EDWARDS V. NOBLE

FUNCTION OF APPELLATE COURT — INFERENCES OF FACT AND EVALUATION OF CONDUCT

Edwards v. *Noble*[1] presented to the High Court an opportunity to express its views with some finality on the role of an appellate Court when hearing appeals on questions of fact. The decision is the third in a trilogy of cases in the High Court which represent, at most, a significant departure from settled principle, and, at least, a warning to Supreme Courts that in all but the most exceptional cases, the judgement of the trial judge in "running down" cases should be regarded as final.

The action was commenced in the S.A. Supreme Court before Chamberlain J., who found the following primary facts: The plaintiff, Noble, was driving his motor-bike with a pillion passenger, Mannix, along the Main North Road between Warnertown and Port Pirie. It was 6.30 p.m. on an evening in August, 1969, and dark. The travellers decided to have a cigarette. The plaintiff stopped his bike on the edge of the bitumen surface, although there was a trafficable verge of over nine feet onto which he could have driven. Both plaintiff and passenger alighted and the bike was put onto its stand, but with the engine still running. If the lights were on, it is likely that Mannix was standing behind the motor cycle, so obscuring its rear light to following traffic. As Noble reached for his cigarettes, a car, driven by the defendant, crashed into the back of his motor cycle, killing Mannix and seriously injuring the plaintiff.

The defendant, Edwards, had been driving home to Port Pirie in his Morris Minor with a passenger, one Bickley. He was travelling three feet in from the bitumen at about 45-50 m.p.h., with his head lights on low beam, due, it would seem, to the frequency of oncoming traffic. Bickley had suddenly become aware of a man (presumably Mannix) about forty feet directly ahead on the bitumen, and yelled a warning to Edwards. Edwards had not seen the man until alerted by his passenger and he did not see the motor cycle until nine to ten feet away from it. Although he swerved immediately it was too late.

With those findings of fact, Chamberlain J. was unable to say that any negligence had been proved against Edwards and he dismissed the action. The plaintiff appealed. In the S.A. Full Court, it was held unanimously that on the facts the defendant had been negligent (for varying reasons), although the plaintiff had been largely to blame. The trial Judge's decision was reversed and by a majority (Bray C.J., Mitchell J.) the plaintiff was awarded 1/3 of his damages. Wells J. would have awarded 1/5.

The position, therefore, before the appeal was brought by Edwards to the High Court may be summarized thus:

1. The trial Judge had found certain primary facts.
2. Bickley, the defendant's passenger, was regarded as a reliable witness by Chamberlain J., and his evidence accepted.

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1. (1971) 45 A.L.J.R. 682.

3. Chamberlain J. evaluated all the facts and concluded that no negligence had been proved against the defendant.
4. The S.A. Full Court, accepting the primary facts, together with the trial Judge's assessment of the witnesses, also evaluated the facts, and came to the unanimous conclusion that negligence had been proved against the defendant; they differed only as to the extent to which the plaintiff's own negligence contributed to the result.

When the case came on for argument before the High Court, sitting in Adelaide, in September, 1971, it soon became clear that the issue which their Honours regarded as central was not whether negligence had been proved or not, but whether the Full Court ought to have interfered with the judgement of the trial Judge. By a majority (Barwick C.J., McTiernan, Windeyer, Walsh JJ.; Menzies J. dissenting), they held that the Full Court was not justified in reversing Chamberlain J's decision. McTiernan J. said:

> "The Full Court seemed to me to accept the learned trial Judge's findings as to the circumstances of the accident but to reject his inference that the defendant was not negligent in his driving. In my opinion the evidence does not afford any convincing reason for rejecting that inference"[2].

