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\*Apr. 30  
May 13

PETER DIAZ CURBELLO (*Plaintiff*) . . . . . APPELLANT;  
  
AND  
  
GEORGE RONALD THOMPSON }  
(*Defendant*) . . . . . } RESPONDENT.

LILLIAN FONTAINE (*Plaintiff*) . . . . . APPELLANT;  
  
AND  
  
GEORGE RONALD THOMPSON }  
(*Defendant*) . . . . . } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Motor vehicles—Negligence—Driver of truck travelling at night at approximately 50 m.p.h. applying brakes and turning slightly to avoid deer—Truck spinning counterclockwise and falling on car coming from opposite direction—Pavement wet and very slippery—Excessive speed in the circumstances.*

While driving a heavy truck at night, at approximately 50 m.p.h., on a section of the Trans-Canada Highway where the posted speed was 60 m.p.h., the defendant noticed some deer on the shoulder of the road and applied his brakes moderately. Almost immediately, one of the deer bounded across the road. The defendant reacted by applying the brakes harder and turning slightly to the left. Sensing

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

that the truck was skidding to the right, he attempted to counteract this movement by turning the wheel slightly to the right. The truck continued to skid, spun counterclockwise more than 180 degrees and toppled over on top of a car which was coming from the opposite direction on its own side of the road. The driver of the car was killed and his passenger was injured. The truck, the rear tires of which were substantially worn, was carrying a near maximum load. The collision occurred on a straight stretch of road and the pavement at the time was wet and very slippery.

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The deceased's widow brought action against the defendant in her capacity as executrix of her husband's estate and in her own right. The passenger brought action on his own behalf. These actions were consolidated and tried together. The trial judge, having found the defendant wholly to blame for the accident, gave judgments in favour of the plaintiffs. The defendant appealed these judgments to the Court of Appeal which, by a majority, allowed the appeals. An appeal by the plaintiffs, limited to the question of liability only, was then brought to this Court.

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

The trial judge rightly decided that the defendant was driving at an excessive speed in the circumstances of this particular case and because of this could not keep control of his vehicle when he found it necessary to slow down.

*Gauthier & Co. Ltd. v. The King*, [1945] S.C.R. 143, followed.

APPEAL from a judgment of the Court of Appeal for British Columbia<sup>1</sup>, reversing three judgments of Aikins J. in consolidated actions for damages for negligence. Appeal allowed and trial judgments restored.

*Richard P. Anderson*, for the plaintiffs, appellants.

*Douglas McK. Brown*, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia<sup>1</sup> which reversed (Davey C.J.B.C. dissenting) three judgments given in favour of the appellants by Aikins J. in the Supreme Court of British Columbia. The litigation arose out of a road accident in which one Clifford Alley Fontaine was killed and a passenger in his automobile, Peter Diaz Curbello, was injured. The appellant Lillian Fontaine brought action against the respondent in her capacity as administratrix of the estate of Clifford Alley Fontaine and in her own right. Curbello brought action on his own behalf. The

<sup>1</sup> (1967), 61 W.W.R. 321, 64 D.L.R. (2d) 611.

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actions were consolidated for trial by order of Ruttan J. and were tried together by Aikins J., who awarded the appellant Fontaine damages in the sum of \$38,287.85 in her personal action and \$1,295.60 in her capacity as administratrix and the sum of \$19,134.85 to the appellant Curbello. This appeal is limited to the question of liability only. The amount of the damages are not now in issue.

The facts are not in dispute and shortly are that at about 1:30 a.m. on September 26, 1961, the deceased Fontaine was driving his 1956 Chevrolet station wagon with the appellant Curbello as a passenger. He was heading south on the Trans-Canada Highway from Yale to Hope en route to Vancouver. He was driving on his own side of the road at a reasonable speed of about 40 miles an hour. No allegation or suggestion of negligence on the part of Fontaine is put forward.

The respondent was driving a four-ton G.M.C. truck from Vancouver northwards. The truck was almost loaded to capacity, the total weight of truck and load being 28,000 lbs.

The two vehicles met on the highway approximately two miles south of Yale. As they met, the truck toppled over on to the Fontaine vehicle while it was wholly on its own side of the road, crushing it. Fontaine was killed and Curbello injured. The respondent was uninjured. This event occurred on a straight stretch of road some 700 feet in length. At the north end of this straight stretch the road curved to the west and at the south end it curved to the east. The road was level, paved and 23 feet, 6 inches wide with a 10-foot gravel shoulder on each side of the pavement. The posted speed was 60 miles an hour. The vehicles met at a point on the straightaway about 200 feet north of the south curve. It was a cloudy night but visibility was good. Rain had fallen earlier. The road surface was wet and very slippery.

