CONTRIBUTORY NEGLIGENCE IN ACTION FOR CONVERSION

HELSON v. McKENZIES (CUBA STREET) LTD., [1950] N.Z.L.R. 878; [1950] G.L.R. 388.

One aspect of Helson v. McKenzies (Cuba Street) Ltd., [1950] N.Z.L.R. 878; [1950] G.L.R. 388, the well known "handbag" case, received perhaps less attention than it deserved when the judgments were published. The reference is to the issue of the plaintiff's contributory negligence. In the Court of Appeal the majority (Gresson and Northcroft JJ.) held that the plaintiff's damages should be reduced by three-fourths under the Contributory Negligence Act 1947; Finlay J. dissenting on this point, thought that the Act did not apply and that full damages should be awarded.

The facts of the "handbag" case were simple. The plaintiff left the handbag, containing over £400 in notes, on a counter in the defendant's shop. Another shopper discovered the bag, and assuming it to be lost, handed it to an employee of the defendant who in turn handed it to another employee, a floor-walker. Shortly afterwards the bag was claimed by a woman who was able to describe its outward appearance. The bag was delivered to her without further enquiry as to her identity or her knowledge of the contents. Subsequent events showed that the claimant was not the true owner. The plaintiff, suing in bailment and conversion, succeeded on the latter ground in the Court of Appeal, subject to the reduction of damages referred to.

In the Court of Appeal the judgments on the issue of contributory negligence turned largely on the applicability of Davies v. Mann (1882), 10 M. & W. 546; 152 E.R. 588, in the light of the provisions of the Contributory Negligence Act 1947. They examined the opinions of the English Court of Appeal on the same matter (with reference to the English legislation of 1945 on which our statute is based) in Davies v. Swan Motor Co. (Swansea) Ltd., [1949] 2 K.B. 291. Gresson J. (at 920 (407)) defined the plaintiff's negligence as consisting of leaving the bag, full of money, on the counter.

He held that this act was so closely connected with the defendant's wrongdoing that the acts of both parties were causal as regards the ultimate loss. He cited a passage from the judgment of Denning L.J. in Davies v. Swan Motor Co. (supra) at 336 to the effect that since the Contributory Negligence Act the court no longer selected one cause as the effective and predominating cause, but now had regard to all the causes and apportioned liability accordingly. The learned judge distinguished Davies v. Mann (supra) on the ground that in the latter case the only action required by the defendant was avoiding action, unlike the present where action of some sort was forced upon the defendant. Upon these grounds the learned judge held that this was a fit case for reduction of the plaintiff's damages. Northcroft J. concurred.

It will be respectfully submitted that this result is erroneous both in fact and in law.

Two main submissions will be put forward. The first, on a mixed question of fact and law, is that before the Contributory Negligence Act a plea of contributory negligence by the defendant in this case would have been defeated on the ground that the sole responsibility for the loss lay with the defendant.

The second submission is that the defendant's liability in these circumstances is not affected by the passing of the Contributory Negligence Act.

As to the first submission, it is suggested that on principle and entirely apart from authority the answer to the question "Did the plaintiff cause or contribute to the loss?" should have been in the negative. The plaintiff's carelessness, as it may be conveniently termed, cannot be denied, but such carelessness was in no way causative of the loss. It is to be kept in mind that the tort committed by the defendant was conversion, and that negligence is no element of that tort. That contributory negligence may nevertheless be pleaded and sustained in such an action is conceded, but carelessness of the plaintiff will not readily be held to contribute to a loss by conversion, this being a tort involving a positive act of

misfeasance. With respect it is submitted that Gresson J.'s statement in Helson's case at 921 (407) that "action of some sort was forced upon the defendant" is not supportable. It was certainly not a necessary consequence that the defendant should commit the tort of conversion. Once the bag came into the possession of the defendant, the dangers inherent upon the plaintiff's careless conduct were at an end. From the point of view of the ultimate result, the defendant's position was no different, at that stage, than if the bag had been deposited with it for safe-keeping; the defendant had every opportunity to take the proper precautions to see that the bag was delivered only to its proper owner, and such opportunity was in no way affected by the fact that the bag was claimed within a short time of coming into the defendant's possession.

