FRED T. MACKLIN (DEFENDANT).....APPELLANT;

AND

JAMES A. YOUNG AND MARY I. YOUNG (PLAINTIFFS) ..... } RESPONDENTS.

1933

*June 13, 14.
*June 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor Vehicles—Husband and Wife—Collision of motor cars —Driver swerving to wrong side of road—Alleged sudden emergency from conduct of other driver—Jury's findings—Drivers found equally negligent—Damages recovered by driver's wife (riding with him) against driver of other car—Latter's claim to indemnity from the other driver (the husband)—Negligence Act, Ont., 1930, c. 27, s. 3—Married Women's Property Act, R.S.O., 1927, c. 182, s. 7.

M., driving his motor car northwards, and Y., driving his southwards, collided, after dusk, about 50 feet north of the north end of a curve, on a paved highway, in Ontario. Y.'s wife was riding with him. Y. and his wife sued M., and M. counterclaimed against Y., for damages. It was alleged against each driver that he was on the wrong side of the road. The jury found that negligence of M. and Y., equally, caused the collision, the negligence consisting, on M.'s part, "by being too far over on his wrong side, swerved to east (his right) side of road but was too late to avoid the accident," and on Y.'s part, "on seeing M.'s car coming towards him, swerved to the east (his wrong) side of the road in the direction of oncoming car." Based on the jury's findings (and having regard to the *Negligence Act*, Ont., 1930, c. 27), judgment was entered for Y. against M. for one-half of Y.'s damages, and for M. against Y. for one-half of M.'s damages, and for

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Hughes JJ.

1933

MACKLIN v. YOUNG.

Y.'s wife against M. for the whole of her damages, and M. was awarded indemnity against Y. for one-half of the damages awarded to Y.'s wife. This judgment was varied by the Court of Appeal, Ont., which allowed Y. his full damages and dismissed M.'s counterclaim (leaving undisturbed Y.'s wife's judgment against M. and not allowing indemnity to M. against Y. in respect thereof). M. appealed.

Held: The judgment at trial should be restored, except that M. should have no indemnity against Y. as to damages awarded to Y.'s wife.

In view of all the evidence, the charge to the jury and the jury's findings, there was not adequate ground for holding that M., "by being too far over on his wrong side," had created a sudden emergency such as to relieve Y. from blame for his act (as found by the jury) of swerving to his left; and the finding of negligence against Y. should not be set aside.

The court could not award to M. indemnity against Y. in respect of the damages awarded to Y.'s wife; s. 3 of the *Negligence Act (supra)* provided for contribution and indemnity only in the case of joint and several liability, and, under the law (*Married Women's Property Act,* R.S.O., 1927, c. 182, s. 7), Y. could not be sued by his wife for damages caused by the accident, and therefore was not and could not be found liable jointly and severally with M. to her. (*McDonald* v. *Adams,* 41 Ont. W.N. 145, approved on this point; *Ralston* v. *Ralston,* [1930] 2 K.B. 238; *Gottliffe* v. *Edelston,* [1930] 2 K.B. 378; *Goldman* v. *Goldman,* 61 Ont. L.R. 657, *Coupland* v. *Marr,* [1931] O.R. 707; *Tetef* v. *Riman,* 58 Ont. L.R. 639, referred to).

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which varied, in favour of the plaintiff James A. Young, the judgment of Rose, C.J., on the findings of a jury.

The action was for damages caused by a collision between two motor cars, the one driven by the plaintiff James A. Young, in which his wife (the other plaintiff) was riding, and the other driven by the defendant. The plaintiffs charged the defendant, and the defendant (who counterclaimed) charged the plaintiff James A. Young, with negligence causing the collision.

The material facts and circumstances of the case are sufficiently stated in the judgments now reported.

At the trial the jury found negligence, causing the collision, in both the defendant and the plaintiff James A. Young, in equal degree, the negligence consisting, on defendant's part, "by being too far over on his wrong side, swerved to east (his right) side of road but was too late to avoid the accident"; and on plaintiff's part, "on seeing Macklin's car coming towards him, swerved to the east (his

(1) (1932) 41 Ont. W.N. 433.

wrong) side of the road in the direction of oncoming car." The jury found that the damages to the plaintiff James A. Young were $850, to the plaintiff Mrs. Young $1,000, and to the defendant $4,958.

