1955
*Nov. 7, 8
1956
*Mar. 2

NORTHLAND GREYHOUND LINES INC. (*Defendant*) ..... APPELLANT;

AND

WILLIAM BRYCE (*Plaintiff*) ..... RESPONDENT;

AND

ROYAL TRANSPORTATION LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Automobile—Negligence—Collision at night with rear of disabled truck—Flares put out by truck driver—Truck lights off—Whether lighting equipment disabled — Damages for loss of life — Trustee Act, R.S.M. 1940, c. 221—Highway Traffic Act, R.S.M. 1940, c. 93.

*PRESENT: Taschereau, Kellock, Estey, Locke and Abbott JJ. Estey J. died before the delivery of the judgment.

(1) [1922] 2 K.B. 113.

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The respondent and his wife (plaintiffs) were killed when the bus in which they were passengers collided at night with the respondent company's disabled tractor and trailer, which was stopped on the right-hand side of the pavement with a clearance for traffic of sixteen and a half feet. The administrators of the respective estates sued the owners and drivers of both the truck and the bus for damages under the *Trustee Act,* R.S.M. 1940, c. 221.

The right rear wheels of the trailer had come off some hours before but the driver had been able to make the repairs and to continue his trip. Some forty miles further, the same wheels came off again and the driver pulled up on the side of the road. As the repairs could not be made at the time, the driver placed lighted flares as required by the *Highway Traffic Act,* turned off all the lights of both the tractor and the trailer and went to sleep in the cab of the tractor. The collision occurred some three hours later.

The driver of another truck of the respondent company, who had been following him and who stopped when the breakdown occurred, did not stay with him. He continued on his way, put his truck in the company's garage some fourteen miles away and went home without communicating with anyone.

The trial judge found that the sole cause of the accident had been the failure of the bus driver to keep a proper lookout, that the lighting equipment of the truck was disabled within s. 18(1) of the *Highway Traffic Act,* that the company had satisfied the onus under s. 82 of the Act with regard to its failure to have the lights of the truck burning and with regard to the moving of the truck, and awarded damages of $2,500 for each deceased. A majority in the Court of Appeal affirmed this judgment but increased the general damages to $5,000 for each deceased.

Held (Kellock J. dissenting in part): That the appeal should be dismissed other than as to the quantum of damages, and the award of general damages made at the trial restored.

Per Curiam: The trial judge had proceeded on the proper principles in assessing the damages under the *Trustee Act.*

Per Taschereau, Locke and Abbott JJ.: There were concurrent findings that the real and effective cause of the accident had been the failure of the bus driver to keep a proper lookout.

Although there had been a contravention of ss. 17 and 18 of the *Highway Traffic Act* on the part of the truck driver, in that the lights at the rear of the trailer were carried at the bottom instead of at the top of the box and in the failure to have the lights lit since the lighting equipment was not disabled as found by the trial judge, the concurrent finding that these defaults did not cause or contribute to the occurrence of the accident has not been shown to have been wrong.

Per Kellock J. (dissenting in part): The truck company has not proved that the lighting equipment on its truck was disabled and that the failure to have the lights lit and to move the vehicle did not contribute to the accident. The effect of the breach of duty on the part of both drivers continued up to the moment of impact and rendered them both equally responsible.

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APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming, Beaubien J. dissenting, the judgment at trial and increasing the award for damages.

A. A. Moffat, Q.C. and *P. S. Morse* for the appellant.

W. P. Fillmore, Q.C. for the respondent (defendant).

W. A. Molloy and *J. F. O'Sullivan* for the respondent (plaintiff).

The judgment of Taschereau, Locke and Abbott JJ. was delivered by:—

LOCKE J.:—The learned trial judge has found that the real and effective cause of the accident was the failure of the appellant Stavos to see the trailer in time to avoid it, which I interpret in the context simply as a finding that he did not keep a proper lookout. The majority of the learned judges of the Court of Appeal (1) have agreed with this, and there are thus concurrent findings upon this question of fact.

Other than the question as to the quantum of the damages allowed in respect to the claim under the *Trustee Act* (c. 221, R.S.M. 1940), the sole matter to be determined in this appeal, in my opinion, is as to whether there has been error in failing to give effect to the provisions of s. 82 of the *Highway Traffic Act* (c. 93, R.S.M. 1940), which declares that, when a motor vehicle is operated upon a highway in contravention of any provision of the Act and loss or damage is sustained by any person thereby, the onus of proving that it did not arise by reason of such contravention is upon the owner or driver thereof.

