L. V. WOLFE AND SONS AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

DAVID J. GIESBRECHT AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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*Feb. 15, 16
*Apr. 24

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Jury trial—Automobile collision—Highway covered with smoke—Driver turning to left to avoid government truck—Head-on collision with approaching car—Finding of jury as to negligent act of appellants' driver—Whether it comes within allegations of negligence in statement of claim—Charge to jury as to respective duty of drivers—Trial judge reading from reported judgments—Mis-direction—Issues between parties not adequately presented nor sufficiently tried—New trial.

The respondent's car, in which the other respondents were passengers, was being driven southwards when the driver noticed a cloud of smoke being carried across the highway about a mile ahead of him, the smoke covering about 150 feet of the length of the highway. As he approached the smoke, he noticed just ahead of it a government truck which was collecting weeds in the ditch to have them burned; and, when near the truck, the respondent's driver had observed another car in front of him drive around it and enter the smoke, and he proceeded to do likewise. He successfully passed the truck, but beyond it his automobile came into collision with the appellants' oil truck and trailer proceeding from the south. Neither driver saw the other by reason of the smoke until the vehicles were a very short distance apart. As a result of the collision, the respondent and the occupants of his car were injured and an action was brought for the resulting damages. In answer to a submitted question, the jury found that the appellants' driver was negligent because "he should have stopped before entering smoke and determined the cause of smoke, especially in view of the nature of his load"; and they found also that there was no contributory negligence on the part of the respondent's driver. The Court of Appeal held that the trial judge had mis-directed the jury and ordered a new trial. The appellants limited their appeal to this Court to that part of the judgment whereby their application for dismissal of the action was refused. They contended that the answer of the jury was not responsive to any of the allegations of negligence pleaded by the respondents and that the finding of the jury (if the jury found that the appellant's failure to stop before entering the smoke caused the accident) in that respect was perverse; and they urged that the respondents' action should have been dismissed as no other finding of negligence had been made. The respondents cross-appealed, asking that the judgment of the trial judge in their favour be restored.

Held that the appeal and the cross-appeal should be dismissed and that the judgment appealed from ([1944] 1 W.W.R. 634) be affirmed.

*PRESENT:—Hudson, Taschereau, Rand, Kellock and Estey JJ.

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On the appeal:

Per Hudson, Taschereau and Estey JJ.—It is unnecessary to decide the issue raised by the appellants' submission. If it be decided that the answer of the jury is responsive and not perverse, a new trial must still be had because there has been no appeal from that part of the judgment of the Court of Appeal which has so decided. If it be decided that the answer is not responsive and perverse, it is an answer of a jury deliberating under the influence of a misdirection. A plaintiff's action should be dismissed upon such a basis, only if the charge of the trial judge has adequately placed the issues involved before the jury or if the Court finds that there is no evidence to support a verdict even if the charge had been without objection; and the present case cannot be so regarded.

Per Rand and Kellock JJ.—The answer of the jury with respect to the negligence of the appellant driver cannot be regarded as a finding which does not come within the allegations of negligence in the statement of claim. There may be some surplusage in the answer, but, regarded reasonably, these allegations were sufficiently wide to include what the jury has found.

On the cross-appeal:

Held that the judgment of the Court of Appeal ordering a new trial should be affirmed.

Per Hudson, Taschereau and Estey JJ.—The pleadings of both appellants and respondents specifically raised issues as to the manner and position upon the highway in which the respective cars were driven; and each claimed that the negligence of the other caused the accident and adduced evidence in support of their respective contentions. These facts and these issues have not been adequately presented to the jury by the trial judge.

Per Rand and Kellock JJ.—The trial judge, from the reading of his charge, seems to have directed the attention of the jury to the conduct of the appellants' driver in proceeding into and continuing in the smoke as being conduct which the jury might well consider to be negligent, while he treated the conduct of the respondents' driver, if the jury considered it in any respect negligent, as though it did not matter, being something which the appellants' driver ought to have anticipated and guarded against. Both what the trial judge said himself and what he read from the reported judgments had the effect of taking away from the jury the issue of negligence, on the part of the respondent driver, as being essentially irrelevant. The result has been that the issues between the parties have not been tried.

