CASE LAW

"LAST OPPORTUNITY" AND "JUDICIAL OPPORTUNITY" (ALFORD v MAGEE)

In view of the difficulties traditionally associated with the law of contributory negligence and the current conflicting assertions, judicial and academic, as to the nature and scope of the "last opportunity" rule, the recent decision of the Full Court of the High Court of Australia in *Alford v Magee*[1] is of singular importance.

The facts of the case were not remarkable; it involved a typical collision between two motor vehicles, the main incidents occupying only a few seconds. The Full Court of the Supreme Court of Victoria ordered a new trial on the ground that the trial judge directed the jury in terms of the "last opportunity" rule, though the facts were not such as reasonably to warrant its application. In doing so, the Court followed an earlier decision of its own in *State Electricity Commission v Gay*.[2] On appeal to the High Court this ruling was affirmed: whether or not it was appropriate to direct the jury on the "last opportunity" doctrine, the actual direction had embodied an incorrect application of the rule, and made a new trial inevitable.

This was sufficient to dispose of the appeal, but the Court, in a judgment prepared by Fullagar J., then proceeded to examine the substance of the "last opportunity" rule, and to lay down certain principles as to its application. In order to assess the importance of the decision it will be necessary to set out the Court's reasoning in some detail.

The Court's first proposition was that the law of contributory negligence is best stated in the form of a general rule that the contributory negligence of the plaintiff is a good defence to his action, followed by a qualification or exception to that rule "which may or may not be correctly expressed in terms of a last opportunity of the defendant."[3] This method of exposition was an alternative to that adopted by many judges[4] who had sought to state the law in a single comprehensive rule defining what negligence of the plaintiff will disentitle him to succeed against a negligent defendant. The first method was preferable as being less likely to confuse a jury. There were also the added considerations that historically the qualification had evolved later than the general rule, and that in the leading cases of *Tuff v Warman*[5] and *Radley v London and North-Western Railway Company*[6] the law had been propounded in the form of a general principle subject to an exception.

The really serious difficulty lay in the formulation of the "qualification". In the early cases, the rule was stated without any qualification whatever. Thus, in *Vanderplank v Miller*[7] Lord Tenterden said: "If there was want of care on both sides, the plaintiffs cannot maintain their action: to enable them to do so, the accident must be attributable entirely to the defendants". The conception

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[1] (1952) A.L.R. 101.
[2] (1951) V.L.R. 104.
[3] Cited *supra*, at 101.
[4] *E.g.*, Sholl J. in *Gay's Case* (1951), cited *supra*.
[5] (1858) 5 C.B.N.S. 573.
[6] (1876) 1 App. Cas. 754.
[7] (1828) M. & M. 169. See also *Butterfield v Forrester* (1809), 11 East 60.

that some qualification was necessary to avoid injustice did not clearly emerge until *Bridge v Grand Junction Railway Company*.[8] Many attempts had been made to find a satisfactory statement of this qualification, the problem being to formulate it in such a way as not to nullify the rule itself. The statement of the qualification in terms of "causation"[9] had not proved adequate and had been "effectively criticised on logical grounds."[10] The two most authoritative statements of the "qualification" were made by Wightman J. in *Tuff v Warman*[11] and by Lord Penzance in *Radley v London and North-Western Railway Company*.[12]

As far as their Honours could ascertain, the expression "last opportunity" first made its appearance in the first edition of Sir John Salmond's *Law of Torts*, in which the "qualification" was described as the "Rule in *Davies v Mann*". This statement commanded widespread attention and if it could have been applied without undue refinement might have provided a practical solution to the problem.

The "last opportunity" rule had, however, failed of its object. It had "merely produced a multiplication of intricacies".[13] It did not represent the whole of what Lord Penzance and Wightman J. had intended, and since *Loach's Case*[14] it had been subjected to so many refinements as to become practically unintelligible. Salmond himself had realised that it was not possible for *Loach's Case* to be accommodated by the rule.[15] "Last opportunity had lost its virtue."[16]

In the last thirty years, the expression "the last opportunity rule" had acquired three distinct senses: (a) Salmond's rule as modified to take account of *Loach's Case* ("constructive last opportunity"). When so stated it had supposedly covered the whole of the "qualification". "In this sense" its existence had been denied by the English Law Revision Committee, and by Viscount Simon L.C. in the *Boy Andrew Case*[17], it had been described as fallacious and "dead" by Denning L.J. in *Davies v Swan Motor Company*[18], and effectively criticized by Professor Glanville Williams.[19] In this sense, the "last opportunity" rule was truly " a rule which has never existed".[20]

(b) A summary and compendious description of the rule in *Tuff v Warman* and *Radley's Case*, objectionable because it described a rule "which may be applicable in favour of a plaintiff although the test of 'last opportunity' is wholly inappropriate."[21]

