PERCY McKEE AND LLOYD TAYLOR *(Defendants)* ..... } APPELLANTS;

AND

ELI MALENFANT AND EARL BEETHAM *(Plaintiffs)* ..... } RESPONDENTS.

1954

*May 28

*Oct. 5

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—motor vehicle—momentarily stopped on highway at night—Rear-end collision—Liability—Proximate cause—Meaning of "parked or left standing" in s. 43(1), The Highway Traffic Act, R.S.O., 1950, c. 167.

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On Dec. 31, 1949 at 5 o'clock p.m. the respondents' motor truck driven by B while proceeding westerly on Provincial Highway No. 3 and at a point some 150 feet west of the intersection of a railway level crossing ran into the rear of the appellants' motor truck. The latter also headed west had been backed down the highway by T and stopped north of the centre of the highway to pick up some equipment from the side of the road. It was equipped with rear lights which complied with the requirements of *The Highway Traffic Act* (Ont.). Two cars travelling westward passed the stationary truck immediately prior to the accident. Gale J., who tried the action without a jury, found that the respondents' negligence was the effective cause of the accident and dismissed the action. The Court of Appeal for Ontario reversed the judgment and held that the cause of the accident was the combined negligence of both parties.

Held: (Cartwright J. dissenting) that the appeal should be allowed and the judgment of the trial judge restored.

Per: Locke J.: Since the oncoming cars were over 1,300 feet distant when the appellants' truck was backed along the highway and brought to a stop, the fact that it was brought into its position in this manner was an irrelevant consideration in determining liability. The proper inference to be drawn from the evidence was that the rear lights were burning on the appellants' truck. It was not "parked" on the highway within the meaning of that term in s. 40(1) (now s. 43(1)) of *The Highway Traffic Act,* and the evidence did not disclose any negligence on the part of the appellants. *Speers* v. *Griffin* [1939] O.R. 552 and *Blyth* v. *Birmingham Water Works Co.* 11 Ex. 781 at 783, referred to.

Per: Cartwright J., dissenting: Whether the negligence of B was the sole or only a contributory cause of the collision was a question of fact with which the Court of Appeal was as well able to deal as the trial judge and the view of the Court of Appeal was the right one. If in doubt it would be the duty of this court to affirm the decision of the appellate court on the principles stated in *Demers* v. *Montreal Steam Laundry Co.* 27 Can. S.C.R. 537.

Decision of the Court of Appeal for Ontario [1953] O.W.N. 652, reversed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) which allowed the plaintiff's appeal from the judgment of the trial judge, Gale J., dismissing the action, to the extent of apportioning the responsibility for the accident equally among the parties to the action.

T. N. Phelan, Q.C. and *John Holland* for the appellants.

C. L. Dubin, Q.C. for the respondents.

The judgment of Taschereau, Kellock and Fauteux JJ. was delivered by:

KELLOCK J.:—The circumstances out of which this litigation arises are set forth in the following paragraphs from the judgment of the learned trial judge:

(1) [1953] O.W.N. 652.

The plaintiff, Beetham was driving a truck owned by himself and his co-plaintiff westerly on No. 3 Highway, with which he was entirely familiar. He said that by reason of the fog and other conditions, which reduced visibility, he was obliged to drive his car at no more than 35 miles an hour, although once he accelerated to 40 miles an hour to pass another vehicle. He further swore that when he approached the railway track, which is shown in the plan, Exhibit No. 1, he slowed down and crossed it at a rate of about 20 to 25 miles an hour. Both figures were mentioned by him. He says at that time he was in a patch of fog, and that upon crossing the tracks he noticed an object in front of him, and that while he attempted to apply his brakes, he does not recall having done so effectively. The next thing he knows was waking in the hospital.

I hold that the impact took place approximately—and when I say "approximately" I mean within a few feet or so either way—150 feet west of the west rail of the Chesapeake and Ohio Railway track. There is a decline away from the track both easterly and westerly and it would seem to be a factor of some consequence to users of the highway, though it is to be observed that the lights on the standing truck into which the plaintiff, Beetham crashed were apparently higher than the elevation of the tracks.

