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*Nov. 26, 27.
*Dec. 21.

WILLIAM R. HALL, ANNIE C. HALL, ALICE R. DALE AND FRANK J. JUSTIN (PLAINTIFFS) ..... APPELLANTS;

AND

THE TORONTO GUELPH EXPRESS COMPANY AND LEONARD HATCH (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Motor vehicles—Negligence—Collision—Highway Traffic Act, R.S.O. 1927, c. 251—Law as to civil liability under ss. 9 (1) and 41 (1), assuming tail light to have gone out shortly before collision without knowledge or negligence of driver—Misdirection to jury—New trial—Amount in controversy on appeals—Jurisdiction—Quashing of appeals.

The liability imposed by ss. 9 (1) and 41 (1) of the *Highway Traffic Act*, Ont. (R.S.O. 1927, c. 251), exists even in absence of negligence; the failure to have a tail light burning and visible on a motor vehicle in accordance with s. 9 (1) is a violation of the Act, and, if a cause of a collision resulting in damages, may involve civil liability under s. 41 (1), even though the light was burning until shortly before the accident and went out without the knowledge or personal fault or negligence of the driver of the vehicle. (*Great Western Ry. Co.* v. *Owners of ss. "Mostyn,"* [1928] A.C. 57, applied).

In the case in question (an action for damages resulting from a collision of motor vehicles) it was held that the trial judge's direction to the jury to an effect contrary to the law as above stated was a mis-

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Lamont and Smith JJ.

direction, and that it affected the jury's findings to such an extent that they should not stand, and a new trial was ordered.

Judgment of the Appellate Division, Ont. (34 Ont. W.N. 216), affirming the judgment at trial in favour of defendants, reversed. As the claims of two of the plaintiffs were each for an amount less than $2,000, their appeals were (at the opening of the argument) quashed for want of jurisdiction (*Armand* v. *Carr*, [1926] S.C.R. 575; *Reynolds* v. *C.P.R.*, [1927] S.C.R. 505, referred to), the Court refusing an application to allow the case to stand over to permit of leave to appeal being asked from the Appellate Division.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing their appeal from the judgment of Orde J.A., upon the findings of the jury, dismissing the action.

The action was for damages, and arose out of an accident due to the motor car in which the plaintiffs were riding, owned by the plaintiff Wm. R. Hall and driven by the plaintiff Justin, running into the rear of a truck belonging to the defendant The Toronto Guelph Express Company, and driven by the defendant Hatch. The collision occurred between Toronto and Brampton on the 16th November, 1927, at about 6 p.m. It was dark at the time. The plaintiffs alleged that the truck displayed no rear red light, or, if it did, that such light did not comply with the requirements of s. 9 of the Ontario *Highway Traffic Act* (R.S.O. 1927, c. 251). The defendants alleged that the truck was equipped with the lights required by law, that such lights were lit at the time of the accident, denied any negligence or breach of duty on their part, and alleged that the accident was due to the negligence of the plaintiff Justin in (among other things) driving at an excessive speed and failing to keep a proper look-out, and that the other plaintiffs assumed the risk of their driver's negligence.

At the trial questions were submitted to the jury, which are set out in the judgment now reported, as are also the jury's answers, so far as answers were made, and, at some length, portions of the judge's charge to the jury, and of discussions between the judge and counsel, and of questions passing between the judge and jury in regard to the jury's findings.

(1) (1928) 34 Ont. W.N. 216.

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As to the plaintiffs William R. Hall and Alice R. Dale, the appeal was allowed with costs here and in the Appellate Division, and the judgment dismissing the action was set aside and a new trial ordered; the costs of the abortive trial being reserved to the judge presiding at the new trial. The ground of the decision was misdirection in charging the jury, as indicated in the above headnote, and as fully set out in the judgment now reported.

As to the plaintiffs Annie C. Hall and Frank J. Justin, the appeal was, at the opening of the argument, quashed for want of jurisdiction, as their claims were each for an amount less than $2,000. The Court refused an application to allow the case to stand over to permit of leave to appeal being asked from the Appellate Division (*a*).

D. L. McCarthy K.C. and *A. W. Plaxton* for the appellants.

T. N. Phelan K.C. for the respondents.

The judgment of the court was delivered by

ANGLIN C.J.C.—As we have come to the conclusion that there must be a new trial in this action, following our usual practice, we shall discuss the facts only so far as is necessary to make clear the ground of our decision and as may be desirable to avoid further difficulty arising from the same cause.

