GEORGE WOTTA AND WILLMS TRANSPORT CORPORATION (*Plaintiffs*) ..... APPELLANTS;

1955

*Feb. 14
*Apr. 26

AND

HALIBURTON OIL WELL CEMENTING COMPANY AND MIKE SMAYDA (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Automobiles—Oncoming vehicles—Collision while passing—Claim and Counterclaim—Conflicting evidence—Negligence—Trial judge unable to make any finding as to liability—Dismissal of claim and counterclaim.

Following a collision between two oncoming trucks, a claim and counterclaim was made by the parties. The accident occurred in daylight at a curve on a dirt road, which was dry and level. The weather was clear. Both parties alleged that the accident occurred after the front parts of their vehicles had passed and that the collision was caused by the negligence of the other driver. The two drivers were the only witnesses of the accident and each testified that he had been driving on his own side of the road. There were no marks on the road, there was ample clearance between the front parts of the vehicles as they passed, and both drivers saw the other vehicle as they approached.

The trial judge was unable to make a finding of negligence against either driver. He found that neither side had proved its case and dismissed both the claim and the counterclaim. The appeal and the cross-appeal were both dismissed by the Court of Appeal. Only the plaintiff appealed to this Court.

Held (Kellock J. dissenting): that the appeal should be dismissed.

Per Taschereau J.: The contention that there is a collision between two motor vehicles, under such circumstances that there must have been negligence on the part of one or both drivers, and the court is unable to distinguish between such drivers as to liability, both drivers should be found equally at fault, is untenable. There are no principles of law that may justify a court of justice, in a case like the one at bar, to hold a person liable in damages, unless negligence is established. There was no prima facie case that both parties were negligent and it is impossible to infer from the facts where the responsibility lies. Neither party has proved its case and both claims were rightly dismissed.

Per Estey J.: There is no suggestion on the part of the trial judge that either driver must have been negligent and the evidence is not such as to lead necessarily to the conclusion that one or the other, or both, were negligent. No basis is disclosed in this case for holding that the judgments below are characterized by some aberration from principle or affected by some error at once radical and demonstrable in the appreciation of the evidence adduced or in the method by which the consideration of it has been approached.

*PRESENT: Taschereau, Kellock, Estey, Locke and Fauteux JJ.

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Per Locke and Fauteux JJ.: The onus of proving negligence, which was the only cause of action asserted in both the action and the counterclaim, lay upon the party advancing the claim. The appellant's contention that the respondent's truck had been driven around the curve at a high rate of speed, causing its rear wheels to skid and to come into contact with the appellant's vehicle, was rejected by the trial judge. There are concurrent findings on this question of fact and this Court should not interfere unless satisfied that the courts below were clearly wrong. The trial judge and the Court of Appeal declined to draw the inference that both parties were at fault and the evidence did not justify such an inference. The respondent may not be found liable on the footing that one or the other of the drivers was guilty of the negligence which caused the collision.

Per Kellock J. (dissenting): The problem presented by such case as the present one is to be approached not only from the point of view that either the one driver or the other had been negligent, but also from the standpoint that the collision had occurred from the negligence of both, and is to be determined upon the balance of probabilities. The trial judge did not approach the case from that standpoint. A consideration of the evidence leads to the conclusion that the negligence which caused the accident was that of the driver of the respondent's car.

APPEAL from the judgment of the Court of Appeal for Saskatchewan, dismissing the appellant's appeal from the dismissal of a claim and counterclaim following a collision between two motor vehicles.

L. McK. Robinson, Q.C. for the appellant.

E. D. Noonan, Q.C. for the respondent.

TASCHEREAU J.:—The plaintiffs-appellants seek to recover damages from the defendants-respondents, as a result of a highway accident which occurred on the 25th of August, 1952, on a municipal road between Katepwa and Balcarres, in the province of Saskatchewan. Wotta, one of the plaintiffs, claims $4,180, being the value of a 1951 White Power Unit, and the other plaintiff claims $6,269, representing the value of a semi-trailer, and 3,000 gallons of gasoline. The total weight of both vehicles and cargo was about twenty tons. The power unit was driven by one Osler. The defendant company, owner of a 1951 model F.W.D. truck, also sustained damages as a result of the collision, and counter-claimed against both plaintiffs for $9,636.79. The trial judge dismissed the action and the counter-claim, and his judgment was confirmed by the Court of Appeal. The plaintiff only appeals to this Court.