As to the accident itself, the learned trial judge said:

The two vehicles came to rest in these positions: the station wagon was upright, that is resting on its wheels, and facing south. The GMC truck had toppled over on its right side and the right side of the freight box (that is the enclosed box built on the deck of the truck for carrying freight) was resting on the top of the station wagon. The GMC truck was facing south-east. The truck, if righted from the position in which it lay resting on top of the station wagon, would have been brought upright with its wheels all on the east side of the centre line.

The evidence establishes that before and at the time of the collision the GMC truck was sliding and out of the driver's control and that the truck during the course of sliding turned something better than 180 degrees, so as to wind up at rest facing south-east.

These circumstances called for an explanation from the respondent: *Gauthier & Co. Ltd. v. The King*<sup>2</sup>.

The explanation given by the respondent was that he was travelling at 48 miles an hour as he entered the straightaway, and seeing a vehicle coming towards him from the north he dimmed his lights. Then he saw some deer on the east shoulder at which moment he applied his brakes moderately. Almost immediately, one of the deer bounded across the road. The respondent reacted by applying the brakes harder and turning slightly to the left. Sensing that the truck was skidding to the right, he attempted to counteract this movement by turning the wheel slightly to the right. The left front corner of the truck struck the deer, propelling it towards the west shoulder. The respondent did not suggest that the impact with the deer had any effect on the movement of the truck. There was little damage, if any, to the left front corner of the truck. The truck continued northward, spinning counterclockwise until it was facing south-east, having spun slightly more than 180 degrees by the time it toppled over on top of the Fontaine vehicle. The respondent admitted that he knew the road was wet and slippery, but said that he was not aware that it was *very* slippery until after the accident. He testified that the truck was in excellent mechanical condition, including good power brakes. The front tires were relatively new but the tires on the rear dual wheels were about 80 per cent worn with minimal tread left in the centre. The tires were still roadworthy and good for some 8,000 more miles according to the evidence. Respecting these rear tires, the learned trial judge said:

The opinions of the witnesses that the rear tires, despite their worn condition, were safe for highway use must be considered as relative. These questions must be considered: At what speed are such tires safe? Under what road conditions are they safe? What weight are such tires capable of carrying with safety? These questions must be considered not just separately but in combination. What may be safe at one speed on a dry road may be unsafe at the same speed on a wet road. What may be a safe speed at one load weight may be unsafe at another load weight. Patently, in my opinion, tires which have practically no tread in the

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<sup>2</sup> [1945] S.C.R. 143 at 149-50, [1945] 2 D.L.R. 48.

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centre are less efficient in stopping a vehicle without producing sliding than tires which have substantial tread on all the tire surface which comes in contact with the road surface. I think it probable, as I shall state later in these reasons, that the worn rear tires on the truck played a part in causing the skid which resulted in the collision with the station wagon.

The learned trial judge said that the respondent impressed him as a truthful witness. He found that the respondent was driving at a speed of approximately 50 miles an hour as he approached and rounded the curve immediately south of the straight stretch on which the collision occurred. Dealing with the actual impact, the learned trial judge said:

The defendant said that while sliding the truck did not cross over the centre line; that his turning to the right to try to get out of the skid or slide had the effect of keeping the truck on his right hand side of the road. The over-all length of the truck was 24 feet. The wheel base was 11 feet. Theoretically it is no doubt possible that the truck with its wheel base of 11 feet could, as to its wheels, have made better than a 180 degree turn on the road, which was 23 feet 6 inches in width, without the wheels crossing the centre line. There were no marks on the shoulders indicating that the truck had gone on to either shoulder of the road. I think it improbable that no part of the truck crossed the centre line. I think it probable that some part of the truck crossed the centre line and hit the station wagon and the truck then toppled over, coming to rest on top of the station wagon. While it may be theoretically possible that the truck, wholly on its own side of the road, toppled over because it was skidding and fell on the station wagon which was entirely on its own side of the road, I think this unlikely, and that some part of the turning and sliding truck struck the station wagon while the latter was wholly on its proper side of the road, and that the truck then toppled over on top of the station wagon. In any event I do not think it makes any material difference whether the truck hit the station wagon and then fell over, or, if, on the other hand it was wholly on its proper side of the road and because of skidding and turning it upset and fell on the station wagon without colliding with it before it started to topple over.

Having considered all the evidence, the learned trial judge concluded:

Separate aspects of the defendant's conduct should not, however, in my opinion, be taken and considered in isolation. All relevant aspects of the defendant's driving should be considered together and in relation to the existing relevant circumstances. The fact is that on braking the truck's speed in a quite ordinary way and on making a very slight turn to the left, and on braking again, harder, but still in an ordinary way, the truck went into a skid, and wholly out of control. It seems to me on a consideration of all the evidence that the truck skidding and going out of control in this case was due to a combination of circumstances which I summarize in this way:

- (a) The truck was being driven at a substantial although lawful speed: approximately fifty miles per hour.