The sole ground of liability now charged against the defendants is their alleged failure to comply with the requirements of s. 9 (1) of *The Highway Traffic Act,* R.S.O. 1927, c. 251, as to a rear or tail light.

Section 9 (1) reads as follows:—

9 (1) Whenever on a highway after dusk and before dawn, every motor vehicle shall carry three lighted lamps in a conspicuous position, one on each side of the front, which shall cast a white, green or amber coloured light only, and one on the back of the vehicle, which shall cast from its face a red light only, except in the case of a motor bicycle without a side car, which shall carry one lamp on the front which shall cast a white light only and one on the back of the vehicle which shall cast from its face a red light only. Any lamp so used shall be clearly visible at a distance of at least two hundred feet.

(*a*) The said plaintiffs have since obtained leave from the Appellate Division, and have brought appeal to this Court which came for hearing on February 14, 1929, when their appeals were allowed, the question of costs of the appeal being reserved.

Subsection (3) of that section reads as follows:—

9 (3) Any person who violates any of the provisions of subsections 1 or 2 shall incur, for the first offence, a penalty of not more than $5; for the second offence a penalty of not less than $5 and not more than $10; and for any subsequent offence a penalty of not less than $10 and not more than $25 and in addition, his license or permit may be suspended for any period not exceeding sixty days.

This alleged omission, it is claimed, entailed civil liability on the defendants under subs. 1 of s. 41 of the same statute, as owner and driver, respectively, of the motor truck. That section reads as follows:—

41 (1) The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation.

The defendants, however, also pleaded negligence on the part of the plaintiffs' driver as the sole cause, or as a contributing cause, of the collision, and gave the following particulars:—

1. The motor vehicle operated by the said Frank J. Justin was being driven at an excessive speed and was not under proper control.

2. The said Frank J. Justin was a person of defective vision and not competent to operate the said motor vehicle.

3. It was the duty of the said Frank J. Justin to have turned to the left as far as may have been necessary to avoid a collision with any vehicles on the highway ahead of him which he had overtaken, and this duty he failed to observe.

4. It was the duty of the said Frank J. Justin to so operate the motor vehicle of which he was in charge and to so control the same as to bring it to a stop within the distance that his headlights would reveal an object on the highway ahead of him and this duty he failed to observe.

5. Even after the danger of a collision with an object on the highway ahead of him became apparent, it was the duty of the said Frank J. Justin to keep such a look-out and have the said motor vehicle under such control as to bring it to a stop before coming into collision with such object, and this duty he failed to observe.

6. The motor vehicle being operated by the said Frank J. Justin was being operated contrary to the provisions of the Highway Traffic Act in that it was being operated at a speed or in a manner dangerous to the public.

7. The lights with which the motor vehicle of the said Frank J. Justin was equipped were defective or insufficient and the brakes with which the speed of the motor vehicle was controlled were defective or inefficient.

8. If the vision of the said Frank J. Justin of vehicles ahead of him on the highway was obstructed by weather or light conditions, it was

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his duty to have operated his motor vehicle at a slow rate of speed and under proper control and this condition he failed to observe.

They also charged assumption of the risk of the driver's negligence by his co-plaintiffs.

The following questions were submitted to the jury:—

1. Q. Were the defendants guilty of any negligence causing the accident?

2. Q. If so, what was that negligence?

3. Q. Was the plaintiff Justin guilty of any negligence contributing to the accident?

4. Q. If so, what was his negligence?

5. Q. After the plaintiff Justin became aware or ought to have become aware of the impending danger, could he by the exercise of reasonable care have avoided the collision?

6. Q. If so, what could he have done?

7. Q. At what sums do you assess the damages sustained by each of the four plaintiffs:—

William R. Hall,
Annie C. Hall,
Alice R. Dale,
Frank J. Justin?

8. Q. If you find the defendants and also Justin both guilty of negligence, in what degree did the negligence of each contribute to the collision:

Defendants	per cent?
Justin	per cent?

