IN THE SUPREME COURT OF NEW ZEALAND
OTAGO AND SOUTHLAND DISTRICT
DUNEDIN REGISTRY

A.44/71

? Special Consideration

BETWEEN NOEL CHARLES SCOTT of Milton, Textile Worker

Plaintiff

v

No

AND JAMES BRIAN HUMPHRIES of 112 Eddystone Street, Kaitangata, Skin Processer

Defendant

Hearing: 19 December 1972

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Counsel: Mitchell for defendant in support
Wright for plaintiff to oppose

Judgment: 26. 4. 73

RESERVED JUDGMENT OF WHITE J.

This is a motion, pursuant to leave reserved, for non-suit or judgment notwithstanding the verdict of the jury. The ground of the application for non-suit or judgment was that there was no evidence or insufficient evidence to support a finding of negligence on the part of the defendant. Alternatively, the defendant has moved for a new trial on the ground that the finding of negligence on the part of the defendant was against the weight of the evidence.

The general issues, on which Counsel were agreed, and the answers of the jury were as follows:

"(1) Was the defendant negligent in a manner causing or contributing to the accident?

Answer: Yes.

(2) If the answer to Issue No. 1 is "Yes", assess the damages.

(1) Special: $1,384.00

(2) General: $4,800.00

(3) If the answer to Issue No. 1 is "Yes", was the plaintiff himself negligent in a manner causing or contributing to the accident?

Answer: Yes.

(4) If the answers to Issues No. 1 and 3 are both 'Yes', by what percentage is it just and equitable that the plaintiff's damages should be reduced, having regard to his share in the responsibility for the accident?

Answer: 75%. "

There was no application for judgment or non-suit at the close of the plaintiff's case. Mr. Mitchell simply opened his case and called evidence as, of course, he was entitled to do. The case must now be considered having regard to all the evidence and a general verdict that the defendant was negligent rather than one specifying the respect or respects in which the jury considered the defendant negligent. Although this makes the task of the defendant a difficult one the state of the evidence was such that I have considered it necessary to carry out a detailed review of it. In doing so I have had the advantage of considering the careful submissions of Counsel and my summing-up on matters of fact as they were in my mind at the trial.

A number of cases were cited but the principles to be applied are stated in Jensen v. Hall (1961) N.Z.L.R. 800. In that case, where a pedestrian emerged from between parked cars and into the path of the defendant's car, the majority of the Court (Gresson P. and McGregor J.) defined the revising function of the Court of Appeal. In restating the principles laid down by the highest Courts it was said that the appellate tribunal cannot substitute its finding for that of the jury but has the duty of considering whether there was any evidence to support the verdict. There may be cases, it was pointed out, where there was some evidence though not enough properly to be acted upon by a jury, the well known test being whether, viewing all the evidence, the verdict was one which reasonable men and women might have come to. In that case the specific allegations of negligence on the part of both defendant and plaintiff were put to the jury. Two out of seven allegations, namely, excessive speed in travelling at 27 m.p.h., and failing to pass behind the plaintiff, were answered in the plaintiff's favour. All the allegations made against the plaintiff were found established and the plaintiff's share in the

responsibility for the accident was assessed at 55 per cent.

In the present case the plaintiff's allegations of negligence were:

(a) Failing to keep a proper look-out.

(b) Travelling at a speed which was excessive in the circumstances.

(c) Failing to stop, steer clear or otherwise avoid the plaintiff.

(d) Failing to take sufficient steps to warn the plaintiff of the approach of the defendant's car.

These allegations were denied by the defendant who in the alternative defence alleged contributory negligence in the following respects:

(a) Failing to remain as near as practicable to the edge of the road contrary to Regulation 89 of the Traffic Regulations 1956.

(b) Failing in the circumstances prevailing to keep himself in a position of safety and clear of motor vehicles using the highway.

(c) Proceeding out on to the highway and into the line of travel of the plaintiff's motor vehicle at a time when the defendant's motor vehicle was so close as to be unable to stop.

(d) Failing to keep a proper lookout.

(e) Proceeding on to the highway when the defendant's motor vehicle was approaching and/or remaining on the highway or adjacent thereto while under the influence of intoxicating liquor.

$6,000.00 was claimed for general damages plus $1,384.00 special damages, which were agreed. The plaintiff suffered concussion with retrograde amnesia and fractures of both bones of the lower leg. He had made a good recovery but was left with some stiffness and weakness in the leg which the orthopaedic specialist considered was a permanent disability.

