1929
*May 27, 28.
*Oct. 1.

J. E. CARTER (DEFENDANT).......... APPELLANT;

AND

IDA VAN CAMP, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, BY HER NEXT FRIEND, SILAS EZRA VAN CAMP, AND THE SAID SILAS EZRA VAN CAMP (PLAINTIFFS), AND J. C. ANDERSON (DEFENDANT). } RESPONDENTS.

IDA VAN CAMP, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, BY HER NEXT FRIEND, SILAS EZRA VAN CAMP, AND THE SAID SILAS EZRA VAN CAMP (PLAINTIFFS). } APPELLANTS;

AND

J. E. CARTER AND J. C. ANDERSON (DEFENDANTS). .... } RESPONDENTS.

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

Motor vehicles—Negligence—Collision between motor cars, resulting in one of them striking and injuring pedestrian—Responsibility for injury—Violation of s. 35 (1) of Highway Traffic Act, R.S.O. 1927, c. 251—Whether driver whose car struck pedestrian liable by reason of conduct after collision—Conduct in emergency—Evidence—Onus of proof (Application and effect of s. 42 of Highway Traffic Act)—New trial.

C. and A., driving motor cars, collided at a street intersection, and A.'s car then struck the infant plaintiff who was on the sidewalk. Plaintiffs sued C. and A. for damages. Both the trial judge (Meredith C.J.C.P.) and the Appellate Division, Ont. (63 Ont. L.R. 257) took the view that A.'s conduct after the collision did not amount to a *novus actus interveniens*, but was an involuntary outcome of the collision, and that the negligence which caused the collision was in law the cause of the plaintiff's injury. The trial judge held that A. and C. were each to blame for the collision; but the Appellate Division held that C. alone was to blame. C. and the plaintiffs appealed to this Court.

Held (1) C., who had violated s. 35 (1) (right of way) of the *Highway Traffic Act* (R.S.O. 1927, c. 251), was guilty of fault causing the collision, and was liable to plaintiffs.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

(2) A. was not to blame up to the moment of the collision; he was entitled to rely on C.'s observing s. 35 (1), and when he became aware of C.'s disregard thereof, it was not possible for him to avoid the collision.

(3) If plaintiffs desired, there should be a new trial, confined to the question whether A. was, or was not, by reason of what occurred after the collision, responsible (jointly with C.) to plaintiffs. Anglin C.J.C. and Rinfret J. so held on the ground that, in view of the unsatisfactory nature of the evidence on the point, and in view of the reasons for its judgment by the Appellate Division, it was doubtful whether sufficient regard had been paid to s. 42 (1) (onus of proof) of the *Highway Traffic Act,* as it applied to the issue between A. and plaintiffs. Smith J. was of opinion that the finding below that A. was not guilty of negligence after the collision was a proper finding on the evidence (expressing the opinion, also, that if A. were held liable, C. could not also be held liable, because, A. not being in fault as to the collision, they were in no sense joint tort-feasors; A.'s liability would have to be based on the fact that. by his own independent act after he was, or should have been, free from the influence of the emergency, he, by negligent handling of his car, injured the plaintiff); that C. alone was responsible to plaintiffs, and the appeals should be dismissed; but, being alone in this opinion, he concurred in disposing of the case as proposed by Anglin C.J.C. and Rinfret J.

Per Anglin C.J.C. and Rinfret J.: Subs. 1 of s. 42 of said Act is *ex facie* applicable to the case of persons in the position of the plaintiffs (*Perusse* v. *Stafford,* [1928] S.C.R. 416). Its application was not prevented by subs. 2, which excludes from the operation of subs. 1 only cases in which the loss or damage is sustained by an occupant of one of the motor vehicles in collision or by the owner thereof, or, possibly, also by the owner of property being carried in it at the time. (*Moreau* v. *Rodrigue,* Q.R. 29 K.B. 300). Therefore the "onus of proof" was on A. to establish that the injury to the infant plaintiff "did not arise through (his) negligence or improper conduct."

Duff and Lamont, JJ., dissented, holding that, on the evidence, the trial judge's finding that A. was partly to blame for the collision should not have been set aside; moreover, even assuming the contrary, A. was at fault in respect of his conduct after the collision; having undertaken to drive a motor car through a street frequented by pedestrians, he was bound, at his peril, so to conduct himself as not to expose them to unnecessary risk of harm by default in management of his car in respect of reasonable care, skill and self possession, whether in emergencies or ordinary circumstances; on the evidence, A.'s manoeuvres after the collision were those of one who had "lost his head"; there was nothing in the circumstances of the collision to have so deprived a reasonably competent driver of his mental equilibrium; that being so, A. had failed to acquit himself of the statutory onus of shewing that the infant plaintiff's injury was not due to any "improper conduct" of his; to hold A. liable on this ground was not inconsistent with a judgment against C., who owed a duty to persons situated as was the infant plaintiff to anticipate such incidents as here occurred as the result of the collision (*Scott's Trustees* v. *Moss.* 17 S.C., 32, and other authorities referred to); plaintiffs should have judgment against both A. and C.; it was not a case for a new trial

1929
CARTER
v.
VAN CAMP
ET AL.
—
VAN CAMP
v.
CARTER AND
ANDERSON.
—

APPEALS from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which reversed in part the judgment of Meredith, C.J.C.P. (1).

