CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ST. GEORGE P. BALDWIN AND ANOTHER (PLAINTIFFS) ..... APPELLANTS;

AND

JOHN W. BELL AND ANOTHER (DEFENDANTS) ..... RESPONDENTS.

1932
*Oct. 4.
*Nov. 28.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Damages—Collision between automobiles—Narrow bridge—Duty of drivers—Proof of negligence—B.C. Highways Act, section 19.

On a foggy night, at about seven o'clock, the appellant's minor son in a roadster (about 5 feet, 10 inches wide), and the respondent's employee (the other respondent) in an auto truck with an overhanging rack (about 7 feet wide), approached a small bridge or culvert on a highway from opposite directions. The bridge was twelve feet long having 4 x 4 rails on each side, four feet high and its width between the railings on each side was seventeen feet, the floor or travelled part consisting of 3-inch planking and being 14½ feet wide. The respondent's truck reached the bridge first and when somewhere on the bridge the overhanging rack scraped the left side of the appellant's car; and, as the appellant's son while driving allowed his left elbow to protrude slightly from the open window to his left, the rack also struck his arm, which was severely injured. The trial judge found that the respondent's truck in crossing the bridge was as near the right railing as he could safely go, but that the real cause of the accident was the overhanging rack, of which the appellant's son had no knowledge, owing to fog and darkness. He found both drivers at fault, awarding ¼ of the fault to the appellant's son and ¾ to the respondent's employee. The majority of the Court of Appeal reversed this judgment on the ground that on the facts it was impossible to find negligence on the part of the respondents.

Held, reversing the judgment of the Court of Appeal (45 B.C.R. 234), Rinfret and Lamont JJ. dissenting, that the judgment of the trial judge should be restored. The respondents owed a special duty, under the circumstances of the case fully stated in the judgment, on a foggy night, to the appellant's son on account of the wide vehicle under his

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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control and he should have used special care in approaching the narrow bridge.

Per Rinfret and Lamont JJ. dissenting. According to the finding of the trial judge, the respondent's employee was, at all times material to the action, "to the right from the centre of the travelled portion of the highway," as provided by section 19 of B.C. *Highways Act;* and the only way the collision could have happened was by the appellant's son driving over to respondent's side of the centre line. Therefore respondents cannot be held to have been in any way responsible for the collision.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, McDonald J., and dismissing the appellants' action for injuries sustained owing to the alleged negligence of the respondent's employee (also respondent) while driving a motor-vehicle.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

R. L. Maitland K.C. and *E. F. Newcombe K.C.* for the appellant.

W. B. Farris K.C. for the respondent.

The judgment of the majority of the court, Smith, Cannon and Crocket JJ., was delivered by

CANNON J.—This is an appeal from the judgment of the Court of Appeal of British Columbia setting aside (Martin and McPhillips JJ.A. dissenting) a judgment of the Honourable Mr. Justice J. A. McDonald whereby the plaintiff St. George P. Baldwin was awarded $1,086.34 for special damages, and the plaintiff Gordon St. George Baldwin $2,250 general damages for injuries sustained in an automobile accident. The amount of special damages would not be sufficient to give jurisdiction to this Court; but the Court of Appeal for British Columbia gave leave to St. George P. Baldwin to appeal to this Court.

The appellant St. George P. Baldwin sued on his own behalf and as next friend to his son Gordon St. George Baldwin.

The respondent Hay is a truck driver employed by John W. Bell; and, on the occasion in question, was driving on the latter's business.

(1) (1932) 45 B.C. Rep. 234.

The accident occurred about seven o'clock p.m., on November 4, 1930, on a road near Kelowna, known as the Okanagan Mission Road, at or near a small bridge or culvert having 4 x 4 rails on each side, four feet high, and a total width between the rails of seventeen feet. The floor or travelled part consists of 3-inch planking and is 14½ feet wide. The respondent Hay admits that he used only this portion of the bridge and that it would not be possible to travel between the running part and the rail. There is no appreciable turn in from the side of the road to the bridge; and the side of the road, to use an expression of the witness Thomas G. Norris, "sort of melts into the bridge."

