PAUL FULLER (DEFENDANT).....APPELLANT;

AND

JOHN NICKEL, ROBERT MOORE AND BERTHA MOORE (PLAINTIFFS) } RESPONDENTS.

1949

*Apr. 28, 29
*Jun. 24

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Motor vehicles—Negligence—Collision at night between truck and car—Truck without required clearance lights and of illegal width—Duty to keep to right of center line—Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, s. 47(1).

In a collision at night between appellant's truck and a car driven by respondent, the whole left side of the car was practically ripped off by contact with the overhanging box of the truck. The truck was not equipped with the clearance lights required by bylaw and was 3½ inches wider than the legal width. The trial judge found that the respondent had not discharged the onus of showing that the infractions of the law contributed to the accident or that the appellant was otherwise guilty of negligence which was a *causa causans*. The Court of Appeal reversed this judgment and found that the probable cause of the accident was the absence of clearance lights, a fact well known to the appellant, coupled with the illegal width of the truck.

*PRESENT: The Chief Justice and Kerwin, Taschereau, Estey and Locke JJ.

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Held: Taschereau J. dissenting, that the absence of clearance lights on the truck was not the *causa causans*, but that the accident would not have happened if respondent had complied with sec. 47(1) of the Vehicles and Highway Traffic Act to keep to the right of the center line.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the decision of McLaurin J. dismissing the action for damages.

R. L. Fenerty for the appellant.

C. E. Smith K.C. for the respondents.

THE CHIEF JUSTICE:—I agree with my brother Estey and would allow the appeal and restore the judgment of the trial judge, with costs throughout.

The judgment of Kerwin, Estey and Locke JJ. was delivered by

ESTEY J.:—The respondent John Nickel with several persons, including the respondents Mr. and Mrs. Moore, as passengers at about 1.30 on the morning of July 3, 1945, was driving a 1938 Plymouth Sedan westward toward Acme in the Province of Alberta when he collided with an International 1939 1½-ton truck owned and driven eastward by the appellant.

The gravelled portion of the road was about 25 feet in width and at this point straight. There were no other vehicles in the immediate vicinity and a slight shower shortly before the collision left the gravel damp.

The respondent Nickel, as a consequence of his serious injuries, was unconscious for some time after the accident and at the trial had no recollection of any of the events immediately preceding or at the time of the collision. The respondents Mr. and Mrs. Moore were seated in the back seat of the automobile behind the driver and observed neither the on-coming truck nor the precise course of the automobile. Klassen, who owned the automobile, was sitting in the front seat on the north side. He deposed that he saw headlights of what he thought was another automobile and aside from observing that the speedometer of his automobile indicated a speed of 28 m.p.h. and that Nickel was driving within a foot or so from the north

(1) (1949) 1 W.W.R. 62.

shoulder "didn't give it much of a thought." Buist, who was in the back seat just behind Klassen, saw the headlights a half mile away and corroborated Klassen that his automobile was close to the north shoulder of the road.

The appellant had two passengers in his truck and was proceeding at a speed of 25 m.p.h. He knew his clearance lights were not working and for that reason, as he said, upon seeing the lights of the on-coming automobile half a mile away he switched his lights on low beam and kept over close to the south shoulder. He concluded that the automobile had lots of room to pass but, he says, "the car kept coming on and it crashed into me." Evidence that after the accident certain tracks were identified as made by the truck near the edge of the gravel for a distance of 20-30 feet was not accepted by the learned trial Judge. Appellant had gone into Calgary in the morning with a load of hogs and was returning with ten head of cattle. The measurements of the rack of his truck disclosed that it was 3½ inches wider than that permitted by law (without a permit and no permit had been obtained).

Sec. 47(1) of the *Vehicles and Highway Traffic Act* (R.S.A. 1942, c. 275) provides:

> 47. (1) Any person acting as the driver of a vehicle shall when meeting another vehicle keep his vehicle at all times to the right of the centre line of the highway.

The witnesses from the respective vehicles deposed that both drivers had complied with the foregoing statutory provision and that each, at the time of the accident, was well over on its own side of the road. If these witnesses were correct, having regard to the width of the road, the collision could not have taken place. That it did take place is conclusive of the fact that one or both of these groups of witnesses were mistaken. It is clear, however, that the automobile touched and slightly dented the north front fender of the truck and knocked the hub cap off the north front wheel, and that the box of the truck stripped the south side of the automobile and the latter turned a semi-circle and stopped facing south-east on the road while the truck went on a distance of 20 feet to the north shoulder of the road.