- (b) The truck was carrying a heavy load, and was in fact loaded close to its maximum capacity.
- (c) The highway surface was wet and slippery.
- (d) The rear tires were substantially worn so that there was minimal tread in the centre of the tires. Patently I think such tires to be less efficient than tires with substantial tread over all the tire surface in contact with the road. In my view it is probable that the worn rear tires contributed to the truck skidding.

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The truck skidded and went out of control on the driver applying the brakes in a quite ordinary way, and on the driver making a slight turn to his left, which involved nothing more than a vehicle moving closer to the centre line, and on a further and harder application of the brakes. I think it apparent that the defendant Thompson was driving at an excessive speed in the circumstances: he was driving at a speed at which he could not keep control of his vehicle when he found it necessary to apply his brakes, turn slightly to his left, and apply his brakes harder to slow down more quickly. The defendant driver must be held to have been negligent. I am satisfied that his negligence was the cause of the collision between the two vehicles.

In the Court of Appeal, Davey C.J.B.C. agreed with the learned trial judge, saying:

He (the trial judge) found that the truck skidded and went out of control because of the combination of speed, its near maximum load, the slippery surface of the road, and the worn rear tires which had substantially less traction on the road than ones with the whole tread intact; that because of those factors Thompson could not keep control of the truck when he attempted to make an ordinary manoeuvre of a slight turn to the left and a quick reduction in speed. From that the learned trial Judge concluded that Thompson's speed, although not exceeding the speed limit, was excessive in the circumstances. Those were all circumstances within Thompson's knowledge. He knew that the road had been seal coated; he knew it was wet; he ought to have known it was slippery, and he knew his rear tires were somewhat worn.

It was his duty to drive his vehicle at a speed which would permit him, under those conditions, to keep it under proper control when meeting the ordinary exigencies of highway travel. His speed was too great to allow him to swerve slightly and to slow the truck down quickly without skidding and losing control. In that he was negligent. That is what I understand the learned Judge's reasoning to be, and on the evidence I am unable to say that he was wrong in drawing that inference.

Lord and Maclean JJ.A. disagreed with Davey C.J.B.C., but it is of great importance to note that both erroneously appear to have accepted the following paragraph in the judgment of Aikins J.:

As I understood counsel for the defendant's argument, he put it that there was no one thing which the defendant driver did nor any one thing which the defendant driver failed to do which could be considered as amounting to negligence. Taking various aspects of the defendant driver's conduct each in isolation I could not find negligence

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on the part of the defendant driver. Taken by itself the defendant driver's speed of approximately fifty miles an hour on a main highway was not excessive. The defendant driver was keeping a reasonably careful lookout. The defendant driver, before the skid, was certainly driving on his proper side of the highway. The GMC truck was properly loaded and was not loaded beyond its proper carrying capacity. The truck was in excellent mechanical condition. The rear tires of the truck were substantially worn so that there was little tread left in the centre of the tires, but the evidence supports the conclusion that they were safe for use, although, as I have said, I think this to be a wholly relative conclusion. The defendant driver's reaction on seeing the deer, in braking and turning slightly to the left and braking again, does not indicate any lack of reasonable care. Taking all these aspects of the defendant driver's conduct individually and in isolation one could not say that he was guilty of any negligence.

as conclusions arrived at by him. The paragraph just quoted is patently a recapitulation of counsel's argument. The learned trial judge rejected the argument that these several aspects of respondent's conduct should be considered in isolation because immediately after so summarizing counsel's argument he said:

Separate aspects of the defendant's conduct should not, however, in my opinion, be taken and considered in isolation.

It was also argued on behalf of the respondent that the learned trial judge found liability by the application of the doctrine of *res ipsa loquitur* in his determination of the case. It is clear to me that he did not do so but that he rightly decided the case on the evidence that was before him, concluding that the respondent was driving at an excessive speed in the circumstances of this particular case and because of this could not keep control of his vehicle when he found it necessary to slow down in the circumstances described by the respondent himself.

The appeal should, accordingly, be allowed with costs here and in the Court of Appeal. The judgments of Aikins J. in the Supreme Court of British Columbia should be restored.

*Appeal allowed and trial judgments restored.*

*Solicitors for the plaintiffs, appellants: Boughton, Anderson, Dunfee & Mortimer, Vancouver.*

*Solicitors for the defendant, respondent: Russell and DuMoulin, Vancouver.*