The respondent Hay was driving, in a northerly direction, a truck with a rack seven feet wide (for holding wood) on the chassis of the said truck which rack extended out at both sides. Gordon St. George Baldwin was driving in the opposite direction a Chevrolet closed car 5′ 10″ wide over all. The cars met at this small bridge; but neither could distinguish the nature of the car the other was driving. Hay naturally knew that he had this overhanging rack; and he says that he was aware of the fact that plaintiff could not know that he had such an overhanging rack. It is common ground that, at the time, one could only see the lights of an approaching car and that the visibility was poor.

The appellant approached the bridge at about fifteen miles per hour. He observed the light of the respondent's truck; but could not tell the nature of the vehicle, nor that it had an overhanging rack. He swears that he was drivslowly and on the right hand side of the road.

The respondent Hay approached the bridge at twenty-five miles per hour. He swears that he slowed a little to see if he had time to cross and then speeded up from twenty to twenty-five miles per hour. He says that he proceeded to cross the bridge on the right hand side and that, as he was leaving the end of the bridge, the other car came across the road; that he swerved on to the grass and, as he was leaving the road, the two cars met and slid along. He had no light on the overhanging part of the truck.

The drivers disagree as to the exact locus of the accident. The appellant says it happened on the bridge; and glass was found by some of his witnesses and a piece of bone on

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the truck. One found part of the handle of the car on the bridge.

The respondent admits that he crossed two preceding bridges that night in the centre and that he anticipated that this particular bridge was clear and did not expect to meet the other car on the bridge.

The appellant driver was resting his elbow on the ledge of the window of his car; and as the cars passed each other, the overhanging rack cut off the appellant's elbow and also the door handle of the Chevrolet. Young Baldwin's arm was very seriously injured and he will suffer a permanent disability.

The respondent Hay knew and admitted in his evidence that the other driver did not know that he was driving with an overhanging rack.

Mr. Norris, a barrister, met the respondent shortly before the accident. He says he did not know he had a rack until he got right on to the vehicle and had to swing right over to his right to avoid the overhanging rack hitting him. Hay was then driving on the centre of the road and did not alter his course at all. Norris had to swing his car to prevent the overhanging rack hitting him.

The respondent Hay states that he did turn out to his own side of the road when he met Norris.

The trial judge made no finding as to the exact spot where the accident happened; but he finds that the real cause of the accident was the overhanging rack, which took more space than would an ordinary car; that the respondent Hay knew that and that the appellant did not; that all that could be seen by the two drivers were two headlights and this is the case whether the accident took place actually on the bridge or a few feet off the bridge; and, although, in his opinion, the respondent had the right to drive a truck upon the road with an overhanging rack and the plaintiff should have anticipated this possibility, the trial judge found both drivers at fault; but, inasmuch as the defendan Hay had a certain knowledge which the plaintiff's driver did not possess, to the latter was imputed one-fourth and to Hay three-fourths of the fault. The trial judge found indications that, at the time of the collision, the defendant's truck was being driven well over to the right side of the road.

The majority of the Court of Appeal found that the respondent had not proven his case, while the two dissenting judges found that gross carelessness had been proven against Hay, although they did not feel that the assessment made by the trial judge should be disturbed.

After a careful and somewhat anxious consideration of this case, we have reached the conclusion that the appeal should be allowed and the first judgment restored. 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.

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. The width available to travel on that bridge made it dangerous to negotiate, to the knowledge of Hay, for his truck covering 7 feet width, and an ordinary car, like the appellant's, which needed 5′ 10″, leaving at most 3′ 2″ actual leeway.

In *Wintle* v. *Bristol Tramways and Carriage Co., Limited* (1), the road was 16 feet wide, the plaintiff's lorry 6 feet 4 inches and the defendant's 6 feet 10 inches meeting at night. The court found that, even compliance with a statute under which one was bound to carry one light, would not lessen the common law liability and does not prevent one from being under the necessity of taking reasonable and proper care to indicate his position in the road to approaching vehicles; 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.

In *LeLièvre* v. *Gould* (2), Lord Esher, M.R., says:—

> If one man is near to another * * * a duty lies upon him not to do that which may cause a personal injury to that other * * * for instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse, or his carriage. * * * If a man is driving on Salisbury Plain, and no other person is near to him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause

(1) (1916) 86 L.J. K.B. 240. (2) (1893) L.R. 1 Q.B.D. 497.

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an injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood.

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. He should have used special care in approaching this narrow bridge. He might have stopped; but he probably misjudged the distance of the approaching car and speeded up and took a chance of clearing the bridge before meeting the car. It was not taking the necessary care to proceed as he did and without having the windshield wiper working, under the weather conditions prevailing that night.

