JEAN BRUCE an infant under the age of twenty-one years by ROY BRUCE her next friend and ROY BRUCE *(Plaintiffs)* ..... APPELLANTS;

1954
*Dec. 1
1955
*Jan. 25

AND

DONALD W. McINTYRE *(Defendant)* ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor cars—Collision—Both drivers at fault—No clear line between fault of the one or the other—Apportionment—The Negligence Act, R.S.O. 1950 c. 252, s. 5 applied—The rule in Davies v. Mann, considered.

Where in an action for damages for negligence both parties are found to be at fault and no clear line can be drawn between the fault of the one and the other the rule in *Admiralty Commissioners* v. *S.S. Volute* [1922] A.C. 129 at 144 applies. In the circumstances of this case s. 5 of *The Negligence Act,* R.S.O. 1950 c. 252, should be applied and the parties found equally at fault.

In an action in damages arising out of the collision of two motor cars it appeared that the male appellant, on a bright moonlight night, turned his car into a laneway on the east side of a highway running north and south and then turned it out again facing southward so that part of it projected into the highway so as to obstruct north-bound traffic. He then turned on a small parking light on the right front of the car. While seated in the car with his fiancé and co-appellant, he saw the respondent's car approaching from the south a quarter of a mile distant but did nothing further to give notice of the position of his own car. The respondent, proceeding at some 45 m.p.h., did not see the stationary car until an instant before the collision.

The trial judge found both parties negligent but held that the negligence of the respondent was the sole cause of the collision. The Court of Appeal for Ontario varied the judgment by finding both parties equally to blame.

Held: that the appeal should be dismissed.

Per Rand J.: The rule in *Davies* v. *Mann* 10 M. & W. 546 does not contemplate a case in which one of the parties becomes aware in time to avoid the negligence of the other. *The Eurymedon* [1938] P. 41 at 49; *Davies* v. *Swan* [1949] 291 at 311; *Boy Andrew* v. *St. Rognvald* [1948] A.C. 140 at 149 and *Sigurdson* v. *B.C. Electric Ry. Co.* [1952] A.C. 291 at 302, applied. *McKee and Taylor* v. *Malenfant and Beetham* [1954] S.C.R. 651 distinguished.

Decision of the Court of Appeal for Ontario [1954] O.R. 265 affirmed.

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

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APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) whereby the judgment at trial was varied by finding the two parties to the action equally to blame.

C. L. Dubin, Q.C. and *William Schreiber, Q.C.* for the appellants.

G. N. Shaver, Q.C. for the respondent.

RAND J.:—Mr. Dubin puts his case on the application of the rule in *Davies* v. *Mann* (2), and cites a statement of that rule given in *Brown* v. *B. & F. Theatres* (3). I take that statement to be in the terms of the general acceptation of the rule for upwards of 100 years following the decision. The language of Anglin J. (in the Supreme Court of Ontario) in *Brenner* v. *Toronto Ry. Co.* (4), quoted at length in *B.C. Electric* v. *Loach* (5) is to the same effect.

But within the last score or so of years a qualification has made its appearance. Its first expression seems to have been in the case of *The Eurymedon* (6) in which Greer L.J. said:—

> If, as I think was the case in *Davies* v. *Mann, one of the parties in a common law action actually knows from observation the negligence of the other party,* he is solely responsible if he fails to exercise reasonable care toward the negligent plaintiff.

This was quoted with approval by Bucknill L. J. in *Davies* v. *Swan* (7). Evershed L.J. at p. 317 concurred:—

> In that case the plaintiff's negligence or fault consisted in placing the donkey upon the highway, *but it having been observed in due time by the defendant,* the defendant by colliding with it was treated as the person responsible for the accident, since by the exercise of ordinary care he could perfectly easily have avoided it: in other words, the negligence of the plaintiff had really ceased to be an operating factor in the collision.

In *Boy Andrew* v. *St. Rognvald* (8), Viscount Simon, speaking of *Davies* v. *Mann,* says:—

> The negligence of the absent donkey-owner, serious as it was, created a static position where nothing that he could do when collision threatened would have avoided the result, whereas the negligence of the driver of

(1) [1954] O.R. 265; 2 D.L.R. 799.
(2) (1842) 10 M. & W. 545; 152 E.R. 588.
(3) [1947] S.C.R. 486 at 489.
(4) (1907) 13 O.L.R. 423.
(5) [1916] 1 A.C. 719; 23 D.L.R. 4; 20 C.R.C. 309.
(6) [1938] P. 41 at 49.
(7) [1949] 2 K.B. 291.
(8) [1948] A.C. 140 at 149.

the vehicle continued right up to the moment when the collision became inevitable. As by driving more carefully he could have avoided hitting the donkey, his negligence was the sole cause.

