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*Dec. 14, 15
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Feb. 9

GERMAINE ANNE CECILE BYRON, as Executrix of the Last Will and Testament of Basil Joseph Byron, deceased, and in her personal capacity (*Plaintiff*) APPELLANT;

ISOBEL MAY WILLIAMS and ROGER BARRY WILLIAMS (*Defendants*) .. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Collision at intersection—Jury's findings as to negligence—Whether trial judge misdirected jury on question of liability.

Damages—Negligence action—Charge to jury—Ceiling and floor amounts mentioned in relation to amount to be awarded—Whether misdirection requiring new trial on issue of damages.

As a result of a collision at an intersection between two automobiles the plaintiff suffered injuries and her husband, the driver of the car in which the plaintiff was a passenger, was killed. The other car was owned by the defendant IW and was being driven by the defendant RW. On the trial of the action subsequently brought by the plaintiff, the jury found that there was negligence on the part of the defendant RW, which caused or contributed to the accident. They gave the following particulars of his negligence: 1. driving too fast in an unfamiliar area; 2. in view of driving and road conditions—exercised poor judgment in passing a series of cars on a hill. The jury further found that there was no negligence on the part of the plaintiff's husband.

The plaintiff's damages for her own injury were assessed at $2,500 and her claim for the death of her husband was assessed at $27,000. Judgment was entered in favour of the plaintiff for the sums awarded together with costs. An appeal was taken by the defendants to the Court of Appeal. The whole Court found misdirection in the trial judge's charge with respect to damages. The majority of the Court found misdirection in the trial judge's charge with respect to the question of liability and a new trial was ordered with respect to both questions save only that the new trial directed as to damages was to be concerned only with the plaintiff's claim under *The Fatal Accidents Act* and there was to be no new assessment of her personal damages. The plaintiff appealed to this Court from the judgment of the Court of Appeal.

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

The Court rejected the position taken by the defendants that the trial judge ". . . failed to direct the jury that having regard for all the evidence there must have been some negligence on the part of the deceased, Basil Byron, which caused or contributed to the damages

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

of the plaintiffs". The trial judge, in his charge to the jury, drew to the attention of the jury the obligations which the law imposes upon a driver entering a through street and no objection was taken to his charge in this respect, and having regard to the functions of an appellate court when dealing with the verdict of a jury which were stated by Duff C.J.C. in *Canadian National Railways v. Muller,* [1934] 1 D.L.R. 768, this Court was of the view that the Court of Appeal was in error in holding that there was misdirection in respect of liability.

As to the objection that the trial judge had mentioned amounts which might be called both a ceiling and a floor in relation to the amount to be awarded, it was held that, having regard to all the evidence that was before the jury and the judge's charge in relation to quantum as a whole, there was no substantial misdirection here and certainly no error constituting a miscarriage of justice within the meaning of *The Judicature Act.*

Gray v. Alanco Developments Ltd. et al., [1967] 1 O.R. 597, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario allowing an appeal from a judgment of Landreville J. and ordering a new trial in an action for damages for negligence. Appeal allowed.

D. J. MacLennan, for the plaintiff, appellant.

John J. Fitzpatrick, Q.C., for the defendants, respondents.

The judgment of the Chief Justice and of Judson, Hall and Spence JJ. was delivered by

HALL J.:—This is an appeal from the Court of Appeal of Ontario which directed a new trial both as to liability and quantum following a trial before Landreville J. with a jury. The action arose out of a collision between two automobiles at the intersection of Royal York Road and Lawrence Avenue West in the Municipality of Metropolitan Toronto at approximately 11:50 p.m. on the night of December 25, 1963, in which the driver of one of the cars, Basil Joseph Byron, was killed. The other car, a yellow Vauxhall Cresta model, was owned by Isobel May Williams and then being driven by Roger Barry Williams. The following questions relating to Roger Barry Williams were put to the jury and answered as stated:

1. Was there any negligence on the part of the defendant Roger Williams, which caused or contributed to the accident?
Answer "Yes" or "No"
Answer: Yes.

1968

BYRON
v.
WILLIAMS
et al.

Hall J.

2. If your answer to question 1 is "yes" of what did such negligence consist? Answer fully, specifying each act of negligence of the defendant, Roger Williams, which you find caused or contributed to the accident.
Answer: 1. Driving too fast in an unfamiliar area. 2. In view of driving and road conditions—exercised poor judgment in passing a series of cars on a hill.

