ROGER ADAMS and THE CORPORATION OF THE TOWNSHIP OF TORONTO (*Defendants*) ..... APPELLANTS;

AND

MANUEL DIAS (*Plaintiff*) ..... RESPONDENT.

1968
*June 13
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Driver entering divided highway from side road—Stalling while crossing westbound lanes—Turning east into eastbound lane after second stall at middle of intersection—Westbound car crossing median strip and crashing head-on into plaintiff's car—Whether contributory negligence on part of plaintiff—Damages.

The motor vehicle accident out of which the present action arose occurred at about 11 o'clock on a rainy night at the intersection of a divided four-lane highway running east and west and a side road running north and south. The plaintiff was travelling south on the side road and after having brought his vehicle to a full stop at the intersection, he made a considerable entry into the intersection at a time when it was free of traffic. However, his engine stalled and his car was temporarily stationary while straddling the two westbound lanes of the highway. The plaintiff restarted the car but it stalled again when it had reached about the middle or centre of the intersection. The plaintiff again restarted his vehicle and was turning it in a south-easterly direction into the southern section of the highway when he was struck head-on by a police car which was being operated by the defendant. This car had been proceeding westerly on the highway, at a rate well in excess of the 50 m.p.h. speed limit, and had veered over from its own right-hand side of the highway, across the median strip so as to be travelling in a south-westerly direction on its wrong side of the road. The plaintiff sustained permanent and crippling injuries as a result of the collision.

The trial judge allocated the fault for the accident 60 per cent to the defendant driver and 40 per cent to the plaintiff driver and assessed the plaintiff's general damages at $85,000. The Court of Appeal affirmed the apportionment of liability but increased the assessment of general damages to $150,000. The defendant and his employer, the defendant municipality, then appealed to this Court and the plaintiff cross-appealed.

Held (Judson J. dissenting in part): The appeal should be dismissed and the cross-appeal allowed.

Per Cartwright C.J. and Martland, Ritchie and Spence JJ.: The plaintiff was not guilty of any negligence which caused or contributed to the accident. While a driver is in no way relieved from the liability which flows from a failure to take reasonable care simply because another user of the highway is driving in such a fashion as to violate the law, no motorist is required to anticipate, and therefore keep on the look-out for, such an unusual and unexpected violation as was manifested by the defendant's course of conduct in the present case.

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

1968

ADAMS *et al.* v. DIAS

As to the amount of damages, the Court of Appeal did not err in principle in awarding the amount which it did and as that amount did not appear to be inordinately high having regard to the injuries sustained, there was no reason for interfering with the increased award.

Per Judson J., *dissenting*: The concurrent findings by the Courts below on liability should be affirmed. The plaintiff's conduct was a contributing factor to the accident. Until almost the moment of impact the plaintiff never saw the police car and the only reason for the stalling was improper operation.

[*London Passenger Transport Board v. Upson*, [1949] A.C. 155, referred to.]

APPEAL by defendants and CROSS-APPEAL by plaintiff from a judgment of the Court of Appeal for Ontario affirming the division of fault but increasing the assessment of damages made at trial in an action for damages for personal injuries. Appeal dismissed and cross-appeal allowed, Judson J. dissenting in part.

W. B. Williston, Q.C., and *H. A. Willis*, for the defendants, appellants.

R. E. Holland, Q.C., B. B. Shapiro, Q.C., and *G. C. Elgie, Q.C.*, for the plaintiff, respondent.

The judgment of Cartwright C.J. and Martland, Ritchie and Spence JJ. was delivered by

RITCHIE J.:—This appeal arises out of a head-on collision which occurred in the Township of Toronto at about 11 o'clock on a rainy night in April 1964, at the intersection of highway No. 5 and a side road called Mavis Road. The respondent, operating his own motor vehicle had entered the intersection and having crossed the northern section of the highway had just completed a left-hand turn into the southern half thereof, when a police car owned by the appellant municipal corporation and operated by the defendant Adams in the course of his employment as a police officer, crossed from its own proper side of the highway directly into the respondent's path. The respondent sustained permanent and crippling injuries as a result of this collision.

The learned trial judge allocated the fault for this accident 60 per cent to the appellant and 40 per cent to the respondent and assessed the respondent's general damages at $85,000, but the Court of Appeal for Ontario, while

affirming the division of fault made at the trial, allowed the respondent's cross-appeal as to damages and thereby increased the award from $85,000 to $150,000. The appellants now appeal to this Court alleging that the trial judge and the Court of Appeal erred in holding that there was any negligence on the part of the appellant Adams which contributed to the accident and from the Court of Appeal's assessment of the general damages while the respondent cross appeals alleging that there was no real evidence upon which a Court could find that he was negligent.

