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*May 20
June 13

ROBERT M. BELL, ADMINISTRATOR OF THE ESTATE OF GEORGE MACLAREN AND ELEGETHA CANDACE MACLAREN (*Plaintiffs*) ..... APPELLANTS;

AND

ARTHUR S. ROBINSON (*Defendant*) ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Motor vehicles—Negligence—Findings of fact by trial judge sitting without jury—Whether judgment at trial should be varied by appellate court—Survival of Actions Act, R.S.N.B. 1952, c. 223—Fatal Accidents Act, R.S.N.B. 1952, c. 82—Motor Vehicle Act, 1955 (N.B.), c. 13.

A collision occurred between an oil tank truck owned by R and operated by his employee G, and an automobile owned and operated by M, who died as a result of injuries received in the accident. The trial judge, sitting without a jury, found that G's negligent driving was the sole cause of the collision. From this decision the defendant appealed to the Appeal Division of the Supreme Court of New Brunswick, where the parties were found to have been equally at fault, and judgment was given awarding 50 per cent of the total damages to the plaintiffs. The plaintiffs then appealed to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

The burden lay upon the respondent to prove that after the deceased became or should have become aware of the truck driver's breach of the provisions of s. 131 of the *Motor Vehicle Act*, he failed to take advantage of an opportunity to avoid the accident of which a reasonably careful and skillful driver would have availed himself. *Walker v. Brownlee and Harmon*, [1952] 2 D.L.R. 450, referred to.

This was a question of fact and as there was evidence to support the conclusion of the learned trial judge with respect to it, his decision should not be varied. *S.S. Hontestroom v. S.S. Sagaporack*, [1927] A.C. 37, *Prudential Trust Company v. Forseth*, (1960), 21 D.L.R. (2d) 587 at 593, *Semanczuk v. Semanczuk*, [1955] S.C.R. 658 at 677, applied. The damages as found by the trial judge were not so excessive as to warrant any interference with the award made by him.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division, reversing a judgment of Robichaud J. Appeal allowed.

D. M. Gillis, Q.C., and *H. W. Church for* the plaintiffs, appellants.

*PRESENT: Locke, Cartwright, Martland, Judson and Ritchie JJ.

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P. Barry, Q.C., and *R. D. C. Stewart, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This action arises out of a collision between an oil tank truck bearing the name and carrying the products of Imperial Oil Company Limited which was owned by the respondent and operated by his employee, H. P. Giddens, and an automobile owned and operated by the late George MacLaren who died as a result of injuries sustained in the collision.

The collision occurred on an icy and steeply banked curve on the highway between St. Stephen and St. Andrews in the province of New Brunswick at about 10:00 a.m. on January 30, 1959, when the respondent's vehicle was proceeding in an easterly direction so that the banked curve sloped down towards his left-hand side of the highway, and as the driver himself admits the truck was skidding or sliding a bit in that direction.

This action is brought by the administrator of the estate of the late George MacLaren claiming under the provisions of the *Survival of Actions Act*, R.S.N.B. 1952, c. 223, and the *Fatal Accidents Act*, R.S.N.B. 1952, c. 82, and by the late Mr. MacLaren's widow who claims for damages resulting from personal injuries sustained by her in the collision.

The statement of claim alleges that the collision was caused by the negligent driving of the truck by Giddens for which the respondent and Imperial Oil Company Limited were responsible, and in the first instance the Imperial Oil Company Limited and Giddens were joined with the respondent as parties-defendant; no appeal has, however, been taken from the Order of the learned trial judge dismissing the action against the Imperial Oil Company Limited nor has any appeal been asserted by the driver.

By the original defence the defendants, Giddens and Robinson, simply "deny the allegations of negligence" and

plead inevitable accident in that the Defendants were using all care and caution at the time the said accident happened and allege that the said accident was caused entirely by the conditions of the highway.

At the trial, however, the respondent Robinson added a counterclaim of $1,500.00 for damages to his truck, alleging that "the said George MacLaren was negligent in failing to keep to his own side of the highway and in not having his car under proper control."

The case was tried before Robichaud J., sitting without a jury, and the learned trial judge, after a careful review of the evidence, concluded that "Gliddens' negligent driving on that occasion was the sole cause of the collision and the damages resulting therefrom" and he specified that negligence as follows:

> The negligence of the defendant driver Giddens consisted, therefore, in the unreasonable speed at which he was driving the Robinson truck, coupled with his lack of control of the same resulting in the rear end of the truck overlapping in the right driving lane of the MacLaren car and colliding therewith.

Pursuant to this finding, the learned trial judge awarded the following damages:

(1)	Under the *Survival of Actions Act* for hospital bills and disbursements, pain and suffering of the late Mr. MacLaren and the loss of his automobile	$ 2,219.88
(2)	Under the *Fatal Accidents Act* general damages for loss of maintenance, support and assistance to the dependants of the deceased	43,500.00
	together with the costs of funeral and burial expenses	932.60
(3)	For injuries, pain, suffering and inconvenience of Mrs. MacLaren	500.00
	together with special damages	141.50

From this decision the respondent appealed to the Appeal Division of the Supreme Court of New Brunswick, and in accordance with the decision of that Court delivered by Ritchie J.A. whereby the parties were found to have been equally at fault, judgment was given reducing the assessment of the damage sustained for loss of pecuniary benefit under the *Fatal Accidents Act* from $43,500.00 to $40,000.00 and awarding only 50 per cent. of the total damages to the appellants so that $21,576.24 was awarded in respect of the claims under the *Fatal Accidents Act* and the *Survival of Actions Act,* Mrs. MacLaren was awarded $320.75 and the respondent Robinson was awarded one-half of his counterclaim, i.e. $750.00. It is from this judgment that the appellants now appeal.