(c) A test which might, in a certain class of case, be used to determine a question of fact—whether a particular case was within the qualification. This was sound only if it was recognised that the "rule" was not strictly a rule of law and did not cover the whole ground. Attempts to expand or refine it in the hope

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[8] (1838) 3 M. & W. 244.
[9] See *e.g. Davies v Mann* (184²) 10 M. & W. 546; *Symons v Stacey* (1922) 30 C.L.R. 169, at 175-6 (per Isaacs J.).
[10] Cited *supra* at 109 referring to Salmond, *Law of Torts* (3 ed. 35); Glanville Williams, *Joint Torts and Contributory Negligence*, Section 62 (1951).
[11] Cited *supra* n. 5 at 585.
[12] (1876) 1 A.C. 754 at 759.
[13] *British Columbia Electric Rly. v Loach*, cited *supra* at 110.
[14] (1916) 1 A.C. 719.
[15] Preface to Salmond, *Law of Torts* (5 ed.) (pp. viii-ix) quoted by Evatt J. in *Wheare v Clarke* (1937) 56 C.L.R. 751 at 757.
[16] Cited *Supra* at 111.
[17] (1948) A.C. 140.
[18] (1949) 2 K.B. 291 at 321.
[19] Glanville Williams, *op. cit.* 236.
[20] Cited *supra* n. 1, at 112.
[21] *Ibid.*

of meeting cases to which it was inappropriate led to unintelligibility.

Their Honours continued that it was hardly possible, nor was it desirable, to state the "qualification" with any greater precision than in *Tuff v Warman* and *Radley's Case*, but that "translation having failed, interpretation remains open". The problem did not arise unless there was "some ground for drawing a distinction in favour of the plaintiff between his negligent conduct and that of the defendant".[22] Comparison of degrees of negligence of plaintiff and defendant was not legitimate at common law, but was probably the fundamental idea behind the cases. A plaintiff, though himself negligent, might be in such a substantially different position from the defendant that he could not reasonably be regarded as the author of his own harm. Authorities such as *Davies v Mann*[23] and *Radley's Case* illustrated the circumstances in which a distinction between the negligence of plaintiff and defendant might be drawn. Such a distinction "should not be drawn on light or trivial or dubious grounds".[24]

Their Honours gave qualified approval to *Gay's Case*. Its great importance was that it recognised that "there may be many cases in which, if the plaintiff's negligence is found to have been a cause of the accident, the jury's only proper verdict is for the defendant, and in which accordingly no reference should be made to the qualification of the general rule as to contributory negligence." But the Court had erred in that they appeared to have held that the qualification, wherever relevant, could always be couched in terms of "last opportunity". References to a "subsequent and severable" act of negligence in the judgment, though having the authority of Lord Birkenhead in *The Volute*,[25] were objectionable as implying that the expression constituted a universal formula. The language was appropriate only to a limited class of case, of which the maritime cases were examples, "where the defendant was actually aware of the plaintiff's negligence and was actually able by the exercise of reasonable care to avoid the mischief but failed to do so."[26]

Their Honours concluded by stating that it would always be a preliminary question for the judge whether or not the facts were such as to warrant a jury's being directed in terms of the "qualification". No rule could be laid down as to the cases, or classes of cases, in which it was proper to put the "qualification" to the jury. They considered, however, that the "qualification" would seldom be appropriate in cases of collision between fast-moving vehicles. They also observed that the judge should not inform the jury as to the law merely in general terms, but should indicate how it applied to the particular facts of the case; accordingly, he should not put the "qualification" to the jury "unless he feels himself able to explain clearly to them exactly how the qualification can be fairly and reasonably applied by them to a view of the facts which it is open to them to entertain."[27]

The exact effects of this judgment can at present be only a matter of conjecture, but it is obviously a creative decision of the utmost significance, and one that should go far towards bringing order into a branch of the law which Lord Du Parcq "has aptly called a maze".[28] In general terms it would appear that the decision amounts virtually to a direction to trial judges that they shall feel free to disregard the artificialities which have accumulated in the law of contributory negligence and that they shall seek to do substantial justice between the parties

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[22] *Ibid.* Their Honours quoted Evatt J. in *Wheare v Clarke*, cited *supra* n. 15 at 743.

[23] (1842) 10 M. & W. 546.

[24] Cited *supra* n. 1, at 113.

[25] (1922) 1 A.C, 129 at 136.

[26] Cited *supra* n. 1, at 115.

[27] *Ibid.* at 116.

