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SUPREME COURT OF VICTORIA — FULL COURT

HARPER v ADAMS

Gowans, Gillard and Lush JJ

14, 15 May, 6 June 1975 — [1976] VicRp 4; [1976] VR 44

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – PERSON IN VEHICLE INJURED – CLAIM FOR DAMAGES FOR INJURIES – DISPUTE AS TO WHO WAS DRIVING THE MOTOR VEHICLE AT THE TIME OF THE COLLISION – TRIAL JUDGE FOUND THAT THE DEFENDANT WAS NOT DRIVING – WHETHER JUDGE IN ERROR – PLAINTIFF AGED 14 YEARS AT TIME OF ACCIDENT – WHETHER DEFENDANT OWED PLAINTIFF A DUTY OF CARE – FINDING BY JUDGE THAT NO DUTY OF CARE OWED – WHETHER JUDGE IN ERROR.

HELD: Appeal dismissed.
1. Gowans J: There were no indisputable circumstances to compel the drawing of the inference that what the defendant had said to the police was the truth. The Judge's inability to rely on the defendant's credibility in respect of other matters did nothing to advance the contention that he should have drawn that inference. There were, however, circumstances militating against the drawing of the inference, and these were of a kind that involved evaluative exercises relative to character and personality.

2. In this situation, a conclusion based upon the circumstances that a particular inference should not be drawn was not capable of displacement. The case where the evaluative exercises related to conformity or otherwise with an objective standard, such as the taking of reasonable care, or the occurrence of an inventive step, fell within a different class and was one where displacement of the conclusion reached was more readily permissible.

3. Lush J: The Judge's finding fell into the category of findings with which an appellate court should not interfere unless convinced that it was wrong. An appellate court cannot reverse a judge's finding of fact unless persuaded that it is wrong. To say that one might or even would have come to a different conclusion one's self was not to be equated to saying that the judge's conclusion was wrong.

4. In the present case the Judge's conclusion was not wrong. Indeed, so far as the matter could be judged on the record, the conclusion that it was not proved that the defendant was driving was the proper conclusion and in the circumstances the conclusion would be accepted that the plaintiff probably was driving.

5. The Judge was correct in his view that negligence on the part of the defendant in relation to the last part of the journey was not proved.

GOWANS J: I have read the reasons for judgment by Lush J, and I agree that the conclusion reached by the learned trial Judge as to whether the defendant was driving the car should not be upset. I have, however, reached that position by an approach which appears to me to be somewhat different from that expressed in those reasons, although ultimately by the use of the same tests.

The critical decision reached by the trial Judge was that he was not satisfied by the evidence that the defendant was the driver. The contention for the appellant is that he ought to have been so satisfied by way of inference from established facts. The facts relied on as established were in the first instance certain physical features attendant on the actual crash — the falling of the defendant from the car at or near the collision with the first tree and his being splashed with acid from the battery located in its static position on the driver's side of the engine; and the absence of any wound in the defendant and the presence of such a wound in the plaintiff, and the finding of a piece of skin on the edge of a broken pillar on the front passenger side of the car. The remaining established fact was the defendant's statement to the police sergeant on the day after the accident that he was driving the car when it ran off the road.

I agree that the physical circumstances relied on could not of themselves compel an inference that the defendant was the driver and that they could not even provide a foundation for such an inference in view of the speculation involved in determining the behaviour of the car in the course of the crash.

The fact of the defendant having told the police that he was the driver would found an inference that that was indeed what had happened. But whether that inference should be drawn in any particular case would depend upon an evaluation of the character, interests and motives of the person making the statement, and in particular a finding as to whether it was against interest or self-serving. Unless the circumstances compelled the inference that the defendant was telling the truth when he told the police sergeant he was driving the car, the learned Judge was entitled to refrain from drawing that inference on the basis of a finding that the statement was merely self-serving.

It was permissible in weighing the considerations pointing to or away from self-interest in the defendant in making the statement to have regard to other statements to the contrary made by him on other occasions which attracted the like considerations, and to make an assessment as to them. It was also permissible to have regard to statements made by the plaintiff which could be interpreted as admissions against interest and draw an inference from them.

There were no indisputable circumstances to compel the drawing of the inference that what the defendant had said to the police was the truth. The Judge's inability to rely on the defendant's credibility in respect of other matters does nothing to advance the contention that he should have drawn that inference. There were, however, circumstances militating against the drawing of the inference, and these were of a kind that involved evaluative exercises relative to character and personality.

In this situation, a conclusion based upon the circumstances that a particular inference should not be drawn is not capable of displacement. The case where the evaluative exercises relate to conformity or otherwise with an objective standard, such as the taking of reasonable care, or the occurrence of an inventive step, falls within a different class and is one where displacement of the conclusion reached is more readily permissible.

For these reasons I think that the Judge's refusal to be satisfied that the defendant was the driver cannot be disturbed on the grounds numbered 1 to 5 set out in the notice of appeal.