In reviewing the facts I propose to draw particular attention to the evidence affecting the initial issues.

The plaintiff who at the date of the accident was employed at the South Otago Freezing Works at Balclutha had spent a Saturday in May 1969 in Milton where his parents lived. According to his evidence he played football in the afternoon after which he had some beers with his friends. Then he had a meal at a tea-room and at about 9.30 met friends to drive back to Balclutha. His friends visited a hotel while he remained in the car because he was then 19. However, his friends bought him two bottles of beer as he had requested. On the way home they stopped at Stirling where the plaintiff's friends went to a party. The plaintiff went to the house where the party was but left almost at once to visit a Mr. Williams, a friend living in Stirling. He reached there at about 10.45 and found a small party in progress. He contributed his two bottles of beer and said that at that stage there was only about one and a half bottles of beer left at that party. He stayed there until about midnight or somewhat later and then left to walk to Balclutha. Asked about the weather conditions he said it was "fairly calm but a slight mist". In cross-examination he repeated this and when asked whether it was drizzling said, "No. Just misty, a light misty rain. A sort of river mist." However, when asked about the road he said it was "quite dry". Asked about his clothing he said he thought it would be all right with light clothes on. He said he was dressed in light trousers and a light coloured jersey. Asked about being seen in the prevailing weather conditions he said, "I didn't think they were that bad." The plaintiff agreed that he would be perfectly safe on the verge but commented, "Fairly hard on the feet and had soft shoes on". Later he said he thought he had "moccasins" on. He was walking on a high-way running parallel to the main route. The roadway with

which we are concerned was straight with some undulations or dips, tar sealed with verges of metal and grass with variations along it. The plaintiff said he walked for 3 to 400 yards on the left hand side of the roadway and then crossed to the right hand side because there was a hedge on the left and it was fairly clear on the right hand side. From that time he remembered nothing until he regained consciousness in hospital. He said that the last thing he remembered was that there was nothing coming in either direction and he had no recollection of hearing a motor before the accident. The plaintiff said that his first information concerning the accident came from the defendant who called on him in hospital on the Sunday and gave him his watch. Later in the week the defendant called again when the plaintiff was able to talk to him. He referred to the conversation as follows in his evidence:

> "What did he say to you? He asked if I could remember what happened. I said I couldn't remember anything. Did he say anything else? He asked if I tripped. Say anything else? He said I just seemed to come from nowhere."

Later the plaintiff referred to a comment of the defendant as follows:

> "Mr. Humphries make any further comments to you? No. Only about whereabouts it had happened.
> Give any indication of where impact occurred? He did mention that impact was on front and I went over bonnet of the car.
> Describe it in any more detail? No just said I went over and landed on side of road in the grass. Left hand side of road I think. I think he said that".

Mr. Williams gave evidence, saying that the plaintiff was "quite sober" when he left starting to walk to Balclutha. Asked about the weather that night he said, "Early in the night it was fine. I think after 10 o'clock that night a river fog or mist which quite often develops in this area. It can have a dampening effect, depends on how severe - it may be in banks".

The defendant and his wife gave evidence. They had been at a twenty-first birthday party in Balclutha and were on their way home to Kaitangata at approximately 1 a.m. on Sunday morning, 25th May, when the accident occurred. Later that day the defendant reported the accident at the Balclutha Police Station. The following extract from his statement is useful as his account of the accident:

> "...It was drizzling at the time, and the wipers on my car were working well. My windscreen was clear. I was going along the part of the road known as the Stirling straight, approaching Stirling itself. I was only going about 45-50 m.p.h. When I was about Wallace's pig farm, I caught a glimpse of a man standing on my left hand edge of the roadway. I am not sure whether he was walking towards Kaitangata or standing still. I eased my foot off my accelerator just before I was going to pass him. The next thing he seemed to jump right out in front of my car with his arms outspread. I never had any time to swerve to avoid him, but braked immediately. He hit the front left hand part of my car, and was knocked into the grass verge. I stopped straight away, and went back.
>
> .....In my opinion the cause of the accident was the fact that this chap jumped out right in front of me, and I didn't have a chance of swerving to avoid him. I don't know whether he was trying to flag me down and hitch a ride or not".