On these findings, judgment was given at trial to the plaintiff Mrs. Young against the defendant for $1,000; and (having regard to the provisions of *The Negligence Act, 1930,* c. 27, s. 3), to the defendant for indemnity against the plaintiff James A. Young to the extent of one-half the amount recovered by the plaintiff Mrs. Young, to the plaintiff James A. Young against the defendant for $425, and to the defendant against the plaintiff James A. Young for $2,479.

This judgment was varied by the Court of Appeal (which held that, upon the facts and circumstances in evidence, the finding against plaintiff of negligence causing the collision was not justified), the judgment, as so varied, being that the plaintiff James A. Young recover from defendant $850; that the plaintiff Mrs. Young recover from defendant $1,000; and that defendant's counterclaim be dismissed.

The defendant appealed to the Supreme Court of Canada. By the judgment of this Court, the appeal was allowed, and the judgment of the trial judge restored, with the variation that (for reasons stated in the judgments now reported) the paragraph, in the formal judgment at trial, giving indemnity to the defendant against the plaintiff James A. Young, be struck out.

R. S. Robertson K.C. and *Duff Slemin* for the appellant.

C. W. R. Bowlby for the respondents.

Reasons were delivered, by Smith J. (dealing more at length, than in the reasons delivered by Hughes J., with the said question of indemnity to defendant), concurred in by Rinfret and Lamont JJ.; and by Hughes J., concurred in by Rinfret, Lamont, Smith and Cannon JJ.

SMITH J. (Concurred in by Rinfret and Lamont JJ.)—I agree with my brother Hughes, for the reasons stated by him, that this appeal should be allowed, and that judgment should be entered on the basis of the findings of the jury. According to these findings, the appellant Macklin and the respondent James A. Young were both negligent,

1933

MACKLIN v. YOUNG.

Smith J.

and contributed to the accident in equal degrees. The respondent Mary I. Young, wife of the respondent James A. Young, was awarded $1,000 damages, which she is, of course, entitled to recover in full against the appellant.

Formal judgment in the trial court adjudges that the defendant (appellant) be entitled to be indemnified by the plaintiff (respondent) James A. Young to the extent of one-half of the amount so recovered by the plaintiff Mary I. Young (respondent). This point was not raised in the pleadings, but was discussed at the trial, as follows:

His LORDSHIP: I suppose she is entitled to her judgment against Macklin regardless of the finding of the contributory negligence of Young, but I suppose that under the statute Macklin is entitled to contribution from Young to that—

Mr. BOWLBY: I think that would be the result.

On behalf of the respondent James A. Young it was submitted in respondent's factum and on the argument that the appellant is not entitled to indemnity for any part of the damages awarded to the respondent Mary I. Young. No cross appeal was taken against this provision in the judgment, but we are of opinion that, in accepting the findings of the jury, this court ought to order the proper judgment that should follow from these findings to be entered. It therefore becomes necessary to adjudicate upon this point raised in the factum and upon the argument. The objection to the clause of the trial judgment referred to is that the respondent Mary I. Young, being the wife of the respondent James A. Young, had no right of action against her husband, and that the appellant, in consequence, has no right to indemnity for any part of the damages awarded against the appellant to the respondent Mary I. Young.

Section 7 of *The Married Women's Property Act,* R.S.O., 1927, ch. 182, reads as follows:

7. Every married woman shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property as if such property belonged to her as a *feme sole,* but, except as aforesaid no husband or wife shall be entitled to sue the other for a tort.

This section is almost an exact copy of sec. 12 of the English *Married Women's Property Act.* Under that section it was held by Macnaghten J., in *Ralston* v. *Ralston*

(1), that no action lay, by a wife against a husband, for libel, and this was followed by McCardie J., in *Gottliffe* v. *Edelston* (2), in an action for personal injury.