The action arose out of an accident which occurred in the afternoon of October 6, 1927, at or near the intersection of Harbord and Borden streets, in the city of Toronto. The defendant Carter was driving a motor car westward on Harbord street, and the defendant Anderson was driving a motor car southward on Borden street. The cars collided at the intersection of the streets, and then Anderson's car struck and injured the infant plaintiff who was on the sidewalk near the south-west corner of the intersection. The plaintiffs (the infant plaintiff aforesaid and her father) sued both Carter and Anderson for damages.

The trial judge, Meredith, C.J.C.P. (1), held that the infant plaintiff's injury was caused by the negligence of each of the defendants, and that each of them was answerable for the damages; that Carter was guilty of negligence in breaking the statutory rule of the road giving the driver on the right-hand side the right of way; and that Anderson was guilty of negligence in carelessly making a left-hand turn against the traffic on such a street as Harbord street; that, seeing Carter's car and the danger, he should have stopped or taken some other means of avoiding the accident, even though he might have been in the right in regard to the right of way. He awarded $7,500 damages to the infant plaintiff, and $1,400 to the other plaintiff.

The plaintiffs appealed, and both defendants cross-appealed, to the Appellate Division; the plaintiffs on the ground that the damages allowed the infant plaintiff were inadequate; the defendant Anderson on the ground that the trial judge, having found that after the collision there was no negligence on his part which caused the plaintiff's damage, erred in holding that there was any negligence on his part which brought about the collision; and the defendant Carter on the ground that, admitting he was partly responsible for the collision, he was not responsible for the injury to the infant plaintiff; that the whole weight of evidence was that, after the collision, a new situation arose in which, if anybody, the defendant Anderson was severably

(1) (1928) 63 Ont. L.R. 257.

and ultimately and solely negligent, as a result of which the infant plaintiff was injured.

The Appellate Division (1) held that Anderson was not guilty of negligence causing the collision nor of negligence after the collision; that the collision was the result of Carter's negligence; and directed that the action be dismissed as against Anderson, that the plaintiffs recover damages against the defendant Carter, and that the infant plaintiff's damages be increased to the sum of $10,000.

The defendant Carter appealed to the Supreme Court of Canada, claiming that he should not have been held liable to the plaintiffs, but that the defendant Anderson should have been held solely liable for the injuries and damages occasioned to the plaintiffs, and, in the alternative, and at the worst for the defendant Carter, the judgment of the trial judge should be restored. The plaintiffs also appealed, claiming that both defendants, and not Carter alone, should be held guilty of negligence, and that the action should not have been dismissed as against Anderson, as directed by the Appellate Division.

D. L. McCarthy, K.C., and *J. O. Plaxton* for (defendant) appellant Carter.

Gideon Grant, K.C., and *Ernest A. Harris* for plaintiffs, appellants.

T. N. Phelan, K.C., for respondent Anderson.

The judgment of Anglin C.J.C. and Rinfret J. was delivered by

ANGLIN C.J.C.—A new trial in a case such as that now before us is always fraught with grave danger. As a result of the former trial and the hearing of appeals by a provincial appellate court and afterwards by this court, not only have the issues become crystallized and the difficulties arising from the course of the first trial been pointed out, but the points on which there seem to be lacunae in the evidence and the precise matters to which proof should be directed have been unavoidably emphasized in a way to bring them forcibly to the attention of the parties and their witnesses. The ordering of even a partial new trial, where,

(1) (1928) 63 Ont. L.R. 257.

1929

CARTER
v.
VAN CAMP
ET AL.

VAN CAMP
v.
CARTER AND
ANDERSON.

Anglin
C.J.C.

as here, the result must largely depend upon new or further evidence concerning a somewhat involved situation, should be resorted to only when the ends of justice clearly require it. But the trial of this action, which has already been had and which resulted in a judgment for the plaintiffs against both defendants, was, in my opinion, so unsatisfactory that a partial new trial is inevitable. The fact that in the Appellate Divisional Court the judgment against one of the defendants was set aside (Grant, J.A., dissenting) and his co-defendant was held solely responsible, unfortunately does not, under the circumstances, enable us to avoid this result. As is usual when a new trial is directed, we refrain from discussion of the facts and the evidence before us further than seems necessary to indicate the grounds on which we proceed.