It is necessary, before turning to the reasons for judgement of the members of the High Court, to establish briefly the position as it was understood before "the trilogy", which consists of *Whitley Muir and Zwanenberg Ltd.* v. *Kerr and Another*[3], *DaCosta* v. *Cockburn Salvage and Trading Pty. Ltd.*[4] and finally *Edwards* v. *Noble.*

The leading Australian case on the question of an appellate Court's approach to primary facts is *Patterson and Another* v. *Paterson*[5]. It was a husband's suit for dissolution of marriage on the ground of the wife's adultery. The judge who heard the suit inferred adultery from circumstances he found upon oral evidence, notwithstanding evidence in denial by the respondent and co-respondent whom he disbelieved. The High Court (Dixon C.J., Webb, Kitto JJ.) dismissed the appeal holding that while the appellate power of the Court extended to the re-examination of the facts, the judge's estimate of the respondent and co-respondent was of first importance, and his estimate not only of the general credibility of the witnesses for the petitioner but of the reliability of their detailed observation was decisive; and these were matters on which his opinion could not be reversed by a Court of Appeal. Dixon C.J. and Kitto J., in a joint judgement undertook a review of the authorities dealing with an appellate Court's approach to findings of fact. The following principles seem to emerge from that review.

1. Since the Judicature Acts, the parties have always been entitled to demand the decision of the Court of Appeal on questions of fact as well as law[6].

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2. *Id.* at 687.
3. (1965) 39 A.L.J.R. 505.
4. (1970) 44 A.L.J.R. 455.
5. (1953-4) 89 CLR 212.
6. See Supreme Court Rules, O. 58 r. 6(1).

2. There is a well-known difference, in the scope of a Court of Appeal's review, between the drawing of inferences from fixed facts, and the making of findings based on testimony. With regard to the latter, the Court of Appeal's scope is restricted in accordance with paragraphs three and four below.
3. Great weight is due to the decision of a judge of first instance whenever in a conflict of testimony the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements.
4. The Court of Appeal may differ on matters of credibility when other circumstances show whether the evidence is credible or not (e.g. where the trial judge has failed to take something into account, or has given credence to evidence afterwards shown to be "self-inconsistent" or contrary to indisputable facts). But, before a Court of Appeal upsets a finding into which credibility enters *it should be convinced that the primary judge is wrong.* (emphasis added).
5. Where there is no reason to suppose that the judge proceeded at all upon the manner or demeanour of the witnesses, the Court of Appeal is bound to reach its own conclusions.

The leading English decision is *Benmax* v. *Austin Motor Co.*[7]. It concerned the evaluation of a set of facts to see whether it could be inferred that an invention contained an "inventive step" and so legitimately could be made the subject of letters patent. The House of Lords in dismissing the appeal, held that the Court of Appeal was quite free to draw its own inferences from the facts found:

> "A judge sitting without a jury would fall short of his duty if he did not first find facts and then draw from them the inference of fact whether or not the defendant had [for example] been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, . . . what is perception, what evaluation . . . In a case like that under appeal where, so far as I can see, there can be no dispute arising out of the credibility of witnesses, but the sole question is whether the proper inference from those facts is that the patent in suit disclosed an inventive step, I do not hesitate to say that an appellate Court should form an independent opinion, though it will naturally attach importance to the judgement of the trial judge"[8].

In the S.A. Full Court, Mitchell J. had stated:

> "But we have a duty to consider whether the inferences from these facts drawn by the trial judge were justified."

On the face of it, at least, that approach appears to follow from the principles of *Patterson and Another* v. *Patterson*, and *Benmax* v. *Austin Motor Co.* However, Barwick C.J. regarded it as an incorrect approach. It was not, his

7. [1955] A.C. 370.
8. per Viscount Simonds, at 373-374.

