1930

*Oct. 15.
*Nov. 3.

ISAAC STANLEY (PLAINTIFF) ..... APPELLANT;

AND

THE NATIONAL FRUIT COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Contributory negligence—"Ultimate" negligence—Motor vehicles—Motor truck striking pedestrian—Restricted vision of driver by reason of car in front—Duty of driver in such case.

Plaintiff, a pedestrian, who had started to cross a street intersection diagonally, was struck by defendant's truck, which was making a left turn behind a sedan car. The trial judge found that the accident was caused by the truck driver's negligence and gave judgment to plaintiff for damages. This was reversed by the Court of Appeal, Sask., which held that, under all the circumstances, the accident was not attributable to negligence of the truck driver (24 Sask. L.R. 137). Plaintiff appealed.

Held (Anglin C.J.C. and Smith J. dissenting): The judgment at trial should be restored. An important finding by the trial judge, which had support in the evidence and should be accepted, was that plaintiff did not move from the moment he stood still to permit cars ahead of the truck to pass him to the moment he was struck. It was therefore obvious that the truck, in making the turn, did not follow the sedan's track but turned further to the right, that is, made a wider curve (towards the plaintiff); in doing so, the truck driver was driving over a portion of the street not shewn by the passing of the sedan to be clear of traffic, and (as he kept his truck only 6 or 8 feet behind the sedan) without having in view the portion of the street where plaintiff stood. There was a duty upon the truck driver

*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

(1) (1915) 52 Can. S.C.R. p. 30.

not to drive over a portion of the street of which he had, by reason of keeping so close to the sedan, only a restricted vision, and on which he knew pedestrians were in the habit of crossing, except at a rate of speed which permitted him to stop within the limits of his restricted vision; and that duty he failed to observe. The trial judge's finding that plaintiff was not guilty of contributory negligence could not, on the evidence, be said to be wrong; and, even if his failure to look out for the truck's approach was negligence, it did not contribute to the accident except in the sense that it was a *sine qua non;* the real cause of the accident was the subsequent and severable negligence of the truck driver (*Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, referred to).

Per Anglin C.J.C. (with whose conclusion Smith J. concurred) (dissenting): The evidence in support of the trial judge's findings, that defendant's negligence was the sole cause of plaintiff's injuries and that plaintiff was not guilty of contributory negligence, leaves their accuracy doubtful, to say the least. His finding that, even if plaintiff was guilty of negligence, the defendant might, by the exercise of reasonable care, have avoided the consequences thereof (*Tuff* v. *Warmen,* 5 C.B.N.S., 573) was not warranted by the evidence. It appeared from the judgment of the trial judge that, while he took into account "ultimate" negligence of defendant in so far as defendant might *actually* have avoided the consequence of any contributory negligence of plaintiff, his mind had not been directed to an important aspect of the case, namely, that class of "ultimate" negligence considered in *B.C. Electric Ry. Co.* v. *Loach,* [1916] 1 A.C. 719, i.e., disabling negligence anterior in fact to plaintiff's contributory negligence, but of such a character that its effects endured and became operative after such contributory negligence had intervened. The Court of Appeal, while finding, on evidence which could not be said to be insufficient to justify it, that plaintiff was guilty of contributory negligence, did not consider or pass upon the question of "ultimate" negligence. A new trial was necessary in order that all the issues in the action might be fully considered and determined.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Bigelow J. in favour of the plaintiff in an action for damages for injuries sustained by the plaintiff as a result of being knocked down by the defendant's truck, which, at the time of the accident, was being driven by the defendant's servant in the course of his duties. The material facts of the case are sufficiently stated in the judgments now reported. The appeal was allowed and the judgment of the trial judge restored (Anglin C.J.C. and Smith J. dissenting, who held that there should be a new trial.)

Russell Hartney for the appellant.

A. E. Bence K.C. for the respondent.

(1) (1929) 24 Sask. L.R. 137; [1929] 3 W.W.R. 522.

