Privy Council Appeal No. 80 *of* 1931.

Eric George Benson - - - - - - - *Appellant*

v.

Kwong Chong - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH JUNE, 1932.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BLANESBURGH.
LORD MERRIVALE.
LORD RUSSELL OF KILLOWEN.
SIR GEORGE LOWNDES.

[*Delivered by* LORD BLANESBURGH.]

This is an appeal from a judgment of the Court of Appeal of New Zealand of the 12th September, 1930, directing the Supreme Court of the Dominion to enter judgment for the defendant—the present respondent—notwithstanding that the findings of the jury at the trial of the action pointed directly to a judgment for the plaintiff, the present appellant. The question to be determined by their Lordships really is whether the Court of Appeal in so directing judgment did not usurp the function of the Jury—the final arbiters of the facts in controversy between the parties.

The action was brought by the plaintiff to recover damages for personal injuries resulting to him from a collision between a motor-cycle ridden by himself and a motor-car belonging to the defendant and driven by his son and servant, Dickson Fore by name. The plaintiff, as a result of the collision, sustained injuries from which he will probably never entirely recover.

The Jury assessed his damages at £1,134 6*s*. 8*d*., and to the Board it was not suggested that that assessment, although it represented the plaintiff's final claim, was in any way excessive. The only question on this head discussed before their Lordships was whether the defendant ought to be held liable for any damages at all.

The action has had a most unfortunate history. It has been tried three times in New Zealand—before Chief Justice Myers in May, 1929, and before Mr. Justice Reed in February and again in May, 1930, on all three occasions with a Jury. At the first trial the Jury were unable to agree on one major issue and were discharged by the learned Chief Justice. At the second trial the Jury's verdict for the plaintiff was, on the motion of the defendant, set aside by Reed J., and a new trial ordered.

After the third trial, on findings not open to the objection taken to those of the second Jury, motions for judgment made both by the plaintiff and defendant were referred by the learned Judge to the Court of Appeal, with the result already stated. From the opinions then expressed it appears that while judgment for the plaintiff was, in the view of the Court, out of the question, the learned Judges, but for the fact that the action had already been tried before three juries, would have ordered a new trial only. To so much the defendant was entitled for the reason that, in their judgment, the findings of the Jury were against the weight of the evidence. But deeming it possible, on what were termed by Reed J. the then undisputed facts of the case, to reach the conclusion that no verdict for the plaintiff by any subsequent Jury could be other than perverse, the Court directed that judgment should at once be entered for the defendant. Their Lordships do not doubt that the learned Judges of the Court of Appeal would themselves be foremost to recognise that a course so drastic must indeed be well warranted if it is to be justified. And the plaintiff, permitted to appeal to their Lordships' Board *in forma pauperis* pursuant to an order of His Majesty in Council of the 5th of March, 1931, challenges *in toto* its permissibility in the circumstances of the present case. His submission is that when the issues of fact in dispute at the trial between him and the defendant have been fully appreciated—and in his view they were not so appreciated by the Court of Appeal—he is, on the findings of the third Jury, entitled, as a matter of right, to judgment in his favour. It will be agreed that the essential importance of the question thus put in issue cannot be gainsaid.

The case is one in which an accurate picture of the *locus in quo* is very helpful to a full appreciation of the real contest, and their Lordships have been much aided by a plan prepared by Mr. Annabel, a civil engineer called by the defendant. Reproduction of that plan here is not practicable, but with its assistance an endeavour will now be made to describe the *locale* in words precise enough for the purposes of this judgment.

The collision took place in Seddon Street, Wanganui, in the morning of the 4th April, 1929. Seddon Street, in its relevant section, may be described as a thoroughfare running from Barrack Street, Wanganui, in the West, to Aramoho, in the East. In its course it meets in that section a street called Spiers Street, which, coming from the North, joins Seddon Street at right angles. From the West to the point of junction, Seddon Street is straight for a quarter of a mile. It is bounded on the South by a railway line. Between the railway fence and the metalled road there is a grass verge 19 ft. 6 in. in width, then follows the metalled road, 16 ft. in width, then a further grass verge of 4 ft. 9 in., then a gutter 2 ft. 3 in. wide, then a footpath of 7 ft., making a total width from fence to fence, South to North, of 49 ft.