Honour observed, a question of whether the inferences were right but whether the appellate Court was convinced that they were wrong. That was a view he had first expressed in *Whitley Muir and Zwanenberg Ltd.* v. *Kerr and Anor*[9]. There he formed with McTiernan J. a majority in favour of the conclusions reached by the trial judge and from that position he expressed himself on the function of an appellate Court:

> " . . . The trial judge, having found the primary facts, may decide that a particular inference should be drawn from them. Here no doubt the appellate Court has more room for setting aside that conclusion. But, even in that case, the fact of the trial judge's decision must be displaced. It is not enough that the appellate Court would, itself, if trying the matter initially, have drawn a different inference. *It must be shown that the trial judge was wrong.* This may be achieved by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the trial judge is so preponderant in the appellate Court's opinion that the trial judge's decision is wrong"[10]. (emphasis added)

In *Edwards* v. *Noble*, the Chief Justice added these remarks:

> "The question is not whether the appellate Court can substitute its view of the facts which, of course, it is empowered to do; but whether it should do so . . . If [the view of the trial judge] is a view reasonably open on the evidence, it is not enough in my opinion to warrant its reversal that the appellate Court would not have been prepared on that evidence to make the same finding. Merely differing views do not establish that either view is wrong"[11].

His Honour did not regard *Benmax's* case as inconsistent with those observations:

> "I do not understand anything said in the reported cases and in particular . . . *Benmax* v. *Austin Motor Co.* to deny the proposition that an appellant to succeed in an appeal against a finding of fact made by a judge sitting alone must convince the appellate Court that the primary judge was wrong in his conclusion . . . *Benmax's* case does decide that an appellate Court is not so bound by the inferences of fact drawn by a primary judge without dependence on the credibility or bearing of witnesses that it may not examine the matter for itself . . . But in my opinion none of these cases warrants the conclusion that an appellate Court may properly set aside such a finding of fact where it is not satisfied it is wrong, in the sense I endeavoured to explain in *Whitley Muir and Zwanenberg Ltd.* v. *Kerr and Another*"[12].

So, in the Chief Justice's opinion, *Benmax's* case decides or affirms, that an appellate Court *can* reject the inferences drawn by a trial judge, but it

9. *Supra* n.3.
10. *Id.* at 506.
11. *Supra* n.1 at 685.
12. *Id.* at 686.

does not decide whether, or when it *should*. To that extent *Edwards* v. *Noble* further develops the principle by asserting that "as a matter of judicial restraint" an appellate court should not so act unless convinced that the trial judge was wrong in drawing those inferences.

For a court to assert that something can be done, but it should not, is to give with one hand and take with the other; you have power in this case, but you shouldn't exercise it. When the trial judge's assessment of testimony in the finding of primary facts is in issue, his findings *cannot* be upset *unless* he has made an error which convinces the appellate court that his assessment of the evidence is wrong. It seems, however, from what the Chief Justice says, that where the trial judge's assessment of primary facts in the drawing of inferences is in issue, the inference he draws *can* be rejected, but they *shouldn't* be, unless the appellate court is convinced that his assessment of the primary facts and their collective effect (i.e. the inference drawn) was wrong.

Is there a logical difference? Can one construct an exhortation as to the manner of exercise of judicial power into a rule of law?

Windeyer J. distinguished *Benmax's* case. That was a course he had taken initially in *Da Costa* v. *Cockburn Salvage & Trading Pty. Ltd.*[13] There, the High Court (Barwick C.J., Windeyer and Gibbs JJ., Menzies and Walsh JJ., dissenting), held that an appeal from the Full Court of the Supreme Court of W.A. allowing an appeal from the trial judge in a negligence action should be allowed and the judgement of the trial judge restored. With the exception of Windeyer J., all the judges based their decisions, at least in part, on their own views of the correctness of the trial judge's conclusions. Thus, it is not clear that the *ratio decidendi* could legitimately be framed in terms of a proposition concerning the function of an appellate Court in appeals on question of fact. However, Windeyer J. did base his decision on that ground. His judgement in *DaCosta's* case is important therefore because of his reliance on it in *Edwards* v. *Noble*. In *DaCosta's* case Windeyer J. had distinguished *Benmax* v. *Austin Motor Co.* in this way:

> "I am sceptical of applying to a finding of negligence the principle *that an appeal Court is as competent to determine the proper inference from proved facts as is the trial judge.* There is, of course, no difficulty in this proposition when the inference of fact is itself of a physical fact or happening, something which could itself have been observed or otherwise perceived, to use Professor Goodhart's word, by the sense of a person actually present at the relevant time . . . But inferences of fact from proved specific facts seem to be logically in a different position from the evaluation or appraisal of the quality of a man's conduct. Was he negligent? . . . the evaluation of conduct in terms of reasonableness is a value judgement upon facts rather than an inference of fact"[14]. (emphasis added)

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13. *Supra* n.4.
14. *Id.* at 464.