The circumstances which are to be considered for the purpose of ascertaining whether there was negligence are:

1st. The nature of the physical object by which the accident was caused. A greater degree of care is required where the use of the object is, in the circumstances, attended with special danger.

2nd. The place of the accident. Greater care was required approaching this bridge by the owner of the wider vehicle.

3rd. The physical conditions prevailing at the time of the accident; the time of the day and the weather, which witness Baldwin describes as follows: "At that time, it was very foggy. The fog was the worst I have known in the Okanagan at that place, the fog from town out," although he admits that they could see the lights.

4th. The conduct of the persons.

In this case, in the ordinary course, the accident could not have happened if Hay, who had the management of the wider vehicle, had exercised proper care. The evidence shews that he was negligent in driving into a narrow bridge, in a dense fog, at a rate of speed immoderate under the conditions, which disabled him from avoiding an accident in the emergency; this seems to be what the trial judge had in his mind. Like the minority judges in the Court of Appeal, we do not feel that we should disturb his assessment of damages as between the parties.

The appeal should be allowed with costs here and in the Court of Appeal and the judgment of the trial judge restored.

The judgments of Rinfret and Lamont JJ. (dissenting) were delivered by

LAMONT J.—The collision which caused the injuries for which damages are sought to be recovered in this action took place between the automobile of the appellant, St. George P. Baldwin, driven by his seventeen year old son Gordon, and a truck belonging to the respondent Bell, driven by the respondent Hay. The accident occurred about 7 p.m. on the evening of November 4, 1930, on the Okanagan Mission Road, B.C., at or near a point where the road crosses, by a narrow bridge, the north branch of Saw Mill Creek. Gordon was driving south and Hay was driving north. It was a foggy night and the headlights of both vehicles were on. The bridge was only 12 feet 2 inches from north to south, and 17 feet from east to west. It was really only a culvert. There was a railing about 4 feet high on each side of the bridge. The evidence as to the point of collision is contradictory: Gordon Baldwin says it was right on the bridge, while Hay says it was about 15 feet to the north thereof. A friend of Gordon's, one Collett, who was riding in the back seat of the automobile, might have definitely fixed the place of the accident but, although he was in the court at the time of the trial, he was not called by either party. Wherever the accident took place, the truck, which was seven feet wide, came in contact with Gordon's left elbow, which was resting on the ledge of the window of the left front door, and crushed it causing serious and permanent injury. Each driver testified that at the moment of impact he was well over on his own side of the road, and each claimed the other had crossed the centre line and invaded his half of the road. Hay was driving about twenty-five miles per hour and Gordon about fifteen. Gordon did not know that the vehicle the headlights of which he saw coming towards him was a truck, or that it was wider than an ordinary automobile. Hay testified that crossing the bridge he was running as close as he reasonably could to the east side thereof, and that the side of his truck was only 4 or 5 inches from the railing. He said that when he was leaving the north end of the bridge the car approaching turned towards him and he, fearing a collision, swerved to the right and drove on to

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the grass, and that the car and his truck grazed each other as they passed. He looked back and saw the other car stop; he stopped too, and heard someone yelling, so he drove off the grass on to the road and backed up over the bridge to see what had happened. He found Gordon Baldwin was hurt but was being attended to, and that young Collett was cut. He drove Collett home and then returned to the scene of the accident with Collett's father. About two hours later he went over the scene with Mr. Lysans who had a flashlight and he shewed Lysans the tracks which he said were made by his wheels on the right hand side, and where, at 6 feet north of the bridge, they turned off onto the grass. They discovered glass about 15 feet north of the bridge where Hay says the accident took place. Next morning, in company with Mr. C. W. A. Baldwin, uncle of Gordon, he again visited the scene of the accident and shewed him the same tracks that he had pointed out the night before to Lysans. They also saw the pile of glass about 15 feet north of the bridge. Lysans corroborates Hay to this extent: that Hay shewed him the wheel tracks he claimed were his. Lysans testified that, with the aid of the flashlight and the light from the automobiles then gathered there, it was easy to follow the track and that at 6 feet north of the bridge he distinctly saw where the wheels went over onto the grass. He says they found a pile of glass 15 feet north of the bridge, and, in addition to the pile of glass, they found a piece of a nickle door handle 2 inches long like those used on an automobile. The appellants admit that the collision broke off the handle of the left front door of their automobile. Lysans also says that he saw the wheel tracks on the inside of the east rail of the bridge at a distance, he thought, of about 15 inches from the rail, and stated he did not think Hay could have driven any closer to the rail. Glass was also found on the bridge together with a piece of a nickle door handle. Whether it was the same part of the door handle which Lysans found north of the bridge the night of the accident the evidence does not shew. One of the witnesses, Thomas Apsey, testified that the glass on the bridge seemed to him "to be scattered over the bridge." Counsel for the respondents contended that the finding of glass and part of the door handle 15 feet north of the bridge and the finding of glass