The infant plaintiff, admittedly without any contributory negligence on her part, while standing on the side-walk on the south side of Harbord street, a little to the west of Borden street, in the city of Toronto, was struck by a motor vehicle driven by the defendant Anderson and seriously injured. This happened almost immediately after Anderson's car had been in collision with that of his co-defendant, Carter, at the intersection; and one of the questions presented for decision was whether Anderson's car being upon the Harbord street side-walk and hitting the infant plaintiff was a consequence of such collision, or was due to some act or omission on his part subsequent thereto which broke the causal connection between those occurrences and the collision, so that negligence which caused the collision could not be said to have been, in law, the cause of the infant plaintiff's injury. Both provincial courts have taken the view that Anderson's conduct subsequent to the collision did not amount to a *novus actus interveniens,* but was an involuntary outcome of the collision, for which, in the opinion of the trial court, he was jointly to blame with Carter, and, in the view taken by the appellate court, was not at all to blame. Both courts agreed that the negligence that caused the collision was, in law, the cause of the infant plaintiff's being injured.

The right of the plaintiffs to recover against one or both of the defendants is clear; indeed it is not seriously contested by either of them. The real issue is whether they

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Anglin C.J.C.

are both liable and, if not, which of them is legally responsible.

An outstanding fact is that the defendant Carter was to blame for an admitted violation of s. 35 (1) of the *Highway Traffic Act* (R.S.O., 1927, c. 251) and was, therefore, guilty of fault causing the collision, either solely, or jointly with his co-defendant. Anderson, who had been found by the trial judge more to blame for the collision than Carter because of his failure to avoid the consequences of the latter's breach of s. 35 (1), was held not to have been at all at fault, up to the moment of the collision, by the Appellate Divisional Court, whose view was that he was entitled to rely upon Carter's observing the rule of the road laid down by s. 35 (1), and that, when he became aware of Carter's disregard of that rule, it was not possible for him to avoid the collision. In that view we respectfully agree.

As to the conclusion of the Appellate Divisional Court, however, that Anderson's subsequent conduct entailed no responsibility on his part, although the trial judge took the same view, we are not certain that in reaching it sufficient regard was paid to the provision of subs. 1 of s. 42 of the *Highway Traffic Act,* as it applied to the issue between Anderson and the plaintiffs. That subsection, in our opinion, is *ex facie* applicable to the case of persons in the position of the plaintiffs, who suffered loss or damage which "resulted from a motor vehicle on the highway." *Perusse* v. *Stafford* (1). That Anderson's vehicle was on the highway and that it was the instrument which immediately caused the infant plaintiff's injury are facts not in dispute. The application of subs. (1) of s. 42 is not prevented by the provision of subs. (2) which, in our opinion, excludes from the operation of subs. (1) only cases in which the loss or damage sued for is sustained by an occupant of one of the motor vehicles in collision or by the owner thereof, or, possibly, also by the owner of property being carried in it at the time. (*Moreau* v. *Rodrique* (2)). The result is that the "onus of proof" was on Anderson to establish that the injury to the infant plaintiff "did not arise through (his) negligence or improper conduct"; and, in our view,

(1) [1928] S.C.R. 416.

(2) (1919) Q.R. 29 K.B. 300.

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Anglin C.J.C.

unless Anderson's subsequent conduct should be held to have been the sole cause of the injury to the plaintiff, a like onus would have rested on Carter as to his responsibility for the collision, had it been in issue. Having regard, however, to Carter's admission of a distinct violation of s. 35 (1), the only issue open on that branch of the case really was as to the concurrent responsibility of Anderson. That, as already stated, was, we think, properly determined in his favour by the Appellate Divisional Court.

In disposing of the issue as to the character and effect of Anderson's subsequent conduct, the learned Chief Justice of Ontario says:

> A moment before the impact Anderson discovered that a collision was imminent and at once turned his car towards his right. This was the only direction in which he could have turned with any chance of avoiding a collision and any reasonable person would have taken that chance. It is not improbable, though there is no evidence on the point, that, in the excitement caused by an impending accident, Anderson put his foot on the accelerator thus imparting additional speed to his car which when struck was within ten feet of the curb and mounted the sidewalk taking the course above set forth. Anderson had to deal with a serious and sudden emergency wherein human life was imperilled and his conduct must not be judged as in a case of voluntary negligence. *Jones* v. *Boyce* (1).