According to the defendant's evidence there was "a little drizzle" and he had his wipers operating and his lights on full beam. When he first saw the plaintiff the defendant said he was on the gravel verge. The defendant's reaction was to slacken speed by "easing his foot off the accelerator". The plaintiff "seemed to jump or stumble out in front" of the defendant's car. He then applied the brake hard but could not avoid the plaintiff who was about a chain in front of him at that stage. The impact was between the left headlight and centre of the bonnet and the plaintiff was thrown over the bonnet. After stopping the car the defendant said he found the plaintiff on

the left hand verge "about 2 feet" behind his vehicle. According to the defendant and his wife the plaintiff was able to give his name, say that his leg was sore and that he was heading for the Freezing Works. They also stated that the plaintiff said he was "drunk". In cross-examination the defendant was asked a number of questions about the weather conditions including questions about "river mist". He agreed that river mist tended sometimes to lie in banks on the road. Following those questions the following questions and answers are recorded:

> "Recall misty or drizzling? It was drizzling because I had my windscreen wipers going.
> Sure not misty? Mr. Scott mistaken when he said it was misty? Yes....."

It was put to the defendant later in cross-examination that if it was misty that might account for his appearing "to come from nowhere?" The defendant's answer was, "He didn't appear to come from nowhere. I saw him there and then he jumped out in front of me, stumbled or whatever it was." The cross-examination regarding the defendant's actions after seeing the plaintiff included the following passage of evidence:

> "Your car tracked in a straight line? Yes. When you saw Mr. Scott jump or stumble in roadway you said he was about? Approximately a chain away from me. Approximately. You agree that point of impact on front of your car was approximately 2 feet in from left hand side? Yes. Had your car been 2 feet to right you agree in all probability impact would have been avoided? Yes. But I probably would have been over the white line. No traffic coming in opposite direction? Not that I can recall, no. Mr. Scott appeared to stumble or jump into roadway? Yes. Assuming you are in a motor vehicle at this moment I presume, correct me if I am wrong, that Mr. Scott appeared to stagger out or jump out in front of you, was picked up in front of car, over bonnet and deposited on edge of road? Yes."

The defendant said again in cross-examination that when he first saw the plaintiff at the side of the road he did not brake but "slacked off" speed.

The defendant's wife's evidence confirmed in general what the defendant said. She was cross-examined concerning the evidence of what the plaintiff said after the accident. She confirmed the defendant's evidence and added, "I think you should realize that when he was saying he was drunk and talking about his leg people who stopped in the car were also there." And to me she said she could talk to the plaintiff "quite reasonably". Regarding the weather she said there was a "light drizzle". Asked whether there was a river fog she answered, "Not that I remember". The car she said had two windscreen wipers which were operating and asked about the visibility she said it was "fairly clear" and that she could see the roadway ahead "clearly". Her estimate of the speed of the car was 45 m.p.h. Coming to the movements of the plaintiff she said:

> "You said you were looking ahead - what were you able to see? Nothing at all. The road was clear. What happened then? Then Mr. Scott one minute he wasn't there and (perhaps a second) and then he was. He was there? Right out in front of me. When you first saw Mr. Scott was he in line of travel of your car? Yes he was. How far out from edge tar seal would that be? Oh I don't know, perhaps 6 feet. When you first saw Mr. Scott in the road in this position tell jury which way he was facing? He was facing the car. Tell jury something about his stance - the way you stand? He had his arms up in air (demonstrates with arms above head). Something else stick in your memory about him? No. Clothing? His pants, first thing I think I saw was his two legs. Say anything about colour? They were white. Anything happen at the incident you observed? That was when my husband put the brake on and I was thrown, I don't know whether it was forward or to the side. I screamed. Seat belts in car? No. When you first saw Mr. Scott on the road ahead of the car

would there be in your view time to stop? No I don't think so. He was right in front of us. There wasn't any time to stop. Did the car respond to braking? Yes. What happened then? He fell over the bonnet and fell off the right hand side. The left hand side of the car, I'm sorry".

In cross-examination Mrs. Humphries was asked about the weather conditions and said she was certain it was "drizzling" and "not misty". Later in cross-examination the following questions and answers are recorded:

"A straight road? Yes. Agree with me that if it was misty it could account for Mr. Scott not being seen by yourself until apparently he was in front of car a short distance ahead of you? No I don't know I would agree. Perhaps it was misty. The car fairly heavily damaged in front? Yes. When it does get misty you can't see much at all, it gets really really misty and you can't see at all - you have to crawl at about 10 m.p.h. Not misty that night? No I don't think it was. Not like that, no it wasn't".

