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*April 25, 26
*June 27.

ROBERT MAXWELL (DEFENDANT).....APPELLANT;

AND

DAWSON CALLBECK (PLAINTIFF).....RESPONDENT.

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

Motor vehicle—Collision between motor cycle and automobile—Ultimate negligence—Contributory Negligence Act (Alberta), 1 Geo. VI, c. 18—Statute specifically pleaded—Statute coming into force after date of accident, but before date of commencement of suit—Whether statute applicable.

An action was brought on October 12th, 1937, by a motor cyclist for damages sustained in a head-on collision with an automobile, which collision occurred on October 30th, 1936. The trial judge dismissed the action on the ground that the accident was caused solely by the plaintiff's negligence, but that judgment was reversed by the appellate court. The respondent, alleging contributory or ultimate negligence of the defendant, pleaded specifically the application of the *Contributory Negligence Act*, which went into force on July 1st, 1937.

Held that the statute has no application to this case; and, also, that upon the facts, the judgment of the trial judge should be restored, as the plaintiff was, to some extent if not *in toto*, guilty of negligence which contributed to the collision.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of the trial judge, Howson J. (2) and maintaining the respondent's action.

The action was brought by the respondent against the appellant for damages sustained in a head-on collision with an automobile. The facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

T. N. Phelan K.C. for appellant.
I. F. Fitch K.C. for respondent.

The judgment of the Chief Justice and of Rinfret, Davis and Kerwin JJ. was delivered by

DAVIS J.—This case arises out of a collision between a motor cycle and a motor car on the Bowness road near the city of Calgary. The collision occurred shortly after

(1) [1938] 3 W.W.R. 691. (2) [1938] 1 W.W.R. 734.

*PRESENT:—Duff CJ. and Rinfret, Davis, Kerwin and Hudson JJ.

midnight on October 30th, 1936. The date becomes important in view of subsequent legislation to which I shall later refer. The owner and driver of the motor cycle (respondent) commenced this action against the owner and driver of the motor car (appellant) for damages claiming $1,177.50 for special damages and $13,820 for general damages. The date of the commencement of the action was October 12th, 1937, and that date becomes of importance also in considering subsequent legislation. The statement of defence was a general denial of liability but at the trial in February, 1938, leave was given to make amendments and the amended statement of defence set up that the collision was caused by the sole negligence of the plaintiff and, alternatively, that the plaintiff was guilty of contributory negligence, or, was guilty of ultimate negligence. The plaintiff then filed an amended joinder of issue and reply, in which he denied that the accident was caused by his sole negligence or that he was guilty of contributory negligence or of ultimate negligence and pleaded further that, if he was guilty of any negligence which in any way contributed to the accident, the liability to make good the damage or loss should be in proportion to the degree in which each of the parties was at fault. He pleaded specifically the *Contributory Negligence Act* of Alberta, 1 Geo. VI, 1937, ch. 18, which did not go into force until the first day of July, 1937.

The case was tried without a jury by Mr. Justice Howson at Calgary on February 23rd, 24th and 25th, 1938, and judgment was reserved until March 22nd, 1938. The action was dismissed with costs.

The learned trial judge carefully analyzed and considered the evidence. He found that the plaintiff had purchased the motor cycle—a second-hand 1929 model—two days before the accident; that the electrical ignition system was not in good condition, the tail light was disconnected, the front wheel brake was not operating, the horn was dead, the battery was very low and, although equipped so that bright and dim lights could be installed, yet the bright light only was actually working; and that between the times of the purchase of the motor cycle and the collision no repair work had been done on the machine except that the plaintiff had wound tape round the electric wiring in two places.

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The learned trial judge found that the collision occurred at a point where the road in question, which is hard-surfaced, makes "a very long, gradual and level curve." The motor cycle and the motor car were travelling in opposite directions.

There was, as is not unusual in these collision cases, a good deal of conflicting evidence, but the trial judge concluded:

> After considering all of the evidence, I find that the defendant did keep a proper lookout, that he was not operating his motor vehicle at an excessive rate of speed and that he had his automobile under proper control. I am convinced that the plaintiff either drove his motor cycle without any light until he was close to the defendant, and then switched it on, or that his light, if on, while rounding the curve, was so ineffective that it not only failed to give the defendant warning of the plaintiff's approach, but actually deceived the defendant. The defendant had then no chance of turning to the right and thus avoiding the collision but upon realizing the imminent danger, he did all that could reasonably be expected of him, namely, he jammed on his brakes.
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> While I have the greatest sympathy for the plaintiff, who was very badly injured, yet I find that the accident was caused solely by his own negligence, and his action must, therefore, be dismissed with costs.

The case was carried to the court of appeal for Alberta. That Court reversed the judgment at the trial and gave judgment in favour of the plaintiff for the sum of $4,802.50 (to include both general and special damages) together with the costs of the action and of the appeal. From that judgment the defendant appealed to this Court and the plaintiff cross-appealed, asking for an increase in the amount of damages awarded from the sum of $4,802.50 and costs to the sum of $14,997.50 and costs.

