BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED (*Defendant*) ..... APPELLANT;

1955

*May 13, 16
*Oct. 4

AND

ERNEST FARRER (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Contributory Negligence—Running down action—Traffic Light Signals—Right to proceed subject to common law duty.

Provisions enacted to facilitate and make safer the movement of pedestrian and vehicular traffic on the highways and public streets by means of regulatory traffic lights are supplementary to the common law duty that rests on all persons to exercise due care. The right to proceed on a "go" signal, whether a green light or a pedestrian "walk" signal, is not an absolute right but is qualified by the common law duty to exercise due care. Where, as in the present case, a pedestrian proceeds on a "walk" signal without looking to see if any traffic may be proceeding contrary to traffic signals and is injured, he may properly be held to be liable for contributory negligence.

Here, at the intersection of two streets where vehicular traffic was controlled by green, yellow and red signals and pedestrian traffic by "wait" and "walk" signals, the respondent while awaiting the "walk" signal saw a bus stopped west of the intersection. He proceeded on the "walk" signal and, after entering the cross-walk, was knocked down by the appellant's bus. The trial judge held the bus driver guilty of very great negligence; that the respondent was entitled to

*PRESENT: Taschereau, Rand, Estey, Locke and Cartwright JJ.

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assume vehicular traffic would obey the traffic regulations and that the respondent's failure to again look for approaching traffic before proceeding did not, in the circumstances, amount to contributory negligence.

The Court of Appeal for British Columbia by a majority judgment ordered a new trial.

Held (Cartwright J. dissenting in part): That the negligence of the bus driver was the direct cause of the accident but that the failure of the respondent to again look to his left before proceeding on the "walk" signal constituted a failure to take reasonable care and in the circumstances amounted to contributory negligence.

Held: Also, that the appeal should be allowed and the judgment at trial restored with the variation that 80% of the fault be apportioned to the appellant and 20% to the respondent.

Cartwright J. (dissenting) would have set aside the order of the Court of Appeal and restored the judgment at trial. Applying *Glasgow Corporation* v. *Muir* [1943] A.C. 448 at 457, he was of opinion that it had not been established that the trial judge erred in concluding that the respondent in the circumstances was not guilty of contributory negligence.

Toronto Ry. Co. v. *King* [1908] A.C. 260 at 269 followed in *Swartz* v. *Wills* [1935] S.C.R. 628; *Chisholm* v. *London Passenger Transport Board* [1939] 1 K.B. 426; *Boxenbaum* v. *Wise* [1944] S.C.R. 292; *King* v. *Anderson* [1946] S.C.R. 129; *London Transport Board* v. *Upson* [1949] A.C. 155; *Nance* v. *B.C. Electric Railway Co.* [1951] A.C. 601; *Walker* v. *Brownlee* [1952] 2 D.L.R. 450; *Johnston National Storage* v. *Mathieson* [1953] 2 D.L.R. 604, considered.

APPEAL from a judgment of the Court of Appeal for British Columbia, which by a majority judgment set aside the judgment of Coady J. awarding the respondent damages for personal injuries sustained when struck by a bus belonging to the appellant.

J. L. Farris, Q.C. and *H. P. Baldwin* for the appellant.

D. McK. Brown for the respondent.

The judgment of Taschereau and Estey J. was delivered by:—

ESTEY J.:—The respondent, at trial, was awarded damages for personal injuries suffered when struck by a trolley bus owned and operated by the appellant. A majority of the learned judges in the Court of Appeal directed a new trial. In this appeal the appellant submits that the negligence of the respondent was the sole cause of his injuries and that his action should be dismissed, while the respondent asks that the negligence of the motorman be held the sole cause and the judgment at trial be restored.

The accident occurred at the corner of Pender and Beatty Streets in the City of Vancouver on March 6, 1952, at approximately 3:30 o'clock in the afternoon. Pender Street runs approximately east and west and Beatty Street enters Pender at this point. At this intersection vehicular traffic is controlled by the rotation of green, amber and red lights, while pedestrian traffic is controlled by "Wait" and "Walk" signals. Simultaneously the red light and the "Walk" signal come on and the pedestrians then proceed in all directions. After the "Walk" signal goes off the red light remains on an appreciable time to permit the pedestrians to reach the curb before vehicular traffic commences.

The respondent, an employee of the Vancouver *Sun*, had completed his day's work and proceeded to the southeast corner of Pender and Beatty Streets with the intention of crossing Pender Street. The "Walk" signal was just going off and when he thought it would change again to "Walk" he says:

> I glanced to my left (to the west). . . . I saw a bus . . . where it would be for taking off and putting on passengers . . . Then I glanced to see how my "Walk" sign was and it was okay, so I glanced down and then stepped off and I took about—I would say two or three steps . . . after that I came to in the hospital.

This is a busy intersection and, while probably a few people were at this curb, he did not think any other person stepped off with him.

The bus driver stated that he stopped at the usual stop sign on Pender, about thirty feet west of the west curb line of Beatty, took on a passenger and closed the door. He states that when he closed the door, after taking on the passenger,

> The light was green and I pulled out, checking my mirror. . . . Pulling into the intersection or to the intersection I glanced at the tray. The fellow put a quarter in it. I looked up again, my intersection was clear . . . no vehicular traffic in that intersection. . . . Approaching the cross-walk on the east side of Pender Street, a pedestrian stepped in front of the bus and I immediately swung the bus to the left, trying to avoid him, applying my brakes as hard as I could.

When the bus driver left the stop sign thirty feet west of Beatty Street the light was green. He did not again observe the lights and, therefore, as the learned trial judge commented, he did not know what colour the light was showing as he entered the intersection. Beatty Street is fifty-two feet wide and, as the bus struck the respondent

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while on the easterly pedestrian walk, it must have travelled from the passenger stop approximately eighty-two feet. Throughout this distance the bus driver says he gradually and continually increased his speed which, at the moment of the accident, he estimated to be approximately twelve miles per hour. Another witness thought it was fifteen miles per hour. The bus driver saw the respondent step from the curb, at which time he estimated the bus to be about fifteen or twenty feet from him. He immediately endeavoured to swing the bus and push the brake to the floor.

That the respondent stepped off the curb when the "Walk" signal permitted his doing so is corroborated by both the evidence of Mrs. Doolin and Mr. Adair, who not only saw the respondent, but they, themselves, stepped off the curb on the "Walk" signal. This, of course, does not mean that all three stepped at the same instant, but, for practical purposes, at substantially the same time.

There is no evidence as to how long the lights remained green, yellow or red, except that the yellow, or amber, light remained but a few seconds, or a very short time. The record does not disclose when these lights were installed, but there is no suggestion they had not been at this intersection a sufficient time to establish their efficiency. It would seem, therefore, in the absence of evidence to the contrary, a court would be justified in concluding that a bus, proceeding at a reasonable rate of speed, which had entered on the green light, would have passed through the intersection before the red light came on. The driver deposed that he had seen the respondent step from the curb. It is clear that the latter did so upon the "Walk" signal and, therefore, the red light would then be showing against the bus driver, who, upon his own admission, was then some fifteen to twenty feet west of the respondent. The fact that the driver was then in such a position in the intersection supports the conclusion that he had not entered upon the green light. Moreover, if, at a busy intersection such as this, a driver, in directing his bus, so far ignores the lights that he cannot say upon what light he entered or what changes in the lights took place as he proceeded through, is not exercising that reasonable care which a prudent driver would exercise under such circumstances.

The learned trial judge concluded that he "entered the intersection at the very tail-end of the yellow signal." This conclusion is supported, as the learned trial judge indicated, upon a consideration of Adair's position on the cross-walk when the bus passed him in relation to the evidence adduced by other witnesses. Moreover, the position of the bus in the intersection at the moment the driver observed the respondent step from the curb lends some support to the foregoing conclusion. Upon the basis that he so entered, I am in complete agreement with the statement of the learned trial judge that "to enter the intersection under these circumstances was a very hazardous and negligent thing to do."

Mr. Farris contended that the learned trial judge had overlooked Adair's statement that the bus had entered the intersection upon the green light. The learned trial judge described Adair as a "reliable witness". Adair deposed the green light was on when the bus entered the intersection. He also stated that when the "Walk" signal came on the front of the bus was six or eight feet east of the western lane; further, that when the accident happened he was himself one-third of the way across the intersection. The learned trial judge considered the relative positions of Adair and the bus and, assuming the bus was going three times as fast as Adair, reached the conclusion the bus had entered the intersection either on the red or "the very tail-end of the yellow signal." While the learned trial judge does not specifically mention Adair's statement that the green light was on, it is clear that he not only considered his evidence, but gave particular weight thereto. Moreover, his statement that the light was green is in conflict with the evidence of other witnesses, as well as with the position of the bus when the driver first observed the respondent. In all these circumstances it would appear that rather than overlooking this evidence the learned trial judge concluded that Adair was in error in making such a statement. Moreover, even if the bus driver had entered upon the green light, that would not have permitted of his ignoring his duty to proceed with due care. Such would have required that he, while within the intersection, should have observed the lights, and particularly at this busy intersection, with which he was familiar, where there were pedestrian "Walk" and

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"Wait" signals, he should, when the amber light showed, have discontinued the gradual and continuous acceleration of his speed and proceeded in a manner that would have enabled him to avoid a collision with a pedestrian exercising his right-of-way under the "Walk" signal.

Upon the whole of the evidence I am of the opinion that the bus driver's negligent driving of the bus through the intersection was a direct cause of the injuries suffered by the respondent.

A more difficult question arises with respect to the conduct of the respondent. He had reached the southeast corner of the intersection and observed the "Walk" change to the "Wait" signal and when, while waiting, he thought "it was going to change," he glanced toward the west, or, as he otherwise expressed it, "glanced casually" to his left and saw the bus at the passenger stop thirty feet west of Beatty Street. While it was not moving, he says the green light was then showing at the intersection, which would permit the bus to enter. He then turned his attention to the north, but could not say more than that it might have "been a question of seconds" after he saw the bus before the "Walk" signal again came on. He is clear, however, that, having "glanced casually" and seen the bus in a stationary position, he did not again look to the west. Had he done so, he would undoubtedly have seen the bus and, as he says, would not have stepped from the curb. The learned trial judge stated:

> He was entitled to assume that traffic proceeding eastward would obey the traffic regulations. . . . but the failure to take these extraordinary precautions which he could have taken is not negligence. There was no failure on his part to take the ordinary precautions that might be expected of a reasonable person. When he saw the "Walk" signal he was entitled to proceed and to expect that his right of way would be respected. This "Walk" signal is an invitation to the pedestrian to proceed. The pedestrian has waited his turn, and to facilitate his movement, all vehicular traffic is stopped in all directions. The ordinary pedestrian is concentrating on his signal and on getting to his destination. Under the circumstances here it seems to me he cannot be held negligent in not looking to his left before proceeding unless he was aware, or ought to have been aware, of the presence of some danger in so proceeding. No doubt it would have been a prudent thing for the plaintiff to look to his left before proceeding, but his failure to do so is not, under the circumstances, negligence.

The pertinent issue is, therefore, should the respondent have looked to the west before stepping from the curb and whether, in not doing so, he was negligent in a manner that

contributed to his own injury. Viscount Simon expressed the duty which rests upon a person to exercise care for his own safety when he stated:

> But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. *Nance* v. *British Columbia Electric Railway Co.* (1).

Legislative bodies have, for many years, been enacting provisions intended to facilitate and make safer the movement of pedestrians and vehicular traffic on the highways and public streets. The general rule is that these provisions and regulations are supplementary, or in addition, to the common law duty that rests upon all persons using the highways to exercise due care. *Swartz Bros. Ltd.* v. *Wills* (2); *Royal Trust Co.* v. *Toronto Transportation Commssn.* (3). In the latter case Mr. Justice Davis, with whom the majority of the Court agreed, stated at p. 674:

> Generally speaking, a motorman on a street car is entitled to assume that a pedestrian or a motorist approaching the street car tracks will stop to permit the street car to pass by and there was in this case a statutory right of way in favour of the street car. But the existence of a right of way does not entitle the motorman on the street car to disregard an apparent danger that confronts him.

The learned trial judge found support for his view that the respondent was not negligent in *Walker* v. *Brownlee* (4), and *Johnston National Storage* v. *Mathieson* (5), both decisions of this Court. In *Walker* v. *Brownlee* the appellant Walker, proceeding in a northerly direction, had failed to look and to yield the right-of-way to the vehicle on his right and, therefore, had not exercised due care at the intersection. It was held that he alone was liable and that in the circumstances the driver of the truck, having the statutory right-of-way, was not negligent. Mr. Justice Cartwright, at p. 461, stated:

> . . . I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful

(1) [1951] 2 All E.R. 448 at 450.
(2) [1935] S.C.R. 628.
(3) [1935] S.C.R. 671.
(4) [1952] 2 D.L.R. 450.
(5) [1953] 2 D.L.R. 604.

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and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali.*

In the *Walker* case there was upon him, not only a common law liability to use due care, but a statutory duty to yield the right-of-way. In the present case the respondent, by virtue of the "Walk" signal, had the right-of-way, but the question is was he required to, and, if so, did he, in exercising his right, use due care. In effect, the respondent contends that he had an absolute right to proceed on the "Walk" signal without looking to see if any traffic was proceeding contrary to the lights, or, as otherwise stated, he had an absolute right to assume that the vehicular traffic in the position of the appellant would obey the regulation and proceed only as the lights directed.

In *Boxenbaum* v. *Wise* (1), two automobiles collided at an intersection where traffic was controlled by lights. The driver having the right-of-way and otherwise proceeding with due care was exonerated of any negligence. Mr. Justice Taschereau, with whom Chief Justice Rinfret and Mr. Justice Hudson agreed, stated at p. 296:

> Before reaching the intersection Wise was invited to cross St. Lawrence boulevard, having the green light in his favour. . . . Seeing the green light, which in certain judgments has been termed "a command to go ahead" in heavy traffic, he committed no fault by slightly accelerating his speed.

My Lord the Chief Justice (then Kerwin J.), with whom Mr. Justice Hudson agreed, stated at p. 299:

> Wise had the right to cross and, with respect to the trial judge who found otherwise, there was no negligence on Wise's part in not anticipating that Pelchat would attempt to cross from south to north with the red light showing against him or in not seeing Pelchat's car sooner than he did.

See also *The King* v. *Anderson* (2).

In *Sparks* v. *Edward Ash, Ltd.* (3), Scott L.J. stated:

> So, on the pedestrian crossing, I think the duty of the pedestrian is intended to be less *onerous* than if he were crossing the road anywhere outside the crossing. His business is to attend primarily to his own duty of getting across as soon as he can with safety. It was this broad thought that was present to my mind in *Bailey* v. *Geddes* (4), although I expressed myself in terms that were too universal. If the effect of the statutory code is to relieve the pedestrian on the crossing of some of the duties he would owe to the motorist *away* from the crossing, the plea of contributory negligence necessarily has its scope cut down in a case like the present. The reality of the position is that the essential object of the set of regulations was to induce pedestrians to desist from the practice of crossing,

(1) [1944] S.C.R. 292.
(2) [1946] S.C.R. 129.
(3) [1943] 1 K.B. 233 at 231.
(4) [1938] 1 K.B. 156.

anywhere and anyhow, streets which carry much traffic, to the danger of themselves and the inconvenience of the traffic, and the inducement was the provision of sufficient privileged crossings where the pedestrian would have the right of way and be officially authorized, and, indeed, invited, to cross without fear of being run over, and free from the burden of anxiety and care involved in having to depend on being perpetually on the look-out for approaching traffic if he wanted to avoid sudden death. This must mean a statutory lightening of his duty of care. In truth, that is what the pedestrian crossing means.

In *Chisholm* v. *London Passenger Transport Board* (1), Scott L.J. stated:

> Neither the Regulations nor the judgments of the Lords Justices in that case (*Bailey* v. *Geddes* [1938]—1 K.B. 156) attempt to define the duty of a pedestrian in regard to embarking from the footway on to the crossing. His duty at that stage is left to the common law.

and at p. 438:

> The pedestrian desiring to leave the footway and traverse the crossing is entitled to assume (1) that approaching traffic is acting and will continue to act so as to be able without difficulty to comply with the directions of the Regulations, and (2) that if an approaching vehicle is far enough away for it conveniently to check its speed, he is entitled to cross.

The light signals at this intersection with respect to vehicular traffic were of the type that are generally found where the green is followed by the yellow, or amber, and then the red. Also, as already stated, there were pedestrian "Walk" and "Wait" signals. The legislative provisions with regard thereto are found in the Street and Traffic By-law No. 2849 of the City of Vancouver. Section 9(1)(*a*) provides, in part, that the "Green light or 'Go', shall mean or indicate that traffic facing such signal may proceed across the intersection, . . .," while in s. 9(1)(*b*) it is provided that the "Yellow light, or 'Caution' or double red, when shown following the green 'Go', shall mean or indicate that traffic facing the signal shall stop . . ." In s. 9(2)(*a*) pedestrians facing the "Walk" signal "may proceed across the roadway . . .," while in s. 9(2)(*c*) it is provided that no pedestrian "shall start to cross the roadway . . ." when the "Wait" signal is showing. The use of the words "may" and "shall" in this by-law would indicate that it was intended one proceeding on the green light should at least exercise the common law duty to use care for his own safety. In other words, the by-law imposes an absolute duty to stop on the red and "Wait" signals, but grants only a permissive right with respect to those who proceed on the green or

(1) [1939] 1 K.B. 426 at 437.

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"Walk" signals. It would, therefore, appear that the by-law contemplates that those proceeding on the green and "Walk" signals will use due care for their own safety, while those who fail to stop at a red or "Wait" signal are at least negligent.

The fact is this by-law appears to be in accord with the foregoing authorities. These authorities indicate that it has been suggested the green and "Walk" signals constitute respectively an "invitation," even a "command," to drivers of vehicles and pedestrians to proceed; further, that one proceeding in accord with the lights has a "less onerous" duty and that such a person is "free from the burden of anxiety and care involved in having to depend on being perpetually on the look-out for approaching traffic if he wanted to avoid sudden death" and, further, that "the plea of contributory negligence necessarily has its scope cut down." Notwithstanding all of these, it is nowhere suggested a person can proceed without the exercise of due care. It may well be that the presence of the lights is a factor in determining what may be, in the circumstances, due care. However that may be, Lord Justice Scott in *Chisholm* v. *London Passenger Transport Board, supra,* stated, in respect of a pedestrian embarking upon the pedestrian crossing in accord with the lights, that "His duty at that stage is left to the common law." In the subsequent case of *Sparks* v. *Edward Ash, Ltd., supra,* the same learned Lord Justice stated in respect to the pedestrian: "His business is to attend primarily to his own duty of getting across as soon as he can with safety." Moreover, in *Boxenbaum* v. *Wise, supra,* my Lord the Chief Justice (then Kerwin J.) at p. 299 stated, as already quoted:

> . . . there was no negligence on Wise's part in not anticipating that Pelchat would attempt to cross from south to north with the red light showing against him or in not seeing Pelchat's car sooner than he did.

Further, in *Walker* v. *Brownlee, supra,* Mr. Justice Cartwright stated that if there be any blame to be cast upon the party having the right-of-way it must be shown that that party "became aware, or by the exercise of reasonable care should have become aware" of the other's disregard of the law.

It, therefore, appears that a pedestrian in the position of the respondent, who is proceeding in the exercise of his right-of-way in accord with the "Walk" signal, cannot be

exonerated from not looking and observing the bus proceeding in a manner that makes it dangerous for him to leave the curb. The duty to use care rests upon every person using the highways and there can be no question here but that he had the opportunity to look and, had he looked, he would have seen the bus and, in that event, not left the curb. This feature distinguishes the case here under consideration from those of which *Johnston National Storage* v. *Mathieson, supra,* is an illustration. In the latter case the driver having the right-of-way, and observing with due care all that could reasonably be seen, had a right to assume that one entering the intersection upon his right would yield to him the statutory right-of-way. Moreover, the fact that one having the statutory right-of-way must proceed with due care is emphasized in *Boxenbaum* v. *Wise, supra.*

In my opinion the appeal should be allowed and the judgment at trial should be restored, but varied, as indicated, apportioning the fault 80% against the British Columbia Electric Railway Co., Ltd. and 20% against the respondent. The respondent should have 80% of his costs at trial, in the Court of Appeal and in this Court.

RAND J.:—I agree with the finding of negligence made at the trial against the bus driver. In giving his evidence, the latter could not remember what light was showing when he reached the first or westerly curb and did not see the yellow or red light at all, and it "bothered him" that he could not do so. It appears that the passenger taken on at the stop had handed over a twenty-five cent piece and that he stood near the driver awaiting either change or tickets, but here again the memory of the driver in part failed him. What he last saw was that as he looked up the light was green and the intersection clear. From this it is inescapable that after that glance at the light, and at once or within seconds, he started and drove through the intersection without further attention to lights; whether to anything else except the passenger, until the last second or so, remains for conjecture.

His course, then, was undoubtedly what Coady J. deduced. The stop was thirty feet west of the westerly curb; the yellow light had flashed on when the bus had

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reached that curb; and before it had reached the easterly curb, 50′ farther, the red light appeared. Automatically the green "walk" signal came on.

At this intersection the signal system set up stopped vehicular traffic in all directions and opened the entire intersection to pedestrians. It was necessary for the latter to move quickly because the "walk" signal gave place to the "wait" signal, while the red holding the vehicles remained a few seconds longer to enable pedestrians within the intersection to complete their movement. When the driver again looked up, he saw the respondent, as he says, from 10 to 15 feet in front of him, and without sounding the horn and moving at a speed of 12 miles an hour, attempted to swing clear. This he did not succeed in doing, with the result that the respondent was struck by the right side of the front end of the bus between 4 and 7 feet from the curb.

But Coady J. construed the "walk" signal to be an absolute justification for what the respondent did. The latter, while awaiting that signal, had glanced to the west where he saw the bus at the stop. Some seconds later, the number of which, judging from the place of impact appears to be not less than 10, the signal flashed on, and without looking in the direction of the bus he started across.

There must, of course, be strict observance of these signals at a protected crossing; but the by-law itself contemplates the possibility that a vehicle may, though moving on the green, enter the intersection on the yellow light. In that case it may happen also that the driver is faced with the red signal before his transit is completed. Regulation No. 9(1)(*b*) provides:—

> Yellow light, or "Caution" or double red, when shown following the green "Go", shall mean or indicate that traffic facing the signal shall stop before entering the nearest crosswalk at the intersection unless so close to the intersection that a stop cannot be made in safety.

When a driver finds himself in that predicament, obviously he must exercise the greatest care in extricating himself.

But I am unable to agree that the right to proceed on such a signal is absolute. These rules are directions governing the normal course of conduct, but they necessarily lack the flexibility which only individual action in special situations can supply. They are for the general safety but the

individual must on occasion supplement them by reasonable and incidental precautions. Even as the driver must contemplate the possibility of the red signal against him in the intersection, so the pedestrian must co-operate in similar anticipation when it is dictated by special circumstances.

Here the respondent, though properly attending to the "walk" signal, knew that a bus in the offing was on its course approximately 80' away, and might at any moment move through the intersection. A careful pedestrian knowing that would keep in mind the possibility of just such a conjunction as arose. The slightest attention to the left would have revealed the bus and avoided the accident. This is no doubt an enhanced duty but the congestion of dangers in city traffic can, under some circumstances, call for it. In doing what he did he fell, in my opinion, short of reasonable care for his own safety.

In *London Passenger Transport Board* v. *Upson* (1), several of the law lords taking part considered this question. In the Court of Appeal (2), the Master of the Rolls, Lord Greene, at p. 937 had expressed the view that the bus driver in that case proceeding on a green light owed no duty to watch out for pedestrians walking in the face of the signals. On this Lord Uthwatt remarked:—

> In the view that I have formed it is not necessary for me to deal with the question of negligence. I desire only to register my dissent from the view expressed by the Master of the Rolls that drivers "are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care". It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

Lord du Parcq, at p. 175, said:—

> My Lords, the learned Master of the Rolls has stated with great clarity a view of the law of negligence which, in my opinion, ought not to receive the approval of your Lordships' House. "The driver of the omnibus," the Master of the Rolls said, "was entitled to assume that the plaintiff, like other pedestrians, would conform to common sense and ordinary care in the presence of an adverse signal, particularly in view of the provisions of the Highway Code." . . . "The fact that a driver knows that other people on occasions do things that no careful driver would be expected to anticipate does not mean that he is under a duty to anticipate such action." It follows from these premises that the appellant's driver was "entitled to drive on the assumption that no pedestrian would disobey the light signal." . . . My Lords, if the premises are granted this reasoning is impeccable, but I do not accept the premises as sound.

(1) [1949] A.C. 155. (2) [1947] 1 K.B. 930.

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Lord Morton of Henryton, at p. 181, after quoting from the language used by the Master of the Rolls, said:—

> In such a case, I think that a driver fails to exercise due care, apart altogether from the regulations of 1941, if he proceeds on the assumption that pedestrians will refrain from crossing the road until the lights change, and drives his vehicle in such a way that he cannot avoid an accident if a pedestrian emerges suddenly from behind the obstruction.

With these general statements of the duties of drivers of vehicles and pedestrians at protected crossings I respectfully agree; they express the continuing obligation on all persons to be reasonably alert. Here there was nothing that called for the respondent's attention incompatible with giving a glance at the bus; but the failure was relatively excusable, and I would assess the responsibility for it at 20%.

The appeal should, therefore, be allowed and the judgment at trial modified accordingly. The respondent will be entitled to 80% of the costs throughout.

LOCKE J.:—The evidence given by the respondent at the trial is reviewed in the reasons to be delivered in this matter by my brother Estey. With great respect for the contrary opinion of the learned trial judge I think that upon his own statement the respondent should not have been relieved of any fault contributing to the accident.

When the respondent saw the bus stopped at the southwest corner of the intersection, he says the green light permitting traffic to proceed east on Pender Street was showing. Thereafter he paid no further attention to the bus. It is a matter of daily occurrence on city streets where the traffic is regulated by lights that at times motor vehicles proceeding at normal speeds approach the limits of intersections when the traffic lights are about to change. In these circumstances it is known to everyone that such vehicles will continue to cross the intersection since to do otherwise would result in blocking traffic when the green light shows for vehicles proceeding upon the intersecting street. It was presumably for this reason that these lights are so designed that the green light is followed by an amber light before the red light appears to permit vehicles in this position to complete their passage across the intersection. I think Farrer was at fault and should be held partially responsible for the accident since knowing how quickly vehicles such as motor buses move from a standing position and having seen

that the light was showing green he should, having regard to his own safety, have looked to see that the vehicle was not in motion across the intersection before stepping off the curb to walk north across the street. Had he done so, it is plain that there would have been no accident.

It would be exceedingly unfortunate, in my opinion, if any doubt should be cast upon the accuracy of the passage from the judgment of Lord Atkinson in *Toronto Railway Co.* v. *King* (1), which was adopted and followed in *Swartz* v. *Wills* (2) and in other judgments since delivered in this Court.

No one would suggest that to say that a driver having the right-of-way may proceed on the assumption that drivers of other vehicles will observe the rules regulating traffic on the streets means that such person may proceed without taking due care for the safety of himself and others. While it was, no doubt, unnecessary to do so, s. 21 of the Highway Act of British Columbia (c. 144, R.S.B.C. 1948) which gives the right-of-way to a driver approaching an intersection as against another approaching from the left concludes in these terms:—

> but the provisions of this section shall not excuse any person from the exercise of proper care at all times.

I do not intend to suggest that the learned trial judge applied the principle stated in *Toronto Railway Co.* v. *King* otherwise than in the manner I have above indicated, but with respect I think his finding relieving the respondent of any share of fault fails to take into account the circumstance to which I have above referred.

I would add that if anything said in *London Passenger Transport Board* v. *Upson* (3), should be considered to be at variance with the statement of Lord Atkinson to which I have referred that in my opinion it is the latter statement that should continue to be accepted as the law in this Court.

I agree that upon the evidence in this case the major part of the fault should be attributed to the driver of the bus and that the degrees of fault should be determined as being

(1) [1908] A.C. 260 at 269. (2) [1935] S.C.R. 628.
(3) [1949] A.C. 155.

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20% to the respondent and the remainder to the appellant. I agree with the disposition of the costs proposed by my brother Estey.

CARTWRIGHT J. (dissenting in part):—The relevant facts and the issues raised in this case are sufficiently set out in the reasons of my brothers Rand and Estey which I have had the advantage of reading.

I do not find it necessary to review the evidence in detail. In my view, it supports the finding of fact made by the learned trial judge that the bus entered the intersection either on the "walk" signal or "at the very tail-end of the yellow signal". The further finding of fact made by the learned trial judge that, in all the circumstances, the respondent was not guilty of contributory negligence ought not, in my opinion, to be disturbed.

In my view the passages from the opinions of the Law Lords in *London Passenger Transport Board* v. *Upson* (1), quoted in the reasons of my brother Rand, are not necessarily inconsistent with the statement of Lord Atkinson in *Toronto Railway Co.* v. *King* (2), as it has been applied in this Court. In *Swartz* v. *Wills* (3), Cannon J. giving the judgment of himself, Lamont and Davis JJ. and of Dysart J. *ad hoc* said at page 632:—

> He (the appellant) had the right of way and was entitled to assume that plaintiff would follow the rule.
>
> Lord Atkinson, in *Toronto Railway* v. *King*, said:—". . . traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less on the assumption that the drivers of all other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets."
>
> Especially in a case where we have a clear cut statutory duty, . . .

Duff C.J. delivered a separate judgment but expressed his concurrence with Cannon J.

In *The King* v. *Anderson* (4), Estey J. with whom Rinfret C.J.C. and Kerwin J., as he then was, concurred, after pointing out that the driver of the appellant's vehicle had violated the express provisions of regulations having the force of statute said at page 133:—

> The respondent on his part was entitled to rely upon the appellant complying with these provisions of section 3 (*j*) "to ascertain" if the

(1) [1949] A.C. 155.
(2) [1908] A.C. 260 at 269.
(3) [1935] S.C.R. 628.
(4) [1946] S.C.R. 129.

turn could be made "in safety" and also "give a signal plainly visible". *Carter* v. *Van Camp* (1); *Toronto Ry. Co.* v. *King* (2), where Lord Atkinson stated:—

> "It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. 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 the same case at page 138, Kellock J. with whom Rand J. agreed said at page 138:—

> I do not think that the respondent was bound to anticipate that the truck would turn into Bute street in the absence of any indication that such was the intention of its driver.

It will be observed that in both *Swartz* v. *Wills* and *The King* v. *Anderson* what was decided was that one party was entitled to assume that the other would not violate an express statutory provision. In *Toronto Ry.* v. *King* the report does not indicate whether the regulations which the motorman disregarded had the force of statute, but their Lordships seem to have so treated them for, at page 269, Lord Atkinson speaks of "a tramcar bound to be driven under regulations such as those quoted above".

In *Upson's* case, on the other hand, the question was whether the appellant's bus-driver was entitled to assume that the respondent pedestrian would "behave with reasonable care" and so refrain from crossing against the light. The opinions stress two points, (i) that there was no statutory provision prohibiting a pedestrian from crossing the road with the light against him, and (ii) that it was in evidence that the bus-driver knew that pedestrians had a habit of doing so.

At page 171, Lord Wright says:—

> He (i.e. a pedestrian) is not given a licence to neglect any reasonable precaution for his own safety, though the law does not forbid him to traverse a crossing with the light against him if he can do so safely.

(1) [1930] S.C.R. 156. (2) [1908] A.C. 260 at 269.

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At page 175, after setting out the view which had been expressed in the Court of Appeal by the Master of the Rolls, Lord du Parcq, continued:—

> My Lords, if the premises are granted this reasoning is impeccable, but I do not accept the premises as sound. It is assumed in them that a pedestrian is "disobeying" an "adverse" signal if he crosses a light-controlled "pedestrian crossing" at a time when the green light is signalling to vehicular traffic permission to advance, whereas in truth the pedestrian is under no legal compulsion to keep off the crossing at such a time, and the signal is never "adverse" to him in the sense that it prohibits him from crossing. The most that can be said is that he often takes a risk, which may be such that it is negligent to take it, if he crosses when the traffic is not being held up.

At page 176, Lord du Parcq says further:—

> The driver of the appellants' omnibus agreed in cross-examination that he knew "that people in London have a habit of crossing a road when the lights are not in their favour." Even apart from the duty imposed on him by the regulations, he was therefore bound to take precautions against the possibility that some person was concealed from his view by the stationary cab and might suddenly emerge from its protection. On this ground alone it must at least be said that there was evidence to support the conclusion that the driver had failed to take reasonable care for the safety of others and was therefore negligent. A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are in fact likely to do.

At page 181, Lord Morton of Henryton says:—

> In his evidence the driver, a very frank and honest witness, admitted that people in London "have a habit of crossing a road when the lights are not in their favour."
>
> * * *
>
> No doubt wise pedestrians do not cross the road when the lights are in favour of oncoming traffic, but there is no regulation which forbids this, and many pedestrians are unwise.

In *Upson's* case no reference appears to have been made in argument to the judgment of the Board in *Toronto Ry. Co.* v. *King* and it is not mentioned in the opinions.

In my view, there is nothing in the judgments in *Upson's* case which should cause us to hesitate to follow the statements which I have quoted above from *Swartz* v. *Wills* and *The King* v. *Anderson*. I do not interpret the last mentioned cases as laying down a rule that a party who has the benefit of a statutory rule of the road is thereby absolved from the duty of taking reasonable care in regard to the movements of the person on whom such rule imposes a duty. Rather, I think, they decide that in determining whether such party has or has not used reasonable care in a particular case a factor, always important and often decisive,

will be the circumstance that he would normally proceed on the assumption that the person upon whom such statutory rule imposed a duty would fulfil it. Observation of the movements of a party bound by statute to yield the right of way to the observer might well constitute a proper look-out when similar observation of the movements of a party not so bound might be inadequate. Whether in a particular case the observation actually made was sufficient to constitute the taking of reasonable care will be a question of fact, and I adhere to the opinion, which I expressed in *Walker* v. *Brownlee* (1), that in deciding such question no doubts should be resolved in favour of the party whose violation of an express statutory provision has been an effective cause of the accident.

In the case at bar, I do not think that the learned trial judge can be said to have misdirected himself as to the duty of the respondent to take reasonable care for his own safety when he said:—

> I am of the opinion, however, that under the circumstances here there was no negligence on the part of the plaintiff. He had looked to his left while waiting for his signal. He saw this bus at the loading zone and he was convinced that it was not moving. He was entitled to assume that traffic proceeding eastward would obey the traffic regulations. He admits that he could have taken greater precautions and could have looked to his left again and, if he did, he could have seen this bus, and having seen it, would not have proceeded. But the failure to take these extraordinary precautions which he could have taken is not negligence. There was no failure on his part to take the ordinary precautions that might be expected of a reasonable person. When he saw the "Walk" signal he was entitled to proceed and to expect that his right of way would be respected. This "Walk" signal is an invitation to the pedestrian to proceed. The pedestrian has waited his turn, and to facilitate his movement, all vehicular traffic is stopped in all directions. The ordinary pedestrian is concentrating on his signal and on getting to his destination. Under the circumstances here it seems to me he cannot be held negligent in not looking to his left before proceeding unless he was aware, or ought to have been aware, of the presence of some danger in so proceeding. No doubt it would have been a prudent thing for the plaintiff to look to his left before proceeding, but his failure to do so is not, under the circumstances, negligence.

I do not read this passage as asserting an absolute right in the respondent to proceed when the "Walk" signal appeared without first having taken reasonable precautions for his own safety. The learned judge accepts the evidence that the respondent looked to his left while waiting for the

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

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signal, that he saw the bus, that he calculated from its position that if he proceeded with the signal when it came on he could do so in safety so far as the bus was concerned, that this calculation was sound, and that it was falsified only by the driver of the bus committing a breach of the by-law by entering the intersection when either the red or the yellow signal light forbad him to do so. The learned judge recognizes a duty upon the respondent to look again to his left before proceeding not only if he was aware but also if he ought to have been aware of the presence of some danger in so proceeding. The learned judge declines to hold that, in these particular circumstances, the respondent ought to have anticipated the breach of the by-law committed by the bus-driver. He decides that the respondent did not fall short of the standard of foresight of the reasonable man.

In approaching the question whether this decision of the learned judge should be disturbed it is helpful to refer to what was said by Lord Macmillan in *Glasgow Corporation* v. *Muir* (1):—

> The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from overconfidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.

The question I have to answer is not whether I would have reached the same conclusion as did the learned trial judge, but whether I am satisfied that such conclusion was wrong, and I have already indicated that I am not so satisfied.

(1) [1943] A.C. 448 at 457.

In the result I would set aside the order of the Court of Appeal and restore the judgment of the learned trial judge. The respondent is entitled to his costs throughout.

Appeal allowed judgment at trial modified.

Solicitor for the appellant: *A. B. Robertson.*

Solicitor for the respondent: *A. E. Branca.*