A further question relating to the deceased, Basil Joseph Byron, was put to the jury to which the jury replied as shown:

3. Was there any negligence on the part of the late Basil Byron? Answer "Yes" or "No"
Answer: No.

There was abundant evidence to justify the negligence found by the jury. The jury had heard Constable Downton, a member of the Metropolitan Toronto Police Force who, on the night in question, was on car patrol in the area in question and who was in a marked police car observing traffic on Royal York Road south of Lawrence Avenue. He was parked in a position where he could observe traffic on Royal York Road, and as he sat there he saw the yellow Vauxhall Cresta model travelling northward on Royal York Road at a speed which he considered excessive and he immediately put his car in motion and took off after the Vauxhall. He describes the condition of Royal York Road at the time as being wet and greasy and the area somewhat poorly lighted. Royal York Road is hilly at this point, and as he proceeded to follow the Vauxhall he saw it overtake and pass four cars going in the same direction. He estimates the speed of the Vauxhall as it overtook and passed these four cars to be close to double the speed of the cars being overtaken and he estimates the speed of the cars being overtaken as being 30 to 35 miles per hour. The Vauxhall remained on the left side of the two-lane highway which was about 21 feet wide until it approached the crest of a hill in the road to the north of which lay the intersection with Lawrence Avenue. He did not actually see the collision as the intersection was over the crest of the hill. The constable also testified that south of the intersection and south of the crest of the hill there was a sign plainly visible on the east side of Royal York Road which said "Reduce Speed Dangerous Intersection".

The driver Williams in his testimony testified that he had been travelling at about 35 miles an hour. He admit-

ted having overtaken the cars referred to by Constable Downton and said that when he was about 250 feet from the Lawrence Avenue intersection a car emerged from that intersection and proceeded southward on Royal York Road, and when he was about 100 feet from the intersection the Byron car emerged. It was stationary when he first saw it. He said he slammed on his brakes and "the car skidded on the wet road and into the side of the Byron vehicle" which had reached the centre of the intersection. It is obvious that the jury did not accept Williams' testimony and disbelieved his statement that he was only going at 35 miles an hour and chose instead to accept the evidence of Constable Downton which indicated driving in a highly negligent manner.

The basis of the appeal in respect of liability was that the learned trial judge had

> . . . failed to direct the jury that having regard for all the evidence there must have been some negligence on the part of the deceased, Basil Byron, which caused or contributed to the damages of the plaintiffs.

and that was the position taken by the respondent in this Court.

The part of the learned trial judge's charge to which the respondent objected and which found favour in the Court of Appeal reads:

> Likewise, the plaintiff comes in with a reply and the plaintiff says, "Look, after all, you ran into the side of my car. I didn't run into you. I was broadside, and if I were in that intersection, and if you had good lights on your car, my car would have been visible to you, driver defendant, 200 feet away, for under the *Highway Traffic Act,* headlights must be able to light up an object at that distance, minimum. So either you had good lights, in which case you would have seen me, or else your lights were so weak and poor on the low beam, that you saw me through the lights of your car when you were 50-75 feet away, and too late because of your faulty lights." So, it is a dilemma that the plaintiff throws back to the defendant.

Immediately before the extract just quoted from the learned trial judge's charge, he had dealt with the defendant's (Williams') case as follows:

> The defendant says, "Well now, why did you not wait there allowing me to pass to go by on the through street, and obey that Section 64." He says, "There are two things. Surely, I did not come out of a blue sky, and I must have been visible." Here the argument is twisted around to the advantage of the defendant, "I must have been visible for 150 feet. If you

1968

BYRON v. WILLIAMS et al.

Hall J.

blame me for not applying my brakes 150 feet away, I can say that you must have seen me 150 feet away, or 200 feet away. And if you did, you did not see me or see the car." He says, "It is a reasonable inference that you must have seen the reflection of my lights coming up the hill and, thus, you were under an obligation of waiting and not starting across the intersection for I hit you a second or two after you moved."

The defendant says, "There was nothing I could do in that circumstance." Because you might argue, and that argument hasn't been advanced, but you might argue that it might be one of logic, "your lights—your car being sideways to me, I did not see your lights as they did not shine on me, but I was visible when you started moving sideways, and only my lights could pick up the side of your car, and when my lights picked them up, I did everything I could to avoid the accident and applied my brakes and skidded. It is your fault."

So there you have the strength, in essence, of the defendant's case. The defendant has a right, at law, to presume that other people will obey the law. And when you are driving down the street, and there is a stop sign, and you see a car approaching that stop sign and you are close to the intersection yourself, you don't have to stop. You have the right to presume that the other driver is going to stop, and if he disobeys that stop sign and comes in front of you, and that is clearly proven, then that other driver has failed in his duty.

Likewise, if the driver has stopped and he starts off in front of you, when you are in that vicinity clearly visible, then he has no business coming across your path of travel, and it is his fault. Those are arguments which fall on the side of the defence.

He said later, in dealing with the plea of contributory negligence:

I have entirely forgotten something in discussing the law. We were discussing the cause of this accident. Sometimes, in a given set of circumstances, while there may be a cause, another person has contributed to that as a cause to the accident, and this brings in the *Negligence Act* of Ontario.

