1969
*May 7, 8
June 6

HUGO LOTHOLZ (*Plaintiff and Defendant by Counterclaim*) — APPELLANT;

AND

WILLIAM ROALD CHARLTON, ANITA KUROPATWA, WALTER GENE LAZZER, and GLORIA MOYER, Executors of the Estate of EMILY CHARLTON, deceased, and WILLIAM CHARLTON (*Defendants and Plaintiffs by Counterclaim*) — RESPONDENTS.

HUGO LOTHOLZ (*Defendant*) ..... APPELLANT;

AND

SHIRLEY CHARLTON, a minor, by her next friend WILLIAM CHARLTON and WILLIAM CHARLTON (*Plaintiffs*) — RESPONDENTS.

HUGO LOTHOLZ (*Plaintiff*) ..... APPELLANT;

AND

WILLIAM ROALD CHARLTON, ANITA KUROPATWA, WALTER GENE LAZZER, and GLORIA MOYER, Executors of the Estate of EMILY CHARLTON, deceased, and WILLIAM CHARLTON (*Defendants*) — RESPONDENTS;

AND

CANADA WEST INSURANCE COMPANY (Third Party) — RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Negligence—Motor vehicles—Head-on collision on dust-covered road—One vehicle almost entirely on wrong side of road—Driver fatally injured—Driver of other vehicle hugging centre of highway—Division of liability—Damages.

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

Following the collision of two motor vehicles, in which accident C (the driver of one of the vehicles) was killed, three actions were brought and tried together. The trial judge found that both the deceased and the appellant L (the driver of the other vehicle) had been negligent and apportioned liability at 50 per cent to each driver.

The accident took place on a gravel road which was dry and very dusty. L was travelling northward at about 50 m.p.h. and was preceded by another vehicle which threw up a cloud of dust. This dust restricted the visibility of the deceased who was driving towards the south. As her automobile and that of L approached one another C's vehicle crossed over on to the northbound lane and the two vehicles met almost head on. The evidence established that when the collision occurred the left side of L's vehicle was either at or slightly to the left of the centre of the highway.

L was awarded $27,500 general damages plus $500 to cover plastic surgery and $500 for dental work. Special damages were fixed at $10,139. By way of counterclaim the executors of the estate of C were awarded $7,500 under *The Trustee Act,* R.S.A. 1955, c. 346, and an additional sum of $30,000 under *The Fatal Accidents Act,* R.S.A. 1955, c. 111. An appeal from the trial judgment was dismissed by the Appellate Division of the Supreme Court, one member of the Court dissenting on the question of the division of liability. L then appealed to this Court from the division of liability and from the damages awarded to the estate of C.

Held: The appeal as to percentage of liability should be allowed; the appeal as to damages should be dismissed.

The major responsibility for the collision lay upon the deceased driver. Her negligence was beyond question. The automobile she was driving was almost entirely on its wrong side of the road.

However, L was also in a measure at fault. A prudent and reasonable man would not hug the centre of a dust-covered highway at a speed of 50 m.p.h. without being aware that there was the likelihood that a driver bound in the opposite direction could also be driving at or near the centre, and that that driver might accidentally cross over or emerge from the dust too late for either driver to avoid meeting more or less head on. L was found to be 25 per cent at fault.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, dismissing an appeal from a judgment of Primrose J. in three actions which arose out of a motor vehicle accident and were tried together. Appeal as to percentage of liability allowed; appeal as to damages dismissed.

R. E. Hyde, Q.C., and *G. W. Robertson,* for the appellant.

J. E. Redmond, for the respondent Charlton *et al.*

P. R. Chomicki, for the respondent Canada Life Insurance Co.

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The judgment of the Court was delivered by

HALL J.:—Three actions arising out of the same motor vehicle collision were tried together by Primrose J. in the Supreme Court of Alberta. He found both drivers equally at fault and apportioned liability at 50 per cent to each driver.

In Action No. 53614 in which the appellant Lotholz was plaintiff, he fixed Lotholz's damages at $27,500 general plus $500 to cover plastic surgery and $500 for dental work, and he also fixed the amount of the special damages at $10,139. In Action No. 54769 he fixed Lotholz's special damages at $3,615. In Action No. 54290 he fixed Shirley Charlton's general damages at $3,000 and William Charlton's special damages at $967.60. In Action No. 53614 he fixed the damages by way of counterclaim payable by Lotholz to the executors of the estate of Emily Charlton, deceased, at $7,500 under *The Trustee Act*, R.S.A. 1955, c. 346, and an additional sum of $30,000 under *The Fatal Accidents Act*, R.S.A. 1955, c. 111, and he also awarded William Charlton the sum of $1,175 special damages. The learned trial judge also ordered that Lotholz have costs in the sum of $500 plus disbursements; that Shirley Charlton have costs in the sum of $250 plus disbursements, and that Canada West Insurance Company have costs in the sum of $200 plus disbursements.

Canada West Insurance Company was joined on its application as a third party in Actions Nos. 53614 and 54769 pursuant to s. 302 of *The Alberta Insurance Act*, R.S.A. 1955, c. 159, and was represented by counsel at the trial.

The appellant Lotholz appealed to the Appellate Division of the Supreme Court of Alberta in all three actions against Primrose J.'s division of liability at 50 per cent and against that portion of the judgment in Action No. 53614 by which damages in the sum of $37,500 were fixed by Primrose J. in favour of the executors of the estate of Emily Charlton, deceased, and against that portion of the judgment in Action No. 54769 by which the third party, Canada West Insurance Company, was awarded costs in the sum of $200 and disbursements.

