SAMUEL D. CAHOON (*Defendant*) .....APPELLANT;

AND

ARTHUR H. FRANKS (*Plaintiff*) .....RESPONDENT.

1967

*May 23
June 26

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Actions—Motor vehicle collision—Action claiming damage to property—Statutory limitation period—Amendments including claim for personal injuries made after limitation period—Whether amendments set up new cause of action—The Vehicles and Highway Traffic Act, 1955 R.S.A., c. 356, s. 131(1).

As alleged by the respondent, on January 8, 1965, he was sitting in a motor vehicle lawfully and properly parked in a parking lane when a motor vehicle owned and operated by the appellant collided with the respondent's motor vehicle. The respondent alleged that the collision was caused by the negligence of the appellant. On December 29, 1965, the respondent commenced an action against the appellant in the District Court, claiming damages in the sum of $305, being the value of his automobile destroyed beyond repair in the collision. This was the only item of damage claimed in the action.

On January 18, 1966, the respondent obtained an order giving him leave to amend his statement of claim to include a claim for personal injuries, and transferring the action to the Supreme Court. On February 8, 1966, an order was obtained permitting the statement of claim to be amended to allege that as a result of the appellant's negligence the respondent sustained a cervical cord lesion and cervical cord, concussion which have left him totally disabled and unable to work. The appellant appealed to the Appellate Division against the above orders and the said appeal was dismissed. The appellant then appealed to this Court.

The amended statement of claim asked for special damages for medical and hospital expenses and for loss of wages and also for general damages. The amendments sought to be included were made after the twelve-month period provided in s. 131(1) of *The Vehicles and Highway Traffic Act,* 1955 R.S.A., c. 356, had expired and the appellant contended that the amendments raised a new cause of action which was barred by s. 131(1). The respondent argued that there was only one cause of action for a single wrongful or negligent act and damages resulting from the single tort must be assessed in the one proceeding.

Held: The appeal should be dismissed.

The amendments did not set up a new cause of action. *Brunsden v. Humphrey* (1884), 14 Q.B.D. 141, in which the Court of Appeal in England held that different rights were infringed in the two actions brought and that a tort causing both injury to the person and injury to property gave rise to two distinct causes of action, is not now good law in Canada and should not be followed.

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*PRESENT: Cartwright, Martland, Judson, Ritchie and Hall JJ.

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APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal from orders made by Haddad D.C.J. and Dechene J. Appeal dismissed.

J. C. Cavanagh, Q.C., for the defendant, appellant.

Derek Spitz, for the plaintiff, respondent.

The judgment of the Court was delivered by

HALL J.:—On January 8, 1965, the respondent who alleges he was sitting in a motor vehicle lawfully and properly parked in the parking lane on the north side of Highway No. 16 in the Province of Alberta near the area known as Manly Corner when a motor vehicle owned and operated by the appellant collided with the respondent's motor vehicle. The respondent alleges that the collision was caused by the negligence of the appellant. On December 29, 1965, the respondent commenced an action against the appellant in the District Court of the District of Northern Alberta, Judicial District of Edmonton, claiming damages in the sum of $305, being the value of his automobile destroyed beyond repair in the collision. This was the only item of damage claimed in the action.

On January 18, 1966, the respondent obtained an order from His Honour Judge Haddad giving him leave to amend his statement of claim to include a claim for personal injuries, and the order also transferred the action to the Supreme Court. On February 8, 1966, an order was obtained from Dechene J. permitting the statement of claim to be amended to allege that as a result of the appellant's negligence as aforesaid the respondent sustained a cervical cord lesion and cervical cord concussion which have left him totally disabled and unable to work. The amended statement of claim asked for special damages of $452 for medical and hospital expenses and $3,575 for loss of wages and $150,000 for general damages. It is these orders which are in issue in this appeal.

Section 131(1) of *The Vehicles and Highway Traffic Act,* 1955 R.S.A., c. 356, provides as follows:

> 131(1) No action shall be brought against a person for the recovery of damages occasioned by a motor vehicle, after the expiration of twelve months from the time when the damages were sustained.

[1] (1967), 58 W.W.R. 513.

The amendments sought to be made were made after the twelve-month period provided in s. 131(1) had expired and the appellant's position is that the amendments raised a new cause of action which was barred by s. 131(1) and he cites the well-known passage in *Weldon v. Neal*[1], which reads:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

Did the amendments set up a new cause of action? The appellant says they did and relies on *Brunsden v. Humphrey*[2]. In that case the plaintiff had sued in the County Court and recovered damages caused to his cab by a collision of his cab with defendant's van. Later he commenced an action in the Queen's Bench Division for personal injuries he had suffered in the same collision. This action was held to be barred by the earlier action and was dismissed. The Court of Appeal (Brett M.R. and Bowen L.J. with Coleridge C.J. dissenting) allowed the appeal, holding that different rights were infringed in the two actions; that a tort causing both injury to the person and injury to property gave rise to two distinct causes of action.

The respondent says that *Brunsden v. Humphrey, supra,* is no longer good law; that there is only one cause of action for a single wrongful or negligent act and damages resulting from the single tort must be assessed in the one proceeding; that the distinction between the old causes of action for injury to the person and damage to goods has been swept away.