I am unable to distinguish this from the language of the Judicial Committee in *Loach* and of Anglin J. in *Brenner*.

In *Sigurdson* v. *B.C. Electric Ry. Co.* (1), Lord Tucker, delivering the judgment of the Judicial Committee, dealt with the proposition urged by the respondent that where one party (A) actually knows of the dangerous situation created by the negligence of another (B) and fails by the exercise of reasonable care thereafter to avoid the danger, A is, generally speaking, solely liable, but that if A, by reason of his own negligence did not actually know of the danger, or by his own negligence or deliberate act has disabled himself from becoming aware of the danger, he can only be held liable for a proportion of the resulting damage. On this Lord Tucker observed:—

> No authority was cited to their Lordships for such a far-reaching proposition, which, if created, would seem to provide the respondent in such a case as the present with a means of escaping its 100% liability by relying on the failure of its motorman to keep a proper lookout . . . Moreover, the proposition is directly contrary to the second rule propounded by Greer L.J. as useful tests in *The Eurymedon,* although it is true to say that it is not altogether easy to reconcile rules 2 and 4 as there stated.

I find it no easier to reconcile this statement of the rule with that made by Greer L.J. and by Evershed L.J. If the circumstance of knowledge had in fact been present in *Davies* v. *Mann,* it could scarcely have escaped mention as it would have presented a situation essentially different from what the report indicates, and one so simple as not to justify treating the decision as laying down a "rule" of any sort.

On the argument Mr. Shaver, distinguishing the basis of that decision from what has been called the "last chance", contended that both had been superseded by the Contributory Negligence law, but the decision of this Court in *McLaughlin* v. *Long* (2), is to the contrary. Other facts of the situation here, however, put the case beyond the scope of either of these formulas, assuming them to have appreciable distinguishing features. An essential element in the former is that the plaintiff should have been unable

(1) [1953] A.C. 291 at 302. (2) [1927] S.C.R. 303.

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at the critical time to take any action that might have avoided the accident and that was not the case here. The oncoming car had been seen for a quarter of a mile away by the plaintiff who when at any distance beyond one hundred and fifty feet could have switched on his headlights and averted the crash.

That circumstance itself is a sufficient distinction; but I think it desirable to examine the case in the light of the provisions of the Motor Vehicle law. The appearance of automobiles upon our highways has obviously created crowding dangers and hazards undreamt of in 1840. The speed and the momentum of these vehicles and the complexity of their operations are such that it has become necessary to place every person concerned with or who may be affected by them under a greatly heightened exercise of care and imagination to stimulate awareness and anticipation. The elaborate and detailed requirements that are now set out in the statutes dealing with speed, lights, signals, positions, parking and other details of management and operation combine to create more than a mere duty of abstention from affirmative action which may cause damage or injury to others; they may require action either by way of precautionary warning or by removing one's self or property from a range of danger which theoretically the prudent conduct of others would make unnecessary. They give rise to a responsibility for greater foresight than the mere first stage of minimum or formal measures of one's own proper conduct: they are intended to promote reciprocal, even overlapping, precautions. Always depending on the surrounding circumstances and subject to other demands of safety, they bind us to contemplate carelessness or oversight in others regardless of their duty under the rules of the road, and they require us to act within the limits of alerted reasonableness to ensure, in the interest of the public, the practicable maximum of generalized and mutual protection against injury to person and damage to property. The scandal of the ravages of our holidays from this cause is the more than sufficient justification for the insistence on the drastic measures to which our highway authorities have been aroused.

The object of the rule forbidding parking on the highway is to protect against the risks of excessive speed and the imperfections or carelessness of lookout chiefly in conditions of limited visibility. The toll of disaster has been too great to leave any doubt about the hazards in fact bound up with stationary cars of which the prohibition is a legislative recognition. Most of the plaintiff's car must be taken to have been on the highway with only one weak dull amber parking light showing and he was not justified in relying wholly upon the oncoming driver to see his car in time to avoid it where by the most ordinary and common sense action on his part the risk could have been eliminated. He had placed himself in a wrongful position which, without serious fault on the part of others, might not be appreciated either because of the physical conditions, the shadows of the trees, for example, the merging of the weak light in that of the moonlight, the nearness of the car to the right edge and the absence of red lights, or casualness in watching the road empty of traffic; he could and in fact did foresee the danger of being parked on the wrong side without a signal of his presence; and the duty arose to make use at least of the sufficient means of warning and precaution immediately at his hand. He did not do this and his failure became negligence which played an effective part in producing the collision.

