1935

*Oct. 28.
*Nov. 22.

GEORGE D. McMILLAN (DEFENDANT)...APPELLANT;

AND

ANNIE MURRAY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Motor vehicles—Negligence—Pedestrian struck by motor car—Statutory onus of proof that damage did not arise through driver's negligence (Vehicles and Highway Traffic Act, Alta., 1924, c. 31, s. 66)—Meeting the onus—Effect of establishing contributory negligence.

Plaintiff, while walking easterly along the roadway (the sidewalks being in bad condition) of a street in Edmonton, Alberta, at 7.25 p.m. on March 11, 1934, was struck, four or five feet from the south (right hand) curb, by a motor car driven easterly by defendant. The evening was dark and the pavement wet. Defendant had been driving cautiously and watching for pedestrians. To avoid a motor which was meeting him, he turned towards the south curb. The glare of the other car's lights prevented him, for a moment or so, from seeing what was ahead of him. As soon as he was out of the glare he saw plaintiff about eight feet ahead of him. He immediately turned his car to the left, shut off the motor and applied his brakes, but struck her. Plaintiff's action for damages was dismissed by Ford J. ([1935] 2 W.W.R. 47), who found that defendant had satisfied the onus placed upon him by s. 66 of the *Vehicles and Highway Traffic Act* (1924, Alta., c. 31) and, on the evidence, did not in fact cause the accident by his negligence. This judgment was reversed by the Appellate Division, Alta. Defendant appealed.

Held: There was ample evidence to support the trial judge's finding; there was no ground upon which his judgment should be set aside; and it should be restored. (*Per* Duff C.J.: There was no ground in the circumstances for attributing negligence to plaintiff. The real question for the trial judge was whether or not defendant had acquitted himself of the statutory onus. On the record it would seem that defendant had shown that, in the situation which confronted him, he had not failed in that standard of care, skill and judgment which can fairly and properly be required of the driver of a motor vehicle; if there was a mistake of judgment on his part, it was an

*PRESENT:—Duff C.J. and Rinfret, Lamont, Davis and Kerwin JJ.

excusable mistake, and the most unfortunate misadventure was an accident; the standards to be applied are not standards of perfection. In this view, the finding of the trial judge, who had the opportunity of observing defendant under cross-examination, ought not to be disturbed).

Poole & Thompson Ltd. v. *McNally*, [1934] Can. S.C.R. 717 (referred to in argument and in the judgments below) discussed and explained. Under the enactment as to onus there dealt with (s. 65 (1) of the Prince Edward Island *Highway Traffic Act*, in substance the same, in the pertinent respects, as that now in question), standing by itself, the defendant may acquit himself of the onus cast upon him, by establishing that the plaintiff's negligence materially contributed to the mishap, and that he could not, in the result, by the exercise of reasonable care, have avoided the consequences of that negligence; or that the mischief was directly caused by the negligence of the plaintiff as well as that of himself co-operating together. The enactment does not itself appear to aim at altering the substantive rules of common law touching the effect of contributory negligence; its purpose seems to be to change the law as to the burden of proof, as explained in *Winnipeg Electric Co.* v. *Geel*, [1931] Can. S.C.R. 443; [1932] A.C. 690.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which gave judgment for the plaintiff for damages, reversing the judgment of Ford J. (2) who dismissed the plaintiff's action, which was brought to recover damages for injuries received when plaintiff was struck by defendant's motor car. The material facts and circumstances of the case are sufficiently stated in the judgment of Davis J. now reported. The appeal to this Court was allowed and the judgment of the trial judge restored with costs throughout.

G. B. O'Connor, K.C., for the appellant.

R. D. Tighe, K.C., for the respondent.

DUFF C.J.—I concur entirely with the conclusion as well as with the reasoning of the judgment of the Court delivered by Mr. Justice Davis.

I should not have thought it necessary to supplement those reasons had it not been for the reference to the judgment of this Court in the case of *Poole & Thompson Ltd.* v. *McNally* (3) in the judgments below and on the argument before us.

A word, first of all, as to the present case. I see no ground in the circumstances for attributing negligence to

(1) Noted in [1935] 3 W.W.R. 117 (no written reasons).
(2) [1935] 2 W.W.R. 47.
(3) [1934] Can. S.C.R. 717.

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the respondent. The real question for the trial judge was whether or not the appellant had acquitted himself of the statutable onus. On the record alone, as we have it before us, I should have thought the appellant had shown that, in the situation which confronted him, he had not failed in that standard of care, skill and judgment which can fairly and properly be required of the driver of a motor vehicle. In other words, I should have thought that if there was a mistake of judgment on his part, it was an excusable mistake and that the most unfortunate misadventure was an accident. The standards to be applied are not standards of perfection.

In this view, the finding of the trial judge, who had the opportunity of observing the appellant under cross-examination, ought not, I think, to be disturbed.

As to *Poole & Thompson Ltd.* v. *McNally* (1), the sole question left to the jury in that case by the judge at the trial was the question of the identity of the motor vehicle which had caused the injury of which the plaintiff complained. Admittedly, this vehicle was not brought to a stop after running into the plaintiff, and a debatable question, no doubt, arose upon the evidence whether the plaintiff had discharged the onus resting upon him to establish that the vehicle was the defendants'. The learned trial judge said to the jury:

> I am requested by counsel for Poole & Thompson Limited to direct "that the onus is on the plaintiff of establishing that the defendants' car caused the accident." The plaintiff must establish that the defendants' car caused the accident. I think I made that clear to you. If you come to the conclusion that the defendants' car caused the accident, you will bring in a verdict for the plaintiff; otherwise your verdict will be for the defendants.

