinion no evidence of any circumstances justifying an affirmative inference that the deceased was guilty of any negligent act or

omission or that it was the cause of the accident and the assumption that the driver's negligence was a cause goes some way to make such a conclusion or hypothesis less probable.

The law requires the assumption that juries arrive at verdicts under and pursuant to the directions received from the Court and not on arbitrary principles. In a case of the present description, where a pedestrian is run down and killed by a driver who says that he did not see him and there is no eye witness, the decision arrived at is largely determined by the approach to the problem and I do not think that the submission to the jury of the issue of contributory negligence can be regarded as unimportant. It cannot be known on which of the

two grounds the jury's verdict was based; no negligence causing the accident, or contributory negligence. The verdict, therefo cannot stand. In my opinion there should be a new trial.

Judgment Evatt J.

This is an appeal from the decision of the Full Court of the Supreme Court of New South Wales which affirmed a ruling of the learned trial Judge in an action brought under the Compensation to Relatives Act that the jury was entitled to find that the deceased had been guilty of contributory negligence.

At the trial Owen J. held that there was evidence from which it might be inferred that the death of the pedestrian was caused through the negligence of the driver of the defendant company's taxi cab. But the learned Judge also directed the jury that there was evidence on which the jury might base a finding of contributory negligence on the part of the pedestrian. The jury found a general verdict for the defendant. As such verdict might have been founded upon a finding of contributory negligence, the verdict cannot stand unless this Court affirms the ruling in point of law that there was some evidence of contributory negligence.

At the trial, there was evidence tending to establish the following facts:-

1. That, as a result of a collision between the pedestrian and the head lamp on the left hand side of the taxi-cab, the former was thrown or fell against a power pole situated on the eastern kerb of Princes Highway, and thereby received fatal injuries.

2. That, when found immediately after the accident, the body of the deceased was partly on the footpath, and partly lying across the gutter.

3. That the driver of the taxi-cab sounded no warning prior to the accident.

4. That although the cab hit the deceased with sufficient force to dislodge a head-lamp and smash its glass, and cause a fatal injuries to a man in robust health, the driver of the cab was not even aware of the fact of collision until he pulled up at a considerable distance from the scene of the accident. He

supposed that he had collided with a dog or some other object, and returned to make enquiries.

5. There was circumstantial evidence from which it might reasonably be inferred that the deceased had crossed over Princes Highway from West to East. It was also contended by the defendant that the jury might infer that at the time of the accident, the deceased was crossing the Highway from East to West.

Two distinct questions arise, and they should be considered separately. The first is whether there was evidence before the jury that the taxi-cab driver was negligent, and that such negligence caused the death of the pedestrian. But for the evidence of the taxi driver himself, summarized in No.4 above, no such evidence existed.

But the evidence of the driver filled the gap in the plaintiff's case. This witness was called by the plaintiff "on the blind". As a right, counsel for the defendant was put in the happy position of being able to cross examine and to lead the witness most favourable to his side. One must not be overpowered with surprise to find that the driver readily agreed with the suggestion of counsel for his employer that he was driving carefully, at a moderate speed etc. etc. But the jury were certainly not bound to accept every portion of the evidence of this witness. As Cockburn C.J. said in Richards v. Morgan (4 B. & S. at p.663): "It must be borne in mind that the party calling the witness may do so not only without the intention of abiding by all the witness may say, but with the deliberate intention of calling on the Court or jury to disbelieve so much of the evidence as makes against him".

Accordingly, the jury was quite entitled to infer that the taxi-cab driver, despite his general denials, was so inattentive to his duty to keep a reasonable look out that, although he came into violent collision with the deceased at a point within a step or two of the eastern kerb of the highway, he was quite unaware even of the fact of the fatal collision. The jury was entitled to draw the inference that the driver failed to observe the collision because he was guilty of gross negligence

in failing to keep a proper look out. If such inference was permissible, then the relation of the driver's negligence to the collision was so close in point of time that the jury might reasonably infer that the cause of the collision was such negligence. (Craig v. Glascow Corporation (35 T.L.R. 214)).

The second question is crucial to this appeal. Assuming that the taxi driver was negligent in failing to keep such look-out as was reasonable in the circumstances, was the deceased guilty of any act or omission which materially contributed to the accident?

First of all, it is essential to keep in mind that there is no such thing as contributory negligence in abstracto. It must be possible to state in words what precise act or omission is to be imputed to the deceased. Learned counsel for the respondent had great difficulty in formulating the charge of contributory negligence. At the trial, the only act or omission left to the jury to consider was that the deceased failed to keep a proper look out.

