

words she demurred. The fact is that had the defendant sincerely wished to avoid costs she would have offered to submit to judgment, and saved at any rate all subsequent costs which have been incurred since vacating the premises.

There will be a declaration that the order or judgment of the Magistrate was obtained by the manifest fraud of the defendant, and a perpetual injunction will issue prohibiting her from taking any steps to enforce it. Defendant will pay costs of this action to be taxed.

Wolff, J.

Judgment accordingly.

Solicitors for Plaintiff: *Curran & Corser.*

Solicitor for Defendant: *L. D. Seaton.*

BUTLER (DEFENDANT) APPELLANT
GRAY (COMPLAINANT) RESPONDENT

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Traffic — Charge of driving a motor vehicle in a manner dangerous to the public — Standard of care in civil and penal cases — Traffic Act, 1919-1935, Section 30.

The appellant was charged before the Magistrate in the Court of Petty Sessions at Perth on two complaints under the Traffic Act, 1919-1935, the first under section 31, alleging that the appellant drove a motor vehicle whilst under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, and the second under section 30 that he drove the vehicle in a manner dangerous to the public. The complaints were heard together and resulted in an acquittal on the first charge and a conviction on the second. It was established in evidence before the Magistrate that the appellant was driving along a road at night at a speed which was not excessive, when he collided with a horse and cart. At the time of the impact the horse and cart were inclined across the road, with the horse on its incorrect side, and in such a position that one only of the two hurricane lamps hanging on the shafts could be seen by the appellant who was driving on his correct side of the road. When convicting the appellant, the Magistrate stated that in his opinion the appellant was driving negligently and dangerously and did not keep a proper look-out. The appellant obtained an order *nisi* to review the decision. On the appeal it was submitted to the Judge that it would be competent for him to amend the complaint under section 205 of the Justices Act and record a conviction of negligent driving against the appellant.

Dwyer, J

Held, that in the circumstances of the case the Magistrate was wrong, as the appellant's failure was not sufficient to establish that he was so guilty in the omission to keep a complete look-out that he should be held guilty of dangerous driving.

Held, also, that it was not competent for the Court on the appeal to allow the amendment requested, and that the appeal should be allowed.

Cases referred to:—

Dankel v. Bond, 1938, S.A.S.R., 45.

Andrews v. Director of Public Prosecutions, 1937, A.C., 576.

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Appeal by way of order *nisi* to review a decision of T. II. Hannah, Esq., S.M., in the Court of Petty Sessions at Perth, convicting the appellant of driving a motor vehicle in a manner dangerous to the public contrary to section 30 of the Traffic Act, 1919-1935. The facts are sufficiently stated in the head-note, and in the following judgment of His Honour, Mr. Justice Dwyer.

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DWYER, J. This case comes before me on an order *nisi* to review a decision of the Magistrate at Perth on the 2nd November last. The appellant was then convicted of an offence under section 30 of the Traffic Act; that section is the one whose marginal note refers to reckless driving. The charge was that on the 15th October, at Walcott St., Mt. Lawley, he drove a motor vehicle along Walcott St. in a manner dangerous to the public. The section under which the charge was brought provides that a person who drives a vehicle on a road recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the road, shall be guilty of an offence.

Now, there was not a great deal of dispute about the facts of this case in the Court below; the hearing was lengthy, but most of the evidence was directed towards proving that the present appellant was guilty of another charge which I may shortly state as driving under the influence of liquor; on that charge, however, he was not found guilty. On the charge now before me he was convicted by the Magistrate, and was fined £5. The Magistrate stated that in his opinion he was driving negligently and dangerously, in that he did not keep a proper lookout; and I think that is the real ground on which the Magistrate came to his conclusion of guilt.

The facts are, I think, somewhat peculiar, and are possibly unlikely to be repeated in other cases. The defendant came

into collision with the horse of a milk van; it was 2 o'clock in the morning; he was driving along Walcott St. in the direction of his home; there is no suggestion that he was driving at any excessive speed, or that he was not completely on his correct side of the road. He said, however, that he did not see the horse that was ultimately struck by him; that horse was, at the time of the collision, in the shafts of a milk cart, and on the shafts or body of the cart were hung two hurricane lamps, one on each side; but the horse and cart were not on their correct side of the road, although they were in a stationary position at the time of the impact. It appears to me from the evidence that the horse was on its wrong side of the road, and that the general position of the horse and cart was inclined towards the south side of Walcott St. It is evident, I think, that only one hurricane light could have been seen there and then from traffic approaching in the opposite direction, and I think also that the position of that light in regard to the centre of the road itself must be taken to have been much further towards the north side of the road than was the head of the horse, which seems to me to have been that part of the animal which suffered the first impact.

It is obvious from these references of mine that the light which betokened the presence of the milk cart was in a position well away from the path of the defendant's car. He said he did not see that light. It is not an abnormal experience of car drivers, I think, to have no mental recollection of objects and lights which are not directly in their way. There is a certain sub-conscious noting of the position of such light on vehicles, as it is not necessary in normal cases to do more than see they are not in a position where the things they mark are likely to become obstacles; and I think that was the case here. There are two other reasons which afford, I think, some explanation of the defendant's statement: the first is that the milk cart seems to have been just on or over the crest of a hill up which the appellant was driving, and that the light would only become obvious as he came in closer proximity to the milk cart; the second is that there was a truck, or a vehicle of that description on his side of the road, certainly on the footpath, but in fact pointing towards him, and I think his attention was more likely to be directed to danger from his left than to the possibility of danger from his right. It is true that the night appears to have been fairly clear, although I think the visibility given

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by street lights is probably overstated; the normal street light which is familiar to me throws a good deal of shadow outside its direct beam to the ground, and it is in the experience of everyone a matter of some difficulty to detect objects in the shadows between the circles of light cast by street lamps. I am inclined to think that these matters, stated as they have been, do afford some reasonable explanation as to why the appellant did not realise that there was an animal nearby, part of whose body was at any rate across the path that he was taking; and I myself do not think that the light was a sufficient indication of the presence of the horse in the position in which it was.

