STUART MILNE HUTCHEON BY HIS NEXT FRIEND, ETHEL HUTCHEON, AND THE SAID ETHEL HUTCHEON (PLAINTIFFS) ..... } APPELLANTS;

AND

TAYLOR STOREY (DEFENDANT)..... RESPONDENT.

1935

* Oct. 30, 31.
* Nov. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Motor vehicles—Collision between motor car and bicycle—Conflict of evidence as to manner and place of accident—Judgment at trial on jury's findings—New trial ordered by Court of Appeal—Judgment at trial restored by Supreme Court of Canada—Jurisdiction of Supreme Court of Canada challenged on ground that judgment of Court of Appeal was "made in the exercise of judicial discretion" within s. 38 of Supreme Court Act (R.S.C. 1927, c. 35).

A motor car driven by defendant westerly on Q. street, a "through" highway, near the city of Toronto, collided with a bicycle driven by plaintiff who had come southerly on M. avenue. There was conflicting evidence as to the manner and exact place of the accident. Defendant contended that plaintiff came fast down M. avenue and ran into the motor car at the street intersection. It was contended for plaintiff that he had turned off M. avenue and proceeded westerly along Q. street and was struck by the motor car about 50 feet west of M. avenue. Plaintiff's action for damages was tried with a jury, who, in answer to questions, found that defendant had not satisfied the jury that the accident did not arise through any negligence or improper conduct on defendant's part; that defendant's negligence causing the accident was "in not exercising the proper amount of care to avoid striking boy who was on the highway going west";

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

1935

HUTCHEON v. STOREY.

that plaintiff could not have avoided the accident by exercising reasonable care; and assessed damages, for which plaintiff was given judgment. The Court of Appeal for Ontario, taking the view that it was "almost impossible to form any opinion as to exactly what had taken place," that the "extraordinary large amount" of damages "could only be justified by a finding of serious permanent injury," that the trial was of a "generally unsatisfactory nature," and that there was "the possibility of the production of more satisfactory evidence at a new hearing," set aside the judgment at trial and ordered a new trial. Plaintiff appealed.

Held: (1) The judgment of the Court of Appeal was not a "judgment or order made in the exercise of judicial discretion" within s. 38 of the *Supreme Court Act* (R.S.C. 1927, c. 35); and an appeal lay to this Court.

(2) The judgment for plaintiff at trial should be restored. There was evidence on which the jury could find as they did; and their conclusions ought not to be disturbed merely because they were not such as judges sitting in courts of appeal might themselves have arrived at (*Toronto Railway Co.* v. *King*, [1908] A.C. 260, at 270; *Mechanical, etc., Co.* v. *Austin*, [1935] A.C. 346, at 375, cited). The reasons expressed by the Court of Appeal (discussed in the judgment of this Court) did not shew grounds to justify a new trial in this case.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario.

The plaintiffs sued for damages for personal injuries suffered by the infant plaintiff (a boy about 14 years of age) when he and the bicycle on which he was riding were struck, so it was alleged, by a motor car driven by the defendant.

The trial was before Kingstone J. with a jury. On the jury's findings (set out in the judgment now reported), judgment was directed to be entered for the plaintiffs. The Court of Appeal set aside the judgment at trial and ordered a new trial. The plaintiffs appealed to this Court.

The infant plaintiff had sued by his next friend, his mother, who had also sued for herself for hospital, medical and other expenses incurred. The jury had found the damages in one sum, $15,000, which was divided by the trial judge into two sums, one of $669.75 for the adult plaintiff, and one of $14,330.25 for the infant plaintiff. The appeal of the adult plaintiff to this Court was abandoned, the amount in controversy being insufficient to give jurisdiction without special leave.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal by the infant plaintiff

to this Court was allowed and the judgment at trial in his favour restored, with costs throughout.

R. R. McMurtry and *E. J. R. Wright* for the appellants.

J. M. Macintosh for the respondent.

The judgment of the Court was delivered by

DAVIS J.—This action arose out of what may be termed, perhaps inaccurately but for convenience, a collision between a motor car and a bicycle on a public highway at a point a short distance outside the westerly limits of the city of Toronto. The bicycle was being ridden by a boy of fourteen years and he was undoubtedly seriously injured. His widowed mother brought this action, as his next friend, for damages for the injuries sustained by him and she joined personally as a plaintiff in the action to recover payments made by her for medical and hospital services and sundry other expenses incurred by her as a result of the accident. The defendant is the owner and driver of the motor car.