I am unable, with great respect, to agree with the learned trial judge that the lighting equipment of the truck and trailer of the respondent, Royal Transportation Limited, was disabled within the meaning of that expression in s. 18(1) of the Act. The provisions of para. (*c*) of s. 17(1) of the *Highway Traffic Act* applied to the truck with its attached trailer, so that, in addition to the head lamps required by s. 17(1)(*a*), it was required to exhibit at night four lighted clearance lamps in a conspicuous position as near the top as practicable, one on each side of the front

(1) [1955] 14 W.W.R. 258; 2 D.L.R. 251.

casting a green light only, and one on each side of the rear casting a red light only, the lights to be such as to be visible under normal atmospheric conditions for a distance of at least 500 feet. The lights at the rear of the trailer in question did not comply with the statute, in that they were carried one on each side at the bottom of the box of the trailer.

When Sopko had put out the flares on the highway, he turned off all of the lights, assigning as his reason for this that to leave them on would soon have exhausted the battery. Other than to say that the battery was a little weak, he did not amplify the matter or attempt to estimate how long it would have sustained the lights. He said, however, that when he stopped he thought he had only two or three gallons of gasoline left in the truck, and that this was insufficient to enable him to keep the engine running and thus charging the battery until daylight. It would have been unnecessary to have kept the head light burning and it was shown that the other lights could be left on independently, which would have materially reduced the drain on the battery. The evidence upon this aspect of the matter is indefinite and, in my opinion, unsatisfactory. Apart from this, it was shown that, at the time of the breakdown, another truck driver employed by the appellant, who had helped Sopko when the truck had broken down earlier that night, was at the scene after the breakdown south of St. Norbert and could readily have obtained an additional supply of gasoline, either at that village which was only some two or three miles distant, or from Winnipeg some fourteen miles away, so that any difficulty in keeping the lights burning until daylight could readily have been overcome. Had the lights been kept on for as long as the battery with the aid of the engine, and the limited supply of gasoline would have made this possible, any subsequent disablement would have been due to the failure to obtain the required fuel.

The learned trial judge found that all three flares were burning as the bus approached the respondent company's vehicle, and accepted the testimony of several witnesses who had theretofore driven north upon the highway that they were visible from one-half a mile to a mile to the

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south, and that while the night was dark the visibility was otherwise good. He considered that the flares, particularly the one placed alongside the stranded truck, must have lighted it up clearly. After finding that the lighting equipment was disabled, within the terms of s. 18(1) of the Act, and that this was not due to negligence on the part of Sopko or the respondent company, he said in part:—

> In order to make the defendant liable it must be shown that the failure to have the truck lights burning in some way caused the loss or damage, but the onus is on the defendant Sopko to prove that such loss or damage did not arise by reason thereof: sec. 82 of the *Highway Traffic Act, supra*. I have already found that the three flares were burning, one of which was alongside the Sopko truck and to the west of it and about 1½ feet from the centre line of the highway. The flare in this position could readily have been seen by Stavos, who was in the driver's seat on the left hand side of his bus. Several other parties had seen the Sopko truck immediately before Stavos approached. I accept the evidence of the witness Adams, a man of considerable experience, that flares constitute a better warning than vehicle lights. I am satisfied that the absence of such clearance lights on the truck made no difference so far as this accident is concerned and that the defendant Sopko has satisfied the onus upon him.

The point was not dealt with more explicitly in the reasons delivered by Adamson J.A. (now C.J.M.), other than to say that he agreed with the learned trial judge that Stavos:—

> "was negligent in not seeing this trailer in time to avoid the accident and that such negligence was the real cause of the accident", and with his finding that the bus company is wholly liable for the damage.

I think that, when the learned judge said that in order to make the defendant liable, it must be shown that the failure to have the truck lights burning in some way caused the loss, he intended that it should be construed as caused or contributed to the occurrence. Despite the fact that the language quoted might indicate that, in determining whether it had been shown that the absence of the red clearance lights and tail light had not caused or contributed to the accident the test was whether the flares that were set out gave a more effective warning of the presence of the stranded vehicle and that that was the decisive point, I do not think the learned judge's language should be so construed but rather as saying that the failure of Stavos to see the flares, which were so plainly visible, showed that he was not keeping any proper lookout and would not have seen the clearance lights or the tail light had they been lighted.