The learned trial judge, in the course of a somewhat lengthy charge, said:—

In a case like this, the parties are in exactly the same position as if the alleged negligence had nothing to do with motor vehicles at all, and the burden of establishing that the defendants were guilty of negligence rests with the plaintiffs. They must establish to your satisfaction that the injuries which they sustained resulted from some neglect of duty or some failure to comply with the law, which is practically the same thing, before they can recover. * * * They must prove, as I have said, that the defendants are guilty of the negligence which is alleged, or they cannot recover. * * * The only negligence which is imputed to these defendants and the only negligence which the plaintiffs must prove in order to succeed at all, is that there was no light shining, no visible light, on the rear of the truck when the accident happened and immediately before it happened. If the plaintiffs cannot prove and have not proved that allegation, then the action fails. * * * The law requires that every motor vehicle shall carry three lights, two white lights at the front and one red light at the rear; you need not bother about other requirements, but as to that the law requires that these lights shall be clearly visible at a distance of at least 200 feet. The first thing you have to determine, because it is at the very threshold of this case, is whether or not upon the evidence of all the witnesses both for the plaintiffs and for the defendants the rear light was burning on that truck and was visible on that occasion.

* * * * *

Q. 1. Were the defendants guilty of any negligence causing the accident?

If, as has been pointed out, the tail light of the defendant Hayhurst's truck was lighted and visible, that puts an end to the action if that is your conclusion and you should answer that first question: "No." You might, however, come to the conclusion, and quite properly, having regard to all the circumstances,—if you so conclude upon the evidence that that is the fact—that though the tail light was not burning the real cause of this accident was either excessive speed or failure to keep a proper look-out on the part of Justin, the driver of the plaintiff Hall's car in which the four plaintiffs were riding. Either of those conclusions will be sufficient justification for answering that question: "No." I think it will be wise for you first to deal with that question in those two aspects before proceeding to answer any other questions. * * * If you come to the conclusion from the evidence * * * that the plaintiff Justin was driving at an excessive rate of speed or failed to keep a proper look-out, and that notwithstanding any negligence on the part of the defendants, notwithstanding that the tail light was out, the sole cause of the accident was one or the other or both of those species of negligence on the part of the plaintiff Justin, then again you would answer the first question: "No," because the negligence of the defendants as to the tail light being out would not be the cause of the accident. A mere breach of duty on the part of one person towards another does not entitle the other to recover damages unless that breach of duty was the cause of the accident. * * * You may, however, come to the conclusion that the defendants were guilty of negligence causing the accident because of their failure to have the tail light burning. If that is the case, you will answer the first question: "Yes." Assuming that you have not found, also, that the plaintiff Justin was the sole cause of the accident, you will answer the second question:—

2. Q. If so, what was the negligence?

You will state fully what it was, in your opinion.

After being out for some hours (5.50—8.41 p.m.), the jury sent to the Judge, in writing, the following memorandum:—

The jury wish to know if by chance the tail light in question was to go out immediately prior to the accident would the defendant be considered guilty of negligence directly causing the accident, taking into consideration that the light by going out would be a matter out of his direct control.

After some discussion with counsel, the jury was sent for and the learned judge then said to them:—

I gather from that question that you may have it in your minds that the evidence establishes two facts. * * * The question, at all events, lends colour to this idea, that you are of the opinion that the evidence might establish that the tail light was in fact lit up until a very short time before the impact, but that it had gone out immediately before that, and therefore it would be quite true that the light had not been seen by the plaintiffs and also quite true that the light was burning, as sworn to by the defendants' witnesses, shortly before the accident, and in that way there would be a reconciliation of the two statements. I understand your question to amount to this, that having that

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in mind, and the light having gone out without the knowledge of the driver, under those circumstances would the driver be guilty of negligence directly causing the accident? As I have said, that is not an easy question to answer. I have had the benefit of argument both by Mr. Bell and Mr. Phelan. It is a question which, if I were trying it and had to decide it myself, would probably require several days in order to come to a conclusion. There are a good many aspects of the question which, from a lawyer's point of view, would have to be investigated. There is no time to do that now, and I have to do the best I can in instructing you. What I have to say may prove upon appeal to be utterly wrong, but that cannot be helped; you have to take it for the time being as being the law. My instruction to you is—I say it with some diffidence—that having regard to the fact that this is a civil action, an action for damages based upon the negligence of the defendant Hayhurst and his driver, *if you find* the circumstances such as you suggest, namely, *that the driver was not aware of the light being out because it had gone out suddenly before the impact, then, in my judgment, the defendants would not be liable.* I say I may be wrong as to that, and because of that I am going to ask you, if that is your conclusion, to make it perfectly plain in the answer to the question. It may be necessary for you to amplify your answer by adding a note to the foot of your answer, to the effect that you come to the conclusion as a fact and find it to be the fact that the light was burning up until shortly before the accident, and had gone out immediately before the accident, and that therefore the defendant driver was not aware of it. Have I made myself clear? Is there anything more you desire to know?

