1958
*Oct. 24
Dec. 18

FRANK McRAE (*Plaintiff*) .... APPELLANT;

AND

FORD ELDRIDGE (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trial—Jury—Juror indicating in open Court misapprehension of certain fact—Whether duty of trial judge to redirect jury—No substantial wrong or miscarriage of justice.

While crossing a street in the City of Toronto, the plaintiff, a pedestrain, came into contact with a car driven by the defendant and was injured. After the accident a dent was found in the right front fender of the defendant's car. The jury found the defendant 30 per cent. to blame.

After the charge to the jury by the trial judge, a juror stated in open Court and before the jury retired, that it seemed to him that one part of the testimony was that the "bump" was on the left-hand side of the car and another on the right-hand side. The trial judge answered that it was a matter for the jury and that they were the sole judges of the evidence. Before both the Court of Appeal and this Court the defendant urged that the trial judge should have redirected the jury. By a majority judgment, the Court of Appeal ordered a new trial. The plaintiff appealed to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

No objection was taken before either the Court of Appeal or this Court to the adequacy or accuracy of the trial judge's charge. Both the evidence and the charge by the trial judge showed that the juror used the word "bump" to describe the point of impact between the plaintiff and the defendant's car and not to describe the dent in the fender. But even assuming that the juror meant to refer to the dent in the fender, no substantial wrong or miscarriage of justice occurred. The jury's answers contain intrinsic evidence that the supposed misapprehension did not affect the verdict. It seems to be beyond any serious question that the jury concluded that the point of impact between the defendant's car and the plaintiff was on the right-hand side of the defendant's car, and any misapprehension which may at one stage have existed in the mind of the one juror could not have affected the verdict.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Danis J. and ordering a new trial. Appeal allowed.

R. E. Holland and *M. J. O'Donohue,* for the plaintiff, appellant.

H. H. Wengle, for the defendant, respondent.

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*PRESENT: Rand, Locke, Cartwright, Martland and Judson JJ.

[1] [1958] O.R. 128, 12 D.L.R. (2d) 352.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] setting aside the judgment of Danis J. upon the verdict of a jury, whereby the appellant had been awarded $5,082.82 damages, and directing a new trial.

The appellant, a pedestrian, was crossing from the north to the south side of Bloor Street East, a highway in the city of Toronto, at about 9.00 a.m. on June 20, 1956. At the point where he was crossing there was a "pedestrian crossing" indicated by two white lines painted on the pavement 14 feet and 6 inches apart. At this point the width of Bloor Street from curb to curb is 54 feet. Approximately in the centre of the street are street-car tracks for west-bound and east-bound traffic. The distance from the northerly curb of Bloor Street to the most northerly rail is 19 feet.

According to the evidence of the appellant, a line of automobiles was proceeding westerly at a distance of about 1½ feet from the northerly curb when a west-bound automobile stopped at the east side of this pedestrian crossing and the persons in it motioned to him to proceed across. He says that he had walked to the centre of the road and stopped as a street-car proceeding easterly on the southerly track was approaching, that he stepped back "a pace or so" so as not to interfere with this east-bound street-car and that the next thing he remembers was after the accident when he was lying on the pavement.

The respondent's evidence was that he was driving his motor-car westerly with his wheels straddling the most northerly rail, that there was a solid line of west-bound motor vehicles between his car and the north curb of Bloor Street, that these vehicles were stationary, that he was going at about 20 miles per hour, that he did not see the lines indicating a pedestrian crossing and was unaware that such lines existed, although he had driven over this same piece of highway almost daily for some months, that he felt a thud which was caused by his car striking the appellant or, as he suggested, by the appellant walking into the side of his car, that he did not see the appellant before he

[1] [1958] O.R. 128, 12 D.L.R. (2d) 352.

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heard the thud and that after the accident there was a dent in the right front fender of his car which, he suggested, indicated the point of impact.

The theory of the defence was that the appellant had walked out between two stopped vehicles into, or into the path of, the respondent's vehicle in such a manner that the latter had no chance to avoid the accident. The theories of the plaintiff were (i) that he had reached the centre of the road and stopped there so that the defendant had ample time to see him or, alternatively, (ii) that even if he was struck by the right side of the defendant's vehicle the latter had time to see him and was negligent in failing to do so.

No objection was taken before the Court of Appeal or before this Court to the adequacy or accuracy of the charge of the learned trial judge in the course of which he said:

> After the accident he (the defendant) said he found a dent on the right front fender near the top of the fender three feet back of the headlight.

At the conclusion of the charge the transcript reads as follows:

> A Juror: My lord, it seems to me that one part of the testimony was that the bump was on the left hand side of the car and another on the right hand.
>
> His Lordship: Well, that is a matter for you. You are the sole judges of the evidence. That is a matter for you to make your finding. You can decide what you like. I can't influence you. You are the sole judges of the facts.

The jury then retired.