With the utmost respect, it would seem at least doubtful whether the "onus of proof" as between him and the plaintiffs, cast on Anderson by s. 42 (1), is sufficiently met by the assumption "that in the excitement caused by an impending accident Anderson put his foot on the accelerator, etc." Had Anderson given this evidence at the trial, it may well be that it would be quite proper to accept his explanation of what occurred. But it is scarcely satisfactory, when, for one reason or another, he did not take advantage of his opportunity to testify at the trial, without any evidence to make such an important assumption in his favour. On the other hand, we are not prepared, on the evidence now before us—more especially because it does not include testimony which, we think, should have been given at the trial by Anderson, whereas it contains extracts from his discovery evidence calculated to confuse rather than to elucidate the issue—to say that the concurrent findings of the learned trial judge and of the appellate court acquitting Anderson of fault subsequent to the collision are

(1) (1816) 1 Stark., 493.

so clearly erroneous that we would be justified in reversing them and holding Anderson responsible to the plaintiffs notwithstanding Carter's admitted initial negligence. Whether the intervening act of another person (Anderson) is an act of conscious volition amounting to a *novus actus interveniens* is often a very nice question. The following cases afford illustrations: *S.S. Singleton Abbey* v. *S.S. Paludina* (1); *Can. Pac. Ry. Co.* v. *Kelvin Shipping Co. Ltd.* (2); *Harding* v. *Edwards et al* (3); *Admiralty Commissioners* v. *S.S. Volute* (4); *Steele* v. *Belfast Corpn.* (5); *Dominion Natural Gas Co. Ltd.* v. *Collins & Perkins* (6); *Sullivan* v. *Creed* (7); *Bull* v. *Mayor, etc., of Shoreditch* (8); *Paterson* v. *Mayor, etc., of Blackburn* (9); *Clark* v. *Chambers* (10); *Burrows* v. *March Gas & Coke Co.* (11); *Hughes* v. *Macfie et al., Abbott* v. *Macfie et al.* (12); *Greenland* v. *Chaplin* (13); *Louisville Auto Supply Co.* v. *Irvine* (14).

On the whole case, therefore, we would, in the exercise of our discretion, order a new trial, if the plaintiffs so desire, merely to determine whether the defendant Anderson is jointly responsible with Carter for the damages sustained by the plaintiffs. These damages were increased by the Appellate Divisional Court, in the case of the infant plaintiff, from the $7,500 awarded at the trial to $10,000, and in this Court the correctness of this assessment was not controverted; nor was the quantum of the allowance of $1,400 made to the adult plaintiff challenged. The plaintiffs' right to recover from the defendant Carter being clear and the amount of damages awarded them not being questioned, we see no reason why those aspects of the case should be again tried out. The appeal of Carter will, accordingly, be dismissed.

We would, however, direct a new trial (if the plaintiffs elect to have it) confined to the question, whether the defendant Anderson is, or is not, by reason of what occurred

(1) [1927] A.C. 16, at pp. 28-29.
(2) (1927) 138 L.T.R. 369.
(3) (1929) 64 Ont. L.R. 98, at p. 108, per Middleton J.A.
(4) [1922] 1 A.C. 129, at p. 136.
(5) [1920] 2 Ir. R., 125.
(6) [1909] A.C. 640, at p. 646.
(7) [1904] 2 Ir. R., 317, at p. 356.
(8) (1902) 19 T.L.R. 64.
(9) (1892) 9 T.L.R. 55.
(10) (1878) 3 Q.B.D. 327.
(11) (1872) L.R. 7 Exch. 96.
(12) (1863) 2 H. & C. 744.
(13) (1850) 5 Exch. 243.
(14) (1925) 212 Ky. 60, at p. 64.

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Anglin C.J.C.

after the collision, responsible to the plaintiffs, as well as his co-defendant Carter. The plaintiffs' election must be filed with the Registrar of this Court within 20 days, otherwise they will be taken to have abandoned their claim against Anderson.

As against the defendant Carter, the plaintiffs are clearly entitled, in any event, to all their costs throughout. They are also entitled to the costs of their appeal to this Court against the defendant Anderson. Should they elect for a new trial as against Anderson, the disposition of all other costs as between them and him should be in the discretion of the judge who shall preside at the new trial. Should they not so elect, save in this Court and the Appellate Division, there will be no costs of the proceedings heretofore had as between Anderson and the plaintiffs, Anderson's costs in the Appellate Division being set off against the plaintiffs' costs here, and the judgment of the Appellate Divisional Court will be modified accordingly.