When speaking of the plaintiff's negligence, the learned judge in each instance makes reference to the bag's valuable contents. This factor may be relevant in determining the plaintiff's degree of blameworthiness in apportioning responsibility for the loss - per Denning L.J. in Davies v. Swan Motor Co. (supra) at 326, as cited in McFarlane v. Neshausen, [1952] N.Z.L.R. 292, 295; but it is submitted that it has no bearing whatever in considering the causation of the loss in the first place. The defendant's wrongdoing would still have been conversion in law if the contents of the bag had been valueless; and the fact that the defendant had no knowledge of the contents and the plaintiff did, is immaterial. If the defendant had had knowledge of the value involved, it might well have exercised more care; but the tort is not one to which degree of care is relevant. The essential fact is that a deliberate act was done by the defendant incompatible with the plaintiff's title; the value of the contents goes only to the quantum of the loss, not to the manner in which it was incurred.

Entirely apart from authority, it is accordingly submitted that the sole fault in this case causing or contributing to the loss lay with the defendant. The plaintiff's carelessness was the mere sina qua non, the act setting up the static state of affairs on which a further

and entirely severable act of the defendant operated to bring about the loss.

The facts of Helson's case (supra) raise in acute form the problem of A's share of responsibility when B, recognizing and appreciating a situation brought about by A's carelessness, fails to avoid an accident which could have been avoided had B exercised reasonable care. On the facts before us we have reached, above, a conclusion that B is here solely responsible; reference must now be made to the relevant authorities.

It is not proposed to discuss whether the so-called rule of last opportunity has survived the Contributory Negligence Act 1947, or its English parent. The contention is put forward that it is not necessary to resort to any mechanical test of causation to absolve the plaintiff from contribution in the present case. And it will be further submitted that it is a well-established principle of law unaffected by statutes providing for apportionment of damages in cases of contributory negligence, that knowledge on the part of B of a dangerous situation brought about by the carelessness of A neutralises that danger, where B could by the exercise of reasonable care have avoided any damage or loss consequent upon further activity by B in that situation; so that in the result B is held solely liable for the loss or damage occurring. Whether, independent of that principle, there is or was a rule of law that the party to a common law action who failed to take advantage of the last opportunity to avoid a collision or accident was solely liable, and whether such rule, if it ever existed, "was dead before the Act" (per Denning L.J. in Davies v. Swan Motor Co. (supra) at 321) is not material for the purposes of this discussion. It is submitted in accordance with the judgment of Evershed L.J. in the case just cited, that such a principle as was applied in Davies v. Mann was quite distinct from what is commonly called last opportunity. The principle here being advanced is expressed in the speech of Lord Shaw in Anglo-Newfoundland Development Co. Ltd. v. Pacific Steam Navigation Co., [1924] A.C. 406, at 420:

> Although there might be . . . fault in being in a position which makes an accident possible yet, if the position is recognized by the other . . . then the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part could have been avoided.

The learned Lord expressly stated that in his view the principle he had enunciated was not confined to Admiralty law.

The same principle is referred to with approval in a number of compelling authorities, notably in Admiralty Commissioners v. S.S. Volute, [1922] 1 A.C. 129, at 136, per Viscount Birkenhead L.C.; The Eurymedon, [1938] P. 41, at 49, per Greer L.J.; and Boy Andrew (Owners) v. St. Rognvald (Owners), [1948] A.C. 140, at 149, per Viscount Simon. In none of these cases is it attempted to justify the result on the basis of "last opportunity", and the opinion of Denning L.J. in Davies v. Swan Motor Co. (supra) at 323 that Lord Shaw's dictum was a restatement of that doctrine in modern form does not therefore appear to be sound. Indeed, in the Boy Andrew Viscount Simon is at pains to distinguish the two; after stating that the last opportunity rule is inaptly phrased and is sometimes apt to lead to error, he states at 149:

> In Davies v. Mann, the negligence of the absent donkey-owner, serious as it was, created a static condition . . . . As by driving more carefully, he [the driver of the vehicle] could have avoided hitting the donkey, his negligence was the sole cause. The negligence of the donkey-owner was therefore a fault not contributing to the collision: it was merely a causa sine qua non.

If it is accepted, as it is proposed to submit it should be, that the Contributory Negligence Act did not have the effect of altering the rules of common law as to causation, it might be expected that subsequent decisions would add little on the subject of causation. The conflict of opinions among the Judges of the English

Court of Appeal in those decisions, however, makes a detailed reference to the case in question necessary.

The cases concerned are Henley v. Cameron (1949), 65 T.L.R. 17; Davies v. Swan Motor Co. (supra), and Harvey v. Road Haulage Executive, [1952] 1 K.B. 120.