The remaining grounds relate to what is put forward as an alternative basis of claim. In my opinion, it was not open to the trial Judge to consider it, and a wrong determination of a claim which was not before the Court to determine cannot be made the basis of appeal against a decision on a claim which was properly before it.

The claim that the plaintiff was the driver of the car and that the defendant was negligent in relation to that situation and that that negligence caused the accident and the injuries to the plaintiff finds no part in the statement of claim endorsed on the writ, and the statement of claim was never amended to include such a claim. The allegation in the reply that if the plaintiff were driving the car (a fact which was specifically denied) the defendant negligently directed and controlled him in the driving, and thereby caused the motor car to run off the road, cannot be treated as equivalent to an allegation that the plaintiff was in fact driving the car and that the defendant was negligent in letting him do so; and it could not be treated as the commencement of an action based on a cause of action resting on the latter basis. As a matter of formal procedure the claim in question was not before the Court.

To treat the claim as made during the course of the hearing was to treat the statement of claim as amended to raise this cause of action four and a half years after the issue of the writ, a period outside s5(6) of the *Limitation of Actions Act* 1958, without any determination under s23(1)(c) that the period was extended, and to treat the amendment as having been effected without formal order and without reserving to the defendant the right to make amendments in the defence as he might wish to do to raise pleas relating to the limitation of actions, contributory negligence, *volenti non fit injuria* or illegality.

Putting aside the difficulties which would be presented to this Court by accepting such a foundation for the appeal, I would think it proper for this Court to treat the learned trial Judge's treatment of the matter as done without advertence to the state of the pleadings in the action and *per incuriam*.

There is no injustice done to the appellant in rejecting a wrongful determination (if such be the case) of an issue not involved in the trial as a ground for setting aside a correct determination of an issue rightly involved in the trial. For these reasons I think that the appeal should be dismissed without consideration of the correctness of the trial Judge's observations on this alternative matter.

GILLARD J: I have had the privilege of reading the reasons for judgment prepared by Gowans and Lush JJ, and I agree with the conclusions reached by them. It appears to me that ultimately, on the presentation of the appellant's case, there emerged three points for consideration by this Court.

First, it was argued that the correct inference to draw from the whole of the evidence was that the defendant was at the material time the driver of the motor car. There was no direct evidence that the defendant was the driver, but various alleged admissions made by him were said to establish that matter. On the other hand, the defendant denied on oath that he was the driver. The problem facing the learned trial Judge was how was he to treat the alleged admissions having regard to all the circumstances. He closely analysed the reasons and motives for various statements made by the defendant. From his questioning of the witnesses, particularly the plaintiff's mother, the learned trial Judge was patently oppressed by the fact that the defendant by denying he was the driver, lost the benefit of an insurance indemnity for the total loss of his motor car, and at the same time, denied his friend the opportunity of recovering compensation from his insurers for the injuries suffered by his friend. It did appear that if the defendant had stuck to the version of the facts as he informed the police, both he and the plaintiff would have benefited. In evidence, the defendant informed the learned trial Judge that the reason he altered the version that he had given to the police was that he had decided to tell the truth, and the truth was that the plaintiff was at the material time the driver of the motor car. Whilst the learned Judge, who had the benefit of seeing the witnesses, was critical of the defendant's oath, nevertheless, it became clear in all the circumstances that there was a motive for the defendant having told an untrue statement to the police and his subsequent alteration of that version. In the end, as I read his Honour's judgment, he was not satisfied that the defendant was the driver of the motor car. Having anxiously read the transcript of evidence myself, and without having had the benefit of having seen and heard the various witnesses, I would have reached the same conclusion, merely on the written record.

Counsel for the plaintiff strongly relied on certain physical signs which were present at the scene of the accident and which as he alleged, were consequences of the accident. It is unnecessary to elaborate the various points made since they are dealt with in the other judgments. It is sufficient for me to say that without any assistance of testimony from experts, if any were available, the submissions made were simply based on speculation. It would have been mere guesswork to assume from the physical conditions referred to, that on the balance of probabilities, the plaintiff was a passenger. To my mind, no such inference could be drawn. Furthermore, the presence of such signs, when added to the evidence of statements made by the defendant could not justify a finding that the plaintiff was the passenger at the material time and that the defendant was the driver.

In the alternative, it was argued on behalf of the plaintiff that even if he were driving the car, then the defendant, as owner of the car and seated beside him, owed a duty of care to the plaintiff, which duty had been breached. So far as this aspect of the appeal is concerned, in my opinion, it was not raised in the statement of claim. In order to raise it, an amendment of the pleading was required. No application was made either to the primary Judge or to this Court for leave to amend. It is unnecessary to speculate what in the circumstances would have been the fate of any such application. In my view, on the case as it is pleaded at present, it was not open to the plaintiff to make such a case for damages. Accordingly, I find it unnecessary to determine whether a duty of care could and did exist and, if it did exist, whether it had been broken.