The judgment of Duff and Lamont JJ. (dissenting) was delivered by

DUFF J.—The learned trial judge took the view that Anderson and Carter were both in part responsible for the collision. In other words, that by the exercise of reasonable care Anderson could have avoided it, and that this absence of reasonable care contributed directly, together with Carter's fault in driving recklessly into a street intersection, in producing the collision. His language is this:

> I find that Anderson was guilty of negligence in carelessly making a left-hand turn against the traffic on such a street as Harbord street. I think it is a common law and common sense duty that no one should turn against the traffic without great care in such a place as that where this accident happened.
>
> Anderson saw Carter's car, he saw the danger, and ought to have stopped or taken some other means of avoiding the accident, even though he may have been in the right in regard to the right of way, because everyone must take reasonable care to avoid injury by another even if that other is in the wrong.

In support of these findings there is a substantial body of evidence. There is the evidence of Long:

> Q. Apparently Carter was turning off to his left to avoid Anderson at the time they touched, is that right?—A. Yes.
>
> Q. And Harbord street to your right-hand side and to the right-hand side of Anderson was entirely free from traffic, wasn't it?—A. Yes.

Q. He had the whole street to turn off to the right and avoid Carter?

His LORDSHIP: The whole intersection was free I understand at all times?—A. Yes.

And there is Izon's statement:

Q. I do not know whether you told me exactly which way the Anderson car was facing at the moment of the impact.—A. I should say it was the southeast.

Moreover, the considerations advanced by Grant, J.A., seem quite adequate to support the conclusion that Anderson, if he had been driving with proper circumspection, must have realized that, in proceeding as he did, he was incurring grave risk of a collision, if one accepts the testimony of the witnesses who speak to the facts mentioned by Grant, J.A., as the learned trial judge did. I cannot perceive any ground upon which this finding of the learned trial judge, whose province it was to evaluate the testimony of the witnesses, can be set aside or disregarded.

Anderson himself refrained from giving evidence at the trial, and left uncontradicted the testimony upon which the learned trial judge and Grant, J.A., proceeded.

If I may say so with the greatest respect, I think the learned Chief Justice of Ontario was influenced by the testimony of Carter, in reaching the conclusion that Anderson was free from blame at this phase of the events preceding the disaster. Carter's evidence on discovery was not available either for or against Anderson. The controversy was not a controversy between Anderson and Carter.

This is sufficient to dispose of the appeal, but other aspects of the case seem to call for some further observations.

Assuming Anderson to have been free from blame in his conduct antecedent to the collision, there appears to be no good reason for granting a new trial. First, there seems, in the evidence before us, to be no escape from the conclusion that Anderson's manoeuvres after the collision were those of a man who had lost his self-control and self-possession. The evidence of the two companions of the infant plaintiff is uncontradicted. Anderson's car, when they first noticed it, appeared to be headed south, down Borden street. Suddenly it turned to the west and was driven directly towards the group of three girls, who were standing on the sidewalk a few feet—one says two and another six—west of the Borden street kerb. The girls ran west as fast as they

1929

CARTER v. VAN CAMP ET AL. — VAN CAMP v. CARTER AND ANDERSON.

Duff J.

could, and one of them, Miss MacFarlane, narrowly escaped being struck down.

Q. Did the car catch up to you?—A. It touched the back of my leg every time I lifted it for two or three steps.

Another, Miss Hall, fell, but is unable to say whether she was struck by the car. The infant plaintiff was struck, she says, after she had run about six feet. So great was the force of the blow that there was "considerable, I suppose it would be flesh" on the bumper, according to one of the witnesses, Long, and some on the radiator; and moreover "it" (flesh) "was all on the road." The testimony on which these facts rest was not contradicted nor was there any cross-examination upon it. The full significance of them can only be appreciated when the evidence of Anderson, given on discovery, is looked at. Although it was evidently the middle of the bumper which struck the infant plaintiff, Anderson expressly states that he was not aware that she had been hit; and his evidence as a whole indicates clearly that he did not see the group of girls towards whom he was directing his car.

His own account is that his car was driven on to the sidewalk by the force of Carter's blow. This could not be reconciled with the condition of Anderson's car, or with the testimony of Miss Hall and Miss MacFarlane, and is explicitly denied by Izon, who was within a few yards of the place where the collision occurred, and who says that at that moment Anderson's car was facing south-east.

Anderson attempts no explanation of his failure to apply his brakes or to continue down Borden street, which was the course on which Carter, who was behind him, proceeded. It seems probable that, in the mental confusion which supervened upon the collision, his own actions left no impression upon Anderson's memory.

If Anderson did not quite lose his head, his conduct in driving his car into a group of girls on the sidewalk, without so much as attempting to apply his brakes, would demand a severity of comment which would be indeed painful to utter. His reference to some small children, whom he says he tried to avoid by swerving his car, is beside the point; the plaintiff and her companions were at the extreme east of the sidewalk and must have been the first persons he encountered.

