

(New Zealand Law Reports, 1931, page 417.)

[IN THE COURT OF APPEAL.]

C.A.

1930.

Oct. 16, 17, 20;
December 13.MYERS, C.J.
HERDMAN, J.
REED, J.
ADAMS, J.
BLAIR, J.
SMITH, J.
KENNEDY, J.

THE KING v. STOREY.

Criminal Law—Manslaughter—Whether Distinction between Ordinary Negligence and Gross or Criminal Negligence—Test of “Reasonableness”—Contributory Negligence—Whether a Defence to Criminal Proceedings—Right of Judge to submit Issues to Jury—Verdict, Meaning of—Error of Judgment—Novus actus interveniens—Whether Negligence caused Death—Exclusion of Evidence—New Trial—Whether Court of Appeal bound by its previous Decisions—Crimes Act, 1908, ss. 170, 171, 442—Motor-vehicles Act, 1924, s. 27.

Accused was charged on two counts—one for manslaughter, under ss. 170 and 171 of the Crimes Act, 1908, and the other under s. 27 of the Motor-vehicles Act, 1924. He was driving a motor-car behind some other cars, and while on his wrong side and attempting to “cut in” ahead of two other cars he collided slightly with another car coming in the opposite direction and on its right side. The car with which he thus collided, after travelling diagonally some 56 ft. across the road after the impact, fell down a bank, and the driver C. and his wife, who was a passenger, were killed. At the trial the defence was set up that the cause of death was the contributory negligence of the driver C, and evidence which tended to show that the actual cause of death was some factor for which the accused was not responsible was excluded. Two issues were put to the jury—(i) whether the collision was due to the negligence of the accused, and (ii) whether the deaths of the persons killed would have resulted but for such negligence. The jury answered the first issue in the affirmative, but strongly recommended “that the accused be dealt with leniently on the grounds that the accident “was brought about by an error of judgment.” The second issue they answered in the negative. The Judge thereupon directed the jury that their findings amounted to a verdict of “Guilty,” which they returned accordingly.

Sir Michael Myers, the Chief Justice, stated a case for the opinion of the Court of Appeal under s. 442 of the Crimes Act, 1908, which is set out below.

Held, 1. That where a person is charged with manslaughter under the Crimes Act, 1908, and the death of the person killed has been caused by the negligent driving of a motor-vehicle, the degree of negligence sufficient to found the offence is fixed by s. 171 of the Act, which supersedes the common law, and no more than ordinary negligence, as distinct from “gross” or “criminal” negligence, or a breach of a legal duty to take reasonable care, requires to be proved.

2. That the same principles apply to offences causing death or bodily injury under s. 27 of the Motor-vehicles Act, 1924.

R. v. Dawe(1) approved and followed.

R. v. Bateman(2) and *R. v. Gunter*(3) not followed.

(1) [1911] 30 N.Z. L.R. 673; 13 G.L.R. 574.

(2) 19 Cr. App. R. 8.
(3) 21 N.S.W. S.R. 282.

Per *Myers, C.J., Adams and Kennedy, JJ.* : There is no distinction in New Zealand between negligence as the foundation of criminal liability and negligence as the foundation of civil liability. Once it is proved that the accused negligently drove his motor-car, and that death or bodily injury to another person was a consequence of that negligence, then such negligence has caused the death or bodily injury.

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Per *Herdman, J.* : It is sufficient for the Crown to prove a breach of a legal duty to take care.

Per *Reed and Smith, JJ.* : The degree of negligence laid down does not extend to all cases of culpable negligence.

Per *Blair, J.* : The negligence must be the substantial or effective cause of death or bodily injury. The test of liability is cause of death, and not a mere contribution to cause of death. The Crown must establish under s. 171 that the death was the consequence of the breach of duty, and under s. 27 must prove negligence and that such negligence caused death or bodily injury.

3. That contributory negligence on the part of the person killed, whether the accused is charged with manslaughter under the Crimes Act, 1908, or on the part of the person killed or injured where he is charged under s. 27 of the Motor-vehicles Act, 1924, is not a good defence.

R. v. Officer(1) followed.

R. v. Birchall(2) not followed.

4. That in a criminal trial a Judge may submit issues to the jury.

Per *Myers, C.J., and Adams, J.* : The Court has an inherent as well as a statutory right to submit specific questions to the jury, who may be invited, but cannot be compelled, to answer them. Such issues may be put either before or after the general verdict is taken, or submitted with the general verdict, but separately. The jury are entitled to return a general verdict instead of answering the issues.

Per *Herdman, J.* : The Court has a statutory power only. The jury need not answer issues unless it pleases, but must give a general verdict.

Per *Reed and Smith, JJ.* : The Court has both a statutory and an inherent power. The former gives no general power to submit issues, but it is allowable, when asking the jury to find their general verdict, to ask that they separately answer the questions of fact submitted; the latter gives a Judge power to request a jury to answer issues instead of giving a general verdict.

Per *Blair, J.* : The only cases in which a jury may be required to answer questions are under s. 442 of the Crimes Act, 1908.

Per *Kennedy, J.* : The Court has an inherent and a statutory right. The jury cannot refuse to answer issues put under the statute.

5. That the answer of the jury to the first issue in the affirmative, with a recommendation for leniency on the ground that the accident was brought about by an error of judgment, amounted to a verdict of "Guilty."

R. v. Warne(3) followed.

(1) [1922] G.L.R. 175.

(2) [1866] 4 F. & F. 1087.

(3) 3 N.Z. C.A.1.

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6. That a new trial must be granted on the ground that where actual injury was not sustained at the time of the impact, but a few seconds later, evidence of a *novus actus interveniens* was excluded, and, no issue thereon having been put to the jury, all the necessary facts were not, and in the circumstances could not be, put to the jury to enable a general verdict to be found.

R. v. Lawrence(1) followed.

The question whether the Court of Appeal is bound by its own previous decisions was considered.

[Upon the second trial, before MacGregor, J., held at the next sessions, the jury, on the charge of manslaughter, found accused "Not guilty," and on the charge under the Motor-vehicles Act found him "Guilty of negligent driving, but not to the extent of thereby causing the deaths of Norman Cook and Amelia Cook." This latter finding was subsequently, by consent, recorded as one of "Not guilty."]

(1) 25 N.Z. L.R. 129, 142; 7 G.L.R. 559, 566.

CASE stated under s. 442 of the Crimes Act, 1908, for the opinion of the Court of Appeal.

The following is the case stated:—

1. The accused was charged on an indictment containing two counts—

(a) That on the 13th April, 1930, on the Ngahauranga Gorge Road, near Wellington, by an unlawful act—to wit, by negligently driving a motor-car, he did kill Violet Amelia Cook and Norman Webb Cook and did thereby commit the crime of manslaughter.

(b) That on the day and in the month and year aforesaid, on the Ngahauranga Gorge Road aforesaid, he did negligently drive a motor-vehicle—to wit, a motor-car—and did thereby cause the deaths of Violet Amelia Cook and Norman Webb Cook.

The first count was laid under ss. 170 and 171 of the Crimes Act, 1908; the second, under s. 27 of the Motor-vehicles Act, 1924.

2. The casualty happened at a point near the upper of two bends in the Ngahauranga Gorge. The distance between the two bends is but 60 yards. The accused was driving the hindmost of a line or procession of five cars travelling northwards in the direction of Johnsonville, there being very little distance apparently between each two of these five cars. All the cars were proceeding at a speed of from fifteen to eighteen miles per hour or thereabouts; and, when the hindmost car rounded the lower bend, all were well on their correct side of the road. A driver of a car rounding the lower of the two bends is unable to see beyond

the upper bend; nor has he any view of south-bound traffic until he reaches the upper bend or a point very near it, and then only if he is well on his correct side of the road. There was a white line marked substantially on the centre of the road for the purpose of safety and of serving as an indication to drivers to keep on their respective correct sides of the road. Such white line extended continuously from below the lower bend to beyond the upper. After rounding the lower bend the accused, Storey, steered his car out of the line of procession with a view to "cutting in" between two of the cars that were ahead of him—increasing his speed for the purpose, according to his own evidence, to about twenty miles an hour. The result was that his car crossed the white line and continued its journey so that the whole or the greater part of the car was on the wrong side of the white line. The accused found himself unable to cut in between any two of the cars ahead of him, and, as he approached the upper bend, a car coming southwards to Wellington driven by the deceased, Norman Webb Cook, and containing as a passenger his wife, the deceased Violet Amelia Cook, rounded the bend well on its correct side of the road, and a collision happened between that car and the car driven by accused. The impact was but slight, but the result was that the south-bound car, to which the brakes were apparently applied, was deflected and travelled diagonally across the road a distance of some 56 ft. and fell over the side of the road down a bank, with the result that both persons in the car were killed. These are the material facts, but I think it desirable that all the evidence should be before the Court, and it is intended accordingly to attach a copy of the notes of evidence, which may be regarded as forming part of the case.

3. Counsel for the accused at the conclusion of the case for the Crown submitted that there was no case to go to the jury, but I overruled this contention.

Counsel also in cross-examination sought to ask questions with a view—

- (a) To setting up a defence of contributory negligence on the part of the deceased Norman Webb Cook;
- (b) To showing that the braking on the deceased's car was defective in that the brakes acted unevenly, causing a tendency, if the brakes were heavily applied, for the car to swing to the right; and
- (c) To showing that there was a pin loose in the steering-gear of the deceased's car, and that the car was therefore dangerous to drive.

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He also sought to adduce evidence with a view to showing—

- (d) That the terrain at the spot where the deceased's car went over the bank was inclined to be loose, and that this might have contributed to the ultimate result of the accident.

4. The notes of evidence show that some questions were asked in regard to the matters (a), (b), and (c) mentioned in the last preceding paragraph, and that as to (d) I disallowed the proposed questions. It was clear that but for the collision there was no reason whatever—and none was suggested—why, notwithstanding the slight defect in the braking system of his car or the defect in the steering-gear, if such defects or either of them existed, the deceased Norman Webb Cook could not have travelled through the Gorge safely. The same consideration seemed to me to apply to the evidence tendered as to the possible loose condition of the terrain on the spot where the car went over the bank. There was no suggestion that but for the collision the deceased's car would have crossed or required to cross the road. I ruled in effect that if the collision was caused by the negligent driving of the accused, nothing that immediately followed in respect of any of the matters referred to in the last preceding paragraph, nor any contributory negligence (if there was any) on the part of the deceased prior to the collision, would afford a defence to the charges unless it could be shown that there was some entirely new factor which brought about the death of the two deceased and with which the accused had nothing to do.

5. I submitted to the jury the two following issues:—

- (1) Was the collision between the accused's motor-car and the car in which Mr. and Mrs. Cook were driving caused by the negligent driving of the accused?
(2) If so, would the death of Mr. and Mrs. Cook have resulted but for such negligence of the accused?

Counsel for the accused contended that I had no power or right to submit issues to the jury, and that the accused was entitled to, and the jury could only be asked to return, a general verdict of "Guilty" or "Not guilty." This contention I overruled.

6. After an absence of over three hours the jury returned with the following answers to the questions submitted to them:—

"The jury's answer to question No. 1 is in the affirmative, "but strongly recommend that the accused be dealt with leniently "on the ground that the accident was brought about by an error "of judgment.

"The jury's answer to question No. 2 is in the negative."

Counsel for the accused submitted that this was in effect a verdict of "Not guilty." I ruled otherwise, and directed the jury that their findings amounted to a verdict of "Guilty"; and they thereupon found a verdict of "Guilty" accordingly on my direction. I said that I would reserve for the opinion of this honourable Court all the questions hereinbefore mentioned, and I remanded the accused for sentence on his own recognizance of £500 and one surety of a like amount to come up for sentence if and when required as a result of the judgment of this Court.

7. The question for this honourable Court is whether my said various directions and rulings were right.

Cornish and *Foden* for the accused.

The *Solicitor-General* (*A. Fair, K.C.*) and *Evans-Scott* for the Crown.

Cornish :—

The count under s. 27 of the Motor-vehicles Act, 1924, is the same as the count for manslaughter. The submissions are : (i) That evidence tending to show that deceased himself was negligent was wrongly excluded, in that if deceased was himself negligent, and his negligence (*a*) either contributed to or (*b*) was the effective cause of the death, this circumstance was available as a defence to prisoner; (ii) that evidence relating to the nature of the terrain at the spot where the car went over the bank was wrongly excluded, as such evidence might properly be relied on by prisoner to show that deceased's death was the result of misadventure; (iii) that there was no case to go to the jury either (*a*) of criminal negligence on the part of accused, or (*b*) of accused's act or acts having caused the death of deceased. (iv) that there is a distinction in New Zealand between negligence as the foundation of criminal responsibility, and this distinction was not acted upon by the learned Chief Justice or the jury so directed; (v) that the Judge had no power to ask the jury (as he did) to answer issues, and so in effect prevent the jury from returning a verdict of "Guilty" or "Not guilty"; (vi) that if it was competent for the Judge to put issues, then the second issue should have been so framed as to enable the jury to say whether or not the negligence of accused caused the death of deceased, and that the second issue was not so framed; (vii) that the verdict was either (*a*) a verdict of "Not guilty" or

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(b) inconclusive. The causal chain is not continuous. Deceased may have voluntarily gone to the side of the road where his car went over the bank. There was no proof that deceased was compelled from the collision to cross the road to where he went over the bank. Even admitting accused's negligence, it was not of a kind necessarily to endanger human life. It must be admitted that there is evidence of negligence on accused's part. It was not enough for the Crown to prove there was a collision: it must also establish that it was the collision that determined deceased's future course of action. There was no evidence as to what dictated deceased's action after the impact. This case differed from *Morley v. Maw*(1). The cause and effect are not so intimately connected as to justify the case going to the jury. It is admitted that there was sufficient evidence of negligence for a civil claim. The onus is heavier, however, where criminal negligence is charged. In *R. v. Dawe*(2) it was held that the distinction between civil and criminal negligence was abolished in New Zealand. Chapman, J.(3), however, did not concur in this view of the case. If s. 171 of the Crimes Act, 1908, is merely declaratory of the common law and the reasons given in *R. v. Dawe*(2) are *obiter*, then the law is the same here as in England. There must be *mens rea*: *R. v. Bateman*(4). Section 171 expressly preserves *mens rea* as a defence. In criminal law the test of negligence is subjective; in civil proceedings it is objective.

[ADAMS, J.—In criminal law the standard of care is what the jury think to be reasonable care in the circumstances.]

They must consider whether there is such negligence as to be culpable and punishable. Section 171 contemplates that a man who has fallen short of the standard may nevertheless in certain circumstances be excused. The verdict was a special verdict until the Judge directed the jury that it amounted to one of "Guilty." The special verdict did not contain the ingredients necessary to constitute a verdict of "Guilty." That the subjective test of negligence exists in England, see *Harvard Law Review*(5). In *Bateman's case*(4) a distinction was made between error of judgment and negligence: *R. v. Gunter*(6); *R. v. Newell*(7); *Tinline v. White Cross Insurance Association, Ltd.*(8);

(1) [1922] G.L.R. 61.

(2) 30 N.Z. L.R. 673; 13 G.L.R. 574.