Asked about making a statement to the police she recalled being interviewed but not signing a statement. In fact she had signed a statement on 8 July 1969 at the Kaitangata Police Station, which she had no doubt forgotten and which was produced. In it she had said, "My husband was not driving fast at the time because the weather was misty and visibility was not good". In re-examination she was asked whether there was any difference in her mind "between a mist and a drizzle". Her answer was:

"There is a fog which comes off river and it is very very thick. I call that fog. You call that local phenomenon fog? Yes. Reference to 'mist' refers to something else? It wasn't to the fog. I really don't remember being misty, it wasn't that fog. Was it affecting your visibility as passenger in car? No."

The remainder of Mrs. Humphries' statement as to what happened was consistent with the evidence she gave at the hearing.

The credibility of the witnesses and the weight to be given to their evidence were matters for the jury. It is proper that I should say, however, that both the defendant and his wife impressed me as truthful and fair witnesses. I would also have accepted the evidence of the plaintiff regarding his movements up to the point of time at which he said he had no memory of what happened.

Having reviewed the evidence it is necessary to examine each allegation of negligence by the plaintiff against the defendant and by the defendant against the plaintiff. In Jensen's case a similar examination was found to throw light on the picture of the accident which presented itself to the jury. Similarly, but to a lesser degree where there is a general verdict, I consider that the answers of the jury to the issues are of assistance in the present case. In the case of a general verdict I think it is important to bear in mind what Cleary J. said in Jensen's case, at p. 814, that "a jury may be satisfied that there was negligence in some respect within the area of the allegations made but at the same time find difficulty in assigning that negligence with the specific particularity where the formulation of a series of questions requires of them." A safe starting point is the finding of 75 per cent contribution. That is a clear indication of blameworthy causative negligence on the part of the plaintiff. It shows without any possible doubt that the jury must have accepted the evidence of the defendant and his wife, at least to the extent that the plaintiff moved out on to the roadway into the path of the defendant's car without warning. It is against that background that I must consider whether it was open to the jury on the evidence to find the defendant negligent. In my opinion the fourth allegation can be dismissed at once in those circumstances. It was not suggested that the defendant should have sounded the horn. The evidence was that the defendant's car was

travelling with its headlights on full beam on a straight road. It is the evidence as to the defendant's lookout, speed and actions when he saw the plaintiff that have to be examined to decide whether in any respect the jury might properly find that the defendant had failed to exercise the care of the ordinary careful motorist in the circumstances.

Considering a proper lookout, the evidence of the plaintiff was that he had crossed the road and had been walking on the verge on the left side of the roadway along which the defendant was driving. Thus his evidence supports the evidence of the defendant that his first view of the plaintiff was on the verge. This is not a case like Lopes v. Taylor (1970) 44 A.L.J.R. 412 where the plaintiff, a pedestrian, remembered nothing as in the present case, but the defendant there had not seen the plaintiff up to the time she struck his windscreen in an illuminated area of roadway. Bearing in mind that a driver of a motor car is looking at the roadway ahead within the beam of his headlights I am satisfied that there was no evidence in the present case that the defendant failed to keep a proper look-out. He saw the plaintiff coming out on to the roadway and in the defendant's split second observations he was able to give an account of what the plaintiff did. This evidence, as I have said, the jury must have accepted in arriving at their verdict.

The remaining allegations concerning speed and action taken or omitted immediately before the impact overlap and it will be useful, I think at this stage, to quote a passage from my summing-up which follows my review of the question whether the plaintiff came "from a position of safety off the road on to the tar seal into the line of approach, whatever the cause, suddenly and without warning into the path of the car":

