

that the means he provided for working his process did not achieve the desired result. The only reference to the valve 7 is that it is arranged in the pipe, and there is no suggestion that it is to be used during the process of disintegration by being closed until the jets from the fixed nozzles have flooded the mass, and then to be opened from time to time in order that the disintegrated material may run out. Wilson's experiment is invalidated, because he was previously told that this valve 7 was to be used if the process was to be successful. Now it was only by constantly using valve 7 and alternately using the two fixed nozzles that Wilson was enabled to clear out the digested material so as to make the invention useful, and in order to effect this he required the aid of an assistant working the various valves while he himself made observations from above. This complicated method of using the appliances is nowhere hinted at in the specification, and I believe had not been discovered before the patent was challenged. Ballantine, the pursuers' leading witness, when first examined, had only applied the fixed jets, shown in diagrams 1 to 6, on a digester which was half-filled with material, and it was in the end admitted that it would have been ineffective if the digester had contained its normal charge. It is significant that none of the appliances disclosed in the patent have ever been put to practical use, and that they were only made for the purpose of showing that they might be effectively operated. As regards figure 7, all that I need say is that I think it proved that if used as directed by the patentee the only effect of the jet of water is to bore a hole through the mass and not to disintegrate it and wash it away unless an amount of water is employed which would make the process commercially useless.

On the whole matter therefore I agree with the Lord Ordinary in holding that the specific claims are bad for want of sufficient description, and, indeed, because of misleading description so far as figure 7 is concerned, and that therefore on this as well as on the other grounds stated the defenders are entitled to absolvitor.

LORD ORMDALE—I had an opportunity of reading your Lordship's opinion, and I concur in it.

LORD DUNDAS was absent.

The Court adhered.

Counsel for the Reclaimers (Pursuers)—Sandeman, K.C.—Wilson. Agents—Finlay & Wilson, W.S.

Counsel for the Respondents (Defenders)—Moncrieff, K.C.—Burn Murdoch. Agents—Davidson & Syme, W.S.

Wednesday, November 23.

FIRST DIVISION.

[Sheriff Court at Perth.

BARTY v. JOHN HARPER & SONS.

*Reparation — Negligence — Road — Motor Car Colliding with Dogcart — Right of Vehicle to Whole Road in Absence of Competing Traffic — Duty of Vehicle Approaching "Blind" Corner.*

A motor car which was being driven at the rate of fifteen miles per hour round a blind corner came into collision with a dogcart proceeding at a walking pace in the opposite direction. At the time when the vehicles first came into sight of one another there was a distance of about twenty yards between them; the motor car was on its proper side of the road, and the dogcart was so far on its wrong side as to prevent the passage of the motor car. In these circumstances the driver of the motor car attempted, unsuccessfully, to pass the dogcart by driving with his near wheels on the grass slope, and the collision followed.

*Held* that, although the driver of the dogcart was guilty of negligence in driving round a blind corner on his wrong side, the proximate cause of the collision was the fault of the driver of the motor car in attempting to pass the dogcart when he admittedly could have avoided the accident by bringing his car to a standstill.

*Observed* (per the Lord President) that the general right which traffic had to occupy any part of the road in the absence of competing traffic did not apply to a blind and dangerous corner, especially in view of the conditions of modern rapid traffic.

William Barty, blacksmith and fencing contractor, Meikleour, Perthshire, brought an action against John Harper & Sons, motor engineers, Blairgowrie, concluding for £1030 damages in respect of a collision between the pursuer's dogcart and a motor car belonging to the defenders and driven by their servant.

The defenders pleaded, *inter alia*—"1. The pursuer not having been injured by any fault of the defenders, or by any servant for whom they are responsible, the defenders should be assoilzied with expenses. 2. The pursuer having himself caused or materially contributed to the accident by his own negligence he is barred from suing the present action, and the defenders should be assoilzied with expenses."

On 19th October 1920 the Sheriff-Substitute (BOSWELL) after proof pronounced an interlocutor making findings in fact and in law, and decerning against the defenders for £630.

The defenders appealed to the Sheriff (SANDEMAN), who on 11th March 1921 recalled the interlocutor of the Sheriff-Substitute, pronounced new findings in fact and in law, and decerned against the defenders for the same amount £630.

