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Fitzgerald (Appellant) v. Lane and another (Respondents)

(First Appeal)

Fitzgerald (Appellant) v. Lane and another (Respondents)

(Second Appeal)
(Consolidated Appeals)

JUDGMENT

Die Jovis 14° Julii 1988

Upon Report from the Appellate Committee to whom was referred the Cause Fitzgerald against Lane and another (First Appeal) and Fitzgerald against Lane and another (Second Appeal) (Consolidated Appeals), That the Committee had heard Counsel on Tuesday the 14th day of June last upon the Petitions and Appeals of Simon Peter Fitzgerald, of "Brambles", 23 Broomfield Ride, Oxshott, Surrey, praying that the matter of the Orders set forth in the Schedules thereto, namely Orders of Her Majesty's Court of Appeal of the 6th day of March 1987, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Orders might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet (which said Appeals were by Order of the House of the 15th day of June 1987 consolidated) ; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Orders of Her Majesty's Court of Appeal (Civil Division) of the 6th day of March 1987 complained of in the said Appeals be, and the same are hereby, **Affirmed** and that the said Petitions and Appeals be, and the same are hereby, dismissed this House: And it is further Ordered, That the Appellant do pay or cause to be paid to the said Respondents the Costs incurred by them in respect of the said Appeals, the amounts thereof to be certified by

the Clerk of the Parliaments if not agreed between the parties.

Cler: Asst. Parliamentor:

Judgment: 14.7.88

HOUSE OF LORDS

FITZGERALD
(APPELLANT)

v.

LANE AND ANOTHER
(RESPONDENTS) (FIRST APPEAL)

FITZGERALD
(APPELLANT)

v.

LANE AND ANOTHER
(RESPONDENTS) (SECOND APPEAL)

(CONSOLIDATED APPEALS)

Lord Bridge of Harwich

Lord Brandon of Oakbrook

Lord Templeman

Lord Ackner

Lord Oliver of Aylmerton

LORD BRIDGE OF HARWICH

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Ackner. I agree with it and for the reasons he gives I would dismiss the appeal,

LORD BRANDON OF OAKBROOK

My Lords,

For the reasons given in the speech to be delivered by my noble and learned friend, Lord Ackner, I would dismiss the appeal.

LORD TEMPLEMAN

My Lords,

For the reasons given by my noble and learned friend, Lord Ackner, I would dismiss the appeal.

LORD ACKNER

My Lords,

On the afternoon of 21 March 1983 the appellant ("the plaintiff), then aged 22, was involved in a tragic accident when crossing Esher High Street, Surrey. The plaintiff was at the time employed by a well known firm of estate agents and surveyors as a trainee negotiator at their Esher branch. Esher High Street has a carriageway which is 30 feet wide and runs approximately north south. It has service roads on both sides separated from the carriageway by footpaths and, fronting the service roads, are shops and offices. The plaintiff's employers have premises on the eastern side of the service road, about 50 yards from a pelican crossing. At about 3.50 p.m. the plaintiff was asked to go to a house a mile or so away to meet a prospective purchaser. As his car was parked in the service road on the north western side of the High Street, he walked to the pelican crossing. The traffic was heavy. There were two lanes of traffic moving south. The nearside lane had been travelling slowly and a car had stopped just before the studs of the crossing. The second line was travelling fairly freely. Although the traffic lights were green to the road traffic and red against the pedestrians, the plaintiff, without stopping, walked at a brisk pace across the pelican crossing. He passed in front of the stationary car and into the path of the first respondent's ("the first defendant") car. As a result he was struck by the offside front corner of the car, thrown up onto the bonnet, came into contact with the windscreen which shattered, and was then thrown forward and onto the offside of the road, where he was struck by the second respondent's ("the second defendant") car which was being driven in the opposite direction, that is in a northerly direction. As a result of these collisions the plaintiff sustained multiple injuries and, in particular, a discloation of the cervical spine resulting in partial tetraplegia.

Sir Douglas Frank Q.C., sitting as a deputy judge of the Queen's Bench Division, in a reserved judgment found that all three parties had been negligent. He assessed the total damages in the sum of £596,553.67. Having concluded that both defendants were responsible for the plaintiffs tetraplegia he then said:

> "As to the apportionment of the liability, on the facts I have recited I find that it is impossible to say that one of the parties is more or less to blame than the other and hold that the responsibility should be borne equally by all three."