His Honour went on to observe that cases involving findings of adultery or "inventiveness"[15] fell naturally on the side of inference of fact, as distinct from evaluation of conduct. In *Edwards* v. *Noble* His Honour affirmed this distinction and added that where the issue concerned "the qualitative evaluation of conduct as tortiously negligent" it was not enough to say that the primary judge was "in no better position to decide" than a judge on appeal. The question was always, should his decision be upset?[16]

Strictly speaking, the passage cited earlier from Viscount Simond's speech in *Benmax's* case, can be regarded only as *obiter dictum*, for his Lordship was using negligence as an example; the actual case concerned inferences of fact from primary facts, not evaluative inferences of conduct from primary facts. But it is very strong *dicta*, and tends to show that the House of Lords did not support the distinction drawn between different types of inferences.

But Windeyer J. makes the distinction. It is not open, in his opinion, for a Court of Appeal to treat both inferences similarly. The "settled rules governing the manner in which a Court of Appeal should deal with appeals on questions of fact" (as Dixon C.J., and Kitto J. referred to the matter in *Patterson's* case) apply only to the drawing of inferences of fact. The evaluation of conduct from facts, on the other hand, should be treated as a jury finding since in such a case the Court of Appeal is not in the same position as the trial judge.

No reason is given as to why, in drawing inferences of fact, the appellate court is in as good a position as the trial judge, and yet, in the evaluation of conduct, its position is different.

Barwick C.J. does not find the distinction easy, because "there is an element of judgement in the decision to draw or not to draw an inference or to prefer one where more than one inference is reasonably open"[17].

It would seem to follow from the position taken by Windeyer J., that "the settled rules" should be confined to inferences of pure fact. The Chief Justice, however, does not seem prepared to acknowledge a clear distinction between different forms of inference. The "settled rules", so it seems, apply to all types of inferences, or none. And his Honour may, by the stand he took in *Edwards* v. *Noble*, feel unable to regard the "settled rules" as relevant in any situation.

The different positions taken up by the two learned judges is nowhere better illustrated than in their approach to *Benmax's* case: both firmly reject the decision as having any bearing on the case before them; Barwick C.J. does so because it is not, in his opinion, inconsistent with his conclusions, which merely operate to restrict what is permitted, by developing on a broad principle[18]; Windeyer J., does so because it is authority only for cases of

15. "Inventiveness": Whether the primary facts pointed to the inference that a novel step was involved in the alleged invention: A step which had not been incorportaed before in that context, and which was more than a mere modification. That was an inference of fact.

16. *Supra* n.1 at 689.

17. *Id.* at 685.

inference of fact, not evaluation of conduct—a much narrower proposition of law than Barwick C.J's.

Walsh J., who dissented in *Da Costa's* case was one of the majority in *Edwards* v. *Noble*. In *DaCosta's* case, his Honour had agreed with Menzies J. that the appeal from the W.A. Full Court should be dismissed. He thought that in the circumstances of the case, the Full Court was entitled to give effect to its own conclusions. No conflict of evidence or assessments of witnesses were involved and his Honour considered that the Full Court had acted within the principles laid down as to the role of an appellate Court in such cases[19]. However, in allowing the appeal from the S.A. Full Court the learned judge said that his statement that in the case the judges who formed the majority of the Full Court of W.A. were not precluded from giving effect to their own conclusions was based upon his "view of the circumstances of that case"[20]. His Honour, however, added that:

> "It should *not* be held that a judgement which requires an evaluation of conduct of a party against the standard or measure of the conduct of a reasonable man placed in the same position is a judgement with which an appellate Court can interfere only in very special circumstances"[21]. (emphasis added)

With respect, this passage is not clear, but it seems that Walsh J. also rejects Windeyer J's distinction; whether he thereby aligns himself with the reasons of the Chief Justice is not apparent.