The defenders appealed, and cited the following authorities—(1) On liability—*Wilkinson v. Kinneil Cannel and Coking Coal Company, Limited*, 24 R. 1001, Lord Justice-Clerk Macdonald at 1004, 34 S.L.R. 533; *Wallace v. Bergius*, 1915 S.C. 205, Lord Justice-Clerk Macdonald at 208, 52 S.L.R. 130; the “*Byewell Castle*,” 1879, 4 P. 219, per James, L.J., at 223; *Armstrong v. Gair*, November 10, 1921 (not reported). (2) On the amount of damages—*Young v. Glasgow Tramway and Omnibus Company, Limited*, 10 R. 242, Lord President Inglis at 245, 20 S.L.R. 169; *M’Kiernan v. Glasgow Corporation*, 1919 S.C. 407, 56 S.L.R. 285.

Counsel for the pursuer was heard only on the amount of damages, and cited no authorities.

LORD PRESIDENT—The defenders in this case have attacked the judgments of the Sheriff-Substitute and the Sheriff, both on the question of liability and on the question of the amount of damages. With regard to the question of liability, I do not think that the defenders have been able to shake the fundamental ground upon which both of these judgments were founded, viz., that the motor car came in sight of the pursuer and his trap at such a distance—which I think cannot be put at less than twenty yards—as to give the motor-driver an adequate opportunity to decide what he should do, and to make it quite practicable for him to pull up in time to prevent collision with the dogcart, instead of undertaking the perilous adventure of forcing a passage between it and the bank and hedge on the near side of the road.

Apart from the serious nature of the injuries which the pursuer unfortunately suffered, his case is not one which commends itself to sympathy. He was driving on a road only some sixteen feet in breadth, which he must have known was not unfrequented by motor traffic; and he chose to drive round a corner which he himself describes on his record as “blind” and dangerous, on the wrong side of the road, thus blocking the way for traffic rounding the corner in the opposite direction on the right side of the road. It was attempted in argument to justify his conduct by asserting the general right which traffic has to occupy any part of the road in the absence of what I may describe as competing traffic. But it is going too far to appeal to that general principle in support of the pursuer’s conduct while rounding a blind and dangerous corner, especially in view of the conditions of modern rapid traffic. There was no excuse in the condition of the road or otherwise for the pursuer driving his dogcart at this place on the wrong side. In fact he was grossly negligent of his own and other people’s safety.

But the real question is what was the real cause of the accident, and in the circumstances briefly outlined at the outset of this opinion I think the cause was that the driver of the motor car attempted, without necessity or justification, to get round the pursuer’s dogcart by mounting the bank at the side of the road when he could with-

out difficulty have brought his car to a standstill. It is true that when the pursuer of an action such as this by his own misconduct places the opposing vehicle suddenly and unexpectedly in a position of great difficulty he may disentitle himself from attributing to the driver of that vehicle anything more than an excusable error in judgment, made in circumstances in which it would be unfair to apply the strict standard of traffic conduct which applies in ordinary circumstances. But I do not think that the circumstances in this case raised a position of embarrassment of that character, for the motor-driver had a space of about twenty yards in which to decide and act.

I am not prepared to proceed upon the view that the motor car was driven at an excessive speed. It had all but passed out of the ten miles control. Its speed may have been eleven or twelve miles an hour, or, as the Sheriff-Substitute thinks, fifteen, but I am not prepared to rest my judgment upon a matter so fine as that. Nor am I prepared to proceed upon the evidence as to whether the horn was blown before coming out of the ten miles control or in mounting the hill from the bridge. The ground upon which I prefer to put my decision is sufficient without going into these debateable matters.

The result is that the judgment, so far as liability is concerned, must stand.

[His Lordship then dealt with the question of the amount of damages.]

LORD SKERINGTON—In so far as regards the question of liability, the material facts are few, and are not in dispute. At the time of the accident the pursuer was driving his dogcart round a blind corner, and so much on the wrong side of the road as to leave no room for approaching traffic to pass in safety. By so doing he negligently imperilled the safety of other users of the road.