I concur in the conclusion that this appeal should be dismissed.

LUSH J: This is an appeal from judgment for the defendant given by Crockett J in a witness action tried without a jury. The claim made was for damages for personal injury sustained in a highway accident in which a motor car ran off the road and in succession struck a guide post and two trees. It was made on behalf of an infant aged 14½ at the time of the accident. The primary allegation was that the defendant, aged 19 and the only other occupant of the car, was driving at the time of the accident and that the accident occurred as a result of his negligent driving. The defendant pleaded, *inter alia*, that the car was driven by the plaintiff and he himself was a passenger and that the plaintiff's negligence in driving caused the accident. The statement of claim was not amended in response to these pleas, but the reply as it was delivered and as it stood unamended at the time of trial included the following paragraphs:—

> "1. SAVE for the admissions contained therein the plaintiff joins issue.
>
> "2. HE specifically denies that he was driving the said motor car as alleged in paragraph 3 thereof.
>
> "3. IF he were driving the said motor car (which is specifically denied) he was to the defendant's knowledge only fourteen years of age and unable and insufficiently experienced to drive competently a motor vehicle and whilst he was so driving he was under the control and direction of the defendant in the driving, management and control of the said motor vehicle.
>
> "4. FURTHER if he were driving the said motor car (which is specifically denied) the defendant—
>
> (a) knowing the age of the plaintiff as aforesaid supplied the plaintiff with two cans of beer with the evening meal about 6:30 p.m. and saw the plaintiff consume same.
>
> (b) went to Flowerdale Hotel to procure more beer about 7:30 p.m. and supplied two cans of beer thereof to the plaintiff and encouraged him to drink them and they were so drunk by the plaintiff in his presence.
>
> (c) notwithstanding the consumption of such beer by the plaintiff about 9.30 p.m., permitted the plaintiff to drive the said motor car owned or in the possession of the defendant.
>
> "5. FURTHER if he were so driving the said motor car (which is specifically denied) the defendant so negligently directed and controlled him in the driving of the same that as a result of such negligent directions or control the defendant caused the said motor car to run off the road and collide with the said trees.
>
> "6. By reason of the matters alleged in paragraphs 3, 4 and 5 hereof the plaintiff did not appreciate the risk involved."

The evidence of the events leading up to the accident given on the plaintiff's behalf and substantially accepted by the trial Judge was that the defendant had during January 1970 been working on the farm of the plaintiff's parents about two miles west of Yea. The plaintiff was at the farm on school holidays. The plaintiff's family and the defendant's family were on friendly terms. The plaintiff's parents owned a house near Melbourne which was their principal place of residence. The plaintiff's mother was, up to 15 January, at the farm with them. At about 4 p.m. on 15 January she left the farm to go to Melbourne, after an admonition to the plaintiff not to use the tractor in the absence of a named older man then apparently working on the farm, not to go shooting and not to light fires.

Very soon afterwards the boys went shooting. The defendant had a car, an Austin 1800, which was a valued possession. The plaintiff drove this car across country, within the boundaries of the farm, to the area where they wanted to shoot and back again. Thereafter, the car made five trips away from the farm. First, the defendant alone drove to Yea to buy six cans of beer. Second, both boys went to Flowerdale, 19 miles away to get six more cans of beer. The plaintiff drove for about the last five miles of the homeward journey. Third, they drove to Yea to see if a snack bar was open. Fourth, they drove again to Yea and bought another six cans. Five of these were in the refrigerator at the farm the next day. The plaintiff appears to have drunk altogether about 3½ cans of beer and the defendant about 9. Fifth, they went out for the sole purpose of driving the car and drove along the Goulburn Valley Highway towards Seymour. By this time it was about 9.30, and of course dark. The defendant drove outward. The plaintiff says that the speed and manner of the driving frightened him and he asked if he could drive. The defendant refused. However, the defendant turned the car round to face in the return direction. This was the

last pre-accident event the plaintiff remembered. The defendant said that at the time of turning the car he told the plaintiff that he, the plaintiff, could drive it back to the farm and they then changed places. They were about 4-5 miles from the farm when the car turned. On the return journey after covering about two miles the car failed to negotiate a curve where the road changed direction to the left, and ran off the right hand side of the road, hitting the guide post and the two trees already mentioned. In the first tree at a height of about 3 feet were found pieces of a rear vision mirror, which apparently had been mounted on the right front mudguard ahead of the windscreen pillar on that side. There was also an abrasion in the bark of that tree some distance higher. The learned Judge found that the defendant had been thrown out of the car after this impact (a finding accepted by counsel for the appellant) and considered that the inference was that he had not been thrown out of the driving seat door which at relevant times would have been in contact with or passing very close to the tree (an inference which counsel for the appellant submitted we should reject). The car came to rest after striking the second tree. The evidence, including photographs, suggests that the car was moving bottom first when it struck this tree and in the end was wrapped around the tree lying on the driving side with the tree against its chassis and underparts, and bent around the tree in a manner which can be called semi-circular. The learned Judge found that the plaintiff was thrown out at this stage, a finding again accepted by counsel for the appellant. He was found lying 10 to 12 feet from the car and to the south of it. If the car had been on its wheels and headed in the direction of movement at the time of the final impact this would have been on the driver's side. The plaintiff was severely injured. The defendant was practically unhurt.