I can assign no other meaning to the words "the absence of such clearance lights on the truck made no difference so far as this action is concerned." I think that, had I been the judge of first instance, the evidence would not have satisfied me that this was so. But where, as here, a learned and experienced trial judge and a majority of the Court of Appeal have come to this conclusion, the former having had the benefit of observing the demeanour of the witnesses as they gave their evidence, that finding of fact should not, in my opinion, be disturbed in this Court unless we are satisfied that it is clearly wrong. In this case I think that has not been shown.

I have had the advantage of reading the reasons for judgment to be delivered by my brother Kellock in this matter and I agree, for the reasons stated by him, that the award of damages under the *Trustee Act* made at the trial should be restored.

I would dismiss this appeal other than upon the issue as to the quantum of damage. As between the appellants and the respondent Bryce, the success being divided, I would allow no costs either in this Court or in the Court of Appeal. I would allow the respondents, Royal Transportation Limited and Sopko, their costs of this appeal, and would make no change in the order as to costs contained in paragraph 4 of the formal judgment of the Court of Appeal.

KELLOCK J. (dissenting in part):—The tractor and trailer of the respondent company, driven by the respondent Sopko, first broke down about seven o'clock on the evening of July 2, 1952, while proceeding northerly on the highway from Emerson to Winnipeg. The tractor and trailer weighed between 12,000 and 13,500 pounds, while the load was 20,000 pounds. The breakdown was due to the shearing of the bolts holding the dual right rear wheels on the axle, which dropped to the pavement when the wheels came off.

Sopko and one Smith, driver of another truck of the respondent company, put the wheels back on after Sopko had obtained the necessary bolts and nuts from a village in the neighbourhood. He then, followed by Smith, proceeded toward Winnipeg. On reaching a spot approximately three miles south of the Village of St. Norbert, the same wheels

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came off again and the truck was brought to a stop on the right-hand side of the pavement, which was twenty-four feet in width. This left some sixteen and a half feet clear to the west.

Sopko place three lighted flares, one some seventy-five paces south of the truck and to the east of the centre line of the highway, one alongside the left rear wheels, and one to the north. He and Smith then went back along the highway where they found one of the wheels although not the other. As Sopko had a spare wheel, he was in a position, on obtaining the necessary bolts and nuts, to make the same repair as before. Smith then left for Winnipeg in his truck, while Sopko got into the cab of his tractor and went to sleep, first turning out all the lights on both tractor and trailer. On arriving in Winnipeg, Smith put his truck away in the respondent company's garage and went home to bed. He made no attempt to communicate with anyone.

At approximately 2.15 a.m. a passenger bus, belonging to the appellant company and driven by the appellant, Stavos, crashed into the rear of the Sopko truck, the respondent Miller, as well as other passengers, being killed. This occurred, as found by the learned trial judge, over three hours after the truck had stopped.

The learned judge found also that the flares Sopko had put out were burning at the time of the accident, accepting in that regard the evidence of witnesses who had driven past the standing truck on their way to Winnipeg within a comparatively short time earlier. I do not think this finding, affirmed as it was by the court below, has been successfully challenged.

Stavos did not see the flares nor did he see the standing truck until too late to avoid striking it. He said that he had seen the red tail lights of a car travelling about 1,000 feet in front of him as he was some distance from the place of the accident, and that as he approached closer he observed another bus of the appellant company approaching from the north which he had recognized from its lights. He also had seen the lights of another vehicle behind that bus. These last mentioned vehicles were observed by some of the witnesses who had seen the flares near the standing truck as they had passed on their way to Winnipeg. One

of these put the place of meeting of the southbound bus and truck about three miles north of the Sopko truck, while another in another car placed it some four or five miles to the north.

Stavos says that as he approached the southbound vehicles, he put the lights of his bus on low beam in order to pass. The southbound bus in fact came to a stop some seventy-five feet to the north of the place of accident.