* * * * *

Now, gentlemen, please do what I have asked. If your conclusions are based upon any such findings, then make that clear. I think the simplest way would be to attach a memorandum at the foot of the answer, to the effect that you find as a fact certain things upon which you base the conclusions at which you arrive. Please retire.

The report of the trial proceeds:—

His Lordship: Gentlemen of the jury, have you agreed upon your answers to the questions?

The Foreman: Yes.

His Lordship: The jury has answered only one question and that is the first question:

1. Q. Were the defendants guilty of any negligence causing the accident? A. No.

The jury have attached to the answer this slip: "Assuming that the light may have gone out immediately prior to the accident unknown to the driver, we the jury believe the defendant not negligent."

Am I to understand, gentlemen, that it is your conclusion from the evidence that the light did go out immediately before the accident, and that you so find?

The Foreman: We do not know, sir.

After some discussion with counsel, the learned judge further said to the jury:—

His Lordship: Gentlemen of the jury, are you prepared to make a finding upon that question as to whether or not the plaintiff Justin was guilty of negligence causing the accident? In other words, is your

answer "No" to question no. 1 based upon this assumption which you have attached to the answer, and that only? Is that right?

The Foreman: (No answer).

His Lordship: That is, you find that the defendants were not negligent because of the assumption that the light may have gone out immediately before the accident? Am I correct in that?

The Foreman: (No answer).

His Lordship: I think the slip may be regarded as their conclusion that upon that ground and that alone they find for the defendants.

Mr. Phelan: In order to avoid the possible necessity for further trial in the matter, I think the jury ought to be asked their opinion on the answer to the first question. The jury have probably assumed that in answering that question as they have answered it, they have done all that is necessary.

His Lordship: It would have been all that is necessary if they had answered the first question: "No," without putting this question to me. It might have been assumed that it was on one or other of these two grounds, and it would not have mattered, for either would have been sufficient. You suggest now that they should either affirmatively or negatively *deal with the other questions?*

Mr. Phelan: Yes, my Lord.

His Lordship: Gentlemen of the jury, can you do that without much loss of time? Can you add, in view of the situation created by this assumption of yours, a further statement to the effect: "We find that the accident was caused *solely* by the negligence of the plaintiff driver," or "We find that the plaintiff driver was not guilty of any negligence causing the accident"? Do you think you can do that immediately? I think it is important, because if the law on the question you have answered is settled otherwise than I have assumed to be the law, there might have to be a new trial. You can put your finding on that point on another slip of paper, if you desire to do so: "We find that the plaintiffs were not guilty of negligence causing the accident," or "We find that the plaintiffs were guilty of negligence causing the accident."

Mr. Plaxton: Is there any doubt about the answer to the first question, my Lord?

His Lordship: In what way? I think their assumption is: "Assuming that the light may have gone out prior to the accident unknown to the driver, we find the defendant not negligent."

Mr. Plaxton: You are stating that as their assumption, my Lord.

His Lordship: That is their finding, I think.

Mr. Plaxton: As long as that is clear, my Lord.

Whereupon the jury again retired at 10.28 o'clock p.m.

* * * * *

Mr. Plaxton: My Lord, owing to the absence of senior counsel I am somewhat embarrassed, but on giving this matter further consideration I think the first question should be answered positively. I have in mind a case where there was an answer like this answer made by a jury on an assumption, and the Court of Appeal sent it back for a new trial on the ground that there should have been a positive answer. I think the jury should bring in a positive answer to that question.

His Lordship: Do not you think it would be better to let sleeping dogs lie? You are in a stronger position before the Court of Appeal on that answer than are the defendants.

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Mr. Plaxton: Supposing the jury find that Justin's negligence is the sole cause of the accident, that puts us in an embarrassing position.

His Lordship: No; that is a positive finding to that effect, and amplifies or explains the "No" and eliminates any difficulty that has been raised by this rider.

Mr. Plaxton: I have in mind, my Lord, the future developments that might arise in this case.

His Lordship: No doubt it will go to appeal. We will wait and see what the jury have to say.

Mr. Plaxton: My Lord, I hope that this case does not look like a "Comedy of Errors," but after reading over these questions I am going to ask your Lordship to direct the jury to answer all the questions, and particularly question no. 7, dealing with the quantum of damages.

