HOUSE OF LORDS

BAKER (A.P.)

v.

WILLOUGHBY

Lord Reid
Lord Guest
Viscount Dilhorne
Lord Donovan
Lord Pearson

Lord Reid

MY LORDS,

The Appellant was knocked down by the Respondent's car about the middle of a straight road crossing Mitcham Common. The road is 33 feet wide at this point and there was a 40 m.p.h. limit in operation. There was not much traffic, the time being Saturday morning. The trial judge held both parties to blame and apportioned 75 per cent. liability to the Respondent. The Court of Appeal altered this and held each 50 per cent. liable. The first question in the case is whether the Court of Appeal were right in so doing. The Appellant had been travelling in a van with another man when it ran out of petrol. The other man crossed the road to get a lift from a passing car to go to fetch petrol. Then he found he had no money and called to the Appellant to give him some. The Appellant was standing on the kerb behind the van and the accident occurred when he was crossing the road for this purpose. Before he left the kerb he looked to his right and only saw one car and he did not look again. When he reached the centre of the road he looked to his left. It was at this point that he was struck by the Respondent's car which he had not seen and which had overtaken the car which he saw. The trial judge held that he was walking and not running across the road. He held that the Appellant was negligent in not seeing that more than one car was approaching, in not waiting until they had passed and I think he was also negligent in not looking to his right again. The learned judge held that the Respondent was driving at an excessive speed or failing to keep a proper look out or both. He

rejected the Respondent's evidence that the Appellant rushed across the road when the car was only some ten yards away.

The Court of Appeal recognised that the trial judge's assessment ought not to be varied unless " some error in the judge's approach is clearly discernible ". But they appear to have thought it impossible to differentiate when both parties had a clear view of each other for 200 yards prior to impact and neither did anything about it. I am unable to agree. There are two elements in an assessment of liability, causation and blameworthiness. I need not consider whether in such circumstances the causative factors must necessarily be equal, because in my view there is not even a presumption to that effect as regards blameworthiness.

A pedestrian has to look to both sides as well as forwards. He is going at perhaps three miles an hour and at that speed he is rarely a danger to anyone else. The motorist has not got to look sideways though he may have to observe over a wide angle ahead: and if he is going at a considerable speed he must not relax his observation, for the consequences may be disastrous. And it sometimes happens, though I do not say in this case, that he sees that the pedestrian is not looking his way and takes a chance that the pedestrian will not stop and that he can safely pass behind him. In my opinion it is quite possible that the motorist may be very much more to blame than the pedestrian. And in the present case I can see no reason to disagree with the trial judge's assessment. I would therefore restore the trial judge on this issue.

The second question is more difficult. It relates to the proper measure of damages. The car accident occurred on 12th September. 1964. The trial took place on 26th February. 1968. But meanwhile on 29th November. 1967, the Appellant had sustained a further injury and the question is whether

or to what extent the damages which would otherwise have been awarded in respect of the car accident must be reduced by reason of the occurrence of this second injury.

There is no doubt that it is proper to lead evidence at the trial as to any events or developments between the date of -the accident and the date of the trial which are relevant for the proper assessment of damages. The plaintiff may have died *(Williamson* v. *Thornycroft* [1940] 2 K.B. 658): or the needs of the widow *(Curwen* v. *James* [1963] 1 W.L.R. 748) or of the children *(Mead* v. *Clarke Chapman & Co.* [1956] 1 W.L.R. 76) may have become less because of her remarriage. And it is always proper to take account of developments with regard to the injuries which were caused by the defendant's tort: those developments may shew that any assessment of damages that might have been made shortly after the accident can now be seen to be either too small or too large. The question here is how far it is proper to take into account the effects of a second injury which was in no way connected with the first.

As a result of the car accident the Appellant sustained fairly severe injury to his left leg and ankle, with the result that his ankle was stiff and his condition might get worse. So he suffered pain, loss of such amenities of life as depend on ability to move freely and a certain loss of earning capacity. The trial judge did not deal with these matters separately. He assessed the whole damage at £1,600 and making allowance for the Appellant's contributory negligence awarded £1,200 with minor special damage.

After the accident the Appellant tried various kinds of work, finding some too heavy by reason of his partial incapacity. In November 1967 he was engaged in sorting scrap metal and while he was alone one day two men came in, demanded money, and, when they did not get it, one of them shot at him. The shot inflicted such serious injuries to his already damaged leg that it had to be amputated. Apparently he made a fairly good recovery but his disability is now rather greater than it would have been if he had not suffered this second injury. He now has an artificial limb whereas he would have had a stiff leg.

The Appellant argues that the loss which he suffered from the car accident has not been diminished by his second injury. He still suffers the same kind of loss of the amenities of life and he still suffers from reduced capacity to earn though these may have been to some extent increased. And he will still suffer these losses for as long as he would have done because it is not said that the second injury curtailed his expectation of life.