Highway No. 5 is a "through highway" within the meaning of *The Ontario Highway Traffic Act,* R.S.O. 1960, c. 172, s. 1(26), and it runs east and west having two eastbound and two westbound lanes, the most northerly of which is 11 feet 6 inches in width, the other three being 12 feet wide. The two sets of lanes are separated by a median or ripple strip some 4 feet in width which has a maximum height of some 3 inches above the surrounding pavement and tapering to 1/4 inch at its outer edges. Mavis Road which is a paved side road 21 feet 1 inch in width, runs north and south and there is a stop sign situate on the west side of the road about 55 feet north of the north edge of the most northerly lane of No. 5 highway.

At the time and place in question, the respondent was travelling south on Mavis Road and having stopped at the stop sign, made a substantial entry into the intersection at a time when it was free of traffic, and when the trial judge has found that there was no traffic within such a distance as to constitute an immediate hazard, at this point his engine stalled and his car was temporarily stationary while straddling the two west bound lanes of highway No. 5, the respondent restarted the car but it stalled again when it had reached a point which the learned trial judge describes as "about the middle or the center of the intersection straddling what would have been the ripple strip if it had been in the spot where the vehicle came to rest at that time; a little more of the vehicle itself south of the center line than to the north". Dias again restarted his vehicle and was turning it in a south-easterly direction into the southern section of highway No. 5 when he was struck head-on by the police car which had been proceeding westerly on highway No. 5 and had veered over from its own right-hand side of the highway, across the ripple strip so as

1968

ADAMS *et al.* v. DIAS

Ritchie J.

to be travelling in a south-westerly direction on its wrong side of the road. The above account of the movements of the respondent's vehicle is a paraphrase of the finding of the learned trial judge, but in considering the findings concerning the appellant's activities, I think it desirable to quote verbatim from the findings at trial. Having found that "the police car was some very considerable distance east of the intersection when the plaintiff's vehicle entered it" he went on to say:

> There was no traffic in the intersection, of course, when the plaintiff driver entered the intersection with his vehicle. And again I repeat there was no traffic within such a distance or proceeding under such circumstances existing as to constitute an immediate hazard to the plaintiff in the operation of his car, or such as to constitute the plaintiff a hazard to approaching traffic. Although the driver of the police car says he approached the intersection at a speed of some 50 miles an hour, and that he reached a certain point where he applied his brakes, I find he is undoubtedly mistaken in that. The evidence that I accept leads me to believe he was travelling at a speed much in excess of that. I think that is apparent not only from the physical damage to the vehicles and the position of the vehicles as ascertained when they came to rest after the collision but, also, from the evidence of a witness who states that at the crest or about the crest of the hill this vehicle passed him at a speed of some 70 to 75 miles an hour. This was a 50-mile speed zone at the area in question.

The trial judge's account of the part played by the appellant's vehicle in the actual collision itself is phrased in the following language:

> The collision occurred in the south-east quadrant of the intersection. The defendant driver had crossed the ripple strip and was proceeding in a south-westerly direction at the time that he collided or his vehicle collided with the plaintiff's vehicle. The collision was almost head-on. The photographic evidence indicates substantially where the first impact was upon the vehicles. They were some distance apart when they came to rest. Strange to say, the plaintiff's vehicle was some distance to the west of the point of impact. Again, it will be remembered that it was travelling easterly or substantially easterly at the time the impact occurred. Again, this leads me to the conclusion that the other vehicle was travelling at a high rate of speed. The plaintiff was not travelling fast; he was travelling slowly. He has said himself below ten miles an hour. I am inclined to look with some skepticism upon his relation of the events that occurred, by reason of the fact he did suffer some post-traumatic amnesia. However, he is substantially corroborated in the details of the accident which he gives by his passenger Korth.
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> There is no question whatever in my mind that the defendant driver is negligent, or was negligent, and that his negligence contributed to or was a substantial cause of this accident in question and the resulting damage. I find that he was negligent in that he failed to keep a proper look-out; that he failed to yield to the plaintiff the right of way to which he was entitled under s. 64 of *The Highway Traffic Act,* after having made prior entry into the intersection; and that he failed to keep his