The appellants' car was being driven in a northerly direction, and the defendant Smayda, an employee of the company, was at the wheel of the truck coming in the opposite direction. The two drivers were the only witnesses of the accident, and their evidence is conflicting. The trial judge was left in a quandary as to who caused the accident, or as to who contributed to it. He could not make any finding of negligence, and consequently dismissed the action and counter-claim, as neither party proved its case, not having *sustained the onus* which was necessary to success. The Court of Appeal shared these views, and I am satisfied that these judgments should stand.

It has been submitted by the counsel for the appellants that when there is a collision between two motor-vehicles, under such circumstances that there must have been negligence on the part of *one* or both drivers, and the Court is unable to distinguish between such drivers as to liability, both drivers should be found equally at fault. The case of *Leaman* v. *Rae* (1) was cited as an authority for that proposition. If that case has really that meaning, as it seems to have, I respectfully think that it should be overruled, as I am not aware of any principle that may justify a court of justice in a case like the one at bar to hold a person liable in damage, unless negligence is established. As it was said by Jenkins L.J. in *Bray* v. *Palmer* (2) "there is no doubt that a judge is entitled in an action for damages for personal injury occasioned by the negligent driving of the defendant to reject the plaintiff's case, if in the view of the judge, the evidence does not suffice to make out that case. The onus is on the plaintiff. The same, of course, applies where there is a counterclaim; the onus is on the defendant to make out the counterclaim." In that case, the trial judge found the stories of the plaintiffs and the respondents "wildly improbable" and was unable to choose between the two, and therefore dismissed the claim and counter-claim. The Court of Appeal ordered a new trial, merely because the trial judge took the view that the accident must have been due to the exclusive negligence of one or the other side, and rejected the possibility of both sides being to blame.

(1) [1954] 4 D.L.R. 423.

(2) [1953] 2 All E.R. 1449 at 1451.

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In *France* v. *Parkinson* (1) and *Baker* v. *Market Harborough* (2), the Court of Appeal held that prima facie an inference could be drawn that both parties were negligent, and that both drivers should share the responsibility. The present case is entirely different. No prima facie case has been established, and it is impossible to infer from the facts where the responsibility lies. Neither the plaintiff nor the defendant who counter-claims has proved its case, and both claims were rightly dismissed.

The appeal fails and should be dismissed with costs.

KELLOCK J. (dissenting):—These proceedings arise out of a collision between two motor vehicles which occurred on a municipal road between Katepwa and Balcarres, in the Province of Saskatchewan, on the 25th of August, 1952. The road was dry and level, the weather was clear and the accident occurred in broad daylight. The appellants' vehicle, consisting of a tractor and trailer, carrying a load of gasoline and weighing in all some twenty tons, was being driven northerly by one Osler, while the respondents' vehicle, a truck, with its load of oil well cementing equipment, consisting of a motor, two pumps and a tank, and weighing some fourteen tons, driven by one Smayda, was proceeding southerly. In the vicinity of the point of collision, the road borders a coulee to the west, around which it curves. The curve to one proceeding southerly is first to the east and then to the west.

According to Smayda, although his truck was still on the curve, the rear end of it had reached a point approximately twenty feet south of the peak or apex of the curve when the collision occurred. Osler says that the place of collision was some seventy-five or one hundred feet southerly of the apex of the curve. The respondents do not in any way attack the credibility of the witness with respect to this statement. He was badly burned and was rushed to the hospital from the scene of the accident. They contend merely that in thus placing the place of accident, he was expressing a view formed on a later inspection.

The fronts of the vehicles successfully passed each other but contact occurred between parts of the vehicles to the rear of where each driver sat. Neither driver saw the actual

(1) [1954] 1 All E.R. 739. (2) [1953] 1 W.L.R. 1472.

contact. The steering gear of the appellant's vehicle being rendered useless, the vehicle, as Osler says, "angled along the road a little bit" and and then went down into the coulee to the west at a point immediately south of the apex of the curve. On the other hand, the rear wheels of the respondents' vehicle were knocked out of commission, with the result that it "just fell over" on its right side but remained within the travelled part of the west side of the road.

Each of the drivers had seen the other's vehicle or the dust from its approach for a considerable distance before they met. According to Osler, he was on his own side of the road with the right wheels of his vehicle about two feet from the ditch. Smayda testified that his right wheels were two feet from the "edge of the road". Whether he meant the edge of the travelled part of the road or that he was, like Osler, on the shoulder, he did not indicate. The vehicles themselves were approximately eight feet wide. The travelled part of the road was from twenty-two to twenty-four feet wide, while from shoulder to shoulder it was thirty feet.

