YEO

v.

THE COUNCIL OF THE SHIRE OF RYLSTONE

JUDGMENT
(ORAL)

30 July 1952

DIXON C.J.
MCTIERNAN J.
WILLIAMS J.
WEBB J.
KITTO J.

YEO

v.

THE COUNCIL OF THE SHIRE OF KYLSTONE

DIXON C.J. JUDGMENT (ORAL)

This appeal arises out of an action brought in the District Court at Mudgee for damages for negligence. The jury found a verdict for the defendant. An application was made to the District Court Judge for a new trial. His Honour made an order for a new trial. There was an appeal from his order for a new trial to the Supreme Court, and the Supreme Court set aside that order and in effect confirmed the verdict. From the order of the Supreme Court this appeal is brought as of right. The action was instituted by the appellant who, with his daughter in the vehicle, had been driving his car upon a country road and who met an obstacle in the form of a tree which had been felled by the respondent's workmen, and in his attempts to avoid the tree ran up a bank and hit another tree, thereby considerably damaging his car. The plaintiff brought the action against the Council of the Municipality of the Shire. He put his case first in nuisance and then in negligence. The trial seems to have proceeded on the cause of action in negligence. To the cause of action in negligence the defence was not guilty and contributory negligence. The Judge left the case to the jury substantially as one for an action of negligence with a defence consisting of the denial of negligence and a plea of contributory negligence. The jury found a general verdict. On the new trial motion the learned judge was of opinion, stated in a neutral form, that so far as the verdict might

be attributed to a finding of contributory negligence, that finding ought not to have been made. The verdict being a general verdict, it is clear that if it was possibly attributable to an issue which ought not to have been left to the jury, it could not stand. Upon the appeal from the new trial order objection was taken by the plaintiff that the learned Judge's order for a new trial involved no question of law and therefore no appeal lay. Section 142 of the District Court Act 1912-1936 gives an appeal if either party is aggrieved by the ruling, order, direction or decision of a Judge in point of law or upon the admission or rejection of any evidence. And section 144, which applies to a case where the appeal is brought by notice of motion, contains in sub-section (3) the not unfamiliar provision that at the request of a party the Judge should make a note of a question of law which is raised.

The first question for consideration is whether the decision of the District Court Judge did, in the language of section 142, amount to a ruling, order, direction or decision in point of law by which the party was aggrieved. The plaintiff, in appealing to this Court, has put forward the view that the application for a new trial was based wholly on the contention that the verdict of the jury was against the evidence and the weight of the evidence, and that that does not involve any question of law. His notice of motion for a new trial is consistent, to say the least of it, with that doubt. It is worded in an untechnical way and says that the ground of the intended application is the default of the jury in that the verdict was against the evidence. The District Court Judge, however, in dealing with the application for a new trial appears to me to have made the question whether there was any evidence of contributory negligence fit to be submitted to a jury the basis of his decision. On

four occasions in the course of the report of his judgment he refers to that issue. The references are in different forms. The first of them says that on application for a new trial the applicant asserts that there was no evidence of contributory negligence on which a jury could act and the verdict was one to which no reasonable men should come. Not long after that statement His Honour says that the main question was whether there was evidence of contributory negligence on which a jury could act and that particular points mentioned were the speed of the plaintiff's vehicle and the state of the brakes on the plaintiff's motor car. Having stated more fully the character of these two subsidiary questions, His Honour says "these are the questions I have to decide, whether there is evidence of contributory negligence". Then coming to the two subsidiary issues he says the point is whether there was evidence on which a jury could say he was travelling at an excessive speed - a dangerous speed. Then at the close of his reasons the learned Judge says that, whilst the plaintiff might be disbelieved, it did not appear to him that the evidence could be assumed to speak to the contrary and build up a case of contributory negligence. Having further referred to the description of evidence submitted to the jury of contributory negligence, His Honour then concluded: "Considering the evidence given in the case it seems to me such a verdict would not be reached by reasonable men carrying out the directions given to them". That final conclusion is, of course, consistent with either view. It is expressed in language that might properly be used if the only matter to be considered were the consistency of the verdict or finding with the evidence and the weight of the evidence. But the language is equally proper if the question is whether there is evidence fit to be submitted to a jury. It is always for the Judge to decide whether a party upon whom