Let me say at once that there was shown to be clear negligence on the part of the plaintiff, Beetham. I do not accept the suggestion that as he went over the railway tracks or that just after crossing the railway tracks he passed through a patch of fog. While it was a bad night and while there was fog elsewhere I am satisfied that the last fog which he saw was some considerable distance east of the railway tracks. This is made plain by an answer or two he gave on his examination-for-discovery which indicated that he was not aware of the place at which he had last met a bit of fog. It is incredible that if it was at or in close proximity to the railway tracks, he would not have remembered the fact when he was examined-for-discovery.

Whether or not the truck with which he collided was showing lights, it is perfectly apparent that Mr. Beetham was driving too quickly in view of the conditions which then existed or was not paying proper attention to what was ahead of him. If he had been proceeding at a proper rate or if he had been attending to his driving it is obvious that he would not have run into the truck. A heavy onus rests upon him to show why he did, and in my view, he has fallen far short of discharging that burden.

The learned trial judge found also that the appellants had been guilty of negligence in leaving their truck on the pavement in the path of westbound traffic when it was perfectly open to them to have taken it entirely off the pavement. The learned judge continues:

The real point in this case seems to be this: Ought Mr. Beetham to have been aware of the existence of that truck on the highway at a point before he did and thus have been able to do something or, alternatively, could he have prevented the collision by the exercise of ordinary care after he actually did see it? I am afraid that both of these questions must be answered in the affirmative.

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The evidence of Mr. Beetham is that he was driving his truck at approximately 20 miles an hour crossing the railway tracks, and that then or immediately thereafter he could have stopped his truck in 40 feet. He also testifies that even driving at 35 miles an hour he could have brought it to a stop in 120 feet. Much stress is laid on the effect of the elevation of the railway track, and it is pointed out in the evidence that that elevation causes a 30 per cent reduction in the view of a motor vehicle on the other side of the tracks. I fear that the situation does not help Mr. Beetham because it is to be remembered that when he was on the railway track with a perfect view ahead of him he was still 150 feet away from the accident. At that time he says he was proceeding at 20 miles an hour and able to stop in 40 feet. It is obvious that if he was being careful he could have then stopped or turned aside in plenty of time to avoid striking the defendant's vehicle.

In addition to that there is the uncontradicted evidence put in by the plaintiff to the effect that two vehicles were preceding the plaintiff's truck and they successfully skirted the defendant's truck just prior to the impact. The implication of that evidence is, of course, important, particularly when it is also coupled with the fact that both of those vehicles had their headlights on. It not only means that two other drivers saw the truck and avoided it, but deeper than that, it shows that for some distance ahead of the plaintiff the highway was illuminated by the lights of those cars and that those lights were successively directed upon the truck which he struck. It also means that he must have witnessed two cars ahead of him turn out to the left side of the highway to pass the truck.

All of these circumstances show conclusively that, on his own story, Mr. Beetham was not giving proper attention to what was going on in front of him and also that even after he did see the standing truck he ought to have been able to turn out or stop and thus avoid hitting it.

The learned judge found considerable difficulty in deciding the question as to whether or not the lights of the truck were lit, but said that if he were required to make up his mind on that point, he would say that the respondents had failed to prove that the lights of the truck were not on. He accordingly concluded that while there was negligence on the part of the appellants in leaving the truck on the highway, that negligence was not a cause of the accident because the respondent Beetham had seen the truck on the highway in sufficient time to have avoided striking it and because he was at fault in not seeing it sooner than he did. This judgment was reversed in the Court of Appeal, the view of that court being expressed as follows:

With respect, I do not agree that the negligence of the plaintiff was the only effective cause of the collision. The defendant Taylor was in his truck with the motor running. He knew that cars were approaching and knew or should have known that under the weather conditions that existed, there was danger of a collision if he remained where he was on the pavement, and he could, at any time up to the moment of impact, have moved his truck on to the twenty-one foot shoulder.

