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Nov. 4

STERLING TRUSTS CORPORATION, Executor of the last will and testament of Dorothy Margaret Brown, Deceased, and WILLIAM JOHN BROWN (*Plaintiffs*) ..... APPELLANTS;

AND

HENRY POSTMA, FRED A. LITTLE and FREDERICK H. LITTLE (*Defendants*) ..... RESPONDENTS.

STERLING TRUSTS CORPORATION, Executor of the last will and testament of Dorothy Margaret Brown, Deceased, and WILLIAM JOHN BROWN (*Plaintiffs*) ..... APPELLANTS;

AND

HENRY POSTMA, OLIVE RUSSELL LITTLE, Executrix of the estate of Fred A. Little, and FREDERICK H. LITTLE (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Negligence—Truck involved in collision between two automobiles—Owner and driver of truck found jointly and severally liable with driver of one of the automobiles—Driver of automobile alone held liable on appeal—New trial ordered by Supreme Court on certain questions.

As a result of a collision between an automobile owned and operated by the defendant P and an automobile owned and operated by the plaintiff B, the plaintiff's wife was killed and B suffered grave and permanent injuries. P had veered to the left in order to avoid hitting a truck which was proceeding in front of him and as a consequence he collided with B's automobile which was approaching in the opposite direction. The trial judge found L Jr. as owner and L Sr. as driver of the truck jointly and severally liable with P for the damages sustained by the plaintiffs. As between the defendants, the trial judge attributed one third to the negligence of L Sr. and two thirds to that of P. An appeal by O L, as executrix of the estate of L Sr., and L Jr. was allowed and

*PRESENT: Cartwright, Judson, Ritchie, Hall and Spence JJ.

so, in the result, P was held alone liable for the damages as fixed by the trial judgment. P did not appear upon the appeal to the Court of Appeal nor upon the further appeal to this Court.

The grounds on which it was argued that negligence should be imputed to the L's were (i) that the tail-light of the truck was not lighted, (ii) that there was not on the rear of the truck a reflector as required by s. 40(2) of the Ontario *Highway Traffic Act,* and (iii) that the driver of the truck was negligent in slowing down and attempting to make a left hand turn without adequate warning and without ascertaining that this movement could be made in safety. As to the second ground, the trial judge found as a fact that there was no reflector on the L truck but, having found that the tail-light was not lighted and that this was an effective cause of the collision, he did not deal with the question whether the lack of a reflector was also an effective cause.

As to the first ground, three questions were raised for decision, (i) was the tail-light on the L truck lighted?, (ii) if not, was the failure to have it lighted an effective cause of the collision? and, (iii) if the second question was answered in the affirmative did the result follow that the respondents were liable for the damages caused to the appellants.

The trial judge answered each of these questions in favour of the appellants. It was conceded that in answering the first question the trial judge misdirected himself as to the incidence of the burden of proof, holding that it was for the L's to show that the tail-light was lighted. The Court of Appeal held that the first question should be answered in the affirmative, but, in so doing mistakenly proceeded on the assumption that certain answers made by L Jr. on his examination for discovery had been admitted in evidence and were evidence against the appellants.

Held (Judson and Ritchie JJ., dissenting): The appeal should be allowed and the judgments of the Courts below set aside except in so far as they found P liable to the appellants, and a new trial should be had of the questions, (i) whether the respondents were liable to the appellants, (ii) if the respondents were found liable to the appellants, the degrees of fault as between the respondents and P, and (iii) the quantum of the appellants' damages.

Per Cartwright, Hall and Spence JJ. The question whether the tail-light on the L truck was lighted at the relevant time could not be answered from a perusal of the written record. A new trial was necessary, and if it should be found as a fact that the tail-light was not lighted it would be for the judge on the evidence adduced before him to decide whether or not that failure was an effective cause of the collision.

The respondents had further argued that even if, contrary to their submission, it should be found that the tail-light was not lighted and that the failure to have it lighted was an effective cause of the collision, they were not to be found liable in the absence of evidence that the driver of the truck knew or ought to have known that the tail-light was out. This argument was rejected. Once it was found (i) that the respondents committed a breach of the statutory duty to have the tail-light lighted, and (ii) that that breach was an effective cause of the appellant's injuries, the respondents were *prima facie* liable for the damages suffered by the appellants.

It was not necessary in this case to decide whether the statutory duty to have the tail-light lighted was an absolute one or, if not absolute, to

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attempt to define the extent of the burden cast upon a person who had committed the breach because in the case at bar it could not be said that the respondents had discharged it. The position of the respondents was not that there was a sufficient explanation to account for and excuse the fact that the light was not lighted; their position was that the light was in fact lighted at all relevant times.