No question was raised at the trial as to the construction of the statute (section 65 (1) of the Prince Edward Island *Highway Traffic Act* of 1930) which, in the pertinent respects, is in substance in the same terms as those of the Alberta statute; nor was any question of contributory negligence raised or submitted to the jury; although a plea of contributory negligence was put in the statement of defence. Counsel for the defendants had, indeed, very good reasons for not asking to have any such issue submitted to the jury. The person who was driving the defendants' vehicle denied that he had come into collision with anybody. It was plainly one of those cases in which

(1) [1934] S.C.R. 717.

the party appealing had elected to rest upon a particular issue and take his chances of success with the jury on that issue. In the judgment of this Court, at p. 724, this is pointed out; and it is also laid down that a finding of contributary negligence against the plaintiff would not have been a reasonable finding. There was not, at the pertinent time, in force in Prince Edward Island any contributory negligence statute of the type which prevails in several provinces providing for apportionment of loss according to the comparative degree of fault.

We do not think that the passage in the judgment of the Court at pp. 722-3, dealing with the construction and effect of the *Highway Traffic Act* (for which, I need, perhaps, hardly say, both in its form and substance, I accept the fullest responsibility), should be regarded as constituting part of the *ratio decidendi.*

We think that, under the statute, standing by itself, the defendant may acquit himself of the onus cast upon him by establishing that the plaintiff's negligence materially contributed to the mishap, and that he could not, in the result, by the exercise of reasonable care, have avoided the consequences of that negligence; or that the mischief was directly caused by the negligence of the plaintiff as well as that of himself co-operating together.

I prefer the use of the phrase "directly caused" in preference to such phrases as "proximate cause," "causa causans," "effective cause," for the reasons given by Lord Sumner in *Weld-Blundell* v. *Stephens* (1).

Subsection one of section 65 of the *Highway Traffic Act* does not itself appear to aim at altering the substantive rules of common law touching the effect of contributory negligence. The purpose of the statute seems to be to change the law as to the burden of proof, as explained in *Winnipeg Electric Co.* v. *Geel* (2).

DAVIS J. (all the other members of the Court concurring).—The respondent brought an action against the appellant in the Supreme Court of Alberta for damages which she claimed to have suffered by reason of being struck by the appellant's automobile on the south side of 84th Avenue in the City of Edmonton on Sunday, March

(1) [1920] A.C. 956, at 983-4.

(2) [1931] Can. S.C.R. 443; [1932] A.C. 690.

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11, 1934, at about 7.25 p.m. On the evening in question the respondent, a married woman slightly over 60 years of age, was walking from her home, about a block west of the scene of the accident, along 84th Avenue in an easterly direction towards St. Anthony's Church, which is about a block east of the scene of the accident. It was a dark night and the pavement was wet. When the respondent left her house on the south side of the avenue she crossed to the north side, but, finding the sidewalk on that side too slippery, returned to the south side. But she could not walk on the sidewalk on the south side because it was just a sheet of ice; she could not see the sidewalk at all, to quote her own words, and consequently she walked down the paved street, walking on the south side with, not against, the eastbound traffic. She says she kept as close to the south curb as she could but when she was struck she was four or five feet out from the curb. She says she did not walk on the north side of the paved street because mud from an excavation had covered part of the boulevard and had come down on to the street. The respondent says she cannot recall anything about the accident, but remembers seeing other people walking on the paved street.

The appellant was driving his car easterly along 84th Avenue to the Metropolitan Church, which is about three blocks further east from the place of the accident, driving in the same direction as the respondent was walking. He appears to have been driving cautiously about fifteen or twenty miles an hour and, as he had been driving down the same avenue to church on Sunday evenings for about eight years and had seen people walking on the street at that place and time, he was watching for pedestrians who might be on the street. Another motor vehicle, travelling in the opposite direction, approached him, and, to avoid the oncoming car, he turned towards the south curb. The glare of the lights of the approaching car prevented him, for a moment or so, from seeing what was ahead of him. As soon as he was out of the glare of the lights of the other car he saw the respondent on the roadway about eight feet ahead of him. He immediately turned his car to the left, shut off the motor and applied his brakes. He felt sure he had cleared her but he heard a thud and pulled into the curb. The respondent was lying on the road

about twelve feet behind the car. Her body was at a right angle to the curb, with her head towards the centre of the road.

The case came on for trial before Mr. Justice Ford, who delivered judgment in favour of the appellant, dismissing the respondent's action. The respondent appealed to the Court of Appeal of Alberta, who unanimously allowed the appeal and awarded the respondent $2,000 general damages and $552.22 special damages, making a total of $2,552.22. No written reasons for the judgment of the Court of Appeal were delivered and we are therefore without the benefit of the reasons stated by the learned Chief Justice at the conclusion of the argument.

The learned trial judge in a reserved judgment said that his further consideration of the evidence confirmed the view he formed at the hearing, that the appellant had satisfied the onus placed upon him by sec. 66 of *The Vehicles and Highway Traffic Act, 1924,* of Alberta (1), which reads as follows:

> 66. 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 such loss or damage did not 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.

The evidence satisfied the learned trial judge that the appellant did not in fact cause the accident by his negligence. There was ample evidence to support this finding and there is no ground upon which the judgment at the trial should be set aside. We concur in the views expressed by the Chief Justice as to the case of *Poole & Thompson Ltd.* v. *McNally* (2).

The appeal is therefore allowed and the trial judgment restored with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Young & Bisset.*

Solicitors for the respondent: *Tighe & Wilson.*

(1) *Reporter's note:* Section 66 (1) here quoted was amended by c. 82 of the Statutes of Alberta of 1935, which came into force on May 1, 1935. In the present case, the judgment of the trial judge was given on April 5, 1935, and the judgment of the Appellate Division on June 6, 1935.

(2) [1934] Can. S.C.R. 717.