Anderson owed a duty not only to persons using the carriage way, but to persons on the sidewalk as well. Such persons, everyone of them, had an independent right to be free from unnecessary molestation in their use of the King's highway; and Anderson's duty as the driver of a motor car—his duty to such pedestrians—was so to conduct himself as not to expose them to unnecessary risk of harm by default in the management of his car in respect of reasonable care, reasonable skill or reasonable self-possession, whether in emergencies or in ordinary circumstances. All this is involved in the proposition, that having assumed the responsibility of driving a motor car through a street frequented by pedestrians, he was under a duty to act reasonably with a view to the safety of such persons. If he was not a person of competent skill or competent self-command, he ought not to have attempted to drive a motor car in such a place. Having undertaken to do so, he was bound at his peril to exercise those qualities. If he did not, he is answerable in precisely the same way as if he had been driving a car, which he knew, or ought to have known, to be insufficiently equipped with brakes or other ordinary safety appliances.

There seems to have been nothing in the circumstances of the collision which would have so completely deprived a reasonably competent driver of his mental equilibrium. That being so, Anderson has failed to acquit himself of the onus resting upon him in virtue of the Ontario statute, of shewing that the injury to the infant plaintiff was not due to any "improper conduct" of his.

I do not agree that to hold Anderson liable is inconsistent with a judgment against Carter. Knowledge must be imputed to Carter, that collisions between automobiles in a public street are frequently attended by collateral incidents of an injurious, not to say destructive character, affecting third persons unconnected with either automobile. Such incidents may arise from various immediate causes. The machinery of a motor may become so deranged in consequence of such an accident, as to deprive the most competent driver of the control of his car; a car improperly equipped may for that reason be forced into some manoeuvre of a dangerous character; a driver may, as Anderson did, lose his head. Such incidents are to be anticipated

1929
CARTER v. VAN CAMP ET AL.
VAN CAMP v. CARTER AND ANDERSON.
Duff J.

and the driver of a motor car owes a duty to people using the same street (at least in the immediate vicinity) to anticipate them. The driver of the car (for example, with defective brakes) which is the immediate cause of the injury, may be responsible, but if what happened was something the negligent person responsible for the collision was under a duty to anticipate as the result of a collision, he also is liable.

The principle has been frequently applied. One of the most striking examples is *Scott's Trustees* v. *Moss* (1), where a person responsible for a balloon ascent was held liable for damage done to a cultivated field into which the balloon descended by the crowd which collected. The individuals constituting the crowd were, of course, themselves liable as trespassers. It is broadly stated by Lord Moulton in *Rickards* v. *Lothian* (2).

The present state of the law on this subject is, I think, fairly summarized in two well known text-books: *1st,* in Clerk & Lindsell on Torts, 8th ed., at p. 133,

> It is submitted that a voluntary act will be held to be new and independent, and the author of the prior wrongful act will thus be free from responsibility for the subsequent damage unless either he fails in carrying out a duty to foresee the possibility of the intervening act and guard against its consequences; or he authorizes or instigates it; or he is found by the Court to have intended the consequences which actually follow.

2nd, in Mayne On Damages, 10th ed., at p. 42,

> The Courts have not been consistent in the tests by which they have determined the limits of responsibility, and the law cannot be regarded as settled, but the present position may be summarized in three rules:—
>
> (1) Damage is recoverable if, without intervening causes, it is the direct result of a wrongful act operating in the physical conditions existing at the time of the wrongful act, even although the conditions are peculiar conditions of which the wrongdoer had no knowledge, and the existence of which he would not reasonably anticipate.
>
> (2) Damage is recoverable if, despite intervening causes, it was intended by the wrongdoer as the consequence of his wrongful act.
>
> (3) Damage is recoverable if, despite intervening causes, it is the natural and probable result of the wrongful act, that is, a result which the wrongdoer contemplated or should have contemplated.

Two judgments of the Supreme Court of Massachusetts throw light upon the point, *Leahy* v. *Standard Oil Co. of New York* (3), and *Meech* v. *Sewall* (4).

Second, whatever view may be taken of the evidence as it stands, it is the duty of this Court to deal with the appeal

(1) (1889) 17 S.C. 32.
(2) [1913] A.C. 263, at p. 273.
(3) (1916) 224 Mass., 352.
(4) (1919) 122 N.E.R., 447.

by passing on that evidence. There has not at any stage of the case been any suggestion that any further evidence would be forthcoming at a new trial. Carter and Anderson both refrained from giving evidence; the plaintiffs, no doubt for good reasons, refrained from calling them as witnesses. All was done deliberately, there was nothing in the nature of surprise; nor has there been at any stage of the proceedings any complaint as to the conduct of the trial. In *Brown* v. *Dean* (1), Lord Loreburn, L.C., called attention to " the extreme value of the old doctrine, *Interest rei publicae ut sit finis litium,* remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor antagonist."