In the evidence outlined above there is material on which the learned Judge, preferring as he did the plaintiff's evidence to that of the defendant, could have found for the plaintiff. The evidence that the car was the defendant's, that he had been driving it up to the time when the plaintiff's memory ended, and had just before that time refused to Act the plaintiff drive, and that the point at which the refusal had been made and at which the plaintiff's memory ended was only about 2 miles from the scene of the accident, would, if accepted in its entirety, have supported a finding that the defendant was driving at the time of the accident. The learned Judge however found that the probable truth was that the plaintiff was driving, and that in any case the plaintiff had not discharged the burden of proving that the defendant was the driver. His decision was based on events which occurred after the accident.

The plaintiff gave evidence that he was conscious after the accident and that he heard the defendant calling. He answered: "I'm over here" and the defendant came to him from what he described as "behind" the car, which seems only to mean that he came from the far side of the wreck. The plaintiff said: "What happened?". The defendant said: "We hit a white post" and then said: "Tell the police I was driving the car. Don't mention anything about the beer".

Mr Opas who appeared with Mr Frederico for the appellant argued that there was in this no admission by the plaintiff that he was driving, but this misses the point of the evidence, which seems to have been led without objection as part of the *res gestae*, namely that the giving of the instruction was consistent rather with the plaintiff having been the driver than with the defendant having been the driver. There would have been no point in giving the first part of the instruction if the defendant had in fact been the driver—it is not plausible to suggest that the plaintiff was being advised not to assert his right to abstain from making any statement to the police.

Soon afterwards a neighbour, named Drysdale, who had heard sounds of the crash, arrived on the scene. The defendant was able to walk after the accident, and in fact had hailed a car from the side of the road and asked the occupants to go to Yea to get help. On returning from this activity, he apparently lay down on the ground near the plaintiff, and was in that position when Drysdale arrived. The defendant asked Drysdale if he could have a look at the car, a matter about which he was insistent. Drysdale shone a torch on the car allowing the defendant to see the extent of the damage. The defendant then said: "Who was driving the car?", and the plaintiff replied "You were". The defendant then said "My God, what have I done now?".

The next morning the defendant was interviewed by a police officer, said he was the driver of the car at the time of the accident, gave an account of the accident which referred to hitting a guide post and a tree, and said that he had had only one small can of beer to drink.

By this time the plaintiff was in the Austin Hospital desperately ill. The defendant's father knew this when he went to see his son at Yea later on that day. The son then told the father that he had not been driving the car at the time of the accident and also told him that he had told the police differently. On the following day, 17 January, conversations occurred in Melbourne between the plaintiff's parents and the defendant and his father in which, as the learned Judge found, the two latter offered assistance in presenting a case which would give the plaintiff recourse against the defendant's third party insurer, i.e. a case based upon the proposition that the defendant was driving at the time of the accident, but the discussion proceeded on the basis that the defendant was maintaining that the truth was that the plaintiff was driving. The defendant has always since maintained this, although there have been variations in his accounts of the accident. He swore to it when prosecuted at Yea for a driving offence arising out of the accident.

On 17 January, the plaintiff, when in a low and probably drugged condition at the hospital, was asked by his mother whether he was driving the car, and replied "I could have been, Mum." All the evidence summarized relating to the conversations on the day following the accident and later was admitted without objection, and most of it was introduced by counsel for the plaintiff.

On the basis of the two conversations immediately following the accident and the conversations of the next few days the learned Judge made his finding, which has already been referred to, on the issue whether the defendant was driving. He set out his reasons at some length in two passages. They may be summarized as follows:—

The various conversations other than the defendant's statement to the police were "only explicable as a matter of probability upon the basis that the defendant was in fact a passenger". When the defendant realized that his car was wrecked, he thought for insurance purposes he and not the plaintiff should appear as the driver. Hence his instruction to the plaintiff, the conversation with Drysdale being in the nature of a test to see if the plaintiff was going to obey the instruction. The change in the story after the police interview was the result of an appreciation of the fact that the plaintiff was seriously injured and of a desire to avoid the guilt (in all senses) of being thought responsible. The learned Judge thought it unlikely that the defendant would have changed his story if he had in fact been the driver and still more unlikely that he would have adhered to the story up to the trial. Once the plaintiff's survival was assured, all the defendant risked was a conviction for careless driving: against this he would have been able to make an insurance claim for the car and he would have seen the plaintiff compensated. The discussions regarding the plaintiff's claim on the 3rd party insurer were only consistent, the learned Judge said, with the defendant having been the passenger at the time of the accident. His Honour referred to this in terms of objective fact, not in terms that the defendant wished to assert that he was the passenger.