The Appellate Division dismissed the appeal with costs. Johnson J.A., dissenting, would have reduced Lotholz's

negligence and liability to 25 per cent instead of the 50 per cent fixed by Primrose J. The third party was given no costs in connection with the appeal.

Lotholz now appeals to this Court and claims that he should not have been held liable at all or, in any event if liable, that his percentage of fault was much less than that of the deceased, Emily Charlton, the driver of the Charlton vehicle. He also appeals against the amounts awarded to the executors of the Emily Charlton estate.

The facts are relatively simple. The collision between the Lotholz and the Charlton vehicles took place at about 8:45 a.m. on May 12, 1966. The vehicles met on a gravel road some $2\frac{1}{2}$ miles south of the Town of Barrhead in the Province of Alberta. Lotholz was driving his automobile northward toward Barrhead. The gravel highway was approximately 24 feet in width with gravel shoulders on each side of approximately 3 feet, giving an overall width of 30 feet 6 inches from ditch to ditch. There was no line or indication fixing the centre of the highway which had to be determined by measurement. The road on the morning in question was dry and very dusty. Visibility on the westerly half of the highway was very restricted by clouds of dust raised by traffic on the road whereas visibility on the eastern side of the highway was relatively better because an easterly wind was carrying the dust westward across the highway. Lotholz was preceded northward by another vehicle which threw up a cloud of dust as it went towards Barrhead. Lotholz was sufficiently far in rear of this vehicle that he had reasonably good visibility. He could not, however, see what was on the west half of the highway or the vehicle which was ahead of him.

The deceased, Emily Charlton, was driving the Charlton automobile southward on this highway and she met the vehicle which was preceding Lotholz some distance to the north of where the collision took place. Her visibility was undoubtedly restricted by the dust thrown up by the vehicle she just met and as the Charlton and Lotholz automobiles came towards one another the Charlton vehicle crossed over on to the northbound lane and the two vehicles met almost head on. As they met the Charlton vehicle was a matter of some 5 feet over the centre of the highway. Lotholz, who was driving with the left side of his automobile at or on the centre of the highway, saw the Charlton automobile emerge

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from the dust on his side of the road. He applied his brakes and skid marks 44 feet in length were discernible on the highway after the impact. There were no marks or indications of the application of brakes by the driver of the Charlton automobile.

The negligence of the deceased, Emily Charlton, is beyond question. The automobile she was driving was almost entirely on its wrong side of the road. The question for decision is whether Lotholz was negligent at all, and if negligent, what percentage of fault should be assessed against him?

The evidence establishes that when the collision occurred the left side of the Lotholz vehicle was either at or slightly to the left of the centre of the highway. There was considerable argument about the exact position of the Lotholz automobile in this regard, but in my view I do not think it is material to determine the location of the left side of the Lotholz vehicle to the inch in relation to the centre of the highway. The fact is that Lotholz was hugging the centre of the highway as he proceeded northward and he had no vision at all of what traffic might be coming southward on the west side of the highway. As stated, the highway, including the gravel shoulders on both sides, was 30 feet 6 inches wide. The centre of the highway was, therefore, 15 feet 3 inches from the outer edge of the east ditch. The east shoulder was approximately 3 feet wide so there remained 12 feet 3 inches on the east side of the centre for Lotholz to drive upon. His automobile was 80 inches in width. He could have driven some 5 feet closer to the east side of the highway without going on the east shoulder, and, in my opinion, it was negligence for him to drive at 50 miles per hour under the conditions as they existed at the time in question. It is true that there would probably have been a collision in any event even if Lotholz had been driving closer to the right shoulder as he should have been doing, but as against that, the driver of the Charlton vehicle might have been able to swerve to her right if she had not been faced with the Lotholz vehicle almost head on or Lotholz might, on seeing the Charlton vehicle, have avoided the collision by swerving a foot or so to his right.

The major responsibility for the collision must rest upon the driver of the Charlton automobile, but I cannot conclude that Lotholz was not also in a measure at fault. The

classic definition of negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. I do not think that a prudent and reasonable man would hug the centre of that highway, dust-covered as it was, and do so at a speed of 50 miles per hour without being aware that there was the likelihood that a southbound driver could also be driving at or near the centre, and that that driver might accidentally cross over or emerge from the dust too late for either driver to avoid meeting more or less head on.

The learned trial judge fixed the responsibility for the accident equally on both drivers. As previously stated, the major responsibility must rest on the driver of the Charlton automobile. Johnson J.A. in the Appellate Division fixed Lotholz's negligence at 25 per cent. I am prepared to accept his finding of 25 per cent. The judgment at trial should be varied accordingly and the amounts for which the parties are to have judgment calculated on this basis.

The damages awarded under *The Fatal Accidents Act* are on the generous side, but the amount is not such that I can say it is a completely erroneous assessment which should be set aside.

I would, accordingly, allow Lotholz's appeal in so far as the percentage of liability is concerned, but dismiss the appeal as to damages.

Lotholz is entitled to his costs of the appeal in this Court and in the Appellate Division. The order made by Primrose J. regarding the costs of trial should stand.

Appeal as to percentage of liability allowed, appeal as to damages dismissed; with costs.

Solicitors for the appellant: Wood, Moir, Hyde & Ross; Brower, Johnson, Liknaitzky, Robertson, Shamchuk & Veale, Edmonton.

Solicitors for the respondent Charlton et al.: Bishop, McKenzie, Jackson & Redmond, Edmonton.

Solicitors for the respondent third party: Kosowan & Wachowich, Edmonton.