The plaintiffs' appeal should be allowed, and Carter's appeal dismissed with costs to the plaintiffs in all the courts.

SMITH J.—I have gone over all the evidence bearing on the question of liability, which, to my mind, establishes beyond doubt that the defendant Carter was solely responsible for the collision between the two cars. His own examination for discovery read as evidence against him fully establishes this, even if accepted as absolutely correct. He says that he was approaching the intersection of Harbord and Borden streets when travelling, at 12 or 15 miles an hour, west, on the northerly part of the former, with his left wheel over the north rail of the northerly track of the street railway, that, when 30 or 40 feet from the easterly curb of Borden street, he saw Anderson's car coming south, pretty well on the west side of Borden street, at about the same distance from the northerly curb of Harbord street, going at about the same speed, and that he had him in view all the time up to the time of the impact, which he says occurred on the south tracks, a little to the west of the intersection. He further says that both increased their speed, and that there were no other vehicles ahead, on or approaching the intersection, which they had practically to themselves, and that they reached the intersection at practically the same time. On this statement Anderson had the right of way under the statute, and Carter says he increased his speed, instead, as the law re-

(1) [1910] A.C. 373, at p. 374.

quires, of yielding the right of way to Anderson. The excuse he gives is, "I wouldn't expect any man would make a left-hand turn without seeing the coast was clear, especially on a through street". There is no evidence that either street was a through street where there was a legal obligation to stop before crossing, and the excuse amounts to nothing. These statements of Carter do not greatly differ from the evidence of Long, a teacher in the Technical School, who was driving in his car behind Anderson, and who is entirely disinterested, and whose evidence in some respects is stronger against Carter.

He says Anderson was travelling south on the west side of Borden street with his right wheels two or three feet from the curb at a little over eight miles per hour, and on approaching the north side of Harbord street he slowed down to about eight miles per hour, extending his left arm, and on reaching the north limit of Harbord street, accelerated his speed to 12 miles per hour and inclined slightly to the left, bringing the left of his car at the time of impact a little to the left of the centre line of Borden street, and pretty well over the south set of rails or between the two sets of rails. He says Carter was coming west along the north side of Harbord street at between 15 to 20 miles an hour when he first saw him, 40 or 50 feet to the east, and that he slowed down to about 15 miles per hour. First he says the two approached the intersection about the same time, but at page 35 [of the Appeal Case] he says Anderson's car got there first, and that the rear of Anderson's car would be about in line with the north side of Harbord street when Carter's was approximately 40 or 50 feet to the east, and that Carter turned to the southwest. If, as Carter says, he and Anderson reached the intersection about the same time, it was clearly his duty to yield the right of way to Anderson, and if, as Long says, Anderson had entered on the intersection when Carter was approximately 40 or 50 feet to the east, then Carter's fault was still greater.

The learned trial judge, however, finds that Anderson also "was guilty of negligence in carelessly making a left-hand turn against the traffic on such a street as Harbord street". I am unable to find any evidence to support this finding. Anderson, going at a moderate speed as all the

evidence shows, slowed down on approaching the intersection, held out his left arm and inclined slightly towards the centre of the street, according to the uncontradicted evidence of Long. All this was the proper thing to do in order to make the left turn with due care, and he had no reason to anticipate that Carter, with this in full view, would disregard the rule of the road by attempting to pass in front. Anderson, in making a left turn, would not be making a turn against the traffic, as the learned judge puts it, had there been any. He would be crossing, as was his right, in front of west-bound traffic on Harbord street, and into and with east-bound traffic. There was, however, no other vehicular traffic on the intersection, and to say that it was Anderson's duty to take more care than he did is to say that he should have kept out of Carter's way when he had, in fact, a clear right over Carter to proceed, and a right to suppose that Carter would yield him that right.

If, therefore, Anderson is to be held guilty of any negligence, it must be negligence in control of his car after the collision, at a time when he should have been free from the influence of that collision to such an extent that with reasonable care under the circumstances suddenly and unexpectedly forced on him he could have controlled his car so as to avoid hitting the plaintiff. The line of the curb of Harbord street, according to the plan, is 13 feet south of the south rail, and Borden street from curb to curb is 24 feet wide. The collision took place on the south track a little west of the centre line of Borden street. From the front of Anderson's car southeast to the point of intersection of the two curbs shown on the plan would be about 15 feet, and from there to the hydrant is 32 feet 8 inches, making a total distance travelled by Anderson's car after the impact of about 47 feet 8 inches, or less if, as Carter says, the rear part of Anderson's car was hit on the south track, because in that case the front would be considerably past the south rail.