The next question is whether the driver of the defenders’ motor car was not also negligent. He deponed that he had it in his power, if he chose, to stop the motor car in its own length, namely, a distance of about fourteen feet. He was going up hill, he had just changed his gear, and he was emerging from a piece of road which was under a ten-mile control. Accordingly I have no reason to suppose that his testimony as regards the crucial matter was inaccurate. He further deponed that when he first caught sight of the dogcart it was thirty feet away. In my judgment the distance was about sixty feet. In either view the driver had it in his power to avoid a collision with the dogcart by bringing his motor car to a standstill. *Prima facie*, therefore, he was in fault for not so acting as to avoid a collision. It was maintained, however, that the present case falls within the familiar category of cases where it has been held that a person in charge of a ship or of a vehicle is not necessarily to be held guilty of negligence because he committed an error of judgment when placed through no fault of his own in a position of diffi-

culty and danger. Unfortunately there is no basis in the evidence for this argument. The driver of the motor car was in no danger and in no difficulty when he first sighted the dogcart. He had a safe and easy way of avoiding a collision by simply stopping his car. Instead of doing so he attempted a feat, the mere statement of which suggests both difficulty and danger. In order to get past the dogcart he drove his car round a blind corner, with the near wheels upon the sloping bank at the side of the road. A telephone pole, the presence of which he had apparently not anticipated, made it necessary for him to bring his car back on to the road, and so he came into collision with the dogcart.

Both parties having been guilty of negligence, the next question is whether the accident was due to their joint fault or to the fault of only one of them. In my judgment it was due solely to the negligence of the defenders' servant, who had it in his power to avoid the consequences of the pursuer's negligence. The pursuer therefore is entitled to recover damages from the defenders.

LORD CULLEN—I agree. I think the pursuer was in fault in being on the wrong side of the road in approaching this "blind" and dangerous corner. The question remains, however, whether the driver of the motor car, when he caught sight of the approaching dogcart on the wrong side of the road, might not, by the exercise of reasonable care, have avoided the accident which ensued. I think it clear that he might have done so. The weight of the evidence is, I think, that the distance between the vehicles at that point was not less than twenty yards. But even on the motor-driver's own estimate of ten yards, the distance was more than sufficient to enable him to avoid the collision by stopping his car, which he says he could have done in a car length, or about fourteen and a half feet. Instead of taking this easy and obviously safe course, he chose, in preference, to attempt the hazardous experiment of carrying on and brushing past the dogcart. The conditions were that the road was about sixteen feet wide; that the dogcart, according to the evidence of the driver of the motor car, was well over the middle to its wrong side; and that the motor car was nearly six feet wide. Thus there was no apparent margin of safety for passing the dogcart, and the motor car was at once forced to invade the sloping verge of the road in its effort to get past, but was unable to maintain itself on the verge. I think that the course taken by the driver of the motor car in these circumstances was rash and imprudent, and such as a person exercising reasonable care would not have taken. I see no ground in the evidence for the view that the circumstances were so embarrassing to the driver of the motor car as not to allow him a sufficient opportunity of forming a proper judgment as between the easy and obviously safe course of stopping on the one hand, and the

dangerous experiment of trying to pass the dogcart in so narrow a space on the other hand.

[His Lordship then dealt with the question of damages.]

LORD MACKENZIE did not hear the case.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute of 19th October 1920, and the Sheriff's interlocutor of 11th March 1921: Find in fact that on 30th June 1919 the appellants' motor car (driven by one of their servants) collided with the respondent's dogcart (driven by the respondent) on the highway between Meikleour and Druidsmere at a point where the road curves; (2) that the motor car was going southwards and uphill and the dogcart northwards and downhill; (3) that when the drivers of the two vehicles first caught sight of each other the speed of the motor car was about fifteen miles per hour and that the dogcart was proceeding at a walking pace; (4) that the motor car was then about twenty yards from the dogcart and on its proper (i.e., the eastern) side of the road, whereas the dogcart was through the negligence of the respondent so far on its wrong side of the road as not to leave room for the motor car to pass it; (5) that the driver of the motor car could have avoided colliding with the dogcart by at once stopping his car, and that it was his duty in the circumstances to take this course; (6) that instead of stopping his car the said driver negligently attempted to pass the dogcart by driving with his near wheels on the grass slope at the side of the road, but that he failed in this attempt and so came into collision with the dogcart, the collision breaking the harness and damaging the dogcart, and throwing the pursuer from his seat to the road and seriously injuring him: Find in law that the negligence of the appellants' driver and not that of the respondent being the proximate cause of the collision the appellants are liable in damages to the pursuer: Assess the damages at £430."

Counsel for Pursuer—Watt, K.C.—J. G. Jameson. Agents—Carmichael & Miller, W.S.

Counsel for Defender—Gentles, K.C.—Maconochie. Agents—Simpson & Marwick, W.S.