The court of appeal reviewed the evidence and, speaking broadly, took the view that the defendant was guilty of negligence in not having taken the right-hand side of the road when meeting the plaintiff who, the Court thought, had a better right than the defendant to be on the other side of the road. Mr. Justice Ford, in delivering the judgment of the Court, said that it was clear from the evidence that the motor cycle was proceeding on its right-hand side of the centre line of the highway, close to the ditch, and at the time of the collision was, according to the defendant's own evidence, not more than four or five and a half feet from the north side of the road. The paved surface of the road is 22 feet wide. As a matter of fact, the plaintiff said he would be "anywhere between the ditch

and possibly five or six feet to my left hand side of the ditch." The defendant admitted that at the time of the impact he swerved his car two or three feet to the left. Mr. Justice Ford said that there was ample room for the defendant to turn to his right of the centre line of the highway when he met the plaintiff on his motor cycle. But with great respect, in the circumstances of this case it is not a question of whether there was ample room—undoubtedly there was; the question is whether when suddenly confronted in the darkness by the motor cyclist there was time or opportunity to avoid a collision. But taking the view they did of the evidence, the court of appeal concluded that

> after the emergency was apparent he (the defendant) and not the appellant (plaintiff) had the last chance to avoid the consequences of whatever negligence of either or both was antecedent to it, and he (the defendant) failed to avail himself of it. This * * * was the real cause of the accident.

Mr. Justice Ford, speaking for the Court, took a view of the evidence quite contrary to that taken by the learned trial judge and concluded his written reasons by stating that the plaintiff did all he could to avoid the collision; that although he had the right to expect that the defendant would yield him the right of way, he kept his motor cycle as near to his right-hand side and as near to the ditch as he could reasonably be expected to do; and that it could not be said that the last clear chance to avoid the accident rested with him.

This case is no different from so many collision cases which present their own difficulties upon conflicting evidence, and it is not easy to determine exactly where the blame lies. The young man on his motor cycle was undoubtedly on what is commonly called his own side of the road and the motor car as it met him travelling in the opposite direction was undoubtedly over to a considerable extent on what is commonly called its wrong side of the road. But it was on a curve in the road, after midnight, and the trial judge has found, and there is abundant evidence to support the finding, that the motor cycle was being driven without any light until it came up close to the motor car and then the light was switched on, or, that the light, if it was on while rounding the curve, was so ineffective that it not only failed to give the defendant

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warning of the approach of the motor cycle but actually deceived the defendant in the sense that the faint light indicated a tail light of a car going in the same direction as the defendant was travelling.

Our view of the whole evidence would agree with that taken by the trial judge that the plaintiff was the author of his own injury but it is not necessary to determine the case on that basis because even if it can properly be said that the plaintiff on his motor cycle was not solely at fault, it cannot safely be said on the evidence that he himself was not, to some extent at least, guilty of negligence which contributed to the collision. While at the date of the accident there may have been a *casus omissus* in the amendments to the Alberta *Vehicles and Highway Traffic Act* (since cured by subsequent amendments) in the absence of any specific statutory provision requiring a motor cycle to be equipped with a lamp or lamps, we agree with the statement of the learned trial judge in this regard:

> This would not excuse any motor cycle driver from failing to have on the front of his machine a light not only sufficient for his driving purposes but ample to properly warn others of his approach—anything less would constitute negligence on his part.

This negligence contributed to the accident and would bar the plaintiff from any recovery under the Alberta law as it stood at the date of the accident.

Counsel for the plaintiff pressed upon us the contention that if it were found to be a case of contributory negligence, then the plaintiff was entitled to the benefit of the *Contributory Negligence Act* of Alberta, 1 Geo. VI, 1937, ch. 18, and that that statute having been specifically pleaded, the plaintiff would be entitled to have the damage apportioned in the degree in which each person was at fault. But that statute was not passed until April 14th, 1937, and did not go into force until July 1st, 1937. It was contended that it applied to this action commenced on October 12th, 1937; the collision had occurred on October 30th, 1936. We cannot accept that contention. The principle is too well established to require authority that a statute is *prima facie* prospective unless it contains express words or there is the plainest implication to the contrary effect.

The *Alberta Contributory Negligence Act* which was specifically pleaded by the plaintiff in his amended joinder

of issue and reply dated February 24th, 1938, as a result of the amendments made by the defendant at the trial, has no application to this case.

We would allow the appeal and restore the judgment at the trial with costs throughout. The cross-appeal necessarily fails and should be dismissed, but without costs.

HUDSON J.—This is an action for negligence in which the learned trial judge found that the accident was caused solely by the plaintiff's negligence. This decision was reversed by the court of appeal in Alberta. There the learned judges took the view that the defendant was guilty of negligence in two respects. In the first place, that he did not keep his vehicle to the right of the centre line of the road, and secondly, that when he became aware of the plaintiff's approach, instead of turning to the right he turned to the left, and that even assuming that there was negligence on the part of the plaintiff himself to act, once the emergency was apparent the defendant had the last chance to avoid the accident and failed to avail himself of it.

In considering the disposition of the appeal, the statements of Lord Shaw of Dunfermline and Lord Macmillan, which I have quoted at length in a judgment given to-day in the case of *Sershall* v. *Toronto Transportation Commission* (1), seem to me to be particularly applicable to the present case. Approaching the matter in the way indicated by these statements, I do not feel any difficulty in accepting the view of the learned trial judge to the extent that there was negligence contributing to the accident on the part of the plaintiff himself. That the defendant may have been guilty of some negligence is a question on which I feel less satisfied, but the mere fact of negligence on the part of the defendant, where there was negligence contributing to the accident, on the part of the plaintiff himself, would not impose liability at common law. A statute of Alberta covering this situation was passed after the accident, but for reasons pointed out by my brother Davis, I do not think that this statute affected this case.

On the application of the doctrine "last chance" it seems to me that the trial judge was best qualified to

(1) [1939] S.C.R. 287.

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decide whether or not the plaintiff was to blame for the situation as it was. With all respect to the court below, I would allow the appeal and restore the judgment of the trial judge, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty & McLaurin.*

Solicitors for the respondent: *Fitch & Arnold.*