Mr Opas argued that once the learned Judge came to regard the defendant's evidence as untrustworthy, there was no direct evidence showing who was at the wheel of the car at the time of the accident and that accordingly that issue had to be decided by inference from other relevant evidence found by the learned Judge to be truthful. He argued that the learned Judge having found the primary facts relating to the events leading up to the accident and relating to the subsequent conversations, the appellate court was in as good a position as the trial court to decide what the proper inference or inferences were, and it should do so. These, he submitted, should not be those which the learned Judge drew, and accordingly the judgment below should be set aside. He referred to *Benmax v Austin Motor Co Ltd* [1955] AC 370, at pp372-3; [1955] 1 All ER 326; (1955) 72 RPC 39; (1955) 2 WLR 418, and *Wheat v Lacon* [1966] UKHL 1; [1966] 1 QB 335; [1966] AC 552 at p568; [1965] 2 All ER 700; [1965] 3 WLR 142. In both of these cases the truthfulness of the witnesses was no doubt relevant to the establishment of the primary facts, but thereafter matters of demeanour and personality of witnesses ceased to bear upon the ultimate matters to be decided – in the first case, whether an invention claimed involved an inventive step, and in the second, what were the final events preceding a death by falling on a staircase, and whether the absence of lights and the form of a hand rail could in the circumstances found a finding of negligence against the occupier. In *Edwards v Noble* [1971] HCA 54; (1971) 125 CLR 296; [1972] ALR 385; (1971) 45 ALJR 682, a case in which the trial judge had made a finding of no negligence on the part of the defendant which was reversed by the Full Court of the Supreme Court of South Australia and which was eventually restored on appeal to the High Court, Barwick CJ, at CLR p304 said:

> "In any appeal against a finding of fact, whether or not by way of re-hearing, however much the appellate court may be in an equal position with the trial judge as to the drawing of inferences, in my opinion, the appellate court ought not to reverse the finding of fact unless it is convinced that it is wrong. If that finding is a view reasonably open on the evidence, it is not enough in my opinion to warrant its reversal that the appellate court would not have been prepared on that evidence to make the same finding. Merely differing views do not establish that either view is wrong. But in deciding that its own view is right and that of the primary judge is wrong, the nature of the 'fact' found by the primary judge is a matter for consideration. Many of the 'facts' within the province of the jury involve elements of judgment, some evaluative aspects akin to an exercise of discretion. Perhaps the 'fact' of negligence or no negligence is of this kind. Others of such facts are mere inferences from other facts or combinations of facts, though even in that case there is an element of judgment in the decision to draw or not to draw an inference or to prefer one where more than one inference is reasonably open."

Windeyer J expressed his opinion in narrower terms at CLR pp312-313:

> "A judge in an appeal court ought not, except in very special circumstances, to substitute for the conclusion of the trial judge his own view of what a hypothetical reasonable man would or would not have done. And that is what is involved in a reversal of a finding of negligence, or no negligence, when the facts of the occurrence are not in doubt. I do not suggest that there can never be a case in which an appeal court can properly be convinced that a trial judge was wrong in his evaluation of conduct in terms of fault, or of degree of fault. But that, I consider, is not so merely because members of the appeal court entertain a different opinion of the character of a man's conduct, in terms of reasonableness, from that which the trial judge formed. It is only so, I think, if the reasons that he gave for his conclusion show that he had in some way misdirected himself in law, or has altogether overlooked or mistaken some relevant fact."

Menzies J, who dissented, formulated the following test at CLR p309:

> "Although in some cases greater refinement may be necessary, it is sufficient in most cases for a court of appeal to inquire whether, despite the advantages of the trial judge, his judgment was in error. That is the test I propose to apply here."

Two years later, in *Imperial Chemical Industries of Australia and New Zealand Ltd v Murphy* (1973) 47 ALJR 122, Menzies J, in a negligence case said at p128:

> "The real question is whether it was shown that he (the trial judge) was in error."

The answer to the question who was driving the car in the present case did not involve an evaluation in the sense in which the word is used in the passages quoted from the judgments of Barwick CJ and Windeyer J above. It may therefore be desirable to turn to the earlier decision of *Paterson v Paterson* [1953] HCA 74; (1953) 89 CLR 212; [1953] ALR 1095. In a joint judgment Dixon CJ and Kitto J, reviewed the authorities on the manner in which appellate courts should deal with appeals from the decision of a trial judge on questions of fact. This judgment demonstrates that the courts of the United Kingdom and of this country had consistently stated that before a court of appeal upsets a finding based on credibility it should be convinced that the primary judge was wrong and should not in such a case merely consider probabilities based on written material; that it should not interfere in a case involving an assessment of witnesses unless it is satisfied that the trial judge did not take proper advantage of having seen and heard the witnesses; and that except in those cases in which the conclusion is one capable of being dealt with wholly by argument, the Court of Appeal should hesitate to interfere. And as Windeyer J said in *Da Costa v Cockburn Salvage and Trading Pty Ltd* [1970] HCA 43; (1970) 124 CLR 192, at pp209-10; [1970] HCA 43; [1971] ALR 97, at p109; 44 ALJR 455, in relation to the proposition that an appellate court was in as good a position as the trial judge to come to conclusions which were no more than inferences from established facts:

> "but this doctrine ought not, I consider, to be taken by judges in courts of appeal as a grant of an uninhibited liberty to review all conclusions of ultimate fact of a judge of the first instance. An appeal court is, it is said, in the circumstances envisaged in as good a position to evaluate the evidence as the trial judge. This does not necessarily mean that its members are in a better position to do so than he was."

Mr Opas's argument fails for two reasons. In the first place the learned Judge's decision did not involve merely an intellectual analysis of the facts before him. Having heard the evidence of the various conversations from the time of the accident onwards, the process of using these to

resolve the central problem of fact involved an appreciation of the character and personality of the participants, particularly those of the defendant. The only person who knew who was driving the car was the defendant. His father might have been convinced by what the defendant told him, and almost certainly was, but he did not know. The judge's task involved deciding whether these conversations were based on an underlying truth that the defendant was not the driver or, in the case of the conversations on 16 January and later, on a false but in some quarters persuasive assertion that he was not. An appreciation of the defendant's character and personality was an essential part of the equipment for this task and this is made clear by the fact that although in other respects and for good reason the judge regarded the defendant as untrustworthy, he was finally persuaded that the probability was that the statement made by the defendant to his father on the morning after the accident, self-serving in some respects though it was, represented the truth. That the defendant's personality was important to the decision is illustrated by the sentence: "I cannot bring myself to believe that the defendant would have wrongly persisted in a story that he was the passenger and the plaintiff was the driver so as to prevent the plaintiff from being able to recover from the defendant's Third Party Insurance Company a substantial sum of damages." Further, the learned Judge set out an appreciation of the motives influencing the defendant. The external influences from which these motives sprang may perhaps be classed as objective facts, but an appreciation of the effect of those influences on a particular person must involve an understanding of that person's character and personality.

The learned Judge's finding therefore falls into the category of findings with which an appellate court should not interfere unless convinced that it is wrong.

In the second place, however it may be expressed, an appellate court cannot reverse a judge's finding of fact unless persuaded that it is wrong. This is the point of the passage quoted from *Da Costa v Cockburn Salvage and Trading Pty Ltd*, *supra*. As has been said repeatedly, to say that one might or even would have come to a different conclusion one's self is not to be equated to saying that the judge's conclusion is wrong.

In the present case I am not persuaded that the learned Judge's conclusion was wrong. Indeed, so far as the matter can be judged on the record, I think that the conclusion that it was not proved that the defendant was driving was the proper conclusion and in the circumstances I would accept the conclusion that the plaintiff probably was driving. The matter is not made easier by the doubtful admissibility of some of the evidence but once this had been admitted without objection the parties and the Judge were at liberty to use it, and the plaintiff, whose counsel tendered the greater part of the doubtful evidence, cannot complain of the result.

It was argued both below and on appeal that certain physical features of the accident and the plaintiff's injuries and the defendant's lack of injuries threw light on the question who was driving. The learned Judge rejected these arguments, holding that it was impossible to draw any inferences from the matters raised. I agree with this, and do not find it necessary to discuss these matters further.

Mr Opas argued in the alternative that if the plaintiff was himself the driver of the car the defendant was nevertheless liable for damages for injuries upon the ground, briefly stated, that the situation of the two boys was such that the older was under a duty to take care for the safety of the younger, and that it was a breach of that duty to permit him to drive in the circumstances existing at the time when he may have been said to have taken the wheel and to fail to exercise control over the manner of his driving.

The only sign of this cause of action in the pleadings is to be found in the paragraphs of the reply quoted above. These can be better understood when it is stated that in the original defence par. 3 alleged that the plaintiff was the driver, par. 4 denied the plaintiff's allegations of negligence and alleged that the accident was caused by the plaintiff's negligence as driver, par. 5 put forward, on the assumption that the defendant was the driver a plea of volenti, based on the consumption of drink by the defendant and the plaintiff's knowledge of that fact, (the word "risk" is used twice in this paragraph), par. 6 pleaded the existence in the circumstances of a "reduced duty of care" and denied breach of such a duty, and par. 7 alleged contributory negligence based on the plaintiff's knowledge that the defendant had been drinking.

The master gave the defendant leave to amend the Defence by omitting the original pars. 5, 6 and 7. This was done and in fact the original pars. 8 (injuries not admitted) and 9 (damages denied) were renumbered as 5 and 6. Leave was also given to the plaintiff to make consequential amendments to the reply but none were made.