In Henley's case the majority (Singleton and Tucker L.JJ.) took no concluded view on last opportunity or Davies v. Mann, holding that on the facts before them both parties were to blame. The chief interest in the case lies in the dissenting judgment of Asquith L.J. The learned Lord Justice took the view that last opportunity (as distinct from the principle of law we have put forward) could still be, and was in the circumstances, applicable; and held one party solely to blame.

In Davies v. Swan Motor Co. the Court (Bucknill, Evershed and Denning L.JJ.) was unanimous in its view that the last opportunity rule, if ever it had an existence as a rule of law, had ceased to be good law prior to and independently of the Contributory Negligence Act. Denning L.J. was further of opinion that if the last opportunity rule was discredited so was Davies v. Mann, which his Lordship considered as illustrating the same rule. On this point the other members of the Court disagreed, saying that such a rule as was applied in Davies v. Mann - where the defendant by exercise of reasonable care, could have avoided the results of the plaintiff's carelessness, the plaintiff being at the material time functus officio - was not affected by the Act.

In the most recent of the cases, Harvey v. Road Haulage Executive, Denning and Hodgson L.JJ., on facts closely analogous to Davies v. Mann, held that in the circumstances the negligence of both parties continued up to the moment of the accident and that accordingly it was a case for apportionment. The judge at first instance, upon an application of the Anglo-Newfoundland Development case and the Boy Andrew, had held one party wholly to blame, but Denning L.J. said that to uphold this view would be a reversion to last opportunity, and he emphasized the conclusion he had reached in Davies v. Swan Motor Co., that such doctrine was no longer law.

It is on the opinion of Denning L.J. that the judgment of the majority in Helson v. McKenzies (Cuba Street) Ltd. is largely based, and his views must accordingly be examined in some detail.

The learned Lord Justice's opinion is fairly summarised in the extract from Davies v. Swan Motor Co. cited in Helson v. McKenzies (Cuba Street) Ltd. at 920 (406):

> The legal effect of the Act . . . is simple enough. If the plaintiff's negligence was one of the causes of his damage, he is no longer defeated altogether. He gets reduced damages. The practical effect of the Act is, however, wider than its legal effect. Previously, to mitigate the harshness of the doctrine of contributory negligence, the courts in practice sought to select, from a number of competing causes, which was the cause - the effective or predominant cause - of the damage and to reject the rest. Now the courts have regard to all the causes, and apportion the damages accordingly. This is not a change in the law as to what constitutes contributory negligence - the search, in theory, was always for all the causes - but it is a change in the practical application of it.

It is in the latter part of the citation, it is respectfully submitted, that the learned Lord Justice has fallen into error. What is called the "practical" effect of the Act is undoubtedly the effect a jury would give - and would be directed to give - in borderline cases. There would be no niceties of application or technicalities such as the last opportunity rule or the refinements of Loach's case,[1916] 1 A.C. 719. Furthermore it is not disputed that in apportioning damages - see McFarlane v. Neshausen (supra) - regard is to be had not merely to causation but also to responsibility other than strict legal responsibility - that is to say, once a party has a share in legal responsibility for the result, his carelessness in all respects, including such as in themselves would not have brought legal responsibility for the accident on that party, may be taken into account in assessing the respective proportions of the damages. But

that should be no reason why, in a proper case, the courts should not direct the jury that if it finds certain facts, one party and one party only is in law responsible, notwithstanding the other party's carelessness. The crucial point in Lord Justice Denning's dictum, it is submitted, is in the phrase "if the plaintiff's negligence was one of the causes of the damage." Whatever hypothesis be advanced to explain the existence of the last opportunity rule, it is respectfully agreed that since the passing of the Act, there is no longer necessity to resort to devices of this kind to select one cause as predominating and to fix all liability upon it. Where, it is respectfully suggested, objection may be taken to his Lordship's views is in their further application to the principle of law which has been considered. This is a principle of law which has received the highest judicial approval not only at common law but also in the Admiralty jurisdiction where there has been no reason for the court to turn a blind eye to trivial fault of the plaintiff's, as there might have been at common law, to mitigate the harshness of the contributory negligence rule. The fallacy in the learned Lord Justice's reasoning is pointed to in the speech of Lord Shaw in the Anglo-Newfoundland Development Co. case (supra) at 420:

> Unless that principle be applied it would be always open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encountering of danger was contributed to by the fact that there was a danger to be encountered.