At the conclusion of his judgment he observed:

> "In view of my findings, one third of the amount of the award will be paid by each of the defendants."

Following submissions made by Mr. Robin Stewart Q.C. for the plaintiff, the judge entered judgment for the plaintiff against the defendants for two-thirds of the total damages.

Both the defendants appealed to the Court of Appeal [1978] Q.B. 781, each contending that the judge was wrong in finding negligence against them, alternatively, that the plaintiff should

have been ordered to bear a greater share of the responsibility. The second defendant further contended that the judge was wrong in equating his share of the responsibility with that of the first defendant, further that his collision with the plaintiff did not cause the tetraplegia, since it had already been caused by the first defendant. Additionally he challenged the validity of the judge's decision on certain items of damage, which he had awarded in favour of the plaintiff. The Court of Appeal affirmed the judge's decisions on all the matters raised by the respective notices of appeal. However, during the course of the appeal, Sir Edward Eveleigh queried whether the order giving the plaintiff judgment against both defendants for two-thirds of the total damages did truly represent the judge's decision, that no one of the parties was more or less to blame than the other. After hearing further argument on this issue, the Court of Appeal allowed the appeal to the extent of varying the judge's order, so that it provided that the plaintiff should have judgment against each defendant for 50 per cent, of his claim. The Court of Appeal gave leave to appeal to your Lordships' House.

<u>The Basis of the Court of Appeal's Decision</u>

Sir Edward Eveleigh, giving the first judgment said, at pp. 793-794 said:

> "The judge's finding indicates that he thought that each of the three parties was equally at fault. That being so, the correct form of judgment should be 'judgment for the plaintiff for 50 per cent, of his claim against each defendant.' There would then follow an order for contribution between the two defendants on a fifty-fifty basis. Subsection (1) of section 1 of the Law Reform (Contributory Negligence) Act 1945 reads:

> 'Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damage recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . .'

In applying this subsection, I have always understood that the court should consider the position between the plaintiff and each defendant separately. In The Miraflores and The Abadesa [1967] 1 A.C. 826 Lord Pearce said, at p. 846:

> 'To get a fair apportionment it is necessary to weigh the fault of each negligent party against that of each of the others. It is, or may be, quite misleading to substitute for a measurement of the individual fault of each contributor to the accident a measurement of the fault of one against the joint fault of the rest.'

The case was concerned with apportionment under section 1 of the Maritime Conventions Act 1911, but the observation of Lord Pearce, which I have quoted, related to the

hypothetical facts of a factory accident case which he had postulated. Later, referring specifically to the Law Reform (Contributory Negligence) Act 1945, section 1, he said, at p. 846:

> 'Its intention was to allow a plaintiff, though negligent, to recover damages reduced to such an extent as the court thinks just and equitable, having regard to his share in the responsibility for the damage (section 1(1)). But that share can only be estimated by weighing his fault against that of the defendant or, if there are two defendants, against that of each defendant. It is true that apportionment as between the defendants comes theoretically at a later stage (under the Law Reform (Married Women and Tortfeasors) Act 1935). But as a matter of practice the whole matter is decided at one time and the court weighs up the fault of each in assessing liability as between plaintiff and defendants themselves. And I see nothing in the Act of 1945 to

show that it intends the court to treat the joint defendants as a unit whose joint blameworthiness could only, one presumes, be the aggregate blameworthiness of its differing components'

Let us assume that the first defendant had suffered injury from the flying glass of his windscreen and that he had counterclaimed against the plaintiff for damages. Would he, too, have been entitled to two-thirds of his damages against the plaintiff? The illogicality of two parties equally to blame being found liable for two-thirds of each others damages is too obvious. I would allow the appeal of each of the defendants in relation to the apportionment and order judgment for the plaintiff against each defendant for 50 per cent, of the plaintiff's claim and order contribution between the defendants on a fifty-fifty basis."