It is common ground that the motor car and the bicycle came into collision on Queen street (which runs east and west) though the exact location of the collision on Queen street having regard to Macdonald avenue (which runs north and south) is highly controversial on the evidence and is in large measure the turning point in the case. Queen street has a paved highway, the concrete being 23 feet 9 inches wide. It is what is called a "through" highway and is a much travelled road. Macdonald avenue has neither a paved road nor sidewalks. A cinder path serves for pedestrians. There is a noticeable incline on Macdonald avenue as it runs southerly into Queen street and there is a "Stop" sign on Macdonald avenue close to the point of its intersection with Queen street.

The defendant was driving his car westerly along Queen street and the boy on the bicycle had come down Macdonald avenue on the cinder path. There were two theories advanced as to the exact location and cause of the accident. The defendant's theory is that the boy on the bicycle came down the cinder path on Macdonald avenue at a fast rate of speed, entered upon Queen street without stopping and ran

1935

HUTCHEON v. STOREY.

Davis J.

right into the defendant's motor car just as the motor car was passing Macdonald avenue, striking the motor car in the centre of one of the side doors of the car. The other theory, advanced on behalf of the boy, is that he had turned off Macdonald avenue and was at the time of the collision proceeding westerly along Queen street, about 4 or 5 feet from the northerly side of the paved road, when at a point about 50 feet west of Macdonald avenue the motor car overtook him; the right front bumper and fender of the motor car striking the bicycle with such force as to cause the injuries. If the latter theory is correct, the motor car and the bicycle were travelling in more or less parallel lines along Queen street for a distance of some 50 feet. The two theories are obviously irreconcilable. There were very few witnesses of the accident and all persons who had any real knowledge of the facts and circumstances appear to have been called at the trial. In the very nature of a sudden accident of this kind it is not surprising that there was a very considerable conflict in the testimony as to the exact details and measurements. The case, which was essentially one of fact for a jury, was tried with a jury.

The following were the questions submitted to the jury and their answers:

1. Has the defendant, Taylor Storey, satisfied you that the accident in question did not arise through any negligence or improper conduct on his part? Answer yes or no. A. No.

2. If your answer to Question No. 1 is "no," then state fully wherein the driver was guilty of negligence which caused the accident to the plaintiff. A. In not exercising the proper amount of care to avoid striking boy who was on the highway going west.

3. If your answer to Question No. 1 is "no," then state if in your opinion the infant plaintiff could have avoided the accident by exercising reasonable care. Answer yes or no. A. No.

4. If your answer to Question No. 3 is "yes," then state fully what the plaintiff could and should have done which would have avoided the accident. A. (No answer).

5. At what amount do you assess damages? A. $15,000.

6. If your answer to Question No. 1 is "no," and to Question No. 3 your answer is "yes," then state if you find it practicable to apportion the respective degrees of fault as between the driver and the infant plaintiff. Answer yes or no. (No answer).

7. If your answer to Question No. 6 is "yes," then state the respective degrees of fault.

Driver ..... Per cent.
Plaintiff ..... Per cent.

(No answer).

It is plain that the jury accepted the theory advanced on behalf of the boy, in that the jury specifically state that the defendant did not exercise "the proper amount of care to avoid striking the boy who was on the highway going west." Apart from the question of the nature and extent of the physical injuries suffered by the boy, the whole case was developed in evidence and put to the jury upon the two conflicting theories of the collision, and if the jury had accepted the defendant's theory that the boy on the bicycle ran right into the motor car at the intersection of Macdonald avenue with Queen street, they undoubtedly would have said so. Their words "who was on the highway going west" must be taken to express the acceptance by them of the other theory, that the accident did not occur at the intersection but some fifty feet west of the intersection while the boy was proceeding westerly along Queen street. The issue was very fairly, and I think completely, put to the jury by the learned trial judge. In fact he recalled the jury after some discussion with counsel and charged them explicitly thus:

> If you find that the plaintiff was the author of his own misfortune, so to speak: he would be the author of his own misfortune if you came to the conclusion that he came down Macdonald avenue and did not stop at the stop sign and ran into this motor car at that point.

