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POOLE & THOMPSON LIMITED (DEFENDANT) ..... } APPELLANT; * Oct. 24 * Nov. 20.

AND

WILFRED McNALLY (PLAINTIFF).... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND

Motor vehicles—Negligence—Highway Traffic Act, P.E.I., 1930, c. 1, s. 65—Construction—Onus of proof—Contributory negligence—Conduct of case at trial as affecting right on appeal to complain of non-direction to jury—Liability of owner of motor car—Nature of presumption under s. 65 (2).

The judgment of the Supreme Court of Prince Edward Island *en banc*, 7 M.P.R. 346, affirming (on equal division of the court) judgment against appellant, as owner of a motor car, for damages for injury to plaintiff, who, it was alleged, was struck by the car through negligent driving thereof by one S., was affirmed.

It was held that there was sufficient evidence to warrant the jury's finding that the said car was the one which struck the plaintiff.

Appellant contended that there was evidence of contributory negligence as to which the trial judge should have instructed the jury. *Held:* (1) A conclusive answer was found in the terms of s. 65 (1) of the Prince Edward Island *Highway Traffic Act* (placing the onus of proof that the damage "did not arise through" the negligence of the owner or driver upon the owner or driver); the submission of the question to the jury would have been irrelevant and futile; the most a finding of contributory negligence could have proved would be that the injury was not entirely or solely caused by S.'s negligence, and this would not have been enough to discharge the onus imposed by s. 65 (1) (the construction and effect of s. 65 (1), and its application with regard to a finding of contributory negligence, discussed). (2) On the evidence such finding could not reasonably have been made. (3) Although contributory negligence had been pleaded, yet, at the trial, the whole defence was that said car was not the one which struck the plaintiff, that it was elsewhere at the time of the accident, and there was no suggestion of reliance upon the question of contributory negligence nor any request to direct the jury upon it; therefore appellant could not now complain of non-direction to the jury upon it.

In s. 65 (2) of said Act (providing that, in an action for damage sustained by reason of a motor vehicle upon a highway, a person driving it with the consent, expressed or implied, of the owner, "shall be deemed to be" the agent or servant of the owner and to be employed as such and "shall be deemed to be" driving it in the course of his employment) the words "shall be deemed to be" must be construed as creating a conclusive, not a rebuttable, presumption.

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* PRESENT:—Duff C.J. and Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ.

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APPEAL (by special leave granted by the Supreme Court of Prince Edward Island *en banc*) from the judgment of the Supreme Court of Prince Edward Island *en banc* (1) dismissing (on equal division of the court) the present appellant's appeal from the judgment of Saunders J., upon the verdict of a jury, that the plaintiff (respondent) recover the sum of $1,500 against the defendants in the action.

The action was against one Sentner and the present appellant company for damages for injury caused to the plaintiff by being struck by a motor car, alleged by the plaintiff to have been driven by the defendant Sentner (whose negligent driving was alleged to have caused the accident) and to have been owned by the defendant company (the present appellant).

The material facts of the case and questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

T. A. Campbell K.C. and *D. L. Mathieson* for the appellant.

J. J. Johnston K.C. for the respondent.

The judgment of the court was delivered by

CROCKET, J.—This is a running down case which was tried in the Supreme Court of Prince Edward Island before Mr. Justice Saunders and a jury.

The respondent, McNally, a fireman in the employ of the Canadian National Railways, was driving his own automobile to Kensington on the night of July 13, 1932, accompanied by a Mr. and Mrs. Paquet and a girl friend of the latter. When approaching the town his left rear tire went down. He pulled over to his right side of the road, stopped his car close to the ditch, dimmed his headlights and got out with Paquet to replace the injured tire. Paquet went behind the car to jack up the rear axle while McNally proceeded to remove the nuts on the rear left wheel. While so engaged another car came along from the direction of the town at a high rate of speed and ran down and demolished a horse drawn unlighted wagon proceeding in the same direction on the other side of the road a few feet

(1) (1934) 7 M.P.R. 346.

ahead of the parked car. After smashing the wagon the running down car careened across the road; struck McNally, threw him forward into the gutter and proceeded on its way until it disappeared in the darkness and fog which prevailed at the time, without its identity being recognized by any of the persons left at the scene of the accident.

McNally was found lying on his back unconscious. One of his arms and five ribs were broken and he suffered other injuries, which confined him to a hospital for over two months and incapacitated him for his employment for over six months.

Subsequent investigation having revealed the fact that a young man named Sentner had borrowed a used Ford coach from the appellant company at Charlottetown, had driven the borrowed car to Kensington with two other men to attend a public dance on the night of the accident and had run down a wagon at the same place while driving out of Kensington with his two companions with whom he had been drinking, the respondent brought this action against Sentner as the driver and the appellant as the owner of the car which had caused his injuries, to recover damages for these injuries and the loss of wages resulting therefrom.

