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*May 7, 23.
*Jun. 11.

ALVA GEORGE RINTOUL (*Plaintiff*) .....APPELLANT

AND

X-RAY AND RADIUM INDUSTRIES LIMITED AND ALBERT OUELLETTE (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Automobiles—Collision with stationary car —Sudden failure of brakes—Defence of inevitable accident.

While driving a car owned by his employer, the respondent company, O. stopped at an intersection for a traffic-light. His service brakes worked properly. The traffic-light having changed, he proceeded and saw that the line of traffic ahead of him was at a standstill. The appellant's car was at the rear of this line of traffic. At about 150 feet away from the appellant's car, O. applied his service brakes and found that they did not work. When his car was 50 to 75 feet from that of the appellant, he applied his hand brakes. This reduced his speed from 12 m.p.h. to 6 m.p.h. but did not stop his car which struck the rear of the appellant's car. The trial judge accepted the defence of inevitable accident and dismissed the action. This judgment was affirmed by the Court of Appeal without written reasons.

Held: The appeal should be allowed.

The respondents have failed to prove two matters essential to the establishment of the defence of inevitable accident: (1) that the alleged failure of the service brakes could not have been prevented by the exercise of reasonable care on their part and (2) that, assuming that such failure occurred without negligence on their part, O. could not, by the exercise of reasonable care, have avoided the collision which he claimed was the effect of such failure.

On the first matter, the respondents have made no attempt to prove that the sudden failure could not have been prevented by reasonable care on their part and particularly by adequate inspection. They called no witness to explain why the service brakes which were working properly immediately before and immediately after the accident and passed satisfactorily the test prescribed by the regulations, failed momentarily at the time of the accident. Furthermore, they have made no attempt to show that the defect could not reasonably have been discovered.

As to the second matter, they have failed to show that O. could not have avoided the accident by the exercise of reasonable care. If the hand brakes had been in the state of efficiency prescribed by the regulations, O. could have stopped his car before the collision occurred. At the least, the unexplained failure to comply with the regulations was evidence of a breach of the common law duty to take reasonable care to have the car fit for the road.

APPEAL from the judgment of the Court of Appeal for Ontario, affirming the judgment at trial.

O. F. Howe, Q.C. for the appellant.

W. G. Gray for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario dismissing, without written reasons, an appeal from a judgment of Barlow J. whereby the plaintiff's action was dismissed with costs and the third party proceedings were also dismissed with costs. The learned trial judge assessed the plaintiff's damages at $2,885.50.

It is apparent from the reasons of the learned trial judge that he accepted the evidence of the respondent Ouellette as to the facts leading up to the collision and the appeal was argued on that basis.

The facts as deposed to by Ouellette were as follows. On April 13, 1954, at about 8.50 a.m. Ouellette was driving a 1952 Dodge motor vehicle owned by his employer, the respondent X-Ray and Radium Industries Limited, easterly on Wellington Street in the city of Ottawa. He stopped at the intersection of Bayview Avenue for a traffic-light and his service brakes worked properly. From the time that he had left his home up to this point he had applied his service brakes five times and on each occasion they had worked properly. The traffic-light having changed he proceeded across Bayview Avenue and saw that the line

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of traffic ahead of him was at a standstill. The appellant's car was at the rear of this line of traffic. When Ouellette was about 150 feet away from the appellant's car he took his foot off the accelerator and applied his service brakes, at this moment he was proceeding uphill at a speed of not more than twelve miles per hour; he found that the brakes did not work; the brake pedal went down to the floor of the car without his feeling any braking action; he allowed the pedal to rise and pressed it down again, still without getting any braking action. Thinking that the service brakes had become useless, he applied his hand brakes; at the moment of this application his car was between 50 and 75 feet from that of the appellant. The application of the hand brakes reduced the speed of his car but did not stop it and it was still moving at about 6 miles per hour when it struck the rear of the appellant's vehicle.