The allegations in pars. 3, 4 and 5 of the reply are not happily assembled, and even less happily made by par. 6 to serve some purpose related to the abandoned defence of *volenti*. The only specific allegation of negligence in these paragraphs is an allegation of negligence in the defendant's direction and control of the plaintiff's driving, a narrower allegation than that advanced in Mr Opas's alternative argument summarized above.

The alternative argument does not appear to have taken the defence by surprise at the trial, and no complaint was made at the trial that it should not be considered. The defendant was, without objection, asked questions in cross-examination designed to obtain from him his opinion of his responsibility towards the plaintiff, but apart from this it seems, from what we have been told during the appeal, that the matter was probably not substantially referred to until the last address in the trial, that of the plaintiff's counsel.

The absence of any objection from the defence at the trial does not alter the fact that the pleadings are unsatisfactory. The statement of claim should have included or should have been amended to include allegations on which the alternative cause of action could be based. Counsel for the defendant would then have had to consider different questions in relation to contributory negligence from those which had originally been considered, and possibly a question of illegality might have arisen. A plea of *volenti* in a different form from that actually taken might have been open, but on the appeal counsel for the defence indicated that they would not wish to press such a defence against this cause of action. In support of his alternative case, Mr Opas cited to us a number of authorities.

Samson v Aitchison [1912] AC 844; [1911-13] All ER Rep Ext 1195 and *Pratt v Patrick* [1924] 1 KB 488; [1923] All ER 512 are cases in which the owner of a vehicle, riding in the vehicle when it was being driven by another, was regarded as the master of that other and, in the sense relevant to a master and servant relationship, in control of that other. *Chowdhary v Gillot* [1947] 2 All ER 541 deals with a comparable situation.

On the other hand, in *Fettke v Bogovic* [1964] SASR 119, it was held that a police constable conducting a licence test was not in control of the driver so as to be vicariously liable for the driver's negligence.

Ashton v Transport and General Insurance Co Ltd [1971] Qd R 296; *Behrendorff v Soblusky* [1957] HCA 84; (1957) 98 CLR 619 and *Soblusky v Egan* [1960] HCA 9; (1960) 103 CLR 215; [1960] ALR 310; were all concerned with different aspects of vehicle insurance, the two latter cases dealing with the fiction of employment of the driver by the owner created by compulsory insurance legislation in New South Wales. *Rubie v Faulkner* [1940] 1 KB 571; [1940] 1 All ER 285, was a case in which the owner of the vehicle was held to aid and abet a driving offence committed by a learner driver.

None of these cases is concerned with the problem whether, at common law, the owner may be under a duty to take care to prevent the driver harming himself and may thus be liable to the driver for damages for injuries sustained by the driver as a result of his own negligence or incompetence.

Mr Opas then cited to us two cases in which it was held that a person who was regarded as in a special need of protection was entitled to recover damages for negligence from a defendant who, in the circumstances, was regarded as under a duty to supply that protection but had failed to do so. They were *Jordan House Ltd v Menow* [1974] SCR 239; (1974) 38 DLR (3d) 105 and *Yachuk v Oliver Blais Co Ltd* [1949] AC 386; [1949] 2 All ER 150. In the first of these cases it was held that the licensee of a hotel who had turned a drunken customer out into the street, where he was injured by a passing car, was liable for breach of a duty of care owed to the customer. The duty arose from the relative positions of the parties. In the second case it was held that a garage proprietor, who supplied petrol to two boys aged nine and seven, who burnt themselves with it

in playing a game, was liable to the boys for negligence. The judgment of the Judicial Committee on the question is short and does not analyse the origins in the facts of the duty. The age of the plaintiffs seems to have been regarded as sufficient in itself to give rise to the duty.

Apart from these cases, the New Zealand case *McCallion v Dodd* [1966] NZLR 710 was decided on the basis that a parent owed a duty of care to a young child to prevent that child from coming to harm on the road on which he was walking with the parent.

The High Court has recently dealt with a similar problem in *Hahn v Conley* [1971] HCA 56; (1971) 126 CLR 276; [1972] ALR 247; 45 ALJR 631. In that case the High Court was divided in opinion, on the facts, as to whether a grandfather owed such a duty to his granddaughter. The granddaughter, seeking her grandfather, reached a point at the side of a road opposite to the place where her grandfather was, and was injured by a car while crossing the road to him. The driver's claim against the grandfather for contribution failed, but a majority of the court held that a duty existed in the circumstances.