The case of *McKee and Taylor* v. *Malenfant and Beetham* (1), a judgment of this Court, was cited, the facts in which were somewhat similar to those here. But there the trial judge found that the plaintiff saw the stopped truck in sufficient time to enable him to avoid collision. There were also the circumstances that the truck was not parked within the meaning of the statute, that it was facing in its proper direction, that the required lights were showing and that the stopping was in the course of the legitimate purpose of gathering up equipment used in work along the highway. Although the external conditions may objectively be the same, a legitimate use of the highway may excuse where a forbidden one will not. The situation was, there-

(1) [1954] S.C.R. 651; 4 D.L.R. 785.

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fore, essentially different, and like the ordinary citation of authority in negligence controversies, it gives little help to the solution of the question here.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.:—I agree with my brother Locke as to the position of the appellants' vehicle in the highway at the time of the collision. In so leaving his vehicle insufficiently lit, the appellant was in breach of s. 10(1) of *The Highway Traffic Act*. His failure to use the other means of illumination at hand which, if used, would have constituted compliance with the statute and given adequate warning of the presence of his vehicle in the highway to approaching vehicles such as that of the respondent, of which he was fully aware, constituted, in my opinion, negligence.

It was undoubtedly the respondent's contention at the trial that the appellant's vehicle was completely unlit and that a light of some sort appeared on it immediately prior to the collision, but I do not think, with respect, that the respondent's evidence is quite what the learned trial judge understood it to be. The respondent testified that if there had been "any" parking lights or light on "a vehicle" on the road, he would have been able to see it and have prevented an accident by swerving. He also testified that if he "had seen" even the small light which the appellants testified was in fact burning, he would have been able to avoid the appellant's vehicle.

The respondent further testified that he could easily, that night, pick up an object in his lights ahead at 150 yards. When asked as to his explanation for not seeing the appellant's vehicle, assuming there were no lights on it, when he was even 200 feet from it, he said he could give no explanation "unless he (the appellant) was sitting in the shade of the trees." His answer to the question

> If the car had one light on that was burning, would you expect that *under ordinary circumstances* you would have been able to see that before the lights of your car would pick it up?,

was:

> It depends how strong it was.

He did not say, as the learned trial judge appeared to think, that the "only" reason he could give for not picking up the other car was because he was not looking. What he

said was that "if" he had not been looking that would be an explanation for not seeing the car. He testified, however, that in fact he had been keeping a good look-out.

In these circumstances, I find myself unable to disagree with the view of the Court of Appeal that a clear line cannot be drawn between the negligence of the appellant Roy Bruce and that of the respondent.

I would dismiss the appeal with costs.

ESTEY J.:—I agree that the appeal should be dismissed with costs.

LOCKE J.:—This is an appeal in a motor car accident case from a judgment of the Court of Appeal of Ontario, whereby a judgment for damages awarded to the appellants at the trial was varied by finding the respondent and the appellant Roy Bruce equally to blame.

The Guelph Line Road, a gravelled highway the travelled portion of which was 22 ft. in width, runs south from Haltonville. The farm of the father of the appellant Jean Bruce, lies to the east of the highway and a lane some 13 ft. in width leading westerly from the farm house, after broadening out to a width of 19 ft., connects with it. At about 7.30 in the evening of October 12, 1951, the appellant Roy Bruce, accompanied by his fiancee, to whom he has since been married, drove his 1937 Chevrolet automobile south from Haltonville along the highway and, when he approached the point where the lane joined the highway from the east, drove into the entrance to the lane and stopped partly in the lane and at least partly down the gravelled portion of the highway itself. According to him, the car was stopped facing in a south westerly direction: the appellant Jean Bruce, when examined for discovery, said that it was facing south down the road. Having stopped the car, Bruce said that he turned off the head lights and turned on the parking lights. There was only one of these in the front end of the car and this he described as a dull amber light, something like a flash light, placed inside the right head light and which, he said, pointed downward towards the road. There was no parking light in the left front head light.

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Bruce's evidence is that he and his companion remained seated in the car in this position for some three to five minutes. She intended to walk down the lane to her father's house while he intended to continue along the highway to his home. While sitting in the car, he saw the respondent's car approaching from the south at a high rate of speed about a quarter of a mile distant and while, on his own admission, at least part of his own car was on the travelled portion of the highway, he did not turn on the head lights of his car which would have given clear notice to the approaching car of its position. The respondent's car continued on its way and a collision took place.