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The judgment of the majority of the court (Newcombe, Lamont and Cannon JJ.) was delivered by

LAMONT J.—This is an appeal from the judgment of the Court of Appeal of Saskatchewan (1), reversing the judgment of the trial judge in favour of the plaintiff in an action for damages for injuries sustained by the plaintiff as a result of being knocked down by the defendant's truck, which, at the time of the collision, was being driven by the defendant's servant. The learned trial judge found that the driver of the truck had been guilty of negligence causing the accident by (*a*) driving at a rate of speed and in a manner dangerous to the public on a public highway under the circumstances; (*b*) not keeping a proper look-out for pedestrians; (*c*) driving his truck too close to the car in front which obstructed his view. The relevant provisions of the *Vehicles Act* (1924, c. 42) are:—

26. No person shall drive a motor vehicle on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public having regard to all circumstances of the case, including the nature, condition and use of the highway, and the amount of traffic which actually is at the time, or might reasonably be expected to be on the highway.

43 (3). When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle, shall be upon such owner or driver.

The Court of Appeal (1) held that the defendant had discharged the onus resting on it under section 43, and had established that the damage suffered by the plaintiff was not the result of negligence or improper conduct on the part of its driver.

The scene of the accident was in the public street in Saskatoon at the intersection of 20th Street and Avenue A. Both streets are paved. Avenue A runs north and south and is 46 feet wide from curb to curb, while 20th Street runs east and west and is 56 feet wide from curb to curb. It does not, however, run farther east than Avenue A, so that any vehicle coming east on 20th Street must turn either north or south on Avenue A. The plaintiff, on the afternoon of the accident, had been walking north on the side-walk on the east side of Avenue A, about opposite the

(1) 24 Sask. L.R. 137; [1929] 3 W.W.R. 522.

south sidewalk of 20th Street. Being desirous of going to the King Edward Hotel on the north west corner of Avenue A and 20th Street, instead of crossing the avenue and then 20th Street at right angles, which crossings were marked on the pavement by yellow lines, he started to go diagonally across Avenue A. Having proceeded about 20 feet he saw an automobile coming along the avenue from the south, and also a Ford sedan, followed by a truck, coming along 20th Street from the west. He stood still to allow them to go by. To the northwest from where he stopped and in the general direction of the King Edward Hotel there was on the street a silent policeman around which, to the east, vehicles, coming off 20th Street and going north on Avenue A, had to pass.

The plaintiff's story is that when he saw the car coming from the south, and the sedan and the truck coming from the west, all these cars were travelling at about 15 miles per hour; that as the sedan came to the intersection it slackened its speed to permit the car from the south to pass, as it had the right of way; that the sedan fell in behind the car from the south—three or four feet behind it; that the car from the south passed between him and the silent policeman at a distance of about two feet from him; that the sedan following, likewise passed him but at a distance of about six feet. After that he has no recollection of the immediate subsequent events. The plaintiff was struck by the radiator of the truck and very severely injured. He says, when he was struck, he had not moved from the spot where he was standing when the first car went by. In this he was corroborated by an independent witness, Charles Leasch, and the learned trial judge found as a fact that he had not moved. When asked why he was not looking out for the truck, the plaintiff said:—

> I was watching the car ahead of the truck. The truck was behind that car, and the car was coming quite close to me then; it was coming quite close to the other car, and I was watching the two, the first one, and the other one coming quite close to it, and I was watching the first car, ahead of the truck, and it disappeared just as it was passing me.

The plaintiff was, therefore, aware that the truck was coming towards him behind the sedan.

The story of Harry Dunlop, the defendant's driver, is that he was driving a one ton truck 16 feet 8 inches long;

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that he followed a Ford sedan down 20th Street and around the turn at the intersection; that the moment the sedan had passed him the plaintiff again started on his way across the street and stepped in front of the truck; that the truck was proceeding around the intersection six or eight feet behind the sedan and at a speed of about 10 miles per hour; that he did not see the plaintiff until the sedan got out of the way; that the plaintiff was then about six feet in front of him and it was too late to avoid the accident; that the moment he saw the plaintiff he applied the brakes and stopped the truck. The truck, according to the tests made subsequent to the accident, could be stopped in 7 feet 10 inches, if going at ten miles per hour, and in 53 feet, if going twenty miles per hour. A policeman, at the scene of the accident almost immediately after it happened, measured the skid marks made by the wheel of the truck after the brakes were applied and stated that the wheel had skidded eight feet.