Judgment of the Court of Appeal ([1944] 1 W.W.R. 634) affirmed.

APPEAL and CROSS-APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge, Anderson J. with a jury, which had maintained the respondents' action for dam-

(1) [1944] 1 W.W.R. 634; [1944] 2 D.L.R. 564.

ages arising out of a collision between the appellants' and respondent's automobiles. The Court of Appeal had ordered a new trial.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

E. M. Hall K.C. for the appellants.

G. H. Yule K.C. for the respondents.

The judgment of Hudson, Taschereau and Estey JJ. was delivered by

ESTEY J.—This action arises out of a collision between appellants' (defendants) truck and respondents' (plaintiffs) automobile, before noon on the 2nd day of June, 1942, on a highway running north from the city of Saskatoon and described throughout the proceedings as Avenue "A".

Men operating government equipment were burning grass and weeds in the western ditch of Avenue "A" that morning, and because of the prevailing wind, the smoke, in varying and changing degrees of density, was blowing across the road in a south-easterly direction. The collision was either well within the smoke field, or at its northern edge or fringe.

The learned trial judge submitted certain questions and answers to the jury, and upon these answers gave judgment for the respondents (plaintiffs). The appellants (defendants) appealed to the Court of Appeal for Saskatchewan, and that Court held the learned trial judge had misdirected the jury and ordered a new trial,

limited to the question of the liability of the parties for the damages already found.

The appellants now appeal to this Court, but limit their appeal

to that part of the judgment of the Court of Appeal for Saskatchewan whereby the defendants' application for dismissal of the action was refused.

The appellants' submission is that

the finding made by the jury was not a finding of negligence which was an effective cause of the accident and no other finding of negligence having been made by the jury judgment should have been entered for the defendants dismissing the action. The said answer was not responsive

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to any of the allegations of negligence pleaded by the plaintiffs and the finding of the jury (if the jury found that Wolfe's failure to stop before entering the smoke caused the accident) in that respect was perverse.

In my view it is unnecessary to decide the issue raised by this submission. If it be decided that the answer is responsive and not perverse, a new trial must still be had because the Court of Appeal has so decided and the applicants have not appealed from that part of the judgment. The cross-appeal of the respondents questions that judgment, but for the reasons hereinafter discussed, I am of the opinion that the judgment of the Court of Appeal should be affirmed.

If it be decided that the answer is not responsive and perverse, it is an answer by a jury deliberating under the influence of a misdirection which the Court of Appeal has held amounts to a substantial wrong or miscarriage of justice (Rule 40 of the Rules of the Court of Appeal in Saskatchewan). It appears to me that a plaintiff's action should be dismissed upon such a basis, only if the charge of the learned trial judge has adequately placed the issues involved before the jury, or if the Court finds that there is no evidence to support a verdict even if the charge had been without objection. This cannot be regarded as such a case.

In *Andreas* v. *Canadian Pacific Railway Co.* (1), the jury were properly instructed and this Court dismissed the action on the basis that there was no evidence to support the verdict; whereas in *Jamieson* v. *Harris* (2), which is perhaps more in point, at p. 634 Nesbitt J. states as follows:

> We are, therefore, unable to say that the jury have found any negligence causing the death for which, in our opinion, the defendant, on the evidence, can be said to be liable.

And again at p. 635:

> We cannot find the evidence went this length but point to it as shewing that the attention of the jury was not closely drawn to what we conceive to be the vital point in issue.

Notwithstanding the jury's findings did not constitute negligence causing the death, because there had been misdirection by the learned trial judge a new trial was ordered. See also *McLaughlin* v. *Long* (3); *Antaya* v. *Wabash R.R. Co.* (4).

(1) (1905) 37 Can. S.C.R. 1.
(2) (1905) 35 Can. S.C.R. 625.
(3) [1927] S.C.R. 303.
(4) (1911) 24 O.L.R. 88.

That there was evidence upon which the jury should properly deliberate both with respect to negligence and contributory negligence is not questioned.

This is the only issue raised by the appellants, and for the foregoing reason, in my opinion, the appeal must be dismissed with costs.