And again,

> I spoke to you about Question No. 3, about his contributing to the negligence, and that is another thing altogether. He may not have been entirely the author of his own misfortune, but he may have, by reason of his not stopping, contributed to the cause of the collision. That is entirely for you to say.
>
> The two points are quite distinct in that sense, and that is the reason you are asked that as a separate question.

Not only did the jury expressly find that the accident was caused by the defendant "not exercising the proper amount of care to avoid striking the boy," but specifically found that the boy "could not have avoided the accident by exercising reasonable care."

There was evidence, and in fact a good deal of evidence, in support of the theory that the defendant struck the boy on the bicycle on Queen street about fifty feet west of Macdonald avenue while the boy was proceeding along Queen street in a westerly direction. It is quite impossible for us to say that the jury could not properly find, viewing

1935

HUTCHEON v. STOREY.

Davis J.

the whole evidence reasonably, that the place of the accident was where they obviously put it. The evidence was conflicting but the jury was the tribunal entrusted with the duty of determining the issues of fact and their conclusions on such matters are not to be disturbed merely because they are not the conclusions which judges sitting in courts of appeal might themselves have arrived at, to adopt the words of Lord Atkinson in *Toronto Railway Co.* v. *King and another* (1).

Counsel for the defendant very properly urged before us the duty in law that rested upon the boy to stop his bicycle at the foot of Macdonald avenue before entering upon Queen street, a through highway. But that point was thoroughly canvassed in evidence at the trial and the jury, in our view, was properly directed upon it. It is to be observed that the defendant stated in evidence that he was familiar with the district at Queen street and Macdonald avenue; that he knew Macdonald avenue was dangerous and a well used highway; that he would naturally keep a lookout for that particular street; that when he was about forty feet east from Macdonald avenue he observed the boy coming down Macdonald avenue on the bicycle; that he thought the boy's speed was very fast; and that, while he knew the boy should stop at the intersection, he did not think that the boy in fact would be able to stop. It is one thing for a motor car driver to assume that another person will comply with the law and stop before entering upon a through highway and to govern his conduct in relation to that other person on that assumption; it is quite a different thing for the driver of the motor car to admit that he observed the other person and realized not only the unlikelihood but the apparent inability of the other person at the given time and under given circumstances to stop.

Now, as to the injuries to the boy. Dr. McKenzie of Toronto, an outstanding brain specialist, described the injuries to the boy under two headings. There was evidence of local injury to the brain in the back part of the head, and, apart from that, there was evidence of a severe general

(1) [1908] A.C. 260, at 270.

injury to the brain as a whole, a severe concussion. A fragment of bone, probably one and one-half inch, was driven through the covering of the brain into the brain and when that fragment of bone was removed the covering over the brain was badly damaged and the underlying brain was pulped and damaged, and part of it oozed out and had to be removed. There was probability of trouble from injury to the frontal region of the brain and more than a possibility of the boy developing epileptic seizures.

The defendant appealed to the Court of Appeal for Ontario against the judgment in favour of the plaintiffs directed to be entered by the trial judge upon the answers of the jury to the questions submitted. The Court of Appeal unanimously set aside the judgment and directed a new trial. From that judgment the plaintiffs appealed to this Court. It is necessary, therefore, that we examine the written reasons given by the Court of Appeal for their judgment. The Court did not discuss the problem that was presented to the jury at the trial as to which of two theories of the accident was to be accepted or the real effect of the language of the jury as giving expression to the acceptance of one or other of the theories. The judgment does not discuss the evidence except to state as facts that the collision took place "at or near" the intersection and that the plaintiff did not stop before entering the intersection and "apparently struck the front door of the defendant's car with much force denting the door and suffering somewhat severe injury." The Court of Appeal obviously took a view of the evidence that was rejected upon confiicting evidence by the jury. The Court concluded that "it is almost impossible to form any opinion as to exactly what had taken place." Assuming that to be so, then the defendant had not satisfied the statutory obligation, which rested upon him as the owner and driver of the motor car, of establishing that the accident did not arise through his negligence or improper conduct (sec. 42 (1) of the *Highway Traffic Act*, R.S.O. 1927, ch. 251), and that is exactly what the jury said in answer to the first question. Upon that state of fact, the plaintiffs were entitled to judgment. In our view, it was not impossible for the jury to come to a conclusion as to exactly what had

1935

HUTCHEON v. STOREY.