> "...Now there is, of course, another matter which has been raised and that is the question of the conditions at the time. You will certainly have to consider

that and if you came to the conclusion that the state of this highway on this night was one in which river mist (which has been variously described in that way, or as fog) was lying across the roadway so that it was highly dangerous, on the admission of the defendant's wife, and I think the defendant himself, it would be to travel at the speed you have heard about, it would be the height of folly, no doubt you would think. But you have to consider whether in fact that was so. I am not going into the detail of the evidence. You have to bear in mind in this case that you have the evidence of the defendant and his wife. It is true there is reference to what she said in her statement, to which you will no doubt pay some attention when you are reading it, but you heard her in the box. It is again for you to decide whether she was unreliable or not. But in considering this matter think back over the evidence and you may well feel that there was in fact no evidence given that the state of the weather, whatever it may be called - fog, river mist, or whatever it was - it was never suggested, as I understand it, by the plaintiff that the situation of heavy fog lying across the road was in fact present on this occasion. There was some argument as to whether it was misty or whether it was drizzly. It is for you to consider. You may think that in fact there may not be a great deal of difference between the two and that if there was a light, misty, foggy type of condition that it would be affecting the windscreen of a vehicle requiring the wipers to be on. And, of course, to that degree in these conditions visibility would be affected to some degree. One of the suggestions is, of course, that he (the defendant) might have steered away to the right. I do not intend to say very much about that because it is for you to consider the whole of the circumstances and, if you accept the fact that he was suddenly faced with a situation of danger created by the pedestrian - if you accept that - you take into account a time for reaction and it is for you in those circumstances to say whether if he decided to brake and did that hard he should be criticized for not having done a different thing - swerving to the right. There is such a thing known as 'the agony of the moment' and one must bear that in mind in considering the actions and testing the matter according to what you would consider an ordinary prudent, reasonable motorist

should be expected to do in the circumstances."

In dealing with these questions I refer first to Mr. Wright's submission that there was evidence on which the jury could find that the defendant was travelling faster than 45 to 50 m.p.h. In my view there is no evidence for such a finding. No expert evidence was called on the subject nor was there specific evidence of any substance from the witnesses. To base a finding that the car was probably travelling at more than 50 m.p.h. on the extent of the plaintiff's injuries or on the damage to the car would be pure conjecture.

Another alternative submission made by Mr. Wright can be referred to conveniently here. It was that the jury could have come to the conclusion that the plaintiff was drunk and that the defendant should have seen him in his headlights in time to avoid him. Apart from the evidence of what the plaintiff said immediately after the accident when concussed the evidence of the plaintiff and Mr. Williams is to the contrary. There was also the evidence of Dr. Pollock who was called by the plaintiff and had studied the hospital notes. Assuming, however, that the jury had reached that conclusion in my opinion it would not help the plaintiff in this case where the only evidence is that the plaintiff came from the area of the verge and was seen then first in the beam of the car's lights and then on the roadway in the path of the car. There was no evidence whatever in this case that the plaintiff was in a position to be seen in the headlights earlier than when he was seen by the defendant.

The next question is whether there was evidence on which the jury might reasonably find that the defendant should have stopped, steered clear or otherwise avoided the plaintiff. In reaching a conclusion on that matter the jury had to consider what the defendant did in the circumstances. The defendant agreed that had his car been

travelling two feet further to the right "in all probability the accident would have been avoided". That would have meant he said that he would have "been over the white line" thus indicating his position. He agreed that there was no approaching traffic at the time but it was not suggested that a prudent motorist would be expected to drive with the right wheels over the centre line. Assuming for present purposes that a speed of 45 to 50 m.p.h. was not excessive, the question is whether in the circumstances a jury might reasonably find that the defendant failed in his duty as a reasonably prudent driver by braking and not swerving to the right when faced with this emergency. In exercising the function of this Court I consider that the answer must be "No" - that in the application of the principles to be applied no reasonable jury could properly find that to fail to swerve to the right amounted to negligence. The question was considered in Jensen v. Hall (supra) where the jury found that the defendant was negligent in failing to swerve to the left. The trial Judge and all the Judges in the Court of Appeal were agreed that such a finding was unwarranted.

I come now to the evidence of the circumstances in which it was alleged that a speed of 45 to 50 m.p.h. was excessive, that question involving again the fact that if the speed had been lower the defendant would have had more time to avoid the plaintiff. Once again I recall the relevant circumstances. The roadway was straight and relatively flat for a considerable distance. It was tar sealed with a marked centre line with gravel and grass verges in the area where the plaintiff said he was walking and where he was seen according to the defendant. The photographs produced illustrated this evidence satisfactorily. The defendant's car was equipped with normal headlights. The evidence was that they were on full beam.