Constable Ross of the R.C.M.P. arrived about an hour after the accident. There had in the meantime been a

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good deal of traffic and many of the marks made by these vehicles had been obliterated. He did, however, find a few feet of truck tire marks 5 feet 9 inches from the south shoulder of the road that corresponded with those of the truck. Upon the assumption that these might be the marks of the south tires of the truck the evidence disclosed that the northern-most edge of the truck would still be 1 foot 11½ inches south of the centre of the highway. If, on the other hand, these were the north tire marks of the truck then the truck was proceeding even further south of the centre, but if, of course, they were not the marks of the truck they are of no assistance in determining the issue in this case. Constable Ross also found skid marks upon the gravelled portion showing that the automobile as a consequence of the impact had made a semi-circle and stopped facing south-east, that approximately 9 feet of the northern portion of the road as one passed through the area of the collision showed no automobile marks whatever. He also found the door of the automobile and to the west of it two gouge marks in the road to the north of the centre. His impression was that the door made at least one of these gouges.

The fact that no tire marks were found on the north side, and the skid marks of the automobile tend rather to contradict the evidence on behalf of the respondents as to the position of their automobile. It was in all of these circumstances that the learned trial Judge found:

> I find myself after consideration unable to choose between the conflicting evidence of the parties and as the onus is on the plaintiffs to establish negligence on the part of the defendant, I am obliged to dismiss the action with costs . . .

The Appellate Court (1) reversed the judgment at trial, directed judgment for respondents and a reference back to the learned trial Judge to assess the damages and, for that purpose, with liberty to hear further evidence. Mr. Justice O'Connor (1), who wrote the judgment in the Appellate Court, stated:

> Having regard to the character of the evidence and the fact that the plaintiff was unable to give any assistance, I find myself unable to hold that the trial Judge was wrong in his conclusion, namely, a finding of inability to determine which or that either of the vehicles was on its wrong side of the road, but I am clearly of opinion that he was wrong in discarding the fact of negligence on the part of the defendant in respect to the condition of his truck.

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This reference to the condition of the truck is in regard to the excess of $3\frac{1}{2}$ inches in the width of the rack and particularly to the absence of clearance lights.

The learned trial Judge stated:

> There is no way of ascertaining whether Nickel was confused or affected by these infractions by the defendant. As far as the evidence of his passengers goes, it might be inferred that he was not.

In the Appellate Court, after referring to Klassen's statement, "I had no other inclination except it was a car which just had two lights on," and to Buist's somewhat similar evidence, the reasons for judgment continued:

> Any inference would be that Nickel had the same opinion whereas if he had seen by clearance lights that it was not an ordinary automobile but was a large truck he would be likely to assure himself that he was far enough away to avoid it, and the absence of clearance lights which was well known to the defendant, would seem to be a very probable contributing cause to the collision.

It may be assumed that the absence of clearance lights justified Klassen and Buist in concluding appellant's vehicle was an automobile rather than a truck, but it is significant that they did not determine the position of the automobile either from the position of the truck or the absence of clearance lights. It was from their observation of the automobile in relation to the shoulder of the road that led them to conclude that Nickel was driving so close to the north shoulder that the possibility of a collision never occurred to them. They do not suggest that the appellant's truck was on the north or wrong side of the road. Neither is such suggested by any measurements, marks or debris found upon the highway after the collision. In fact the debris and marks found and the measurements made by Constable Ross tend rather to support the conclusion that the truck was on its own or south side of the road. With great respect, there does not appear to be anything in the evidence of Klassen or Buist upon which an inference might be supported that Nickel had determined his course upon the absence of the clearance lights. He probably did conclude it was an automobile and in that event it was his duty under sec. 47(1) "to keep his vehicle at all times to the right of the centre line of the highway." If Nickel had complied with sec. 47(1) no collision would have occurred, as there is no evidence to suggest that the truck was ever on the north or wrong side of the road,

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while in this connection the evidence of Constable Ross is significant that a space of 9 feet from the north shoulder of the gravelled portion of the road indicated no traffic marks although the condition of the road was such that it would have disclosed them had they been made.