Alexander, the brake tester, says that a driver with his mind set on making as quick a stop as possible, and with brakes working right at 20 miles per hour, should stop in 37 feet, and at 15 miles per hour, in 20 feet 8 inches. These tests, he says, are with a new car and brakes in perfect condition. The average car on the road, he says, stops in

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Smith J.

50 to 55 feet, and Anderson's was better than the average car. Again he says, when prepared to act the average stop at 20 miles per hour is from 55 to 60 feet, and that in an emergency, and with his mind unprepared, a man would go further; how much further depending on the condition of brakes and the mental make-up of the man. He would expect a person confronted with a sudden emergency to go a considerable distance further.

Anderson was certainly confronted with a sudden emergency. The witness Izon says (p. 46 of the case) that Anderson's car after the impact wobbled much in a very indefinite course towards the southwest corner. This was manifestly the direct result of the impact. His first thought, on seeing the other car about to hit him, would be to avoid the collision or lessen its force, and he naturally attempted to swerve to the right, away from the approaching car, as he says he did. He then receives the impact of the other car, which cuts through his running board and dints his rear door, causing his car to wobble in an indefinite course, as described by Izon. At the time of impact his mind is naturally centred on the car that is bearing down on him. Then he must recover control of the car's direction. Next he observes that he is heading for some children on the sidewalk and makes a move to avoid them which is successful, but which brings him in collision with the plaintiff, whom he had not seen, and the hydrant. At 15 miles per hour the car would go 22 feet in a second, and at 12 miles per hour, 17·60 feet, so that to recover from the effect of the emergency and make the necessary moves to avoid the accident to the plaintiff, he had at best three seconds of time.

I agree with the remarks of the learned trial judge where he says,

> I am not able to say that in this emergency a driver of ordinary ability could have saved the situation. As I have often said, although there should be no need to say it, we are not to judge the driver in an emergency of that kind as if we were sitting in Court here quietly saying what he should and should not have done.

A man licensed to drive must, of course, exercise in an emergency that degree of skill in controlling a car under the circumstances that a reasonably skilful holder of such a licence should exercise, but to hold that Anderson, under the circumstances of this case, should have, in the space of

some 48 feet, and within three seconds from the emergency, have so fully recovered himself and the control of the car as to successfully steer clear of all the dangers that suddenly confronted him is, in my opinion, to cast upon him liability to exercise a degree of skill that the most skilful might have failed to command. It must be remembered too that Anderson should not be expected to exercise the high degree of skill that might be expected from a licenced professional chauffeur wholly employed in driving cars.

It is argued that Anderson should have put on his brakes, but that would not have saved the children in front of him on the sidewalk. He had instantly to get rid of the wobble and avoid the children. To seize the emergency brake he would have to let go the steering wheel with the right hand, when it was urgently needed on the wheel. He was suddenly, when in a perturbed state of mind produced by the collision, called on to make instantly several precautional movements. It is easy, as the learned trial judge observes, for us, sitting here quietly, with minds unperturbed by any emergency, to say that he could have applied at least his foot brake, but with the other things calling at the same moment for decision and action, within what part of the three seconds should he have had this brake on? On Anderson's evidence it is not likely that the application of the foot brake, at the earliest it could reasonably be expected to be applied, would have saved the plaintiff.

Much was said about the breaking of the hydrant, but as this is made of thin cast-iron, it would not stand much of an impact from a weight of one or one and a half tons.

If Anderson were to be held liable, it seems to me that Carter could not also be held liable, because, Anderson not being in fault as to the collision, they were in no sense joint tort-feasors. Anderson's liability would have to be based on the fact that, by his own independent act after being free or after he should have been free from the influence of the emergency so far as control of his car was concerned, he, by negligent handling of his car, injured the plaintiff.

The learned trial judge held that Anderson was not guilty of negligence in the control of his car subsequent to the collision, and this finding of fact is concurred in by the Appellate Division, and should not, under these circum-

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Smith J.

stances, be lightly interfered with. My personal opinion is, as indicated above, that it was a proper finding on the evidence before the court. I am therefore of opinion that Carter alone is responsible to the plaintiff, and that the appeal should be dismissed with costs. However, as I am alone in this opinion, I concur in disposing of the case as proposed by the Chief Justice.

Appeal of the defendant Carter dismissed with costs.

Appeal of the plaintiffs allowed to the extent and on the terms set out in the judgment of the Chief Justice.

Solicitors for the plaintiffs, appellants: *Harris & Keachie.*

Solicitors for the defendant, appellant, Carter: *Plaxton & Plaxton.*

Solicitors for the defendant, respondent, Anderson: *Phelan & Richardson.*

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*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.