S. 65 (1) of the Prince Edward Island *Highway Traffic Act* provides:—

> When loss or damage is sustained by any person by reason of a motor vehicle upon a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver shall be upon the owner or driver.

And s. 65 (2):—

> In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle upon a highway, every person driving such motor vehicle who is living with and as a member of the family of the owner thereof and every person driving such motor vehicle with the consent, expressed or implied, of the owner thereof shall be deemed to be the agent or servant of the owner of such motor vehicle and to be employed as such and shall be deemed to be driving such motor vehicle in the course of his employment, but nothing in this sub-section shall relieve any person deemed to be the agent or servant of the owner and to be driving such motor vehicle in the course of his employment from the liability of such damages.

In virtue of these statutory provisions it was only necessary for the plaintiff, in order to maintain his action against both defendants, to prove that his injuries were caused up-

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on a highway by a motor vehicle of which the appellant was owner and which Sentner was driving at the time with the appellant's consent. It was then for the defendants to prove that McNally's injuries did not arise from the negligence or improper conduct of Sentner. No serious question seems to have been raised on the trial as to the appellant's ownership of the Ford coach which Sentner drove to Kensington on the night in question, or as to his having obtained the appellant's permission to use it for that purpose, so that practically the whole issue in controversy between the parties on the trial, as it was conducted, was as to whether this was the car which had struck McNally.

The learned trial Judge directed the jury that this was the crucial point in the case and summed up very clearly and completely the evidence of Sentner and all other defence witnesses which had been adduced in an effort to prove that, notwithstanding the undisputed fact that he had run down a wagon in the same locality on the night in question and continued on his way without stopping, there was no other car parked on the roadside opposite the wagon at the time and that he had neither struck McNally nor in any manner come in contact with his car. The jury returned a verdict for the plaintiff against both defendants, assessing the damages at $1,500.

The defendant, Poole & Thompson, Limited, moved the Court *en banc* to set aside the verdict against it and enter judgment in its favour. Sentner did not join in this motion, which was heard before Chief Justice Mathieson and Mr. Justice Arsenault, the main grounds argued being that there was not sufficient evidence of the identity of the car to reasonably warrant the verdict, that the appellant was not legally liable for the damage upon a proper construction of s. 65 (1) of the *Highway Traffic Act,* and that there was evidence of contributory negligence and the learned trial Judge had not instructed the jury upon this question.

The learned Chief Justice held, as to the evidence concerning the identity of the car, that there was nothing on this ground to support the verdict but conjecture, and was of opinion also that the evidence established contributory negligence on the part of the plaintiff which would debar him from recovering. For these two reasons he thought

the appeal should be allowed and judgment entered for both defendants.

Mr. Justice Arsenault, on the other hand, held that there was sufficient evidence of the identity of the car to support the verdict and no evidence of contributory negligence on the part of the plaintiff which would have justified the learned trial Judge in leaving that question to the jury, even had counsel representing the defendants separately not failed, as they did, to request that he do so. His Lordship fully discussed the construction of s. 65 (2) of the *Highway Traffic Act,* which the learned Chief Justice in his view of the case had not considered it necessary to do, and held that its effect was to render the appellant liable for any damage which Sentner had caused while driving its car, even though he may not in point of fact have been driving the car as its *agent* or *servant* in the usual sense of these words. He, therefore, held that the appeal should be dismissed.

The result of this division of opinion was that the verdict of the jury and the trial judgment entered thereon stood.

The Supreme Court of the Province having granted special leave to appeal to this Court, we are now called upon to pronounce upon substantially the same questions as those argued in the provincial Court *en banc.*

After as careful an examination of the two opposing judgments as I have been able to make and of all the relevant evidence to which we have been referred on the question of the identification of the motor car that struck the plaintiff, I feel bound to say that I concur in the opinion of Mr. Justice Arsenault that there was sufficient evidence to warrant the verdict for the respondent upon this question—the only issue the jury was required to determine.

It was an issue upon which the jury might well enough have found either way upon a consideration of the whole evidence, and depending in its final analysis upon the credibility of Sentner's story that, although he had run down and smashed the wagon and continued on his way without stopping, he did not strike the plaintiff's or any other car, and that no car was parked at the time at or near the spot where he had run down the wagon.