Slade L.J., having earlier in his judgment dealt with (1) the liability of the first defendant; (2) the liability of the second defendant; (3) causation, then said [1987] Q.B. 812-814:

"At the trial the plaintiff's counsel conceded that he was guilty of contributory negligence. In these circumstances, the judge, having decided issues (1), (2) and (3) above in favour of the plaintiff, had two further decisions to make, apart from those relating to the quantum of damage. First, he had to decide the extent to which the damage recoverable should be reduced by reason of the plaintiff's own fault under section 1(1) of the Law Reform (Contributory Negligence) Act 1945. Secondly, he had to decide how great a contribution in respect of the damage each defendant should recover from the other under section 1(1) of the Civil Liability (Contribution) Act 1978. The judge dealt very briefly with the questions of contributory negligence and contribution together in the passages cited or referred to by Sir Edward Eveleigh in his judgment. As Sir Edward Eveleigh has said, the judge's finding indicated that he considered each of the three parties to be equally at fault. Section 1(1) of the Act of 1945 requires the damages

recoverable to be reduced 'to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage.' Counsel on behalf of each of the respective defendants has submitted in effect that on any footing the plaintiff's share in the responsibility for the damages was, on the facts, greater

than that of his client and the judge should have applied the subsection accordingly.

"I have considerable sympathy with this submission. There can be no doubt that the plaintiff was, to a significant extent, the creator of his own great misfortune. It was he who set in motion the whole train of events, by carelessly and unnecessarily hurrying into a busy road at a pelican crossing at a time when the lights were red for pedestrians and green for traffic, and when a line of more or less stationary traffic in the nearside lane increased the risk of injury from traffic approaching from the offside lane. In contrast, each of the defendants, as a result of the plaintiff's negligence, found himself confronted by a quite unexpected emergency. If hearing the case at the trial, I might well have held that the plaintiff's share in the responsibility for his injuries must be regarded as larger than that of either of the defendants. However, this court is always slow to interfere with the decision of a judge of first instance on a question of apportionment such as this, and subject to what is said below, I see no sufficient grounds to interfere with the decision of the judge in this context.

"Nevertheless, I do not think that the form of order actually made by the judge gave effect to his clear conclusion that the plaintiff's responsibility for the injury was no less (though no greater) than that of either of the defendants. If only one of the defendants had appeared before him, this conclusion must, more or less inevitably, have led to a ruling that the damages recoverable by the plaintiff against that defendant should be reduced by 50 per cent, (not 33 1/3 per cent.) under section 1(1) of the Act of 1945. I can see no possible grounds in principle or logic why the amount of the reduction should be less, merely because two defendants were parties to the action instead of one. On the issue of contributory negligence, the judge, with respect to him, was, in my opinion, led into error by considering the share of the responsibility of the plaintiff for his injury vis-à-vis the defendants <u>conjunctively</u> instead of individually; 'that share can only be estimated by weighing his fault . . . against that of each defendant': see <u>The Miraflores and The Abadesa</u> [1967] 1 A.C. 826, <u>per</u> Lord Pearce at p. 846. (The emphasis is mine.) If the judge had taken the latter course, it seems clear that he would have regarded the responsibility of the plaintiff vis-à-vis each defendant as being 50 per cent.

"Section 2(1) of the Act of 1978 requires that, as between the two defendants, the amounts of their respective contributions 'shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.' I see no

sufficient grounds for differing from the judge's conclusion that the responsibility of each of the two defendants for that part of the injury for which the plaintiff was not responsible was equal. I therefore agree that the appeal of each of the defendants should be allowed on the limited issue of apportionment, and that the judge's order should be varied by giving judgment for the plaintiff against each defendant for 50 per cent, (instead of two-thirds) of the plaintiff's claim and by ordering contribution between the defendants on a fifty-fifty basis."

Nourse L.J. agreed with the views of Sir Edward Eveleigh and Slade L.J. as set out above [1987] Q.B. 781, 800.