Dunlop further says that but for the sedan in front of him he could have seen the plaintiff whom he struck with his radiator but that at no time after he saw the plaintiff could he have done anything to avoid the accident. He admits, however, that he knew that pedestrians were in the habit of walking diagonally across Avenue A. The witness, Leasch, testified that when they were taking the plaintiff from under the truck Dunlop said: "God, I did not see that man," and the witness, Morley, testified that after the accident he got on the truck with Dunlop and asked him how the accident happened and that Dunlop replied that "he did not know how it happened, he never saw the man." Dunlop says these statements are not correct. These, in my opinion, constitute the material parts of the evidence given at the trial.

The plaintiff being injured by reason of a motor vehicle on the highway the statute places upon the defendant the burden of proving that his injuries did not arise through the negligence or improper conduct of its driver. As to the degree of care which a driver of a motor vehicle must exercise I agree entirely with what was laid down by Mr.

Justice Turgeon, in giving the judgment of the Court of Appeal, when he said (1):—

> 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.

The difficulty, however, is in determining what a reasonably prudent man would have done under the circumstances. That responsibility is placed in the first instance upon the tribunal whose duty it is to find the facts—in this case the trial judge.

The first act of negligence on the part of the defendant found by the trial judge was that its driver was proceeding at a rate of speed dangerous to the public, having regard to all the circumstances. The rate of speed was stated by Dunlop to be 10 miles per hour, and, by other witnesses, at varying rates between 10 and 20 miles—the highest being 20 miles. The trial judge made no finding as to the rate Dunlop was driving at the time of the accident. I do not think that the absence of a finding as to the rate is material in this case. What the learned judge in effect did find was that the rate at which the truck was being driven—whether it was 10 miles per hour or 20 miles—was too fast a rate to enable Dunlop to stop the truck between the time he was first able to see the plaintiff and the time when the accident happened. If there was a duty resting on the driver to have his truck so under control that he could stop it within the distance at which he could see pedestrians on a street on which he knew pedestrians were in the habit of crossing diagonally, his rate of speed prevented him from performing that duty and therefore may well be called dangerous. Whether or not there was such a duty I shall deal with later.

The second and third findings as to the driver's negligence are as follows:—

> (2) He was not keeping a proper lookout for pedestrians. Knowing that this was a busy intersection where there was a large pedestrian traffic, it seems to me that it was his duty to be on the look-out for pedestrians, and to operate his car so that he could stop immediately. This is not the case of a man stepping in front of a car. * * *

(1) 24 Sask. L.R., at 141-142.

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(3) The driver of the truck was following too close to the car in front. This obstructed his vision of the plaintiff, and he should have gone much more slowly, if he had done what an ordinary prudent and cautious man would do. I think he was negligent in not slacking his speed, so as to eliminate the possibility of danger to others, when his sight was interfered with by the car in front.

The only evidence as to the look-out kept by the defendant's driver was that of the driver himself. He says he was watching the car in front of him and keeping a look-out "for anything that came up," but that he could not see the plaintiff nor could the plaintiff see him until the sedan in front got out of the way.

In determining whose want of care was really responsible for the accident, there is one finding made by the trial judge which, in my opinion, is of the utmost importance. That is his finding that the plaintiff did not move from the moment he stood still on the street to permit the cars to pass him to the moment he was struck by the truck. That finding was based upon evidence which the trial judge was entitled to credit and, in my opinion, it cannot now be successfully assailed. Starting with the fact that the plaintiff did not alter his position on the street, it is not difficult to see what must actually have happened. Both the car from the south and the Ford sedan passed the plaintiff without injuring him, going between him and the silent policeman. Dunlop was following the sedan. If he had kept to the course taken by the sedan he too would have gone by the plaintiff without injuring him. He, however, struck the plaintiff with the centre of his radiator. To do that it is obvious that when the sedan turned to the left around the intersection Dunlop did not follow in the sedan's track but turned farther to the right, that is, he was making a wider curve than that made by the sedan. That he would do so is most probable seeing that he had a long heavy truck which, the evidence shews, ordinarily requires a wider space to make the turn than does a Ford sedan. In taking that wider curve Dunlop was driving his truck over a portion of the street not shewn by the passing of the sedan to be clear of traffic. Of the portion of the street on which the plaintiff was standing Dunlop had no view, as his line of vision was obstructed by the sedan in front of him. That he could not have a view of it will be readily understood when it is remembered that he was sitting on