[28] *Ibid.* at 110, and quoted by Glanville Williams *op. cit.*; and in present case at 110.

in accordance with the facts of each particular case. They are told that no rule can be laid down as to cases in which the "qualification" should be put to the jury, and that no precise formulation of the "qualification" is possible. In each case the judge is charged with the duty of deciding from the facts before him (a) whether the jury should be told that a "qualification" to the general "stalemate" rule of contributory negligence exists; (b) what form of words is most appropriate to explain the "qualification" to the jury. Earlier decisions are to be regarded not as authorities binding upon him, but merely as guides to aid in the determination of these two questions. References to "real" or "decisive" cause, to "subsequent and severable acts of negligence" and to "last opportunity" in these cases are to be taken not as statements of law, but as felicitous formulations of the "qualification" appropriate to particular sets of circumstances; from these he is free to select and adapt according to the exigencies of the facts before him. Limitations are suggested such as that the "qualification" will seldom be applicable to collisions between modern vehicles, but even these are to yield if the facts of the case so require. In cases of doubt, it is hinted that a covert comparison of the respective degrees of negligence of the plaintiff and defendant will be of considerable assistance in determining whether the "qualification" applies.

In view of the very flexible discretion thus given to the trial judge to find and formulate a rule for the case before him, the question arises, What is the present status and scope of the so-called "last opportunity" rule? In view of their Honours' discussion of the rule in the instant case, it is submitted that the following observations can be made.

(1) The rule is not to be regarded as a rule of law covering all the possible situations in which a plaintiff, though himself guilty of negligence, shall nevertheless be entitled to recover against a negligent defendant. The attempt to comprehend *Loach's Case* within the ambit of this rule by the enumeration of the patently artificial doctrine of "constructive last opportunity" is severely criticised. *Loach's Case* is correctly decided not because the defendant had a "constructive last opportunity" of avoiding the mischief, but because the facts were such as to attract the "qualification" to the stalemate rule as expressed by Wightman J. and Lord Penzance.

(2) The rule is sound if it is restricted to Salmond's original formulation and is recognised as not covering the whole of the ground, *i.e.* only "real" and not "constructive" last opportunities are to have any efficacy.

(3) As so stated, the rule is not really a rule of law *per se*, but simply one test to be used in determining whether the "qualification is to be applied in favour of a negligent plaintiff."

(4) Thus, cases may arise in which the defendant did not have a real last opportunity of avoiding the damage but may nevertheless be held liable to a negligent plaintiff.[29]

(5) There may be cases in which, although the defendant had a last opportunity, the plaintiff is nevertheless regarded as the author of his own wrong. This point is not explicitly made in the judgment but can, it is submitted, be inferred from (a) the fact that the Court disapproved of the "last opportunity" doctrine as a principle of law, thus releasing the judge from the necessity of automatically applying it in favour of the plaintiff whenever a "last opportunity" of the defendant is proved, and from (b) the Court's statement[30] that "most probably the fundamental idea behind all the cases from *Davies v Mann* and *Tuff v Warman* onwards is that there are cases in which there is so substantial a difference between the position of the plaintiff and the position of the defendant at the

[29] *Loach's Case*, cited *supra* n. 14; and see *Commissioners for Railways v Leahy* (1904) 2 C.L.R. 54, discussed in present case at 110-111.

[30] Cited *supra* n. 1 at 112.

material time that (although the accident could not have happened if the plaintiff's conduct had not been negligent) it would not be fair or reasonable to regard the defendant as in any real sense the author of his own harm". Thus, although a defendant may have had a "last opportunity", nevertheless, regard being paid to the whole of the circumstances, there may not have been such a "substantial difference" between the position of plaintiff and defendant as to entitle the plaintiff to the protection of the "qualification".

The "last opportunity" rule, then, in the Court's view, is not a rule of law, but a test to be used in the determination of the applicability of "the qualification". The same is to be said for statements in the cases which put the question in such terms as the "separate and severable act of negligence" of the defendant, or ask whether the defendant was "master of the situation".[31] The greatest difficulty in the present case is that the Court leaves the "qualification" virtually undefined. From another point of view, this is, of course, its greatest merit, as it leaves a trial judge free to arrive at his own conception of the qualification in accordance with his sense of justice as applied to the particular facts of the case. But the lack of formulation of the "qualification" also has its dangers. As it stands, the term "qualification" could perform two distinct functions—(a) to describe a rule of law to which the "last opportunity" and other "rules" are related as facts in the manner described above, or (b) to give a generic name to an indefinite multiplication of legal rules, each one of which prescribes conditions of liability in particular sets of circumstances. It is clear from the judgment that the court intends the term to be used in the first sense, but it is submitted that, unless the rule now described as a "qualification" is formulated in some satisfactory fashion, there is considerable danger that the term will come to be used in the second sense. The problem could arise at the appellate level in the following way: The direction of the trial judge may be objected to on the grounds (a) that the "qualification" was put to the jury although the facts did not warrant it; or (b) that the "qualification" was explained to the jury in a confusing manner. The first question should cause no difficulty, but the second may well do. If the Court disapproves of the form of words chosen by the trial judge, to express the "qualification", and indicates what it considers to be a more appropriate formula, there will be a considerable danger of the formula hardening into a rule of law governing circumstances of like nature; unless the Court is vigilant on each occasion to indicate that it is not laying down a rule, a proliferation of new "qualifications" may result.