vehicle under such control as would have enabled him to avoid an accident or collision when it was reasonably possible for him so to avoid it. Had he been alert and watching what was occurring ahead of him, and had he been travelling at such a speed that he was able to react properly and adequately to the situation, I think he could have brought and should have brought his vehicle to a stop before he even entered the intersection. While it is true, I think, that the movement of the plaintiff's vehicle within the intersection caused some confusion, particularly on the night in question in the light of the inclement weather, the defendant driver was familiar with this intersection, he could see it if he had been keeping a proper look-out, the movements of the vehicle, and he could have slowed down. He said he did slow down by applying his brakes at a certain time—in one instance he says ten car lengths from the other vehicle, and at another point five or six car lengths from the plaintiff's vehicle. He estimates a car length to be 20 feet. At that time he was headed on a south-westerly course. Just where he veered from his normal lane of traffic, in which he had been proceeding prior to reaching the intersection, or prior to the time when he was close to the intersection, it is difficult to say, but he did veer to the left or to his left, to the south-west and across the median or ripple strip. And I have no hesitation in finding he is right when he says he applied his brakes, although there was no indication upon the pavement that he had done so that was visible or apparent following the accident.

It is thus clearly established from the facts as found by the learned trial judge that the appellant's vehicle was being driven at a rate well in excess of the 50 m.p.h. speed limit directly across the median strip between the two double lanes of highway No. 5 onto a portion of the highway where he had no right to be and that he there ran head-on into the defendant's vehicle.

In dividing the fault so as to find the respondent 40 per cent to blame for the accident, the learned trial judge found the respondent to be negligent in the operation of his vehicle in the following manner:

When it stalled the second time, and before he proceeded forward, I think that he should have been sufficiently alert to have been aware of the presence of and the course of the other vehicle upon the highway. His evidence is that at no time did he see the other vehicle approaching until it was at a point a very short distance from him, and just before or at the time that he started forward after he had stalled the second time. In other words, according to his version, only one half to one second in time before the collision occurred. It is quite apparent to me that at that point of time the other vehicle was on its south-westerly course. Undoubtedly, the driver had taken some steps to avoid the plaintiff's vehicle as best he could under the circumstances, but I think much too late. Had the plaintiff been keeping a proper look-out, I think that there is a good probability that he could have avoided this collision, at least rendered it much less severe. And I think it was quite imprudent, and would have been quite imprudent of him to have proceeded forward after this second stalling with the oncoming vehicle in the position in which it was proceeding at the time that he stalled the second time. I find that he was negligent in that he failed to keep a proper look-out, and that he

1968

ADAMS *et al.* v. DIAS

Ritchie J.

proceeded in the face of danger without insuring that he could safely proceed further on his way. Such negligence, again, I find was a contributing cause to the accident in question and the resulting damage.

With the greatest respect for the learned trial judge, I am of opinion that this latter finding of negligence placed a much higher duty of care on the respondent than that which is required of a reasonably prudent motorist.

It is true that a driver is in no way relieved from the liability which flows from a failure to take reasonable care simply because another user of the highway is driving in such a fashion as to violate the law, but in my opinion, no motorist is required to anticipate, and therefore keep on the look-out for, such an unusual and unexpected violation as was manifested by the appellant's course of conduct in the present case.

It is to be noted that the negligence found against the respondent by the learned trial judge consisted of failure to keep a proper look-out when he proceeded forward after the second time he had stalled. At this time more than half of his vehicle was to the south of the centre line of the highway thus leaving the two northerly lanes, which together measured 23½ feet, almost completely free for the appellant. As Dias moved from the position of his second stall wholly into the southern half of the intersection, it was his duty to look ahead and to the west to determine whether any other vehicles were approaching from these directions at such a distance as to constitute a hazard, but he was in my view under no duty to keep a look-out for cars travelling west on the other side of the ripple strip which divided the highway.

The learned trial judge found that the respondent should have been sufficiently alert to detect the fact that the appellant's car was on a south-westerly course at the time when he was moving away from his second stall, but I do not think that even if he had observed the police car's lights veering towards the south, he could have been expected to foresee that it would continue on this course so as to cross the ripple strip and invade the area which was reserved for eastbound traffic. Upon seeing the lights of the approaching vehicle turning towards the south, the normal reaction of a reasonable motorist would, I think, have been to conclude that it was moving further over into the southerly lane of the northern section of the highway rather

than that it was bent upon crossing the centre line so as to travel entirely onto its wrong side of the road. The fatal error on Constable Adams' part was not that he adopted a south-westerly course, but that he continued on that course across the ripple strip and taking into consideration the speed at which he was travelling, the elapsed time from the moment when his front wheels encountered the ripple strip until the collision occurred cannot have been much more than one second.

In my view the respondent's actions after the appellant had crossed the ripple strip were conditioned by the imminent danger in which he was placed through the appellant's negligence, and with all respect to the learned trial judge, I do not think that he had any opportunity to take avoiding action after the appellant had started to cross the ripple strip. As I have indicated, even if the respondent's vehicle had remained where it was after the second stall, there would have been ample room for Adams to pass it on his own side of the highway and it seems to me that the most probable explanation of the accident is that he became confused, misjudged the position of the respondent's car and thought it necessary to move over to the wrong side of the road. Like all such decisions made by drivers travelling at a high rate of speed, it must have been made in a matter of seconds and the result proved that it was clearly wrong.