on the bridge, would indicate that the collision took place north of the bridge; that the truck smashed the glass in the left rear door, which is established by the evidence, and that some part of the glass fell to the ground and some remained on the running board of the car and was shaken off on the bridge.

The learned trial judge found as follows:—

> I am satisfied that the defendant's wheel marks were those which were afterwards seen by the defendant Hay and the witness Lysans. This would indicate that at the point of collision the defendant's truck was being driven well over to the right side of the road and in fact as far to the right as it could be driven if a collision between the right side of the truck-rack and the railing of the bridge was to be avoided. The real cause of the accident was I think that the defendant's rack overhung the truck and took more space than would an ordinary car. The defendant Hay knew this and the plaintiff did not know it.

This, in my opinion, is a finding that, whether the accident occurred on the bridge or on the road immediately to the north thereof, Hay was, at all times material to the action, east of the centre of the road. This finding is justified by the evidence and, in my opinion, must be accepted. From that finding it necessarily follows that the only way the collision could have happened was by Gordon Baldwin driving over to Hay's side of the centre line. If that is how the collision occurred, can Hay be held to have been in any way responsible for it? Both drivers had a right to be on the road with the vehicles they were driving. Both, however, were under a duty to take reasonable precautions to avoid a collision. In *Hambrook* v. *Stokes Bros.* (1), Atkin L.J. said:—

> The duty of the owner of a motor car in a highway is not a duty to refrain from inflicting a particular kind of injury upon those who are in the highway. If so, he would be an insurer. It is a duty to use reasonable care to avoid injuring those using the highway.

The precautions which both drivers were under a duty to take to avoid a collision are set out in the statute. Section 19 of the British Columbia *Highways Act*, provides:—

> 19. In case a person travelling or being upon a highway in charge of a vehicle drawn by one or more horses or other animals, or propelled by some other means, meets another vehicle drawn or propelled as aforesaid, he shall reasonably turn out to the right from the centre of the travelled portion of the highway, allowing to the vehicle so met one-half of the travelled portion of the highway.

(1) [1925] 1 K.B. 141, at 156.

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If this statutory provision had been observed by both drivers in the present case it is clear the accident would have been avoided.

If we accept the finding of the trial judge as to the position of the truck at the time of the accident, and, as I have already said, I think we must accept it, that finding means that Hay performed the duty resting upon him under the statute and that Gordon did not. That being so, I am unable to see how Hay could have been guilty of negligence causing the accident unless he became aware or had an intimation that Gordon was about to cross the centre of the travelled portion of the highway, and he (Hay) failed to avoid a collision being able to do so. Upon this point Hay was examined and he testified that it was not until the front of Gordon's car was on the centre of the road that he feared a collision, and that he immediately swerved to the east. He, therefore, had no intimation that Gordon was not going to comply with the statute until it was too late to get out of his way. Under the circumstances there was, in my opinion, no duty resting upon Hay to anticipate that Gordon would commit a breach of the statute. It is not suggested that after the danger become apparent Hay could, by any act of his, have avoided a collision. What is charged against him is that:

> the overhanging rack of the appellant's truck occupied more space than would an ordinary motor car and that he knew this and Gordon Baldwin did not, and that he was driving too fast under the circumstances.

None of these circumstances, however, could have brought about the collision if Gordon had remained on his own side of the road. The truck was not an outlaw on the highway. It had a perfect right to be there so long as its overhanging rack did not prevent its driver from giving to a vehicle going in the opposite direction one-half of the travelled portion of the highway. The fact that Hay knew the width of the truck and that Gordon did not, cannot, in my opinion, be said to have caused or contributed to the accident for, as the trial judge pointed out, anyone driving at night and seeing the lights of an approaching car must anticipate that it may be a truck.