For the respondents it was contended in this court that the situation would have been altogether different had there been no one in the appellants' truck at the time, but as its driver was in fact in the truck, the contention was that there was continuing negligence down to the moment of impact in that the driver could have moved the vehicle off the road at any time prior thereto.

In my view, with respect, this contention, which found favour in the Court of Appeal, is not sound. Whether or not there was a driver who remained in the truck, there was continuing negligence in the continuing presence of the truck on the road, but it is well settled in cases of this kind that where a clear line can be drawn between the negligence of plaintiff and defendant, it is not a case of contributory negligence at all. This case may therefore be disposed of upon the first ground upon which the learned trial judge disposed of it, namely, that after the respondent saw the vehicle in his path, he had plenty of opportunity to avoid it but failed to do so.

As to the contention with respect to the second ground, that although Beetham should have seen the truck at a much greater distance than he actually did see it had he been keeping a proper lookout, this could amount to no more than contributory negligence, it is sufficient to refer to the judgment of the Privy Council in *Sigurdson* v. *B.C. Electric Ry. Co. Ltd.* (1), where Lord Tucker, at p. 9, said:

> The proposition is that where one party (A) actually knows of the dangerous situation created by the negligence of another (B) and fails by the exercise of reasonable care thereafter to avoid the danger, A is generally speaking solely liable, but that if A by reason of his own negligence did not actually know of the danger or by his own negligence or deliberate act has disabled himself from becoming aware of the danger he can only be held liable for a proportion of the resulting damage.
>
> No authority was cited to their Lordships for such a far-reaching proposition, which, if correct, would seem to provide the respondent in such a case as the present with a means of escaping its 100 per cent liability by relying on the failure of its motorman to keep a proper look-out. It can hardly be the consequence of such a collision that, if the respondent's motorman had kept a good look-out but had nevertheless continued to drive at an excessive speed, he might be treated as solely to blame, but that by failing to keep a good look-out until it was too late to avoid the accident the measure of the respondent's liability would be reduced. Moreover, the proposition is directly contrary to the

(1) [1952] 4 D.L.R. 1; [1953] A.C. 291 at 302.

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second of the rules propounded by Greer L.J. as useful tests in *The Eurymedon* (1), although it is true to say that it is not altogether easy to reconcile to rules (ii) and (iv) as there stated.

I would allow the appeal with costs in this court and in the court of appeal and restore the judgment of the learned trial judge.

LOCKE J.:—There are some facts, in addition to those referred to in the judgment at the trial, which, in my opinion, require consideration in determining whether any negligence on the part of the appellants was shown.

The vehicle owned by the appellant McKee is described as a 1941 International stake and dump truck which had been loaned by him to the Municipal Telephone Board for use in telephone line construction, and at about 4.30 p.m. on December 31, 1949, the day's work being over, it was parked in the yard of the Sandwich South Town Hall. The appellant Taylor, intending to pick up some tools and equipment, backed it out of these premises which adjoined Ontario Provincial Highway No. 3 to the north and to a point some seventy feet distant to the east from the point of intersection of the highway and the road leading out of the Town Hall property. This manoeuvre was carried out entirely upon the north half of the highway, which was of asphalt 20.4 feet in width, or partly on the north half and partly on the shoulder to the north of the highway, at a time when there was no traffic in either direction. There Taylor, seeing three cars approaching from the east at a distance estimated by him as being some 1300 feet, stopped the truck intending, after they had passed, to back some 80 feet further to the east to a point opposite the place where the equipment lay to the north of the highway. According to him, about one half of the truck was on the highway when it was stopped, the remainder being on the shoulder to the north, but the evidence of Constable Sheppard, who attended the scene of the accident almost immediately after it happened, is to the effect that he, from the marks on the pavement, concluded that the truck was entirely upon the north side of the highway at the moment of impact. Whichever be right in the view I take of this aspect of the matter, this is an irrelevant consideration in the circumstances of the present case.

(1) [1938] P. 41.