This case in my opinion is to be viewed in light of the well-known observation made by Lord Uthwatt in *London Passenger Transport Board v. Upson*[1], at p. 173 where he said:

> A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

The actions of Adams in my view constituted the type of folly which a driver is not bound to anticipate and no amount of experience on the highway would lead the reasonably careful motorist to consider it in any way likely that a police car with its red light flashing which appeared to be approaching the centre line of the highway, was going to continue on its way across the ripple strip directly into his path.

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[1] [1949] A.C. 155.

1968

ADAMS *et al.* v. DIAS

Ritchie J.

I am fully conscious of the fact that the findings of fact of the learned trial judge have been affirmed by the Court of Appeal and I in no way dissent from those findings, but it has often been said that when it comes to deciding the proper inferences to be drawn from accepted facts, the Courts below are in no better position to decide the issue than the judges of an appellate Court and I am of the opinion that the facts found by both the Courts below do not support the conclusion that the respondent was guilty of any negligence which caused or contributed to this accident. I would accordingly allow the cross-appeal.

The respondent suffered a severe closed head injury with damage to the brain stem area which has resulted in permanent and crippling disability and the evidence indicates that he will require constant and continual nursing care and service and medical supervision for the rest of his life, so that there can be no question about his right to recover substantial damages. In awarding the respondent $150,000 general damages, the Court of Appeal treated the $85,000 award made by the learned trial judge as being a wholly erroneous estimate of the damage and as I cannot find that the Court of Appeal erred in principle in awarding the amount which it did and as that amount does not appear to me to be inordinately high having regard to the injuries sustained, I can find no reason for interfering with the increased award. I would therefore dismiss the appeal.

The statement of claim was amended at the trial so as to include a claim for "general damages in the amount of $250,000 on behalf of the Ontario Hospital Services Commission *for future hospitalization*". (The italicizing is my own.)

The Ontario Hospital Services Commission is not a party to these proceedings but it is assumed that the claim was included pursuant to s. 52(2) of the Regulations [O. Reg. 1/67] passed pursuant to *The Hospital Services Commission Act*, R.S.O. 1960, c. 176, which read as follows:

> 52(2) The Commission is subrogated to any right of an insured person to recover all or part of the cost of insured services from any other person, including future insured services, and the Commission may bring action in the name of the insured person to enforce such rights.

When this claim was drawn to the attention of the learned trial judge he said:

> If it were indicated to me that this man were required to remain in a hospital over which the Ontario Hospital Services Commission had juris-

diction, then I think I would be inclined to ensure there was some definite sum allocated for that purpose, but I am not at all sure, in the light of the evidence, whether that is going to be so.

1968

ADAMS *et al.* *v.* DIAS

Ritchie J.

This matter was raised before us, but there is, in my opinion, no evidence upon which this Court would be justified in making any estimate of the future hospitalization, if any, which will be undergone by the respondent *in an institution approved by the Commission,* and I therefore do not think that we are in a position to deal with this claim.

The respondent will have the costs of the appeal in this Court and his costs of the cross-appeal both here and in the Court of Appeal for Ontario.

JUDSON J. (*dissenting in part*):—I would not interfere with the trial judge's apportionment of 40 per cent of the responsibility for this accident to the plaintiff. This apportionment was affirmed by the Court of Appeal and in my opinion there was ample evidence for the common conclusion of both Courts on this point.

The plaintiff entered this intersection from a stop street to the north and stalled in this position when Adams in the westbound police car had to make a decision to avoid him by veering either to the north shoulder or the eastbound lanes to the south. Adams chose to veer to the south. The plaintiff stalled his car again in the median strip and then began to make a left turn into the eastbound lanes. The cars collided in the south-east quadrant. Until almost the moment of impact the plaintiff never saw the police car. According to the plaintiff's own witness, who was a motor mechanic and who had examined the car immediately before its recent purchase by the plaintiff, the only reason for the stalling was improper operation.

I would affirm the concurrent findings on liability and accept the increase in the damages awarded in the Court of Appeal. Consequently, I would dismiss the appeal and cross-appeal, both with costs.

Appeal dismissed and cross-appeal allowed with costs, JUDSON J. *dissenting in part.*

Solicitors for the defendants, appellants: Willis, Clarke, Dingwall & Newell, Toronto.

Solicitors for the plaintiff, respondent: Elgie & Philp, Toronto.