1944

*Feb. 21, 22.
*Apr. 25.

AIME A. MARTINEAU (PLAINTIFF)..... APPELLANT;

AND

HIS MAJESTY THE KING (DEFENDANT). RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Negligence—Motor vehicle—Injury to pedestrian on highway—Presumption of fault created by section 53 of the Quebec Motor Vehicles Act—Such presumption of fault may be rebutted by defendant—Quebec Motor Vehicles Act, R.S.Q., 1941, c. 142, s. 53.

The presumption of fault created by section 53 of the *Quebec Motor Vehicles Act* against the owner or driver of an automobile is merely a presumption which is rebuttable: it does not constitute a liability defeasible only by evidence of fortuitous event or superior force (*cas fortuit ou force majeure*) or of a foreign cause not attribuable to defendant.

The judgment of the trial judge should be restored, as, upon the evidence, the respondent has entirely failed to rebut such presumption. The appellate court had reduced by half the amount of damages granted by the trial judge on the ground that there had been contributory negligence.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, varying the judgment of the Superior Court, Sévigny C.J., and reducing by half the amount of damages awarded.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

J. A. Gagné K.C. and *W. Desjardins K.C.* for the appellant.

Gaston Esnouf K.C. for the respondent.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

The judgment of the Court was delivered by

TASCHEREAU J.—In the village of Sillery near Quebec city, a truck belonging to the respondent struck and seriously injured appellant's wife who at the time was attempting to cross the road. The appellant, who is common as to property with his wife, as chief of the community, instituted the present action in which he claims $13,495.68.

The trial judge awarded him $6,970.18, but the Court of King's Bench reduced this amount to $3,485.09 on the ground that there was contributory negligence.

The liability of the respondent cannot be questioned. The trial judge found that the truck driven by an employee of the Highway Department was going at an unreasonable rate of speed in the village of Sillery, at a time when the traffic was heavy, thus endangering the safety of pedestrians. The Court of King's Bench reached the same conclusion, and this concurrent finding of facts relieves us of the duty of dealing any further with this point.

But the Court of King's Bench thought that the imprudence of appellant's wife in crossing the road contributed to the accident in such a way, and to such an extent, that the liability of the respondent should be reduced by fifty per cent.

With great respect, I believe that this appeal should be allowed and the judgment at the trial restored. The sole and determining cause of the accident was the speed at which the truck was driven, and the failure of respondent's employee to exercise a proper control over his truck and bring it to a stop in order to avoid hitting appellant's wife.

The preponderance of the evidence, and the trial judge so found, is to the effect that when the victim proceeded to cross the street with her friend, there was no obstruction on the highway in the immediate vicinity. In order to cross the road, the victim had to walk approximately twenty feet, and before doing so, she looked to her right and to her left to make sure that the road was clear and that she could go ahead in all safety. Seeing nothing coming, she had the right to assume that no driver, in violation of the law of the road and of the most elementary prudence, in this village of Sillery which has been termed by respondent's driver himself, as a "dangerous place". would emerge at such a rate of speed and imperil her life, before she had finished crossing the road.

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It was her undisputable right to cross where she did, and before doing so, she took the ordinary precautions of a reasonable person. By her conduct, she created no sudden emergency which would strengthen respondent's case, and the evidence reveals nothing that she did that might have in any material way contributed to the accident.

Although I agree with the trial judge in his disposition of this case, I do not wish it to be understood that I also concur in his too sweeping statement that the presumption of fault created by section 53 of the *Motor Vehicles Act* can be destroyed only

> par la preuve d'un cas fortuit ou de force majeure, ou d'une cause étrangère qui ne lui soit pas imputable.

It is not a liability defeasible by "cas fortuit ou force majeure" which the law has created against the owner or driver of an automobile, but merely a presumption of fault which is rebuttable by the defendant.

In the present case, the respondent has entirely failed to rebut this presumption, and therefore the present appeal must be allowed with costs, and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitor for the appellant: *Wilfrid Desjardins.*

Solicitor for the respondent: *Gaston Esnouf.*