(3) 30 N.Z. L.R. 688; 13 G.L.R. 580.

(4) 19 Cr. App. R. 8.

(5) Vol. 12, p. 428.

(6) 21 N.S.W. S.R. 282.

(7) 27 N.S.W. S.R. 274.

(8) [1921] 3 K.B. 327, 331.

Moore v. R.(1). As to the effect of the deceased's contributory negligence, if any, see *Law Journal*(2); *R. v. Rose*(3); *R. v. Birchall*(4); *Russell on Crimes*(5), citing *R. v. Bunney*(6). The doctrine that contributory negligence is no defence is not so entrenched in our jurisprudence that it cannot be dislodged. In *R. v. Kew and Jackson*(7) the reason given for saying that contributory negligence is no defence—namely, that the Queen was prosecutrix and could not be guilty of contributory negligence—is very unconvincing. The sanctity of human life as a reason for excluding evidence of contributory negligence is first mentioned in *R. v. Swindall*(8); *R. v. Kew and Jackson*(7); *R. v. Swindall*(8). In *R. v. Officer*(9) there was no suggestion that there was contributory negligence on the part of deceased. The jury, however, it is submitted, acquitted on the ground that they considered the driver of the car in which deceased was riding was negligent. It is suggested it is futile to lay down definite rules which will have no practical regulation on the conduct of juries. The same causation is required on a charge of manslaughter and on a charge under s. 27 of the Motor-vehicles Act, 1924: *Stroud on Mens Rea*(10); *R. v. Walker*(11). *R. v. Birchall*(4) is the only authority directly in favour of accused, although this decision was questioned in *R. v. Jones*(12); but that case is an authority for the proposition that if the negligence of the deceased consists in a direct participation in the act that causes the death the other party will not be liable. There was really no contributory negligence at all in *R. v. Jones*(12). There is no evidence that the act of deceased in driving across the road after the collision was determined by the action of accused. On the question of causation, see *In re Polemis and Furness, Withy, and Co., Ltd.*(13); *Pollock on Torts*(14); *Adams v. Lancashire and Yorkshire Railway Co.*(15); *Siner v. Great Western Railway Co.*(16). In *Adams v. Lancashire and Yorkshire Railway Co.*(17), if the issue had been put to the jury, "If the company had not been negligent would the deceased have been killed?"

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(1) [1926] S.A. L.R. 52, 76.

(2) [Newspaper] Vol. 70, p. 118.

(3) [1928] 20 Cr. App. R. 164, 165.

(4) 4 F. & F. 1087.

(5) 8th ed., Vol. 1, p. 768.

(6) Queensland Digest, 351.

(7) 12 Cox C.C. 355, 356.

(8) 2 C. & K. 230.

(9) [1922] G.L.R. 175.

(10) pp. 138, 139.

(11) [1824] 1 C. & P. 320.

(12) 11 Cox C.C. 544.

(13) [1921] 3 K.B. 560, 577.

(14) 13th ed. 35, 36.

(15) 4 C.P. 739, 743.

(16) 4 Ex. 117, 123, 125.

(17) 4 C.P. 739.

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the jury must have answered in the negative; but such an issue does not cover the whole question.

[SMITH, J.—Does not s. 30 of the Motor-vehicles Act, 1924, indicate that contributory negligence may be a defence?]

It is submitted it does. As to what is a reasonable consequence, see *The City of Lincoln*(1). In *The Flying Fish*(2) it was held that the intervening conduct of the master of the ship exonerated the ship originally responsible for the collision. The present case, it is submitted, is between the last two cases cited. In *R. v. Morby*(3) it was held that it was necessary to prove that the wrongful act caused or accelerated the death, not that it might have done so. As to whether the use of the term "contributory negligence" is not a misnomer, see *Archbold's Criminal Pleading*(4), *Dublin, Wicklow, and Wexford Railway Co. v. Slattery*(5). The onus is on the Crown to prove the negligence and also that it caused the death: *R. v. Waters*(6); *Elliott Steam Tug Co. v. John Payne and Co.*(7); *Davis v. Garrett*(8); *Beven on Negligence*(9); *Sneesby v. Lancashire and Yorkshire Railway Co.*(10). It is submitted the above cases show what may be regarded as a consequence of an act, and what not.

[MYERS, C.J.—Is not your strongest point the refusal to admit evidence that may have shown that the death was not the consequence of the collision?]

The second issue does not give the jury an opportunity of saying whether the negligence of accused caused the death, or whether, on the manslaughter charge, accused killed deceased. There is no doubt deceased would not have met his death if accused had not been negligent; but that, it is submitted, does not conclude the matter. It does not establish that accused killed or caused the death of deceased. The jury should have had an opportunity of answering this question. A Judge has no power in criminal trials to put issues to the jury. Section 442 (2) only applies when the case is being stated for the Court of Appeal: *R. v. Jameson*(11); *Halsbury's Laws of England*(12); *R. v. Allday*(13). The issues in this case

(1) 15 P. & D. 15.

(2) Br. & L. 436.

(3) 8 Q.B.D. 571.

(4) Ev. & Prac., 27th ed. 889.

(5) 3 A.C. 1155, 1166.

(6) 6 C. & P. 328.

(7) [1920] 2 K.B. 693.

(8) [1830] 6 Bing. 716.

(9) 4th ed., Vol. 1, p. 91.

(10) [1874] 9 Q.B. 263.

(11) [1896] 2 Q.B. 425.

(12) Vol. 9, p. 373, note (a).

(13) 8 C. & P. 136, 140.

distracted the jury's attention from what the real question was. They concentrated only on the question of negligence, which does not conclude the inquiry: *Archbold's Criminal Pleading*(1); *R. v. Davies*(2); *Harris on Criminal Law*(3); *Roscoe's Criminal Evidence*(4); *R. v. Hendrick*(5); *Blackstone's Commentaries*(6); *R. v. McMahon*(7). It is submitted s. 27 of the Motor-vehicles Act, 1924, revives the common-law doctrine of culpable negligence. The words of s. 27, "recklessly or negligently," have this effect. *R. v. Dawe*(8) is not against this submission; it turns on the meaning of s. 171 of the Crimes Act, 1908.

[MYERS, C.J.—May not s. 27 be *in pari materia* with s. 171 of the Crimes Act, 1908, and, the words of s. 27 being different, the section should be construed differently?]

It is submitted such is the position. The decision in *R. v. Bateman*(9) is applicable to the language of s. 27. The question must always be as to whether the negligence is the substantial cause of death. There must be proved by the Crown the wantonly careless mind and that the act of the accused must be the substantial cause of death. The matter must be left to the jury. It is wrong to exclude evidence of negligence of deceased, as this may be shown to have been the cause of the death. It is submitted that the expression "error of judgment," used in the verdict, negatives negligence, and the verdict is one of "Not guilty." As to the meaning of "error of judgment," see *R. v. Gray*(10). "Error of judgment" negatives the essential ingredient of negligence. There can be no punishable negligence if there is no guilty mind: *Harvard Law Review*(11); *Savage v. British India Steam Navigation Co., Ltd.*(12); *Beven on Negligence*(13); *Roscoe's Criminal Evidence*(14). As to reading the verdict as a whole, see *Myerson v. R.*(15); *R. v. Chainey*(16); *Stroud on Mens Rea*(17); *R. v. Williamson*(18); *Words and Phrases Judicially Defined*(19).

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(1) Ev. & Prac., 27th ed. 222.

(2) [1897] 2 Q.B. 199.

(3) 13th ed. 409.

(4) 15th ed. 308.

(5) [1921] 15 Cr. App. R. 149; 37 T.L.R. 447.

(6) Vol. 4, p. 394.

(7) 13 Cox C.C. 275.

(8) 30 N.Z. L.R. 673; 13 G.L.R. 574.

(9) 19 Cr. App. R. 8.

(10) [1891] 17 Cox C.C. 299.

(11) Vol. 29, pp. 40, 41.

(12) 46 T.L.R. 294, 295.

(13) 4th ed., Vol. 1, p. 101.

(14) 15th ed. 847.

(15) 5 C.L.R. 596.

(16) 9 Cr. App. R. 175.

(17) p. 122.

(18) C. & P. 635.

(19) Vol. 3, p. 2457.

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Fair, K.C. :—

If accused had been on his correct side of the road he could not have seen deceased's car until it was 110 ft. from him. The events leading up to deceased's death took place in not more than three and one-half seconds. In such circumstances the various incidents cannot be split up and be regarded as separate incidents. Any possible contributory negligence of deceased cannot be relied on in answer to the charge. It is submitted that so long as accused's negligence contributed to the death he is guilty of the offence. It is conceivable that both parties to a collision may be guilty of an offence: See *Motor-vehicles Act, 1924, s. 28*. If a person contributes to the death of another person he is liable for having caused that death; it does not matter whether his action is the preponderating or substantial cause of the death or not. The accused, in order to free himself from liability, must show that the negligence of the deceased was the sole cause of the accident: *Archbold's Criminal Pleading*(1); *Russell on Crimes*(2); *R. v. Walker*(3); *R. v. Swindall*(4); *R. v. Longbottom*(5); *R. v. Hutchinson*(6); *R. v. Dant*(7). The decision in *R. v. Birchall*(8) stands alone on this question and will not be followed. The decision in *R. v. Jones*(9) dissents from the judgment in *R. v. Birchall*(8); *R. v. Kew and Jackson*(10); *R. v. Gylee*(11); *Wittig v. R.*(12); *R. v. Bunney*(13); *E. and E. Digest*(14). The second question is whether the negligence of the accused was in fact contributory to the death. If it had appeared that the effect of his negligence was spent or exhausted, that would have been a defence: *Beven on Negligence*(15); *Blyth v. Birmingham Waterworks Co.*(16); *Salmond on Torts*(17). There is the strongest possible inference in the present case that what happened after the collision was caused by it. There was no room for a *novus actus interveniens*.

[HERDMAN, J.—Is that not a matter for the jury?]

It is submitted not, where the chain of causation is not broken. All evidence of contributory negligence on the part

- (1) *Ev. & Prac.*, 27th ed. 889.
- (2) 8th ed., Vol. 1, p. 767.
- (3) 1 C. & P. 320.
- (4) 2 C. & K. 230.
- (5) 3 Cox C.C. 439.
- (6) 9 Cox C.C. 555, 557.
- (7) 10 Cox C.C. 102.
- (8) 4 F. & F. 1087.
- (9) 11 Cox C.C. 544.

- (10) 12 Cox C.C. 355.
- (11) 1 Cr. App. R. 242.
- (12) 27 C.L.R. 158.
- (13) *Queensland Digest*, 351.
- (14) Vol. 15, p. 802; 4th Supp. 470,
citing *R. v. Chotem*.
- (15) 4th ed., Vol. 1, p. 91.
- (16) [1856] 25 L.J. Ex. 212, 214.
- (17) 7th ed. 151 *et seq.*

of deceased should be excluded except as forming part of the *res gesta*: *Admiralty Commissioners v. S.s. Volute*(1); *Swadling v. Cooper*(2); *R. v. Pocock*(3).

[HERDMAN, J.—If the evidence had been admitted, might not the jury have found that the negligence had been spent and the deceased alone was responsible for his own death?]

Even if the evidence had been admitted the jury must have been directed to disregard it once accused had been found negligent, and no miscarriage of justice can have been occasioned: *R. v. Ledger*(4); *Stephen's Digest of Criminal Law*(5); *Russell on Crimes*(6). *R. v. Bennett*(7) is distinguishable from the present case on the facts: *Stroud on Mens Rea*(8); *H.M.S. London*(9). Dealing with the cases cited for accused, it is submitted that in *Adams v. Lancashire and Yorkshire Railway Co.*(10) the plaintiff made his own choice. *Siner v. Great Western Railway Co.*(11) is distinguishable on the facts. *The City of Lincoln*(12) shows that the happening for which relief is sought need not flow directly from the collision. If evidence tends to show that the chain of causation was broken, it is conceded it is admissible, but in the present case the happening was so sudden that the evidence excluded could have made no difference in the jury's verdict. There has been no miscarriage of justice. The evidence excluded was irrelevant; it could not possibly have shown a break in the chain of causation. In *The Flying Fish*(13) the facts were entirely different from the present case. There was a clear break in the chain of causation. *R. v. Waters*(14) was decided on its special facts; it is a case showing spent negligence. *Elliott Steam Tug Co. v. John Payne and Co.*(15) is likewise distinguishable. An alternative danger prevents an act that might be regarded as a *novus actus interveniens* from being so regarded: *Salmon on Torts*(16); *Beven on Negligence*(17); *S.s. Singleton Abbey v. S.s. Paludina*(18); *Weld-Blundell v. Stephens*(19). As to the putting of issues to the jury, see

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(1) [1922] 1 A.C. 129, 144.

(2) 46 T.L.R. 597.

(3) [1851] 17 Q.B. 34; 5 Cox C.C. 172.

(4) 2 F. & F. 857.

(5) 7th ed. 222.

(6) 8th ed. 761.

(7) Bell C.C. 1.

(8) p. 139.

(9) [1914] P. 72, 74, 80.

(10) L.R. 4 C.P. 739.

(11) [1869] 4 Ex. 117, 124.

(12) 15 P.D. 15, 19.

(13) Br. & L. 436, 443.

(14) 6 C. & P. 328.

(15) [1920] 2 K.B. 693.

(16) 7th ed. 37, 177.

(17) 4th ed. 96.

(18) [1927] A.C. 16, 24.

(19) [1920] A.C. 956, 983, 984.

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R. v. Forrest(1); *Archbold's Criminal Pleadings*(2); *R. v. Hendrick*(3); *Halsbury's Laws of England*(4); *R. v. Jameson*(5); *R. v. Davies*(6). No different degree of proof of negligence is required in criminal cases from that in civil cases: See *R. v. Dawe*(7). This observation applies, it is submitted, to a charge under s. 27 of the Motor-vehicles Act, 1924.

[REED, J.—Is not s. 171 of the Crimes Act, 1908, of general application?]

It is submitted it is. Section 27 of the Motor-vehicles Act, 1924, is *in pari materia* with s. 171 of the Crimes Act, 1908. If a higher standard of proof is required in the 1st subsection of s. 27, then the same standard should apply to the 2nd subsection; but this is impossible. The wording of s. 28 supports this contention. As to the meaning of the verdict, it is submitted it was properly treated as one of "Guilty": *R. v. Warne*(8); *R. v. Bourke*(9). The finding of an "error of judgment" does not remove accused's act from the category of negligent acts: *R. v. Harding*(10). The term "error of judgment" is inconsistent with either negligence or no negligence. The jury has found negligence against accused: *Salmond on Torts*(11). The jury must be taken to have used the expression "error of judgment" in its popular sense. They are not aware of the legal signification it has, if any.

Evans-Scott :—

Any act contributing to the death renders the doer of such act criminally liable: *Salmond on Torts*(12). Evidence of contributory negligence is not admissible. It has no greater right to admission than evidence of drunkenness would have in a case in which drunkenness is no defence.

Cornish, in reply :—

The statement in *R. v. Dawe*(7) that s. 171 of the Crimes Act, 1908, abolished the common-law rule is *obiter*. If it is not *obiter*,

(1) 20 S.A. L.R. 78.