the left hand side of the truck and that the sedan was only six or eight feet in front of him. The question then is, was there a duty resting upon Dunlop not to drive over a portion of the street of which he had only a restricted view, and on which he knew pedestrians were in the habit of crossing, except at a rate of speed which permitted him to stop his truck within the limits of his restricted vision? In my opinion such a duty rested on him. A one ton truck driven by gasoline is an instrumentality fraught with danger to pedestrians crossing the street unless care is taken by its driver. If Dunlop had permitted someone to bandage his eyes so that on making the turn at the intersection he could not see a pedestrian in front of him, and he struck and injured the pedestrian, who remained in the same place on the street, could it reasonably be contended that the driver was not guilty of negligence causing the accident? In my opinion it could not, for I do not think any reasonably prudent man would continue to drive his car when he could not see the portion of the street over which he was to pass. What is the difference between such a case and the present one where the driver was unable to see the plaintiff in time to stop his car before injuring him, by reason of the fact that he permitted his vision to be obstructed by the sedan, to which he kept too close, so close that he could not keep a proper lookout for pedestrians? I can see none. Dunlop's duty towards the plaintiff was to keep his truck so under control that, if the plaintiff should happen to be on that portion of the street which Dunlop could not see when making the turn, the truck could be stopped or turned aside without injuring the plaintiff. This duty he could have performed by allowing a greater distance to separate him from the sedan, or by reducing his speed. With great deference, therefore, I am unable to take the view of the Court of Appeal that the defendant disproved negligence on the part of its driver.

As to the sounding of the horn: the statute calls for it when "it is reasonably necessary to notify pedestrians or others of the approach of the vehicle." As the plaintiff was well aware of the near approach of the truck, I share the doubt of the trial judge and the Court of Appeal that any good purpose would have been served by sounding it.

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The learned trial judge found that there had been no negligence on the part of the plaintiff. The plaintiff started to walk diagonally across the street; he reached a point part way between the silent policeman and the curb, but a little east of the silent policeman, and there stopped in the line taken by traffic going north on Avenue A. He knew that the truck was following close to the sedan; he stood looking at the passing cars and paying no attention to the approaching truck, evidently assuming that as the car from the south and the sedan had passed between him and the silent policeman, the truck would do the same. Can it be said that a man who walks into the line of traffic knowing that several cars are approaching, and does not look to see if he is out of danger, is exercising that care and prudence to avoid accident which it is the duty of every person using the highway to exercise when others are likewise using it? In my opinion a failure, in certain circumstances, to watch out for an approaching car might properly be characterized as negligence by a tribunal whose duty it is to pass upon it. As long ago as the case of *Cotton* v. *Wood* (1), Erle C.J., laid down the duty of pedestrians in these words:—

> It is as much the duty of foot-passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot-passengers.

His Lordship was there dealing with horse-drawn vehicles. To-day we have the much more rapid and therefore much more dangerous motor cars, which, I cannot help thinking, imposes upon their drivers a greater duty to take care than was imposed upon the drivers of more slow going vehicles. The trial judge, however, held that the plaintiff's conduct did not amount to contributory negligence; and I am not prepared to say he was wrong; in fact, in this case, I think he was right. Even if we admit that the plaintiff's failure to look out for the approach of the truck was negligence on his part, the real question is, did that negligence contribute to the accident? Was the real cause of the accident the failure of the plaintiff to watch out for the truck or the failure of the defendant's driver to keep him-

(1) (1860) 8 C.B., N.S., 568, at 571.

self in a position to see the part of the street over which he was driving his truck in making the turn around the intersection?

In his classic judgment in *Admiralty Commissioners* v. *S.S. Volute* (1), Lord Chancellor Birkenhead said:—

> In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A. recovers in full: see among other cases *Spaight* v. *Tedcastle* (2) and *The Margaret* (3).
>
> At the other end of the chain, A.'s negligence makes collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be guilty of any negligence and A. wholly fails. *The Bywell Castle* (4); *Stoomvaart Maatchappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (5).
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> In between these two termini come the cases where the negligence is deemed contributory, and the plaintiff in common law recovers nothing, while in Admiralty damages are divided in some proportion or other.

After reviewing a great many of the cases on the subject the Lord Chancellor sums up the result in these words:—

> Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame * * * might, on the other hand, invoke the prior negligence as being part of the cause of the collision.