The appellant's infractions of the *Vehicles and Highway Traffic Act*, both in failing to display clearance lights and having upon his truck a rack 3½ inches too wide, may justify the imposition of penalties, but in fixing the responsibility for a collision in an action between parties they are important only if they constitute a direct cause of that collision. *The City of Vancouver* v. *Burchill* (1); *Forbes* v. *Coca-Cola Co. of Canada and Guiteau* (2); affirmed without discussion of this point in *Coca-Cola Co. of Canada and Guiteau* v. *Forbes* (3).

The burden of proof rested upon the respondents to establish that the negligence of the appellant was a direct cause of the collision. In view of the contradictory character of the evidence and the conclusions of the learned trial Judge, the observations of Lord Macmillan in *Jones* v. *G.W. Ry.* (4), are appropriate:

> If the evidence established only that the accident was possibly due to the negligence to which the plaintiffs seek to assign it, their case is not proved. To justify the verdict which they have obtained the evidence must be such that the attribution of the accident to that cause may reasonably be inferred. If a case such as this is left in the position that nothing has been proved to render more probable any one of two or more theories of the accident, then the plaintiff has failed to discharge the burden of proof incumbent upon him. He has left the case in equilibrium, and the Court is not entitled to incline the balance one way or the other.

The issues in this case are entirely questions of fact. Even though the learned trial Judge did not pass upon credibility except as to the brother and father of the appellant, he had an opportunity to observe the witnesses which gave him an advantage in determining the value of the evidence, which is denied to an Appellate Court.

As stated by Lord Shaw of Dunfermline in *Clarke* v. *Edinburgh and District Tramways Co.* (5):

> . . . witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the

(1) [1932] S.C.R. 620.
(2) (1941) 3 W.W.R. 909.
(3) [1942] S.C.R. 366.
(4) (1930) 47 T.L.R. 39 at 45.
(5) (1919) S.C. (H.L.) 35 at 36.

nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page.

In *Kinloch* v. *Young* (1) Lord Loreburn, L.C., stated at p. 4:

> But this House and other Courts of appeal have always to remember that the Judge of first instance has had the opportunity of watching the demeanour of witnesses—that he observes, as we cannot observe, the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any Court of appeal. Even the most minute study by a Court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say.

The contention of the respondents that even if the automobile was not upon its own side of the road the appellant, having seen the lights of the automobile half a mile away, should have avoided the collision is not established. The essential question again is just where were these vehicles, which upon the evidence cannot be determined. Moreover, one possibility supported by some evidence is that the truck was proceeding at a moderate rate close to the south edge of the gravelled portion of the road. If that were correct the only other step the appellant might have taken was to stop—even that might not have avoided a collision unless the automobile stopped or turned further to the north. It cannot be said upon the evidence that the appellant did not reasonably anticipate that the automobile would turn to the north in compliance with the statutory requirement of sec. 47(1). This particular point does not appear to have been canvassed in the evidence and upon the whole there is no evidence that justifies the conclusion that the appellant's conduct was a direct cause of the collision.

Counsel for both parties cited *The King* v. *Demers* (2). That case, as so many of this type, depends upon its own facts. There an automobile collided with that portion of a scraper extending beyond the red lights displayed upon a truck owned and operated by the Department of Highways. The learned trial Judge found both parties at fault and apportioned the liability. The Crown appealed and both in the Appellate Court and in this Court the judgment at trial was affirmed on the basis that the evidence supported it. In the Nickel case the learned trial Judge

(1) (1911) S.C. (H.L.) 1 at 4. (2) [1935] S.C.R. 485.

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was of the opinion that the evidence was so contradictory he could not conclude the respondents (plaintiffs) had proved a case.

The judgment of the learned trial Judge should be restored and this appeal allowed with costs.

TASCHEREAU J. (dissenting):—This appeal arises out of an automobile accident which occurred on the highway one and one-half miles east of the Village of Acme, in the Province of Alberta. At about 1:30 a.m. one of the respondents, John Nickel, driving east-west on a twenty-five feet wide highway, collided with a motor truck coming from the opposite direction, and owned and operated by the appellant. John Nickel and the two other respondents who were with him in the automobile, were seriously injured.

The trial judge found himself unable to choose between the conflicting evidence of the parties, and as the onus was on the plaintiffs to establish negligence, he dismissed the action with costs. The Court of Appeal (1) unanimously allowed the appeal, and referred the case back to the trial judge for assessment of damages.