His Lordship: I have told the jury that if they negative the first question there is no necessity for their answering any of the other questions. If there has to be a new trial, the jury on the new trial will deal with the question of damages.

Mr. Plaxton: Surely we do not want that, my Lord?

His Lordship: You cannot have a series of findings, some by one jury and some by another. The jury is sometimes directed to find the quantum of damages because the trial judge thinks there is a lack of evidence to justify the finding and that the plaintiffs should be nonsuited, and in order to avoid the possibility of a new trial on the question of damages if he is wrong the jury is requested to assess the damages. But if in this case the jury had simply answered the first question: "No," and none of the trouble had developed because of the question they put to me, there would have been no necessity for assessing the damages in this case, because if there has been misdirection on my part and a new trial is directed, then all the questions would go back to the new jury. It is only in those cases where a new trial is not necessary that a jury is asked to find the damages, Mr. Plaxton.

Mr. Plaxton: If we are right in our assumption of the law, namely, that the defendants are liable even though they were not aware of the tail light being out?

His Lordship: How can you possibly get that question settled except by another jury?

Mr. Plaxton: If they give a positive answer.

His Lordship: They give a positive answer, namely that the defendants were not guilty of negligence causing the accident.

Mr. Plaxton: Pursuant to a direction from your Lordship.

His Lordship: If I am wrong in that direction, no higher court is going to find the defendants guilty of negligence upon this or any other evidence; they are going to direct a new trial.

Mr. Plaxton: I submit not, my Lord. I submit that if the Court of Appeal came to the conclusion that it was the jurors' intention to find the defendants negligent, or to find that they would have been negligent, in law, if (with respect) properly directed with regard to the question of the tail light—I have in mind a situation that arose in a case I was in.

His Lordship: I would be very much surprised to find that a higher Court has ever, where the jury has not found negligence on the part of the defendants, usurped the functions of the jury and found negligence.

Mr. Plaxton: The point is, that if the jury had been directed that it was in law negligence to have the tail light out, even though the

driver did not know it—and that apparently is their idea having regard to their answer to the first question—and the Court of Appeal said that there had been a misdirection as a matter of law, then they would say, if these other questions were answered here, that they could deal with the matter without sending it back for a re-trial.

His Lordship: I do not see how. Your right to relief is a finding of such negligence on the part of the defendants and until you get that you cannot succeed, and that finding must be—as you have chosen to submit the matter by questions to the jury—a finding of the jury; and no higher court will, because the jury has, upon insufficient grounds or upon an untenable ground, as you suggest, found the defendants not negligent, infer from that that because the ground was wrong therefore the jury would have found that they were negligent.

Mr. Plaxton: I submit it is logical, my Lord.

His Lordship: I do not agree with you.

Mr. Plaxton: I press the objection, my Lord.

His Lordship: In view of that answer I would not ask them to answer the other questions. They are all based upon the theory of a finding of negligence on the part of the defendants.

The jury returned to the court room at 10.45 o'clock p.m.

His Lordship: The memorandum reads:—

"We the jury find the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse weather conditions."

Have you any comment to make upon that finding?

Mr. Phelan: Do the jury find that that was the cause of the accident? I think that is apparently their intention, but they ought to say it in order to make the matter clear.

His Lordship: Gentlemen of the jury, is that your conclusion, that the plaintiff Justin's negligence caused the accident?

Mr. Plaxton: How can they say that?

His Lordship: Wait a moment, please. It might only be a finding of contributory negligence.

Mr. Phelan: It might be, unless the jury is prepared to say that that was the cause of the accident.

His Lordship: Gentlemen of the jury, can you say that that was the cause of the accident? If that is what you conclude, you can add some words to the effect that the plaintiff Justin's negligence was the cause of the accident.

The Foreman: By that memorandum I think that is what we inferred.

His Lordship: If that is what you believe, just go back to your room once more and add those words, or words to that effect—I do not desire to suggest what words should be employed, but words to express what you really find. Just continue the sentence to that effect.

Whereupon the jury again retired and returned to the court room at 10.51 o'clock p.m.

His Lordship: Your memorandum now reads:—

"We the jury find that the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse weather conditions, and was the cause of the accident."

It is not quite grammatical in form, but we will not say anything about that now.

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Upon those findings I am constrained to dismiss the action with costs.

Only question no. 1 of the series of questions submitted to them was answered by the jury; but, to the paper containing them, we find pinned, one below the other, the two memoranda above mentioned.