It was contended by counsel for the appellants that as the road was narrow, the night foggy and the respondent's truck wider than an ordinary automobile, there was a duty

resting upon Hay to be extra careful not to injure anyone using the highway and that he should have had a light to mark the left side of his truck. It is established that the bridge was seventeen feet wide, and that the road leading up to the bridge had no ditch on the right hand side so that, if the accident occurred north of the bridge, as I think it did, the road was sufficiently wide for the cars to pass in safety and have a satisfactory margin to spare. There was some fog which made the windshield misty, unless the windshield wipers kept it clear. Only one of Gordon's wipers was working, which one the evidence does not disclose, but he drove with his head out of the window the better to see, until just before the accident when he withdrew it. Then, looking through the windshield he saw the railing of the bridge on the right hand side—he thought it was at the southwest corner. If it was his right hand wiper which was working and through which he saw the railing, and the wiper directly in front of him was not working and the windshield covered with mist, it would account for his failure to see the truck after he drew in his head. Notwithstanding the evidence of some fog, Hay says he could see the railing of the bridge on his right hand side, and he was able to run his truck within a few inches of it. Furthermore a speed of twenty-five miles per hour does not seem to me excessive, so long as the light is such that a driver can see to keep his own side of the road.

In support of the argument that Hay should have had a light to mark the left hand side of the truck, the appellants cited the case of *Wintle* v. *Bristol Tramways & Carriage Co., Limited* (1). In that case the plaintiff claimed damages from the defendants in respect of the alleged negligent driving by night of their petrol lorry or trolley, when the plaintiff's steam lorry was run into and damaged. The negligence alleged was that the defendants were burning only one light on their trolley when they should have had two. The defence was that the statute required only one light and that the defendants had complied with the statute. In his judgment, at page 242, McCardie J. says:—

> Under the Locomotives on Highways Act of 1896 and the regulations made thereunder the defendants were bound to carry one light on their trolley. In the absence of doing so they are exposed to certain penalties.

(1) (1917) 86 L.J.K.B. 240.

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That provision does not, in my opinion, lessen their common law liability, and compliance with the regulation does not prevent them from being under the necessity of taking reasonable and proper care to indicate their position in a roadway to pedestrians and approaching vehicles. In this case the defendants carried only one light. There was evidence before the deputy Judge that it was usual for lorries to carry two lights, and he no doubt thought that the defendants ought to have had two lights on their lorry.

This judgment was affirmed on appeal (1).

It will be observed that in that case there was evidence that it was usual for lorries to carry two lights and, as stated in 21 Halsbury, page 449, a person is entitled to rely upon the other party taking reasonable care and precautions, and, in places to which the public have access, is entitled to assume the existence of such protection as the public have, through custom, become justified in expecting. See also *Smith* v. *South Eastern Rly. Co.* (2).

The non-observance by an automobile driver of the precautions prescribed or duties imposed by the legislature is usually *prima facie* evidence of negligence and, if damage results from such non-observance, he will be liable therefor. It is, however, not disputed that the statutory enactment is not in every case to be taken as the measure of the duty of the individual. As in the *Wintle* case (3) a person may comply with the terms of the statute and yet find that he has omitted some other duty of care which involves him in liability. *Precessly* v. *Burnett* (4). In such cases, however, the common law duty has been relied upon by the plaintiff because the statutory provision, if complied with, was not sufficient to prevent the accident and did not afford the plaintiff the measure of protection to which he was entitled. These cases, it seems to me, can have no application to the case at bar for here, if Gordon Baldwin had performed the statutory duty resting upon him the accident could not have happened. We were not referred to any case in which a plaintiff has successfully invoked the aid of a common law duty to take care, to excuse his failure to perform a statutory requirement which, if complied with, would have prevented the accident.

As, in my opinion, Hay was entitled to expect that Gordon would use reasonable care and take proper precautions

(1) 117 L.T.R. 238.
(2) [1896] 1 Q.B. 178.
(3) (1917) 86 L.J.K.B. 240.
(4) [1914] S.C. 874.

in passing on the highway, and as, in particular, he was entitled to assume that he (Gordon), would observe the requirements of section 19 of the *Highways Act,* I am unable to reach any other conclusion than that Gordon Baldwin was the author of his own wrong.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Maitland and Maitland.*

Solicitors for the respondent: *Farris, Farris, Stultz & Sloan.*