The evidence is contradictory. Nickel, the driver, sustained a fractured skull. He suffered a loss of memory and has no recollection of anything that happened. But three of his passengers testified that he was driving on the right side of the road. The defendant Fuller and his brother who was sitting with him in the front seat of the truck, and their father who was following in his own car, swore that the truck was being driven on the right side. Nickel's car was going at a speed of twenty-eight miles an hour, and the truck at approximately twenty-five miles. The learned trial judge disregarded any suggestion that Nickel was not sober and unable to drive an automobile.

It is common ground that the truck had its headlights on, and that the total width between the outside edges of these head-lamps was forty-eight inches, while the width between the inside edges was thirty-two inches. It is also common ground that the total width of the box of the truck was ninety-nine and one-half inches, and that there were no clearance lamps, one on each side of the front and

(1) (1949) 1 W.W.R. 62.

one on each side of the rear, placed as near the top as practicable. The truck was therefore being driven on the highway in violation of the two following regulations:

It shall be illegal for any person to drive without permission of the Board upon any public highway, any vehicle which with the load carried thereon exceeds ninety-six (96) inches in width or one hundred and fifty (150) inches in height from the pavement or road surface; or any vehicle, including tractors with semi-trailer units exceeding the wheelbase length of thirty-five (35) feet, or any other combination of vehicles coupled together exceeding a total length of fifty (50) feet.

Clearance Lamps. Every Public Service Vehicle or Commercial Vehicle having a width, including the road thereon, in excess of eighty (80) inches at any part, shall carry four clearance lamps in a conspicuous position as near the top as practicable, one on each side of the front which shall cast a green light only, and one on each side of the rear which shall cast a red light only. The lights so used shall be visible in normal atmospheric conditions from a distance of at least five hundred (500) feet and during the period between sunset and sunrise or at any time when the atmospheric conditions are such that objects on the public highway are not plainly visible at a distance of three hundred (300) feet, the same clearance lamps shall be alight.

The appeallant was driving his truck on a public highway, and it is not disputed that the truck exceeded the allowed width of ninety-six inches, by three and one-half inches.

Counsel for the appellant strongly urged that the marks seen on the south side of the road were a sure indication that the truck was being driven entirely on the right of the centre line of the highway. These marks which were only eight to ten feet long are not however as revealing as suggested by the appellant. The truck which came to a stop on the north side of the road, travelled approximately seventy-five yards or more after the accident, and there is nothing to show that the place where they were seen, is opposite the place where the accident happened. Moreover, there was a heavy traffic on that particular highway that same night, and the evidence does not disclose that they are the marks of the truck. The trial judge himself does not seem to believe that the evidence on this point is conclusive. He says in his reasons for judgment:—

If the marks observed by Ross represent the position of the right dual wheels of the truck, then the extreme left side of the truck was to the right of the centre line. Exhibit 5 contains the measurements necessary to make this calculation, and Ross' figure of 5 ft. 9 inches from the south shoulder should probably be reduced because a foot or two of this distance could not be regarded as a travelable portion of the road.

If the learned trial judge had thought that these marks had really been made by the truck, he would surely not

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have said that the evidence was so conflicting, that it was impossible to choose. Moreover, they have been observed at a distance of five feet nine inches from the extreme south shoulder of the road. The distance between the outer edges of the outer hind wheels is eighty-two inches. That would mean that the left hind wheels were at a distance of twelve feet and seven inches from the south shoulder, and therefore, over the centre line. To this must be added more than ten inches being the overhanging portion of the box over the rear wheels. But an attempt has been made to show that Ross took his measurements from a point which was not on the travelling portion of the road. I have come to the conclusion that this evidence is unsatisfactory and cannot help the Court to reach a conclusion.

As already stated, the respondent John Nickel was unfortunately unable, on account of his injury, to give his version of the accident, but from the known facts, I think it is possible to draw the logical inference to reach a proper conclusion.

Charlesworth, The Law of Negligence, 2nd ed., says at page 22:

> There is evidence of negligence if the facts proved and the inferences to be drawn from them are more consistent with negligence on the part of the Defendant than with other causes.

And at page 22 also (footnote (*e*)) he adds:—

> It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is *reasonable probability* that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to.