Police Constable Brennan, called as a witness by the defendants, had made an investigation a few minutes after the accident. His evidence as to the service brakes is as follows:—

HIS LORDSHIP: Now witness, tell us what did you do and where did you do it?

A. I checked the brake pedal by pressing on it, and I found that the pedal went to the floorboards.

Q. Where did you do this?

A. At the scene.

Q. Right on the road there?

A. Yes.

Q. What did you do?

A. I drove the car to the station, and I found on driving it in that the brakes worked. They would stop the car at any time. The brakes were tested on Fairmount Avenue by the Tapely Brake Tester.

Q. Were you there?

A. Yes. Three successive tests were taken. The first two tests, at 20 miles an hour, registered 14 feet to stop, or 95 per cent, and the third test—I don't recall what the third test was.

MR. GRAY: Q. Can you recall on approximately how many occasions you found it necessary to use the brakes as you were driving from the scene of the accident to the police station?

A. Possibly about three times.

Q. And the brakes worked on those occasions?

A. They did.

Brennan testified that he is experienced in testing brakes and that brakes are considered good if they will stop a car going at 20 miles per hour in forty feet. Following the test made by Brennan, Ouellette drove the car away from the Police Station.

Ouellette testified that on the day prior to the accident he had "work done on the brakes" of the motor vehicle at the garage of the third party.

In the Statement of Claim, the appellant, after stating that the respondents' car had run into his car while stationary on the highway, alleged that Ouellette was negligent in the following respects amongst others:—

(*a*) He failed to keep a proper lookout;

(*b*) He failed to bring his vehicle to a stop when he saw or should have seen that the traffic ahead of him, going in the same direction, had come to a complete stop;

(*c*) His brakes were not in good repair;

(*d*) He failed to apply his brakes in time, or at all, to avoid an accident which he knew, or should have known, was likely to occur;

The defence relied on at the trial and before us was pleaded in the Statement of Defence as follows:—

(4) The Defendants allege and the fact is that at the time and place referred to in the Statement of Claim the brakes of the Defendant motor vehicle suddenly and without warning failed and it was in the circumstances impossible for the Defendant driver to avoid the collision.

(5) The Defendants allege and the fact is that they had taken all reasonable and proper precaution in the care of the brakes on the said motor vehicle and plead that the said collision was an inevitable or an unavoidable accident.

There can be no doubt that, generally speaking, when a car, in broad daylight, runs into the rear of another which is stationary on the highway and which has not come to a sudden stop, the fault is in the driving of the moving car, and the driver of such car must satisfy the Court that the collision did not occur as a result of his negligence. The learned trial judge regarded this principle as applicable to the case at bar but was of the view that the unexpected failure of the service brakes placed Ouellette in a situation of emergency in which he acted without negligence and that the collision was the result of an inevitable accident.

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The defence of inevitable accident has been discussed in many decisions. A leading case in Ontario is *McIntosh* v. *Bell* (1), which was approved by this Court in *Claxton* v. *Grandy* (2). At page 187 of the report of *McIntosh* v. *Bell*, Hodgins J.A. adopts the words of Lord Esher M.R. in *The Schwan* (3), as follows:—

> . . . In my opinion, a person relying on inevitable accident must shew that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill.

In my view, in the case at bar the respondents have failed to prove two matters both of which were essential to the establishment of the defence of inevitable accident. These matters are (i) that the alleged failure of the service brakes could not have been prevented by the exercise of reasonable care on their part, and (ii) that, assuming that such failure occurred without negligence on the part of the respondents, Ouellette could not, by the exercise of reasonable care, have avoided the collision which he claims was the effect of such failure.

As to the first matter, assuming that the service brakes failed suddenly, the onus resting on the respondents was to show that such failure could not have been prevented by the exercise of reasonable care. In Halsbury, 2nd Edition, Volume 23, page 640, section 901, the learned author says:—

> Driving with defective apparatus if the defect might reasonably have been discovered . . . (and other matters) . . . are negligent acts which render a defendant liable for injuries of which they are the effective cause.