Porter J.A. in his reasons for judgment in the Appellate Division said:

> An examination of the record in *Brunsden v. Humphrey* discloses that it was first dealt with (1883) 11 Q.B.D. 712, by two judges of the Queen's Bench Division, Pollock, B. and Lopes, J. They disposed of it by denying

[1] (1887), 19 Q.B.D. 394 at 395. [2] (1884), 14 Q.B.D. 141.

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the plaintiff the right to assert a claim for personal injury caused by the very accident in which he had obtained judgment for injury to his property. Pollock, B. says at p. 714:

> "The fact that damages for the injury to the plaintiff could have been laid and recovered in the former action shews conclusively that the present action cannot be maintained."

Lopes, J. says at the same page:

> "It is quite true that in the action in the county court the plaintiff claimed and recovered nothing in respect of personal injury to himself. But the cause of action in the county court, and the matter to be determined there, was the negligence of the defendant in driving his van. The plaintiff made no claim in the county court for damages in respect of his personal injuries, but he might have done so, for the injury was caused by the same matter which was tried and determined in the county court, that is, the defendant's negligence. He is now bringing his action, not for a new wrong, but for a consequence of the same wrongful act which was the subject of the former suit."

On appeal, three judgments were delivered, one dissenting and agreeing with the court below. Brett, M.R. and Bowen, L.J. based their judgments on the ground that two rights of action exist: (1) injury to the person, and (2) injury to the property. In reaching the conclusion which he did, Bowen, L.J. said at p. 150:

> "This leads me to consider whether, in the case of an accident caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there is one cause of action only or two causes of action which are severable and distinct. This is a very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the Court below and from the great authority of the present Chief Justice of England."

Lord Coleridge, C.J. dissented, saying at p. 152:

> "It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same; that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different *rights*, i.e., his person and his goods I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured his trousers which contain his leg, and his coatsleeve which contains his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it."

It is important to bear in mind that it was the "forms of action" that were abolished by the *Supreme Court of Judicature Act, 1873*. To apply *Brunsden v. Humphrey* to the facts here would be to revive one of the very forms of action which that Act abolished. The cause of action or, to

use the expression of Diplock, L.J., "the factual situation" which entitles the plaintiff here to recover damages from the defendant is the tort of negligence, a breach by the defendant of the duty which he owed to the plaintiff at common law which resulted in damage to the plaintiff. The injury to the person and the injury to the goods, and perhaps the injury to the plaintiff's real property and the injury to such modern rights as the right to privacy flowing from negligence serve only as yardsticks useful in measuring the damages which the breach caused.

Of the five judges involved in *Brunsden v. Humphrey*, three disagreed with the judgment we are considering and one of the two that supported it declared himself in doubt. Actually, the majority judicial opinion expressed in the case disagreed in the result and one other doubted. Such a conflict of reasoning cannot be accepted as making the principle of the decision persuasive to this Court as far as I am concerned.

To deny this plaintiff the opportunity to have a court adjudicate on the relief which he claims merely because it lacks ancient form would be to return to those evils of practice which led to judicial amendment and the ultimate legislative abolition of "forms of action". As Lord Denning, M.R. said in *Letang v. Cooper*, [1965] 1 Q.B. 232 at p. 239:

> "I must decline, therefore, to go back to the old forms of action in order to construe this statute. I know that in the last century Maitland said 'the forms of action we have buried, but they still rule us from their graves' (see Maitland, Forms of Action, 1909, p. 296), but we have in this century shaken off their trammels. These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer. Lord Atkin, in *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1, 29, told us what to do about them:
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> > 'When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.'"

I make reference again to the abstracts quoted by Johnson, J.A. from the judgment of Lord Denning in *Letang v. Cooper* at p. 240, and the judgment of Diplock, L.J. in *Fowler v. Lanning* [1959] 1 Q.B. 426. "The factual situation" which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. This single cause of action cannot be split to be made the subject of several causes of action.

Since the foregoing was written, this matter has been re-argued and counsel for the respondent has brought to our attention the cases in the United States of America where this subject and *Brunsden v. Humphrey* have been dealt with. What Fleming in "The Law of Torts", 3rd ed., describes as the "dominant American practice" rejects *Brunsden v. Humphrey*. (See *Dearden v. Hey*, 24 N.E. 2d 644, and annotations therein refered to.)

The decision in *Brunsden v. Humphrey* may well have persisted in Great Britain largely because the courts were bound by it. Free as we are to apply reason unhampered by precedent, I am of the opinion that the principle of *Brunsden v. Humphrey* ought not to be adopted.

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I agree with Porter J.A. I think that *Brunsden v. Humphrey* is not now good law in Canada and it ought not to be followed. The amendments did not set up a new cause of action and the passage from *Weldon v. Neal* previously quoted has no application in the instant case.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Cavanagh, Henning, Buchanan, Kerr & Witten, Edmonton.

Solicitors for the plaintiff, respondent: Macdonald, Spitz & Lavallee, Edmonton.