The *Negligence Act* sets out that where you find an accident to have been caused by two persons, two drivers, and you say that one has contributed to the accident; in short, the analysis is of the question, first of all, to find out if the plaintiff, Basil Byron, was negligent—excuse me, was the defendant negligent. And if you arrive at the conclusion that he wasn't—let us assume that—if you say he was not negligent, then the plaintiff's action fails.

If you find that the defendant driver was negligent, you go one step more and you say, "Now, was the late Basil Byron also negligent? Was there something he could have done to avoid this accident? Was he alert? Was he cautious? Did he fail to advance sufficiently in the intersection to see if there were lights coming or cars, or anything?" You analyze all the acts of Basil Byron, and if you arrive at the conclusion that there was some negligence on his part, then the *Negligence Act* applies, and you have the right to apportion the liability between the plaintiff and the defendant.

In my view the extract referred to in the judgment of the Court of Appeal must be read in the light of what the

learned trial judge said immediately before, and when so read I am unable to see that there was any misdirection. McLennan J.A., in the Court of Appeal, while agreeing that there had been misdirection, went on to say:

> In view of the clear position put to the jury that he is just offering them arguments that might be put forward and had previously made it clear elsewhere in his charge that it is entirely a question for them to decide, I do not think that constitutes any error constituting a miscarriage of justice within the meaning of the *Judicature Act*. The findings of the jury with respect to the negligence of the defendant are—(1) driving too fast in an unfamiliar area, (2) in view of driving and road conditions, exercised poor judgment in passing a series of cars on a hill. There is nothing in the findings related to what is said to be misdirection.

The learned trial judge, in his charge to the jury, drew to the attention of the jury the obligations which the law imposes upon a driver entering a through street and no objection was taken to his charge in this respect, and having regard to the functions of an appellate court when dealing with the verdict of a jury which were succinctly stated by Duff C.J.C. in *Canadian National Railways v. Muller*[1] as follows:

> We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal, to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly unreasonable as to show that the jury could not have been acting judicially;

I am of the view that the Court of Appeal was in error in holding that there was misdirection and I would allow the appeal in respect of liability.

The appellant also appealed on the damage issue alleging misdirection and in this regard all three members of the Court of Appeal which heard the appeal were of opinion that a new trial should be had on the question of quantum and ordered a new trial accordingly.

It is a question of whether there was evidence upon which the jury, properly instructed, could arrive at the amount awarded or whether the amount awarded was such that twelve sensible men could not have reasonably arrived at that sum.

I think the amount awarded was reasonable in the circumstances and supported by the evidence.

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[1] [1934] 1 D.L.R. 768.

1968

BYRON v. WILLIAMS et al.

Hall J.

However, the respondents objected to the following statement by the learned trial judge in his charge to the jury:

When the actuary gives us how much money would be required to purchase a five and a quarter annuity to produce $1,000.00 each year, and he gives us a sum of $13,364.00, and then you jump to the figure of $3,000.00. Let us say he makes $3,500 a year. You multiply that by $3,500.00 and you would arrive at an amount close to $45,000.00. So now I want to tell you that do not be misled by the figures of the actuary in that respect. They are intended as a guide; but a guide that is very far off because they do not take into account a multitude of contingencies that might arise, if the man had lived, and any amount in that area, in my opinion, would be overly generous. Just as much as if you award this lady $5,000.00 or $10,000.00, I would say you are starting to be cheap and picayune on that score. So that there is a limit, but that I give you a very wide margin, depending on your appraisal of those facts, of these contingencies of which I have spoken, and then you can determine what might be a financial security for this woman, to replace the financial security which she had in her husband.

It is to be noted, however, that the statement objected to was preceded by the following:

The most important aspect of her claim is as of executrix of the estate. We have heard a considerable body of evidence as to her husband, Basil Byron. There is no doubt that starting with the basis of it, it is a shock for a woman to lose her husband, and it's the same matter for a man to lose his wife, but we are not here, and neither is it your function, to analyze and award damages for sentimentalities. You must not proceed out of sentiment for the plaintiff, or on sentiment of revenge against the defendant, if you find him liable.

The amount that must be fixed is based on the pecuniary loss, expectation of life, economic gain, security and stability of life, which this woman had when she had her husband, and which she has not now.

You are entitled to take into account the character of the man, and you must take into account that whether he was a good worker, because on that hinges stability, and also his habits, living habits, his relationship with his own wife.