After the jury had retired, counsel for the respondent made an objection to the charge, with which we are not now concerned as the learned trial judge re-charged the jury in regard to it, and the transcript continues:

> This question that one of the jurymen asked as to the evidence, I think possibly it should have been explained to them, because I do not recall—I may be quite wrong about this—but I do not recall any evidence of a bump on the left side of the defendant's vehicle. Evidently there must have been some misunderstanding.
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> HIS LORDSHIP: There could have been a bump on the left side and Mr. McRae could have been shot up in the air.
>
> MR. WENGLE: There could have been a bump anywhere on that car.
>
> HIS LORDSHIP: The dent was found on the right side of the car. The defendant said—
>
> MR. WENGLE: There was no evidence of a dent on the left.

HIS LORDSHIP: I did not say there was any evidence.

MR. WENGLE: I am afraid the juror misunderstood that, and I think possibly that part of the evidence should have been clarified for the juryman. That is all I have to say.

The jury answered the questions put to them as follows:

Question 1: Has the defendant Ford Eldridge satisfied you that the accident was not caused by any negligence or improper conduct on his part:

Answer: No.

Question 2: Was there any negligence on the part of the plaintiff Frank McRae which caused or contributed to the accident?

Answer: Yes.

Question 3: If your answer to question number 2 is "Yes" then state fully of what the negligence of the plaintiff Frank McRae consisted. Answer fully.

Answer: Frank McRae did not exercise proper caution when attempting to cross the street.

Question 4: If your answer to question number 1 is "No" and your answer to question number 2 is "Yes", state in percentages the degree of fault or negligence attributable to each:

Defendant Ford Eldridge 30%

Plaintiff Frank McRae 70%

Question 5: Irrespective of how you answer the other questions, at what amount do you assess the total damages sustained by the plaintiff, Frank McRae?

Special Damages .... $ 2,442.75
General Damages $14,500.00
Total Damages $16,942.75

On these answers judgment was entered for 30 per cent. of the damages assessed.

The defendant appealed to the Court of Appeal. The only ground of appeal which was dealt with in the reasons of the Court of Appeal and which was urged before us was stated as follows in the notice of appeal:

> The learned trial Judge erred in failing and refusing to direct the Jury on the question of the location of the dent on the fender of the Defendant's automobile when it was apparent to the learned trial Judge from a question asked by a member of the Jury that the said Juryman misheard or misunderstood the evidence, and the learned trial Judge erred in not requiring that part of the evidence which dealt with the said dent to be read back to the Jury.

The majority of the Court of Appeal were of opinion that the remark of the juryman, quoted above, disclosed an error in his mind which it became the duty of the learned trial judge to correct and were not satisfied that his failure to do so had not occasioned some substantial wrong or miscarriage.

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Schroeder J. A., dissenting, was of opinion that there was no error on the part of the trial judge and alternatively that, if there were, no substantial wrong or miscarriage had been occasioned by the omission complained of and would have dismissed the appeal.

After reading the evidence and the charge of the learned trial judge, it is my opinion that in the remark quoted, the juryman used the word "bump" to describe the point of impact between the appellant and the respondent's vehicle and not the dent in the fender; and that the learned trial judge so understood him appears to me to follow from his statement to Mr. Wengle:

> There could have been a bump on the left side and Mr. McRae could have been shot up in the air.

The words "bump" and "dent" are not synonymous. One of the usual meanings of the former is "collision" and it appears to me that it was in that sense that it was used by both the juryman and the learned trial judge. However, as all the learned Justices of Appeal proceeded on the view that the juryman in using the word "bump" meant to refer to the dent on the fender of the respondent's car, I will deal with the appeal on that assumption.

Proceeding on this assumption, I am in substantial agreement with the reasons of Schroeder J. A. but I wish to rest my judgment on the second ground on which his decision was based, that is that it can safely be affirmed that there was no substantial wrong or miscarriage.

I think it altogether probable that the suggested misapprehension on the part of the one juryman, if it existed, was cleared up by other members of the jury, in the course of their deliberations, but, be that as it may, it appears to me that the jury's answers contain intrinsic evidence that the supposed misapprehension did not affect the verdict. If a juryman mistakenly believed that there was a dent on the left-hand front fender of the defendant's car the tendency of that mistake would be to bring him to accept the first of the theories of the plaintiff as to how the accident had happened to which I have referred above; and, had the jury found that the plaintiff had reached the centre of the road before being struck it seems to me that their answer to question no. 2 would have been differently worded

and that it is extremely unlikely that they would have placed only 30 per cent. of the blame upon the defendant who, on that view, would have been without any excuse or explanation for failing to see the plaintiff before the impact. Counsel for the defendant submits that the jury might have found the plaintiff 70 per cent. to blame even if they accepted the first of his theories because they might have thought that his stepping back "a pace or so" was the chief cause of the accident; but it seems to me that if this had been their view the jury would have said that the plaintiff's negligence consisted in stepping back into, or into the path of, the defendant's car.

When the answers of the jury are considered in the light of the whole evidence and of the charge of the learned trial judge it seems to me to be beyond any serious question that they concluded that the point of impact between the defendant's car and the plaintiff was on the right-hand side of the defendant's car, and, consequently, any misapprehension which may at one stage have existed in the mind of the one juryman cannot have affected the verdict.

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: O'Donohue & Hague, Toronto.

Solicitors for the defendant, respondent: Tureck & Wengle, Toronto.

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