It will be noticed that the metalled way is only 16 ft. wide out of this total width of 49 ft. between fences, and that its centre line is almost equidistant from each fence. Possibly, therefore, it is not always easy to say, viewing it from some distance, whether a vehicle is on its proper side of the way or not. Nor does it expressly appear from the evidence that the traffic along Seddon Street is always confined to the metalled centre; and there is certainly no physical difficulty in the way of its extending at times to the southern grass verge. The plaintiff in the course of his evidence said that on previous occasions he had when on his cycle been pushed off the road on to the grass there by Dickson Fore, driving the defendant's car.

In Spiers Street, measuring its breadth from West to East, the footpath to the West is 10 ft. 9 in. in width, then comes a gutter of 1 ft. 6 in., then a verge of grass 7 ft. 6 in., then the metalled road of 11 ft., then a grass verge of 8 ft., then a channel 1 ft., than a footpath 11 ft., making a total width from fence to fence, West to East, of 50 ft. Seddon Street is the main street. It appears, relatively to Spiers Street, to be a principal thoroughfare. According to Mr. Justice Reed, it has a considerable traffic.

At the South end of Spiers Street, near the point of junction, there is, or was, at the time of collision, a triangular patch of grass in the middle of the metalled track, with still further to the South in a direct line and beyond the junction of the two streets a larger patch of scattered grass. For a vehicle coming down Spiers Street for the purpose of crossing and finally proceeding West along Seddon Street towards Barrack Street there were then physically two routes of choice. The first, to keep the triangular patch on the left and cross diagonally into Seddon Street—"cutting the corner," as it has been described in the case; the second to continue across Seddon Street, passing these two patches on the West, then turning sharp to the right along Seddon Street, on its South or left side, the rule of the road in that respect being in New Zealand the same as in England.

As will be seen presently, the second of these two routes was the regulated route for the plaintiff, and one of the contested questions at the trial, and possibly, when seen in its true perspective, the determining fact in the case, was whether the plaintiff, coming down Spiers Street, found his way to the place of collision in Seddon Street by the one route or by the other.

On the morning in question, on his way to his work, the plaintiff reached the point of junction of the two streets at about 6.40 o'clock. At the same time the defendant's car was approaching from the West and was then apparently about 60 ft. distant from the West side of Spiers Street. To vehicles so situated certain regulations or rules of the road, having the force of statute, are applicable, and it will be convenient to paraphrase at once such of these as are now relevant.

First, it was the duty of the plaintiff thereunder, when approaching the turning into Seddon Street, after signalling his intention, to maintain his position to his left of the centre line of Spiers Street until he had passed the centre line of Seddon Street and then turn into that street as directly and quickly as he could with safety.

Secondly, it thereby became his duty to give way to the defendant's motor-car and allow the same to pass before him and, if necessary, for that purpose to stop his motor-cycle.

On the other hand, it was the duty of Dickson Fore, the defendant's son, to keep his car to the left of the centre line of the road-formation of Seddon Street, and, approaching the intersection of the two streets, to do so at a speed not exceeding 15 miles an hour.

Again, there were matters personal to the plaintiff and to Dickson Fore, to which reference may also at this point conveniently be made.

The plaintiff at the time of the accident was a motor driver employed by the Wanganui City Council. He had been in the Council's service for three years and a-quarter. He had had ten years' previous experience in travelling and in garages. His home was in Ballance Street, to the North of and parallel with Seddon Street. He passed the scene of the collision on his cycle, normally, twice every day on which he went to work. It was not suggested that any complaints of his driving had ever before been made by anyone.