In *Grand Trunk Railway Co. of Canada* v. *Griffith* (1), Mr. Justice Duff as he then was says:

> I will not put in my own words the second observation; but will quote the words of the Lord Chancellor in Richard Evans & Co. *v.* Astley (3):
>
> "It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but courts, like individuals, habitually act *upon a balance of probabilities.*"

(1) 45 S.C.R. 387.

In a more recent case, *New York Life Ins. Co.* v. *Schlitt* (1), it was said at page 300:—

> All the circumstances of the case, as revealed by the evidence, lead me to the conclusion that the respondent has brought himself within the provisions of the double indemnity clause of the policy. In *Jerome* v. *Prudential Insurance Company of America* (1939, 6 Ins. L.R. 59), Rose C.J. said: "Nothing, practically, can be proved to a demonstration, and courts act daily, and must act, upon a *balancing of probabilities.*"

The appellant was driving a truck having a width of ninety-nine and one-half inches, or eight feet nine and one-half inches. At the least the left side of his truck was very near the centre line, if not overhanging, he was driving without clearance lights, a truck wider than the width authorized by the regulations, and in view of the absence of clearance lights, it is fair to assume that the driver of the passenger car was deceived as to the exact location of the truck on the highway. The two head-lights of the truck between which there was only a distance of thirty-two inches, would rather indicate to an oncoming motorist, that he would meet an ordinary passenger car, having a normal width. There was nothing to warn an ordinary prudent man, that the vehicle that was coming, had a width of nearly nine feet, and that he had to take additional precautions. This violation of the regulations constituted a menace on the highway, and Nickel had the right to assume that the law was being observed. As it has been said by Lord Atkinson in *Toronto Railway Company* v. *The King* (2):

> But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets.

In *Baldwin* v. *Bell* (3), Mr. Justice Cannon speaking for the majority of the Court, dealt with a case where some of the circumstances were quite similar to those with which we have to deal. At page 5, he says:—

> We agree with the trial judge that the real cause of the accident was the overhanging rack which occupied more space than would *an ordinary motor car.* We also believe that in the parallel position which the two cars occupied at the time of the accident, the plaintiff would have suffered no injury, had it not been for the overhanging of the rack on the respondent's truck.

(1) [1945] S.C.R. 300.
(2) [1908] A.C. 269.
(3) [1935] S.C.R. 1.

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The appellant drove his car in such a manner as to pass safely the vehicle coming in the opposite direction, if it had been of ordinary, and not of abnormal width.

At the foot of page 5, Mr. Justice Cannon adds:—

The care to be exercised must depend on the *nature of the vehicle,* the character of the highway and the general circumstances of the case.

At the foot of page 6, he further says:

We therefore reach the conclusion that the defendant Hay owed a special duty under the circumstances of the case, on a foggy night, to the appellant, on account of the *wide vehicle under* his control.

In the case of *His Majesty The King* v. *Demers* (1), the statement of facts at the same page is the following:—

On the evening of the 18th July, 1929, the respondent's late husband, Lucien Robillard, while driving his automobile on the Sherbrooke-Magog highway, and approaching Magog, met a tractor belonging to the Department of Roads, which was towing a scraper designed to level the surface of the road. One part of the scraper extended about ten or twelve inches farther to the left than the side of the tractor, and it is assumed that the deceased collided with that part of the scraper, as a result of which he lost control of his machine, which turned over three times and did not come to a stop until it had reached a distance of 200 feet behind the tractor. The driver, the late Robillard, was almost instantly killed.

And at page 486, Sir Lyman Duff says:—

I agree with the learned trial judge that the arrangement of the lights upon the vehicle that Bolduc, the servant of the Roads Department, was driving, when the mishap occurred in which the husband of the respondent lost his life, was calculated to mislead the drivers of automobiles met with on the road; and that the servants of the Road Department were guilty of actionable negligence in proceeding along the road in such circumstances.

I have come to the conclusion that under the circumstances of this case, taking into account the width of the truck, the determining cause of this accident is the failure by the appellant to have clearance lights as provided for by the regulations, which are obviously enacted to prevent accidents on the highways. If the appellant had complied with the regulations, the driver of the passenger car would have seen the overhanging edges of this truck, and the accident would have been avoided.

I agree with the conclusions reached by the Court of Appeal, and I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty, Fenerty, McGillivray & Robertson.*

Solicitors for the respondents: *Smith, Egbert & Smith.*

(1) [1935] S.C.R. 485.