Smayda does not attempt to account for the collision, stating that he does not know how it occurred. Osler testified that as the respondents' truck came around the curve it was, in his view, proceeding at some forty miles an hour and that it "slid" into the vehicle he was driving. Smayda testified that his vehicle could not reach a speed of more than twenty-eight miles per hour in fourth gear, which he was using at the time. Each of the drivers deposed that he was travelling about twenty-five miles per hour, and that neither had put on his brakes before the accident.

The learned trial judge reached the conclusion that both vehicles were in fourth gear at the time of the collision and that their maximum speed would be twenty-eight miles per hour. He also accepted the evidence of Smayda that the latter's truck would not skid at such a speed. The learned judge said that he found himself in a quandary and could make no finding as to "which" driver had been negligent. He therefore dismissed both the action and counterclaim.

Both parties appealed but the appeal and cross-appeal were dismissed. Martin, C.J.S., in delivering the judgment of the court, after stating that the onus was upon each party

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to prove negligence on the part of the driver of the other vehicle, summed up the judgment of the learned trial judge as follows:

> After a detailed review of the evidence the trial judge concluded that he could not make a finding which driver was negligent; he was of the opinion that neither party had sustained the onus which was necessary to success.

In the view of the learned Chief Justice:

> The important point in the case is as to *which* vehicle was on the wrong side of the centre of the highway . . . There was no eye-witness and there were no marks on the highway which would indicate *which* vehicle was on the wrong side. The learned trial judge has made no findings as to the credibility of the witnesses and under the circumstances, it is impossible for this court to say that the trial judge was wrong in his decision *that he could not find which driver was negligent.*

It is, of course, true, as has been pointed out in other cases, that a judge is entitled in an action for damages occasioned by the negligent driving of the defendant to reject the plaintiff's case if, in the view of the judge, the evidence does not suffice to make out that case. The onus is on the plaintiff. The same, of course, applies where there is a counterclaim; the onus is on the defendant to make out the counterclaim.

In *Claxton* v. *Grandy* (1), Cannon J., speaking for Duff C.J., Rinfret and Crocket JJ., said at p. 263:

> Moreover, a jury, properly directed, would have found that, in the case of two cars driven on a straight road having an icy surface, about to pass each other when the collision occurred such an accident must have resulted from negligence, and not from an unavoidable accident. . . .

In my opinion, this statement is not limited to the facts of the case there under consideration and is even more applicable where the road surface is dry. The problem presented by such a case as the present is to be approached from the above point of view, and is to be determined by the balance of probabilities.

In *Baker* v. *Harborough Industrial Co-operative Society Ld.* (2), Denning L.J., points out at 1476, that it is pertinent to ask in such a situation what would have been the position if there had been in either of these vehicles, a passenger who had been injured in the collision. Had he brought action, then on proof of the collision the natural inference would be that one or other or both drivers had been to blame. Every day, proof of collision is held to be

(1) [1934] 4 D.L.R. 257. (2) [1953] 1 W.L.R. 1472.

sufficient in such a case to call on the two defendants for an answer, and in no case do both escape liability, one or other being held to blame, and sometimes both.

Where, as here, no third person is involved, the conclusion, as already stated, while it might be that neither had established a case of negligence on the part of the other, in reaching that conclusion the court would have to approach the problem, not only from the standpoint that either the one or the other had been negligent, but also from the standpoint that the collision had arisen from the negligence of both.

In my opinion, it is clear that the learned trial judge, in the case at bar, did not approach the case from that standpoint. This is stated in terms in the judgment of the Court of Appeal. As there pointed out also, the learned trial judge did not deal with the question of credibility. Although he appears to have proceeded on the view that the collision occurred through negligence, nevertheless, unless he could determine *which* driver had been negligent, the action and counterclaim must fail. He did not direct his mind to the question as to whether or not both had been negligent. This would of itself be sufficient to require that a new trial be directed. *Bray* v. *Palmer* (1). When the evidence is considered, however, it leads, in my opinion, to a different result.

Under the provisions of the relevant statute, the *Vehicles Act*, 1951, c. 85, s. 124(1), each driver was required, in passing the other, to drive closer to the shoulder than to the centre of the road, and by s-s. (8), not to inconvenience the other in any way. According to his evidence, Osler was complying with these requirements but Smayda was not, if his evidence above referred to is to be taken as referring to the edge of the travelled part of the road.