The Correct Approach to the Determination of Contributory Negligence, Apportionment and Contribution

It is axiomatic that whether the plaintiff is suing one or more defendants, for damages for personal injuries, the first question which the judge has to determine is whether the plaintiff has established liability against one or other or all the defendants i.e. that they, or one or more of them, were negligent (or in breach of statutory duty) and that that negligence (or breach of statutory duty) caused or materially contributed to his injuries. The next step, of course, once liability has been established, is to assess what is the total of the damage that the plaintiff has sustained as a result of the established negligence. It is only after these two decisions have been made that the next question arises, namely, whether the defendant or defendants have established (for the onus is upon them) that the plaintiff, by his own negligence, contributed to the damage which he suffered. If, and only if, contributory negligence is established does the court then have to decide, pursuant to section 1 of the Law Reform (Contributory Negligence) Act 1945, to what extent it is just and equitable to reduce the damages which would otherwise be recoverable by the plaintiff, having regard to his "share in the responsibility for the damage."

All the decisions referred to above are made in the main action. Apportionment of liability in a case of contributory negligence between plaintiff and defendants must be kept separate

from apportionment of contribution between the defendants inter se. Although the defendants are each liable to the plaintiff for the whole amount for which he has obtained judgment, the proportions in which, as between themselves, the defendants must meet the plaintiff's claim, do not have any direct relationship to the extent to which the total damages has been reduced by the contributory negligence, although the facts of any given case may justify the proportions being the same.

Once the questions referred to above in the main action have been determined in favour of the plaintiff to the extent that he has obtained a judgment against two or more defendants, then and only then should the court focus its attention on the claims which may be made between those defendants for contribution pursuant to the Civil Liability (Contribution) Act 1978, re-enacting and extending the court's powers under section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935. In the contribution proceedings, whether or not they are heard during the

trial of the main action or by separate proceedings, the court is concerned to discover what contribution is just and equitable, having regard to the responsibility between the tortfeasors inter se, for the damage which the plaintiff has been adjudged entitled to recover. That damage may, of course, have been subject to a reduction as a result of the decision in the main action that the plaintiff, by his own negligence, contributed to the damage which he sustained.

Thus, where the plaintiff successfully sues more than one defendant for damages for personal injuries, and there is a claim between co-defendants for contribution, there are two distinct and different stages in the decision-making process - the one in the main action and the other in the contribution proceedings.

The Trial Judge's Error

Mr. Stewart accepts that the judge telescoped or elided the two separate stages referred to above into one when he said:

> "I find that it is impossible to say that one of the parties is more or less to blame than the other and hold that the responsibility should be borne equally by all three."

The judge, in my judgment, misdirected himself by thinking in tripartite terms, instead of pursuing separately the two stages - phase 1: was the plaintiff guilty of contributory negligence and, if so, to what extent should the recoverable damages be reduced, issues which concerned the plaintiff on the one hand and the defendants jointly on the other hand; and phase 2: the amount of the contribution recoverable between the two defendants having regard to the extent of their responsibility for the damage recovered by the plaintiff - an issue which affected only the defendants inter se and in no way involved the plaintiff.

The vice of this misdirection is that it can, and, in my judgment for reasons which I shall explain, in this case it did, result in the judge taking into account the proportions in which the defendants between themselves were liable for the plaintiff's recoverable damages, in deciding on the degree of contributory negligence of which the plaintiff was guilty. He allowed his judgment on the issue of contributory negligence to be coloured by his decision as to the proper apportionment of blame between the defendants. While stating in substance on the one hand that the plaintiff's responsibility was no more and no less than of either of the defendants, his ultimate conclusion, as mirrored in his order, was that each of the defendants was twice as much to blame as the plaintiff. This could not be right on the facts. Sir Edward Eveleigh [1987] Q.B. 781, 792H, had difficulty in seeing where the second defendant was to blame at all and, as stated above, Slade L.J. said, at p. 813D, he had considerable sympathy with the submission made on behalf of each of the defendants "that on any footing the plaintiff's share in the responsibility for the damage was, on the facts, greater than that of his client." As previously stated, this was a case in which at the trial Mr. Stewart, with characteristic sense of reality, conceded that his client was guilty of contributory negligence. As the trial judge observed:

> "There is no doubt that the plaintiff failed to heed the obvious advice given in the Highway Code, namely, 'When the red man signal shows, don't cross. Press the button on the box and wait.'"