I can only summarize by saying that generally speaking, Basil Byron has been shown by the witnesses to be an ordinary, sound, good-living man, getting along reasonably well with his wife. There is a presumption that people, husband and wife, do get along, and not the contrary presumption that he was a man who carried certain complexes from his war service. That he appeared to be a good worker, according to the witnesses. I, unfortunately, and you might not view it with a great deal of understanding, those changes of jobs all the time. This may be explained that he wanted to improve his income and wanted to learn in a new field, but a rolling stone many times does not gather any moss. The man had been off work for some—one employer said one month, and there was some evidence about three months. But be that as it may, over all their married life it is not substantial. You may take that into account—the future of that man which would be reasonably expected.

You must not be generous, and you must not be picayune in awarding that amount, because there are all sorts of contingencies that may arise.

Mrs. Byron might die, and we hope that that definitely isn't true. In a few years time, there may be a possibility that Mrs. Byron might marry, and that is a possibility, in the light of seeing her and how she has spoken to you, and how the medical reports are. These are things you are entitled to take into consideration.

The plaintiff has produced an actuary's testimony showing, on the basis of the average, on the given basis of the age of the wife, and on the basis of the age of the husband, what is the expectancy of life—the expectancy of life, and that is 22.5 years. That is, again, a probability on the average, but it does not mean that it will be an actual fact that he would have lived to 22.5 years. One or the other may have died—the male 28.1, and the female 29.5. You take it all into consideration, therefore, the probability and you have to analyze, and you are entitled to take and to consider that he was a man five feet, ten and 135 pounds in weight; his physical condition—his reported health, his energy, his living habits—these are the things to consider.

The objection is to the learned trial judge having mentioned amounts which might be called both a ceiling and a floor in relation to the amount to be awarded. It would have been better if the learned judge had not been as specific as he was in this instance, but the real question is whether what he did say was misdirection of a nature requiring a new trial on the issue of damages. Having regard to all the evidence that was before the jury and the judge's charge in relation to quantum as a whole, I am of opinion that there was no substantial misdirection here and certainly no error constituting a miscarriage of justice within the meaning of *The Judicature Act*.

I have decided this case without reference to the decision of the Court of Appeal of Ontario in *Gray v. Alanco Developments Ltd. et al*[2]. I have proceeded solely on the ground that in this particular case the assessment of the jury is, in my opinion, reasonable and one that ought to be supported. I would reserve *Gray v. Alanco Developments Ltd. et al.* for further consideration when the occasion arises.

I would, accordingly, allow the appeal and restore the trial judgment with costs here and below.

RITCHIE J.:—I have had the advantage of reading the reasons for judgment prepared by my brother Hall with which I am in full accord, but I would like to say also that this case is in my view clearly distinguishable from that of

[2] [1967] 1 O.R. 597, 61 D.L.R. (2d) 652.

1968

BYRON v. WILLIAMS et al.

Ritchie J.

Gray v. Alanco Developments Ltd. et al.[3], to which reference was made by counsel for the respondents. The unanimous decision of the Court of Appeal for Ontario in the latter case was rendered on the day after the decision was handed down in that Court in the present appeal and the Court there ordered a new trial limited to the assessment of general damages on the ground that the trial judge had expressed his personal view as to the upper and lower limits of damages to be awarded under this head in that case. I think it important to observe that the decision in that case was limited to precluding a trial judge from expressing his personal opinion based on figures awarded in other cases as to the proper quantum of damages to be awarded, for example, for pain and suffering or for loss of the amenities of life.

The limited effect of the decision in that case is disclosed in the following passage from the reasons for judgment at p. 603 where it is said:

> What has been stated is applicable to those headings of general damages where there can be no evidence as to the value in monetary terms of the loss sustained, for example damages, claimed for pain and suffering or the loss or diminution of the amenities of life.

In the present case the learned trial judge was commenting on the effect to be given to the evidence of an actuary as to life expectancy and the amount that would be required to purchase an annuity, and having pointed out to the jury that these figures were only intended as a guide, he went on to speak of the hazards of life which would have existed even if the husband had not been killed and which should be taken into consideration in making an award to the widow. In so doing he, in effect, indicated that the jury would be "overly generous" if they considered awarding an amount in the area of a figure based entirely on the actuarial tables and he also expressed the opinion that if they only awarded $5,000 or $10,000 they would, in his opinion, be starting to be "cheap and picayune on that score".

These remarks of the trial judge in the present case do not appear to me to come within the category referred to in *Gray v. Alanco Developments Ltd. et al., supra,* and I

[3] [1967] 1 O.R. 597, 61 D.L.R. (2d) 652.

agree with my brother Hall that reading the trial judge's charge as a whole, the mention of his opinion as to amounts to be awarded was in no way a fatal defect.

As I have indicated, I would dispose of this appeal as proposed by my brother Hall.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: MacMillan, Rooke, MacLennan & Avery, Toronto.

Solicitors for the defendants, respondents: Gardiner, Roberts, Anderson, Conlin, Fitzpatrick, O'Donohue & White, Toronto.