WINSTON *v.* NELLES

1931

*Nov. 23, 24.

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

Negligence—Motor vehicles—Injury to pedestrian—Damages claimed against two motor drivers—Jury finding each driver guilty of negligence—Appeal by one driver—Question as to his responsibility for accident, having regard to evidence and jury's findings—Emergency through negligence of another—Control of car—Divided court—New trial.

APPEAL by the defendant Winston from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, on an equally divided court, dismissed his appeal from the judgment of O'Connell, Co. C.J., who, on the verdict of a jury, gave judgment for the plaintiff against both defendants (the present appellant and one Wright) for damages for personal injuries caused by being struck, while on the sidewalk near the intersection of St. Clair and Wells Hill Avenues, Toronto, by the appellant's motor car. The jury found that the defendant Wright's negligence was "in cutting in on Winston's car without giving due notice to (*sic.*) such intention," and that the defendant Winston's (appellant's) negligence was "in not having his car under proper control to meet an emergency." The appellant contended that there was no evidence to support the jury's finding of negligence against him, and that it should have found that he was not guilty of any negligence causing the accident.

On the appeal to this Court, after hearing argument of counsel, the Court delivered judgment orally. Anglin C.J.C. would order a new trial; Rinfret and Smith JJ. would allow the appeal and dismiss the action as against appellant; Lamont and Cannon JJ. would dismiss the appeal. In the result, the judgment of the Court, delivered by the Chief Justice, was that the appeal be allowed and a new trial ordered, the costs of the abortive trial and of the appeals to the Appellate Division and to this Court to follow the event of the new trial.

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

(1) (1931) 40 Ont. W.N. 313.

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Anglin, C.J.C., stated that, in view of the divided opinion, and of the fact that he found, personally, that the trial already had was most unsatisfactory, he would order a new trial, agreeing with the two Judges who would allow the appeal, to the extent of setting aside the verdict, and with the two other Judges who would dismiss the appeal, to the extent of refusing to enter judgment for the defendant, contrary to the verdict of the jury, a power undoubtedly possessed by the Court, but very rarely to be exercised, and then only in the clearest cases.

Lamont J. (with whom Cannon J. concurred) stated that in his opinion there was no sound reason for interfering with the judgment as it stood; that the meaning of the jury's verdict was plain; they found an emergency due to cutting in, and found that the appellant was guilty of negligence in not having his car under control; from appellant's own evidence, he was driving at 18 to 20 miles an hour, and he had put his foot on the brake; the evidence was that the curb was five inches high, and that appellant not only jumped the curb and caught the plaintiff, but also that his car then ran 38 feet; on these facts it was open to the jury to say that the accident would not have occurred if he had had his car under control.

Smith J. (with whom Rinfret J. concurred) stated his opinion that the jury had not made any finding on which the judgment against appellant could be sustained; the only negligence on his part that the jury was able to find —and finally undertook to find—was that he had not his car under control to meet an emergency; implying that he should have been prepared in advance to meet this emergency, which he could not foresee; that the jury did not make any finding that appellant was negligent in what he did after being placed by Wright in the emergency; that there is no obligation imposed by law on a driver to keep himself specially prepared for action in connection with some possible unforeseen emergency in which he may be placed; and there was no evidence, up to the time he was interfered with by the negligence of Wright, that appellant was not in full control of his car; that what the jury pretended to say was negligence does not in law constitute negligence. The learned judge agreed with the

opinions expressed by Riddell and Fisher J.J.A. in the Appellate Division, and was of opinion that the action should be dismissed as against the appellant.

Appeal allowed and new trial ordered.

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

F. J. Hughes K.C. for the respondent.

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