The Respondent on the other hand argues that the second injury removed the very limb from which the earlier disability had stemmed, and that therefore no loss suffered thereafter can be attributed to the Respondent's negligence. He says that the second injury submerged or obliterated the effect of the first and that all loss thereafter must be attributed to the second injury. The trial judge rejected this argument which he said was more ingenious than attractive. But it was accepted by the Court of Appeal.

The Respondent's argument was succinctly put to your Lordships by his counsel. He could not run before the second injury: he cannot run now. But the cause is now quite different. The former cause was an injured leg but now he has no leg and the former cause can no longer operate. His counsel was inclined to agree that if the first injury had caused some neurosis or other mental disability, that disability might be regarded as still flowing from the first accident: even if it had been increased by the second accident the Respondent might still have to pay for that part which he caused. I agree with that and I think that any distinction between a neurosis and a physical injury depends on a wrong view of what is the proper subject for compensation. A man is not compensated for the physical injury: he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg: it is in his

inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as

he used to earn or could have earned if there had been no accident. In this case the second injury did not diminish any of these. So why should it be regarded as having obliterated or superseded them?

If it were the case that in the eye of the law an effect could only have one cause then the Respondent might be right. It is always necessary to prove that any loss for which damages can be given was caused by the defendant's negligent act. But it is a commonplace that the law regards many events as having two causes: that happens whenever there is contributory negligence for then the law says that the injury was caused both by the negligence of the defendant and by the negligence of the plaintiff. And generally it does not matter which negligence occurred first in point of time.

I see no reason why the Appellant's present disability cannot be regarded as having two causes, and if authority be needed for this I find it in *Hanwood* v. *Wyken Colliery Co.* [1913] 2 K.B. 158. That was a Workmens Compensation Act case. But causation cannot be different in tort. There an accident made the man only fit for light work. And then a heart disease supervened and it also caused him only to be fit for light work. The argument for the employer was the same as in the present case. Before the disease supervened the workman's incapacity was caused by the accident. Thereafter it was caused by the disease and the previous accident became irrelevant: he would have been equally incapacitated if the accident had never happened. But Hamilton L.J. said (at page 169):

> "... he is not disentitled to be paid compensation by reason of the
> " supervention of a disease of the heart. It cannot be said of him that
> " partial incapacity for work has not resulted and is not still resulting
> " from the injury. All that can be said is that such partial incapacity
> " is not still resulting ' solely' from the injury."

The Respondent founded on another Workmens Compensation case in this House—*Hogan* v. *Bentinck Collieries* [1949] 1 All E.R. 588. There the man had an accident but his condition was aggravated by an ill-judged surgical operation and it was held by the majority in this House that his incapacity must be attributed solely to the operation and not to the accident. But *Harwoods* case was not disapproved by any one. Lord Simonds, one of the majority, quoted with approval from the judgment of du Parcq L.J. in *Rothwell* v. *Caverswall Stone Co.* [1944] 2 All E.R. 350 at page 365:

> " If, however, the existing incapacity ought fairly to be attributed
> " to a new cause which has intervened and ought no longer to be
> " attributed to the original injury, it may properly be held to result
> " from the new cause and not from the original injury even though, but
> " for the original injury, there would have been no incapacity."

Then having said that negligent or inefficient treatment by a doctor may amount to a new cause du Parcq L.J. continued:

> " In such a case, if the arbitrator is satisfied that the incapacity would
> " have wholly ceased but for the omission, a finding of fact that the

" existing incapacity results from the new cause, and not from the
" injury, will be justified."

This part was also quoted by Lord Simonds. I think it clear that du Parcq L.J. meant that one can only attribute the disability to the new cause alone and disregard the accident if it appears that but for the new cause the man would have recovered, for then the injury by accident can no longer be operative as a cause. But this case is no authority for holding that, during the period when the injury by accident would still have incapacitated the man if he had had proper treatment, the ill-judged operation could be regarded as submerging or obliterating the original accident. It therefore does not assist the Respondent.

We were referred to a number of shipping cases where the question was who must pay for demurrage or loss of profit when a vessel damaged by

two mishaps was in dock to have both sets of damage repaired at the same time. It would seem that much depends on which mishap rendered the vessel unseaworthy or no longer a profit-earning machine. I get no help from these cases because liability for personal injury cannot depend on which mishap renders the man " unseaworthy " or " not a profit-earning " machine ". If any assistance is to be got, it is I think from *The Haversham Grange* [1905] P. 307 where neither collision rendered the vessel unseaworthy. The damage from the first collision took longer to repair than the damage from the second and it was held that the vessel responsible for the second collision did not have to contribute towards payment for time lost in repairs. In my view the latter would have had to pay for any time after the repairs from the first damage had been completed because that time could not be claimed from the first wrongdoer. The first wrongdoer must pay for all damage caused by him but no more. The second is not liable for any damage caused by the first wrongdoer but must pay for any additional damage caused by him. That was the ground of decision in *Performance Cars* v, *Abraham* [1962] 1 QB 33. There a car sustained two slight collisions: the first necessitated respraying over a wide area which included the place damaged by the second collision. So repairing the damage caused by the first collision also repaired the damage done by the second. The Plaintiff was unable to recover from the person responsible for the first collision and he then sued the person responsible for the second. But his action failed. The second wrongdoer hit a car which was already damaged and his fault caused no additional loss to the Plaintiff: so he had nothing to pay.

These cases exemplify the general rule that a wrongdoer must take the Plaintiff (or his property) as he finds him: that may be to his advantage or disadvantage. In the present case the robber is not responsible or liable for the damage caused by the Respondent: he would only have to pay for additional loss to the Appellant by reason of his now having an artificial limb instead of a stiff leg.

It is argued—if a man's death before the trial reduces the damages why do injuries which he has received before the trial not also reduce the damages? I think it depends on the nature and result of the later injuries. Suppose that but for the first injuries the Plaintiff could have looked forward

to twenty years of working life and that the injuries inflicted by the Defendant reduced his earning capacity. Then but for the later injuries the Plaintiff would have recovered for loss of earning capacity during twenty years. And then suppose that later injuries were such that at the date of the trial his expectation of life had been reduced to two years. Then he could not claim for twenty years of loss of earning capacity because in fact he will only suffer loss of earning capacity for two years. Thereafter he will be dead and the Defendant could not be required to pay for a loss which it is now clear that the Plaintiff will in fact never suffer. But that is not this case: here the Appellant will continue to suffer from the disabilities caused by the car accident for as long as he would have done if his leg had never been shot and amputated.

If the later injury suffered before the date of the trial either reduces the disabilities from the injury for which the Defendant is liable, or shortens the period during which they will be suffered by the Plaintiff, then the Defendant will have to pay less damages. But if the later injuries merely become a concurrent cause of the disabilities caused by the injury inflicted by the Defendant, then in my view they cannot diminish the damages. Suppose that the Plaintiff has to spend a month in bed before the trial because of some illness unconnected with the original injury, the Defendant cannot say that he does not have to pay anything in respect of that month: during that month the original injuries and the new illness are concurrent causes of his inability to work and that does not reduce the damages.

Finally, I must advert to the pain suffered and to be suffered by the Appellant as a result of the car accident. If the result of the amputation was that the Appellant suffered no more pain thereafter, then he could not claim for pain after the amputation which he would never suffer. But the

facts with regard to this are not clear, the amount awarded for pain subsequent to the date of the amputation was probably only a small part of the £1,600 damages and counsel for the Respondent did not make a point of this. So in these circumstances we can neglect this matter.

I would allow the appeal and restore the judgment of Donaldson J.

Lord Guest

MY LORDS,

I have read the Opinion of my noble and learned friend, Lord Reid, with which I agree. I would therefore allow the appeal.

Viscount Dilhorne

MY LORDS,

I entirely agree with the Opinion of my noble and learned friend, Lord Reid. I would therefore allow the appeal.

Lord Donovan

MY LORDS,

I agree entirely in the Opinion of my noble and learned friend, Lord Reid, and would therefore also allow the appeal.

Lord Pearson

MY LORDS,

The first question is whether there was justification for the Court of Appeal to alter the trial judge's apportionment of the responsibility for the accident, attributing 25 per cent. to the Plaintiff and 75 per cent. to the Defendant. In my view, the apportionment should not have been altered and should now be restored. On this question I agree entirely with the opinion of my noble and learned friend, Lord, Reid, and have nothing to add.

The second question is, as my noble and learned friend has said, more difficult. There is a plausible argument for the defendant on the following lines. The original accident, for which the defendant is liable, inflicted on the Plaintiff a permanently injured left ankle, which caused pain from time to time, diminished his mobility and so reduced his earning capacity, and was likely to lead to severe arthritis. The proper figure of damages for those consequences of the accident, as assessed by the judge before making his apportionment, was £1,600. That was the proper figure for those consequences if they were likely to endure for a normal period and run a normal course. But the supervening event when the robbers shot the Plaintiff in his left leg, necessitated an amputation of the left leg above the knee. The consequences of the original accident therefore have ceased. He no longer suffers pain in his left ankle, because there no longer is a left ankle. He will never have the arthritis. There is no longer any loss of mobility through stiffness or weakness of the left ankle, because it is no longer there. The injury to the left ankle, resulting from the original accident, is not still operating as one of two concurrent causes both producing discomfort and disability. It is not operating at all nor causing anything. The present state of disablement, with the stump and the artificial leg on the left side, was caused wholly by the supervening event and not at all by the original accident. Thus the consequences of the original accident

have been submerged and obliterated by the greater consequences of the supervening event.

That is the argument, and it is formidable. But it must not be allowed to succeed, because it produces manifest injustice. The supervening event has not made the Plaintiff less lame nor less disabled nor less deprived of amenities. It has not shortened the period over which he will be suffering. It has made him more lame, more disabled, more deprived of amenities. He should not have less damages through being worse off than might have been expected.

The nature of the injustice becomes apparent if the supervening event is treated as a tort (as indeed it was) and if one envisages the plaintiff suing the robbers who shot him. They would be entitled, as the saying is, to "take the Plaintiff as they find him". *(Performance Cars* v. *Abraham* [1962] 1 QB 33.) They have not injured and disabled a previously fit and able-bodied man. They have only made an already lame and disabled man more lame and more disabled. Take, for example, the reduction of earnings. The original accident reduced his earnings from £.x per week to £y per week, and the supervening event further reduced them from £*y* per week to £z per week. If the defendant's argument is correct, there is, as Mr. Griffiths has pointed out, a gap. The plaintiff recovers from the Defendant the £.x-y not for the whole period of the remainder of his working life, but only for the short period up to the date of the supervening event. The robbers are liable only for the £*y-z* from the date of the supervening event onwards. In the Court of Appeal an ingenious attempt was made to fill the gap by holding that the damages recoverable from the later tort-feasors (the robbers) would include a novel head of damage, viz., the diminution of the Plaintiff's damages recoverable from the original tortfeasor (the defendant). I doubt whether that would be an admissible head of damage: it looks too remote. In any case it would not help the plaintiff, if the later tortfeasors could not be found or were indigent and uninsured. These later tortfeasors cannot have been insured in respect of the robbery which they committed.

I think a solution of the theoretical problem can be found in cases such as this by taking a comprehensive and unitary view of the damage caused by the original accident. Itemisation of the damages by dividing them into heads and sub-heads is often convenient, but is not essential. In the end judgment is given for a single lump sum of damages and not for a total of items set out under heads and sub-heads. The original accident caused what may be called a "devaluation" of the plaintiff, in the sense that it produced a general reduction of his capacity to do things, to earn money and
to enjoy life. For that devaluation the original tortfeasor should be and remain responsible to the full extent, unless before the assessment of the damages something has happened which either diminishes the devaluation (e.g. if there is an unexpected recovery from some of the adverse effects of the accident) or by shortening the expectation of life diminishes the period over which the plaintiff will suffer from the devaluation. If the supervening event is a tort, the second tortfeasor should be responsible for the additional devaluation caused by him.

The solution which I have suggested derives support from a passage in the judgment of Buckley L.J. in *Harwood* v. *Wyken Colliery Company* [1913] 2 K.B. 158 at pages 166-7 and from a passage in a judgment given in the Court of Appeal of British Columbia in *Long v. Thiessen and Lalibert* [1968] 65 Western Weekly Reporter 577. Shortly these were the facts of this latter case. On 27th November, 1964, Long as the driver of his motor vehicle was stopped at a street intersection when his vehicle was struck in the rear by the vehicle of the first defendant. As a result he suffered injuries to his neck and shoulder. On 23rd April, 1966, Long suffered similar injuries when his stationary vehicle was again struck in the rear by a motor vehicle driven by the second defendant. There were separate actions, but each defendant admitted liability and the actions came to trial together for assessment of damages and there was an appeal as to the assessment. In

the course of a judgment with which Nemetz J.A. concurred, Robertson J.A. said :

> " Because the injuries inflicted in the second accident were super-
> " imposed upon the then residual effects of the injuries inflicted in the
> " first accident, it is a matter of the greatest difficulty to determine what
> " damages should be awarded for each set of injuries. The plaintiff
> " should not receive more in respect of the first accident than he would
> " if the second had not occurred, nor should be receive less because it
> " did occur ... I think that the way in which justice can best be done
> " here is: *(a)* to assess as best one can what the plaintiff would have
> " recovered against the Thiessens had his action against them been
> " tried on April 22, 1966 (the date before the second accident) and to
> " award damages accordingly; *(b)* to assess global damages as of the
> " date of the trial in respect of both accidents; and *(c)* to deduct the
> " amount under *(a)* from the amount under *(b)* and award damages
> " against Lalibert in the amount of the difference. I think that nothing
> " I have said in this paragraph is inconsistent with *Baker* v. *Willoughby*
> " (1968] 2 W.L.R. 1138 or any of the cases referred to there."

The last sentence was referring to the judgment of Donaldson J. at first instance in the present case.

I would allow the appeal and restore the judgment of Donaldson J. both in respect of the total amount of the damages and in respect of his apportionment.

(300837) Dd. 197039 120 9/69 St.S