In answer to a question by his own counsel as to whether he had swung "over to the left at all, that is the east side of the road, at any time coming around that curve", Smayda's answer was:

> No, I don't think so—no.

Again, on discovery, he testified in relation to the time when his truck was rounding the curve,

> I think if I had put on the brakes that it probably would have pulled me into the coulee.

(1) [1953] 2 All E.R. 1449.

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Why this should have been the result is not explained. When proceeding around the curve, the tendency of the vehicle would undoubtedly be to go to its left and the driver would, of course, be endeavouring to control that by directing the vehicle to the right. Had the vehicle been proceeding around the curve under proper control, application of the brakes should not have had any such result as Smayda says he feared. There is, in the above answer, more than a suggestion that, under the circumstances, Smayda realized that he was going too fast.

Smayda testified also that when the fronts of the two vehicles passed each other there was an intervening space of some four feet. At that time the whole of the appellants' vehicle was in his vision and remained so until the tail end of the trailer had passed him. If there had been the slightest indication during that time that any part of that vehicle would encroach upon the road occupied by any part of Smayda's truck, he would undoubtedly have realized it and said so. He notices nothing of the kind, however. In fact, as already pointed out, he does not suggest fault in any particular on the part of the driver of the appellants' truck.

If, therefore, the rear of Smayda's truck had been proceeding and continued to proceed in the same path as the front of his vehicle, there could have been no collision. The probable explanation for the collision, in my view, is either that the rear of the respondents' truck had not straightened out on the road after rounding the curve, or that the high load which it carried caused the body to lean toward the left under the influence of the pull to the left to which it was subjected in rounding the curve. This would explain what Osler saw and described as "sliding", even though, as found by the learned judge, the truck did not actually skid. There is, moreover, other evidence which supports this view.

After the accident the respondents' truck turned over on its right-hand side and came to rest on the westerly half of the travelled portion of the highway. The force of the collision with the much heavier vehicle of the appellants would, of course, tend to drive the respondents' vehicle to its right. The inference, therefore, is that that truck was farther to its left when struck than when it came to rest.

It is, however, contended that no inference of this kind can be drawn because Smayda at one point in his evidence

testified that his truck had travelled some sixty feet out of control after the accident before it came to rest. He does not say, however, that in the interval the course of the truck had in any way been deflected towards its left. Moreover, in his answer to his own counsel he said:

A. Well, as the fronts passed, the fronts of the trucks, it was O.K., there was plenty of clearance. I would say practically four feet, everything was fine, just passing by like any other vehicles on the road, *until it struck* some place in the rear. There was just one—and that was it. My truck went out of control and started to turn *then*, the wheels were knocked out underneath it.

Q. Do you know what caused your truck to go out of control?

A. Well, the back wheels were knocked out and they criss-crossed underneath the truck and the truck *just went over on its side and turned over.*

The italics are mine.

Osler testified that any curve in the road upon which he was travelling tended to carry his vehicle to its right. This is undoubtedly so.

In these circumstances, in my opinion, the evidence warrants the conclusion that the negligence which caused the accident was that of the driver of the respondents' truck. I would therefore allow the appeal and, the respondents not having questioned the damages, direct the entry of judgment in favour of the appellants for the sum of $10,149. The appellants should have their costs throughout.

ESTEY J.:—This appeal arises out of a collision between two large motor vehicles at about 3:00 o'clock in the afternoon of August 25, 1952, on a municipal road near Katepwa in the Province of Saskatchewan. The appellants brought an action for damages to their truck and trailer and the respondent Haliburton Oil Well Cementing Company, Limited counterclaimed for damages to its truck. The learned trial judge stated: "On the evidence I cannot make a finding which driver was negligent," and dismissed both the action and the counterclaim. This judgment was affirmed in the Court of Appeal, where it was pointed out that there were no eye witnesses other than the drivers of the respective motor vehicles and no evidence of skid or other marks on the highway to indicate the position of the motor vehicles as they approached the point of collision. The drivers, in their evidence, differed materially on vital points. Chief Justice Martin, writing the judgment of the Court, concluded:

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The learned trial judge has made no findings as to the credibility of the witnesses and under the circumstances it is impossible for this court to say that the trial judge was wrong in his decision that he could not find which driver was negligent.