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The significant feature of the decision rendered on behalf of the Appellate Division is that it recognizes the negligence of the respondent's driver and allows the appeal entirely on the ground of the appellants' contributory negligence.

In reviewing the conduct of the respondent's driver, Ritchie J.A. has this to say:

> Giddens admits that immediately prior to the collision the truck was sliding towards the centre line but says it was "carrying off" to the right as it went down the hill. He also admits that, taking a chance nothing would happen and without slowing down, he had continued along the road and around the curve where the collision occurred. The pavement at the scene of the collision was practically glare ice.

The crux of the decision appealed from is to be found in the following paragraph:

> Accepting the finding of the learned judge that the rear of the tank wagon was about four feet north of the centre line there was, including the north shoulder, about eighteen feet for the deceased to manoeuver his car so as to avoid collision with the truck. Either he did not have, by reason of the glare ice covering on the pavement, sufficient control of his car to enable him to veer to his right or he was not maintaining a proper lookout and did not see the truck. In any event, with great respect, it is my opinion the evidence, apart from his own statements, points irresistibly to the conclusion there also was negligence on the part of the deceased and that such negligence contributed to the collision.

It will be observed that the Appellate Division has not identified the negligence which it attributes to Mr. MacLaren whereas the learned trial judge has made specific findings in the appellants' favour with respect to the allegations in the respondent's counterclaim. The following excerpts from the decision of the learned trial judge will serve to show that these findings relate to questions of fact and that they are based on his assessment of the witnesses who appeared before him.

As to the allegation that Mr. MacLaren failed to keep to his own side of the highway, the learned trial judge has this to say:

> According to her (Mrs. MacLaren's) evidence, when the Robinson truck "bumped into" them, as she said, her late husband was then driving his automobile on his own right-hand side of the highway. This is corroborated by Mrs. Edna Mowatt, an independent witness, who impressed me as a very truthful one. Mrs. Mowatt testified that at the time of the collision the late Mr. MacLaren was driving his automobile "on the right-hand side going to St. Stephen". In her cross-examination, by Mr. Barry,

Mrs. Mowatt stated that Mr. MacLaren, at that time, "wasn't far off from the edge of the ditch"—"from where it turns down over the ditch". . . . she said, again referring to Mr. MacLaren:—

> "Well I would say his two wheels was over on the edge of the gravel—over on the edge of the gravel at the side of the road."

After making reference to the evidence of the driver Giddens and his helper, the learned trial judge continued:

> Needless for me to elaborate any further on the issue of contributory negligence, raised by the inclusion of a counterclaim, by the amendment to Arthur S. Robinson's defence. The evidence to which I have just referred is sufficiently convincing to negative the particulars of negligence set out in the Counterclaim.

This seems to me to be a case to which the observations of Lord Sumner in *S.S. Hontestroom v. S.S. Sagaporack*[1], recently approved by this Court in *Prudential Trust Company v. Forseth*[2], and *Semanczuk v. Semanczuk*[3], have particular application. Lord Sumner there said at pp. 47-8:

> . . . Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial Judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

* * *

It is not suggested that the learned trial judge acted on any wrong principle in attributing the cause of the collision entirely to the negligence of Giddens, and I can see no indication of his having either failed to use or having misused the advantage afforded to him by seeing and hearing the witnesses, nor has the Appeal Division cast any reflection on the honesty of any of the witnesses upon whose testimony his findings are based.

On the other hand, by accepting the findings of the learned trial judge that the respondent's truck was about 4 feet north of the centre line of the highway, the Appeal Division has confirmed the fact that the truck was being

[1] [1927] A.C. 37.
[2] (1960), 21 D.L.R. (2d) 587 at 593.
[3] [1955] S.C.R. 658 at 677, [1955] 4 D.L.R. 6.

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operated contrary to the provisions of s. 131 of the *Motor Vehicle Act* of New Brunswick, 1955 (N.B.), c. 13, which reads as follows:

> Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one line of traffic in each direction each driver shall give to the other at least one-half of the main travelled portion of the roadway.

It accordingly appears to have been accepted by both courts below that, as a result of the truck driver taking a chance and rounding a steeply banked curve covered at least in part with practically glare ice without slowing down, the truck invaded that half of the highway which Mr. MacLaren was entitled to assume would be free for his own use. In these circumstances the burden lay upon the respondent to prove that after Mr. MacLaren became or should have become aware of the truck driver's breach of the law, he failed to take advantage of an opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself (see *Walker v. Brownlee and Harmon*[1]). This is a question of fact and as there is evidence to support the conclusion of the learned trial judge with respect to it, I do not think that his decision in this regard should be varied nor do I think that the damages as found by him were so excessive as to warrant any interference with the award which he made.

In the result, I am of opinion that the judgment at the trial in this case should not have been varied, and I would allow this appeal with costs throughout and restore the judgment of the learned trial judge.

Appeal allowed with costs throughout.

Solicitors for the appellants: Logan, Bell & Church, St. John, N.B.

Solicitor for the respondent: J. Paul Barry, St. John, N.B.

[1] [1952] 2 D.L.R. 450 at 461.