The learned trial judge found that the negligence of the appellant Stavos in failing to keep a proper lookout was the sole cause of the accident. As to the contention that the respondents ought to have moved the standing truck off the pavement on to the shoulder, he considered the nature of the ground would have involved danger of overturning had that been attempted, and that it was not unreasonable for the respondents to have waited until the morning in order to have the vehicle unloaded, repaired and removed. In this view he considered that as far as concerned the moving of the tractor-trailer, the respondents had satisfied the onus placed on them by s. 82 of the *Highway Traffic Act*.

With regard to the conduct of Sopko in turning off the lights, the learned judge, in the view that Sopko had given evidence that the battery on the truck was not strong enough to have kept the lights burning all night, an erroneous view of the evidence as I shall point out, considered that the lighting equipment of the truck was "disabled" within the meaning of s. 18(1) of the statute, basing this finding also upon his view that Sopko had testified that he did not have sufficient gasoline to run the engine for more than an hour and that he would have to keep the engine going in order to maintain the battery. The learned trial judge made this finding "with some hesitation" but considered that it was not, in any event, material in view of his conclusion that it was the negligence of Stavos in failing to keep a proper lookout which was the effective cause of the accident. Further, the learned judge, basing his finding upon the evidence of one of the witnesses that, as the learned judge said, "flares constitute a better warning than vehicle lights", found that the onus under s. 82 arising from the failure to have burning the lights which the statute required, was satisfied.

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In the Court of Appeal, Adamson J.A., as he then was, with whom Coyne J.A., concurred, accepted the findings of the learned trial judge, as did Montague J.A., the latter with some reluctance as he "was not entirely satisfied with the conduct of the driver of the Royal Transportation truck". Beaubien J.A., however, did not agree that the lighting equipment of the standing truck was disabled within the meaning of the statute or that the respondents had satisfied the onus thrown upon them by s. 82. In his view, Smith was in a position to have secured any necessary gasoline in a very short time, either at St. Norbert or a very few miles farther north, and that on the admission of Sopko that the battery was charging all the way from Winnipeg to Emerson and return, he could not be heard to say there was any danger of it running down. The learned judge pointed out that, as Sopko had admitted, he could have turned off the headlights and left the clearance and rear lights on, thus using a negligible amount of current.

Beaubien J.A., was also of the view that, coupled with the lights of the southbound bus and truck, the gray colour of the canvas over the Sopko trailer must, to some extent, have made it difficult to see that vehicle. He considered that had Sopko kept lighted the rear clearance lights on the trailer as the statute required him to do, those lights would have been visible a considerable distance from the trailer and, being upon the side of the highway upon which the bus was proceeding, could have been seen in time to avoid the collision. He was therefore of opinion that the negligence of Sopko had contributed to the accident and would have assessed the degrees of negligence at twenty per cent and eighty per cent respectively as between the respondents and appellants.

S. 17(1)(*a*) of the statute requires every motor vehicle after sundown and before sunrise to carry a lamp at the back of the vehicle casting a red light only, clearly visible under normal atmospheric conditions from a distance of not less than five hundred feet to the rear of the vehicle, and in the case of vehicles such as the tractor trailer here in question, to carry, in addition, two lighted clearance lamps in a conspicuous position as near the top as practicable, one on each side of the rear, also casting a red light only. These

lights are similarly required, when lighted, to be visible under normal atmospheric conditions from a distance of at least five hundred feet.

It will be convenient to set out relevant part of s. 18(1):

(1) In any case where any public service vehicle, commercial truck, or motor truck, the registered gross weight of which is in excess of eight thousand pounds, is stopped on a highway during the period when lighted lamps are required to be displayed on vehicles, *and the lighting equipment required by this Act is disabled* and the vehicle or truck cannot immediately be removed from the travelled portion of a highway outside a city, town or village, the driver or other person in charge of the vehicle or truck shall cause to be placed on the highway in the manner hereinafter provided

two lighted flares, lamps or lanterns, one at a distance of at least two hundred feet in advance of the vehicle and the other at least two hundred feet to the rear.

S. 67(1) and s. 82 read:

67(1) No person shall park or leave standing any vehicle, whether attended or unattended,

(*a*) upon the travelled portion of a highway, outside of a city, town or village, when it is practicable to park or leave the vehicle off the travelled portion of the highway;

(*d*) in such a manner that it obstructs traffic on a highway.

(3) The provisions of this section shall not apply in the case of a vehicle so disabled while on a highway that it cannot be readily moved until a reasonable time has elapsed to permit its removal.