Menzies J. dissented. He set out the "settled rules" as they emerged from *Patterson and Another* v. *Patterson*, and proceeded to examine the facts as found by Chamberlain J., and the inferences drawn. His Honour concluded that the trial judge had not given sufficient weight to the failure of the defendant to keep a proper lookout, and he would have affirmed the decision of the Full Court on that ground, and dismissed the appeal.

I would venture to suggest that the High Court, in deciding to allow the appeal, expressed a proposition of law which may be put in this way:

Where a trial judge in applying law to a set of primary facts (which he has found by a correct approach), is required to evaluate the culpability of conduct against a legal standard, an appellate Court ought not, as a matter of judicial restraint, to substitute its own evaluation based on the facts found, unless it is convinced that the trial judge was wrong in his evaluation. In other words, for the purposes of an appeal, a court ought to treat an evaluation of conduct by a trial judge as a *finding* of fact, and should therefore only reverse it when it would normally be open to a Court of Appeal to reverse a *finding* of fact; that is, where the inference is not open on the evidence, or where the trial judge has given credence to evidence afterwards shown to be "self-inconsistent"; c.f. *Patterson's* case[22].

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18. The difficulties which that view presents have already been mentioned.
19. *Supra* n.4 at 466.
20. *Supra* n.1 at 694.
21. *Ibid.*
22. *Supra* n.5.

The law as it now stands has one of three courses open to it in its development. It may be forced by the logic of the reasons for judgement of Barwick C.J., to extend the suggested principle of *Edwards* v. *Noble* to *all* inferences from primary facts, whether evaluations of conduct or of a set of facts pointing collectively to further facts, so that all *inferences* would be treated as *findings of primary facts;* and "the settled rules" would no longer be good law. Or, all evaluation, whether of fact or of conduct may come in time to be regarded judicially as inferences of fact, and the distinction drawn by Windeyer J. between inferences of fact and inferences of conduct may become the means of re-establishing "the settled rules". Or, the trilogy may be regarded as mere decisions of local policy—thus providing no departure from "settled" principle: those who read carefully the cases cited by the majority of the High Court, will find it difficult to see how their Honours could regard them as in any way supporting, either directly or by contrast, the proposition emerging from their judgments. Yet we are, nevertheless, faced with an authoritative decision of the High Court.

Perhaps *Edwards* v. *Noble* is best regarded as a "local administrative directive" to Supreme Courts; an order to reduce at all costs the number of appeals from judges of first instance, where the only issue is what inferences to draw from facts found and undisputed. Certainly that view finds support in the concluding paragraphs of Windeyer J's judgment:

> "The law reports in recent times have been filled with accounts of road accident cases. These illustrate that often the same facts are viewed differently by different judges concerned to determine culpability. It may seem remarkable that reasonable men should differ so often, and so markedly, as to what would in given circumstances be expected of a reasonable man. But this merely demonstrates that reasonable prudence is an indefinite criterion of conduct. From this appeals multiply; lawyers flourish; cases which turn on their own facts are reported, bringing by debatable analogies uncertainties in the practical working of the law of negligence. Compulsory insurance by the owners of motor vehicles against their liabilities to third parties often produces protracted litigation . . . Yet the interest of the community is best served by bringing litigation speedily to finality. That can be confidently asserted without invoking the conventional Latin tag. It provides a justification for the firm maintenance of what I take to be the rule of law, namely that a decision of a trial judge on a question of fact and his opinion as to whether conduct was blameworthy are not to be set aside unless they are convincingly shown to be wrong. And one man's opinion about blame is not shown to be wrong simply because it is not shared by other men"[23].

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23. *Supra* n.1 at 690.

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