The respondents cross-appeal and ask that this Court reverse the decision of the Court of Appeal for Saskatchewan and reinstate the judgment of the learned trial judge in favour of the plaintiffs.

The charge to the jury must be read and considered as a whole. *Jones* v. *Canadian Pacific Railway Co.* (1). When this charge is read as a whole, the conclusion arrived at by the Court of Appeal that the learned trial judge presented this as a case of ultimate negligence appears to be well founded. It is true that he makes reference to the possibility of concurrent and continuing negligence on the part of these parties, but he so minimizes the importance of these considerations that in effect he withdraws them from the jury. His repetition and the emphasis he placed upon the conduct of Wolfe before he entered the smoke field, and that of Giesbrecht as he went around the government truck in effect excluded all other issues from the minds of the jurymen as they retired to deliberate. As far as Wolfe's conduct is concerned, at the very conclusion of his charge, in response to a request from counsel that he specifically deal with the point of impact, the learned trial judge in part uses the following language:

> Well, gentlemen, in regard to where the accident happened * * * I have my own view on it, but I don't know that it is particularly important. * * * And, as I say, even if that is so, that does not seem to me to go to the crux of the case at all * * * because, even supposing Wolfe was on his own side of the road, that would not be sufficient—or that might not be sufficient. Was it his duty, as a reasonable man, to stop before he ever went into that smoke? If he had, it would never have occurred.

A jury listening to the charge as a whole would conclude, as this jury apparently did, that there were but two issues. First, was the defendant Ernest Rudolph Wolfe negligent before he entered the smoke field in not stopping, getting out of his car and going to see? Second,

(1) (1913) 83 L.J. P.C. 13.

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did Giesbrecht proceed in a reasonably careful manner as he went around or passed the government truck? Even with respect to one of these questions the learned trial judge goes so far as to say:

> Was Wolfe negligent in not stopping his car before he got into that smoke? Because once he got into the smoke he incapacitated himself from avoiding the consequences of any negligence that the plaintiff might have been guilty of in getting where he was. And I will leave that with you. That is for you to decide.

The comment of Mr. Justice Mackenzie, on behalf of the Court of Appeal, seems particularly apt:

> This seems to pose the difficult question as to what there was left for the jury to decide after the learned judge had told them that Wolfe had incapacitated himself from avoiding the consequences of any negligence on the part of the plaintiff.

The pleadings of both parties raised other issues as to where upon the highway and in what manner they were proceeding immediately before and at the moment of impact. The trial continued for five days, and evidence was adduced to support these issues. Many witnesses gave evidence, and the physical facts as evidenced by the marks on the highway and the damaged vehicles were canvassed with care. There was disagreement and contention upon vital points which in the opinion of the parties had a bearing upon this case, some of them so important that counsel immediately asked that the jury be specifically instructed with regard to them.

The smoke covered "at least a quarter of a mile" of the highway. As one proceeded his field of vision varied. At times he could see some distance, and at times no distance. The smoke passed over the road in gusts. Even if the appellant did get out and look, he still was under a duty to proceed with due care, and likewise the respondent, even after he got by the government truck, he was under the same duty to use due care.

In my opinion to the moment of impact the position of the vehicles upon the highway, both in relation to the centre line and the distance south of the government truck; the speed of the respective vehicles, particularly in relation to the range or field of vision of their drivers; and the ability of the drivers to stop in the event of an emergency, are all important factors for the consideration of the jury under instructions from the learned trial judge that clarify the issues and explain the relevant law

in relation to the facts as adduced in evidence by the parties. *Tart* v. *G. W. Chitty and Co. Ltd.* (1), and *Baker* v. *E. Longhurst and Sons Ltd.* (2); *Tidy* v. *Battman* (3).

The pleadings of both plaintiffs and defendants specifically raised issues as to the manner and position upon the highway in which the respective cars were driven. Each claimed that the negligence of the other caused the accident and adduced evidence in support of their respective contentions. In my opinion, and with deference to the learned trial judge, these facts and the issues were not adequately presented to the jury.

The language of Nesbitt J., in *Jamieson* v. *Harris* (4), as above quoted, is particularly appropriate:

* * * that the attention of the jury was not closely drawn to what we conceive to be the vital point in issue.

