D. McCANNELL (DEFENDANT).....APPELLANT; 1937

AND

F. C. McLEAN (PLAINTIFF).....RESPONDENT. *Feb. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Collision—Verdict of jury—Appeal—Discussion of principle acted upon in setting aside, on appeal, the verdict of a jury as against the weight of evidence.

This Court dismissed the defendant's appeal from the judgment of the Court of Appeal for Ontario affirming (by a majority) the judgment at trial on verdict of a jury in favour of the plaintiff in an action for damages resulting from a collision of motor vehicles.

Discussion of the principle on which this Court acts in setting aside the verdict of a jury as against the weight of evidence. Authorities cited.

The verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of Jeffrey J. on the verdict of a jury, in an action (and counterclaim) for damages suffered through a motor vehicle collision.

The collision occurred on September 5, 1935, about 9.30 p.m. The defendant had been driving a truck in a northerly direction when there was a break-down in its electrical equipment and its lights went out and its motor stopped. Defendant and some men to whom he had been giving a lift pushed the truck some distance along the highway and then

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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partially off the travelled portion, on the east (right hand) side of the road, but part of the truck projected on to the paved part. On the opposite side of the highway there were a store and a gasoline station. There was a space at the gasoline station where there would have been room for the truck to have been placed clear of the travelled portion of the highway. Leaving the truck parked as aforesaid, the defendant went into the store to telephone for assistance. There were no lights (there was a reflector) on the rear of the truck and no steps were taken to warn oncoming traffic. It was a clear moonlight night. The highway was straight. The plaintiff in a motor car, travelling also in a northerly direction, collided with the truck. There were other factors or alleged factors in the situation, as, the position in which the truck was parked, and whether or not at an angle, interference with outlook by reason of lights at the gasoline station, lights from a motor car coming behind the plaintiff.

At the trial questions were given to the jury and answered as follows:

1. Were the injuries of which the parties complain caused by the negligence of the defendant? Answer: Yes.

2. If so, in what did such negligence consist? Answer: In not taking proper precaution, as he and the men were able to move the truck along highway, he should have moved truck to the clear space at left hand of highway, where it would have been clear of pavement at store or station.

3. Was the plaintiff guilty of negligence which caused or contributed to cause the injuries and damages of which the parties complain? Answer: No.

4. If so, in what did such negligence consist? Answer fully: [No answer.]

5. Could the plaintiff notwithstanding the negligence of the defendant, if any, by the exercise of reasonable care, have avoided the accident? Answer: No.

6. Q. If you answer question 5 "Yes," say what he should have done or failed to do? Answer fully. [No answer.]

The jury found damages for the plaintiff in the sum of $3,300. Judgment was entered for the plaintiff for that sum and costs.

The defendant's appeal to the Court of Appeal for Ontario was dismissed with costs, Fisher J.A. dissenting (who would allow the appeal and dismiss the action, with costs). The defendant appealed to the Supreme Court of Canada (and, by special leave granted by the Court of Appeal for Ontario, also appealed as to the dismissal of his counterclaim).

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On behalf of the defendant (appellant) it was claimed (*inter alia*) that the jury's answer to the second question was not supported by the evidence and further that it was not a finding of negligence in law and did not support a judgment for the plaintiff; and that the jury's answers to the third and fifth questions were perverse and unreasonable and not such as a reasonable jury might find on the evidence and should be set aside.

By the judgment of this Court, now reported, the appeal was dismissed with costs.

J. R. Cartwright K.C. for the appellant.

M. A. Miller K.C. and *R. B. Hungerford* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—We are all agreed that the questions involved in this appeal are questions of fact and that the majority of the Court of Appeal were right in their conclusion that the findings of the jury are sufficient and that the verdict could not properly be set aside.

We do not consider it necessary to review at large the questions raised in the able argument of Mr. Cartwright which were fully discussed on the hearing of the appeal. It seems desirable, however, to add a word or two in respect of the principle on which this Court acts in setting aside the verdict of a jury, as against the weight of evidence, with a view to granting a new trial or giving judgment in favour of one of the parties.

The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. That is the principle on which this Court has acted for at least thirty years to my personal knowledge and it has been stated with varying terminology in judgments reported and unreported. It will be sufficient to refer to the judgments in one of the most recent decisions, *C.N.R.* v. *Muller* (1). In the course of the

(1) [1934] 1 D.L.R. 768.

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reasons delivered by the majority of the judges who heard the appeal (p. 769) there occurs this passage:

> We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal, to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly unreasonable as to show that the jury could not have been acting judicially (C.C.P., Arts. 501 and 508 (3); *Metropolitan Ry. Co.* v. *Wright* (1)). In construing the findings, moreover, one must not apply a too rigorous critical method; if, on a fair interpretation of them, they can be supported upon a reasonable view of the evidence adduced, effect should be given to them.

Mr. Justice Lamont, who delivered a separate judgment, said this (p. 772):

> The same principle was followed in *Metropolitan Ry. Co.* v. *Wright* (2). There, as in the case at bar, there was evidence given on both sides and on all the issues proper to be submitted to and considered by a jury. In neither case could the trial judge properly have withdrawn the evidence from the consideration of the jury who are the proper judges of the facts. In both cases the jury found negligence on the part of the company.
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> In the *Wright* case (2) the House of Lords held that, under these circumstances, the well established rule should apply, namely, that the verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust, so unreasonable and unjust as to justify the court in concluding that the jury had not really performed the judicial duty cast upon them.