This case establishes that a duty of care for the purpose of the law of negligence can arise from a factual situation in which one person is in some measure responsible for another. It also shows that the decision whether, in a given situation, such a duty exists may involve subjective elements, at any rate in the present state of the authorities dealing with this kind of case. Such a duty, it is to be expected, will only be held to arise if there is some inequality between the persons involved, so that the situation is one in which one would be regarded as responsible for the other's safety, and not one in which they would be regarded as equals, each responsible for himself. The inequality might be in point of age, knowledge, authority, sobriety or other matters. Menzies J, (dissenting) in *Hahn's Case* at CLR p289 said that the grandfather's "awareness of the likelihood of the child crossing the road did require him to do something for her protection". Barwick CJ at CLR p286 said:

> "But in my opinion neither the realisation that she was intending to come to him nor that if she did so she might come to harm imposed a legal duty on the grandfather to go to her for breach of which the child could successfully sue the grandfather in tort for the whole of her injuries."

Windeyer J at CLR p294 considered that a duty existed but that the case was not one in which the existence of a duty and the breach of it needed to be considered separately.

The present case also is one in which separate consideration of the aspects of duty and breach is not rewarding because the same considerations enter into both elements. However, if the question is asked, did the situation when the plaintiff took the wheel call for some protective action or restraint on the part of the defendant, the argument put by the plaintiff is that his age, his inexperience and the fact that he had had some drink placed the defendant, who as owner of the car had the right to control its use, under a duty either to refuse to allow him to drive or to keep a very close eye on him when driving. I do not include, as a factor, knowledge on the part of the defendant that the plaintiff intended to indulge in speeding, because, although the learned Judge thought that the plaintiff might have been a more willing participant in the last journey than he had admitted, it would require substantial rejection of the plaintiff's evidence to find that that was the plaintiff's intention and that the defendant knew it.

To decide whether there was a failure in care by the defendant, the same factors must be considered — the plaintiff's age, his inexperience and his drinking. The learned judge dealt with this branch of the case by assuming a duty and directing his mind to the question of negligence, holding that the defendant was not negligent. The attack made on this finding is that it does not advert to the fact that the defendant, aged 14½, had had 3½ cans of beer to drink. This is true, although it is clear that the learned Judge could by no means have forgotten or over-looked the fact, but there is no evidence from the plaintiff or anyone else to indicate the effect of the drink on the plaintiff at the time of the accident or at the time, a few minutes earlier, when he took the wheel of the car. The beer had been drunk over a period of some 3 hours, a period which included a fair amount of activity and a meal and which was followed by a session in front of the television set. There is no evidence from which it could be found that the plaintiff was affected by liquor or that the defendant knew that he was, at the time of the accident. It is highly probable that the defendant himself was, and no doubt this would have dulled his perceptions of the condition of

the other boy, and he cannot excuse himself by reliance upon his own insobriety. Nevertheless there is no evidence that the plaintiff was affected.

The Judge's finding that the plaintiff was a competent driver, or at least that the plaintiff had every reason to believe that he was a competent driver was fully justified. The defendant had handled the Austin car, had on that very night driven it on the highway, had driven trucks, a utility and a tractor around the farm, and the defendant appears to have known all these things. The deficiency in the plaintiff's education as a driver was that he had had no experience of high speed highway driving, or, as would seem to follow, of driving at relatively fast speeds, but this was not known to the defendant.

It was also said that the defendant should have exercised closer supervision over the plaintiff's handling of the car, in two respects, first that he should have instructed him to drive slowly and secondly, that he should have interfered with the controls so as to recover control of the car himself immediately before the crash. There is no evidence to suggest that the plaintiff was driving the car at any unusual speed. In fact the only evidence is that the car was being driven at about 50 m.p.h., which could not be considered a high speed on a country highway. The argument that the defendant should have seized the steering wheel or the handbrake or disengaged the gears by knocking the gear level does not seem to be an argument on which a finding of negligence could be made, still less a finding of negligence causing the accident.

The argument at the trial seems to have covered a wider area of the relationship between the plaintiff and the defendant than the reply, the suggestion being that the defendant had been left in general charge of the plaintiff and was in general responsible for him. The plaintiff's mother did not say so, nor did the plaintiff, and attempts made to persuade the defendant to acknowledge his responsibility in cross-examination were quite rationally met without an assumption of any legal duty by the defendant's answers. The learned Judge appeared to think that the defendant was generally responsible for the plaintiff under the circumstances, but it is difficult to accept this finding in the light of the fact that the house in which the two boys were to spend the night together was the plaintiff's home, and that the defendant, although a friend, was at the time also an employee. That the defendant did a number of things which on any view he should not have done does not warrant the finding that he was under some general legal responsibility for the plaintiff.

In the result, I think that the Judge was correct in his view that negligence on the part of the defendant in relation to the last part of the final journey was not proved.

I would therefore uphold the learned Judge's rejection of this cause of action. I have dealt with it in this judgment because it might be thought undesirable that the plaintiff and his family should feel that their case had failed without being considered because of some deficiency in the documents placed on the Court file. In my opinion, however, the plaintiff was not entitled to have judgment in the Court below based on this cause of action, and is not entitled to appeal to this Court in relation to it. Appeal dismissed.

Solicitors for the appellant: C A Curtain and Sons.
Solicitors for the respondent: Peter Barker, Harty and Co.