(2) Ev. & Prac., 27th ed. 222.

(3) 37 T.L.R. 447; 15 Cr. App. R. 149.

(4) Vol. 9, p. 373, note (a).

(5) O'Brien's Life of Lord Russell of Killowen, p. 279.

(6) [1897] 2 Q.B. 199, 202.

(7) 30 N.Z. L.R. 673; 13 G.L.R.

574.

(8) 3 N.Z. L.R. (C.A.) 1.

(9) 32 N.Z. L.R. 821, 833; 15 G.L.R. 518.

(10) 1 Cr. App. R. 219, 225.

(11) 7th ed., p. 27, para. 3.

(12) 7th ed. 21.

then the case was wrongly decided. As to what is *obiter*, see *Law Quarterly Review*(1) and *Kelly and Co. v. Kellond*(2). It is competent to this Court, composed of two divisions, to decline to follow *R. v. Dawe*(3). The question whether or not the Court of Appeal is bound by its own judgment is at large. On the question of causation, it is submitted the evidence should have been admitted, and its weight is a matter for the jury. The onus is on the Crown to show there has been no miscarriage of justice. An opportunity was not afforded the jury of finding what caused deceased's death. *R. v. Warne*(4) and *R. v. Bourke*(5) are cases dealing with general verdicts: the verdict in this case was special.

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Cur. adv. vult.

MYERS, C.J. :—

At a very early stage of the trial, held before me on the 31st July and 1st August, 1930, it became plain that there must emerge a number of questions of law of very general application, and I intimated how I proposed to rule on these questions, at the same time stating that, if necessary, I would reserve all questions for the opinion of this Court. I stated the case for this Court in the widest possible way, and as the result several questions of law of considerable importance have been argued. These questions I propose now to consider *seriatim*.

1. The first question is as to whether, where a prisoner is charged with manslaughter under the Crimes Act, 1908, the death of the person killed having been caused by the prisoner's negligent driving of a motor-vehicle, anything more than what may be called ordinary negligence is required to be proved. Mr. Cornish's contention is that ordinary negligence is insufficient, and that there must be what he calls "criminal negligence" or "gross negligence." For this proposition he relies upon various English and Australian decisions—for example, *R. v. Bateman*(6), *R. v. Gunter*(7), and *R. v. Newell*(8).

In *Bateman's case*(6), which was that of a charge against a medical practitioner for manslaughter by negligence, Lord Hewart, C.J., said this: "In expounding the law to juries on the trial of indictments for manslaughter by negligence, Judges have often referred to the distinction between civil and criminal liability

(1) [1920] Vol. 46, p. 261.

(2) 20 Q.B.D. 569.

(3) 30 N.Z. L.R. 673; 13 G.L.R. 574.

(4) 3 N.Z. C.A. 1.

(5) 32 N.Z. L.R. 821; 15 G.L.R.

518.

(6) 19 Cr. App. R. 8.

(7) 21 N.S.W. S.R. 282.

(8) 27 N.S.W. S.R. 274.

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“for death by negligence. The law of criminal liability for negligence is conveniently explained in that way. If A has caused the death of B by alleged negligence, then, in order to establish civil liability, the plaintiff must prove (in addition to pecuniary loss caused by the death) that A owed a duty to B to take care, that that duty was not discharged, and that the default caused the death of B. To convict A of manslaughter, the prosecution must prove the three things above mentioned, and must satisfy the jury, in addition, that A's negligence amounted to a crime. In a civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done. In a Criminal Court, on the contrary, the amount and degree of negligence are the determining questions. There must be *mens rea*.” And later on in his judgment he says: “In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, Judges have used many epithets, such as ‘culpable,’ ‘criminal,’ ‘gross,’ ‘wicked,’ ‘clear,’ ‘complete.’ But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.”

The learned Lord Chief Justice emphasized the point throughout his judgment that there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime. It is not unimportant to point out that the class of cases of which *R. v. Bateman*(1) is an illustration is dealt with in New Zealand in s. 170 of the Crimes Act, 1908. That section and s. 171, to which particular reference will be made later, are two of a group of sections under the title “Duties tending to the Preservation of Life,” and s. 170 enacts that “Every one who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill, and care in doing any such act, and is criminally

(1) 19 Cr. App. R. 8.

"responsible for omitting without lawful excuse to discharge *that duty* if death is caused by such omission."

As I read s. 170, it seems to me clear that the decision in *Bateman's case*(1) is not law in New Zealand so far as the criminal responsibility of a medical practitioner is concerned. This does not, of course, imply that a medical practitioner is criminally responsible for the consequences of a mere mistake or error of judgment—I mean such a mistake or error of judgment as does not necessarily involve an absence of reasonable skill and care and might not unreasonably be made by a reasonably skilful and careful practitioner. The position is therefore that in New Zealand the same standard applies in regard to both civil and criminal responsibility.

R. v. Gunter(2)—which case was decided nearly four years before *R. v. Bateman*(1)—was also a case where persons who are described in the report as carrying on "a sort of medical practice" were charged with manslaughter by negligence, and it was held that the negligence which is essential before a man can be criminally convicted must be culpable, exhibiting a degree of recklessness beyond anything required to make a man liable to damages in a civil action. Cullen, C.J., said: "It must be such a degree of culpable negligence as to amount to an absence of that care for the lives and persons of others which every law-abiding man is expected to exhibit. Short of this he may be blameworthy because he has not exhibited the caution reasonably to be expected from an ordinarily prudent person in the particular situation, and this would expose him to an action for damages. But the charge of a criminal offence based on negligence must be supported by a culpable recklessness in taking risks at the expense of other people's lives or limbs."

R. v. Newell(3) was the case of a charge against a person for manslaughter by negligent driving of a motor-car, and on the question of the degree of negligence required to establish criminal responsibility the Court followed and applied *R. v. Gunter*(2) and *R. v. Bateman*(1).

But, even though *Bateman's case*(1) and *Gunter's case*(2) do not apply in New Zealand in the case of a medical practitioner, Mr. Cornish's contention is that they correctly state the law applicable to such a case as the present. I cannot accept this contention. The law in New Zealand is laid down by the Crimes Act, 1908. By s. 175 (2) of that Act "culpable homicide," so

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(1) 19 Cr. App. R. 8.

(2) 21 N.S.W. S.R. 282.

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far as is material for the purposes of this case, is defined as consisting in the killing of any person either (a) by an unlawful act, or (b) by an omission without lawful excuse to perform or observe any legal duty, or (c) by both combined. By s. 186 it is enacted that culpable homicide not amounting to murder is manslaughter. The law as to criminal responsibility which prescribes the standard of care required, and the degree of negligence which is sufficient to found the offence, at all events in a case where the charge is one of manslaughter under the Crimes Act, is laid down by s. 171, which is as follows:—

Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, or maintains anything whatever which, in the absence of precaution or care, may endanger human life is under a *legal duty* to take *reasonable precautions* against and to use *reasonable care* to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to perform *such duty*.

In *R. v. Dawe*(1) the Court of Appeal, consisting of six Judges, considered the effect of this section. Stout, C.J., after saying that, to ascertain the liability of the accused, recourse must be had to the Crimes Act, 1908, and that s. 171 lays down the duty of persons in charge of things, animate or inanimate, which, in the absence of precaution, may endanger human life, quoted the section, and proceeded as follows: "By this section the Court is bound. It cannot, to my mind, as the section is not ambiguous, refer to cases that may have been decided at common law as to what neglect when in charge of a motor-car enables a jury to declare that manslaughter has been committed. . . . As I have pointed out, the section of our Act does not introduce the word 'gross,' and, as I have also pointed out, many of the English authorities show that in leaving the case to the jury many Judges have not used the word 'gross.' As I understand from the Judge who gave the direction to the jury in this case, he pointed out to them that the prisoner would not be guilty if it was a mere accident—there must be neglect of duty."

Williams, J., agreed with the findings of the other members of the Court.

Denniston, J., said: "I think that s. 171 of the Crimes Act, 1908, disposes, and was probably intended to dispose, in respect of all cases within its purview, of the distinction between 'negligence' and 'gross negligence' which there is at least

(1) 3 N.Z. L.R. 673; 13 G.L.R. 574.

“strong ground in contending has been established by a number
“of English decisions.”

Edwards, J., after saying that counsel agreed that in many criminal cases at common law the jury had been directed that to render a person criminally liable for the consequences of his neglect it is necessary to establish a greater degree of negligence than would suffice in a civil action brought in respect of the consequences of the same act, while in other criminal cases no such direction had been given, proceeded as follows: “If the
“case before the Court had been ruled by the common law upon
“this subject there might, therefore, have been some difficulty
“in determining it. In my opinion, however, the Solicitor-
“General is right in his contention that the case is ruled by the
“171st section of the Crimes Act, 1908.”

Cooper, J., after referring briefly to the circumstances of the case, said: “In order in such a case to sustain an indictment
“for manslaughter it is not necessary for the Crown to prove
“gross negligence. It is sufficient if it is established that the
“person charged with the offence has failed to take reasonable
“precautions against, and has failed to use reasonable care to
“avoid, the danger. . . . There may very likely be cases
“in which a higher degree of negligence than is sufficient to
“sustain an action at law may require to be proved in order to
“justify a conviction for manslaughter; but in my opinion this
“higher degree of proof is not necessary where a person who is
“in charge and has the control of a dangerous machine or animal
“causes, without lawful excuse, by a neglect to exercise reason-
“able precautions and care, the death of a human being. His
“breach or neglect of duty in such a case is the crime of
“manslaughter.”

Chapman, J., said that he wished to guard himself against being supposed to express the opinion that every neglect of duty that would render a man liable in a civil action would, if the death of the person thereby injured ensued, render the negligent actor liable for manslaughter. He said: “It may be that the
“Crimes Act gives a more stringent while giving a more precise
“definition of manslaughter by negligence than that recognized
“by the common law, but I do not find that the wording of
“s. 171 necessarily excludes the distinction long observed between
“mere negligence and culpable negligence.”

If *Dawe's case*(1) can be said to be an express decision on the meaning and effect of s. 171 of the Crimes Act, 1908, then clearly

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it ought, I think, to be followed by this Court. Mr. Cornish contends that, as both divisions of the Court are sitting, the decision may be open to review, and he cites *Kelly and Co. v. Kellond*(1), per Lord Esher, M.R.(2). But *Dawe's case*(3) was decided in 1911, when the Court of Appeal sat as only one division, and it was a Court, as I have said, consisting of six Judges. Mr. Cornish, however, contends that all the statements made by the learned Judges regarding s. 171 were mere *obiter dicta*. I do not think that that is so—*New South Wales Taxation Commissioners v. Palmer*(4); *Hole v. Garnsey*(5), per Lord Atkin(6)—but for my part I am content to say that, even if they were *obiter*, I agree with the view taken by the majority of the Court. It seems to me that s. 171 means exactly what it says, and that no attempt should be made to whittle it down. It is part of our Criminal Code—the original Act of 1893 was, indeed, called the “Criminal Code Act.” The test under both ss. 170 and 171 is that of “reasonableness.” This term cannot be defined, but the standard must be set in each particular case by the jury by applying their common-sense to the evidence as to the facts of the case and any admissible expert evidence that is adduced. The standard should be neither too high nor too low: it should be a “reasonable” standard, the standard of skill and care which would be observed by a reasonable man. I desire, however, expressly to say that, while I think, having regard to s. 171 of the Crimes Act and to what was said in *Dawe's case*(3), there is no distinction in New Zealand between negligence as the foundation of criminal liability and negligence as the foundation of civil liability, it follows that, under that section as under s. 170, a mere mistake or error of judgment which should in a civil action prevent an act or omission from being imputed as negligence is equally a good defence on a criminal charge involving negligence. But let there be no mistake as to what I mean when I refer to an error of judgment in respect at least of a charge where s. 171 applies. I have in mind cases like that of *The Bywell Castle*(7), where a person has to act and make up his mind on an emergency created by the negligent act of another. If a person by his own negligence places himself in a position of peril in respect either of his own safety or of the safety of others and then has to act on the spur of the moment and what he does turns out to be wrong, the position, to my mind, is

(1) 20 Q.B.D. 569.

(2) *Ibid.* 572.

(3) 30 N.Z. L.R. 673; 13 G.L.R. 574.

(4) [1907] A.C. 179, 184.

(5) [1930] A.C. 472.

(6) *Ibid.* 497.

(7) 4 P.D. 219.

quite different. In such circumstances the person who so acted could not, in my opinion, rely upon error of judgment as an answer.

Other English and Australian cases were cited by Mr. Cornish, such as *Tinline v. White Cross Insurance Association, Ltd.*(1), where Bailhache, J.(2), said that in a case of manslaughter by negligent driving the crime consists in driving with gross or reckless negligence. Ordinary negligence, he says, does not make a man liable for manslaughter. I do not think it necessary to refer further to the cases cited. It is sufficient to say that, whatever the law may be elsewhere, it is governed in New Zealand by s. 171 of the Crimes Act.

Before leaving this branch of the case, there is one further point raised by Mr. Cornish to which I will refer in order to show that it has not been overlooked. The contention is that at common law "gross" or "criminal" negligence is required to support a charge of manslaughter, and (assuming that to be so) that the common-law requirement still exists by reason of s. 40 of the Crimes Act, which section is as follows:—

40. (1) All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply to any defence to a charge under this Act, except in so far as they are hereby altered or are inconsistent herewith.

(2) The matters provided for in this Part of this Act are hereby declared to be justifications or excuses in the case of all charges to which they apply.

Section 40 is contained in Part III of the Act, under the title of "Matters of Justification or Excuse." Section 171 is not in Part III, but in a later Part of the Act, under the title "Duties tending to the Preservation of Life." Assuming the common law to be as Mr. Cornish contends, his argument is answered by s. 171, which supersedes the common law. Section 171 must, of course, be read with s. 175 (2), which defines "culpable homicide." It is interesting, and not without significance, that in s. 175 (2)—originally s. 156 of the Criminal Code Act, 1893—following the language of the English Bill of 1880, the words "an omission without lawful excuse" are substituted for the words "a culpable omission," which appeared in the corresponding section of the original English Criminal Code Bill of 1879. This point, which was not noticed in *Dawe's case*(3), I think further supports the view taken in that case by the majority of the Court.

(1) [1921] 3 K.B. 327.

(2) *Ibid.* 330.

(3) 30 N.Z. L.R. 673; 13 G.L.R. 574.

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2. The next question has reference to the meaning and effect of s. 27 (1) of the Motor-vehicles Act, 1924. The section is as follows :—

(1) Every person commits a crime, and is liable on indictment to imprisonment for a term not exceeding five years or to a fine not exceeding five hundred pounds, who recklessly or *negligently* drives any motor-vehicle and thereby causes bodily injury to or the death of any person, or who while in a state of intoxication is in charge of a motor-vehicle and by an act or omission in relation thereto causes bodily injury to or the death of any person.

(2) It shall be no defence to an indictment for the crime of manslaughter that the guilty act or omission proved against the person charged upon such indictment is an act or omission constituting a crime under this section.

Mr. Cornish contends that there is no real difference between the two counts in the indictment, the first count charging the accused with manslaughter, and the second with an offence under s. 27 (1) of the Motor-vehicles Act, 1924. He argues that each count is really a charge of manslaughter, and that the same distinction exists between civil and criminal negligence in respect of both counts. If each count is really a charge of manslaughter, the answer to the first question disposes of this question also. But alternatively, as I understand his argument, Mr. Cornish contends that if the negligence required to be proved on a charge of manslaughter is merely what may be called ordinary negligence, then there is a difference between the two counts, and a greater degree of negligence is required to support a charge under s. 27. In the further alternative he contends that s. 27 enables a person charged thereunder to invoke all the defences which would be open to a defendant motorist in a civil action for damages caused by negligent driving. He also contends, as I understand his argument, that in a charge under s. 27 it must be shown that the negligent driving was the sole cause of the death or the bodily injury. I am unable to agree with any of these contentions. In the first place, it is the duty of the Court to consider the mischief aimed at by s. 27. It is well known that prior to the passing of the Act of 1924 juries seemed to think that there was something very serious in a charge of manslaughter arising out of negligent driving, and that such a charge amounted almost to murder. The result was that they showed a great aversion to convicting in any case, no matter how strong, and this aversion resulted in many miscarriages of justice. Various Judges of the Supreme Court from time to time commented on this result and suggested an amendment of the law, creating an offence under a different name, but involving precisely or substantially the same elements as manslaughter. Eventually this suggestion was

adopted by the passing of s. 27 of the Act of 1924. In these circumstances, to hold that s. 27 was merely intended to, and does in fact, enable to be raised the various defences that may be raised in a civil action would bring about a worse state of things than existed previously. In the second place, s. 27 must be regarded, I think, as being in *pari materia* with the provisions of the Crimes Act relating to manslaughter by negligence, and s. 171 of the Crimes Act is therefore applicable, in my opinion, to both counts of the indictment. I think, therefore, that the standard of negligence required to be proved on a charge under s. 27 is precisely the same as that required to be proved in a case of manslaughter under the Crimes Act. If this is so, it follows, once it is proved that the accused negligently drove his motor-car and that the death or bodily injury to another person was a consequence of that negligence, that such negligence has caused the death or bodily injury. It was said by Pollock, C.B., in *R. v. Swindall*(1)—a charge of manslaughter—that generally it may be laid down that where one by his negligence has contributed to the death of another he is responsible.

3. The next question is whether or not contributory negligence on the part of the person killed where the accused is charged with manslaughter, or on the part of the person killed or injured where the charge is under s. 27 of the Motor-vehicles Act, is a good defence. Upon this point there is a good deal of common-law authority, and all the cases, which are collected in *Archbold's Criminal Pleading*(2), *Russell on Crimes*(3), and *Roscoe's Criminal Evidence*(4), tend to show (with but one exception) that it is not a good defence. The one exception is *R. v. Birchall*(5), in which none of the previous cases where the contrary view was expressed appear to have been cited. But, as is pointed out in *Archbold*, in a later case, *R. v. Jones*(6), Lush, J., ruled that contributory negligence on the part of the deceased was not allowed as an excuse in a criminal case, and, upon *Birchall's case*(5) being cited, stated that that case was quite at variance with what he had always heard laid down. In the still later case, *R. v. Kew and Jackson*(7), Byles, J., held that contributory negligence on the part of the deceased was no answer. The point was dealt with in New Zealand by Reed, J., in *R. v. Officer*(9), where he directed

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(1) 2 C. & K. 230.

(2) 27th ed. 889.

(3) 8th ed. 767.

(4) 15th ed. 847.

(5) [1866] 4 F. & F. 1087.

(6) [1870] 11 Cox C.C. 544.

(7) [1872] 12 Cox C.C. 355.

(8) [1922] G.L.R. 175.

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the jury that contributory negligence was not a defence. This view is in accordance with the weight of authority in England, is consistent with the provisions of our Crimes Act, and is, in my opinion, correct. In a civil action between two private persons there is every good reason for the law that, where the plaintiff as well as the defendant has been guilty of negligence, and such negligence continues up to the time of the impact which results in the injury to the plaintiff, neither party can recover damages from the other. In such circumstances the defendant's answer to the plaintiff is in effect: "It was your own fault, or, at all events, as much your fault as mine. You could have avoided the impact, and you were therefore the author of your own injury." That is both good sense and justice where a monetary claim is made for a private wrong. But manslaughter, or an offence under s. 27 of the Motor-vehicles Act, 1924, is a crime, a public wrong, an offence against the State, and I can see no good reason why the negligent actor should be excused because the killed or injured person was also negligent. His act is none the less an offence against the State, no matter how negligent some other person or persons may have been. The truth is, I think, that from the point of view of the criminal law—I am referring now particularly to s. 27 of the Act of 1924—where two people are injured, each of them having been negligent up to the time of impact, each of them must be regarded as having caused the injury to the other. For example, if a head-on collision occurs between two motor-cycles which are being ridden after dark on an unlighted country road, neither cyclist carrying any light, and both cyclists are injured as the result of the collision, plainly neither of them could recover damages from the other, but in my opinion each of them would be guilty of an offence under s. 27.

4. The fourth question involves the right of the Judge on the trial of a criminal case to submit issues to the jury. There is no reference in the Crimes Act to this point, except in regard to one particular aspect of it, to which I will refer directly; but I think that the same inherent power resides in the Court in New Zealand as in England. In New Zealand, issues have, in fact, been submitted in several cases, particularly where the case would otherwise have involved directions on more or less complicated questions of law which it would have been difficult to make intelligible to a jury of laymen. This same course has been adopted in England even in cases where difficult questions of law do not seem to have existed. It was adopted, for

example, in *R. v. Jameson*(1), though the report does not refer to this particular point. The case is referred to in *Halsbury's Laws of England*(2), where it is said to be doubtful whether a Judge can lawfully adopt this course. In *R. v. Davies*(3), issues were put to the jury, and, on a case stated as to the effect of the verdict of "Guilty" entered upon the answers of the jury, Lord Russell of Killowen, C.J., said: "It is for the jury to determine whether a person is guilty or not guilty upon direction as to points of law by the Judge: here, however they appear not to have pronounced a verdict of guilty or not guilty at all. It is true that it is still sometimes the practice to ask the jury to give special findings upon the facts, but it is ordinarily a safer and better course to get the opinion of the jury as to whether the accused is guilty or not guilty, the Judge directing them upon the law." *R. v. Morby*(4) is another instance of a case where the Judge submitted an issue to the jury, and subsequently, after obtaining the answer, directed the jury to find a verdict of "Guilty." The conviction was quashed by the Court of Criminal Appeal upon the ground that the direction of the learned Judge, though right in point of law, was not applicable to the facts proved; but it was not suggested that the Judge was wrong in submitting an issue to the jury. Another instance where the same course was adopted was *R. v. Hendrick*(5), where questions were submitted to the jury and on these questions being answered the Deputy Chairman of Sessions directed a verdict of "Guilty," which was recorded, leave to appeal being granted. Before the Court of Criminal Appeal it was argued for the accused that, in the circumstances, the Deputy Chairman had usurped the functions of the jury, that the verdict recorded was not the verdict of the jury, and that it ought to be set aside. In support of this contention *R. v. Davies*(3) and *R. v. Allday*(6) were relied upon. The Court quashed the conviction, upon the ground that the answers to the questions put to the jury were not in themselves sufficient to enable the Court to give judgment treating the answers as a special verdict. Again not a word was said by the Court against the right or power to submit issues. In *Roscoe's Criminal Evidence*(7) it is stated that Pollock, C.B., doubted whether the mode of putting questions to the jury and then recording a

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(1) [1896] 2 Q.B. 425.

(2) Vol. 9, p. 373, note (a).

(3) [1897] 2 Q.B. 199.

(4) 8 Q.B.D. 571.

(5) 37 T.L.R. 447; 15 Cr. App. R.

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(6) 8 C. & P. 136.

(7) 15th ed. 308.

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verdict *without taking a direct answer of "Guilty" or "Not guilty"* was correct. In my opinion, there is nothing to prevent the Judge putting specific questions to the jury, but the jury are not bound to answer them. In other words, a jury may be invited, but cannot be compelled, to answer specific issues. As was said by the Lord Chief Justice in *R. v. Davies*(1), it is better to leave the general issue to the jury, save, I would add, in exceptional circumstances where in the interests of justice it seems desirable that specific questions should be put. Even when they are put, however, the jury are entitled, if they think fit, to return a general verdict instead of answering the issues. I have dealt with this point at some length because of its general importance and of the fact that it was much debated at the bar. But it is unnecessary in the present case to rely upon any inherent right or power in the Court to submit issues, because, in my opinion, the course I adopted is expressly authorized by s. 442 of the Crimes Act, 1908, subs. 1 and 2 of which are as follows :—

(1) The Court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge, for the opinion of the Court of Appeal in manner hereinafter provided.

(2) If the decision of the question may in the opinion of the Court depend on any questions of fact, the Court may in its discretion ask the jury questions as to such facts separately, and the Court shall make a note of such questions and the findings thereon.

In this case, as has already been stated, important questions of law arose at a very early stage of the trial, and I intimated during the trial and well before its conclusion that I intended to put issues, and that if in the result the accused was convicted I would reserve all questions for this Court. It was necessary, or at least desirable, in my opinion, to submit specific questions in order that the questions of law involved might be properly raised. This was just as much, as I thought and still think, in the interests of the accused as of the Crown. I see no reason why the specific questions should not be asked either before or after the general verdict is taken, or submitted together with the general issue. In each case it seems to me that the specific questions would be asked "separately," as provided by subs. 2.

5. A question was also raised as to the meaning of the verdict of the jury. Mr. Cornish contends that the answers of the jury amount to a verdict of "Not guilty." I do not agree. In the first place, the jury specifically answered the first issue in the

(1) [1897] 2 Q.B. 199.

affirmative—namely, that the collision between the accused's motor-car and the car in which the two deceased were driving was caused by the negligent driving of the accused. The jury then proceeded to recommend that the accused be leniently dealt with "on the ground that the accident was brought about "by an error of judgment." In my opinion, these words do not derogate from or affect the specific finding of negligence. They do not form part, nor are they a qualification, of the general answer to the question; they are merely part of a recommendation to mercy. Moreover, the authorities show that the Court is justified in looking at the whole conduct of the case, and the evidence taken, in order to construe the findings: Per Denniston, J., in *R. v. Dawe*(1), citing *Dawson v. R.*(2); *Myerson v. R.*(3). See also *R. v. Warne*(4); *R. v. Bourke*(5); *R. v. Roscoe and Holland*(6). The meaning of the words quoted above contained in the recommendation of the jury is, in my opinion, perfectly plain. There is no inconsistency between the answer to the question and the addendum: the addendum does not necessarily, nor does it in my opinion in fact, negative the essential element of negligence. What the jury meant, obviously, was that when the accused pulled out of the procession of cars he thought that he would be able to "cut in" between two of the cars in front before the upper bend in the Gorge was reached, that this act turned out to be an error of judgment on his part, but that the act nevertheless constituted negligent driving. It is no defence to prove that a man is honestly negligent: *R. v. Gylee*(7).

6. Notwithstanding that, in my opinion, all the questions so far dealt with must be answered against the accused, I still think that there may be said to have been the possibility of a mistrial by reason of the fact that evidence was excluded. I held in effect that, if the *collision* was caused or contributed to by the negligent driving of the accused, negligence, if there was any, on the part of the deceased *prior to* the collision would not, nor would anything that immediately followed by reason of the alleged defects in the car driven by the deceased, or anything in connection with the condition of the terrain, afford a defence to the charges, unless it could be shown that there was some

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| (1) 30 N.Z. L.R. 673, 682; 13 G.L.R. 574, 577. | (5) 32 N.Z. L.R. 821; 15 G.L.R. 518. |
| (2) 3 N.Z. L.R. (C.A.) 1. | (6) [1922] N.Z. L.R. 405. |
| (3) 5 C.L.R. 596. | (7) 1 Cr. App. R. 242. |
| (4) 3 N.Z. C.A. 1. | |

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novus actus interveniens with which the accused had nothing to do and which brought about the death of the deceased. That ruling was, in my opinion, correct. Nevertheless, I think that, in the circumstances of the case, the evidence should have been admitted and been later the subject of direction to the jury as to how they should regard it. If the two deceased had been killed or injured at the very time of the impact, it could not, I think, be said that the exclusion of the evidence relating merely to the alleged defects in their car or to any contributory negligence could possibly have resulted in a miscarriage of justice even if the evidence ought to have been admitted, and therefore the accused would not have been entitled to a new trial. The mere exclusion of evidence or a mere misdirection does not necessarily require that a new trial should be ordered: Crimes Act, 1908, proviso to s. 445 (1). But the supposititious circumstances to which I have just referred do not exist here. The death of the two deceased happened after their car had travelled some 56 ft. diagonally across the road, and through the car then falling over the bank. The question, then, is whether what followed after the impact was a consequence of the accused's negligence. Whether the driver, Cook, drove his car across the road voluntarily or whether it was forced across the road as the result of the impact, it was at the trial and is now impossible to say. Even if he drove it voluntarily, the accused would, in my opinion, be responsible if it were a reasonable and natural thing to do for the purpose of taking the car to a place of apparent safety, whether to ascertain the extent of damage to the car or to see the accused and discuss the question of the responsibility for the collision. If, then, the deceased's car fell over the bank by reason of the earth being loose, I think that that would be a consequence for which the accused was responsible. I think, however, in a case of this kind, where the actual injury is not sustained at the time of the impact but a few seconds after, that in the circumstances all the evidence should be admitted. As stated in the judgment in *R. v. Hakiwai*(1) recently given by this Court, the principle to be adopted is that enunciated by Cooper, J., in *R. v. Lawrence*(2): "I think, however, in a criminal matter we may at least say this: If the evidence wrongly admitted may reasonably be considered to have influenced the jury in arriving at their verdict, then its wrongful admission may be

(1) [1931] N.Z. L.R. 405; G.L.R. 166. (2) 25 N.Z. L.R. 129, 142; 7 G.L.R. 559, 566.

"said to have prejudiced a prisoner's chance of acquittal, and
"thus may well be considered to have resulted in a substantial
"wrong. So, if evidence which might tend to influence a jury
"in favour of a prisoner is wrongly rejected, a prisoner is
"prejudiced in his defence. In such a case, even though if such
"evidence had been admitted there might still on the whole
"case be sufficient evidence to justify a conviction, I think the
"rejection of evidence might well be said to have resulted in
"a 'substantial wrong,' the prisoner having been prevented
"from placing before the jury the whole of the material
"constituting his defence."