Clearly the plaintiff ought to have known that the lights were showing green in favour of the traffic approaching the crossing and that the vehicles in the outer of the two lanes going south were travelling freely. That he was substantially the author of his own sad misfortune cannot be gainsaid. The negligence found against the first defendant was that at 30 miles per hour he was travelling too fast and that he was not keeping a proper lookout for pedestrians trying to cross the road, albeit against the traffic lights. The negligence found against the second defendant was that he too was travelling too fast or failing to keep a proper lookout. In my judgment, to rate the negligence of either of the two defendants as being twice as bad as that of the plaintiff is clearly wrong and must have resulted from the judge misdirecting himself in the manner which I have described.

Such being the situation the question as to what is the just and equitable deduction to make from the plaintiff's damages is at large for your Lordships' consideration. Like Slade L.J., if I had had to try the case at first instance, I might have well have held that the plaintiff's share in the responsibility for his injuries was larger than that of either of the defendants. There may therefore be, I hope, some small comfort for the plaintiff that I view the order of the Court of Appeal, that he is to have judgment against each defendant for 50 per cent, of his claim, as achieving, in the circumstances, a generous award from his point of view.

My Lords, in view of the opinion which I have expressed above, there is a strong temptation to say no more. However, out of deference to Mr. Stewart's able argument I feel I should express my view as to his main criticism of the judgment of the Court of Appeal and, because it raises a point of some importance, comment on the dictum of Lord Pearce in The Miraflores and The Abadesa [1967] 1 A.C. 826, 845, 846 upon which the Court of Appeal strongly relied.

The Court of Appeal's Interpretation of the Judge's Decision

In the quotation from Sir Edward Eveleigh's judgment [1987] Q.B. 781, 793 set out above there is to be found the statement "The judge's finding indicates that he thought that each of the three parties was equally at fault. That being so, the correct form of judgment should be 'judgment for the plaintiff for 50 per cent, of his claim against each defendant.'" With respect I cannot agree. I concur in the view expressed by Moffitt P. in the Court of Appeal of New South Wales in Barisic v. Devenport [1978] 2 N.S.W.L.R. 111 at 121-122 that:

"In ordinary language, if three persons are severally and equally responsible for an event 'the share of the responsibility' for the event of any one would be one-third, not one-half."

Nor, with respect, can I agree with Slade L.J. [1987] Q.B. 781, 813 that "the form of the order actually made by the judge [did not

give] effect to his clear conclusion that the plaintiff's responsibility for the injury was no less (though no greater) than that of either of the defendants." If there was any doubt as to the true construction of what the judge said initially in his judgment as to the apportionment of the liability, it was subsequently made clear, not only by his statement at the end of his judgment, "one-third of the amount of the award will be paid by each of the defendants," but also by his acceptance of Mr. Stewart's submission that the proper form of the judgment was, judgment for the plaintiffs against both defendants for two- thirds of the total damages. Indeed, as previously stated, no suggestion was made either in the notices of appeal or in their initial submissions by counsel for the defendants in the Court of Appeal, that the order he made was inconsistent with the true interpretation of the judge's decision. I am quite satisfied that the judge, as a result of the misdirection to which I have made reference above, did intend to reduce the damages recoverable by the plaintiff by only one-third, a decision which I have already characterised as being clearly wrong.

The Miraflores and The Abadesa [1967] 1 A.C. 826

The claim in that case arose out of a collision between two ships, the steam tankers Miraflores and the Abadesa. In avoiding becoming involved in that collision, the steam tanker George Livanos ran aground and sustained damages. The owners of the George Livanos brought an action against the owners of both the Miraflores and the Abadesa in respect of her grounding. In a separate action the owners of the Miraflores had brought an action against the owners of the Abadesa in respect of their collision. The actions were heard together by Hewson J. who held in respect of the collision action that the Miraflores had been one-third and the Abadesa two-thirds to blame for the collision. In respect of the grounding action he held that the George Livanos had herself been negligent. However, he treated the negligence which led to the collision as "one unit," in respect of the grounding and the

negligence of the George Livanos as the other unit. He found it impossible to distinguish between the degrees of fault of the two units and therefore held that the George Livanos was 50 per cent. to blame for the grounding and entitled to recover the remaining 50 per cent, from the Abadesa and the Miraflores in the proportion of two-thirds and one-third respectively. The House of Lords held that the "unit approach" was wrong, having regard to the terms of section 1 of the Maritime Conventions Act 1911 which provides:

> "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargos or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault . . ."