82. Where a motor vehicle is operated upon a highway in contravention of any provision of this Act and any person claims to have sustained loss or damage thereby the onus of proof that such loss or damage did not arise by reason of the contravention of the Act shall be upon the owner or driver thereof.

With regard to turning off his lights, Sopko's evidence is as follows:

Q. Why did you leave your electric lights off?

A. On account of my battery dying out.

Q. Your battery had been charging all the way to Emerson?

A. Yes.

Q. And on the way back to where you broke down south of St. Jean?

A. Yes.

Q. Wouldn't it be well charged up then?

A. Well, it would be.

Q. Your battery was not defective?

A. She was a little weak because starting up a truck from one place to another takes quite a bit of juice.

Q. You only started up two or three times from Emerson?

A. Yes.

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Sopko did not testify, as the learned trial judge seemed to think, that the battery was not strong enough to keep the lights burning all night. While he did testify that he had only enough gasoline to keep the engine operating about an hour, the battery was not dependent upon the operation of the engine, and, in any event, neither he nor Smith made any effort to obtain gasoline, which could no doubt have been readily obtained in the neighbourhood. If it was not, the onus of establishing that fact was upon the respondents. I agree, therefore, with Beaubien J.A., that it is impossible for the respondents to contend in these circumstances that the lighting equipment of the standing truck was "disabled" within the meaning of the statute. The onus of proof that the accident did not arise by reason of this contravention of the statute was upon the respondents.

The respondents contend that the onus is satisfied by the finding of the learned trial judge that the effective cause of the accident was the failure of the appellant Stavos to keep a proper lookout and to see the flares. In taking this view, the learned judge accepted, as already pointed out, the opinion of a witness that flares constitute a better warning than vehicle lights. The statute, however, does not enable the court to make any such substitution. It provides for flares *only* when the lighting equipment is disabled in the case of a truck with a registered gross weight in excess of eight thousand pounds. In the case at bar, neither condition was met. The statutory requirement was for three red lights showing to the rear of the vehicle.

The paramountcy of the requirement for red to be shown on the rear of a standing vehicle is further emphasized by s-s. (2) of s. 7, which permits a vehicle, when standing upon a highway at a time when lighted lamps are required to be displayed, to show *"in lieu of* the lights hereinbefore required", one light on the left side of the vehicle in such a manner as to be clearly visible both to the front and the back for a distance of at least two hundred feet in normal atmospheric conditions, such light to show white or green

to the front and "red only" to the rear. In the view of the legislature, flares are second best and are only authorized when the vehicle is disabled from showing red lights.

My brother Locke, in *Bruce* v. *McIntyre* (1), observed that

> . . . persons driving upon the highway at night are, I think, entitled to proceed on the assumption that the drivers of other vehicles will comply with the provisions of the Highway Act and that any vehicle, either parked or temporarily stopped on the highway, will exhibit a red light at the rear.

This was said with respect to the Ontario statute, which calls for red lights on the rear of standing vehicles. In that case the light shown was amber and the court considered that the background, including the moon then shining, made it more difficult to see the light actually burning than would otherwise have been the case.

Stavos, unlike the drivers of any other vehicles who approached from the south and passed the standing truck that night, was meeting the driving lights of southbound traffic. While he testified that the lights of those vehicles did not interfere with his vision, that does not eliminate the consideration that the flares would not be as readily picked out as they would have been had there been no other lights in the background. This was also the view of Beaubien J.A., as I have already pointed out. In fact, while Stavos did not see the flares, he did see the white lights of the southbound traffic, although it was farther away.

In my view, it is impossible for the respondents to "prove" (the statutory word) that had they had the three red lights on the back of the truck lit, these would not have been seen by Stavos at the statutory distance of at least five hundred feet, an ample distance within which he could have, if necessary, stopped his vehicle or at least passed to the left of the standing vehicle. Had the lighting equipment been in fact disabled, the situation would no doubt have been different. There would then have been no contravention of the statute as to lights to which s. 82 would have applied.

In my opinion, the same result obtains with respect to the failure of the respondents to move the standing vehicle prior to the accident. The breakdown occurred within nine miles of the City of Winnipeg and within fourteen miles

(1) [1955] S.C.R. 251 at 261.