The learned trial judge stated the facts:

At about 3:00 o'clock on the afternoon of the 25th day of August, 1952, one Donald Osler, an employee of the plaintiff Wotta, was driving a motor vehicle comprised of a 1951 White power unit owned by the plaintiff Wotta and a Westeel semi-trailer owned by the plaintiff Willms Transport Corporation. This motor vehicle was just less than eight feet in width and 37 or 38 feet long and the semi-trailer carried 3,000 gallons of gasoline. The total weight of the unit and cargo was 20 tons. Visibility was good. The vehicle was being driven in a northerly direction on a municipal road between Katepwa and Balcarres. The road was dry, in good condition and Osler says that the travelled portion of the road was approximately 24 feet wide. When surveyed on May 4th, 1953, the width was established as 30 feet from shoulder to shoulder.

At the same time the defendant Smayda, an employee of the defendant Haliburton Oil Well Cementing Company, Limited, was driving a 1951 model F.W.D. truck owned by his co-defendant, in a southerly direction from Balcarres on the same road. The truck was a solid unit, that is, there was no trailer. The truck weighed about 14 tons, was 26 feet in length and 7' 10" in width. Both drivers were experienced operators and knew the road well. Osler says in his evidence that he saw the defendant's truck coming towards him about a mile away and was at that time travelling at about 20-25 miles per hour, that he was driving at this slow rate of speed in order to avoid meeting the truck on the curve. He was driving on the east side of the road about three feet from the edge. He claims that as the defendant's truck came around the curve it was sliding and that he endeavored to edge into the ditch, but the truck "struck me on the front along the side of my truck." On being asked by counsel for the plaintiff whether the front part of the defendant's vehicle went by without colliding with the front part of his, he replied "I don't know, I can't say just what—exactly whether the front part of his vehicle struck first or whether it scraped or whether it went by clear, but he claims the defendant's vehicle struck his."

In this Court the appellants rested their case largely upon the contention that the respondent Smayda drove the Haliburton vehicle around the curve in such a negligent manner as to cause it to skid and collide with the appellants' truck. The road was a muncipal dirt highway and, upon the day in question, dry. Osler, driving the appellant's truck, deposed:

. . . this truck came around the curve and it was sliding and I tried to edge into the ditch, I tried to get my outside into the ditch but this truck struck me on the front along the side of my truck.

.....

Well, I saw him come around the curve and I saw him starting to slide and I watched him and he didn't seem to be getting any less.

At another point in his evidence he used the word "skidding". While at that time he thought Smayda was driving too fast, he did not then form an opinion as to his speed, but, at the trial thought he was going about forty miles an hour.

Smayda, driving respondent's truck, says he was driving in fourth gear at about twenty-five to twenty-eight miles an hour and, going around the curve, because of the governor on his vehicle, he could not go faster than twenty-eight miles per hour. At that speed he deposed "there is no possible chance of that truck skidding." Moreover, he said he experienced no trouble in going around the curve. The trial judge stated:

> It is true that Osler says the defendant's truck caused the collision, that he tried to go into the ditch and that the defendant's truck skidded. On the other hand, I accept the evidence that a truck of that description would not skid at the maximum speed of 28 miles per hour but I can understand that a trailer outfit as the plaintiff was operating might do so. There is no physical evidence such as tire marks to assist me.

While the trial judge makes no finding as to credibility, it is obvious that in this instance he accepts the evidence of Smayda and refuses to accept the evidence of Osler. The learned trial judge so disposed of that contention and the evidence supports his conclusion.

Once that issue is disposed of the evidence is all to the effect that two competent drivers, familiar with the road, proceeding at a reasonable rate of speed around what they both described as a dangerous curve, somehow collided. That the front ends passed without contact appears to be clearly established. The road measured thirty feet from shoulder to shoulder. Both drivers claim they were within two feet of the edge of the road. Both trucks were approximately eight feet wide. If the drivers were right as to their respective positions, there was such a distance between their vehicles as to make a collision, apart from very substantial skidding or some other incident not here suggested, impossible. Smayda says the distance between the two vehicles as their front ends passed was about four feet. Osler, when asked if the front of his vehicle passed without hitting the front of respondent's, answered:

> I don't know. I can't say just what—exactly whether the front part of his vehicle struck first or whether it scraped or whether it went by clear.