As to Dickson Fore, he at the time of the accident was only 14½ years old. He was born, as he himself said, on the 2nd August, 1914. In 1928, when he may have been under and could not have been much over 14, he obtained a driver's licence by representing that he was then 16. In cross-examination at the trial he admitted that he had been in trouble over speeding before, he had been told that he drove too fast, although he had neither been fined nor involved in an accident. Hicks, one of the witnesses first on the scene after the collision, said that Dickson Fore, in answer to a question, told him that the collision

was his fault; he was driving too fast. In view of Fore's very qualified denial at the trial, the Jury were well entitled if they were so minded to accept Hicks' evidence on this point, especially as he had never seen the plaintiff Benson before the accident, and was apparently quite independent. Their Lordships say no more with reference to these matters than this, that, as the result of a criticism which ignores them entirely, it is a serious responsibility indeed to treat as actually perverse a Jury's verdict for the plaintiff.

The case made in evidence by the plaintiff was that, coming down Spiers Street, he approached the corner in low gear and at a speed of seven miles an hour; that he blew a whistle which he carried on his wrist, and looked, as was his invariable rule, in both directions of Seddon Street—West and East; that, seeing the defendant's car approaching from the West—on its wrong side, as he thought, of the metalled way, and at a speed of 40–45 m.p.h.—he conceived that he had time to cross in front of it, and, not cutting the corner, but proceeding straight on, he had in fact crossed to his near side of Seddon Street close to the verge, and was actually heading West along that Street when the defendant's motor-car, slanting from the northern side of the metalled way, struck the back wheel of his cycle on its right or off-side with its own off front wheel. The plaintiff knew of the give-way regulation, but he sought to excuse himself for proceeding by the suggestion that the vehicle nearest the junction was in practice treated as entitled to go on. His evidence was emphatic to the effect that, had the defendant's car kept straight ahead, there was plenty of room for it to pass behind his cycle. Had it kept its course on its correct side of the street there could have been no accident at all.

Dickson Fore's story was that he approached the intersection of the two roads on his correct side of the road, and at a speed of 25 miles an hour only; that when he was about 14 or 15 yards off he saw the plaintiff on his cycle come round the corner of Spiers Street on his wrong side, *i.e.*, cutting the corner; that, in order to avoid a collision, he began to swerve to his right, but as he did so the plaintiff swerved to his left and struck the motor-car on its left side where the battery was—struck it on its left wheel, another witness, Willetts, said.

Fore said in cross-examination—

> "I put the brakes on when I saw Benson. I did not keep them on. I put them on quickly and let them go again, and let the car go on to avoid Benson, as he was on the wrong side. I accelerated as soon as I took my foot off the brake to give him room to pass me."

Their Lordships cannot help noticing, as they pass, how serious, for the defendant, is this statement, if the conclusion is once reached that Benson did not in fact cut the corner at all; if it be found that he was not then on his wrong side in any sense of these words.

By the close of the evidence two things had become common ground. The first was, that after the collision the defendant's car, proceeding on its slanting course eastward, crossed the grass verge next the railway, knocked down a post thereon, and ended in the wire fence. And the second was as to the place of collision. This, within the limits of a foot or so, was, it seems, agreed. The collision took place in Seddon Street close to the grass strip adjoining the railway, 9 ft. or more to the west of the line of the western kerb of Spiers Street. It did not remain in dispute that the defendant's car was then very much on its wrong side of the road. On the other hand, it seems to have been ultimately conceded that it had, initially, been travelling on its right side.

Other things emerged in evidence fit for the consideration of the Jury.

The first was as to the plaintiff's cycle tracks remaining visible, as it was said, on the road. Dickson Fore and the Police Constable Willetts, the only other witness of fact for the defendant, and to whom further reference must later be made, said that they traced these tracks as they "cut the corner." The plaintiff's brother, on the other hand, examining the road, it is true, in the afternoon, found tracks corresponding with those both of the cycle and the car, which, for the cycle, followed the course stated by the plaintiff.