The same view, under sec. 7 of the Ontario Act, has been taken by Wright J. in *Goldman* v. *Goldman* (3), and by the Appellate Division in *Coupland* v. *Marr* (4). This is clearly the correct view, and, having regard to the words of the statute, would seem hardly to require argument, were it not for the suggestion that the wife might ground a right of action on an implied contract by the husband to carry her with reasonable care, rather than on tort. Such an argument, however, is not tenable, in view of the ultimate result of the authorities which are exhaustively reviewed by Mr. Justice Middleton in *Tetef* v. *Riman* (5).

In the present case, therefore, Mary I. Young had no right of action against her husband, James A. Young, for damages sustained by her through his negligence, and the appellant can have no right of indemnity against the husband unless it is expressly provided for by the statute. The statute relied upon is *The Negligence Act, 1930,* ch. 27; sec. 3 of which reads as follows:

> In any action founded upon the fault or negligence of two or more persons the court shall determine the degree in which each of such persons is at fault or negligent, and where two or more persons are found liable they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

The jury has found that the damage to Mary I. Young was the result of the negligence of the appellant and her husband, but, under the law as already stated, the husband was not and could not be found liable jointly and severally with appellant to the wife, and it is only in the case of joint and several liability that the section provides for contribution and indemnity.

I am therefore in accord with the decision of the Court of Appeal of Ontario in *McDonald* v. *Adams* (6), where it is held that there is no right to contribution under such circumstances.

(1) [1930] 2 K.B. 238.
(2) [1930] 2 K.B. 378.
(3) (1928) 61 Ont. L.R. 657.
(4) [1931] O.R. 707.
(5) (1926) 58 Ont. L.R. 639.
(6) (1932) 41 Ont. W.N. 145.

1933

MACKLIN v. YOUNG.

Smith J.

The appeal will therefore be disposed of as set out in the reasons of my brother Hughes.

HUGHES J. (Concurred in by Rinfret, Lamont, Smith and Cannon JJ.).—This action arose out of a collision between two motor vehicles, which occurred after dusk on the evening of the 3rd day of November, 1930, on a paved highway which runs approximately in a northerly and southerly direction between the city of Brantford and the town of Simcoe in the province of Ontario. Fred T. Macklin was driving his motor vehicle in a northerly direction and had come around a gradual curve. The plaintiff James A. Young, accompanied by his wife, the plaintiff Mary I. Young, was driving his motor vehicle in a southerly direction and accordingly was approaching the same curve. The accident occurred approximately fifty feet north of the end of the curve and therefore at a place where the road was straight. The plaintiffs alleged that the motor vehicle of the defendant was wholly or partly on the west side of the road at the time of the collision. The defendant, on the other hand, contended that the motor vehicle of the plaintiff, James A. Young, was wholly or partly on the east side of the road at the time of the collision.

The action was tried before the Chief Justice of the High Court with a jury at Hamilton on the 11th, 12th and 13th days of April, 1932. The jury retired at 3.25 p.m., returned several times and finally brought in their verdict at 8.20 p.m., a duration of almost five hours.

The jury found that the drivers were equally negligent and answered the questions as to liability as follows:

Q. 1. Was the collision caused by the negligence of Macklin?—A. Yes.

Q. 2. If so, in what did such negligence consist?—A. By being too far over on his wrong side, swerved to east side of road but was too late to avoid the accident.

Q. 3. Was the collision caused by the negligence of James Young?—A. Yes.

Q. 4. If so, in what did such negligence consist?—A. On seeing Macklin's car coming towards him, swerved to the east side of the road in the direction of oncoming car.

Counsel for the plaintiffs thereupon submitted to the learned trial judge that the answer to question no. 4 was not negligence in law. This discussion is important. It is as follows:

Mr. BOWLBY: Well, my submission would be, my Lord, that the answer to question number 4, that is, the plaintiff's negligence, is not negligence in law at all.

His LORDSHIP: Why? "On seeing Macklin's car coming towards him, swerved to the east side of the road in the direction of the oncoming car." Why isn't it?

