RECENT CASES

WELCH v. STANDARD BANK LTD.[1]

Negligence—head-on collisions

Two vehicles collided when travelling in opposite directions on a dry main road 23' 8" wide at night. Both drivers were killed and there were no witnesses or skid marks. No safe inference could be drawn as to the path taken by each vehicle before impact and the speed of each vehicle was unascertainable. Madan J. in the High Court of Kenya held that both drivers were equally to blame for the accident.

The Court was faced with the Australian and English views which conflict. The Australian view has its modern origin in *Briginshaw v. Briginshaw*[2] where Dixon J. said that 'no presumption of law, or prima-facie right, operates in favour of either party. . . . The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurence or existence before it can be found'. Thus in *Nesterczuk v. Mortimore,*[3] where a motor car and a motor cycle travelling at night in opposite directions on a straight level road with a bitumen surface collided, the High Court of Australia held that neither party had established his claim. Similarly in *Maher-Smith v. Gaw,*[4] where again two vehicles met head-on and the trial judge was unable to decide who was to blame, the Supreme Court of Victoria followed *Nesterczuk v. Mortimore* in holding neither to blame. The burden of proof is on the plaintiff to prove negligence.

The English view is expressed in Denning L.J.'s dictum in *Baker v. Market Harborough Industrial Co-operative Society*:[5]

> Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both.

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1 [1970] E.A. 115.
2 (1938) 60 C.L.R. 336, 361.
3 (1965) 115 C.L.R. 140.
4 [1969] V.R. 371.
5 [1953] 1 W.L.R. 1472, 1476.

> If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence, the result must be the same. In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame. . . . The court will not wash its hands of the case simply because it cannot say whether it was only one vehicle which was to blame or both. In the absence of any evidence enabling the court to draw a distinction between them, it should hold them both to blame, and equally to blame.

This dictum has now been applied by the Divisional Court in *W. & M. Wood (Haulage) Ltd. v. Redpath*[6] and by the Court of Appeal in *Davison v. Laggett*.[7] It was specifically disapproved by the Australian High Court in *Nesterczuk v. Mortimore*.

Madan J. preferred Denning L.J.'s 'accommodation approach' to Dixon J.'s 'active approach'. He held that it was 'not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame'.[8] But it looks as if the Australian and English views on head-on collisions, where there is a dearth of evidence to show which driver is responsible, are likely to remain apart.[9]

D.B.

R. v. LUDLOW[1]

Joinder of charges

The break with precedent in regard to joinder of charges in *Connelly v. Director of Public Prosecutions*[2] has so far received little attention in Australia. In England it was a rule of practice based on *Jones*[3] that a second charge is never combined in one indictment with a charge of murder. The rule found its way into the Australian codes

6 [1966] 3 W.L.R. 526.
7 (1969) 133 J.P. 552.
8 [1970] E.A. 115, 118.
9 The wider implications of the law governing the burden of proof in criminal and civil cases are more fully examined by Dr. Edwards at pp. 169-196.
1 [1970] 2 W.L.R. 521.
2 [1964] A.C. 1254.
3 [1918] 1 K.B. 416.