And then again, that of Lord Watson in *Bray* v. *Ford* (5):

Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal.

In view of the foregoing, it is unnecessary to specifically discuss the other points dealt with by the Court of Appeal and counsel upon this appeal, and because there must be a new trial, I refrain from discussing the evidence adduced by the parties.

Counsel for the respondents contended that even if the charge was subject to objection, there has been no wrong or miscarriage of justice and therefore that under Rule 40 of the Rules of the Court of Appeal for Saskatchewan a new trial should not be ordered. This rule is similar to English Rule 556, and in my opinion is answered by the observations of Lord Halsbury, L.C.:

It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant. *Bray* v. *Ford* (6).

Hutcheon v. *Storey* (7).

The appeal and the cross-appeal should be dismissed with costs, and the judgment of the Appellate Court for Saskatchewan affirmed.

(1) [1933] 2 K.B. 453.
(2) [1933] 2 K.B. 461.
(3) [1934] 1 K.B. 319.
(4) (1905) 35 Can. S.C.R. 625.
(5) [1896] A.C. 44, at 49.
(6) [1896] A.C. 44, at 48.
(7) [1935] S.C.R. 677.

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The judgment of Rand and Kellock JJ. was delivered by:

KELLOCK J.—This is an appeal by the defendants from the judgment of the Court of Appeal for Saskatchewan dated the 10th day of March, 1944 allowing an appeal by the defendants from the judgment at trial in favour of the plaintiffs and directing a new trial. The appeal is upon the ground that the action should have been dismissed on the answers made by the jury. The respondents cross-appeal, asking that the judgment at trial be restored. The facts may be sufficiently stated as follows: On the morning of the 2nd of June, 1942, the respondent Giesbrecht was driving his motor car, in which the other respondents were passengers, southerly on the highway known as Avenue "A" running into the city of Saskatoon from the north. This highway is paved and the pavement is about 21 feet wide. As the respondents approached the airport north of the city, smoke was seen to the south, blowing across the highway in a south-easterly direction. This smoke was occasioned by the operation of a Provincial Government truck which was proceeding northerly on the westerly side of the highway, dragging behind it, but in the westerly ditch, a set of harrows by which weeds in the ditch were being collected and as collected were being burned.

As Giesbrecht approached this truck, he had observed another car in front of him drive around it and enter the smoke and he proceeded to do likewise. He successfully passed the truck, but beyond it at some point, and this is the subject of dispute, his automobile came into collision with the appellants' oil truck and trailer proceeding from the south. Neither driver saw the other by reason of the smoke until the vehicles were a very short distance apart. As a result of this collision, Giesbrecht and the occupants of his car were injured and the action was brought for the resulting damages, including damage to Giesbrecht's car. It may be noted that the respondent Mary Adrian recovered damages to an amount which does not permit of an appeal.

The respondents allege that the accident was due to the negligence of the driver of the appellants' truck in a num-

ber of particulars, namely excessive speed, failure to keep the truck under proper control, failure to keep a proper lookout, failing to turn seasonably to the right of the centre of the highway when meeting the respondent Giesbrecht and to drive nearer to the shoulder than the centre of the highway when about to pass the Giesbrecht car (section 117 (1) of the *Vehicles Act,* R.S.S. c. 275). By amendment at the trial, a further allegation of driving the truck into the smoke covered area of the highway with heedless inattention as to the consequence of injuries to the plaintiff and others on the highway, was set up. These allegations of negligence were denied by the appellants who, on their part, alleged that the respondent Giesbrecht could, by the exercise of reasonable care, have avoided the collision and that the collision was caused solely by negligence on the part of Giesbrecht in that, knowing that his vision was obscured by smoke, he drove his automobile on the east side of the highway when he ought to have anticipated northbound traffic without taking any precautions to ascertain that there was no traffic approaching from the south, and without satisfying himself that it was safe to drive upon the east side, failing to return to the west side after he had passed the Government truck, excessive speed, failure to keep a proper or any lookout and failing to turn seasonably to the right of the centre of the highway when meeting the appellants' truck, and to drive nearer to the west shoulder than the centre of the highway when about to pass the truck. By way of reply, the respondents alleged that if there were any negligence on the part of Giesbrecht, then the driver of the appellants' truck could, by the exercise of reasonable care, have avoided the collision.