According to the appellants' evidence, the truck was equipped with the usual lights for such vehicles, both front and rear. The rear lights were described by Taylor as being two red lights at the corners of the body, three red lights directly in the middle of the rear of the truck about ten inches below the rack and a tail light about two feet in from the extreme outside of the rack, close to the place where the licence plate was attached. The dimensions of the vehicle are not given in the evidence other than a statement by one of the Police witnesses that it was more than eighty inches wide, and the description of the lights appears to comply with the requirements of s. 10(5a) of *The Highway Traffic Act* (R.S.O. 1937, c. 288 as amended). Both of the appellants swore that these lights had been turned on as the vehicle was backed on to the highway and were burning at the time the truck was stopped on the highway and at the time of the collision. Police Constable Sheppard of the Ontario Provincial Police who arrived at the scene of the accident a few minutes after it had occurred, said that at that time the light at the right rear was burning but the others were not, having apparently been shattered by the impact. The respondent Beetham, however, said that he had not seen any lights on what he called the "blurry object" with which he collided. The respondent Malenfant, who arrived at the scene some minutes after the collision, and one Hornsey, who arrived after the event, both said that there were then no lights showing at the rear.

Upon this question, the learned trial Judge said that he had difficulty in coming to a conclusion as to whether or not the lights were on at the time of impact and that it was unnecessary for him to decide the point but that, if he were required to do so, he would say that the plaintiffs had failed to satisfy the onus of proving that the lights were not on. He said further that, while there was much to be said both ways, it would be very difficult for him to conclude that the appellants, who he considered to be responsible and decent people, would perjure themselves, and that, as against their positive evidence, there was only the testimony of Beetham which he thought was so uncertain and unsatisfactory as to be unworthy of much credence.

No finding upon this question of fact was made by the Court of Appeal.

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I interpret what was said by the learned trial Judge as meaning that he accepted the evidence of the appellants upon this point in preference to that of the respondent Beetham. My consideration of the evidence leads me to the conclusion that the lights were on.

Whether or not part of the truck was off the asphalt to the north, there is no dispute as to the fact that all of it was to the north of the centre line. The first two of the oncoming cars passed to the left of it but the truck driven by the respondent Beetham which closely followed them, without changing its course along the northern half of the highway, crashed into the rear of the appellant McKee's truck.

The learned trial Judge in delivering judgment at the conclusion of the trial said in part that:—

> . . . it was a matter of extreme foolishness to back the defendant's truck on to the pavement and into the path of the westbound traffic when, as the evidence demonstrated, it could have been kept entirely off the pavement.

During the course of the argument of this appeal, counsel for the respondent was asked if, in considering whether or not the appellants had been guilty of any negligence, he contended that the fact that the truck had been backed along the highway some seventy feet affected the matter, or whether from the standpoint of liability the situation was any different than it would have been had the truck been halted at the place in question while proceeding westerly on the highway. The learned counsel conceded that in the circumstances there was no distinction to be made and I can see none. The fact that the car had been backed into this position was, in my opinion, an irrelevant consideration when, as shown, the oncoming cars were over 1,300 feet distant when the truck was brought to a halt and there was no other traffic in the vicinity.

The question to be decided upon this aspect of the matter in considering the judgment appealed from is as to whether it was actionable negligence, in conditions such as were shown to exist at the time of this accident, to halt a truck equipped with all the warning lights required by the provision of *The Highway Traffic Act* for a brief period for the purpose of collecting the equipment used for construction along the highway. The truck was not "parked" within

the meaning of that expression in 40(1) of the Act (*Speers* v. *Griffin* (1)). The learned Judges of the Court of Appeal consider that it was. With respect, I am of the contrary opinion.

