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DONALD A. DESHARNAIS and THE PACIFIC CARTAGE & STORAGE COMPANY LIMITED (*Defendants*) APPELLANTS;

AND

MURIEL JOHNSON (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Negligence—Motor Vehicle—Pedestrian run down in intersection—Driver's vision obscured by frosted windshield—Whether if pedestrian not in pedestrian crossing, onus on driver discharged—The Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, ss. 59 (2), (4), 94(1).

In an action for damages against the appellants for injuries suffered by the respondent, who was knocked down at a street intersection and run over by a motor truck driven by the appellant driver and owned by the appellant company, the defences pleaded were negligence by the respondent in crossing the intersection diagonally and her failure, contrary to s. 59(4) of *The Vehicles and Highway Traffic Act*, R.S.A. 1942, c. 275, to yield the right-of-way to the vehicle, and in the alternative, contributory negligence. The evidence was that the driver's vision was obscured by frost on the windshield which prevented his seeing the respondent. No one saw the collision but from the evidence adduced the trial judge considered that it had occurred, either while the respondent was crossing from the northeast to the northwest corner of the intersection and while she was in the pedestrian right-of-way or, after she angled off that right-of-way slightly in a southwesterly direction. He found the latter to be the case but that that was not a contributing cause of the accident, and that the entire fault was the negligence of the truck driver. The judgment was affirmed by Supreme Court of Alberta, Appellate Division, Frank Ford J.A. dissenting.

Held: (Locke J. dissenting), that the appeal should be dismissed. Upon the evidence the accident was caused by the negligence of the driver of the truck and there was no negligence on the part of the rspondent contributing to the accident.

Per: Rinfret C.J. and Kerwin J.:—It made no difference whether the respondent followed the unmarked crossing, or whether she deviated "very slightly" therefrom as the trial judge found, or even if she crossed at a point further to the south and near the centre of the intersection, as the majority of the Court of Appeal thought, in any event, the position of the respondent had nothing to do with the accident.

The respondent stated she looked to her left, where the traffic nearest her would be expected. As a result of the accident she remembered nothing further but that did not necessarily mean that she did not thereafter look to her right, and there was nothing to indicate that the truck would have been seen at any relevant period in sufficient time for the respondent to avoid the accident. *Nance* v. *British Columbia Electric Ry. Ld.* [1951] A.C. 601 at 609.

*PRESENT: Rinfret C.J. and Kerwin, Estey, Locke and Fauteux JJ.

In view of the finding that the position of the respondent was not a contributory cause of the accident, the onus section, s. 94(1), need not be considered.

Per: Estey and Fauteux JJ.:—There was no evidence accepted by the trial judge that justified a finding that the respondent was not upon the pedestrian lane when struck by the appellants' truck. Therefore, the case fell within s. 59(2) by virtue of which the operator of the vehicle shall yield the right-of-way to the pedestrian. There was no evidence as to the manner in which the respondent conducted herself and, therefore, no evidence that she failed to exercise due care.

Per: Locke J. (dissenting):—The evidence disclosed that the respondent proceeded across the intersection diagonally from the northeast corner toward the southwest corner and was to the west of the centre of the intersection when struck by the truck. In failing to concede the right-of-way given to the oncoming vehicle by s. 59(4), and in failing to take any precautions for her own safety, her negligence contributed to the accident. *Swartz* v. *Wills* [1935] S.C.R. 628. The statement in the reasons for judgment of the majority of the Court of Appeal that the evidence must prove beyond a doubt to the satisfaction of the jury that the pedestrian did by negligence contribute to the accident was error. The evidence in the case discharged the onus placed upon the appellants by s. 94(1). Both the driver and the respondent were guilty of negligence contributing to the accident, as found by Frank Ford J.A., and the liability should have been apportioned equally. *The Volute* [1922] A.C. 129, 144. *The Contributory Negligence Act*, R.S.A. 1942, c. 116, s. 2.

APPEAL and, cross-appeal as to costs only, from a judgment of the Supreme Court of Alberta, Appellate Division (1), dismissing (Frank Ford J.A. dissenting), the defendants' appeal from a judgment of Howson C.J.T.D., holding them liable for the damages sustained by the plaintiff.

R. L. Fenerty, Q.C. for the appellants.

M. Millard, Q.C. for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by:—

KERWIN J.:—Several errors were pointed out in the reasons for judgment of the trial judge and in the reasons in the Court of Appeal but, irrespective of any onus under s. 94(1) of *The Vehicles and Highway Traffic Act* of Alberta, R.S.A. 1942, c. 275, the evidence satisfies me, as it did the trial judge and the majority of the Court of Appeal, that the accident was caused by the negligence of the driver of the truck and that there was no negligence on the part of the respondent contributing to the accident. In my opinion

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it makes no difference whether she followed the unmarked crossing, or whether she deviated "very slightly" therefrom as the trial judge found, or even if she crossed at a point further to the south and nearer the centre of the intersection as the majority of the Court of Appeal thought. On this point I am inclined to agree with the trial judge but, in any event, the position of the respondent had nothing to do with the accident. The truck driver was driving a truck in which his vision to the left was obscured by reason of frost on the windshield; he proceeded at the same rate of speed down the street and across a busy intersection, failed to see the respondent, and his truck struck her.

Centre Street in the City of Calgary runs north and south, and 20th Avenue runs east and west. The respondent had in her hands letters for mailing and she intended to cross from the northeast to the northwest corner of the intersection of these highways in order to deposit the letters in a mail box situated on the northwest corner. Neither highway is a stop street and there are no traffic lights. The respondent stated that before starting to cross, she looked to her left, that is, to the south where the traffic nearest her would be expeced. As a result of the accident she remembers nothing further but that does not necessarily mean that she did not thereafter look to her right. In *Nance* v. *British Columbia Electric Railway Ld.* (1), a pedestrian had been instantly killed by a street car and in the British Columbia Court of Appeal, Chief Justice Sloan had said:—"Had he taken the precaution of a momentary glance, he would not have walked into a position of imminent peril." Viscount Simon, speaking for the Judicial Committee, stated at page 609 with reference to this statement:—"On this, their Lordships would respectfully observe that in their opinion there was no evidence that the deceased did not look, and that if he looked, it may be that he saw that the car was stationary." Furthermore, in view of the down grade of Centre Street to the north at some point north of the intersection, and accepting the truck driver's evidence as to his rate of speed, fifteen to twenty miles per hour, there is nothing to indicate that

(1) [1951] A.C. 601.

the truck would have been seen at any relevant period in sufficient time for the respondent to avoid the collision.

On my view of the matter, s. 6 of *The Contributory Negligence Act*, R.S.A. 1942, c. 116, and the question of ultimate negligence need not be considered. Section 6 provides:—

> Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless he is satisfied by the evidence that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous therewith.

I might add that in my opinion the Court of Appeal were in error in attaching as much importance as they did to the positions occupied after the collision by the various articles that had been in the respondent's hands. In view of the tendency of these articles to be scattered after an event such as that with which we are concerned, nothing may be inferred from where they were found as to where the accident occurred. The evidence of the witness Craven has not been overlooked but in view of the findings of the trial judge it must not have been accepted by him, and a reading of the transcript appears to justify his disregard of it.

The appellants relied upon s. 59(4) of *The Vehicles and Highway Traffic Act*:—

> Every pedestrian crossing a roadway at any point other than within a marked or unmarked crossing shall yield the right-of-way to vehicles and street railway cars upon the roadway, provided that this provision shall not relieve the driver of a vehicle or street railway car from the duty of exercising due care for the safety of pedestrians.

It was argued that if it be shown that the respondent was off the pedestrian crossing, she must yield the right-of-way to vehicular traffic; that her failure to do so contributed to the accident; and that this satisfies the onus resting on the truck driver of proving that the accident was not *entirely* or *solely* due to his fault as provided by s. 94(1):—

> When any loss or damage is sustained or incurred by any person by reason of a motor vehicle in motion, the onus of proof that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle.

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Kerwin J.

Even if the respondent had not been on the pedestrian crossing, I agree with Mr. Justice Clinton J. Ford, speaking for the majority of the Court of Appeal, that this has nothing to do with the matter unless it be found that it was a contributory cause of the accident.

For the reasons already indicated, I think the onus section, s. 94(1), need not be considered but our attention was called to an extract from the judgment of Mr. Justice Clinton J. Ford where, after disposing of the appellants' contention now under consideration, he continues:—

> The answer might also be stated in this way: The evidence, including any fair inference therefrom, must prove *beyond a doubt* to the satisfaction of the jury that the pedestrian did by negligence contribute to the accident, and until this has been done the onus still remains on the driver. *Geel* v. *Winnipeg Electric Co.* (1).

Objection was raised, and I think properly so, to the words "beyond a doubt" but I venture to think that their insertion was inadvertent. The *Geel* case was concerned with a section of the Manitoba Motor Vehicles Act which as it then stood may be taken for present purposes to be the same as s. 94(1) of the Alberta Vehicles and Highway Traffic Act except that the words "entirely or solely" did not appear. In the judgment of Lord Wright delivered on behalf of the Judicial Committee it was stated:—"if, however, the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus" and in concluding he put it thus:—"No doubt the question of onus need not be considered, if at the end of the case the tribunal can come to a clear conclusion one way or the other, but it must remain to the end the determining factor unless the issue of negligence is cleared up beyond doubt to the satisfaction of the jury". The meaning of "doubt" in these two extracts is clear. Lord Wright was not dealing with doubt or reasonable doubt as used in criminal cases and I am quite sure that Mr. Justice Clinton J. Ford meant nothing more than Lord Wright although unfortunately in the former's reasons in this case the letter "a" was inserted between "beyond" and "doubt". The matter is mentioned merely because of the significance attached to it by counsel for the appellants.

(1) (1932) 3 W.W.R. 49.

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The trial judge directed that the respondent should have costs "on triple column 5" but the Court of Appeal could find no reason to increase the usual scale allowable under the rules. A litigant has no more right to cross-appeal than to enter a substantive appeal on a question of costs only and, in any event, I would not interfere with the order made by the Court of Appeal.

The appellants did not question the amount of the damages awarded and the appeal should, therefore, be dismissed with costs and the cross-appeal without costs.

The judgment of Estey and Fauteux, JJ. was delivered by:—

ESTEY J.:—At trial the respondent was awarded damages for injuries suffered when struck by appellant company's one-and-one-half ton truck driven by its employee, appellant Desharnais, at the intersection of Centre Street and 20th Avenue in the City of Calgary on Monday, October 25, 1948, at 7:30 a.m. The majority of the learned judges in the Appellate Division affirmed this judgment at trial. Mr. Justice Frank Ford, dissenting in part, would have held the negligence of both parties contributed, and apportioned the fault two-thirds against the appellant and one-third against the respondent.

It was a clear, cold, frosty morning. Appellant Desharnais had left the truck outdoors all night and the windshield was covered with frost. He removed some, but an examination of the windshield disclosed that sufficient had not been removed to make driving reasonably safe. Moreover, Desharnais deposed that as he approached the intersection the sun blinded him. Notwithstanding these two factors, he continued driving at his speed of fifteen to twenty miles per hour as he entered the intersection.

When about one-quarter of a block north from the intersection he deposed that he saw a young lady crossing the intersection at an angle toward the southwest corner. As he noticed her she was not quite half way across. He "kind of watched her" and "figured she was all of the way across the street." He then "lost vision of her." When he realized that his truck had struck a young lady, he thought it was the same one, who had turned around and was walking back toward the northeast corner. No

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evidence was adduced to support this surmise and, on the contrary, Miss Halpin, who worked for the same company as the respondent, had just crossed from the northeast corner and had reached Campbell's car at the southwest corner when she heard a noise and, turning, she saw the respondent under the truck. I am in agreement with the majority of the learned judges in the Appellate Court that Desharnais had seen Miss Halpin and, as he admits that he had seen no other young lady, he never did see the appellant. This conclusion is in accord with the remarks which he made immediately following the collision when he asked: "Where did she come from?"

The learned trial judge and all of the judges in the Appellate Division have, upon the evidence, held that the appellant Desharnais was negligent in a manner that contributed to the collision and the record amply supports that conclusion.

The appellants submit that the respondent, by her own negligence, contributed to her injury. The learned trial judge stated:

> On the evidence produced, I find that the plaintiff did angle very slightly from the pedestrian right-of-way between the northeast and northwest corners, but I cannot find that that was a contributing cause of the accident.

The Vehicles and Highway Traffic Act (R.S.A. 1942, c. 275) contains two relevant provisions, s. 59(2) and 59(4). These provide that at an intersection such as that here in question the operator of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway upon or within any crossing at an intersection, while a pedestrian crossing at any point other than within the marked or unmarked crossing shall yield the right-of-way to the operator of the vehicle. In neither case is the driver or the pedestrian excused from a duty to exercise due care. In view of these statutory provisions it is material to determine, if possible, where the respondent was at the moment of impact.

Craven, who was walking across 20th Avenue from the southwest toward the northwest corner, while he did not see the collision, did see the respondent who, as he deposed, was angling across the intersection toward a point that would be about one-quarter of the distance from the south-

west to the northwest corner on the west side of Centre Street. I am in agreement with the learned judges of the Appellate Division that the learned trial judge, in finding "the plaintiff (resp.) did angle very slightly," either discounted or disbelieved the evidence of Craven.

Campbell, who worked for the same company as respondent and Miss Halpin, conveyed them in his automobile, along with others, to their work each morning. Respondent and Miss Halpin met him at the southwest corner of this intersection. Miss Halpin, upon this occasion, when at the northeast corner saw respondent coming down Centre Street on the east side, but, observing that respondent was carrying some letters that presumably she would mail at the northwest corner, did not wait for her, but proceeded toward Campbell's car then approaching the southwest corner from the west on 20th Avenue.

The respondent deposed that she had come down Centre Street on the east side with letters she intended to mail at the northwest corner; that at the northeast corner she turned and started across to mail the letters at the northwest corner, looking to the south for oncoming traffic. She remembers nothing as to the events that followed, except "yelling, 'My arm hurts, take me home,' " but she cannot say where she was at that time. The next thing she remembers is waking up in the hospital some hours later. The doctor said "she was responding a little from 24 to 36 hours." If her evidence is accepted it is a fair conclusion that she was walking on the pedestrian lane on the north side of 20th Avenue crossing Centre Street.

The letters, respondent's purse and the contents thereof were found scattered in, or near, the southwest quarter of the intersection. No person states precisely where these were found, except Miss Halpin does say that the broken glasses were picked up "in the cross-walk from the north to the south side of 20th Avenue on the west side of Centre Street" about half way.

No person saw the collision, nor did anyone see the truck at any time touch her body. Four saw her upon the street immediately after the accident. One deposed she was rolling under the front part of the truck, another between the front and the back wheels, a third that she was lying between the wheels of the truck and the fourth that she

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was behind the truck, which was still proceeding, however, within the intersection. All agreed that the truck passed over her. It is important to observe that she suffered severe injury about her head, arms and legs, including a fractured skull and forearm. Her clothes were torn and sand and gravel impressed both in her lacerations and her clothes. These facts make it clear that those who saw the respondent under the truck did not see the manner in which she must have been thrown about, if, indeed, not dragged some distance, in order that such injuries might be inflicted.

The appellant Desharnais deposed as follows:

> I kind of shielded my eyes from the glare of the sun, and the next thing I knew there was a big thump like a bump and I looked back in the rear view window or mirror and I could not see anything, in the rear view window, and I went a few feet further and I looked again and I seen a young lady laying on the road. I immediately stopped and got out and went over to her.

Then he deposed:

> Q. The sun did not bother you at any other point along Centre Street except when you got to the intersection of 20th Avenue?
> A. That is right, sir.
> Q. That is the only place it bothered you?
> A. That is right, sir.

He was of the opinion that the respondent had somehow come in contact with the side of the truck and that the right rear dual wheel passed over her when he was about the middle of the intersection. Although no other witness saw the wheels pass over her, some such occurrence may well have happened. The front of the truck was carefully examined. There was no mark that would indicate a point of impact. This, of course, having regard to the manner in which the front of the truck was constructed, is not significant. The learned judges of the Appellate Division were of the opinion, with which I respectfully agree, that, having regard to all the circumstances, the probability is that she was struck by the front of the truck.

Centre Street and 20th Avenue are each 42 feet wide between the curb lines. The truck was being driven at from 15 to 20 miles per hour, or approximately $22\frac{1}{2}$ to 30 feet per second. Appellant Desharnais would, therefore, proceed straight through the intersection, as he said he did, in less than $1\frac{1}{2}$ to 2 seconds. There is no suggestion

that he applied his brakes until after he had passed over the respondent and stopped his truck about 40 to 50 feet south of the intersection.

It is often difficult to determine just how such collisions occur and in what manner the injuries are inflicted. This is no exception. Moreover, experience indicates that conclusions based upon the position of articles scattered about, that were in the possession of an injured party, are often unreliable. The significant factors are that no person saw the truck strike respondent, or, indeed, at any time touch her. Her injuries were extensive and the major portion must have been suffered before anyone saw her under the truck and, therefore, further north in the intersection than where the witnesses first saw her under the truck. Then, having regard to the width of the intersection (42 feet) and the speed of the truck, together with the fact that the appellant never saw the respondent until he had looked the second time, after realizing something had happened, supports a conclusion that this collision occurred at least well to the north of the intersection.

The learned trial judge stated:

> The plaintiff then attempted to cross Centre Street to reach Campbell's car and it was then she was struck by the defendant's car and injured. In attempting to reach Campbell's car, she probably did one of two things, either she went towards the northwest corner on the pedestrian right-of-way until she was struck or she angled off that right-of-way very slightly in a southwesterly direction and was there struck.

The learned judge would appear not to have given sufficient weight to the positive evidence of the respondent that she was then crossing Centre Street on her way to mail the letters and thereafter would proceed to Campbell's car.

When Craven's evidence is discounted or disbelieved, there is no direct evidence as to respondent's position, except her own, which would place her within the pedestrian lane. With great respect to those who have concluded otherwise, I am of the opinion that there is no evidence accepted by the learned trial judge that justifies a finding that the respondent was not upon the pedestrian lane when struck by the appellant's truck. Therefore, the case falls within s. 59(2), by virtue of which the operator of a vehicle shall yield the right-of-way to a pedestrian.

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Respondent was, quite apart from any statutory provision, required to exercise due care as she proceeded to cross the intersection. There is, however, no evidence as to the manner in which she conducted herself and, therefore, no evidence that she had failed to exercise due care.

The evidence here adduced supports the conclusion that it was the negligence of the appellant Desharnais driving the appellant company's truck that was the sole direct cause of the respondent's injuries.

I agree with the majority of the learned judges in the Appellate Division that no basis is disclosed which would support the exercise of a judicial discretion to increase the usual scale of costs and I, therefore, agree that the costs at trial should be taxed under Column 5 on the old scale in effect when the action was tried.

In my opinion the appeal should be dismissed with costs and the cross-appeal without costs.

LOCKE, J. (dissenting):—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta dismissing the appeal of the present appellants from a judgment for damages, for personal injuries awarded against them at the trial by the late Chief Justice Howson of the Supreme Court of Alberta. Frank Ford J.A. disagreed with the judgment of the majority of the Appellate Division and would have apportioned the damages between the parties under the provisions of *The Contributory Negligence Act* (R.S.A. 1942, c. 116).

The respondent is a stenographer in the employ of the Consolidated Mining and Smelting Company Limited at Calgary and was at about 7.30 o'clock on the morning of October 25, 1948, crossing the intersection of 20th Avenue and Centre Street in that city when she was knocked down and seriously injured by a truck, the property of the appellant company, and driven by the appellant Desharnais in the course of his employment. Miss Johnson who lived not far distant left her home on the morning in question to proceed to work, walking south along the east side of Centre Street. Centre Street runs north and south and is intersected at right angles by 20th Avenue and it was her intention to proceed to the southwest corner of this intersection to meet Mr. J. M. Campbell, a fellow employee,

who was in the custom of driving Miss Johnson and other employees to their work at the plant some ten miles distant. There was at the time a letter box on the north-west corner of the intersection and, according to Miss Johnson, she intended to mail some letters which she was carrying in her hand in this box. A Miss Halpin, a friend employed by the same employer, had preceded her along Centre Street and crossed the intersection ahead of her. Owing to the severity of the injuries sustained in the accident, the respondent unfortunately did not remember anything that occurred after she commenced to cross. However, she recollected what she had done up to that moment and gave the following answers to questions directed to her on her direct examination at the trial:—

Q. Now, we would like to know what you remember of that accident, what happened that day, what you remember happened that day?

A. I remember starting to cross the street, to cross from the northeast corner of Centre Street and 20th Avenue, to go across to the west side.

Q. Why were you going over to the west side?

A. Because I was going to mail some letters, and then I had to go across 20th Avenue to get my ride to work.

* * *

Q. Where did you come from to get to the corner?

A. Straight up Centre Street from the north.

Q. You came from the north along Centre Street?

A. From 27th Avenue south to 20th Avenue.

Q. You walked down from 27th Avenue to 20th Avenue?

A. Yes.

* * *

Q. And did you see Miss Halpin that morning?

A. I remember seeing Viola before I got to the corner, but she did not wait for me.

Q. Viola Halpin?

A. Viola Halpin, yes.

Q. And you remember seeing her ahead of you at the corner?

A. She came to the corner before I did, but she did not stop and wait for me to cross over.

* * *

Q. Do you remember seeing her on that corner?

A. Yes, I remember seeing her there.

* * *

Q. What did she do?

A. She went on across the street.

Q. What did you do?

A. I came on up to the corner and then I crossed, started to cross.

Q. You started to cross?

A. Yes.

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Q. Do you know whether you looked for traffic before you started to cross?

A. I would say I did.

Q. Well, what did you do before you started to cross?

A. Before I started to cross the corner, I looked towards 16th Avenue, which is south.

Q. Yes? Because traffic would be going north on the side of the street?

A. That is right.

Q. You remember doing that?

A. Yes, sir, I remember that.

Q. And how far did you proceed, as far as your memory carries you?

A. I don't know, sir.

Q. You don't know?

A. No. I remember starting across Centre Street but I don't know how far I ever got.

Campbell's car was approaching the intersection from the west on 20th Avenue as Miss Johnson reached or was about to reach the northeast corner of the intersection, he intending to stop to pick up his passengers. In cross-examination, further answers were made by the respondent relating to this:—

Q. Now, as to the accident itself. I think you have told us here today that you recall stepping off the northeast corner with the intention of going directly across to the northwest corner?

A. Yes, sir.

Q. You have told us, I believe, that you have no recollection of what you actually did after stepping off, is that right?

A. No, I haven't.

Q. And you have told us that you have actually no recollection as to whether you saw Mr. Campbell's car there or not, you don't know?

A. No, sir, I don't remember seeing it.

Q. And you don't know whether you carried out your intention of going straight across, or whether something happened to change your mind, or not, that is a blank, is that right?

A. Yes, sir.

Q. You have also told us that you were in the habit, when you did see Mr. Campbell waiting to hurry to his car, is that right?

A. Yes.

Q. You don't know whether you hurried on this occasion or not?

A. No, sir.

Q. You don't even know whether his car was there or not?

A. No, I don't.

Following these answers, the respondent was asked by the learned trial judge whether she remembered what she had done on other occasions prior to this accident at that corner and said that her practice was to go straight across

to the northwest corner and then from that corner to the southwest corner, and, in answer to the question:—

"You never cut through the middle of the street?"

said:—

No sir, I made a practice of crossing in my own pathway, always had.

With respect, I think this evidence was inadmissible. This was, however, followed by the admission that she did not remember what she had done on the morning in question.

Desharnais was driving south on Centre Street approaching the intersection. The weather was clear and bright but there had been a hoarfrost during the night and the windshield of the respondent company's truck, which had been standing out overnight, had become coated with frost. According to Desharnais, he had scraped the frost off the windshield on the driver's side and to some extent from the right side of the windshield and he was driving with the window on the left door of the truck lowered. Despite this, he did not see Miss Johnson though, according to him, he saw another young woman cross the intersection from the east side of Centre Street. The speed of the truck is not in dispute; it was proceeding at between 20 and 25 miles an hour when it entered the intersection and struck Miss Johnson.

In spite of the fact that Campbell, Miss Halpin and the witness Callbeck who was in Campbell's car at the time the accident took place were so close to the scene, none of them saw Miss Johnson as she proceeded across the intersection, the only witness who was able to give evidence as to this being George H. Craven, who lived nearby and who was proceeding from the southwest to the northwest corner of the intersection as the truck approached from the north and Miss Johnson was crossing the street. According to Craven, the respondent was not walking towards the northwest corner of the intersection but appeared to be heading towards the car which was parked on 20th Avenue close to the southwest corner. As Craven was about half way across 20th Avenue, he said that Miss Johnson was almost directly opposite him and the truck was then about to enter the intersection, so that it is apparent that he observed her immediately before the moment of impact. Upon a plan of the intersection this witness indicated the course followed by Miss Johnson as being on a line running slightly

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west of due southwest from the centre of the curve of the curb at the northeast corner. Craven had apparently not kept his eyes fixed upon the respondent and did not see the actual impact but placed her position as being slightly to the north of the centre line of 20th Avenue and in the traffic lane. In answer to a question directed to him by the learned trial judge, he described her course across the intersection as cutting the corner. The only other evidence as to the point of impact is that to be inferred from the place where her personal belongings were found on the pavement after she had been struck, and as to this I respectfully agree with Mr. Justice Frank Ford that it supports Craven's account as to Miss Johnson's position at the time of impact.

Desharnais' excuse for not having seen the respondent crossing in full view from his left is that he was dazzled by the rays of the sun. He contends that he had removed sufficient of the hoarfrost from the windshield to enable him to see clearly objects ahead and to his left. In addition, the open window on the left door of the truck gave him added vision to his left. However, it is clear that whether his failure to see Miss Johnson was due to the glare of the sun, or to his vision through the windshield being obscured, or to his failure to look to his left, he was guilty of negligence which contributed to the occurrence of the accident. If his vision was obscured for either of these reasons, it was a negligent act to have approached the crossing at a speed of from 20 to 25 miles an hour. The only question to be determined is whether upon this evidence the respondent should not have been found to have been guilty of negligence contributing to the accident and the damages accordingly apportioned.

In determining this question, certain statutory provisions must be considered. Ss. 2 of s. 59 of *The Vehicles and Highway Traffic Act* (c. 275, R.S.A. 1942), in so far as relevant, reads:—

> The operator of a vehicle . . . shall yield the right-of-way to a pedestrian crossing the roadway upon or within any crossing at an intersection except at intersections where the movement of traffic is regulated by a police officer or traffic control signal . . . This provision shall not relieve the pedestrian from the duty of exercising due care for his safety.

S-s. 4 of that section provides that:—

> Every pedestrian crossing a roadway at any point other than within a marked or unmarked crossing shall yield the right-of-way to vehicles and street railway cars upon the roadway, provided that this provision shall not relieve the driver of a vehicle or street railway car from the duty of exercising due care for the safety of pedestrians.

S-s. 1 of s. 94 of the same Act deals with the question of onus of proof in these terms:—

> When any loss or damage is sustained or incurred by any person by reason of a motor vehicle in motion, the onus of proof that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle.

There is a concrete sidewalk on either side of Centre Street and a boulevard between the roadway and the sidewalk enclosed by concrete curbing. On each of the four corners of the intersection there is a rounded curb which connects the curbing on Centre Street with that along both sides of 20th Avenue. At the northeast corner the sidewalk extends westerly to connect with the street curb at that point. The sidewalk on the east side of Centre Street appears from the photographs filed to be connected with the street curbing in the same manner as that at the northeast corner. Both avenue and street are forty-two feet in width from curb to curb. There is no marked crossing between the northeast and the northwest corners of the intersection and there was no traffic light.

In the reasons for judgment of the learned trial judge he said in part:—

> In attempting to reach Campbell's car she probably did one of two things, either she went toward the northwest corner on the pedestrian right-of-way until she was struck or she angled off that right-of-way very slightly in a southwesterly direction and was there struck. No witness produced can say, because no witness actually saw the collision . . . On the evidence produced, I find that the plaintiff did angle very slightly from the pedestrian right-of-way between the northeast and northwest corners, but I cannot find that that was a contributing cause of the accident.

While it is true that Craven did not see the actual impact, it was only an instant before it occurred that he had seen the respondent walking directly into the path of the oncoming truck. Howson C.J. does not mention the evidence of Craven. He was an independent witness who did not know any of the parties to this litigation. There is no reflection on his veracity and there is nothing to contradict

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his evidence as to the manner in which the respondent crossed the intersection and that the impact took place in the traffic lane of the westerly half of the intersection at or slightly to the north of the centre line of 20th Avenue. It is, I think, not without significance that while this action was tried at Calgary on September 6, 1950, judgment was not given until March 1, 1952 and, with great respect, I think what appears to me to be the failure of the learned trial judge to give effect to the evidence of Craven, supported as it was by the evidence as to the place on the pavement where the personal belongings of the respondent were picked up or if he disbelieved it to so state, may not be unconnected with the delay of nearly a year and a half in delivering his judgment. Unless the evidence of Craven and the other evidence is to be rejected, the respondent did not angle off the direct line from the northeast corner to the northwest corner "very slightly": rather did she walk almost directly in a south westerly direction from the northeast corner of the intersection where she was seen by both Callbeck and Craven in the direction of the car which was about to stop or had stopped close to the curb at the southwest corner.

The finding of the learned trial judge that the course followed by the respondent across the intersection was not a contributing cause of the accident must be weighed in the light of his conclusion that she deviated very slightly from the direct cross-walk from the northeast to the northwest corner of the intersection. Clinton J. Ford J.A. by whom the reasons for judgment of the majority of the Court were delivered considered that the evidence of Miss Halpin placed the point of impact at approximately the centre of the west lane of vehicular traffic on Centre Street and near the centre of 20th Avenue, which would agree with the evidence of Craven as to this. This conclusion cannot be reconciled with the opinion of the learned trial judge that she had deviated very slightly from the pedestrian right-of-way. However, after saying that if she was a few feet farther to the south than her position as estimated by the learned trial judge it could not:—

> be safely inferred or held that any different situation would be created from a practical point of view than that which the learned trial judge had in mind as the driver, not seeing her, principally because of the condition of his windshield, drove straight across the intersection without any lessening of speed.

the learned Justice of Appeal said:—

> But, weighing the evidence, including that of the plaintiff, who said that she distinctly remembered looking for north-bound traffic as she started to cross, but could not remember anything more, I cannot reach the conclusion with assurance that what she did amounted to negligence contributing to the accident.

These portions of the reasons for judgment of the majority of the Court followed a passage in which the following appears:—

> The evidence, including any fair inference therefrom must prove beyond a doubt to the satisfaction of the jury that the pedestrian did by negligence contribute to the accident, and until this has been done the onus still remains on the driver. (*Geel* v. *Winnipeg Electric Company* (1)).

In *Geel's* case the Judicial Committee on an appeal from this Court (2) considered the effect of s. 62 of the *Motor Vehicle Act* of Manitoba, which dealt with the onus of proof in an action for damages for personal injury caused by the operation of a motor vehicle and provided that the onus of proving that the damage did not arise through the negligence of the owner or driver of the motor vehicle lay upon them. The Manitoba section, as it then read, being passed before the enactment of *The Tortfeasors and Contributory Negligence Act* of that province in 1939, differed from s. 94(1) of the Alberta statute, in that the words "entirely or solely" did not appear. These words, it may be noted, now form part of s. 81(1) of *The Highway Traffic Act* of Manitoba (c. 93, R.S.M. 1940). Dealing with the effect of this section the Judicial Committee, after saying that the burden remained on the defendant until the very end of the case, expressly approved the following statement of the effect of a like section in the Saskatchewan Act made by Turgeon, J.A. in *Stanley* v. *National Fruit Company* (3):—

> Section 43 of the Act places the onus of proof upon the defendants. This means that the defendants must lose if no evidence of the circumstances of the accident is given at all, or if the evidence leaves the Court in a state of real doubt as to negligence or no negligence, or is so evenly balanced that the Court can come to no sure conclusion as to which of the parties to the accident is to blame. But if evidence for and against is given upon the points in question, the rule in favour of the preponderance of evidence should be applied as in ordinary civil cases, and the statutory onus will cease to be a factor in the case if the Court

(1) [1932] 3 W.W.R. 49. (2) [1931] S.C.R. 443.
(3) (1929) 24 S.L.R. 137 at 141.

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can come to a definite conclusion one way or the other, after hearing and weighing the whole of the testimony. Nor does this statutory onus increase the degree of diligence required in the owner or driver of a motor vehicle. His duty to others remains the same, notwithstanding the shifting of the burden of proof. He must exercise at all times the same measure of caution as might be expected, in like circumstances, of a reasonably prudent man. He must take proper precautions to guard against risks that might reasonably be anticipated to arise from time to time as he proceeds on his way. This degree of care, and nothing more, is required of him except in cases specially provided for, with which we are not concerned here.

With respect, I am unable to find anything in this decision to support the view that the onus is upon the defendant in the present case to prove beyond a doubt that the negligence of the respondent contributed to the accident.

I am of the opinion that the onus placed upon the appellants by s. 94(1) has been discharged. Frank Ford J.A. concluded from the evidence that the respondent at the time of the accident had proceeded from the northeast corner of the intersection to a point approximately in the middle of 20th Avenue and approximately in the middle of the westerly half of Centre Street. I do not take it from the reasons for judgment of the majority that they disagreed with this view and, indeed, it seems to me the only conclusion consistent with the evidence. It cannot be seriously contended that she looked to her right for oncoming traffic as she walked in a southwesterly direction across the intersection. If I correctly understand that portion of the reasons for judgment delivered by Clinton J. Ford J.A., he was of the opinion that the fact that she failed to do so and failed to concede the right-of-way to the approaching truck, as required by s-s. 4 of s. 59 of *The Vehicles and Highway Traffic Act,* was not negligence contributing to the accident. While not so stated, I must assume that by this it is meant that the accident would have happened in any event, even had the respondent crossed the intersection upon the cross-walk. This may or may not be so but that is not the point. This conclusion overlooks the fact that in deciding where the fault lay, not only are the actions of the driver of the truck to be considered but also those of the respondent. To say that the accident would have happened any way and to treat this as decisive is merely to consider the question of the liability of the truck driver. He was undoubtedly guilty of negligence contributing to

the accident. But the respondent's actions must also be considered. The statement of the law contained in the judgment of Sir Lyman Duff C.J. in *Swartz* v. *Wills* (1), is constantly quoted in street crossing accidents of this kind but, unfortunately, not consistently followed. Dealing there with s. 21 of *The Highway Act* of British Columbia which in its effect is indistinguishable from s-s. 4 of s. 59 of the Alberta Statute, he said (p. 629):—

> I can perceive no ambiguity or obscurity in this language. The driver approaching an intercommunicating highway is to keep a lookout for drivers approaching upon the right upon that highway and to make way for them. If everybody does this a collision is not only improbable, it is hardly possible. The respondent failed in this plain duty. This neglect of duty was the direct cause of the collision.

This was the duty of the respondent in the present matter as she walked diagonally across the intersection in question. The morning was clear and bright and the approaching truck was plainly visible and, failing in that duty, she walked without looking directly in the path of the truck. To say that such conduct was not a contributing cause of this accident is, in my opinion, to say that the right-of-way provisions of the statute may be ignored with impunity.

Whether she would have been struck had she proceeded across the cross-walk, in which situation she would have had the benefit of s-s. 2 of s. 59 of the statute, is a debatable matter but, in my opinion, it is aside from the point. In *Toronto Railway* v. *King* (2), Lord Atkinson, delivering the judgment of the Judicial Committee, said:—

> 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.

Had the respondent been crossing on the cross-walk and had she seen the truck approaching as it was at a moderate rate from her right, she might assume that it would slow down and permit her to cross and might not realize until too late that the driver had not seen her. Had that been the situation, the fault might well have been found to be entirely that of the truck driver, but that is not this case.

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

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Mr. Justice Frank Ford in his reasons for judgment has said that the conclusion is inescapable that the plaintiff was guilty of contributory negligence and with this I am in complete agreement. He was of the opinion that the damages should be apportioned two-thirds as against the present appellants and one-third as against the respondent. The respondent was at the time she was struck some twenty feet to the south of the cross-walk and I am unable to find any more excuse for her conduct than I am for that of the driver Desharnais. The negligence of each of them, in my opinion, continued up to the moment of the collision and the rule stated by Viscount Birkenhead in *The Volute* (1), applies. S. 2 of *The Contributory Negligence Act* (c. 116 R.S.A. 1942) provides that, where by the fault of two or more persons, damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault. S. 2(*a*) provides that if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally. In this matter I find myself quite unable to distinguish any difference in the degree of fault of the driver Desharnais and that of the unfortunate respondent and I would accordingly apportion the blame equally between them and find the appellant liable for fifty per cent of the damages awarded by the learned trial judge.

While the damages awarded appear to me to be very high, I do not think a case has been made out to warrant any reduction in the amount.

The appeal should be allowed with costs here and in the Court of Appeal. The respondent should recover her costs of the action up to the conclusion of the trial under Column 5 on the old scale in effect when the action was tried.

I would dismiss the cross-appeal without costs.

Appeal dismissed with costs and cross-appeal without costs.

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

Solicitors for the respondent: *Millard & Woolliams.*

(1) [1922] 1 A.C. 129 at 144.