Mr. BOWLBY: Because, my Lord, the answer to question number 2 makes it clear that the defendant, as the plaintiff has always contended in this case, was driving on the wrong side of the road, and so far on the wrong side of the road that it was necessary for him to go to his right side in order to avoid an accident.

His LORDSHIP: In order for whom to go?

Mr. BOWLBY: For the defendant.

His LORDSHIP: That is what he was endeavouring to do, according to the jury.

Mr. BOWLBY: No; they said he went too late.

His LORDSHIP: "By being too far over on his wrong side, swerved to east side of the road." He swerved to the east; that is to his right.

Mr. BOWLBY: That is his right.

His LORDSHIP: But was too late to avoid the accident.

Mr. BOWLBY: Yes.

His LORDSHIP: What they mean is, I take it, that coming around the bend he took the larger side of the curve, the outside, and coming into the straight his intention was to get back on to the right side, and to give Young his half of the road, but that he put that off too long; and then they think that Young, making the little left turn that has been described, or the big left turn, whichever it was, frustrated that attempt of Macklin's.

Mr. BOWLBY: Well, of course, I do not want to enter into a long argument, but my submissions would be that if Macklin is on the wrong side of the road, and, as the evidence shows, coming straight for Young on his wrong side of the road, there was really nothing, in the flash of time that there was, that Young could do that could be negligence. As has been said by the courts, if A puts B in a position of grave danger and emergency, and B does the wrong thing, B is not negligent.

His LORDSHIP: In order that you can succeed at all, you have got to uphold the second finding, the finding of Macklin's negligence.

Mr. BOWLBY: Oh, yes.

His LORDSHIP: Now, if that finding is justified, and Macklin was really trying to get back to the right side, the very least little turn by Young to the left would frustrate that attempt, or might; and I should think the answer to the fourth question could for that reason be supported if the answer to the second question can stand. I think that the attack, if there is to be an attack, upon the findings would be rather against the answer to the second question than the answer to the fourth. If the fourth stood all by itself without the second, then there might be force in your suggestion, but, the second standing, I do not believe I can say there was no evidence to justify the fourth.

Mr. BOWLBY: It is not a question of no evidence, my Lord; it is a question of the negligence that the jury find not being negligence in law under the authorities.

His LORDSHIP: Simply because it is done in an emergency.

Mr. BOWLBY: Yes—on all the evidence. Of course, the plaintiff's contention from start to finish in this case has always been that Macklin was on his wrong side of the road.

1933

MACKLIN v. YOUNG.

Hughes J.

His LORDSHIP: I know.

Mr. BOWLBY: And the jury find that. Now, under those circumstances—I have authorities to bear out my contention—under those circumstances, there was only, on all the evidence, a flash of time.

His LORDSHIP: Yes, but I cannot conceive how a reasonably competent driver could, even in such an emergency as Young thought existed, have adopted the course that Young adopted.

Mr. BOWLBY: Well, there is a case on all fours—I mean, the facts are absolutely identical with this case, and Mr. Justice Orde said—

His LORDSHIP: Well, they are not identical; you never saw facts that were identical.

Mr. BOWLBY: However, I think there is a very strong contention there.

His LORDSHIP: Well, I do not know what you are going to do about it if you want—my present impression is against you on that. I have been thinking about it a bit since the verdict was rendered, and my present impression is, as I said before, that if the second answer stands the fourth can be supported, and that it was really for the jury to say whether this was a mere failure to do the best thing in a sudden emergency, or whether, having regard to all the facts, it was an act of want of reasonable skill, which, in the case of the driver of a motor car, is negligence, because it is negligent to be in charge if you have not reasonable skill.