It was clearly for the Jury to say, even if they accepted the evidence for the defence, whether the tracks deposed to were necessarily those of the plaintiff's cycle on this occasion, or whether indeed they were the tracks of that cycle at all. And the jury's conclusion on this matter may well have been influenced by the view they took of two other things with reference to which there was striking evidence. Dickson Fore's statement was—and, if true, it was consistent with his story—that the plaintiff as the result of the collision was thrown off his cycle in the middle of Seddon Street and lay there; and Willetts said that, on his arrival twenty minutes later, and apparently for all the time he remained there, the cycle itself was lying in the centre of this street "of considerable traffic," as Mr. Justice Reed described it. But, against all this there was the evidence of three witnesses, living close by, and first on the scene of the collision, one of whom attended the then unconscious plaintiff, that he lay on the grass verge with his feet towards the railway until he was carried to a neighbouring house, and that his cycle, further to the West, lay on the grass with its handles pointing in that direction.

Another most important matter fit for the jury's consideration had reference to the condition, after the collision, of the two vehicles. Did the appearance of the car show that, as Fore asserted, it had been struck violently by the cycle on its left side, or, as the plaintiff said, that its collision with his cycle had been with its right front wheel. Where, again, was the damage done to the cycle? To its back wheel, as would be expected if the plaintiff's story were true; to its front

wheel and face, if Fore's ? Upon these questions the evidence stands thus. The car was badly damaged on its *right* side, but this may have been due to its final collision with the post and is accordingly, so far, only a neutral fact. But there was no damage at all done to the left-hand side of the car. This was admitted by Fore ; and a witness Martin, who took the car away to repair it within two hours of the event, said in his evidence :—

> " There was no mark on the left side of the car to show that the cycle had struck it there. The only damage on that side was that the battery was dislodged. If the blow had occurred on that side there would have been a mark on the left-hand mudguard."

And, further, as to the cycle, the evidence with reference to its condition was all of it consistent with the plaintiff's story. A motor engineer, Chapman, spoke to this. The witness, it seems, told the Court by means of models how, in his view, the accident happened, but no account of what he said appears on the record. His evidence proceeds :—

> " The cycle appears to have been damaged mostly on the frame. The back wheel appears to have been struck hardest. If the front had been struck it would have been considerably more bent than the frame. . . . The back must have been struck severely and dragged round."

There was no contradiction of this evidence, very fit, surely, for the consideration of the Jury. Fore did not examine the cycle after the accident. Willetts, strangely enough, did not consider it important to make any examination. And he made none.

At the close of the evidence the learned trial Judge asked the Jury a series of questions framed with reference to the evidence which had been given before them. These questions, with the Jury's answers, were as follows :—

1. Was the defendant's driver negligent :
   (*a*) In driving at an excessive speed ?
   Jury's answer : Yes.
   (*b*) In driving on the wrong side of the road ?
   Jury's answer : No.
2. Was the plaintiff negligent :
   (*a*) In cutting the corner of Spiers Street ?
   Jury's answer : No.
   (*b*) In attempting to cross Seddon Street in front of defendant's car ?
   Jury's answer : Yes.
3. If you find that both were negligent, could each up to the last moment have avoided the accident by the exercise of ordinary care ?
   Jury's answer : No.
4. If not, could either of them, and, if so, which ?
   Jury's answer : The defendant's driver could have avoided the accident by the exercise of ordinary care.
5. Assess the damages to the plaintiff irrespective of your answers to the above questions :
   Jury's answer :
   Special damages, £134 6*s*. 6*d*.
   General damages, £1,000.

In the light of the evidence which their Lordships have so elaborately summarised, they can have no doubt as to the meaning of these answers. In the opinion of the Jury, the plaintiff did not cut the corner of Spiers Street, as had been alleged by the defendant. But he was negligent in proceeding to cross Seddon Street even by his correct route in front of the defendant's car. The defendant's driver on the other hand was negligent in driving at an excessive speed, but he was initially on his right side of the road.