Now, in these cases one must of course look at the behaviour of the person charged, not at the moment of impact merely, but for an appreciable time at least before, and possibly after the impact. The question is, as has been pointed out by the High Court, what was his actual behaviour? I should have thought that it would be proper to consider the mental side, and the assumed mental outlook of the defendant, in a charge of this nature, but of course the judges of the higher tribunal express a different opinion, and I must hesitate to differ from them in any way; but I do not think it can be said that the whole thing is completely objective, because if it were so, then the occurrence of an accident, and the presence or result of harm to a member of the public, might seem to resolve the whole question. I do not think that is so, and perhaps the decisions of the House of Lords in England in *Bateman's* case and *Andrews'* case do suggest that the state of mind of the defendant should be considered. However, in this case it is not in controversy that the defendant was proceeding at a moderate pace on his correct side of the road; and that he was keeping a lookout in some way, because he did see other vehicles present at the time. He ran into a horse which was on or had been allowed to stray to its wrong side of the road, and to a part which I think he was entitled to consider would be open to him if there was a vehicle under control; I think he would be entitled to assume that a driver would pull back to his correct side. It is not now suggested that he could be treated as having been in a drunken condition, because he has been acquitted of that; it is not now suggested that at the moment of impact he was careless in any way; there was no reckless disregard on his part of any normal precautions of the road, nor is there any suggestion of wilful or intentional omission of those matters which drivers on the road

are bound to give attention to and which constitute the elements of duty and care which they should observe towards others.

Driving dangerously is not to be imputed to a man because an accident happens; it seems to me that this is substantially what has occurred in the particular case before me. The Magistrate certainly has based his finding on a failure to keep a proper lookout, but that failure is to be weighed up in connection with all other circumstances of the case, as the section of the Traffic Act indicates, before it can be interpreted as dangerous driving. Here it is obvious that the appellant was not failing to keep any lookout, for things seen by him show that he was acting as was natural on the particular occasion; and although he may be expected to see a horse before collision, I think that having regard to the whole of the circumstances, that failure was not sufficient to establish that he was so guilty in the omission to keep a complete lookout that he should be held guilty of dangerous driving. I, therefore, would myself conclude on the evidence that the proper finding on the charge was not one of dangerous driving, which was the one recorded by the Magistrate. I have said that if this had been a plain question of fact I should have hesitated very much to differ from a Magistrate who had heard witnesses, and come to a conclusion on their evidence. But, as the evidence itself is not substantially contradictory, the only question to be resolved is what interpretation should be put on admitted facts. The appellant is entitled to have the interpretation of myself as Judge of this Court of facts no longer in controversy, and while perhaps those facts are well open to different interpretations, I feel justified in coming to that which I have mentioned.

I have been invited to say that under section 205 of the Justices Act the complaint should be amended now, and a finding of negligent driving recorded against the appellant. I doubt whether I have such a power; in fact I think I have not. I think the Magistrate had the power, and could have exercised it, as section 46 of the Justices Act seems to give him authority which would enable him to do so; but he was not asked to do so, and he did not. I do not propose to express any opinion whether, if he had, a finding of negligence would have been proper; I do say that negligence as a subject of a penal proceeding is not necessarily the same as would be sufficient to make the defendant responsible for damages in a civil proceeding. I think it is clear there is a difference, and I think the cases of *Andrews* and

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Bateman in the House of Lords indicate that. It is, perhaps, that in a civil case the standard of care to be applied is that of a competent driver, whereas it may be that the standard in a criminal case is the reasonably best performance of the person charged, and that he cannot be expected to do anything that is impossible of him; I also suggest that in criminal negligence there must be something more than a mere unintentional omission in some regard or other; that there must be something in the nature of wilful misconduct, or reckless conduct, on the part of the person charged. However, I satisfy myself by saying that I think I am not competent to accede to the application of counsel for the respondent to make such an amendment as is asked. It is obvious that if those amendments are made the defendant has certain rights, and it would be impossible at this stage of the proceedings to allow him the free exercise of the statutory privilege which he is given in case of variance and consequential amendment.

In the circumstances of the case I think the appeal should be allowed; I do it with hesitation, but I think I have the advantage of a fairly complete, even though brief, statement of the law on the matter by counsel, and with their assistance I have come to the decision I have mentioned, without feeling the need of further consideration.

The rule should, therefore, be made absolute.

Rule made absolute—Conviction quashed.

Judgment accordingly.

Solicitors for Appellant: *Jackson, McDonald, Connor and Ambrose.*

Solicitor for Respondent: *Crown Solicitor.*

FORBES (DEFENDANT) APPELLANT

DELLA (COMPLAINANT) RESPONDANT

1944.

Oct. 13.
Nov. 2

Landlord and Tenant — Ejectment proceedings — Interpretation of Distress for Rent Abolition Act, 1936-1941, section 6 — Justices Act, 1919-1936.

The respondent was the owner of a dairy farm, which he let to the appellant in January, 1942, at an agreed rent of £7 per week. Disputes arose between the parties as to the terms of the tenancy, including the rent, and in June, 1943, the respondent served a notice to quit on the ground of non-payment of rent. When the appellant failed to comply with this notice the respondent issued a complaint under the Justices Act, claiming an order for the ejectment of the appellant pursuant to section 6 of the