Assuming, for the purpose of what I am about to say, that the plaintiff was negligent, the situation, in my opinion, brought about by his negligence would not have resulted in damage to him but for the subsequent and severable negligence on the part of the defendant's driver, as is established, it seems to me, by the fact that both the other cars passed him without doing any damage. There is, I think, in this case a clear line to be drawn between the negligence of the plaintiff and that of the defendant. The plaintiff's conduct contributed to the accident only in the sense that it was a *sine qua non*. If he had not been on the street the accident, of course, would not have happened, but I cannot find anything in his conduct which

(1) [1922] 1 A.C. 129, at 136.
(2) (1881) 6 App. Cas. 217.
(3) (1884) 9 App. Cas. 873.
(4) (1879) 4 P.D. 219.
(5) (1880) 5 App. Cas. 876.

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provoked, induced or in any way assisted in bringing about the negligence of the defendant's driver. Neither do I find that the negligence of the defendant's driver was so interwoven with the state of things brought about by the conduct of the plaintiff that the plaintiff should be held equally guilty of causing the accident. A driver who, in broad daylight, runs down a pedestrian standing still on a street on which he knows pedestrians are in the habit of walking and on which there is no opposing or crossing traffic, assumes a heavy burden when he seeks to shew that he was not guilty of the negligence or improper conduct which caused the accident. It is not, in my opinion, sufficient for the defendant to say—as in effect it says here: "True our driver ran down the plaintiff and injured him because he did not see him in time to stop the truck, but the plaintiff should have looked out for the truck and got out of the way."

I agree, therefore, with the trial judge that the defendant's negligence was the proximate cause of the plaintiff's injuries.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the trial judge.

ANGLIN C. J. C. (dissenting).—In this case the trial judge found negligence on the part of the defendant to have been the sole cause of the injuries sustained by the plaintiff. He negatived any contributory negligence on the part of the plaintiff. The evidence in support of both these findings leaves their accuracy, in my opinion, doubtful, to say the least. Towards the close of his judgment he said,

> But even if the plaintiff could be said to be negligent, in standing where he was, or otherwise, his negligence was not, in my opinion, the proximate cause of the accident. The old case of *Tuff* v. *Warman* (1), which is still good law, decides that his contributory negligence would not dis-entitle him to recover, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. The defendant could have avoided this accident by the use of the ordinary care of a reasonable man for the reasons I have given above, and I therefore conclude that the plaintiff is entitled to succeed.

The evidence does not warrant this finding.

No other allusion is made to "ultimate" negligence. It is reasonably obvious, from the passage quoted, that while the trial judge took into account "ultimate" negligence of the defendant, in so far as he might *actually* have avoided

(1) (1858) 5 C.B., N.S., 573.

the consequence of any contributory negligence of the plaintiff, he did not consider, and did not express any opinion upon, the question whether, when he did see, or should first have perceived, the plaintiff's danger, the defendant's servant could, but for some preceding disabling negligence on his part, have avoided running him down.

It is this latter class of " ultimate " negligence which the Privy Council considered in *B.C. Electric Ry. Co.* v. *Loach* (1), i.e., disabling negligence anterior in fact to the plaintiff's contributory negligence, but of such a character that its effects endured and became operative after such contributory negligence had intervened.

The Court of Appeal, on the other hand, found, upon evidence, which I am unable to say was insufficient to justify such finding, that the plaintiff was guilty of contributory negligence. They, however, did not consider or pass upon the question of " ultimate " negligence. We are, therefore, without any finding by either of the provincial courts upon the issue dealt with in the *Loach* case (1). We cannot tell what the finding of the learned trial judge upon this, not improbably, vital question, would have been had his mind been directed to that aspect of the case. In the absence of such a finding it is impossible to hold that this action was fully tried.

In my opinion, therefore, a new trial is necessary in order that all the issues in the action may be fully considered and determined. I, therefore, refrain from further comment upon the evidence.

The costs of the appeal to this Court must be borne by the respondent. The costs of the abortive trial and the appeal to the Court of Appeal should abide the event of the new trial.

SMITH J. (dissenting).—I would order a new trial in this action; costs of the appeal to this Court to be borne by the respondent; costs of the abortive trial and the appeal to the Court of Appeal to abide the event of a new trial.

Appeal allowed with costs.

Solicitor for the appellant: *Russell Hartney.*

Solicitors for the respondent: *Bence, Stevenson, McLorg & Yanda.*

(1) [1916] 1 A.C. 719.