There is ample evidence that the weather conditions, to use a neutral term, were such that the windscreen wipers of the defendant's car were in operation. Unless it was open to the jury to find that the speed was excessive because of the weather conditions at the time I am satisfied that no reasonable jury could properly find that a speed of 45 to 50 m.p.h. was excessive.

In reviewing the evidence I have quoted evidence of weather conditions and, in particular, the evidence of river fog. The defendant's evidence was that it was drizzling. As the record of the evidence shows, however, mist and river fog were referred to and there was evidence that if river fog was lying on or across the road a speed of from 45 to 50 m.p.h. would certainly be excessive. Having carefully reconsidered the evidence, however, I am satisfied that it was not open to the jury to find that there was river fog of the kind that was described which would have called for a much reduced speed. Moreover, it is obvious in my opinion that the jury did not reach any such conclusion. Had they done so there would not have been a finding of 75 per cent contribution.

There remains the question whether on the evidence of the weather conditions the jury might reasonably find that the speed of the defendant's car was excessive. My summing-up shows how I left the question to the jury, but it is necessary at this stage to consider the matter in light of the close analysis of the evidence which can be made after a trial is over. Is there evidence on which the jury might reasonably find that the defendant's speed was excessive? The evidence of Mrs. Humphries has been referred to. What she said in a statement to the police, as quoted above, was, "My husband was not driving fast at the time because the weather was misty and visibility was not good". There was no estimate of speed in her statement. Her estimate in evidence was 45 m.p.h. I

must consider Mrs. Humphries' evidence, however, on the basis that the jury accepted what she said in her statement as her real recollection and impression nearer the date of the accident rather than the evidence she gave in Court. With that assumption I must consider what I have already said about river fog and, what is very important, the evidence of the plaintiff himself when questioned as to whether it might have been difficult for a motorist to see him. Repeating evidence quoted above, he said it was "fairly calm but a slight mist". Asked in cross-examination whether it was "drizzling" the plaintiff answered, "No. Just misty, a light misty rain. A sort of river mist". He was then asked whether it might have been difficult to see him in those conditions and he said, "I didn't think they were that bad". Asked whether he was getting very wet he said that he did not think so. It seems to me that on the evidence no jury could reasonably find that the conditions and visibility were worse than what might reasonably be expected in light drizzle which made it necessary to have a car's wipers operating.

In considering the question of speed in the circumstances of the case I refer again to Jensen's case. At p. 809 Gresson P. said, "The question is whether the facts establish negligence (the onus being upon the plaintiff to do so) according to the legal concept of negligence, i.e. to avoid foreseeable dangers - not merely those which are possible". The test of foreseeability was referred to by Gresson P. and McGregor J. in Jensen's case, at pages 806 and 817 respectively, both quoting the following passage from the judgment of Lord Dunedin in Fardon v. Harcourt-Rivington (1932), 146 L.T. 391:

> "If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions".

Gresson P. also referred to the words of Lord McMillan in the same case:

> "The user of the road is not bound to guard against every conceivable eventuality but only against such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience..."

Gresson P. then said:

> "I appreciate that negligence is primarily a question of fact for the determination of the jury; but whether or not there is evidence upon which the jury could found a finding of negligence is a question of law for the Court; a mere scintilla of evidence is not enough. There must be evidence on which the jury might reasonably come to a conclusion in favour of the plaintiff: Viscount Finlay in Everett v. Griffiths (1921) A.C. 631, 668".

Applying these principles and asking the question whether there was any evidence of negligence within the area of the plaintiff's allegations as a whole, I have come to the firm conclusion that a jury could not reasonably find that a speed of 45 to 50 m.p.h. was excessive in the circumstances. Looked at dispassionately the cause of the accident was the action of the plaintiff which was outside the area of reasonable foreseeability. Adopting again the language of Gresson P. in Jensen's case, "there was no obligation to guard against the particular act in the circumstances which prevailed because it was so unlikely to happen". The jury obviously gave the case careful attention in reaching its conclusions but the cases make it plain that it is no reflection on a jury nor a usurpation of the jury's function to hold that there was no evidence on which a particular conclusion could be reached.

Having reached the conclusion that on the totality of the evidence a verdict for the plaintiff cannot be supported the proper course, as stated in Jensen's case, is to set aside the judgment entered at the trial and enter judgment for the defendant.

Solicitors:
Adams Bros., Dunedin, for the plaintiff
Baylee, Brunton & Mitchell, Dunedin, for the defendant