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He was, however, satisfied that it was the respondent's vehicle that struck his. The impact must have been substantial. Osler's vehicle proceeded some distance into a coulee on the south side of the road and immediately caught fire. The Smayda truck remained upon the highway, proceeded some sixty feet and turned over on its side. An examination of that vehicle disclosed that the point of impact must have been just in front of the rear wheels. Osler states that as a consequence of the impact his brakes were completely ineffective.

It is also of some significance that, though Osler deposed he saw the respondent's truck sliding or skidding, he was not sure whether the front end had passed without colliding. Moreover, he changed his mind as to where the collision took place after he had visited the premises at some later date.

Counsel for the appellants cited a number of cases which he submitted lent support to his submission, among them *Laurie* v. *Raglan Building Co.* (1). There a ten-wheel lorry, heavily laden with wood, was driven on a road described as "in an extremely dangerous condition." It had snowed earlier in the day, then it had frozen and "the surface of the road was like glass." In the course of his judgment it was stated by Lord Greene M.R.:

> . . . the road was in such a condition that a prudent driver, even if he did not find it necessary to stop, would have proceeded at a very much slower speed.

The excessive speed of the defendant upon the slippery road presented a stronger case in favour of the plaintiff and quite distinguishes it from the case at bar.

He also referred to *McIntosh* v. *Bell* (2), where a collision occurred between the appellant's (plaintiff's) truck, driven westward on Boulevard Drive in Toronto, and a motor car driven eastward by the respondent (defendant). The learned trial judge was of the opinion that a dangerous rate of speed had not been proved, nor had the other items of negligence been established, and he accordingly dismissed the action. The Court of Appeal held that upon the defendant's own evidence he was driving in a dangerous manner

(1) [1942] 1 K.B. 152. (2) [1932] O.R. 179.

on a slippery road and, as a consequence, at a turn in the road, he skidded across a wide boulevard and collided with the plaintiff. Latchford C.J. stated at p. 183:

> The fact remains that when the defendant was aware the pavement was in a most dangerous condition, his car was being driven by him at such a speed that its momentum caused him to lose the control which it was his duty towards the plaintiff to have exercised in the circumstances.

Here again the condition of the road and excessive speed, neither of which is present in the case at bar, make it quite distinguishable upon its facts.

In *Claxton* v. *Grandy* (1), the collision occurred upon a straight, slippery road, when visibility was good. The plaintiff claimed damages on the basis of the defendant's negligence and the defendant counterclaimed, alleging the plaintiff was negligent. The jury found that owing to the icy condition of the pavement the accident was unavoidable. Upon this verdict the learned trial judge dismissed both the claim and the counterclaim. In the Court of Appeal a majority of the learned judges (Middleton and Macdonnell JJ.A. dissenting) affirmed the judgment at trial. In this Court it was held that there "were serious misdirections" and with respect to unavoidable accident Mr. Justice Cannon (with whom Sir Lyman Duff C.J., Rinfret J. (later C.J.) and Crocket J. agreed) stated at p. 263:

> . . . a jury, properly directed, would have found that, in the case of two cars driven on a straight road having an icy surface, about to pass each other when the collision occurred such an accident must have resulted from negligence, and not from an unavoidable accident.

In *Bray* v. *Palmer* (2), the facts were that both drivers turned toward the centre of the highway, which resulted in a head on collision. Both gave their respective explanations for so doing. In such circumstances at least one, as the learned trial judge intimated, was at fault. The Court of Appeal, while expressly recognizing the well known rule that a plaintiff must prove negligence in order to recover, concluded that upon the evidence negligence was established and that in the circumstances it was for the judge to determine whether one or both of the parties were negligent.

In the case at bar there is no suggestion on the part of the learned trial judge that either must have been negligent

(1) [1934] 4 D.L.R. 257. (2) [1953] 2 All. E.R. 1449.

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and, apart from the skidding, to be further discussed, the evidence is not such as to lead necessarily to the conclusion that one or the other, or both, were negligent.

In the case at bar the appellants did make a prima facie case of negligence when Osler deposed the respondent's vehicle skidded as it came around the curve. This, considered in relation to the evidence given by Smayda, caused the learned trial judge to conclude that there had been no skidding and, therefore, he did not accept the evidence of Osler. While the learned trial judge did not make a finding with respect to the credibility of the respective drivers, he did, upon this issue, accept the evidence of the respondent. The onus rested upon the appellants to prove negligence on the part of the respondent. Upon the evidence the learned trial judge found that he could not find the driver Smayda was negligent and, therefore, the appellants had not discharged the onus resting upon them, nor could he find that the driver Osler was negligent and, therefore, the respondent had not discharged the onus resting upon it with respect to its counterclaim. In the result the learned trial judge has found that neither the appellants nor the respondent had discharged the onus to establish the negligence which they had alleged.