Mr. Justice Reed, their Lordships note, is of the opinion that the Jury accepted the plaintiff's story of his own movements in preference to that of Dickson Fore. With this opinion of the learned trial Judge their Lordships are in entire agreement. It is, they think, beyond question, correct. With it in view the answers of the Jury to questions 3 and 4 are not open to misunderstanding. The plaintiff could not up to the last moment have avoided the accident by the exercise of ordinary care, for the reason that, following as he did his correct route, his original negligence had then ceased to operate; he was then on his proper place on the road proceeding West; no action of his could have avoided the collision. The defendant's driver, however, could up to the last moment have avoided the accident by the exercise of ordinary care, either by keeping to his course on his correct side of the road, or even by stopping his car, (as on his own admission apparently he could have done), instead of accelerating his speed, as in fact he did.

In the course of his judgment in the Court of Appeal Herdman J. says this :—

> "Had the Jury found that plaintiff had been guilty of some antecedent negligence that had ceased to operate it would have been open to them to take the view that the plaintiff could not in the circumstances existing have made himself safe and that the defendant ['s servant] could have avoided the catastrophe by taking some precautionary measures."

In their Lordships' judgment, the Jury did so find. They will discuss in a moment the learned Judge's reason for adopting the contrary view.

Was there evidence then fit for the consideration of the Jury and sufficient, if accepted, to justify that conclusion. In their Lordships' judgment, so soon as the Jury found that the plaintiff did not cut the corner, the final result reached by them was on the evidence almost inevitable. The only conflicting circumstance that remained was the statement of Fore that, as a result of the collision, the plaintiff lay unconscious in the middle of Seddon street, with evidence of the policeman that the cycle lay there also for, it would seem, not less than an hour after the collision. But, in face of the evidence for the plaintiff to the contrary, to say nothing of the essential improbability of the evidence as to the cycle, it cannot be doubted that the Jury, if so minded, were well entitled to reject both stories. Thereupon, all else followed : the place of collision ; the absence of all damage

to the left of the car: the angle of the blow to the cycle as deposed to by the plaintiff and the uncontradicted evidence as to the corresponding condition of the cycle.

Was there evidence, then, fit for the consideration of the Jury that the plaintiff did not cut the corner? Mr. Justice Reed, with whose judgment his colleagues were in agreement, concedes that there was:—

> "Had this evidence" [for the defendant] "been accepted by the Jury," he says, "they must have found for the defendant, but they apparently rejected it and in law they were entitled to do so. They accepted the evidence of the plaintiff, and I repeat they were entitled in law to do so."

In the judgment of the Board, there can on this point also be no doubt. Be it remembered that their Lordships are not considering whether they would themselves have accepted the evidence as sufficient. That was the question for the Jury, not for the Court. So much being premised, the analysis of the evidence which they have made inevitably, as their Lordships think, instructs an affirmative answer to the only question which they are entitled to ask themselves.

Their Lordships think it right to add, however, that there is in the Jury's answers no trace of perversity. Indeed, these answers are characterised by a nice discrimination. The Jury rejected the plaintiff's pleas in relation to the give-way rule. They found him to have been initially negligent notwithstanding his excuses. And is there not much to be said for their final conclusion when regard is had to the youth and inexperience as a driver of this boy of 14½, who ought to have had no licence to drive at all, and who was nevertheless entrusted by the defendant with the charge of his car? If the Jury were of opinion that the collision was really due to the youth and inexperience of this boy, unequal to a situation he had himself done so much to create, can it be affirmed that they were necessarily wrong?

How then was it that the Court of Appeal felt themselves justified, notwithstanding the Jury's findings, in directing judgment to be entered for the defendant? The answer, their Lordships think, is to be found in a misapprehension on the learned Judges' part of the Jury's answers.

Mr. Justice Herdman bases his judgment on his interpretation of the answer to question 2 (*b*):—

> "It is a finding," he says, "that an attempt was made by the plaintiff to cross Seddon Street and to cross in front of the defendant's car with knowledge that it was approaching. The attempt to cross was frustrated by the defendant's vehicle, for the evidence proves that the motor-bicycle struck the car on the left side, knocking off a battery box. . . . The answer to issue 2 amounts to a finding of the Jury that the plaintiff was in substance the victim of his own default."