I have thought it advisable to set out these latter proceedings somewhat *in extenso* in order to make clear the course of the trial, which, in our opinion, unfortunately renders a new trial unavoidable.

In the first place, it seems open to doubt whether the second memorandum brought in by the jury should be regarded as an answer by them to questions nos. 3 and 4, which were otherwise unanswered, or, as intended to give a second reason, pursuant to the instruction of the learned trial judge, for the negative answer which they made to question no. 1. Physically the paper on which this memorandum is written is attached to the sheet of paper containing the questions as if it might be intended as an answer to questions nos. 3 and 4, and it was so treated by the learned judge who delivered the judgment of the Appellate Court, and is also so dealt with towards the close of the respondents' factum, where counsel says that a certain conclusion for which he was arguing "is fortified by the jury's answer to questions 3 and 4," although he had, earlier in the factum, as he did at bar in this Court, dealt with the second memorandum as part of the jury's explanation of, or reasons for, their answer, "No," to the first question. So regarded, this second memorandum might present a serious obstacle to the success of this appeal. On the other hand, if it should be treated as made in response to questions 3 and 4, the second memorandum may amount to nothing more than a finding of contributory negligence on the part of the plaintiffs' driver.

But, however that may be, we are clearly of the view that the minds of the jury were so affected by the learned trial judge's direction to them, that, although the tail light was out and its being extinguished was a cause of the collision, the defendants would not be liable "if the driver was not aware of the light being out, because it had gone out suddenly before the impact"—which was tantamount to telling them that the statutory duty under s. 9 (1) was

not absolute but involved civil liability under s. 41 (1) only if the non-observance of s. 9 (1) was in some degree attributable to personal fault or negligence of the defendant Hatch, the driver of the motor truck of his co-defendant, and that, unless they found such fault or negligence to be established by the evidence, they should answer the first question in the negative—that that direction influenced all their findings.

In effect, the jury's findings, as they now stand, merely negative such personal fault or negligence of the defendant Hatch, because, having reached that conclusion, they may have deemed themselves dispensed from making any finding on the vital question whether the tail light of the defendants' truck was, or was not, in fact lighted and clearly visible at a distance of at least 200 feet, as prescribed by s. 9 (1), at the moment of the collision, or immediately prior thereto. The learned judge had very properly said earlier in his charge:—

> The first thing you have to determine, because it is at the very threshold of this case, is whether or not upon the evidence of all the witnesses both for the plaintiffs and for the defendants the rear light was burning on that truck and was visible on that occasion.

Upon that crucial question, owing to the course of the trial and notwithstanding the insistence of counsel for the appellants, there is no finding. The foreman's answer to the question of the learned judge, thus reported:

> Am I to understand, gentlemen, that it is your conclusion from the evidence that the light did go out immediately before the accident, and that you so find?
>
> The Foreman: We do not know, sir.

does not mean that the jury could not find whether the tail light was in fact lighted or extinguished, but only that they could not determine precisely when it had gone out, if it was in fact out. Nor does their first memorandum imply that the light was in fact out, as the learned judge might appear to have thought:—

> Mr. Plaxton: Is there any doubt about the answer to the first question, my Lord?
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> His Lordship: In what way? I think their assumption is: "Assuming that the light may have gone out prior to the accident unknown to the driver, we find the defendant not negligent."
>
> Mr. Plaxton: You are stating that as their assumption, my Lord?
>
> His Lordship: That is their finding, I think.
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> Mr. Plaxton: As long as that is clear, my Lord.

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Having, in effect, been told that negligence causing the accident was the only matter for their consideration, and that the fact that the requirement of s. 9 (1), as to the tail light, was not complied with, would not, if established, amount, *per se,* to negligence, the jury, not improbably, put that aspect of the case entirely out of their minds when dealing with the question of the negligence of the plaintiffs' driver, and took the view that his negligence, which they, no doubt, found to have been proven, could alone in law be regarded as negligence causing the collision. Their second memorandum cannot in any view of it be taken to import more than this. It does not imply either that the tail light was in fact burning, or that, if not, its being out did not contribute to causing the collision. Fault attributable to the defendants being excluded, the only material negligence was that of the plaintiffs' driver, which was in that sense *the cause* (the jury, though invited to do so, did not say " the *sole* cause ") of the collision. The direction to the jury as to the purview and effect of ss. 9 (1) and 41 (1) of the Ontario *Highway Traffic Act* was impliedly, if not expressly, approved in the judgment delivered by the Appellate Divisional Court in May, 1928. That that direction was erroneous, in our opinion, admits of no doubt under the decision of the House of Lords in *Great Western Railway Co.* v. *Owners of S.S. " Mostyn "* (1), decided late in 1927, which apparently was not referred to either at the trial or in the Appellate Divisional Court. The head note of the report reads as follows:—

> Under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, the owner of a vessel doing damage to a harbour, dock or pier, or works connected therewith, is responsible to the undertakers for the damage, whether occasioned by negligence or not, where the vessel is at the time of the damage under the control of the owner or his agents.