The learned trial judge reserved judgment and on April 20, 1932, he gave judgment. After referring to *Harding* v. *Edwards* (1), and *Smith* v. *Cowan* (2), the learned trial judge said in his written reasons:

The point made is that the act which the jury say was negligence on the part of Young was one of those errors of judgment in a sudden emergency which the courts have said ought not to be called negligence, and the two cases cited are cases in which the trial judge, in considering an act somewhat like the act of Young, came to the conclusion that the act, because an act done in a sudden emergency, was not properly to be called an act of negligence. But this case is a case tried with a jury, and I think it was for the jury to say whether the act was an act of the class to which I have been referring or was an act of incompetence amounting to negligence; and my recollection is that I put to the jury the question—not in writing, but for their consideration—as to the category into which Young's act or any act of Young might fall. The jury, upon a charge which was not objected to, have said that Young was negligent; that means, I think, that they have found that Young's act was not an act falling within the category in which the acts referred to in the cases cited were found to fall, but an act falling within the other category. I see, therefore, no necessity of postponing the matter further in order to hear counsel for the parties who are not represented here today, and I shall proceed to direct the entry of judgment in accordance with the findings of the jury.

Formal judgment accordingly was entered for the plaintiff, James A. Young, for $425, being one-half of his dam-

(1) 64 Ont. L.R. 98; affirmed (*Tatisich* v. *Edwards*), [1931] Can. S.C.R. 167.

(2) (1926) 31 Ont. W.N. 110.

ages, and for the plaintiff, Mary I. Young, for $1,000, against the defendant; for the defendant on his counterclaim for $2,479, being one-half of his damages, against the plaintiff, James A. Young, and the defendant was awarded indemnity against the plaintiff, James A. Young, for one-half of the damages awarded to the plaintiff, Mary I. Young.

From this judgment the plaintiffs appealed to the Court of Appeal for Ontario, on the grounds, among others, that the verdict was unreasonable, that the effective cause of the accident was the negligence of the defendant, that the defendant had created an emergency, and that, accordingly, the act of Young in turning to the left was not negligence in law. On the 25th day of November, 1932, the Court of Appeal allowed the appeal of the plaintiffs and varied the judgment below by allowing the plaintiff, James A. Young, the full amount of his damages of $850 against the defendant, by dismissing the counterclaim of the defendant and by awarding costs throughout to the plaintiffs.

The learned Chief Justice in appeal was of opinion that the negligence of Macklin was the sole effective cause of the collision, and that the finding of the jury that Young was negligent was not a finding of negligence in law. Mr. Justice Riddell was of opinion that the finding of the jury was unreasonable; and Mr. Justice Fisher, that the defendant had created an emergency and was solely to blame.

From the judgment of the Court of Appeal, the defendant appealed to this Court.

Counsel for the respondents, when called upon, contended before us that the answer of the jury to question number 2 made it clear that the jury did not believe the evidence adduced by the appellant, that all the evidence at the trial which the jury did believe supported the contention of the respondents that the appellant had created a sudden emergency, and that, therefore, the remarkable act of the respondent, James A. Young, in turning his motor vehicle to the left was not, in the circumstances, negligence in law.

There was a serious conflict of testimony at the trial.

The respondents swore that the motor vehicle of the appellant was wholly or partly on the west side of the road, both before and at the time of the collision.

1933

MACKLIN v. YOUNG.

Hughes J.

The following witnesses, however, called by the appellant, were respectively asked the following questions and made the following answers, among others:—

S. H. Carson:

Q. Now, down to that time, you having the lights of the Macklin car in view, what side of the highway was he travelling on, the right or the left?—A. When Mr. Macklin came around the curve he was on the—what he would call his right side of the road; my left hand side.

Q. Your left hand side; that would be his right hand side?—A. Yes.

Q. Now, from that time, as he came around the curve on his own right hand side of the pavement, down to the time that Young made the turn that you have told us about, did Macklin come over to the other side of the pavement at all?—A. You mean did he come—

Q. Did he come over on his wrong side of the pavement?—A. No.

Q. Did he—you can tell us, because you say you were watching his lights until Young turned—did he deviate at all from his own side of the pavement, did Macklin?—A. Macklin—I couldn't tell his position until he rounded the curve, but after he rounded the curve he was in his proper position.

Q. And then when he had rounded the curve did you see him as he came along before Young made the turn?—A. Yes.

Q. And when you saw him coming along after—Macklin I am talking about now?—A. Yes.

Q. As you saw Macklin coming along after he had rounded the curve and made the turn, did Macklin or did he not continue on his own right hand side?—A. Yes.