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of the respondent company's garage there. In order to put the truck in condition to be moved, it was necessary to do only what Sopko and Smith had already done shortly before at St. Jean. All that were needed were a few bolts and nuts which Ramsay, the Superintendent of the respondent company's operations, testified were obtainable at the company's garage in Winnipeg.

This witness also said that most of their drivers had been with the company for a long time and understood that he was to be called in case of an emergency. Smith, who had been with the company approximately twenty-five years, had had these instructions and knew Ramsay's telephone number and also knew how to get the company's mechanic. Instead of making any attempt to follow these instructions and get in touch with Ramsay or the mechanic by telephone from St. Norbert or any place else, neither Sopko nor Smith did anything although they had over three hours between the breakdown and the accident.

Accepting, as I do, the impracticability of moving the standing truck off the concrete on to the soft shoulder without replacing the wheels, nevertheless, leaving the stalled vehicle on the highway beyond a reasonable time was a contravention of the statute, even although flares had been put out. It is significant that while s. 67 uses the words "a reasonable time", s. 18(1) uses the words "cannot *immediately* be removed." In requiring the removal of a stalled vehicle within a reasonable time for its removal, the statute recognizes that its presence on a highway is a hazard to other traffic, including even the unwary to whom its protection is also extended. The hazard which such an obstacle presents, even when lighted, has been proved over and over by the numerous cases which have reached the courts arising out of such collisions. I think it is impossible, therefore, for the respondents to "prove" that this further contravention of the statute did not contribute to the accident.

Mr. Fillmore relies upon certain decisions in other cases on facts having more or less resemblance to those here in question. Some of them should be referred to. In *Marsden Kooler Transport* v. *Pollock* (1), my brother Estey has distinguished the facts of *Jones* v. *Shafer* (2), from those in

(1) [1953] 1 S.C.R. 66 at 70. (2) [1948] S.C.R. 166.

the case then before the court. In both cases, flares had been placed on the highway to the north and south of the stalled truck. In the *Jones* case the flares were removed by a person unknown, and the learned trial judge found that the truck could not have been moved by the means at hand and the necessary equipment to move it could not have been obtained at least until the next morning. Moreover, after the flares had been removed and before the accident, the police had turned on the lights on the truck.

In *Marsden's* case, the flares had not been placed as required by the relevant statute and they had gone out. Although the truck driver had communicated with another of the appellant's drivers, who came out with his truck, no effort had been made to move the stalled vehicle, the trial judge finding that that could have been done had the two tractors been used for the purpose. Moreover, the truck driver left the trailer, went to Edmonton and, on finding the appellant company's warehouse closed, went home to bed, making no other effort to get in touch with his employer until the next morning. Nor did he notify the police or anyone else of the presence of the trailer on the highway.

It may also be remarked that in neither of the above cases was any statutory provision similar to s. 82 of the statute here in question invoked.

In *McKee and Taylor* v. *Malenfant* (1), the learned trial judge found that had the respondent been keeping a proper lookout, he would have observed two vehicles preceding him travelling in the same direction, pass the standing truck. It was also found that after he did see the standing truck in fact, he had plenty of opportunity to avoid hitting it. In this court the case was disposed of by the majority upon this second ground.

The decision of the Judicial Committee in *Marvin Sigurdson* v. *British Columbia Electric Railway Company* (2), is a reaffirmation of the decision in *Admiralty Commissioners* v. *S. S. Volute* (3), and points out that the language of Viscount Birkenhead, at p. 144, is to be preferred to attempts to classify acts in relation to one another with reference to time or with regard to the knowledge of one

(1) [1954] S.C.R. 651. (2) [1953] A.C. 291.
(3) [1922] 1 A.C. 129.

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party at a particular moment of the negligence of the other party and his appreciation of the resulting danger, and by such tests to create categories in some of which one party is solely liable and others in which both parties are liable. Their Lordships said at p. 299:

> Time and knowledge may often be decisive factors, but it is for the jury or other tribunal of fact to decide whether in any particular case the existence of one of these factors results or does not result in the ascertainment of that clear line to which Viscount Birkenhead referred—moreover, their Lordships do not read him as intending to lay down that the existence of "subsequent" negligence will alone enable that clear line to be found.