As already stated, the Court of Appeal affirmed the view expressed by the learned trial judge. In such circumstances the rule expressed by Sir Lyman Duff in *Livesley* v. *Horst Co.* (1), applies:

> In these circumstances, the appellants must fail unless they can make it appear that the judgments below are characterized by some aberration from principle or affected by some error at once radical and demonstrable in the appreciation of the evidence adduced or in the method by which the consideration of it has been approached.

It would appear that no basis is disclosed in this record for holding that any of the exceptions mentioned in the foregoing quotations are present in the case at bar.

The appeal must be dismissed with costs.

The judgment of Locke and Fauteux JJ. was delivered by

LOCKE J.:—On the afternoon of August 25, 1952, the vehicle driven by one Osler, the property of the appellant Wotta, and that of the respondent, driven by one Smayda,

(1) [1924] S.C.R. 605 at 606.

collided upon the road between Katepwe and Balcarres. This was described in the evidence as an ordinary municipal dirt road which ran approximately north and south, being 30 feet in width from shoulder to shoulder, of which some 22 feet was occupied by the travelled portion.

Osler was driving north. The vehicle driven by him was a White truck and 3,000 gallon Westeel tank semi trailer designed for hauling gasoline, the over all length approximating 36 feet and the width 8 feet. With its load the total weight approximated 40,000 pounds. The semi trailer was equipped with dual wheels.

The vehicle driven by Smayda which was proceeding south consisted of a F.W.D. truck carrying a tank and two pumps and other equipment used for the purpose of cementing oil wells, its length being 26 feet over all and its width at the widest point 7 feet 10 inches. It was equipped with single wheels in the front and two duel wheels on each side at the rear. Its weight approximated 28,000 pounds.

Both drivers saw the other vehicle as they approached the scene of the accident. The exact point of impact was not found by the learned trial judge but the evidence appears to me to establish that it was at or close to a point where the road, which curved slightly to the east to pass a coulee, straightened out to continue southerly.

It is common ground that there was ample clearance between the front portions of the vehicles as they passed. When examined for discovery, Smayda said that the front of his truck was about 4 feet west of the other vehicle as they passed and this was put in as part of the appellant's case at the trial. In passing, however, the vehicles came into collision. According to Osler, the respondent's truck struck that of the appellant but he was unable to say whether it was the front part or the side of it which had struck his vehicle. According to Smayda, the reverse was the case. He claimed that his truck had been struck by the appellant's vehicle near the rear wheels which, he said, were "knocked out" so that the truck turned over on its side. Both drivers claimed to have been driving on their own side of the road. Osler, who said that his own speed was from 20 to 25 miles per hour, estimated the speed of the other truck at 40 miles per hour as it passed around the curve on

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the road, and said that it was "sliding" towards him and that while he had endeavoured to turn his vehicle into the ditch at the east side of the road he had been unable to do so. Smayda said that he had been driving in fourth gear as he rounded the curve at about 28 miles per hour and that there was a governor on the engine which prevented his going any faster. According to him, he had no difficulty in negotiating the curve, and said that the road was perfectly dry, and there was no possible chance of the truck skidding at that speed.

There were no marks on the road made by either truck to assist in determining their respective positions either before or at the time of impact and, other than the two drivers, there were no eye witnesses.

The present appellant brought action and the respondent counterclaimed for the loss sustained by them respectively.

Doiron J., by whom the action was tried, found that both vehicles were in fourth gear at the time of the collision and that their maximum speed was not more than 28 miles per hour, thus rejecting Osler's estimate of the speed of the respondent's car. As to the alleged sliding or skidding of the respondent's truck, the learned trial Judge said:—

> I accept the evidence that a truck of that description would not skid at the maximum speed of 28 miles per hour but I can understand that a trailer outfit as the plaintiff was operating might do so.

Saying that on the evidence he was unable to make a finding of negligence against either driver, he found that neither side had proved its case and dismissed both the action and the counterclaim.

The present appellant appealed to the Court of Appeal and the present respondent cross-appealed and both appeals were dismissed by the unanimous judgment of the Court delivered by the Chief Justice of Saskatchewan. The reasons for judgment delivered conclude:—

> The learned trial judge has made no findings as to the credibility of the witnesses and under the circumstances it is impossible for this court to say that the trial judge was wrong in his decision that he could not find which driver was negligent.