Q. And was he or was he not on his right hand side at the time Young turned over?—A. Yes.

H. Persall:

Q. Were you or were you not able to see the Macklin car when it got to the end of the curve and straightened out, if it did?—A. Yes, I was.

Q. And at that time can you tell us about how far you were behind it?—A. I couldn't say; a hundred feet or more is what I was following him, but I couldn't say just exact.

Q. Well, would it or would it not be much more than a hundred feet?—A. No, I wouldn't think it would be.

Q. You wouldn't think it would be much more than a hundred feet that you were behind. Perhaps that answers it, my Lord. Then were you or were you not able to see at that time upon what part of the highway the Macklin car was travelling?—A. He was on his right hand side.

J. Davis:

Q. Then you have told us that you observed the car which was going along the highway in the Brantford direction ahead of you; did you notice upon what portion of the pavement it was proceeding?—A. It was on the pavement on the right side.

Dr. Quinn:

Q. Was, was he or was he not coherent in what he said?—A. He appeared to me to be a man who was very much confused at the office and at the time of the accident.

Q. And was he or was he not able to give you any rational account of what had occurred?—A. Naturally, knowing this road and having driven it so often, I was interested to know how an accident of this sort could occur on a slow curve, and Mr. Young expressed to me that he had become very confused and apparently had taken the wrong side of the road.

His LORDSHIP: Q. And what?—A. Apparently had taken the wrong side of the road.

Q. Oh, don't say apparently had done anything. Tell what he said?—A. Well, that is what I recall, sir—

Q. Listen: is that your gloss or his statement?—A. His statement, sir.

B. Milligan:

Q. When you spoke to Mr. Young, was he or was he not, as nearly as you could judge, able to answer you coherently?—A. Yes, I think so. I asked him—I asked for the drivers of the cars first. Someone told me that the driver of the coupe had been taken to the hospital, and Mr. Young came forward as the driver of the Nash sedan, and I asked him, I said, "What happened?" He says, "I don't know," he said, "I saw the lights of this car coming—appeared to be coming towards me."

Q. He said?—A. Yes.

Q. Yes?—A. "And I turned over to the left to avoid them." "Well," I said, "why didn't you pull over here to the right and stop?" Showed him the space on the right hand side. He said, "I don't know."

The learned trial judge charged the jury fully on their duty if they found that Macklin had created a sudden emergency, using the following words:

Supposing Macklin was on the wrong side of the road, then what about Young? Could Young have done something better than he did do, and ought he to have done something better than he did do? Now, it is true, as counsel have stated to you, that in a sudden emergency for which you are not responsible you are not held to be negligent simply because you did not do the thing which, thinking about it afterwards calmly, you can say was the right thing. You are bound—and I come back to what I started with—you are bound to use reasonable care, that is, the care of a reasonably careful man, you are bound to use reasonable skill, and if you have not reasonable skill you have no right on the road in control of a motor car, and reasonable skill is the skill of a reasonably competent driver, in this case; but you are not supposed to be a superman, you are not supposed to be able to think and to act, in a sudden emergency which you have not created, more quickly and more accurately, correctly, than the reasonably competent, careful man. And so, if you find that Macklin was on Young's side of the road, you will ask yourselves whether Young's act in turning, if you think he did turn, was the right act under the circumstances, or if it was not the right act whether it was an act that ought to be called a negligent act.

Then, supposing you find that Macklin was not on Young's side of the road—let me pause there a moment before I go to that question. In considering Young's act I think you ought to inquire as to how long it had been apparent to Young, or how long it would have been apparent to Young had he been paying all the attention that he ought to have been paying, that Macklin was on the wrong side of the road. Young

1933

MACKLIN v. YOUNG.

Hughes J.

does not speak of seeing Macklin—you will correct me if I am wrong—I think Young does not speak of seeing Macklin while Macklin was on the curve; I think Young's knowledge of Macklin's lights, according to Young, begins when Macklin was in or getting into the straight. Now, suppose that Macklin in the straight was on or partly on Young's side of the road; did Young become aware of that fact as soon as a reasonably competent, careful driver would have become aware of it? If not, was failure to become aware of Macklin's position sooner a bit of negligence which had to do with or was a cause of this accident?—because of course you are not concerned with any bit of negligence that did not enter into the accident itself.