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I have already said that negligence, if there were any, on the part of the deceased driver prior to or connected with the impact would be no answer to the charge against the accused. The same observation equally applies to the alleged defects in the deceased's motor-car, whether they existed prior to the collision or were caused or accentuated by the impact. That would not be a *novus actus* intervening between the collision and the death of the two deceased. Nor would the loose condition of the soil, if it were proved, come within the category of *novus actus interveniens* if the deceased driver acted reasonably in crossing the road after the impact for either of the purposes I have indicated, or if the jury thought that, faced, as the deceased driver was when he rounded the bend, with two cars travelling towards him abreast on a narrow road and the apparent certainty of a collision—a position brought about by the accused's negligence—he lost his head and crossed the road. That, and the falling of the car over the edge of the road into the creek, would, I think, be consequences of the accused's negligence for which he would be responsible. But if it appeared that in some way or other the deceased driver was negligent *after* the impact *and after the effect of the accused's negligence was spent*, and that the death of himself and of his wife was due to that subsequent negligence, that would be a *novus actus*. On the case as it went to the jury I would myself have thought that that did not appear; but I feel unable to say with certainty that the excluded evidence, if it had been admitted (subject, of course, to direction to the jury), may not have enabled this point to be more cogently put by the accused's counsel than it was. The evidence having been excluded, an issue raising the point was not put to the jury. In the result, all the necessary facts were not put, and in the circumstances could not be put, to the jury to enable a general verdict of guilt to be found.

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Applying, therefore, the principle stated by Cooper, J., in *R. v. Lawrence*(1), I think the proper course is to order a new trial.

In the view that I take, I do not consider it necessary to discuss the many authorities that were cited at the Bar on this aspect of the case; the principles that I think are applicable are treated fully in *Salmond on Torts*(2). True, the learned author is there dealing with the question of damages in a civil action, but in my view the same principles apply in this case. If the accused would have been liable in a civil action for damages by reason of the death of the two deceased being a consequence of his negligence, he is also, in my opinion, responsible criminally. *R. v. Forrest*(3) might also be usefully cited, in that it was a case of criminal responsibility.

HERDMAN, J. :—

It is unnecessary for the purposes of this judgment to restate at elaborate length the facts in this case: they are recorded explicitly in the case stated by His Honour the Chief Justice. A Mr. and Mrs. Cook, on the 13th April, 1930, came by their death in the Ngahauranga Gorge. It is alleged against Storey that he was responsible for the fatality, and accordingly he was charged, first, under ss. 170 and 171 of the Crimes Act, 1908, with "that on the 13th April, 1930, on the Ngahauranga Gorge Road, near Wellington, by an unlawful act—to wit, by negligently driving a motor-car—he did kill Violet Amelia Cook and Norman Webb Cook and did thereby commit the crime of manslaughter"; and, second, under s. 27 of the Motor-vehicles Act, 1924, with that, on the date mentioned above, "on the Ngahauranga Gorge Road aforesaid, he did negligently drive a motor-vehicle—to wit, a motor-car—and did thereby cause the deaths of Violet Amelia Cook and Norman Webb Cook."

The first question that arises for decision is whether in the case of charges laid under the above-mentioned provisions it is necessary for the Crown to prove against the accused anything more than a breach of duty to take reasonable precautions against, and to use reasonable care to avoid, danger.

The charge founded upon s. 171 is that of manslaughter, and it is contended on behalf of the accused that to justify a verdict of "Guilty" something more than a mere breach of duty must be proved. It is said that what is termed "culpable negligence"

(1) 25 N.Z. L.R. 129, 142; G.L.R. 559, 566.

(2) 7th ed. 152-170.

(3) 20 S.A. L.R. 78.

must be established, and in justification of that proposition our attention has been called to certain English authorities which differentiate between the kind of negligence which creates a civil liability to pay compensation and the kind of negligence which is necessary to support a charge of manslaughter. We have been invited to pay special heed to the judgment of the Lord Chief Justice of England in the case *Percy Bateman*(1), in which, on p. 11, after referring to various epithets used by Judges when describing criminal negligence, he makes this observation: "But whatever epithet be used, and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects, and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

In New Zealand, however, we have in s. 171 a special statutory provision couched in clear and unambiguous language which has already received interpretation at the hands of this Court. The essence of the offence is the omission without lawful excuse to perform a specific duty. Section 171 was considered in *R. v. Dawe*(2). That there existed a distinction between negligence which gave rise to civil liability and negligence under s. 171 which made a man criminally responsible was a point which counsel for the accused sought to make in *Dawe's case*(2).

The terms in which the jury expressed its verdict gave rise to the argument. They were these: "We consider the accused guilty of neglect of duty caused by extenuating circumstances, but not gross neglect, and strongly recommend him to mercy."

The point now under consideration was therefore in issue, and was discussed by the learned Judges who then formed the Court of Appeal. His Honour the Chief Justice, Sir Robert Stout, referring to s. 171, said: "By this section the Court is bound. It cannot, to my mind, as the section is not ambiguous, refer to cases that have been decided at common law as to what neglect when in charge of a motor-car enables a jury to declare that manslaughter has been committed." Denniston, J., says(3): "I think, however, that s. 171 of the Crimes Act, 1908, disposes, and was probably intended to dispose, in respect of all cases within its purview, of the distinction between 'negligence'

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(1) 19 Cr. App. R. 8.

(3) 30 N.Z. L.R. 682.

(2) 30 N.Z. L.R. 673; 13 G.L.R.

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"and 'gross negligence' which there is at least strong ground in contending has been established by a number of English decisions." Edwards and Gooper, JJ., interpreted s. 171 in the same way. The only member of the Court who dissented from this view was Chapman, J. I have no doubt whatever that the opinion expressed by the majority in *Dawe's case*(1) is not *obiter*. In view of the terms of the verdict, it was necessary to decide whether under the section the Crown was obliged to prove gross or culpable negligence, and the Court came to the conclusion that proof of a breach of duty was sufficient, and decided accordingly that the verdict returned by the jury was a verdict of "Guilty."

The question raised in the present case, in so far as it relates to s. 171 of the Crimes Act, having been definitely disposed of in *Dawe's case*(1), nothing more need be said, for by that judgment this Court is bound.

As to the charge under s. 27 of the Motor-vehicles Act, 1924, I have always considered that it was sufficient for the Crown to prove a breach of a duty to the public on the part of the accused, and I can discover nothing in the statute from which I can infer that proof of any higher degree of negligence than that which amounts to a breach of duty to take care is required.

The second question that was raised in the course of the argument upon the case stated was whether, in a criminal prosecution for death caused by negligence what is called the contributory negligence of the dead man can be pleaded by way of defence on a charge of manslaughter.

In *Russell on Crimes*(2) the author says: "It has been generally held that it is no defence that the deceased was guilty of contributory negligence"; and in *Stroud on Mens Rea*(3) the learned author states that "there is no doctrine of contributory negligence in criminal law."

The sole question for the jury is, Did the negligence of the prisoner materially contribute to the death of the deceased? The fact that the neglect of the dead man was a factor in causing his own death will not entitle a prisoner to escape.

In *R. v. Birchall*(4) Willes, J., held a different opinion. He said: "Moreover, it appeared that the deceased had contributed to the fatal result by not getting out of the way as the other men had done, and, until he saw a decision to the contrary, he

(1) 30 N.Z. L.R. 673; 13 G.L.R. (3) p. 138.

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(2) 8th ed., Vol. 1, p. 767.

(4) 4 F. & F. 1087.

"should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action."

But the view taken by Willes, J., has not met with acceptance. In *R. v. Jones*(1) Lush, J., expressly dissented from it, stating that the decision was at variance with what he had always heard laid down; and in 1846, in *R. v. Swindall*(2), Pollock, C.B., in summing up to a jury said: "The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct, and, if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings." Other cases were cited during the argument in support of the principle laid down by Pollock, C.B., to which it is unnecessary to refer.

The reason why contributory negligence may be pleaded as a complete defence in civil proceedings, but not in answer to an indictment, is obvious. In the former the plaintiff seeks compensation for an injury done. If he was a party to doing the damage in respect of which he claims, it would be contrary to principle to allow him to make a profit out of his own misconduct. In the latter case different considerations apply. The public welfare is to be secured. By negligence life may be lost; serious physical injury may be inflicted; and the rights of people to use the highway with safety are to be preserved: so the law lays it down that, if a man's life be lost because of the negligence of another, the latter, if indicted, cannot seek to escape by proving that the dead man's neglect contributed to the disaster. My observations under this heading apply just as much to prosecutions under the Motor-vehicles Act as to proceedings commenced under the Crimes Act.

I come now to the real question of difficulty in the present case. The fact that a man's negligence contributed to his death is no answer to a charge against another for causing death by negligence. But that leaves undecided this question: Is proof of neglect on the part of the man who has been killed to be excluded? The Crown's responsibility in criminal cases is to prove its case, but it is always open to the prisoner to prove either that the sole cause of death was the negligence of the dead man or that any negligence of which he himself had been guilty in the initial stages of the episode had ceased and that thereafter some new act or omission for which the dead man was alone responsible supervened and caused his death. For instance, if

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(1) 11 Cox C.C. 544.

(2) 2 C. & K. 230.

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in the present case Mr. Cook had remained where he was after the collision for ten minutes or so, and had then restarted his car, taking a course across the road to the bank over which he fell, would it not be open to the accused to prove either that Mr. Cook did this deliberately and that his car went down the bank because the ground was unsafe, or that some mechanical defect which existed before the collision took place forced him across to a part of the road where he was in peril?

To my mind, it is palpable that such evidence may be introduced to support the plea of "Not guilty," and to me it seems unnecessary to refer to authorities to support such a proposition. I have noted that in opening his argument the learned Solicitor-General made the following submissions:—

1. If the negligence of accused contributed to Mr. Cook's death, that is enough.

2. If the negligence of the deceased was the sole and only cause of his death, then there should be a verdict of "Not guilty."

3. Evidence of contributory negligence is admissible as part of the *res gestæ*.

4. That the before-mentioned submissions applied both to proceedings taken under s. 171 of the Crimes Act for manslaughter and to proceedings taken against a person under s. 27 of the Motor-vehicles Act, 1924.

In framing the third submission I would rather that he had not used the words "contributory negligence" and had spoken of "negligence" only, but otherwise I know of no reason which would justify me disputing the correctness of the Solicitor-General's submissions. The matter of importance for decision in the present case is whether certain evidence which the prisoner's counsel asked the Court to receive was wrongly excluded. This Court is not concerned with the ultimate decision of the jury. We have to determine whether it had before it all the available relevant material to enable it to arrive at a just and correct conclusion. The question is, Was the evidence which it was proposed to tender relevant to the issue?

In *R. v. Ledger*(1), a case of manslaughter, the Lord Chief Justice, in addressing the grand jury, laid down the law thus: "A mistake, indeed, was said to have arisen from the negligence of the defendant. Still, if the particular negligence imputed to the prisoner appeared not to have been the proximate and

(1) 2 F. & F. 857.

"efficient cause of the catastrophe, the bill for manslaughter ought not to be found; and if it appeared that other causes had intervened the prisoner's negligence would not have been the proximate and efficient cause of the deaths which had occurred." In *R. v. Hughes*(1) Lord Campbell, C.J., stated the *ratio decidendi* in this way: "Was the death of the deceased the direct consequence of the act or omission of the prisoner?" If this be a correct statement of the law, then it must be open to a prisoner to prove that the death of the person was not the consequence of his act or omission.

A reference to the case stated shows unquestionably that there was evidence before the jury from which a neglect on the part of the accused to observe a duty could be inferred. Driving in a procession up a hill, he, for the purpose of passing a car in front of him, left his position at a point on the road where it was dangerous to attempt to negotiate such a manœuvre. For the collision which took place between Mr. Cook's car and the car of the accused the latter appears to have been wholly responsible. But the function of the jury was to determine not only who was responsible for the collision, but whether the negligence of the accused in colliding with Cook's car was the cause of the latter's death. The impact between the two vehicles was slight, and the narrative shows that after the collision, from which apparently violence was absent, Mr. Cook's car "was deflected and travelled diagonally across the road a distance of some 56 ft. and fell over the side of the road down a bank." How did the car come to be deflected? Did the collision account for the deflection, or did Mr. Cook deliberately drive across the road, or did the car, after the collision, cross the road because of some defect in its mechanism for which Mr. Cook was solely responsible?

At the conclusion of the case for the Crown, counsel for the prisoner submitted that there was no case to go to the jury, but His Honour the Chief Justice very properly decided otherwise. The case stated shows, however, that prisoner's counsel, in cross-examination, attempted to ask questions with a view—

- (a) To setting up a defence of contributory negligence on the part of the deceased Norman Webb Cook; and
- (b) To showing that the braking on the deceased's car was defective in that the brakes acted unevenly, causing a tendency, if the brakes were heavily applied, for the car to swing to the right;

(1) 26 L.J. M.C. 202.

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- (c) To showing that there was a pin loose in the steering-gear of the deceased's car, and that the car was therefore dangerous to drive.
- He also proposed to call evidence for the purpose of showing—
- (d) That the terrain at the spot where the deceased's car went over the bank was inclined to be loose, and that this might have contributed to the ultimate result of the accident.

Evidence was admitted about the condition of the brakes and steering-gear of Mr. Cook's car, but on p. 8 of the case it is recorded that Mr. Cornish (counsel for the accused) proposed at a stage in the evidence "to ask questions based upon the suggestion of contributory negligence on the part of the deceased, which questions were disallowed," and evidence which went to show what the condition of the ground was like at the point where Mr. Cook's car went over the bank was also disallowed.

I have already expressed the opinion that contributory negligence on the part of Mr. Cook would have been of no avail for the purposes of the defence; but, in my opinion, proof of negligence on his part for the purpose of proving that he alone was responsible for his death, or that his death was caused by some agency or circumstance wholly unconnected with any act or omission of the accused, was admissible. What Mr. Cornish could have proved or would have proved by means of cross-examination or from the lips of his own witnesses it is impossible to say. As I understand the matter, he proposed to show that the negligence of accused was completed when the collision took place, and that Mr. Cook, after the impact, after all danger was over, for some purpose of his own, drove across the road a distance of some 56 ft. on to ground that was so unstable that it gave way beneath the weight of his car, and that so his death was caused.

It seems to me that in cases of this kind evidence which goes to prove negligence on the part of a man whose death has resulted from a motor collision is always admissible in support of the plea of "Not guilty," for the object of tendering it is to prove that the negligence which produced the result was not the negligence of the accused, but the default of some one else.

A man who is charged with theft may prove by cross-examining Crown witnesses or by calling evidence on his own behalf that he did not steal or that some one else probably did the stealing.

It is not for us to say whether the evidence was or was not sufficient. If there was some evidence available, it seems to me that the accused was entitled to have it put before the jury.

In the present case evidence was given from which it could be inferred that the collision was not a violent one, and one witness (Mr. Foley) said that it was his opinion that Mr. Cook had deliberately crossed the road, and another witness (Mr. Coffin) said that, "as a matter of fact, Cook's car got past Storey's car."

I have stated that accused was undoubtedly guilty of negligence when he attempted to pass the car in front of him, and it seems to me to be impossible to exonerate him from the charge of having caused the collision. But I cannot help feeling that that does not end the matter. There still remains the question, Was it his negligence that caused Mr. Cook's death? Could it not be urged on behalf of accused that the collision and all its consequences were over and done with, that Cook started off again, that because of his defective brakes or steering-gear or of set purpose he proceeded to an unsafe part of the highway, and that the cause of his death was something unconnected with the default of accused which certainly did produce a collision but not the after-events which ended in tragedy? It seems to me that evidence which might prove this is unobjectionable, and that it should not have been excluded.