the burden of proving an issue fails fails to adduce evidence sufficient to discharge the onus. Such a question is a matter of law. For the insufficiency of evidence to support an issue is a matter of law, upon which the Court must direct the jury. But it is not always a question of law whether evidence which is adduced in support of an issue is not only sufficient to discharge the burden of proof but so conclusively establishes the issue that a finding to the contrary should be set aside. In the present case on the question of contributory negligence it lay upon the defendant to prove the issue. In questions of negligence and contributory negligence it would rarely be possible to say that there was a sufficiency of evidence to support the issue and to carry it to the jury and nevertheless at the same time to say that the evidence was of such a quality as to make an affirmative conclusion on their part unreasonable. In substance the question for the District Court Judge must have been whether there was evidence of contributory negligence. But in any case whatever meaning is attached to the final words quoted from his judgment, it is quite clear that one of the steps by which he reached that final conclusion was to determine that there was no evidence fit to be submitted to the jury of contributory negligence. Such a decision is a matter of law. It was a matter fairly arising before him on the motion for a new trial. Indeed I think it was impossible for him to decide the motion upon any other ground. He did so decide it and in my opinion his decision clearly involved a question of law. The provision, to which I have referred, in sec. 144(3) of the District Court Act does not appear to me to touch the present case. It is enough to say that the question of law arose on the motion for a new trial and was dealt with by His Honour. The fact that he so dealt with it appears in the shorthand notes taken as it is to be assumed with the authority of the Court at the time and the provisions are therefore sufficiently satisfied. But the decisions show that the taking

of a note is not a condition precedent to the right of appeal, although the omission to request that a note be taken if there be none, may affect the exercise of the discretion of the appellate Court. On appeal to the Supreme Court their Honours decided that there was a sufficiency of evidence to justify the submission to the jury of the issue of contributory negligence. I agree in their Honours' decision. The situation appearing from the evidence can be shortly stated. The plaintiff was proceeding from Rylstone along a road which was not properly formed into a formed road going towards Kandos. He drove up a hill which perhaps was not a very steep hill, but he drove at some speed. It had a gravel surface. When he got to the top of the hill, 70 yards away there was visible to him a tree, which had been felled by the Shire Council's employees, lying across the road. He says that he put on his brakes, his car skidded, it skidded to the left, and he went up a bank and he skidded further until he hit a tree. The damage to the car was made the subject of the action. The measurement of the skid marks show that he had skidded in all 115 feet. The 115 feet was the full distance from the point where the skid marks first showed to the point at which he hit the standing tree. He actually left the road at a point 79 feet from the place where the skid marks were first seen and, after climbing the bank, which was not a particularly high one, the skid marks were shown as another 36feet. The evidence is not very distinct as to the distance between the standing tree which he actually hit and the felled tree which was 70 yards below the course of the hill. But there is some evidence that it was 60 feet. At all events a policeman, who measured the distance, said that the skid marks commenced 9 or 10 feet from the top of the hill. In the course of proving his damages the plaintiff put in a full account of the repairs done to the car and from that account it appeared that his brakes had received some attention and there was evidence that the linings of the brakes were worn

and that there was some oil in the linings of the brakes. On the other hand there was evidence that his brakes had received attention some three weeks before the accident. Whatever view might have been taken of primary negligence on the part of the defendant, it was, in my opinion, open to the jury, upon these facts, to say that the plaintiff was travelling at an excessive speed and also to say that his brakes were not in proper order, and that the fact that the car skidded and climbed the bank was to some degree attributable to his brakes not being uniform and in good order. It is a question entirely as to what was open to the jury as a reasonable conclusion from the circumstances stated. The plaintiff himself told the policeman that he was travelling from 30 to 35 miles per hour and in evidence he stated that he was travelling from 30 to 40 miles per hour but not more than 40, as he came over the top of the hill. In all the circumstances it was, in my opinion, open to the jury to say that he was travelling at a much higher speed than that and to form the conclusion that to do so was in the circumstances negligent on his part and exhibited a want of care for the safety of himself and his car. In those circumstances I am of opinion that the appeal from the judgment of the Supreme Court should be dismissed.

MCTIERNAN J.

I agree. I shall only add this. I think that the manner in which the learned trial judge stated his reasons for granting a new trial, left some room for the contentions, which Mr. May made, as to whether there was a point of law upon which the appeal could be founded. But upon the whole of his Honour's reasons, I am of opinion that the trial Judge did decide clearly enough that there was no evidence of contributory negligence. That, of

course, is a question of law and therefore an appeal lay under sec. 144 of the District Courts Act.

WILLIAMS J.

I agree. I have nothing to add.

WEBB J.

I agree.

KITTO J.

I agree.

The appeal will be dismissed with costs.