The Legislature has by the Highway Act prescribed regulations to be complied with by those using motor cars upon the highways of the Province, for the protection of others lawfully upon them. These include the requirements as to lights to which I have referred, designed to enable drivers to detect other objects upon the road in time to avoid them and to warn other traffic of the approach or presence of cars at times when, by reason of darkness or other causes, visibility is impaired. Subject to certain provisions such as those contained in s. 40(1), persons operating motor cars, on compliance with these statutory requirements, may lawfully drive them upon the highways and there is no requirement that they must be kept perpetually in motion. To stop a car for some temporary purpose upon its proper side of the road cannot be negligence *per se*. Motor cars are constantly stopping upon the highway for short periods for a variety of purposes, whether they be motor buses, such as was the case in the action of *Colonial Coach Lines Ltd.* v. *Garland* in which judgment was delivered by this Court in April of this year, or passenger or commercial vehicles. Drivers of other vehicles are aware of this and that they must for their own protection keep a vigilant lookout.

The fact that the appellants' truck was lighted in the manner required by the statute does not, of course, of itself relieve them from liability for negligence and there may well be circumstances where to leave a car so lighted for any appreciable period of time might be a negligent act. The appellants were not required, however, to assume that other persons approaching from the east would do so with a complete disregard for their own safety. In *Blyth* v. *Birmingham Water Works Co.* (2), Baron Alderson said that negligence was the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do. Here, both of the appellants had seen the approaching

(1) [1939] O.R. 552. (2) (1856) 11 Ex. Welsh. H. & G. 781 at 783.

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cars when they were a considerable distance away and were, in my opinion, entitled to assume that, as they could see them approaching, the drivers of the approaching cars, the head lights of all of which were turned on, would see the truck with its warning lights in ample time to pass it in safety. I do not consider that it was the duty of the appellants in these circumstances to drive the truck off the highway, or that it was a negligent act to fail to do so.

While being of this opinion, I would come to the same conclusion as that of the learned trial Judge if, contrary to my view, it was a negligent act on the part of Taylor to permit the truck to remain standing upon the highway at the time in question. I respectfully agree with him that the proximate cause of this accident was the undoubted negligence of the respondent Beetham. According to his evidence, he approached the place where the highway crossed the right-of-way of the Chesapeake and Ohio Railway at a speed of twenty miles an hour with the headlights of his car burning. The respondents put in evidence as part of their case in chief a portion of the examination for discovery of the appellant Taylor, in which he said that he had first seen the three cars approaching from the east when they were some 1,200 feet east of the railroad track, a statement which he repeated when giving evidence on his own behalf. The appellant McKee, who was a short distance away from the place where Taylor stopped the truck, said that he had seen the cars approaching when they were at least a quarter of a mile east of the railroad. The respondent's car was the last of these three cars but the evidence of Beetham is entirely silent regarding them and it would appear that he had not seen or had not noticed either of them, though they were only a short distance ahead of him and passed the truck in the customary manner almost immediately before his vehicle collided with it. The point of impact was found to have been 150 feet west of the track, yet Beetham driving, as he says, at only twenty miles an hour, a speed which would have enabled him to stop his truck within 40 feet and with the head lights burning, proceeded due west upon the north half of the highway without swerving, driving in to the rear of the stationary truck. I do not consider that the evidence of Beetham sustains the view that his vision was

obscured by fog at the time he crossed the railroad track but if, indeed, it was, it was his negligent act in continuing at an undiminished speed which caused the accident.

I would allow this appeal and restore the judgment at the trial. The appellants should have their costs throughout.

CARTWRIGHT J. (dissenting):—The relevant findings of the learned trial judge are stated in the judgment of my brother Kellock.

As I read the reasons of the learned trial judge, he does not discredit the evidence of Beetham generally or regard him as an untruthful witness although he does reject that part of his testimony as to encountering a patch of fog just as he crossed the railway tracks about 150 feet east of the point of collision. The reason assigned by the learned trial judge for rejecting this part of Beetham's evidence is that it was inconsistent with an answer made by him on his examination for discovery which, at the trial, he did not remember having made but which it was proved he did make.

The shorthand reporter who had taken down the examination was called as a witness and her evidence so far as relevant is as follows:—

Mr. Holland: Q. Would you refer to your notes, please, perhaps one-third of the way through Mr. Beetham's examination. We had been talking about fog banks and the actual number of the question is Question 82 and 83? A. Yes, sir.