In leaving this issue to the jury, the trial Judge assumed that the question of contributory negligence depended largely, if not entirely, upon the preliminary question whether there was evidence from which the jury might reasonably infer that the deceased had reached the point of collision while crossing Princes Highway from the easterly side thereof. In my opinion, the preliminary question is not material. Whichever was the direction of the pedestrian's progress across the highway, that direction might have been altered by him at any instant. We know that he was killed near the eastern kerb. Upon the assumption that the taxi-driver failed to keep a proper look out (it is only upon that assumption that the issue of contributory negligence arises at all), no reasonable inference as to the movements of the deceased can be made from the driver's evidence that he never saw the deceased at all. For lack of evidence, we are quite unable to say how and under what conditions the deceased came to be at the point of collision at the crucial time. He may have been moving from west to east or from east to west.

He may have been taking all or no precautions for his own safety. He may have displayed error of judgment, either negligently or not. He may have been keeping a reasonable look out or he may not. When struck, he may have been moving or he may not. He may have been in full possession of his faculties, or he may have been overcome with illness or faintness. It is possible that, having taken every reasonable precaution, he slipped or stumbled on the damp road in order to avoid the consequences of the assumed negligence of the driver. In attempting to cross the road at all, he may have acted prudently or carelessly. On all these matters, there is a complete absence of evidence from which a reasonable inference can be made. It follows that, upon the issue of contributory negligence, the case belongs to the Wakelin type. Therefore, the learned Judge should not have allowed the issue of contributory negligence to be submitted to the jury.

We were invited to express an opinion as to the correctness of the decision of the Supreme Court in Dunn v. Railway Commissioners of New South Wales (29 S.R., N.S.W. 24). It is not necessary or desirable to do so. There the Court was of opinion that the well known principle of Wakelin's case (12 App. Cas. 41) should be applied to set aside a verdict for the plaintiff because, it was held, no inference of negligence could be drawn from the facts. The same principle was applied by the Full Court in the very recent case of Hillman v. Carson. Whether the applications of the principle were sound or not, the principle itself is sound; and on occasions, it has to be applied as well to cases where the issue of contributory negligence is raised as to cases where the only issue is the negligence of the defendant.

The appeal should be allowed, and a new trial ordered.

JUDGMENT McTIERNAN J.

I agree that the appeal should be allowed and a new trial ordered on the ground that there was no evidence fit to be left to the jury upon which it could find that the deceased was guilty of contributory negligence. As the jury was directed to consider whether, if it should find the driver of the defendant's taxi guilty of negligence, the deceased was guilty of contributory negligence, and, if it should make that finding, to give a verdict for the defendant, it is now impossible to determine upon what hypothesis the verdict stands. If there is no reasonable support for the hypothesis that the deceased was guilty of contributory negligence, the verdict for the defendant cannot be supported. It is really upon the assumption that the deceased was attempting to cross the road from east to west that the theory that he was guilty of contributory negligence is founded. For it it is said that, if the fact was that the deceased had come from the eastern footpath, the inference could be drawn that he stepped in front of the on-coming taxi car, which, as the fatal accident shows, was running so near that side of the road. It may be that, if this fact was proved, it would provide a reasonable basis for a finding by the jury that the deceased was guilty of a breach of his duty as a pedestrian to take due care for his own safety, and that this breach of duty contributed to the accident. Upon an examination of the whole of the evidence, I cannot find any direct evidence or any evidence from which the fact could be fairly inferred that the deceased was attempting to cross the road from east to west. The theory that the deceased was guilty of contributory negligence, so far as it depends upon the assumption that he left the east footpath before he was run over, must fail. There was, however, evidence, which it was the function of the jury to believe or not, that he came from the west side of

the road. If that were the fact, one can only speculate whether or not the deceased was guilty of any negligent act or omission which contributed to the accident. The onus of proving facts upon which the jury could reasonably find such negligent act or omission was on the defendant. It is not a more probable inference from the evidence that the deceased was negligent than that the defendant's driver was negligent. The evidence does not, in my opinion, establish prima facie any contributory negligence on the part of the deceased. The jury could reasonably find from the evidence that the deceased was coming from the western side of the road and infer that he was crossing in the beam of the headlights of the defendant's car, and that the driver could have seen him if he were keeping a proper look-out. The driver said he did not see the deceased. The jury could reasonably find on the evidence that the driver failed to keep a proper look-out and that the accident resulted from this negligence. The plaintiff was, in my opinion, entitled to have a finding of the jury on this issue, and, if it found in her favour, to be given a verdict without considering the further question whether the deceased was guilty of contributory negligence.