Well, supposing Macklin, as I say, was on the wrong side of the road, then, having regard to the duty to see, and having regard to what I have said about action in an emergency, was Young negligent in what Young did if Young pulled to the left instead of pulling to the right, or instead of stopping, or instead of doing whatever else may be suggested?

There is no doubt that the jury weighed the conflicting evidence seriously. At one time the jury returned and the following discussion took place between the learned trial judge and the jury:

JUROR: We are deadlocked as to the testimony of several witnesses, and that is where we stand just at present.

His LORDSHIP: Do you mean deadlocked as to what the witnesses said, or as to—

JUROR: As to whether we consider—

His LORDSHIP: They ought to be believed?

JUROR: —they are right to the points or as to whether we should accept or reject—

His LORDSHIP: I see. It is not any doubt as to what they said?

JUROR: No, your Lordship.

The respondents have no finding from the jury that there was a sudden emergency. In fact, there is a great deal of evidence from which the jury may well have inferred that the respondent, James A. Young, if he had been keeping a proper look out, could, with or without a slight reduction of speed, have allowed Macklin to pass safely on the east side of the road.

The following questions and answers in the cross-examination of the respondent, James A. Young, are apposite:

Q. Yes, that is correct. We have already heard that this was November; the trees, of course, were bare of leaves, weren't they?—A. I would expect they would be, yes.

Q. Very much as the photograph, Exhibit 2, indicates?—A. Yes.

Q. No obstacle to prevent you seeing the headlights, the full headlights, of the Macklin car shining as it came into the curve, was there?—A. If I had been looking down that far, I couldn't—

Q. Well, that is it, Mr. Young. Now perhaps you will tell us, why weren't you looking?

Mr. BOWLBY: He said if he had been looking that far.

Mr. BELL: Q. Why weren't you looking?—A. Well, ordinarily driving you look fifty or a hundred feet ahead.

Q. Yes?—A. In around that direction.

Q. Yes?—A. This car came very rapidly into the orbit of my vision.

Q. And did you or did you not know that there was a curve there? —A. Not until afterwards, no.

Q. So that the situation is this, that, not knowing there was a curve there, you were not prepared for the appearance of anything swinging around the curve, and you could not tell whether or not it had got over to your side; is that putting it fairly?—A. No, that is not the way of it. The car was on my side when I saw it.

The respondents, moreover, have not a finding of the jury that the appellant was wholly or partly on the west side of the road at the time of the accident. In fact, it may be contended that the appellant has a finding of the jury that he was back to the east side of the road but was too late to avoid the accident, because the respondent, James A. Young, also swerved to the east side of the road.

Nor have the respondents a finding of the distance between the cars when the appellant swerved to the east side of the road except by inference from the words " too late," the tardiness therein expressed possibly having a causal relationship to the accident only by reason of the frustration spoken of by the learned trial judge.

In *Smith* v. *Schilling* (1), Lord Justice Scrutton said:

Great attention is always paid to the view which the judge at the trial takes of the verdict of the jury.

This jury, fully charged, did not find any sudden emergency and put Young into the category of a negligent person. It is impossible to remove him from this category on the findings of the jury without also weighing directly conflicting evidence; and we do not suggest that, if we were permitted to weigh the evidence, we should exonerate him.

The appeal, therefore, should be allowed with costs against the respondent James A. Young here and in the Court of Appeal and the judgment of the learned trial judge restored, with this variation, however, that in accordance with *McDonald* c. *Adams* (2), with which we agree, paragraph 3 of the formal judgment which gave the appellant indemnity against the respondent James A. Young for

(1) [1928] 1 K.B. 429 at 432. (2) (1932) 41 Ont. W.N. 145.

1933

MACKLIN v. YOUNG.

Hughes J.

one-half of the damages awarded to the respondent Mary I. Young should be struck out.

Appeal allowed with costs; judgment at trial restored with variation.

Solicitors for the appellant: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitors for the respondents: *Bowlby & Turville.*

---

* PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ.