OREST SWYRD (*Plaintiff*) .....APPELLANT;

AND

JOSEPH TULLOCH (*Defendant*) .....RESPONDENT.

AND

OREST SWYRD (*Defendant*) .....APPELLANT;

AND

ALVIN TULLOCH AND FLORENCE THOEN (*Plaintiffs*) .....} RESPONDENTS.

1953
*Nov. 23
1954
*Apr. 12

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Automobile—Collision at intersection—Through street—Right of way—Excessive speed—Lookout—The Vehicle and Highway Traffic Act, R.S.A. 1942, c. 275, s. 53(1).

These are consolidated actions taken by both drivers and the passengers of one of the cars following a collision between two automobiles at an intersection in the City of Edmonton where the streets were icy and slippery. The appellant was on a through street. The trial judge found that both drivers had been equally negligent; that the respondent had stopped before entering the intersection but had not kept an adequate lookout after starting up again; that the respondent had entered the intersection first; that the appellant had been driving at an excessive speed; that neither driver had been as alert as he should have been. The Court of Appeal affirmed the trial judgment.

Held: (Rand and Kellock JJ. dissenting), that the appeals should be dismissed.

Per Rinfret C.J. and Taschereau J.: There were concurrent findings of fact and the invariable rule, always followed by this Court, applies.

Per Estey J.: There were concurrent findings of fact. Neither driver, for the purpose of avoiding the collision, changed his speed or direction, sounded his horn or applied his brakes. The respondent did not see the appellant until almost the moment of impact. The appellant did not see the respondent enter the intersection or failed to exercise reasonable care to avoid an apparent danger. That the appellant was driving too fast considering the condition of the street, is fully supported by the evidence. Section 53(1) of *The Vehicle and Highway Traffic Act* (R.S.A. 1942, c. 275) placed a duty upon the respondent to stop and not enter the intersection until he could do so with safety. Statutory provisions directed to the regulation of traffic on highways and public streets, as ordinarily enacted, are in adidtion to but not in lieu of the common law obligation to exercise due care. S. 53(1) contemplates that one in the position of the respondent would exercise due care in ascertaining the condition of the traffic on the highway and also as he proceeded to enter into and continued through the same. It follows that the mere fact that the respondent entered the

*PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ.

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intersection first did not necessarily mean that he had the right-of-way. That the trial judge had this in mind is evident when regard is had to his reasons as a whole and to his finding that the respondent did not keep an adequate lookout after he had started up again.

Per Rand and Kellock JJ. (dissenting): The trial judgment is vitiated by an initial misconception of s. 53(1) which governed these two automobiles as they approached the intersection. It found that the respondent actually entered the intersection first and that he, therefore, had the right-of-way even though the appellant was travelling on a through street. S. 53(1) imposes a clear duty upon the person who is proposing to enter upon a through street to see to it that he can do so with safety. As there is conflicting evidence as to the speed in the light of the statutory right-of-way, a new trial should be had.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, affirming the trial judgment in an action following a collision between two automobiles.

W. J. Shortreed Q.C. for the appellant.

C. W. Clement Q.C. for the respondents.

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

The CHIEF JUSTICE:—I would dismiss these appeals with costs.

The Appellate Division confirmed the judgment of the trial judge. There are therefore concurrent findings of facts and the invariable rule, always followed by our Court, applies.

The result is that Tulloch was found at fault because he "did not keep an adequate lookout . . . before he actually entered the intersection" and that "Swyrd was driving too fast considering the state of that particular through street and of that intersection".

The finding of the trial judge, concurred in by the Appellate Division, was also that Tulloch "entered the intersection first. He, therefore, had the right of way . . . etc."

Upon these findings it was held "that the driver of each car was negligent and the proportion of negligence was equal".

I can find no reason to modify these judgments. I have in mind our decision in *Thériault* v. *Huctwith et al* (1) and also the language of Lord Wright as quoted by Viscount Simon in *S.S. British Fame* v. *S.S. McGregor* (2): "It would require a very strong and exceptional case to induce

(1) [1948] S.C.R. 86. (2) (1943) 112 L.J.P. 6 at 7.

an Appellate Court to vary the apportionment of the different degrees of blame which the judge has made when the Appellate Court accepts the findings of the Judge".

The dissenting judgment of Rand and Kellock JJ. was delivered by:—

RAND J.:—The judgment of Wilson J. at trial, affirmed without reasons, by the Appellate Division, is, in my opinion, vitiated by an initial misconception of the statutory provision which governed these two automobiles as they approached the intersection. He says:—

> I find that the DeSoto actually entered the intersection first. It therefore had the right-of-way even though the Buick was travelling on a through street.

Sec. 53 of *The Vehicle and Highway Traffic Act* reads:—

> Every vehicle being about to enter upon any main or secondary Provincial Highway as defined in The Public Highways Act, or upon any other highway, which at the request of the local governing body has been designated and marked as a highway at which vehicles are required to stop, or upon any intersection at which it is required to stop by any by-law of any city, town or village, shall be brought to a stop at a point not less than ten feet nor more than fifty feet from such highway, *and shall not enter upon the highway either for the purpose of crossing it or for proceeding along it until the conditions of traffic on the highway are such that the vehicle can enter upon the highway with safety.*

I see nothing obscure in the meaning of the last clause of this section, and it imposes a clear duty upon the person who is proposing to enter upon what is known as a through street to see to it that he can do so with safety.

By-law No. 128 of Edmonton, after enacting the substance of sec. 53, adds a proviso:—

> Provided that the driver or operator of any such vehicle *who has come to a full stop* as required by the provisions of this bylaw upon entering the through traffic street as well as drivers or operators of vehicles on such through traffic streets *shall be subject to the usual right of way rule prescribed by law and applicable to vehicles at intersections.*

Whatever the scope or meaning of this proviso, it is ultra vires so far as it may affect the concluding language of the section. Admittedly Avenue No. 97 is a street to which the section applies; if this is a result of the by-law, the proviso is severable: if it is effected under the statute, the by-law is superfluous.

The finding that

> the driver of the Buick car, Swyrd, was driving too fast considering the state of that particular through street and of that intersection.

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evidences the influence of the misconception: there is no reference to any particular rate of speed, it is a speed too great in the circumstances; and he found that the two drivers were equally negligent. What is indicated is that the trial judge had in mind sec. 42 of the *Traffic Act* which deals with speed.

These findings and his expressed understanding of the statute make clear his view of the situation to have been that the Buick car, having regard to the iciness of the street and to the fact that any car coming from a side street which entered the intersection first had the right-of-way, was proceeding at too great a speed to be stopped when it should have been stopped, a view that was basically erroneous.

We must then either draw our own conclusions from the evidence as to the speed in the light of the statutory right-of-way or return the case for a new trial. As there is conflict in the testimony upon that fact and however undesirable it may be, I see no other course than to submit the issues again for determination.

I would, therefore, allow the appeals with costs as of one appeal in this Court and in the Court of Appeal, and direct a new trial. The costs of the first trial will be disposed of by the judge at the new trial.

ESTEY J.:—This appeal arises out of actions taken to recover damages suffered in a collision between two automobiles at the intersection of 101st Street and 97th Avenue in the City of Edmonton on January 1, 1952, between 4:30 and 5:00 o'clock in the afternoon. The appellant was driving his Buick westward on 97th Avenue and respondent Joseph Tulloch his DeSoto southward on 101st Street. The streets were covered with snow or ice and were slippery. No other traffic was present in any relevant distance.

The appellant Swyrd brought an action against respondent Joseph Tulloch for damages and Tulloch counterclaimed, asking damages against Swyrd. A second action was started, in which the passengers in the Tulloch automobile, namely, Alvin Tulloch and Florence Thoen, asked damages against appellant Swyrd. These actions were consolidated prior to trial.

The learned trial judge found both drivers negligent, equal in fault and gave judgment accordingly. He also gave judgment against appellant Swyrd in favour both of

Alvin Tulloch and Florence Thoen, giving them damages respectively of $100 and $25 and costs. Swyrd's appeal to the Appellate Division was dismissed, but the judgment as between him and respondent Joseph Tulloch was varied by apportioning the fault one-third to appellant Swyrd and two-thirds to respondent Joseph Tulloch.

Upon all material points the evidence is contradictory. That of the appellant and his passenger, apart from the fact of and the approximate place of the collison, is in complete contradiction to that of the respondent Joseph Tulloch and his passengers. The learned trial judge, who observed the witnesses as they gave their evidence, did not make an express finding as to credibility. It is, however, obvious that he did not accept the evidence of the appellant Swyrd nor that of his passenger, but did accept that of the respondent Joseph Tulloch and his passengers.

The learned judges in the Appellate Division affirmed the findings of the learned trial judge and we have, therefore, concurrent findings of fact.

The material findings of the learned trial judge may be summarized:

(*a*) that Tulloch stopped his DeSoto momentarily at the stop sign, but did not keep an adequate lookout after he started up again;
(*b*) that Tulloch entered the intersection first;
(*c*) that Swyrd was proceeding at all relevant times at an excessive rate of speed;
(*d*) that neither driver was as alert as he should have been.

Visibility was good and there was no other traffic within any relevant distance and no reason suggested why either driver's attention should be attracted away from the driving of his automobile. The collision occurred in the northwest quarter of the intersection. Neither driver, for the purpose of avoiding a collision, changed his speed or direction, sounded his horn or applied his brakes. There can be no doubt upon this record but that respondent Joseph Tulloch did not see appellant's automobile until almost the moment of impact. Appellant's evidence that he saw Tulloch's automobile north of the stop sign, proceeding at an excessive speed which was maintained in disregard of the stop sign to the point of collision, when he himself was at the western edge of the east curb of 101st Street, proceeding at fifteen to twenty miles per hour, was disbelieved by the trial

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judge. The learned judge found as a fact that he was proceeding at "an excessive rate of speed" and was not "as alert as he should have been." In these circumstances appellant Swyrd either did not see respondent Joseph Tulloch enter the intersection or, if he did see him, he failed to exercise reasonable care to avoid an apparent danger.

That Swyrd "was driving too fast considering the state of that particular through street and of that intersection," as found by the learned trial judge, is fully supported by the evidence. Swyrd himself deposes that he was driving at a speed of fifteen to twenty miles per hour when he saw Tulloch proceeding south "at such a speed it more or less froze me at the wheel and all I could do was carry on through." Moreover, notwithstanding the absence of any other traffic and the size of the intersection, he deposes that he could not have avoided the collision. If he had been proceeding at the speed of fifteen to twenty miles per hour two alternatives would probably have happened, either one of which would have avoided the collision—Tulloch would have seen him and not entered the intersection, or, if in error he concluded that he might do so with safety and did enter the intersection, Swyrd, by using due care, could have avoided the collision. However that may be, Swyrd's speed was in excess of fifteen to twenty miles per hour. His own passenger placed his speed at from thirty to forty miles per hour. One of Tulloch's passengers states that he did not see the Swyrd automobile until it appeared in front of him and, as he stated, "I didn't know it was a car, there was just a flash in front of me." Another passenger in Tulloch's automobile stated: "I couldn't estimate the speed of the car shearing across but it was a very high rate of speed as I just saw, just a blur, more or less, a streak, go right in front."

Because of what may occur in a collision, it is often unsafe to place too much reliance upon conclusions drawn from the movements of colliding automobiles immediately following the impact. It is, however, of some significance to observe that Tulloch's automobile proceeded only a few paces toward the southwest, while Swyrd's automobile proceeded a distance of seventy-five feet and came to rest, facing eastward, against a heavy Paige wire fence, which it damaged.

Moreover, the learned trial judge having refused to accept Swyrd's evidence that he was proceeding at fifteen to twenty miles per hour and having found, as a fact, that he was proceeding at an excessive rate of speed upon a public street within the City of Edmonton means, when read in relation to the other evidence with respect to his speed, that he was proceeding at a rate in excess of twenty-five miles per hour and, therefore, "shall prima facie be deemed to be driving at an unreasonable rate of speed" within the meaning of s. 42(2) of *The Vehicles and Highway Traffic Act* (R.S.A. 1948, ch. 275).

The important section, so far as respondent Joseph Tulloch is concerned, is s. 53(1) of the said statute, which reads as follows:

> 53. (1) Every vehicle being about to enter upon any main or secondary Provincial highway as defined in The Public Highways Act, or upon any other highway, which, at the request of the local governing body has been designated and marked as a highway at which vehicles are required to stop, or upon any intersection at which it is required to stop by any by-law of any city, town or village, shall be brought to a stop at a point not less than ten feet nor more than fifty feet from such highway, and shall not enter upon the highway either for the purpose of crossing it or of proceeding along it until the conditions of traffic on the highway are such that the vehicle can enter upon the highway with safety.

This section 53(1) placed a duty upon Tulloch to stop and not to enter the intersection until the conditions of traffic on the street were such that his automobile might enter with safety.

The learned trial judge, in the course of his judgment, stated:

> I find that the DeSoto actually entered the intersection first. It therefore had the right of way even though the Buick was travelling on a through street.

Statutory provisions directed to the regulation of traffic on highways and public streets, as ordinarily enacted, are in addition to but not in lieu of the common law obligation to exercise due care. Section 53(1) contemplates that one in the position of the respondent Joseph Tulloch would exercise due care in ascertaining the condition of the traffic on the highway and also as he proceeded to enter into and continued through the same. *Royal Trust Co.* v. *Toronto Transportation Commission* (1); *Theriault v. Huctwith* (2). It follows that the mere fact that Tulloch entered the

(1) [1935] S.C.R. 671. (2) [1948] S.C.R. 86.

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intersection first did not necessarily mean that he had the right-of-way. That the learned judge had this in mind and did not regard the foregoing statement as complete is evident when regard is had to his reasons when read as a whole and to his findings of fact; in particular, that Tulloch "did not keep an adequate lookout after he had started up again" and that he was not "as alert as he should have been." As a consequence, the learned judge assessed Tulloch with an equal share of the fault. The learned judge found, and the evidence supports his finding, that Tulloch stopped and, exercising due care, continued into the intersection but, as he proceeded therein, he failed to use that care which a reasonable man in the same circumstances would have used. The evidence equally supports his finding that Swyrd was proceeding at an excessive rate of speed and he also was not "as alert as he should have been." The learned judge, therefore, found both parties negligent. The learned judges in the Appellate Division accepted his conclusions of fact and affirmed his judgment.

The appeal against the judgment in favour of Alvin Tulloch and Florence Thoen should also be dismissed.

I am, therefore, of the opinion that both of the appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellant: *Shortreed & Shortreed.*

Solicitors for the respondents: *Smith, Clement, Parlee & Whittaker.*