That the guide indicated in these judgments is precisely the guide by which judges in England have governed themselves in considering such questions is plain from the judgment of Lord Wright delivered in the recent case, *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austin* (3), a judgment which, as to form and as to substance, was adopted by Lord Atkin and Lord Macmillan. In view of what was said in the Court below, it is, perhaps, desirable to transcribe the following passage (p. 374):

> The objection in *Wood* v. *Gunston* (4) was that the damages were excessive, and a new trial was there ordered. The use of the phrase "miscarriage of juries" is significant. It indicates what there must be to justify the appellate Court in interfering with or controlling the verdicts of juries. Since then many cases have been reported on these matters, but I think most useful guidance to help the appellate Court is to be found in *Metropolitan Ry. Co.* v. *Wright* (2). Lord Fitzgerald (5) states the question to be "whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust": and he adds that the onus is on the appellants to establish that this condition is fulfilled. But the most illuminating statement is, I think, to be found in the observations of Lord Halsbury (6). He refers to the case of *Solomon* v.

(1) (1886) 11 App. Cas. 152, at 156.
(2) (1886) 11 App. Cas. 152.
(3) [1935] A.C. 346.
(4) (1665) Style, 466.
(5) 11 App. Cas. 152, at 155.
(6) 11 App. Cas. 152, at 156.

Bitton (1), where the question according to the report (the correctness of which was afterwards disputed in *Webster* v. *Friedeberg* (2) was stated to be "whether the verdict was such as reasonable men ought not to have come to." Lord Halsbury said (3) that was an erroneous statement of the principle. "If a Court,—" he proceeded, "not a Court of Appeal in which the facts are open for original judgment, but a Court which is not a Court to review facts at all,—can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves. That, I think, is not the law. * * * I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable, a Court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word 'might" were substituted for 'ought to' in *Solomon* v. *Bitton* (1) I think the principle would be accurately stated."

Lord Halsbury in these valuable observations is, I think, going back to the test applied in *Wood* v. *Gunston* (4), which was whether there was a miscarriage of the jury. Thus the question in truth is not whether the verdict appears to the appellate Court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate Court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion.

This, as we have observed, is the principle on which this Court has always acted in dealing with such questions, but the principle is so completely settled and so well known that in many cases it has not been considered necessary to state it in terms.

There being some evidence for the jury, that is to say, the evidence being of such a character that the trial judge could not properly have withdrawn the issue from the jury, the question whether, in such circumstances, a jury, considering the evidence as a whole, could not reasonably arrive at a given finding may be, it is obvious, a question of not a little nicety; and the power vested in the court of appeal to set aside a verdict as against the weight of evidence in that sense is one which ought to be exercised with caution; it belongs, moreover, to a class of questions in the determination of which judges will naturally differ, and, as everyone knows, such differences of opinion do frequently appear.

In exercising this power under the guidance of the general principles stated in the judgment of Lord Wright, the court has not the advantage of more specific rules of general

(1) (1881) 8 Q.B.D. 176.
(2) (1886) 17 Q.B.D. 736.
(3) 11 App. Cas. 152, at 156.
(4) (1655) Style, 466.

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application; and it may be worth while to advert to the risk of treating decisions dealing with controversies touching its exercise in relation to the facts of a particular case and expressions found in judgments as binding authorities constraining other courts to a particular course in dealing with a different case involving different facts. It would, perhaps, not be entirely without value to cite a passage from the judgment of Lord Macnaghten in *Colls* v. *Home and Colonial Stores Ltd.* (1). The judgment, it is true, concerns generally an entirely different head of law, but the passage has, we think, no little relevancy to the topic now under discussion. It is in these words:

> * * * Speaking for myself, I doubt very much whether it is a profitable task to retry actions which depend simply on questions of fact, or to review and endeavour to reconcile or distinguish a number of cases that naturally enough contain some statement which, taken by themselves and apart from the context, may seem to be contradictory, but which must all proceed upon the same principle. It would only be another link in the embarrassing chain of authority, or, if I may venture to say so, only another handful of dust to be cast into one scale or the other when the claims of opposing litigants come to be weighed in the balance. I think there is much good sense in the observations of Brett L.J. in *Ecclesiastical Commissioners* v. *Kino* (2). "To my mind," said his Lordship, "the taking of some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion as laying down a rule of conduct for other judges in considering a similar state of facts in another case, is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration."

I do not think Lord Macnaghten means to say that the course taken by judges of great experience in applying a principle to particular facts may not be exceedingly instructive and helpful as illustrating the practical working of the principle; but it is a very different matter to treat such expressions and such decisions as absolving the judges who are called upon to exercise this power to set aside verdicts as against the weight of evidence from the responsibility of determining in each particular case whether or not the conditions have arisen under which the power can properly be put into effect.

It is, perhaps, advisable to observe that what has been said above does not contemplate cases in which there is

(1) [1904] A.C. 179, at 191. (2) (1880) 14 Ch. D. 213.

some valid objection to directions given by the court to the jury in respect either of insufficiency or impropriety, or where the court may have to consider some circumstance connected with the conduct of the proceedings at the trial as having a bearing upon the question whether, consistently with justice, the verdict can be allowed to stand.

Appeal dismissed with costs.

Solicitors for the appellant: *Smith, Rae, Greer & Cartwright.*

Solicitors for the respondent: *Miller & Hungerford.*