In the course of his speech, Viscount Haldane says:—

> The claim is based on an allegation of negligence, resulting in liability at common law, and also on the provisions of s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, which it is said does not require proof of negligence in order to render it applicable. The courts below have agreed in holding that negligence has not been proved, and the nautical assessors who have been present to advise us are of opinion that there was no negligence shown. I understand that we are unanimously of the same opinion. * * *

(1) [1928] A.C. 57.

The question which we have to answer is whether, in a case in which neither negligence nor any other act of an unlawful nature has been established against the owners of the *Mostyn* or those in charge of her, s. 74 makes the owners answerable for the damage done in this case to the dock.

I assume that the master and those in charge were not answerable for any wilful act or negligence, inasmuch as none has been proved against them. But in the case of the owner the section does not in terms require any wrongful act to be established as the condition of liability. The words, taken by themselves, are unambiguous. The owner is to be liable for any damage done to the undertaking. My Lords, if the language of this section could legitimately be construed by us who sit here without regard to authority, I should find difficulty in saying that the appellants were not entitled to claim that it applied. It has been said that to take this view is to attribute to Parliament an intention which is hardly conceivable, the intention of making people liable for damage where they have been in no way to blame. But I am unable to attach much weight to this consideration, where the words are clear. What the motives of Parliament were we do not know and cannot inquire. It may be that it desired to encourage undertakers of this class by providing insurance at the cost of owners who are in no way to blame. There are instances of such a principle in modern statutes, such as the Workmen's Compensation Acts, and it may be that it was something analogous that was in the mind of the legislature. I do not know, and I feel myself precluded from even trying to inquire, or from speculating.

But we cannot proceed here on this simple view. It has been established by a decision which is binding on us by this House that the language must be interpreted as subject to some qualification which is implicit in the words, and the question which alone we are free and bound to examine, is what this qualification is, and how far it extends.

After discussing at length the decision in *River Wear Commissioners* v. *Adamson* (1), the learned Viscount thus states his conclusion as to "what was really laid down" in that case:—

I think only that there having been no human agency as the cause, and the real cause having been the act of God, the case was not covered by the section. The learned judges were at least agreed on this, that when the cause was not human agency but a *vis major* beyond human control, it did not come within the words.

In the case before us there was not only no negligence, but, on the hypothesis which I am making, there was no breach of duty at all. It is therefore important to see whether the grounds of the decision in this House in the *Adamson* case (1) laid down for us any different principle which was held to take the case outside of the words of the statute. This is not easy to determine, for there was divergence of opinion.

(1) (1877) 2 App. Cas., 743.

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After carefully analyzing the speeches delivered in the House of Lords in *Adamson's* case (1), Lord Haldane concludes:—

> We appear to me to be bound by the authority of the *Adamson* case (1) to hold that the section in question is not to be read literally, but as applying when the damage complained of has been brought about by a vessel under the direction of the owner or his agents, whether negligent or not. The decision further exempts the owner when the vessel is not under such control but is for instance derelict. When there are facts to which it applies it effects an alteration in the common law which imposes a new liability to be sued on the owner, and to that extent changes not merely procedure but also substantive law.

Although Mr. McCarthy, for the appellants, practically rested his appeal on the authority of the decision in the *Mostyn case* (2), in the course of his very able argument in answer, Mr. Phelan for the respondents made no allusion to that very recent and most important decision, a careful study of which has failed to disclose to us any real ground of distinction between the statutory provisions there dealt with and those now before us. There, as here, the responsibility of the owner for damages done by his vessel (here, by his motor vehicle) is declared in terms unqualified and unrestricted save by one exception, that of the vessel being under compulsory pilotage—here, the one exception is that of the motor vehicle being in the possession of some person other than the owner, or his chauffeur, without the owner's consent. In each case alike the exception merely serves to emphasize the unlimited scope of the main provision. Obliged by the decision in the *Adamson* case (1) to place a further limitation upon the responsibility of the owner created by s. 74 of the English statute, the House of Lords in *Mostyn's* case (2) confines that limitation most strictly to what they were bound to hold that the judgment in the *Adamson* case (1) necessarily implied. There is no earlier decision on the scope of the statute now before us which precludes our holding that it imposes, subject to the one exception expressed, unrestricted and absolute liability on the owner, thus giving to it the effect which we think its plain language clearly imports. But if the restriction held to have been placed on the application of the English statute in *Adamson's* case (1) should also be held to apply to the liability im-