As indicated by counsel for the respondents in opening, the respondents contended that Giesbrecht had passed the Government truck and had got back to his own side of the road without having entered the smoke area, when the appellants' truck appeared out of the smoke and the two vehicles came together. The position taken by the appellants on the contrary was that the appellants' truck was always east of the centre line of the highway and that the collision had taken place much farther

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south than the respondents alleged and well within the smoke covered area. Evidence was led in support of these contentions.

Counsel at the trial agreed that on the evidence, the case was not one of ultimate negligence, and in my opinion, that is clearly so. As to whether the collision took place north or near to the north edge of the smoke area or much farther south, or east or west of the centre of the highway, were matters for the determination of which the jury, properly directed, was the proper tribunal. The learned trial judge submitted questions to which the following answers were made:

1. Was there negligence on the part of Ernest Rudolf Wolfe which caused the accident?

Answer: Yes.

2. If your answer is in the affirmative, state in what that negligence consists?

Answer: He should have stopped before entering smoke, and determined the cause of smoke, especially in view of the nature of his load.

3. Was there contributory negligence on the part of D. J. Giesbrecht?

Answer: No.

4. If your answer is in the affirmative, state in what the contributory negligence consists?

Answer:

As the new trial ordered was with respect to liability only, it is not necessary to refer to the questions dealing with damages.

A new trial was directed by the Court of Appeal because, in its view, the charge of the learned trial judge was defective in the following respects, briefly put:

1. That the learned trial judge had read to the jury certain extracts from judgments in reported cases which included not only statements of principle but references to the parties and the facts in those cases, so that the jury may well have applied what they heard, both of fact and law, too literally.

2. That the learned trial judge failed to instruct the jury as to the duty of the respondent Giesbrecht when undertaking to pass the Government truck.

3. That the jury were instructed that Giesbrecht, when confronted by the Government truck, had no alternative but to turn to the left side of the road or otherwise the truck would have run into him.

4. That taken as a whole, the charge on the question of liability was erroneously predicated upon the assumption that this was a case of ultimate negligence in which responsibility for avoiding the accident was entirely on the appellant driver.

It may be pointed out that at the time when this action was tried, contributory negligence was a defence in the province of Saskatchewan. The respondents other than the respondent driver, however, were not identified with his negligence, if the jury came to the conclusion that there was any negligence on his part: *Canadian Pacific Railway* v. *Smith* (1). The principles of law, applicable to the discharge of the jury's duty in such a case as the present, are not in doubt, and the duty of the learned trial judge is equally clear. His duty was to direct the jury as to the law applicable and as to how that law was to be applied to the facts before them according as they might find them. The degree in which it is important to point out these matters expressly must always depend upon the circumstances of the case: *Spencer* v. *Alaska Packers Association* (2). To adopt the language of Lord Watson in *Bray* v. *Ford* (3), cited by Nesbitt J. in the *Spencer* case (2) at page 367:

> Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal.

The learned trial judge in the early part of his charge told the jury more than once that the real problem, taking all of the evidence into consideration, was who really was the cause of the accident, and he quoted extracts from a number of judgments to that effect. He then proceeded, however, to read expressions from some judgments applicable, in the opinion of the judges who there presided, to the facts under consideration in those cases. These judgments dealt with cases where the negligence, if any, on the part of the plaintiffs in those cases was, in the

(1) (1921) 62 Can. S.C.R. 134.
(2) (1904) 35 Can. S.C.R. 362.
(3) [1896] A.C. 44, at 49.