Davis J.

taken place. There are difficulties in the case, as there are in all these motor collision cases, but that does not mean that the jury is not entitled to accept one of two or more conflicting stories of what in fact took place. The reasons for the judgment appealed against proceed further to state that "the medical evidence was extremely confusing, some of the doctors and the mother" suggesting that the disposition of the boy has been changed as a result of the accident. As a matter of fact there were only two doctors called, and both of these on behalf of the plaintiffs. Dr. McKenzie was the only doctor called to give opinion evidence. Dr. Dalrymple merely spoke of the condition of the boy as he saw and examined him in the hospital. We cannot, with respect, agree that the medical evidence was in any way confusing. The judgment further proceeds to state that "there is no corroboration of the mother's evidence as to the character of the boy before the accident." But there can be no legal consequence to the absence of corroboration of statements by the mother as to the disposition of the boy before and after the accident. The jury saw both the mother and the boy and heard their evidence, and the weight to be attached to their evidence was entirely a matter for the jury. The judgment further states the amount of damages was an "extraordinary large amount" but does not say that in the opinion of the Court the amount was either unreasonable or excessive. The amount is large but not so large as to disclose an entirely wrong principle in its ascertainment or an entirely unreasonable view of the evidence. The Court expressed the view that such damages "could only be justified by a finding of serious permanent injury." In our view, there is much more in the evidence than a mere possibility of a very serious permanent injury. The judgment concluded that the trial already had was of a "generally unsatisfactory nature" and that there was "the possibility of the production of more satisfactory evidence at a new hearing." Neither counsel before us could offer any suggestion as to the possibility of the production of more satisfactory evidence on a new trial than was had on the first trial, and we are at a loss to understand what sort of evidence is now available that was not available and given at the first

trial. There were two affidavits sought to be used by the defendant in the Court of Appeal on an application for a new trial, but as these affidavits were not admitted in that Court and were included in the appeal book, by order of Mr. Justice Middleton, only for convenience if this Court should think they should have been received in the Court below, this Court took the same view as the Court below that these affidavits could not be read.

With the greatest respect, we cannot agree with the view that the trial was of a generally unsatisfactory nature, and in our opinion the Court of Appeal was not justified in directing a new trial upon any of the grounds referred to in the reasons for their judgment or upon any other ground discussed before us. There was, in our view, no "substantial wrong or miscarriage" that would have entitled the Court below under sec. 27 of the Ontario *Judicature Act*, R.S.O. 1927, ch. 88, to grant a new trial. Lord Wright in the House of Lords in the very recent case of *Mechanical and General Inventions Co. Ltd.* v. *Austin* (1) said:

> An appellate court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion.

The appeal must be allowed and the judgment of the learned trial judge restored in so far as the infant plaintiff recovered against the defendant the sum of $14,330.25 to be paid into court to his credit upon the terms of the judgment.

The defendant having moved to quash the appeal to this Court of the boy's mother as a plaintiff in respect of her recovery at the trial of the sum of $669.75, her counsel abandoned her appeal as being an amount in controversy insufficient to give jurisdiction without special leave, and the judgment of the Court of Appeal therefore stands in respect of the rights of the plaintiff mother.

The defendant raised before us on a substantive motion, which we enlarged to consider on the hearing of the main appeal, the question of the jurisdiction of this Court to entertain the appeal, upon the ground that the order of the Court sought to be appealed from was "a judgment or order made in the exercise of judicial discretion" and

(1) [1935] A.C. 346, at 375.

1935

HUTCHEON v. STOREY.

Davis J.

therefore not appealable to this Court under sec. 38 of the *Supreme Court Act*. Sec. 36 expressly gives a right of appeal from a judgment "directing a new trial." The reasons given by the Court of Appeal for its order directing a new trial were, as in *Varette* v. *Sainsbury* (1), insufficient grounds in law upon which to justify an order for a new trial, and the subject matter was not one which by special statute or by its very nature was merely a matter of discretion for the Court below. The motion to quash is therefore dismissed.

The costs of the infant plaintiff of this appeal, including the costs of the defendant's motion to quash, and his costs in the courts below, must be paid by the defendant.

Appeal allowed with costs.

Solicitors for the appellants: *Nesbitt, McMurtry & Ganong.*
Solicitors for the respondent: *Macdonald & Macintosh.*

(1) [1928] Can. S.C.R. 72.