In his speech Lord Morris of Borth-y-Gest said, at p. 841-842:

> "The section calls for inquiry as to fault, and inquiry as to damage or loss, and inquiry as to causation. As applied to the claim made by the George Livanos it becomes necessary to decide whether the damage or loss to the George Livanos

> (or her cargo or freight) was caused by the fault of two or more vessels. The decision of the learned judge being that such loss or damage was caused by the fault of all three vessels, that is, the fault of herself, the fault of the Miraflores and the fault of the Abadesa, it followed that the liability to make good the damage or loss had to be 'in proportion to the degree in which each vessel was at fault,' which I think means the degree in which the fault of each vessel caused the loss or damage. Consequently three inquiries were involved. To what extent as a matter of causation did the fault of the Abadesa bring about the grounding of the George Livanos? To what extent as a matter of causation did the fault of the Miraflores bring about the grounding of the George Livanos? To what extent as a matter of causation did the fault of the George Livanos bring about her grounding? The liability to make

good the damage or loss caused by the grounding would be in the proportions shown by the answers to those questions.

"In performing the task directed by section 1, I think that it may lead to confusion if it is sought to link the faults of two separate vessels into one 'unit.' I think that it is preferable to follow the wording of the section without introducing the complication of 'units.' As applicable in the present case, once it was established that there was fault in each one of the three vessels and also that the damage or loss of the George Livanos was caused to some extent by the fault of each one of the three vessels, then it became necessary to apportion the liability for the damage or loss by deciding separately in reference to each one of the three vessels what was the degree in which the fault of each one caused the damage or loss to the George Livanos. The process necessarily involved comparisons and it required an assessment of the inter-relation of the respective faults of the three vessels as contributing causes of the damage or loss. If the faults of two vessels out of three are being grouped together there may be risk of making it difficult to make separate comparisons and assessments as between the three."

It is thus clear that section 1 of the Act of 1911 contemplates the individual assessment of the fault of each vessel liable for the damage. It makes no provision for contribution over, since ex hypothesi, the extent to which each vessel must contribute to the loss has already been determined. That, however, is not the scheme of the Law Reform (Contributory Negligence) Act 1945 which by section 1(3) specifically provides that section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 shall apply in any case where two or more persons are liable or would, if they had been sued, be liable by virtue of section 1(1) of the Act of 1945 in respect of the damage suffered by any person. Indeed, it is specifically provided by virtue of section 3 that the Act shall not apply to any claim to which section 1 of the Maritime Conventions Act 1911 applies.

Lord Pearce, with whom Lord Reid and Lord Hodson agreed, also concluded that the "unit approach" was wrong. He said, at p. 844:

"First, it does not accord with section 1 of the Maritime Conventions Act 1911, which requires that liability shall be

assessed 'in proportion to the degree in which each vessel was at fault' For on the 'unit approach' there is not an assessment of the degree in which each vessel was at fault. Secondly, and in consequence, the judge assessed at too high a figure the fault of the George Livanos in proportion to the respective individual faults of the Abadesa and the Miraflores."

That part of Lord Pearce's speech, at p. 846, which Sir Edward Eveleigh and Slade L.J. quoted [1987] Q.B. 781, 794, 813, is obiter since it was directed to the Law Reform (Contributory Negligence) Act 1945.

Although the decision of the Court of Appeal in Davies v. Swan Motor Co. (Swansea) Ltd. [1949] 2 K.B. 291 was referred to in the course of argument, Lord Pearce makes no reference to it in his speech. In his judgment Denning L.J. in Davies's case when considering how the Law Reform (Contributory Negligence) Act 1945 operated, where a plaintiff brought an action against the driver of two vehicles said, at p. 325:

> "If they were both found guilty of 'fault' which caused the damage, could it possibly be said that the plaintiff's damages were to be reduced as against one and not as against the other? And even if that were possible, what would be the proportions as between the two drivers? Would contributions be assessed on the higher or lower figure of damages? If the Act of 1945 were to involve such questions, it would introduce many complications into the law. The Act seems to contemplate that, if the plaintiff's own fault was one of the causes of the accident, his damages are to be reduced by the self-same amount as against any of the others whose fault was a cause of the accident, whether he sues one or more of them, and they bear the amount so reduced in the appropriate proportions as between themselves."