Q. You have looked at that? A. I have a reference here to fog banks.

Q. Your questions are not numbered?—A. Not in my shorthand notes, no.

Q. Following the question, "How thick were these fog banks"? then we have another question: "For what period of time would you be going through a fog bank, for instance? A. Well, it would be about 15 or 20 feet at a time".

Q. Have you looked that up? A. Yes.

Q. Would you read the next two questions and answers?

A. "Q. I see, when was the last fog bank you went through prior to the accident? A. I don't recall that.

Q. You have no idea? A. No".

His Lordship: Does that conform with the transcript?

Mr. Holland: Yes, my Lord.

On reading the whole of Beetham's testimony I incline to agree with Mr. Dubin's submission that the probable explanation of these answers is that Beetham understood

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the questions to refer not to the bank of fog which blew in immediately preceding the impact but to banks of fog encountered prior to that time; but, be this as it may, accepting the primary facts as found by the learned trial judge, I am in agreement with the view of the Court of Appeal that this is a case in which the negligent acts of both parties were continuing and effective causes of the collision.

On the evidence the concurrent findings of fact that both parties were negligent could not be successfully challenged. The difficult question on which the Court of Appeal has differed from the learned trial judge is as to whether a clear line can be drawn between the negligence of Taylor and that of Beetham so that the negligence of the latter is to be regarded as the only effective cause of the accident.

The learned trial judge refers to the conduct of the appellants in leaving the truck on the pavement when it could have been kept entirely off it as "extreme foolishness" and continues:—

> I am completely satisfied that the truck need not have been on the pavement prior to the accident. If it was on the pavement unnecessarily then those who were in control of that vehicle were showing less than normal commonsense to put it there, and I think that Mr. McKee himself realized that it was a highly dangerous thing to do for when conversing with Mr. Malenfant shortly after, he made such an admission.

I respectfully agree with these observations. The danger involved in leaving the truck on the highway was that the driver of some vehicle proceeding westerly along the highway, who would have no reason to anticipate the presence of the stationary truck, might fail to see it in time to avoid a collision, perhaps by reason of the bad visibility caused by the weather conditions, perhaps through momentary inattention, perhaps by reason of some other cause. It is not now disputed that Beetham was negligent in failing to see the truck or in failing to realize that it was a stationary obstruction sooner than he did, but I think the conclusion inescapable that as soon as he did realize the situation he applied his brakes. He was in fact too late in doing this and more until he "came to in the hospital".

The question whether on the findings of the learned trial judge as to the primary facts the negligence of Beetham was the sole cause or only a contributory cause of the collision is itself a question of fact, but it appears to me to be

one with which the Court of Appeal is as well able to deal as was the learned trial judge and I agree with the view of the former expressed by F. G. MacKay J.A., when after referring to the judgments in *Admiralty Commissioners* v. *S. S. Volute* (1) and *Marvin Sigurdson* v. *Electric Ry. Co.* (2) he says:—

> Applying these principles to the facts of the present case, as found by the learned trial judge, I am of opinion that the cause of the accident was the combined negligence of the plaintiff Beetham and the defendant Taylor, and that the negligent acts of each of them were so closely involved the one with the other in time, place and circumstances, as to render them in combination the effective cause of the accident and I would apportion the responsibility to each of them equally.

Where two parties have been negligent, the question of fact whether the dividing line between such negligences is clearly visible is often difficult and I think it is so in this case. I have, however, as indicated above, reached the conclusion that the right answer to the question is that given by the Court of Appeal. Had I been doubtful I would have thought it our duty to affirm the decision of the Court of Appeal on the principles stated in *Demers* v. *Montreal Steam Laundry Co.* (3).

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: *McTague, Deziel, Clark & Holland.*

Solicitors for the respondents: *Riordon & Mousseau.*

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*PRESENT: Taschereau, Kellock, Estey, Cartwright and Fauteux JJ.

(1) [1922] A.C. 129. (2) [1953] A.C. 291.
(3) (1897) 27 Can. S.C.R. 537.