The respondent was driving a 1941 Dodge Sedan, with sealed beam standard head lights which were turned on. According to him, he was driving at a speed of 45 miles an hour to the right of the center of the road, with the right wheels of his car about a foot and a half from the easterly limit of the travelled portion. While he said that the head lights would enable him to pick up objects at a distance of 150 yards, he did not detect the presence of Bruce's car or see any light until an instant before the collision, when he said that he saw a sudden flash of light. The cars collided in a manner which resulted in the principal damage being done to the right front portion of each. Bruce's car was driven to the north by the impact and stopped, facing westerly, partly in the ditch which ran along the east side of the highway. The respondent's car stopped in a position straddling the road some 65 feet to the north of the point where the cars had collided and some 20 feet to the north of Bruce's car.

To the east of the highway, growing in a north and south line some 16 or 17 feet from the travelled portion of the road, were large maple trees. These grew both to the north and to the south of the lane and along the north side of the lane itself leading in to the farm. While it was bright moonlight, it was shown by the evidence that there were shadows cast by these trees across the lane and highway which would contribute to the difficulty of seeing a car such as that of the appellant Bruce, which was dark blue in colour.

There was a conflict of evidence as to the position in which Bruce's car was standing as the appellant approached from the south. The trial Judge found that it was then

facing in a south-westerly direction, with about 5/6ths of the rear portion off the main highway. The Chief Justice of Ontario, with whom Hope J.A. agreed, came to a different conclusion, finding that about 5/6ths of the rear portion of the car was on the travelled portion of the highway.

The only evidence relating to this question was that of the appellant Bruce and of Harold Pollard, an engineer who specializes in the investigation of motor vehicle accidents. Bruce's evidence was that the front right wheel of his car was within 3 or 4 inches of the easterly limit of the travelled portion of the highway, though he was not sure that the rest of the car was entirely clear of it. It was shown that to the north of the point where the north side of the lane joined the highway there was a mail box upon a post about one or two feet north of the lane and one foot to the east of the travelled portion of the highway. Bruce had said when examined for discovery that the left rear fender of his car was the part of it closest to the post carrying the mail box and was a foot or two feet distant from it and to the south of it. At the trial, he said that the right rear corner of his car was about one foot south of the post.

Pollard, whose evidence on this point was accepted by the learned Chief Justice, said that it was impossible that this could be true since the mail box and post were not touched by Bruce's car as it recoiled to the north after the impact. Having examined Bruce's car which was 65 inches in width and being informed as to the position in which it had stopped after the collision, he said that, in his opinion, to the extent of 57 inches of its width at least, Bruce's car must have been standing upon the travelled portion of the highway. I respectfully agree with the conclusion of the Chief Justice on this aspect of the matter.

The learned trial Judge, while finding that Bruce had been negligent in parking his car in the position referred to, found that this was not an effective or contributing cause of the accident. The respondent's car was properly equipped with head lights which, he had said, lit up the road to a distance of 150 yards ahead of him but, admittedly, he had not seen Bruce's car nor the small parking light until an instant before the collision and had expressed the opinion that if he had seen the car when it was 100 feet or even

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50 feet distant he could have avoided the accident. In these circumstances, the learned Judge considered the respondent to be wholly at fault.

The negligence found against the plaintiff at the trial was "in stationing or parking his car in the position where he placed it." The reasons delivered did not particularize further and it is accordingly not clear whether the conduct of the appellant Bruce was found to have been a breach of the provisions of s. 43(1) of the *Highway Traffic Act* (R.S.O. 1950 c. 167).

The learned Chief Justice, after reviewing the facts, referred to the finding of negligence against the respondent as being that he should have seen Bruce's car before he did and, being unable to say that the learned trial Judge was wrong in this finding, considered that it should be affirmed.

The respondent has not appealed against this finding and, accordingly, the sole matter to be determined is whether the appellant Bruce was at fault or negligent and, if so, whether this "caused or contributed" to the accident, within the meaning of s. 2 of *The Negligence Act* (R.S.O. 1950, c. 252).

The Highway Traffic Act, by s. 10(1), requires that every motor vehicle on a highway after dusk shall carry three lighted lamps in a conspicuous position, one on each side of the front which shall cast a white, green or amber coloured light only, and one on the back of the vehicle which shall cast from its face a red light only. Subsection 14 of that section further provides that a motor vehicle, while standing upon any highway at such times as lights are required by this section for the vehicle may, in lieu of the above mentioned lighting equipment show one light carried on the left side of the car in such a manner as to be clearly visible to the front and rear for a distance of at least 200 feet and to show white to the front and red to the rear of the vehicle.