This passage has been approved by McCardie J. in *Phillips* v. *Brittania Hygienic Laundry Co.* (4) and by Hogg J.A. in *Grise* v. *Rankin et al.* (5), and, in my opinion, correctly states the law.

In the case at bar the respondents have made no attempt to prove that the sudden failure could not have been prevented by reasonable care on their part and particularly by adequate inspection. They called no witness to explain the extraordinary fact that the service brakes which were working properly immediately before and immediately

(1) [1932] O.R. 179.
(2) [1934] 4 D.L.R. 257 at 263.
(3) [1892] P. 419 at 429.
(4) [1923] 1 K.B. 539 at 551 and 552.
(5) [1951] O.W.N. 21 at 22.

after the accident and passed satisfactorily the test prescribed in the regulations failed momentarily at the time of the accident. Without going so far as to say that such a story appears to be intrinsically impossible, it is clear that its nature was such as to cast upon the defendants the burden of furnishing a clear and satisfactory explanation of so unusual an occurrence.

Furthermore, the respondents have made no attempt to shew that the defect, whatever it was, could not reasonably have been discovered. The evidence is that the respondents' car was a 1952 Dodge. There is no evidence: (*a*) as to when it was purchased, or (*b*) whether it was purchased new or second-hand, or (*c*) how far it had been driven, or (*d*) how often, if ever, the service brakes had been inspected, or (*e*) how often, if ever, the hand brakes had been inspected. The only evidence touching the point at all is Ouellette's statement quoted above that there "was work done on the brakes" the day before the accident. There is nothing to indicate whether the brakes referred to in this statement were the service brakes or the hand brakes although in argument it seemed to be assumed that the reference was to the service brakes. No evidence was given as to what instructions were given to the third party, or as to what work was done by him, or as to what report, if any, was made by the third party when the car was delivered, or as to whether the third party was competent to inspect or repair brakes. The onus resting on the respondents in this regard is not discharged by the bald statement that on the day before the accident there was work (unspecified) done on the brakes.

Passing to the second matter mentioned above, i.e., that even assuming that the failure of the service brakes occurred without negligence on the part of the respondents, they have failed to show that Ouellette could not have avoided the collision by the exercise of reasonable care, it may first be observed that the relevant statutory provisions in force in Ontario are as follows. *The Highway Traffic Act* R.S.O. 1950, C. 167 provides:—

> 12 (1) Every motor vehicle other than a motorcycle, when operated upon a highway shall be equipped with brakes adequate to stop and to hold such vehicle, having two separate means of application, each of which means shall apply a brake or brakes effective on at least two wheels and each of which shall suffice to stop the vehicle within a

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proper distance, and each means of application shall be so constructed that the cutting in two of any one element of the operating mechanism shall not leave the motor vehicle without brakes effective on at least two wheels.

* * *

(4) All such brakes shall be maintained in good working order and shall conform to regulations not inconsistent with this section to be made by the Department.

The regulations made pursuant to the *Act* provide in part as follows:—

1. In making a brake test a Bear Hydraulic Brake Tester, Cowdrey Dynamic Brake Tester, James Decelerometer, Muether Stopmeter, Tapley Brake Testing Meter, or such other instrument as may be approved by the Minister, shall be used.

* * *

4 (1) The service brakes of a motor vehicle or motor vehicle and trailer shall be adequate to stop the vehicle or vehicles within forty feet when travelling at the rate of twenty miles an hour on a dry asphalt or concrete pavement free from loose material and having not more than one per cent grade.

(2) The hand brakes of a motor vehicle or motor vehicle and trailer shall be adequate to stop the vehicle or vehicles within sixty feet when travelling at the rate of twenty miles per hour, on a dry asphalt or concrete pavement free from loose material and having not more than a one per cent grade and to hold the vehicle or vehicles stationary at any place on any highway.