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Much stress was laid upon the fact that no marks were found on the borrowed car after it was returned to the appellant's garage to indicate that it had been damaged in any way on its left side, though its front iron bumper had been broken and removed and laid inside the car. The defence sought to account for the breaking of the bumper by the fact that it had been welded and that the impact with the wagon was sufficient to break it. The bumper, however, was not broken at the weld, and, as there was indisputable testimony that the rear bumperette on the McNally car had been caught and bent straight back on its left side, breaking the iron arm by which it was attached to the frame of the car, and also that the running down car was, immediately after passing the McNally car, observed to be throwing up gravel and heard to be making a clicking noise as it passed over the railway crossing a short distance beyond and Sentner himself admitted that he had afterwards been held up by its dragging and finally catching behind the front wheel, the probability would seem to lie on the side of the inference that it was broken by striking the rear bumperette of the McNally car rather than by striking the rear wheels of a light wooden carriage, as contended. If there were nothing else I should think that this evidence alone would have afforded abundant justification for the jury's verdict.

With regard to the contention that there was evidence of contributory negligence as to which the learned trial Judge should have instructed the jury, it seems to me a conclusive answer to it is found in the terms of s. 65 (1) of the *Highway Traffic Act* above quoted.

That enactment, as the present Chief Justice of this Court (then Duff, J.), construing an identically similar section in the Manitoba *Motor Vehicle Act* in *Winnipeg Electric Co.* v. *Geel* (1), clearly pointed out, creates against the owner or driver of a motor vehicle, by reason of which loss or damage has been proved to have been sustained by any person upon a highway, a rebuttable presumption of negligence, which must be disproved before either can escape liability therefor. The presumption thus created can be rebutted only by proof that the injury claimed for "did not arise through the negligence or improper conduct of the owner or driver." The onus of proving that

(1) [1931] Can. S.C.R. 443.

fact is explicitly placed on the owner or driver. The result is that, once it is proved in any action that the plaintiff was in fact injured upon a highway by a motor vehicle, he is, under the provisions of s. 65 (1), entitled to judgment against the driver, at least, of the motor vehicle by which he was so injured if upon the whole case there is no such evidence as would reasonably warrant a finding that the injury did not arise through the driver's negligence or improper conduct.

Applying the enactment in this sense to the case at bar, what would have been the result if the question of contributory negligence had been submitted to the jury and the jury had found that there had been some negligence on the part of the plaintiff which materially contributed to cause the injury? Would such a finding have established the fact that the plaintiff's injury did not arise through Sentner's negligence or improper conduct within the meaning of s. 65 (1)? It would assuredly not have established that there was no negligence or improper conduct on the part of Sentner which contributed to cause the injury. On the contrary, it would have established that the injury was caused in part by the negligence of the plaintiff and in part by the negligence of Sentner, or, in other words, that the real proximate and direct cause of the injury was the combined negligence of the two and that neither could by the exercise of due care have avoided it. The most a finding of contributory negligence on the part of the plaintiff could be said to prove, had such a finding been made, would be that the injury was not entirely or solely caused by Sentner's negligence or misconduct. This in my opinion would not have been enough to discharge the onus stated in the subsection. Proof that his negligence or improper conduct did not entirely or solely cause the injury claimed for, is not proof that the injury "did not arise through" his negligence or improper conduct, which is the fact the subsection explicitly enacts must be proved in order to rebut the statutory presumption which it creates, unless indeed these controlling words of the subsection are construed to mean "did not entirely or solely arise through" the negligence or improper conduct of the owner or driver. I cannot think, having regard to the reason and purpose of the enactment and the context in which the words are used, that they are reasonably capable of any such con-

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struction. The submission of the question of contributory negligence to the jury would, therefore, have been quite irrelevant and futile.

Apart from this consideration, however, I agree with the opinion of Mr. Justice Arsenault that in the circumstances disclosed by the whole evidence a finding of contributory negligence could not reasonably have been made against the plaintiff.

Another consideration which, I think, would completely dispose of this ground of appeal is that, notwithstanding both defendants in their separate statements of defence pleaded contributory negligence, the whole defence on the trial was in reality an alibi: that the Sentner car was not near the scene of the accident when McNally was injured, but in Kensington. Their counsel accordingly did not suggest at any stage of the trial that they were relying in any way upon the question of contributory negligence and made no request to the learned Judge to give any direction to the jury in reference to it. Having thus themselves to all intents and purposes abandoned that plea, they surely cannot now be heard to complain that the learned trial Judge should have directed the jury upon it.

As to the contention that the words "shall be deemed to be," as used in s. 65 (2), should be construed as creating only a rebuttable and not a conclusive presumption, I am of opinion that they must be construed in the latter sense. It is manifest from the whole language of this subsection that the intention of the Legislature was to make every owner of a motor vehicle responsible for any loss or damage resulting from its operation on a highway, provided that such loss or damage occur while it is being driven by a person with his consent, express or implied. To give the words "shall be deemed to be" only a *prima facie* effect, as if the words "until the contrary be shown" immediately followed them, would defeat the clear intent of the section.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *D. L. Mathieson.*

Solicitor for the respondent: *J. B. Johnston.*