The principle upon which this Court will act when evidence has been wrongly rejected was considered in *R. v. Lawrence*(1). In his judgment, Cooper, J., said: "I think the rejection of "evidence might well be said to have resulted in a 'substantial " 'wrong' " [within the provision contained in s. 445 of the Crimes Act, 1908], "the prisoner having been prevented from "placing before the jury the whole of the material constituting "his defence." That, I think, has been the result in the present case, so, in my judgment, there should be a new trial.

Two subordinate matters were referred to us for consideration. The learned Chief Justice put two issues to the jury. Counsel for the accused objected to this course being taken, and contended that there was no legal authority for such a proceeding. I confess that I was surprised that this question has arisen for determination, for I have always understood that issues might be put to a jury, and it is within my own experience that issues

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(1) [1906] 25 N.Z. L.R. 129; 7 G.L.R. 559.

C.A. have been put in criminal cases by different Judges. Sub-
 1930. section 2 of s. 442 of the Crimes Act, 1908, contains this pro-
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 any questions of fact, the Court may in its discretion ask the jury questions as
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 the findings thereon.

But it might be said in this case that the questions of law arising for decision do not depend on any questions asked of the jury. If that be so, I can still see no reason why questions should not be put in the form of issues. When a jury is directed, it is frequently invited to address itself to certain questions. A jury need not answer issues unless it pleases, and must ultimately decide whether an accused person is guilty or not guilty.

At the Jameson trial in 1896(1) issues were put, so there exists one precedent for such a course being taken. I am not prepared to go the length of deciding that the trial was abortive because members of the jury were invited to answer specific questions.

Because the jury, in answering one of the questions, added "that it strongly recommended that the accused be dealt with leniently on the grounds that the accident was brought about by an error of judgment," it was claimed that this was a verdict of "Not guilty." My observations on that point are these: Because a man's judgment is at fault, it does not follow that he has not been negligent.

It is not the business of a jury in a case which negligence is charged to decide whether an accused person used his best judgment. The function of the jury is to decide whether he exercised proper care.

In New Zealand we have definite authority for the proposition that a recommendation to mercy is not to qualify a verdict of "Guilty." A consideration of the words added by the jury satisfies me that the passage amounts to no more than an appeal for leniency. There is nothing in the language used from which one can infer that the jury intended to subtract from the verdict of "Guilty." On the contrary, the added words indicate that the jury assumed that punishment would or could be meted out as a result of its finding of "Guilty."

For reasons which appear in the foregoing judgment, I think that there should be a new trial.

(1) 2 Q.B. 425.

REED, J. :—

The accused was charged on an indictment containing two counts—

- (a) That on the 13th April, 1930, on the Ngahauranga Gorge Road, near Wellington, by an unlawful act—to wit, by negligently driving a motor-car, he did kill Violet Amelia Cook and Norman Webb Cook and did thereby commit the crime of manslaughter.
- (b) That on the day and in the month and year aforesaid, on the Ngahauranga Gorge Road aforesaid, he did negligently drive a motor-vehicle—to wit, a motor-car—and did thereby cause the deaths of Violet Amelia Cook and Norman Webb Cook.

The first question that falls to be determined is as to whether or not it is necessary for the Crown to establish, as regards either or both counts, that the accused has been guilty of gross negligence—that is, negligence going beyond what would be required to establish a mere civil claim for damages.

The question involves the consideration of the effect upon the rule at common law of s. 171 of the Crimes Act, 1908, which reads as follows :—

Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, or maintains anything whatever which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to perform such duty.

The Court of Appeal in *R. v. Dawe*(1) had to consider the meaning of this section, and, in the words of Cooper, J., held :
 “ In order in such a case to sustain an indictment for manslaughter
 “ it is not necessary for the Crown to prove gross negligence. It
 “ is sufficient if it is established that the person charged with the
 “ offence has failed to take reasonable precautions against, and
 “ has failed to use reasonable care to avoid, the danger.”

When *R. v. Dawe*(1) was decided the authorities were conflicting as to whether or not the common law recognizes any distinction between gross negligence and ordinary negligence in prosecutions for manslaughter. Since then *Bateman's case*(2) has been decided, and may be said to settle the law in England. It was in that case laid down by the Court of Criminal Appeal that
 “ in order to establish criminal liability the facts must be such

(1) 30 N.Z. L.R. 673 ; 13 G.L.R. (2) 19 Cr. App. R. 8,

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“that, in the opinion of the jury, the negligence of the accused
“went beyond a mere matter of compensation between subjects
“and showed such disregard for the life and safety of others as
“to amount to a crime against the State and conduct deserving
“of punishment.”

This Court usually follows the decisions of the Court of Criminal Appeal, and if it were here a question of common law the decision in *R. v. Dawe*(1) might well be held to be open to reconsideration. It is contended by counsel for the accused: (i) That the observations of the Judges in that case as to the effect of s. 171 are merely *obiter*, and that the case was really decided on the common law; (ii) that, in any case, of the six Judges constituting the Court, one (Chapman, J.) expressed his doubt as to the overriding effect of the section, and one (Williams, J.) contented himself with agreeing with the finding at which the other members of the Court had arrived, the finding being that the verdict of the jury was a general verdict of “Guilty” with a strong recommendation to mercy; and that, as this left only four Judges who had definitely expressed an opinion that s. 171 altered the common law, this present Court, which consists of seven Judges, is entitled to and should decline to follow *Dawe’s case*(1) if satisfied that the rule there established was *per incuriam*.

I will deal with this second contention first. As a general rule this Court of Appeal considers itself bound by its own previous decisions, and it is convenient that that practice should be generally adopted, and not departed from unless in very exceptional circumstances; but in law it does not appear to be so bound. In England a decision of the House of Lords once given upon a point of law is conclusive upon that House afterwards. An erroneous decision can be set right only by an Act of Parliament: *London Street Tramways Co., Ltd. v. London County Council*(2). The Judicial Committee of the Privy Council is, however, not strictly bound to follow an earlier decision of the Committee, and may dissent therefrom if, after examining the reasons, they find themselves forced to do so: *Tooth v. Power*(3). As regards other Courts in England, it is stated in *Halsbury’s Laws of England*(4), the editors of the article being Bray, J., and Mr. Robinson, a barrister, that “As a rule, co-ordinate Appellate Courts consisting of more than one Judge ought to follow previous decisions of the Court, but, in exceptional cases, they

(1) 30 N.Z. L.R. 673; 13 G.L.R. 574.

(2) [1898] A.C. 375.

(3) [1891] A.C. 284, 292.

(4) Vol. 18, p. 211.

"are not bound to do so. In a proper case, all the members of the co-ordinate Courts sitting as a Full Court may decide whether they will or will not follow a decision arrived at by a smaller number of the members of the Court."

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As regards the first paragraph, several authorities supporting the statement are cited. Of these, the case of *The Vera Cruz*(1) is informative. Brett, M.R., said: "It was the custom for each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a Court of co-ordinate jurisdiction. But there is no statute or common-law rule by which one Court is bound to abide by the decision of another of equal rank; it does so simply from what may be called the comity among Judges. In the same way there is no common-law or statutory rule to oblige a Court to bow to its own decisions; it does so again on the grounds of judicial comity."

For the second paragraph a case, which was strongly relied on by counsel in the present case, is cited—that of *Kelly and Co. v. Kellond*(2). Lord Esher, M.R., there said: "This Court" [*i.e.*, the Court of Appeal] "is one composed of six members, and if at any time a decision of a lesser number is called in question, and a difficulty arises about the accuracy of it, I think this Court is entitled, sitting as a Full Court, to decide whether we will follow or not the decision arrived at by the smaller number." Fry, L.J., said: "As to the power of this Court when sitting as a Full Court to overrule the decision of a Court consisting of a smaller number, I do not think it is necessary to give an opinion. I think that is a matter of very great importance, and if it ever should become a matter for consideration I should desire to consider it carefully"; and Lopes, L. J., said: "I do not desire to express an opinion as to what is the power of a Full Court of Appeal in respect of a decision of three of their number"; and so the matter rests as far as that Court is concerned.

Upon the general question, Lord Cairns, L.C., delivering the opinion of the Privy Council in *Ridsdale v. Clifton*(3), made some remarks which are pertinent to the point. His Lordship said: "In the case of decisions of final Courts of Appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be final as to third parties. The law as to rights of

(1) 9 P.D. 96, 98.

(3) 2 P.D. 276, 306, 307.

(2) 20 Q.B. 569, 572.

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“property in this country is to a great extent based upon and formed by such decisions. When once arrived at, these decisions become elements in the composition of law, and the dealings of mankind are based upon a reliance on such decisions. Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly ought not to be reopened without the very greatest hesitation”; and later: “In proceedings which *may come to assume a penal form*, a tribunal, even of last resort, ought to be slow to exclude any fresh light which may be brought to bear upon the subject.” The decisions of our Court of Appeal are appealable to the Privy Council, and are therefore not final. It would appear that, in those circumstances, the weight of authority is in favour of the proposition that the Court is not necessarily bound by its own decisions. The right to decline to follow a previous decision, in view of the grave consequences following on uncertainty in the law, should be exercised only in very exceptional circumstances, and with the greatest hesitation. Moreover, in my opinion, it should never be exercised except by a Court constituted under the powers conferred by s. 9 of the Judicature Act Amendment Act, 1913—that is, of both divisions sitting together.

I turn now to the first contention, that the observations of the Judges in *R. v. Dawe*(1) as to the amending effect of s. 171 upon the rule at common law were merely *obiter*.

I think, upon a critical examination of the case, that it is clear that the statements made were not *obiter dicta*, but were the *ratio decidendi* of the case. In the summing-up of Cooper, J., the learned trial Judge, his direction as to the law on the subject was based on s. 171, and negatived the submission by counsel that a greater degree of negligence is necessary than would suffice in a civil action brought in respect of the consequences of the same act. The jury found that there was no gross neglect, but there was a “neglect of duty.” The argument in the Court of Appeal was largely directed to the question as to whether “gross” neglect was an essential ingredient of the offence of manslaughter. The Solicitor-General submitted, *inter alia*, that the distinction between gross negligence and ordinary negligence had been expressly eliminated in New Zealand by s. 171; and when counsel for the prisoner was arguing on the rule at common law

(1) 30 N.Z. L.R. 673; 13 G.L.R. 574.

Cooper, J., interposed with the question, "May there not be an exception to the rule you state, where a person is in charge of a dangerous machine? Section 171 seems to recognize this." Then Stout, C.J., in giving judgment, quoted s. 171, and said: "By this section the Court is bound. It cannot, to my mind, as the section is not ambiguous, refer to cases that have been decided at common law as to what neglect when in charge of a motor-car enables a jury to declare that manslaughter has been committed." Denniston, J., said: "I think that s. 171 of the Crimes Act, 1908, disposes, and was probably intended to dispose, in respect of all cases within its purview, of the distinction between 'negligence' and 'gross negligence.'" Edwards, J., after referring to the conflicting decisions at common law, said: "If the case had been ruled by the common law upon this subject there might, therefore, have been some difficulty in determining it. In my opinion, however, the Solicitor-General is right in his contention that the case is ruled by the 171st section of the Crimes Act, 1908," and, after quoting the section, "The direction given by the learned Judge to the jury was strictly in accordance with the law as so enacted." I have already quoted the observations of Cooper, J., in the early part of this judgment, where he negatives the necessity of proving gross negligence and makes the sole test of criminal responsibility the question as to whether the accused has failed to take reasonable precautions against, and has failed to use reasonable care to avoid, the danger. Chapman, J., dissented from the view taken of the section, holding that the wording did not necessarily exclude "the distinction long observed between mere negligence and culpable negligence." I think, therefore, that it is obvious that the whole case turned on the question of the meaning to be attached to s. 171, and that the views expressed by the learned Judges were necessary to a determination of the case. If gross negligence had been held to be necessary, the jury by their verdict had negatived an essential ingredient of the offence.

With those views I respectfully agree, and think that the wording of the section shows that the Legislature intended to settle, so far as New Zealand is concerned, what was then a vexed controversy as to what degree of negligence was required to be proved to establish a criminal offence in respect of the use of dangerous machines. It is to be observed that the section does not appear for the first time in the consolidating Crimes Act of 1908, but as s. 152 of the Criminal Code of 1893; there is, therefore, no presumption against an alteration of the common

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law: See Lord Herschell in *Bank of England v. Vagliano*(1). I desire to emphasize that it only deals with negligence in respect of the use of such machines, and does not purport to be a general definition of the degree of negligence necessary to be established in all cases of alleged culpable homicide.

The ruling in *R. v. Dawe*(2) therefore applies to the first count: does it apply to the second? It will be observed that s. 171 is wide in its language, simply stating that a person who fails to act in accordance with the duty imposed upon him by the section is "criminally responsible for the consequences of "omitting without lawful excuse to perform such duty." It does not say "shall be guilty of manslaughter," but at the time the statute was passed that was the only offence with which, in the case of death, an offender could be charged. The offence was culpable homicide, as consisting in the killing of a person by an unlawful act, or by an omission without lawful excuse to perform or observe any legal duty, or by both combined (s. 175), and was manslaughter, as being culpable homicide not amounting to murder (s. 186). Bodily harm caused by negligence was provided for by s. 206, which prescribes the punishment of any one who causes actual bodily harm to any person "under such "circumstances that if death had been caused he would have "been guilty of manslaughter." The word "manslaughter," therefore, bulked largely before juries in cases of this nature, and full advantage was taken by counsel for the defence to deter juries from finding an otherwise decent and respectable man guilty of what was hinted to be a most serious crime. This entailed laborious explanations from the Judges as to the degrees in manslaughter, ranging from a comparatively trivial offence to something little less than murder, but with little effect upon juries, and many a quite unjustifiable acquittal was the result.

To meet this difficulty s. 27 of the Motor-vehicles Act, 1924, was enacted. The relevant part is as follows:—

(1) Every person commits a crime, and is liable on indictment to imprisonment for a term not exceeding five years or to a fine not exceeding five hundred pounds, who recklessly or negligently drives any motor-vehicle and thereby causes bodily injury to or the death of any person . . .

(2) It shall be no defence to an indictment for the crime of manslaughter that the guilty act or omission proved against the person charged upon such indictment is an act or omission constituting a crime under this section.

The question is as to whether the common law applies to the construction of this section, or whether it must be read in the

(1) [1891] A.C. 107, 144.

(2) 30 N.Z. L.R. 673; 13 G.L.R. 574.

light of s. 171 of the Crimes Act, 1908, and the decision in *R. v. Dawe*(1). I think there can be no doubt about the matter, for the following reasons: (i) Section 171 of the Crimes Act, 1908, is in its terms general, and purports to prescribe the duties of persons in charge, *inter alia*, of motor-cars. (ii) It, in effect, defines what shall be deemed to be criminal negligence in respect of the driving of motor-cars as an absence of reasonable precautions and care to avoid danger. (iii) *R. v. Dawe*(1) definitely excludes any question of the degree of negligence as a factor in considering whether an offence has been committed. (iv) The two statutes are, as regards the offence, *in pari materia*, and it is a sound rule of construction that in such a case a judicial decision in one is a guide to the meaning of the other: *R. v. Mason*(2). There is, therefore, no ground for suggesting that the words "recklessly or negligently" in the section mean anything less than they say, nor any warrant for any implication that a greater or grosser degree of negligence is necessary to support a criminal charge for a breach of the section than for a charge of manslaughter under the Crimes Act. It would be absurd if it were so. The degree of negligence is a matter for consideration of the Judge alone as a factor in determining the measure of punishment.