Accepting the evidence of Ouellette as to the speed and position of his car at the instant he actually applied the hand brakes, it is obvious that if they had been in the state of efficiency prescribed by the regulations he could have stopped his car before the collision occurred, even if the car had not been, as it was, proceeding uphill. It is unnecessary to consider whether the effect of the statute and regulations was to cast an absolute duty on the respondents to have the hand brakes in the prescribed condition, for, at the least, the unexplained failure to comply with the regulation was evidence of a breach of the common law duty to take reasonable care to have the motor vehicle fit for the road. Apart from statute there must obviously be a common law duty on anyone who drives a motor vehicle on a highway to have it equipped with brakes, and the regulations may well be taken as the expression of the Legislature's view as to what constitutes a reasonable braking system.

In my opinion, on the evidence the respondents have not only failed to show that the alleged failure of the service brakes was inevitable, they have also failed to show that after such failure occurred Ouellette could not by the exercise of reasonable care have avoided the collision. It follows that the appeal of the plaintiff should be allowed.

It remains to consider what order should be made in the third party proceedings. Following the issue of the third party notice the local Master of the Supreme Court of Ontario at Ottawa made an order on the defendants' application for directions providing in part as follows:—

> AND IT IS FURTHER ORDERED that upon the Third Party issue being entered for Trial it shall be placed on the Trial list next following the action between the Plaintiff and the Defendants and shall be tried at or after the Trial of the action between the Plaintiff and the Defendants as the Trial Judge may direct.

At the trial the third party was represented by counsel who took part in the trial of the issues between the plaintiff and the defendants; but it was made clear by the learned trial judge that he would first dispose of the action between the plaintiff and the defendants and, in the event of the plaintiff succeeding, he would then proceed with the trial of the third party issue.

The learned trial judge having dismissed the plaintiff's action at the conclusion of the hearing it followed that the third party proceedings should also be dismissed and he so directed. The plaintiff having appealed to the Court of Appeal for Ontario the defendants served a notice of appeal as against the third party. The Court of Appeal dismissed the plaintiff's appeal at the conclusion of the argument and, accordingly, also dismissed the defendants' appeal in the third party proceedings.

The plaintiff having appealed to this Court, the defendants did not appeal in the third party proceedings. At the conclusion of the argument of the plaintiff's appeal in this Court on May 7, 1956, the defendants' counsel asked that the appeal be adjourned to give him an opportunity of appealing from the dismissal of the defendants' claim against the third party. The hearing of the appeal was adjourned, accordingly, and came on again for hearing on

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May 23 when the argument was concluded. In the meantime the defendants had obtained an extension of time for appealing in the third party proceedings and had perfected their appeal.

As has already been pointed out the issue between the defendants and the third party has not yet been tried and, in my opinion, it should be ordered that the judgment of the learned trial judge and that of the Court of Appeal so far as they deal with that issue be set aside and that the third party proceedings proceed to trial in accordance with the practice of the Court.

In the result the appeal of the plaintiff is allowed and judgment is directed to be entered in his favour against both defendants for $2,885.50 with costs throughout including any costs incurred by the plaintiff in the third party proceedings. The judgment of the learned trial judge and that of the Court of Appeal dealing with the third party proceedings are set aside and it is ordered that the issues raised in those proceedings be tried in accordance with the practice of the Court. The costs, as between the defendants and the third party, of the former trial and of the appeal to the Court of Appeal are to be disposed of by the judge presiding at the trial of the third party proceedings. There should be no order as to the costs of the appeal to this Court insofar as it relates to the third party proceedings.

Appeal allowed with costs.

Solicitors for the appellant: *Howe, Howe & Rowe.*

Solicitors for the respondents: *Borden, Elliot, Kelley, Palmer & Sankey.*