In the present case, the Court said that it was not possible to state the "qualification" more precisely than in *Tuff v Warman* or *Radley's Case*. In the former case, the negligent plaintiff can recover, "if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff"; and in the latter "if the defendant could, in the result, by the exercise of ordinary care and diligence have avoided the mischief." If anything, it is submitted, these statements are too precise for the Court's purpose. Though there is no reference to "last opportunity" in them, they are strongly imbued with that concept. It is difficult to see that they are any better adapted than Salmond's rule to accommodate the decision in *Loach's Case*. It is probably for this reason that the Court said in reference to these two statements that "translation having failed, interpretation remains open".[32] It is submitted that the Court's "interpretation" makes it quite clear that their Honours regarded the true substance of the "qualification" to be a comparison of the respective degrees of negligence of plaintiff and defendant. As "apart from the new statutes, it is not, of course, legitimate to enter upon any comparison in point of degree,"[33] the Court could not formulate the "qualification" in terms

[31] *Ibid.* at 113
[32] *Ibid.* at 112
[33] *Ibid.*

of comparative negligence and so was forced to leave it unformulated. It is not unlikely, as submitted above, that future cases will force hte "qualification" into the open, unless in the meantime the adoption of apportionment legislation becomes universal.

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MINISTER OF THE INTERIOR v HARRIS and THE SOUTH AFRICAN HIGH COURT OF PARLIAMENT ACT

The decision of the Appellate Division of the Supreme Court of South Africa delivered towards the end of 1952[1] in the case of the *Minister of the Interior v Harris*[2] is of considerable interest to students of constitutional law. In that case the court unanimously held that the High Court of Parliament Act was invalid, but each of the five judges delivered a separate judgment.[3]

Notwithstanding the unanimity of the conclusions reached, there are quite marked differences in certain aspects of the reasons given by several of the members of the court. These differences are particularly crucial in the judgments of the Chief Justice, Mr. Justice van der Heever and Mr. Justice Schreiner. The Chief Justice and Mr. Justice van der Heever expressed similar views, although the latter used language capable of wider application, but Mr. Justice Schreiner went much further than his brethren and said that while he concurred with the reasons given by the Chief Justice, nevertheless he was also of the opinion that the Act before the court was invalid for quite a different reason as well.

The Chief Justice commenced by emphasising the continued validity of the so-called "entrenched clauses", sections 35, 137 and 152 of the South Africa Act.[5] He pointed out that these sections undoubtedly conferred certain rights on individuals and that those rights could not be abolished or restricted unless the procedure prescribed by section 152 itself was followed.[6] It was apparent that if these rights were to be protected then the individual must of necessity have the right to call on the judicial power to help him resist any executive or legislative action which offended against these sections.

The task of the court according to the Chief Justice was therefore to decide whether the High Court of Parliament Act infringed any of these sections. His Honour was of the opinion that Parliament had the power under the South Africa Act to create new courts, but such courts, he said, must be "courts of law" as contemplated by the South Africa Act. In his view the High Court of Parliament was not such a court as was envisaged by section 152 and the Act creating that court was therefore invalid.

He advanced three reasons for holding that the High Court was not a "court". Firstly, he said, it was not comprised of judges but of legislators sitting in judgment on themselves. Many of them had no training in the law, they delegated consideration of the case before them to a judicial committee and generally the court adopted a procedure alien to a court of law. Secondly, according to

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[1] 13th November, 1952.

[2] This note is based on the reports of the case appearing in *The Rand Daily Mail* of 14th November, 1952.

[3] The Chief Justice, Mr. Justice A. van de Sandts Centlivres, Mr. Justice L. Greenberg, Mr. Justice O. D. Schreiner, Mr. Justice F. P. van der Heever and Mr. Justice O. H. Hoexter.

[5] See *supra* p. 64 ff.

[6] For other aspects of the matter see *ibid.*

[7] The Act provided that individuals had no right to bring under review to the High Court of Parliament any decision of the Appellate Division. The only person who had that right was a Minister of State; and under Section 5 (1) (a) he was compelled to approach the Court whenever the Appellate Division declared an Act invalid.