Their Lordships disposed of the criticism with respect to the facts of the case there in question on the ground that the jury were entitled to come to the conclusion, "taking a broad view of the case as a whole", that the negligence of the motorman was in the circumstances the sole cause of the accident irrespective of the precise moment at which he became aware of the danger. After referring to the provisions of the *Contributory Negligence Act* and other similar enactments, their Lordships stated, at p. 304:

> . . . it may well be that in practice this legislation may have tended to encourage the application of those broad principles of common sense in the apportionment of blame unless the dividing line is clearly visible. Whether or not it emerges with clarity or is so blurred as to be barely distinguishable from the surrounding mass is a question of fact in each case for the tribunal charged with the duty of determining such questions.

In the case at bar, I do not think a clear line can be drawn in the apportionment of blame as contributing causes of the accident between the failure on the part of Stavos to keep a proper lookout and the contravention of the statute by the respondents in the respects mentioned. The effect of the breach of duty on the part of both appellants and respondents continued up to the moment of impact and both are, in my opinion, equally responsible. Reference may usefully be made to the decision of the House of Lords in *Stapley* v. *Gypsum Mines Limited* (1), and particularly to the judgment of Lord Reid at p. 486. The judgments of the members of the Court of Appeal in *Williams* v. *Sykes and Harrison Limited* (2), afford an illustration of the application in other circumstances, of course, of the principle which, in my judgment, is to be applied in the case at bar.

(1) [1953] 2 A.E. 478. (2) [1955] 3 A.E. 225.

Miller, the deceased, was fifty-six years of age and in normal health except that he was, as found by the learned trial judge, "hard of hearing". The learned trial judge found upon the evidence that it was to be inferred he was reasonably happy. Basing himself upon the decisions of the House of Lords in *Benham* v. *Gambling* (1), and of this court in *Bechthold* v. *Osbaldeston* (2), he assessed the damages under the *Trustee Act* at $2,500, taking into consideration the depreciation in the value of money.

In the Court of Appeal, Adamson J.A., with the concurrence of Coyne and Montague JJ.A., after pointing out that "each case must be decided on its own facts", went on to say:

> Where, however, there is no substantial difference in the quality, usefulness, or the happiness of the lives which are lost, to allow $7,500 for the loss of one life (as was done in the Bechtold case, supra), and only $2,500 as was done in this case is not equitable.
>
> The right to damages under this head is given by sec. 49(1) of the Trustee Act, R.S.M. 1940, c. 221, "as if such representative were the deceased in life." For total and permanent disablement (and that is what loss of life amounts to, at least) a person is usually allowed a very substantial sum.

In this view, he fixed the general damages at $5,000. The item of $440 special damages was not in question.

In *Benham's* case, Viscount Simon points out more than once that while the thing to be valued is the "prospect of a predominantly happy life", attention is to be directed in every case to the life of the individual in question. He also said at p. 168 :

> Damages which would be proper for a disabling injury may well be much greater than for deprivation of life.

This is counter to the basis upon which the judgment below proceeds, as set out above. It should be said that while s. 49(1) of the *Trustee Act,* R.S.M. 1940, c. 221, is not *ipsissima verba* with 24 & 25 Geo. V, c. 41, s. 1 (Imperial), the effect for present purposes is the same.

I agree, therefore, with Beaubien J.A., that the judgment at trial, proceeding, as it did, upon proper principles, ought not to have been disturbed.

(1) [1941] A.C. 157. (2) [1953] 2 S.C.R. 177.

1956

NORTHLAND GREYHOUND LINES INC. v. BRYCE AND ROYAL TRANSPORTATION LTD.

Kellock J.

The appeal should therefore be allowed the order of the Court of Appeal of the 17th of January, 1955, be set aside, and the judgment at trial be amended by striking out para. 1 thereof and amending para. 2 by providing for judgment against the respondents Royal Transportation Limited and Joseph Sopko as well as the appellants. The appellants should have their costs in the Court of Appeal against the respondents Royal Transportation and Sopko, the latter to have their costs of the cross-appeal of the respondent Bryce to that court. The appellants should have one-half of their costs in this court against the respondents Royal Transportation Limited and Sopko and one-half against the respondent Bryce. There should be no costs in this court as between the respondents Royal Transportation Limited and Sopko and the respondent Bryce.

Appeal allowed in part.

Solicitors for the appellant: *Aikins, MacAuly & Company.*

Solicitors for the respondent (plaintiff): *McMurray, Walsh & Company.*

Solicitors for the respondent (defendant): *Fillmore, Riley & Fillmore.*