The force of Lord Justice Denning's dictum, that since the Contributory Negligence Act the court no longer selects one cause as the cause of the accident, but has regard to all the causes, is not disputed. That is sufficient to dispose of the last opportunity cases, where one party, though at the time of the accident not functus officio, has been absolved from blame by the mere reason of the later negligence, in point of time, of the other party. Such result was based on the fallacy that the breaking of the camel's back can be attributed solely to the last straw, and the fallacy has been recognized as such before the

passing of the Act. The submission made is that in the case under review, and in the other cases covered by the general proposition which has been advanced, the plaintiff's carelessness simply was not a cause of the loss. The proposition, it is submitted, is unanswerable as a matter of law in the light of the Anglo-Newfoundland Development Co. case and the other decisions cited earlier. In a moment the further submission will be developed that this rule of law has been unaffected by the passing of the Contributory Negligence Acts. If a gloss may be added respectfully to the learned Lord Justice's dictum, the search was always for the legal causes, and in certain circumstances the courts have laid down that one party's original carelessness does not qualify as a legal cause.

It is necessary to define the limits of the proposition which has been advanced. The essentials are (a) a static situation of risk created by carelessness on the part of A; (b) appreciation of the situation by B, and his ability to avoid the risk by the use of reasonable care. As to (a) the attempt to distinguish between static and dynamic negligence has been criticised. It is submitted, however, that it is of help to ask in each case "Did A's act cause the harm?" The case of an obstruction left on the highway may be considered: in one case it is run into at night time, in the other by daylight. In the first case, notwithstanding the apparently "static" conditions, A may be held liable to contribute, because one aspect of the situation created by his carelessness - the fact that the obstruction was unlighted - was a factor right up to the moment of collision. In other words, the situation was not a truly static one. On the other hand, in daylight, A's carelessness was spent when B saw the danger in time to avoid it; not so, however, if B came upon the obstruction immediately after rounding a sharp bend.

A difficulty arising out of (b) is the place, if any, to be given in the proposition advanced to the case where B, by his own negligence, has deprived himself of what would otherwise have been an opportunity to avoid harm - the situation which in the last opportunity cases was

covered by Loach's case (supra). It is a difficulty which does not arise in Helson's case, but it is nevertheless a point which should be adverted to, since a proposition of law, which must raise the issue, has been put forward in general terms.

The submission made is that, as the law stands, constructive opportunity alone does not necessarily involve the party in whose hands it lies in full responsibility. If there is not an affirmative answer to the question "Did B being fully aware of the situation created by A, nevertheless have the opportunity to avoid by the use of reasonable care the results of A's carelessness?" then the general proposition of law on which this discussion is based is inapplicable, as there is yet no authority grafting on to that rule a qualification of the nature of the principle in Loach's case (supra) in the last opportunity cases. The question will then be purely one of "Whose act caused the harm?" and the result, in general, will be that both parties are held liable to contribute. There is not space to enter into a discussion whether there is logic in the distinction thus drawn between negligence in not seeing an obstruction and negligence after seeing it. The point is merely made that apparently the one situation is covered by the authority which fixes liability on one party: the other is not.

The final submission made is that the proposition which has been advanced cannot be affected by an Act which was intended (in the words of Bucknill L.J. in Davies v. Swan Motor Co. (supra) at 310) "to alter the legal consequences of negligence by both parties causing or contributing to the damage complained of."

The wording of the statute must be turned to in order to see if the conclusions reached above are consistent with it. Section 3 of the statute provides for reduction of damages, on claim or counterclaim, where damage is suffered partly as the result of fault of the plaintiff and partly as the result of fault of some other person. The crux of the matter lies in the definition of the word "fault" in s. 2. "Fault" means:

> negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort, or would, apart from this Act, give rise to the defence of contributory negligence.

If, as has been submitted, there exists a rule of law "apart from the Act" that in certain circumstances the negligence or carelessness of one party to a common-law action is not to be regarded as causal, then such negligence or carelessness would not be a "fault" giving rise to the defence of contributory negligence apart from the Act, and the case is accordingly not one for reduced damages under the Act. This view gains support from Griffin v. F.T. Wimble and Co. (N.Z.) Ltd., [1950] G.L.R. 137, and the Canadian cases there cited by O'Leary C.J., and from Davies v. Swan Motor Co. (supra) per Bucknill L.J. at 310 and per Evershed L.J. at 317.

The conclusion is accordingly put forward that neither authority nor the wording of the statute itself compels a different view from that reached on principle earlier in this note. On the grounds stated it is submitted that the judgments of the majority in Helson v. McKenzies (Cuba Street) Ltd. were erroneous in this respect and that the plaintiff should have recovered full damages.