(1) (1877) 2 App. Cas. 743. (2) [1928] A.C. 57.

posed by ss. 9 (1) and 41 (1) of the Ontario *Highway Traffic Act,* that would not help the present defendants, because they were not within it. If the rear or tail light was not burning, or if, though burning, it was not visible at a distance of at least 200 feet, neither of these facts can be attributed to an act of God; and the motor truck was at the time of the collision admittedly under the direction of the owner or his agent.

It will be noted that Lord Haldane in the *Mostyn* case (1) dealt with the arguments of counsel as to presumed intention and motives of Parliament. Similar arguments were advanced at bar in this Court. Conceding that s. 41 (1) was intended to impose civil liability upon the owner of a motor vehicle where there had been a violation of the statute, counsel for the respondents argued that such responsibility is vicarious and must be confined to cases in which the person in charge of such motor vehicle would be responsible at common law. We find nothing in the statute to justify so restricting its application. On the contrary, the imposition by s. 41 (1) of liability on the driver as well as the owner and the provision of subs. (3) seem to make clear that the purpose of the section is not only to impose direct civil liability, but also that that liability should be unrestricted, save as explicitly otherwise declared in the section itself. The inclusion of the driver's statutory responsibility is idle, if the application of the section is confined as Mr. Phelan contends.

We are accordingly of the opinion that the learned trial judge misdirected the jury as to the scope and effect of ss. 9 (1) and 41 (1) of the Ontario *Highway Traffic Act,* and that such misdirection affected their findings to such an extent that they cannot stand. It follows that the judgment for the defendants must be set aside and that a new trial must be ordered in favour of the appellants William R. Hall and Alice R. Dale.

While the Court is naturally reluctant to grant a new trial, it is satisfactory in this case to find such a clear and distinct ground of misdirection on which to base our order; for, otherwise, the later proceedings at the trial, by which the jury's findings were elicited, seem to us to have been so unsatisfactory that we should have to consider very

(1) [1928] A.C. 57.

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carefully whether, in the sound exercise of judicial discretion, we ought not, on that ground, to direct a new trial rather than affirm a judgment based on a verdict so arrived at.

If, perchance, the Legislature should consider that our interpretation of the statute imposes a liability wider than was intended, that body can by appropriate amendment change the law in whatever direction it may deem proper.

There is no reason why on the new trial the jury should not be asked, at the outset, these two direct questions:—

1. Q. Did the defendants' motor truck carry up to the moment of the collision a rear lamp lighted and casting a red light clearly visible at a distance of 200 feet?
2. Q. If not, did the failure to have such a light cause the collision?

Of course these two questions will be followed by questions appropriate to cover the other issues.

At the opening of the argument it was pointed out to counsel for the appellants that the claims of the plaintiffs Annie C. Hall and Frank J. Justin were each for an amount less than $2,000 and that, as was held in *Armand* v. *Carr* (1), and *Reynolds* v. *C.P.R.* (2), the Court is without jurisdiction to entertain the appeal by them. An application to allow the case to stand over to permit of leave to appeal being asked from the Ontario Appellate Divisional Court, the Court felt itself obliged to refuse. The appeals of these two plaintiffs, Annie C. Hall and Frank J. Justin, were accordingly quashed. They will not, however, be required to pay to the defendants any costs in this Court.

The judgment of the Court, therefore, is that, as to the plaintiffs William R. Hall and Alice R. Dale, this appeal is allowed and the judgment dismissing the action is set aside with costs in this Court and in the Appellate Divisional Court to the successful appellants and a new trial is ordered. The costs of the former trial will be reserved to the judge who shall preside at the new trial.

Appeal allowed with costs (as to appellants William R. Hall and Alice R. Dale).

Solicitor for the appellants: *Herbert A. W. Plaxton.*

Solicitors for the respondents: *Phelan & Richardson.*

(1) [1926] S.C.R., 575.

(2) [1927] S.C.R., 505.