The next question is as to whether or not contributory negligence is any defence, in respect of this particular offence, to a proceeding under either statute. I desire to say here that there is nothing, in my opinion, which necessitates different principles being applied to a consideration of the law applicable to the respective statutes. The question can therefore be considered generally.

That being so, the general rule is that contributory negligence of the deceased is no defence. That rule has been established by a long line of decisions in cases of charges of manslaughter based on negligence, where it has been repeatedly held that it was no defence that the deceased contributed to the result by his own negligence. The contrary was held in *R. v. Birchall*(3); but that case stands alone. If, however, there were any doubt about the matter, s. 171 excludes any question of contributory negligence. In saying this, it may be observed that the term "contributory negligence" is unfortunate. It is generally used to include all classes of negligence by a plaintiff where without that negligence the accident would not have happened. It is

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(1) 30 N.Z. L.R. 673; 13 G.L.R. (2) 2 T.R. 581.

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(3) 4 F. & F. 1087.

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not every class of such negligence of which evidence would be inadmissible as a defence to a criminal charge. I instance the type of case where in a civil action the defendant could rely on the *Bywell Castle*(1) rule. If in a criminal proceeding the deceased's negligence was of such a nature as to put the accused in sudden peril, and, in the "agony of the collision," he adopted a course which in other circumstances would be negligent, I cannot doubt that proof of those facts would be an answer to the charge: the deceased would be the author of his own death. The rule excluding contributory negligence as a defence to a charge of manslaughter applies, I think, solely where the negligence of the accused is voluntary and independent of the acts of the deceased. It is interesting to observe that in a note to *Russell on Crimes*(2) mention is made of a Queensland case, *R. v. Bunney*(3), a report which is not available here, in which Griffith, C.J., suggested that evidence to establish contributory negligence might in a criminal case be admitted to show that the death was not due to the culpable negligence of the defendant. Such a reason would not, in view of s. 171, have any weight here. I think, therefore, that, subject to what I have said, the rule applies to both counts of the indictment.

I have dealt with these questions at length for the reason that the learned Chief Justice was largely influenced to reserve this case for the Court of Appeal in order to get a definite decision upon them, conflicting views having been at times expressed in the Courts as to the full effect of s. 171. The questions were fully argued as being relevant to a consideration of the present case.

I now turn to the questions more directly in issue. The first in importance of these is whether the meaning of the verdict is (i) "Guilty" with extenuating circumstances, (ii) "Not guilty," or is (iii) inconclusive. Two issues were submitted to the jury: "1. Was the collision between the accused's motor-car and the car in which Mr. and Mrs. Cook were driving caused by the negligent driving of the accused?" To this the jury answered, "The jury's answer to question 1 is in the affirmative, but strongly recommend that the accused be dealt with leniently on the grounds that the accident was brought about by an error of judgment." The second issue was: "If so, would the death of Mr. and Mrs. Cook have resulted but for

(1) [1879] 4 P.D. 219.

(2) 8th ed. 767.

(3) 6 Q.L.J. 80.

"such negligence of the accused?" to which they answered, "The jury's answer to question 2 is in the negative." If any doubt may be said to exist as to whether this is a verdict of "Guilty" or "Not guilty," the doubt is caused by the statement that "the accident was brought about by an error of judgment." Now, any sort of negligence may be euphoniously described as "an error of judgment." It depends on the measure of culpability the speaker desired to attach to the act: if desirous of glossing or mitigating the offence he may so term the actions of the accused, whereas a sterner view would be that the act was negligent or even grossly negligent. But, as already pointed out, the degree of negligence is a matter for consideration for the Judge alone for the purpose of fixing the measure of punishment. In such a case as the present an "error of judgment" as a defence can only truly arise where the acts of the deceased have been of such a nature as to place the accused in a position that he is unable to exercise a reasoned judgment and the alleged negligent act is done in pursuance of an attempt to avoid the consequences of the act of the deceased. If the accused in those circumstances does the wrong thing that is truly an error of judgment, that would be an answer to a criminal charge as it would to a civil action. In such a case there would be no evidence of want of reasonable precautions, nor of an absence of reasonable care, to bring the accused within s. 171. But that is not the kind of error of judgment that the jury have found here. Neither in the defence nor in the summing-up of the learned Judge is there any suggestion of the accused being subjected to a sudden emergency: the negligence charged was being in the position he was in on the road, which position he had taken with deliberate intent, unaffected by any act of the deceased, and so the jury have found, adding a recommendation to mercy. That they should choose to call his act "an error of judgment" does not affect the finding of causing the death of Mr. and Mrs. Cook by negligent driving. I think it is a verdict of "Guilty."

The next question is whether or not the learned Judge had power to ask the jury to answer issues. It is contended that he had not, and that he should have left the case to the jury on the simple question, "Guilty or Not guilty." The question may be considered from two aspects: (i) Whether, and, if so, in what circumstances, there is a statutory power; (ii) whether or not there is an inherent power. As to the first, under the heading

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of "Appeal," s. 442 (1) and (2) of the Crimes Act, 1908, provides as follows:—

(1) The Court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge, for the opinion of the Court of Appeal in manner hereinafter provided.

(2) If the decision of the question may in the opinion of the Court depend on any questions of fact, the Court may in its discretion ask the jury questions as to such facts separately, and the Court shall make a note of such questions and findings thereon.

I think this gives no general power to submit issues to a jury. As I read those subsections, the procedure prescribed requires the case to be submitted to the jury on the general question of "Guilty or Not guilty." Subsection 2 then provides that if the decision by the Court of Appeal may depend on some questions of fact the Court may in its discretion ask the jury questions on such facts *separately*—that is, separately from the general question. This does not necessarily mean that those questions are to be asked after the finding of "Guilty" or "Not guilty," although that may be done. I think that it is allowable when asking the jury to find whether the prisoner be guilty or not guilty also to ask that they *separately* answer the questions of fact submitted. Then, is there any inherent jurisdiction to submit issues in lieu of the general question? The cases show that this has repeatedly been done, and there would appear to be no doubt that a Judge has the power to request a jury to answer issues instead of giving a general verdict. There are difficulties in this proceeding: (i) The jury is entitled to decline to answer issues; (ii) if issues are submitted and on the answers a verdict of "Guilty" is *directed*, the verdict cannot stand unless those answers cover every necessary ingredient of the offence: *R. v. Kendrick*(1). It becomes of the nature of a special verdict. Special verdicts have been recognized in England for hundreds of years, but the general practice is for a special verdict to consist of a statement by the jury of the facts upon which they ask the Court to pronounce the law. When, as in the present case, the jury are asked specific questions, upon answering which they are directed to find a prisoner guilty, I cannot doubt that the answers so given must be subject to the same rules as govern a special verdict—that is to say, the Court cannot draw from other statements contained in the

(1) 37 T.L.R. 447.

answers any inference of facts necessary for the determination of the case; all such facts must be found by the jury, and expressly stated.

This brings me to the next question—as to whether or not the answers in this case do cover every necessary finding required to constitute the offence charged. It is contended by counsel for the accused that the jury have not by these answers found that the negligence of the accused *caused* the death of the deceased. The point of this contention arises from the peculiar facts of the case. The collision was very slight—a mere brushing of the two cars—followed by the car occupied by the deceased travelling diagonally across and down the road for a distance of 56 ft. and then falling over the bank. Involved in the question is a further question, with which I shall deal later—as to whether the learned Judge was justified in excluding evidence that the brakes and steering-gear of the deceased's car were defective and that the terrain by the bank was treacherous and crumbly.

Now, the collision between these two cars being due, as found by the jury, to the negligence of the accused, he is liable for the consequences arising from it until the intervention of some diverting force or until the force put in motion by his negligence has itself become exhausted. In the peculiar circumstances of this case it was in issue whether there had been (i) the intervention of some diverting force—*nova causa interveniens*—or (ii) whether the effect of the original negligence of the accused had itself become exhausted. If the jury found either of these two questions in favour of the accused he could not be convicted, and the answer to the second of the issues does not cover those questions. It is true that the jury found that the deaths would not have resulted but for the negligence of the accused, which might well be the case and yet the accused be not liable had the jury chosen to find that the deceased recovered control of his car after the collision and then voluntarily went over to the open space, which, proving to be treacherous ground, gave way and precipitated the car over the bank. There was some evidence in that direction: a Crown witness (Foley), in cross-examination, said: "It was my opinion after the collision that Mr. Cook had deliberately crossed the road to get to that open space."

Of course, if, to apply the metaphor of Lord Sumner in *S.s. Singleton Abbey v. S.s. Paludina*(1), the hand of the

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(1) [1927] A.C. 27.

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accused was still heavy on the deceased, the accused would still be responsible even though the deceased had voluntarily gone across to the treacherous part of the road. But that was a question of fact for the jury. I think that the answer by the jury amounts to nothing more than that the negligence of the accused was merely the *causa sine qua non*, this finding leaving open the question as to whether or not an unbroken chain of causation is established between the act of the accused and the deaths of the deceased. This, in my opinion, is an essential ingredient of the offence. To support the indictment it was essential for the Crown to prove, as to the first count that the accused by negligently driving his car did *kill* the deceased, and, as to the second, did *cause the death* of the deceased. I think these two expressions may be taken as synonymous. Each of them requires as an essential a finding that the chain of causation is complete between the negligence and the deaths. For these reasons I am of opinion that, as ruled in *R. v. Kendrick*(1), "The answers " of the jury to the questions put to them are not, in themselves, " sufficient to enable the Court to give judgment, treating them " as a special verdict."

The final question is as to whether or not certain cross-examination was properly stopped, and whether or not certain evidence was properly disallowed. The cross-examination that was stopped was directed to showing contributory negligence on the part of the deceased. It has already been shown that contributory negligence is no defence to the charge. Logically, therefore, cross-examination directed to proving it is irrelevant, and should not be allowed; but an exhaustive examination of the authorities fails to produce any case in which such cross-examination has been stopped. It may be that that is due to the fact that such evidence, in the different state of the law existing elsewhere, is there relevant to the question of the degree of culpability. Such a reason would be of no weight here with s. 171 in existence; but I do not think that, even so, the cross-examination can be stopped, for it is really part of the *res gestæ* and may conceivably prove relevant upon the very question that I have already said I do not think is covered by the issues put. For the same reasons I think that one is bound to admit evidence in chief of all the contributing circumstances, even though, at the stage tendered, such evidence may be suggestive of an attempt to set up a defence of contributory negligence, for until the conclusion of the whole case it is hardly possible to definitely

(1) 37 T.L.R. 447.

determine that the evidence is not relevant to disprove a causal nexus between the negligence and the death or injury. In summing-up, the jury would, of course, have to be warned to disregard such parts of the evidence as by that time it would appear were irrelevant.

I think, therefore, that for two reasons—(i) that the answers of the jury to the questions put to them are not sufficient to enable the Court to give judgment, and (ii) that the cross-examination should have been allowed and the evidence tendered admitted—there should be a new trial.

ADAMS, J. :—

I have had the advantage of reading the judgment of the learned Chief Justice in this case, and, after careful consideration, find myself in complete agreement with the conclusions at which he has arrived and the reasons given. I shall therefore content myself with concurring in that judgment.

BLAIR, J. :—

Upon the question as to the degree of negligence required to be proved to establish the crime of manslaughter due to negligent driving, or the crime of negligent driving causing death or grievous bodily harm under the Motor-vehicles Act, 1924, I fully concur with the judgment upon this point delivered by the Chief Justice. The degree of care in both cases is that provided by s. 171 of the Crimes Act.

As this Court is adopting the views of the majority of the Court in *Dawe's case*(1), the question as to whether that decision is binding upon a Court composed of both divisions of the Court of Appeal really does not arise. For the reasons expressed by my brother Reed, I doubt whether *Dawe's case*(1), if our views were in conflict with that decision, would be binding upon us.

I find myself unable to agree with the view which appears to be held by some of my brothers in this Court, that in a charge of manslaughter against an allegedly negligent motorist or in a charge under s. 27 (1) of the Motor-vehicles Act the accused can be convicted if the evidence falls short of proof that his negligence was at least the substantial or effective cause of death or bodily injury, as the case may be.

An examination of the Crimes Act and the Motor-vehicles Act shows, I think, that the proof required to convict for the

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crime of manslaughter or the crime of negligent driving causing death is the same. The crime of manslaughter as against a motorist is created by four sections of the Crimes Act—viz., s. 171, which provides for the standard of care; s. 173, which provides that homicide is the killing of a human being; s. 175, which provides that homicide is culpable when it consists in the killing of any person by an omission without lawful excuse to perform or observe any legal duty; and s. 186, which makes culpable homicide, not amounting to murder, manslaughter. The indictment against Storey was that he did *kill* the two deceased. The proof required to establish this charge is, firstly, that Storey was guilty of negligent driving of his motor-car, and, secondly, that the death of the deceased was the consequence of such negligence. Section 171 says that the negligent person “is criminally responsible for the *consequences* of omitting without “lawful excuse to perform such duty.” Unless the Crown can establish that the death was the *consequence* of the breach of duty, the Crown’s case fails.

Under the Motor-vehicles Act it is made a crime for any person negligently or recklessly to drive a motor-vehicle and *thereby cause* bodily injury to or the death of any person. To establish this crime, the Crown must prove negligence, and that such negligence *caused* the death or bodily injury. It will thus be seen that the proof required in each case is the same. The Crown’s case under the Crimes Act and the Motor-vehicles Act fails if there be wanting proof of nexus between the negligence and the death.

In some of the judgments by my brothers in this Court expressions such as “contributory to the death” and similar expressions have been used. Reference is also made to the English common law regarding the definition of contributory negligence. We are not concerned with the English common law, because our Criminal Code defines the offence. Whether the crime charged be manslaughter or negligent driving causing death, the Crown has to prove in the case of manslaughter that the death was the consequence of the negligence, and in the case of negligent driving causing death that the death was caused by the negligence.

In their contexts the word “causes” and the word “consequences” are synonymous in effect. If *Dawe’s case*(1) was correctly decided—and this Court is unanimous upon this

(1) 30 N.Z. L.R. 673; 13 G.L.R. 574.

point—then it follows that the English common law has no application to crimes defined by s. 171; and it seems to me that if we accept *Dawe's case*(1) as a correct exposition of the law, then it follows that we must disregard the English common law on manslaughter, whether that common law is or is not more lenient to the accused. We cannot go outside the plain definition of the offence in our own statutes.

The question in a charge of manslaughter is whether the death is the consequence of an unlawful act, and the question in a charge under the Motor-vehicles Act is whether the negligent act caused the death. These are the only questions the jury have to try.