Rule 141 of the Court of Queen's Bench of Saskatchewan declares that counterclaim shall have the same effect as a cross action. The collision being between two motor vehicles upon a highway, the statutory presumption of

negligence referred to in s.152(1) of the *Vehicles Act* (R.S.S. (Sask.) c. 344) is inapplicable. The onus of proving negligence, which was the only cause of action asserted in both the action and the counterclaim, lay upon the party advancing the claim.

I construe the finding of the learned trial Judge as meaning that the evidence adduced by the parties respectively, to the extent that the same was accepted by him, failed to satisfy him that the other party was at fault.

As long ago as 1860, Erle C.J. said in *Cotton* v. *Wood* (1):

> Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case.

a statement the accuracy of which has never been questioned.

It was the appellant's case that Smayda had driven around the curve at a high rate of speed, causing the rear wheels of his vehicle to skid so that they came in contact with the appellant's vehicle, but both these contentions were rejected by the trial Judge. There are concurrent findings on these questions of fact and we should not interfere unless satisfied that the courts below were clearly wrong in the manner in which they disposed of the issue (*Albert* v. *Aluminum Co.* (2)). These contentions being negatived, there remained only the conflicting evidence of the drivers that each had driven on his side of the centre of the roadway.

In *Metropolitan Railway Co.* v. *Jackson* (3), a case in which the issues of negligence had been tried by a Judge and a jury, Cairns L.C. said (p. 197):

> The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred.

Where, as in the present matter, the issues are tried by a Judge without a jury, he must decide both of these questions. The learned trial Judge, upon the evidence in this case, declined to draw the inference that there had been negligence on the part of either driver, and the Court of

(1) (1860) 8 C.B. (N.S.) 568 at 571.
(2) [1935] S.C.R. 640 at 642.
(3) [1877] 3 A.C. 193.

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Appeal has unanimously concurred in that view. My consideration of the evidence taken at the trial and the argument addressed to us on behalf of the appellant has failed to disclose any error in the judgment appealed from and, in my opinion, this appeal fails.

We were referred on the argument of this matter to the judgment of the Appeal Division of the Supreme Court of New Brunswick in *Leaman* v. *Rea* (1), and some recent decisions in the Court of Appeal in England where, upon the facts proven, it was found that the inference to be drawn was that both parties had by their negligence contributed to the accident. It must be rarely, indeed, that decisions upon the facts proven in one negligence action are of assistance in arriving at a proper conclusion upon different facts in another action. What constitutes actionable negligence and the applicable rules as to the burden of proof are matters which have long since been decided. In Beven on Negligence, 4th Ed. 138, it is said that the rule *res ipsa loquitur* does not apply to an accident on a highway and that the fact of an accident raises no presumption of negligence. As support for that statement, a passage from the judgment of Blackburn J. in *Fletcher* v. *Rylands* (2), in which that learned Judge referred to what had been said in *Hammack* v. *White* (3), is relied upon. I think this statement to be too broad since there are circumstances in which negligence may be inferred from the mere occurrence of an accident upon a highway. In the New Brunswick case, the trial Judge had been of the opinion that the two cars which came into collision were driving in the center of the highway when they collided, and one of the cases in England upon which Harrison J. relied was *Bray* v. *Palmer* (4), where there had been a head-on collision in the center of the road. In such cases, at least in Canada where the various highway traffic statutes as well as every rule of prudence require drivers when meeting another vehicle to turn seasonably to the right to permit a safe passing, a collision in the center of the road clearly affords some evidence from which negligence on the part of each driver might, in the absence of a satisfactory explanation, be properly inferred.

(1) [1954] 4 D.L.R. 423.
(2) (1866) L.R. 1 Ex. 265 at 286.
(3) (1862) 11 C.B. (N.S.) 588.
(4) [1953] 1 W.L.R. 1449 at 1455.

This is, however, not such a case. It appears to be common ground that at least the forward part of both vehicles were on the proper side of the road and passed at a safe distance from each other, but something occurred which brought the rear part of the vehicles into contact. That any part of both vehicles was in the center of the road is not suggested by anyone. In my opinion, the evidence does not justify the inference that both parties were at fault and the respondent may not be found liable on the footing that one or other of the drivers was guilty of the negligence which caused the collision.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Robinson, Robinson & Alexander.*

Solicitors for the respondent: *Hodges & Noonan.*