Clearly the two dicta cannot stand together. Further, I have difficulty in following why the claimant's share in the responsibility for the damage which he has suffered can only be estimated by weighing his fault against each of the defendants, where there is more than one defendant. Nor am I aware that, as a matter of practice "the court weighs up the fault of each (original emphasis) in assessing liability as between the plaintiff and defendants themselves." Where liability is established against joint tortfeasors, judgments are entered against each of them in respect of the same sum - the total recoverable damages reduced by the appropriate sum to reflect the plaintiff's share, if any, in

the responsibility for the damage. This course is wholly consistent with the words of section 1(1) of the Act of 1945 which provides that the "damages recoverable" by the plaintiff are to be reduced by his share in the responsibility for the damage, thus contemplating one sum of damages as the subject matter of a number of judgments, and not a number of judgments in respect of different sums. As stated above section 1(3) of the Act of 1945 expressly applies the contribution procedure provided by the Act of 1935 to cases of multiple defendants liable by virtue of section

1(1). If the responsibility of each party at fault is to be weighed against each of the others and several judgments in different sums are to be entered, there would be no call for contribution proceedings, because the responsibility for the damage would have been directly apportioned amongst all parties at fault, as under section 1 of the Maritime Conventions Act 1911.

In my judgment, in order to assess the "claimant's share in the responsibility for the damage" which he has suffered as a result of the defendants' established negligence, the judge must ask himself to what extent, if at all, the plaintiff has also been part author of his own damage. This obviously requires careful evaluation of the plaintiff's conduct in the light of all the circumstances of the accident and those circumstances, of course, include the conduct of all the defendants who have been found guilty of causative negligence. Circumstances will, naturally, differ infinitely. In the instant case the plaintiff's conduct set in motion the chain of events that led to the accident. If the plaintiff had not ignored or failed to observe that the lights were against him and in favour of the traffic, when he decided to cross the pelican crossing, then the accident would never have happened. It was the negligent response of each of the defendants to the dangerous situation thus created by the plaintiff which established their joint and several liability.

In other situations it might be the defendants, who, for example, through their negligent driving, or negligent operation of a factory or building site, create the initial danger and it is then the response of the plaintiff to that dangerous situation that has to be assessed. What accounted for the reduction in the damages awarded to the plaintiff was his degree of culpability in setting the scene for the collision. In different circumstances, where the initial danger of injury is created by the negligence of the defendants, then it is the plaintiff's response to that situation which has to be assessed. In neither event does the exercise of assessing the plaintiff's share in the responsibility for the damage

which he has sustained necessitate the determination of the extent of the individual culpability of each of the defendants, once the judge is satisfied that the defendants each caused or materially contributed to the plaintiff's damage. While the plaintiff's conduct has to be contrasted with that of the defendants in order to decide to what extent it is just and equitable to reduce the damages, which would be awarded to him if the defendants were solely liable, it does not involve an assessment of the extent to which the fault of each of the defendants contributed to that damage. What is being contrasted is the plaintiff's conduct on the one hand, with the totality of the tortious conduct of the defendants on the other. As previously stated, the determination of the extent of each of the defendants' responsibility for the damage is not made in the main action but in the contribution proceedings between the defendants, inter se, and this does not concern the plaintiff.

I accordingly take the view that the dictum of Denning L.J. in Davies v. Swan Motor Co. (Swansea) Ltd. [1949] 2 K.B. 291, 325, cited above is correct and that the observations made by Lord Pearce in The Miraflores cited above as to the practice and procedure which should be adopted in relation to the Law Reform (Contributory Negligence) Act 1945 and the Law Reform (Married

Woman and Tortfeasors) Act 1935 (now the Civil Liability (Contributions) Act 1978) should not be followed.

I should add that in reaching my decision, I have derived considerable assistance from the judgment of Samuels J.A. in the Australian case of Barisic v. Devenport [1978] 2 N.S.W.L.R. 111 referred to above.

I accordingly would dismiss this appeal with costs.

LORD OLIVER OF AYLMERTON

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Ackner. I agree with it and would dismiss the appeal for the reasons which he has given.