I am at one with the Chief Justice when he says he refuses to accept the contention that the Crown must prove that the negligence was the *sole* cause of the death, and, for different reasons than those expressed by him, I consider that we cannot apply the law applicable to civil cases to a criminal case. A jury in a criminal case could, if it thought that the accused's negligence was the effective cause of the death, find the accused guilty notwithstanding that on the victim's part there was negligence which in a civil case might have prevented the victim or his representatives from succeeding. The Chief Justice says in his judgment: "It follows, once it is proved that the accused negligently drove his motor-car and that the death of or bodily injury to another person was a consequence of that negligence, that such negligence has caused the death or bodily injury."

If the Chief Justice by the use of the words "a consequence" means "the consequence," then I concur in his views. I confess I cannot understand how death can be a consequence of negligence if the negligence was not the cause. Negligence can, of course, have a number of consequences, but in a criminal charge against a motorist we are not concerned with any consequence except death or bodily injury. Section 171 makes the negligent person criminally responsible for "the consequences," and if the Crown's case does not directly connect the negligence with the death or bodily injury and establish that the one is the consequence of the other, then, in my view, the Crown's case fails. If the Crown's case establishes negligence on the accused's part, and the accused, even if he admits that negligence, can produce evidence that the real and effective cause of the death was the

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victim's own negligence, surely the jury who are to try the question as to whether the accused's negligence caused the death must look at these additional facts for the purpose of saying whether the Crown has established that the death was the consequence of the accused's negligence.

Expressions used in some of the judgments already delivered in this case are susceptible of the construction that some members of this Court hold the view that a mere contribution by the accused to the death of the victim is sufficient to support a charge under either statute. I do not think it is intended to go to this length; and, if it were so, then it would be the duty of a Judge trying such a case to direct the jury that it was their duty to convict even if the victim himself were guilty of 99 per cent. of the negligence and the accused were guilty of only 1 per cent.

From a practical point of view, no jury would convict in such a case. But it seems to me that such an assumed case shows that the test of liability is *cause* of death, and not a mere contribution to cause of death.

When discussing the question of the possible application of the law of civil actions to charges against motorists the Chief Justice points out that in a civil case it is open to the defendant to say to the plaintiff, "It was your own fault, or, at all events, "as much your fault as mine. You could have avoided the "impact, and you were, therefore, the author of your own "injury." My learned brother then says that for the purposes of our Crimes Act the negligent motorist commits a crime against the State, no matter how negligent the other person may be. I agree that he commits a crime against the State, but unless his crime results in death or grievous bodily injury this crime is not punishable under s. 27, but is punishable under s. 28 of the Motor-vehicles Act. To constitute a crime under s. 27 the negligent driving must cause death or bodily injury. To prove this crime there must be proof that the negligence caused the death or bodily injury. If the Crown's case carries the matter no further than to leave it in doubt as to whether the negligence of the accused or the negligence of the victim himself was the cause, then, in my opinion, the case against the motorist under s. 27 fails; *a fortiori* if on the Crown's case it appears that the victim was the author of his own death. I appreciate that if both the victim and the accused were equally negligent the jury could find the accused guilty, and the jury could, if the victim were guilty of greater negligence than

the accused, also find the accused guilty of causing the death. A man may be the effective cause of another's death even though others contributed to it. The question of cause is a question of fact for the jury. The matter cannot be worked out mathematically. In my view, the question as to whether the accused's negligence is the cause is peculiarly one for the jury, and all evidence touching the question as to whether the negligence of the accused or of the victim, or even of a third party, was the cause of the victim's death is relevant and material to the question of cause.

It follows from what I have said that, in my opinion, the evidence excluded at the trial should have been admitted, and I concur that there should be a new trial.

I think I should add that, in my opinion, there is a distinction between driving recklessly and driving negligently. Both are made offences under s. 27. To constitute negligent driving involves only a disregard of the duty created by s. 171. A negligent driver is remiss in his duty, but a reckless driver is more than merely forgetful or inattentive—he is knowingly disregarding of his duty. A driver could be found guilty of negligence when the evidence shows that he is reckless, but he could not be found guilty of recklessness when charged with negligence only.

Upon the question of the right of the Judge to submit issues to the jury, I agree that in the present case it was proper to submit issues, because the answers in this case were required for the case mentioned in s. 442 of the Crimes Act. But, in my view, the only cases in which the jury may be required to answer issues are cases within s. 442, and not any other cases. The jury is sworn to try the question as to whether the accused be guilty or not guilty and “to return a verdict accordingly.” To say that a Judge may make a request to a jury to do something else and at the same time admit that it is his duty to advise the jury that they are not bound to comply with the request means, in my view, that there is no right to require a jury to answer issues, except in the cases mentioned in s. 442.

For the reasons stated by him, I adopt the view expressed by the Chief Justice as to the meaning of the jury's verdict.

SMITH, J. :—

I have had the pleasure and advantage of reading the judgment prepared by Mr. Justice Reed. I agree with his

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conclusions and with the reasoning upon which they are based. The *Bywell Castle*(1) type of case, referred to by His Honour, is not strictly a case of negligence; but His Honour's meaning is clear. I can see no advantage in attempting to state again what has been so well stated by His Honour, and, with respect, I concur in his judgment.

KENNEDY, J. :—

I have had the opportunity of reading the judgment delivered by the Chief Justice. I find myself so much in agreement with what he has said that I have not thought it necessary to prepare a separate judgment dealing with the questions discussed by him, and I desire to be understood as concurring in that judgment.

R. v. Dawe(2), in my opinion, is a definite decision as to the meaning of s. 171 of the Crimes Act, 1908, and this Court is bound by that decision. The practice of the Privy Council is to review, if necessary, its own decisions—*Read v. Bishop of Lincoln*(3)—although a decision of the House of Lords upon a question of law is conclusive and binding on the House in subsequent cases: *London Street Tramways Co. v. London County Council*(4). I think that this Court should follow the practice of the English Court of Appeal. The rule to be adopted by that Court has recently been discussed in *Newsholme Bros. v. Road Transport and General Insurance Co.*(5). Scrutton, L.J., took the view that the Court was bound by its own decisions in any case raising substantially similar facts, while Greer, L.J., took the view that the Court might decline to follow a previous decision, though it would only be in most exceptional cases that those powers could be exercised. There are dicta and decisions in favour of either view, although, in my opinion, the weight of authority is in favour of the view stated by Scrutton, L.J.

In *Mills v. Jennings*(6) Cotton, L.J., delivering the judgment of the Court (James, Baggallay, and Cotton, L.JJ.), said(7): "As a rule, this Court ought to treat the decisions of the Court of Appeal in Chancery as binding authorities, but we are at liberty not to do so where there is a sufficient reason for overruling them. As the decision in *Tassell v. Smith* may lead to consequences so serious, we think that we are at liberty to

(1) [1879] 4 P.D. 219.

(2) 30 N.Z. L.R. 673; 13 G.L.R. 574.

(3) [1892] A.C. 644.

(4) [1898] A.C. 375.

(5) [1929] 2 K.B. 356.

(6) [1880] 13 Ch. Div. 639.

(7) *Ibid.* 648.

"reconsider and review the decision in that case as if it were
 "being reheard in the old Court of Appeal in Chancery, as was
 "not uncommon." In *In re Watts, Cornford v. Elliott*(1),
 Cotton, L.J., in the Court of Appeal said: "Though sometimes
 "a decision of the Court of Appeal is overruled, this is only to
 "be done with great caution."

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In *Kelly and Co. v. Kellond*(2) Lord Esher, M.R., said: "This
 "Court is one composed of six members, and if at any time a
 "decision of a lesser number is called in question, and a diffi-
 "culty arises about the accuracy of it, I think this Court is
 "entitled, sitting as a Full Court, to decide whether we will
 "follow or not the decision arrived at by the smaller number."
 No opinion, however, was expressed upon this point by Fry
 and Lopes, L.JJ. The case of *Wynne-Finch v. Chaytor*(3) is a
 decision to the same effect. In *Hobson v. Leng and Co.*(4),
 Buckley, L.J., expressed the view that where the two Judges
 in the Court of Appeal differed in opinion, with the result that
 the decision stood unreversed, the Court of Appeal is not bound
 by the decision. The same view had been expressed by Brett,
 L.J., in *Smith v. Lambeth Assessment Committee*(5), where there
 had been in the Exchequer Chamber an equal division among
 the Judges.

In *Australian Agricultural Co. v. Federated Engine-drivers
 and Firemen's Association of Australasia*(6) Isaac and Higgins, JJ.,
 both expressed the view that the High Court of Australia should
 follow the rule by which the Privy Council governed itself. In
 the judgment of Isaacs, J., it is stated that the Supreme Courts
 of New South Wales and Victoria have maintained their
 authority to overrule prior decisions of their own, while
Desormeaux v. Ste Thérèse(7) is referred to as showing that the
 Supreme Court of Canada reviews its own decisions. That
 learned Judge, however, finds support for his view in the
 practice of the English Court of Appeal, which, he states, is to
 review its own decisions. In *Duval v. Maxwell*(8) it was decided
 that the Supreme Court is competent to overrule a judgment
 of the Court differently constituted, if it clearly appears to be
 erroneous.

There are, however, dicta and decisions to the contrary
 effect.

(1) [1885] 29 Ch. Div. 947, 953.

(2) [1888] 20 Q.B. 569.

(3) [1903] 2 Ch. 475.

(4) [1914] 3 K.B. 1245.

(5) [1882] 10 Q.B. 327.

(6) [1913] 17 C.L.R. 261.

(7) [1910] 43 Can. S.C.R. 82.

(8) [1901] 31 Can. S.C.R. 459.

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In *Lavy v. London County Council*(1) Lindley, L.J., in the Court of Appeal, referred to a decision of the Court which, he said, "We should be bound to follow whether we thought it "right or not." In *Pledge v. Carr*(2) the Court of Appeal (Lord Herschell, L.C., Lindley and A. L. Smith, L.JJ.) dismissed an appeal. Lord Herschell in his judgment concurred with the other members of the Court, saying, "We cannot overrule "*Vint v. Padget*, for that was the decision of a Court co-ordinate in jurisdiction with ourselves; all we can do, therefore, "is to dismiss this appeal." In *Evans v. Rival Granite Quarries, Ltd.*(3), Buckley, L.J., had said that the Court of Appeal is as much bound by decisions of the Court of Appeal as a Court of first instance. In *Velazquez Ltd. v. Inland Revenue Commissioners*(4) Cozens-Hardy, M.R., expressed the view that, where there had been a decision of the Court of Appeal upon a question of principle, it was not right for the Court, whatever its own view might be, to depart from that decision.

In *Attorney-General v. Parr*(5) Pollock, M.R., and Atkin, L.J., both referred to a decision of the Court of Appeal as binding upon them. In *Huyton and Roby Gas Co. v. Liverpool Corporation*(6) Bankes and Atkin, L.JJ., likewise treated a previous decision of the Court of Appeal as binding and as precluding them from coming to a contrary decision. In *Freeborn v. Leeming*(7) Bankes, Scrutton, and Atkin, L.JJ., all say that they are bound by a previous decision of the Court of Appeal.

In addition to the many decisions in which Lord Justices have declared themselves as bound by previous decisions of the Court, there may be specially mentioned the case of *Olympia Oil and Cake Co., Ltd. v. Produce Brokers Co., Ltd.*(8), where both Buckley and Phillimore, L.JJ., followed two decisions of the Court of Appeal which they were of opinion were wrongly decided. Buckley, L.J., said, "I am unable to adduce any "reason to show that the decision I am about to pronounce is "right. . . . But I am bound by authority, which, of course, "it is my duty to follow"; Phillimore, L.J., said, "With "reluctance—I might almost say with sorrow—I concur in the "view that this appeal must be dismissed"; while in the House of Lords(9) Lord Sumner(10) said, "On these grounds I think

(1) [1895] 2 Q.B. 577.

(2) [1895] 1 Ch. 51.

(3) [1910] 2 K.B. 979.

(4) [1914] 3 K.B. 458.

(5) [1924] 1 K.B. 916.

(6) [1926] 1 K.B. 146.

(7) [1926] 1 K.B. 160.

(8) 112 L.T. 744.

(9) [1916] 1 A.C. 314.

(10) *Ibid.* 332.

"that the Court of Appeal, though bound to follow the earlier decisions, were right in indicating their objections to them."

The case of *Wynne-Finch v. Chaytor*(1) is an earlier decision to the contrary effect. It is, as a writer in the *Law Quarterly Review*(2) says, "so peculiar that it may be considered unique."

The case was argued before the Full Bench of the Court of Appeal. Stirling, L.J., delivering judgment of the Court, said, "There is, however, a decision of the Court of Appeal in *Daglish v. Barton*(3) which is inconsistent with this view. The Court on that occasion consisted of the late A. L. Smith, L.J., and Vaughan Williams, L.J., the latter of whom expressed doubt as to the true meaning of the subsection, and now agrees with the present judgment. With the greatest respect, we are unable to agree with *Daglish v. Barton*(3), and think that it ought not to be followed; and it is, therefore, overruled."

I think that the weight of authority is in favour of the view that the English Court of Appeal is bound by its own decisions, and that the Court of Appeal in New Zealand should hold itself likewise bound by its own decisions, unless, of course, it appears from the decision of a superior Court that its earlier decision should not be followed.

Whether or not there is an exception to this rule where the Court, which ordinarily sits in divisions, sits as a Full Court of Appeal, it is immaterial to determine for the purposes of this case, because when *R. v. Dawe*(4) was decided the Court did not sit in divisions. But, even if the rule be that, the Court may in exceptional cases, perhaps more readily where there are penal consequences, decline to follow its own decisions, but even then exercising extreme caution. This is not, in my opinion, such a case. Moreover, in my opinion, *R. v. Dawe*(4) correctly interprets s. 171 of the Crimes Act, 1908.

I agree that on the trial of a criminal case a Judge has power to submit issues to the jury; but that power is not in terms conferred by the statute, but depends upon the inherent power of the Court. Section 442 of the Crimes Act, 1908, empowers the Court, where in its opinion the decision of any question of law arising depends upon any questions of fact, to ask the jury questions as to such facts separately. The use of the word "separately" shows that these questions are put in addition to

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(1) [1903] 2 Ch. 475.

(4) 30 N.Z. L.R. 673; 13 G.L.R.

(2) Vol. 46, p. 4.

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(3) [1900] 1 Q.B. 284.

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the general issue. Section 442 does alter the law to this extent : that the jury may not properly refuse to answer the issues put to them under that section, whereas they may refuse to give an answer to issues otherwise put to them and insist upon giving a general verdict only. I agree with Mr. Justice Reed that when a jury is asked specific questions, upon answering which it is directed to find a prisoner guilty, such a direction is proper only if all the facts have been found by the jury. A Judge is not at liberty to draw from the statements contained in the answers any inference as to facts not already found but necessary for the determination of the case. Questions of fact are for the jury, and a Judge may not, on issues being submitted, withdraw from the jury the determination of any question of fact not covered by the issues.

The issues put to the jury were not exhaustive, and the answers amount to no more than a finding that the negligence of the accused was a *sine qua non* of the death of the deceased. They do not necessarily negative the existence of the *novus actus interveniens* suggested. I agree that there should be a new trial.

New trial ordered.

Solicitors for the Crown : *Crown Law Office* (Wellington).

Solicitors for the prisoner : *Foden and Thompson* (Wellington).