Section 41 deals with the rules of the road. These do not contain any provision directing vehicles to drive upon the half of the highway which is to the right of the center, except when meeting another vehicle going in the opposite direction. A driver is then required to turn out to the right from the center of the road, allowing to the vehicle so met one half of the road free (s-s. 8).

Section 43 (1), so far as it is necessary to consider it, provides that:—

> No person shall park or leave standing any vehicle, whether attended or unattended, upon the travelled portion of a highway, outside of a city, town or village, when it is practicable to park or leave such vehicle off the travelled portion of such highway.

Subsection 9 of that section provides that notwithstanding the other provisions of the section:—

> No person shall park or leave standing any vehicle whether attended or unattended upon any highway in such a manner as to interfere with the movement of other traffic.

The reasons for judgment delivered in the Court of Appeal do not specifically deal with the question as to whether Bruce's car was parked upon the highway, within the meaning of that term in s. 43(1) of the Highway Act. While it is unnecessary to decide the point for the purpose of disposing of this appeal, it is my opinion that the vehicle was parked and that, as it was practicable at the place in question to park it off the highway, there was a clear contravention of the provisions of the section. Apart, however, from this, persons driving upon the highway at night are, I think, entitled to proceed on the assumption that the drivers of other vehicles will comply with the provisions of the Highway Act and that any vehicle, either parked or temporarily stopped on the highway, will exhibit a red light at the rear (*Toronto Railway* v. *King,* (1), Lord Atkinson at p. 269). This, of course, does not relieve any driver of the obligation to exercise due care in driving so as to avoid injury to himself and others. The statute does not, it is true, provide that when vehicles are stopped or parked, they must be placed on or to the right of the roadway along which they are proceeding, but it is a matter of common knowledge that this is practically the universal practice. In my opinion, in the present case the respondent was entitled to assume that any other vehicle standing upon the highway or parked off the highway would be facing to the north and would exhibit the red light required by the Act. While Bruce said that he turned on the parking light when he stopped his car, and it was found as a fact in the judgment at the trial that the parking light was on, there is no finding as to the time in relation to the time of the arrival of the respondent's car at the point of collision when the light

(1) [1908] A.C. 260.

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was turned on, and the fact that he did not see any light until just before the impact may have been for the reason that it was not turned on until a very short space of time before the impact. It is further to be noted that Bruce had seen the respondent's car approaching when it was over 400 yards away and if, instead of exhibiting the small amber parking light, he had turned on the head lights of his car, the collision would clearly have been averted.

These several acts and defaults of the appellant Roy Bruce were, in the circumstances of this case, faults or negligence within the meaning of s. 2(1) of *The Negligence Act* which, in my opinion, contributed to the occurrence of the accident.

I respectfully agree with the opinion of the learned Chief Justice of Ontario that this is a case where the principle stated by Viscount Birkenhead in *Admiralty Commissioners* v. *S.S. Volute* (1), is applicable as no clear line can be drawn between the negligence of Bruce and that of the respondent. I am further of the opinion that this is a case in which s. 5 of *The Negligence Act* should be applied and these parties found to be equally at fault.

The appeal should be dismissed with costs.

CARTWRIGHT J.:—The facts of this case are stated in the reasons of my brother Locke.

Except on one point, the learned Chief Justice of Ontario accepted for the purposes of his judgment all the findings of fact made by the learned trial judge as to how the collision, out of which this action arises, occurred. The point to which I refer is as to the extent to which the stationary automobile of the appellant was obstructing the travelled portion of the highway. If it were necessary to choose between the conflicting views on this question, I would, for the reasons given by my brother Locke and by the learned Chief Justice, prefer the view of the latter to that of the learned trial judge. I do not, however, find it necessary to express a final opinion on this point as it is clear, as was pointed out by the learned Chief Justice, that, on either view, the appellant's vehicle was obstructing the travelled portion of the highway to such an extent that it would be

(1) [1922] 1 A.C. 129 at 144.

struck by an automobile proceeding northerly in a proper position on the highway unless the driver of such automobile saw it in time to avoid striking it.

The question whether on the findings of fact made by the learned trial judge as to how the collision occurred the negligence of the respondent was the sole cause or only a contributing cause of the collision, while itself a question of fact, is one with which the Court of Appeal was in as good a position to deal as was the learned trial judge. Where two parties have been negligent the question whether a clear line can be drawn between the negligence of the one and the other is frequently so difficult as to give rise to differences of judicial opinion. In the case at bar I agree with the conclusion expressed in the penultimate paragraph of the reasons of my brother Locke.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *William Schreiber.*

Solicitors for the respondent: *Shaver, Paulin & Branscombe.*

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*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Abbott JJ.