Their Lordships have been at pains to show in advance how completely mistaken the learned Judge is in saying that "the evidence proves that the motor-bicycle struck the car on the left

side." But the really effective criticism of the learned Judge's interpretation of this answer is that it has no regard to the answers returned by the Jury to questions 3 and 4 ; nor has it any sufficient regard to their answer to 2 (*a*). Any difficulty in harmonising these answers, and it is very slight, arises, as their Lordships think, from the use of the word "attempting" in question 2 (*b*). The real issue covered by that question would have been more clearly defined if, in the question, the word "proceeding" had been substituted for the word "attempting." It becomes clear in their answers to the third and fourth questions that it was in essaying to cross Seddon Street that, in the Jury's finding, the negligence of the plaintiff consisted. It is, in the judgment of their Lordships, not doubtful, when regard is had to the evidence led, that the Jury in their answers to questions 3 and 4 were accepting the plaintiff's evidence that at the time of collision he had completely crossed Seddon Street.

The misapprehension under which, as their Lordships think, Mr. Justice Reed laboured is different in kind. He bases his conclusion on a series of what he calls "uncontested facts." In their Lordships' opinion, these so-called facts are not properly so described, but they have thought it more convenient to answer the learned Judge's views by so framing their own analysis of the evidence as therein to disclose the real questions in difference which, as they think, the Jury were required to solve. Only one statement of the learned Judge seems to require an answer in terms. In his view the only negligence on the part of the defendant's servant as found by the Jury was that his car was being driven at an excessive speed. Their Lordships do not agree. The Jury's answer to that effect in 1 (*a*) is an answer in terms of the question. The answer was quite consistent with their answer to questions 3 and 4, that at the latest stage of all—again using the terms of the question—Dickson Fore was, in additional respects, lacking in the exercise of ordinary care.

But Reed J. was of opinion, and the other members of the Court of Appeal agreed with him, that the defendant was entitled to a new trial on the ground that the verdict was against the weight of evidence in that it disregarded the testimony of the Police Constable Willetts, some of whose statements in evidence have already been alluded to.

It is very plain that Reed J.'s own view was that the plaintiff did "cut the corner." But that question of fact was, as he recognises in the passage from his judgment already quoted, a question not for him, but for the Jury, and how it can be said that the Jury were not entirely within their rights in refusing to accept the constable's evidence, if they were minded so to do, their Lordships cannot understand. His evidence, as it appears on the record, shows that he was a witness inaccurate in detail ; in conflict on material points with the defendant's son ; responsible for a statement as to the position of the cycle which, in itself *prima facie* unacceptable, is contradicted by other credible

testimony, and moreover a witness so unintelligent, that busying himself at the time with unimportant details, he thought it unnecessary even to look at the condition of the cycle. If freedom of judgment in relation to the reliability of such a witness is to be denied to jurors, trial by jury has become an outworn survival. It would be more candid that, in civil cases at all events, it should be done away with altogether.

In their Lordships' judgment, accordingly, there is no justification at all for a new trial. In their opinion, the plaintiff-appellant is in accordance with the verdict of the Jury entitled to judgment as a matter of right.

In the view which their Lordships take of the facts and findings, it is unnecessary for them to discuss any of the delicate questions of law so much canvassed in the Court of Appeal and before them.

In the result their Lordships will humbly advise His Majesty that this appeal be allowed; that the judgment of the Court of Appeal of the 12th September, 1930, be discharged, and that the action be remitted to the Supreme Court with a direction to enter judgment for the plaintiff for the sum found by the third Jury, with the costs of the action and of all three trials.

The costs of the application to Mr. Justice Reed for a new trial after the second verdict were reserved. In their Lordships' opinion, there ought to be no costs of that application to either side. The plaintiff is entitled to his costs in the Court of Appeal. So far as the costs of this appeal are concerned, the plaintiff will receive such costs as are allowable to an appellant suing *in forma pauperis*.

In the Privy Council.

ERIC GEORGE BENSON

v.

KWONG CHONG.

DELIVERED BY LORD BLANESBURGH

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