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opinion of the judges there presiding, mere narrative, the negligence on the part of the defendants being the effective cause of the accident. As I read the charge of the learned trial judge, he directed the attention of the jury to the conduct of the appellants' driver in proceeding into and continuing in the smoke without being able to see or knowing whether or not there was traffic on the road in front of him, as being conduct which the jury might well consider to be negligent, while he treated the conduct of Giesbrecht, if the jury considered it in any respect negligent, as though it did not matter, being something which the appellants' driver ought to have anticipated and guarded against. In my opinion, both what the learned judge said himself and what he read from the decided cases had the effect of taking away from the jury the issue of negligence on the part of the respondent Giesbrecht. I quote one extract:

> Here is another excerpt from one of the judgments: It is a principle of law which you can apply to this case—"if one of the parties in a common law action is not in fact aware of the other party's negligence"—that is, supposing a man is going along, as in this case, the plaintiff being in the smoke, and the defendant doesn't know that the plaintiff is in the smoke—"if he could by reasonable care have become aware of it and could by exercising reasonable care have avoided causing damage to the other negligent party, he is solely responsible if he fails to exercise such care".
>
> The law is this: if one party is not in fact aware of the other party's negligence, but if he could by reasonable care have become aware of it, and by the exercise of reasonable care have avoided causing damage to the other, he will be responsible. Let me put it this way, gentlemen: the plaintiff can be negligent, but if the defendant by exercising reasonable care could have avoided doing damage to the plaintiff, then the negligence of the defendant is the real cause of the accident.

After reference to the fact that Wolfe may have been on the right side of the road, but that that might not be all the care that he should have taken, the learned judge proceeded:

> That is, there is a duty to take reasonable care to avoid acts and omissions which could be reasonably foreseen to bring injury to the other party, that is to say, let us suppose that the plaintiff was negligent, and that Wolfe, by being careful, by reasonable carefulness, could have avoided the results of what Giesbrecht did, then Wolfe is the cause, the real cause of the accident.

That is to say, if both drivers proceeded into the smoke and came together, the one, although on his proper side of the road, is solely responsible because he should have anticipated the possibility of the other driver being negligently, or otherwise, in front of him, while the latter need not do so and can recover. I do not think it necessary to refer at further length to the charge. There are other illustrations to the same effect which could be given. I think that the result has been that the issues between the parties have not been tried.

In his factum, counsel for the respondents has referred to section 131 of the *Vehicles Act*, R.S.S. c. 275, which provides that—

> Every person in charge of equipment used in connection with the maintenance of provincial highways may at such times as he deems it expedient to do so, affix thereto a red flag and, while such flag is so affixed, he shall have the right of way over every person operating or driving a vehicle on the public highway.

Basing himself on this provision, counsel for the respondents contends that—

> Under this section, Giesbrecht was bound to give way to the Government outfit, and, as he says, "I thought I had to give him the road".

Giesbrecht said that, as he approached the Government truck the wheels were slowly turning and that he had to give it the road, so he turned to the left and passed the truck, in low gear at about 5 miles an hour. He said the Government truck was moving at a speed slower than a man would walk, that he saw no flags on it and that he was about 20 or 25 yards north of the truck when he saw that it was moving.

It is not necessary to consider what bearing section 131 might have as between Giesbrecht and the Government truck, had there been a collision between these vehicles. That is not the question here. If, in the opinion of the jury, Giesbrecht had safely passed the Government truck and the accident took place at a point south of the truck where Giesbrecht's course ceased to be affected by the presence of the Government truck on the highway, it is difficult to see that section 131 could have any operation whatever. On the other hand, if the jury accepted the view that the accident took place at a point where

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Giesbrecht's course was still affected by the presence of the Government truck on the road, questions would still arise as to whether or not, in the first place, the jury believed Giesbrecht when he said he thought he had to give the Government truck the road, and in the second place, whether there were not other alternative courses open to him than the course he actually followed in continuing past the truck and putting himself into the path of traffic approaching from the south which he could not see and which could not see him.

I do not think that effect should be given to the contention of the appellants that the action should be dismissed. The argument is that the charge was defective in that it was unfavourable to the appellants, but that that is immaterial, if, as the appellants contend is the case, the answer of the jury with respect to the negligence of the appellant driver does not come within any of the allegations of negligence pleaded, all other allegations of negligence being impliedly negatived. I do not think, however, that it can be said that the answer to the second question is a finding of negligence, which does not come within the allegations of negligence in the statement of claim. There may be some surplusage in the answer, but regarded reasonably, I think the allegations of negligence in the statement of claim are sufficiently wide to include what the jury has found.

The appeal and cross-appeal must accordingly be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants: *Hall & Maguire.*

Solicitor for the respondents: *G. H. Yule.*