Per Judson and Ritchie JJ., *dissenting*: The provisions of s. 51 of *The Highway Traffic Act* were no more effective than the decision in *Kuhnle v. Ottawa Electric Railway Co. and Green,* [1946] 3 D.L.R. 681, to relieve the appellants from the burden which they assumed on the pleading of proving that the negligence of L Sr. combined with that of P to cause the collision and resulting damage. The only evidence given on behalf of the appellants as to the absence of a tail-light on the L truck was that given by P, and as this only served to raise a doubt in the trial judge's mind, the Court of Appeal was right in concluding that the onus cast upon the appellants to prove this allegation was not satisfied. The only other allegation of negligence which appeared to find any support in the evidence was that L "was in the process of making an unusual manoeuvre without first ascertaining that it could be done in safety". However, the evidence did not establish that any negligent manoeuvre by L caused or contributed to the accident. Thus the case could be disposed of as it was by the Court of Appeal on the ground that the appellants failed to discharge the burden of proving that the tail-light on the truck was either not operating or defective, and that this constituted negligence which contributed to the accident.

The Court of Appeal was right in its reversal of the trial judge on the grounds: (i) that he was in error in putting the burden of proof on the respondents, and (ii) in his failure to find that P's negligence was the sole effective cause of the accident.

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Moorhouse J. Appeal allowed and a new trial directed on certain questions, Judson and Ritchie JJ. dissenting.

B. J. Thomson, Q.C., for the plaintiffs, appellants.

J. J. Robinette, Q.C., and *R. E. Nourse, Q.C.*, for the defendant, respondent, Olive Russell Little.

W. B. Williston, Q.C., and *J. Sopinka*, for the defendant, respondent, Frederick H. Little.

CARTWRIGHT J.:—The facts out of which this appeal arises and the course of the proceedings in the Courts below are set out in the reasons of my brother Ritchie and in those of my brother Spence.

The following findings made in both Courts below are not now challenged, (i) that the collision, in which Mrs. Brown was fatally injured and William John Brown suffered grave and permanent injuries, was caused by negligence on the

part of Postma and (ii) that Brown was not guilty of any negligence. The question of difficulty is whether there was negligence in the maintenance or operation of the truck owned by Frederick H. Little and driven by his father, the late Frederick A. Little, which was also an effective cause of the collision.

The grounds on which it was argued before us that negligence should be imputed to the Littles were (i) that the tail-light of the truck was not lighted, (ii) that there was not on the rear of the truck a reflector as required by s. 40(2) of *The Highway Traffic Act,* R.S.O. 1950, c. 167 [now R.S.O. 1960, c. 172, s. 51(2)], and (iii) that the driver of the truck was negligent in slowing down and attempting to make a left hand turn without adequate warning and without ascertaining that this movement could be made in safety.

The first and third of these grounds were pleaded in the statement of claim as originally delivered; the second was pleaded in an amendment permitted by the learned trial judge at the opening of the trial.

As to the third ground, I agree with Mr. Thomson's submission that the circumstance that in giving evidence Postma limited his complaints to the lack of tail-light and reflector does not prevent the appellants taking the position that the late Fred A. Little was otherwise negligent, if the evidence taken as a whole supports that position.

As to the second ground, the learned trial judge found as a fact that there was no reflector on the Little truck but, having found that the tail-light was not lighted and that this was an effective cause of the collision, he did not deal with the question whether the lack of a reflector was also an effective cause.

As to the first ground, three questions were raised for decision, (i) was the tail-light on the Little truck lighted?, (ii) if not, was the failure to have it lighted an effective cause of the collision? and, (iii) if the second question is answered in the affirmative does the result follow that the respondents are liable for the damages caused to the appellants?

The learned trial judge answered each of these three questions in favour of the appellants. It is conceded that in answering the first question the learned trial judge mis-

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directed himself as to the incidence of the burden of proof, holding that it was for the Littles to shew that the tail-light was lighted.

The Court of Appeal held that the first question should be answered in the affirmative, but, in so doing, mistakenly proceeded on the assumption that certain answers made by Frederick H. Little on his examination for discovery had been admitted in evidence and were evidence against the appellants.

After an anxious perusal of all the admissible evidence bearing on the question whether the tail-light on the Little truck was lighted at the relevant time, I have been forced to the conclusion that this question cannot be answered from a perusal of the written record. The learned trial judge has found that Postma, though confused, was honest and when all his evidence is read it is plain that on two points he did not waver; he reiterates that the tail-light was not lighted and that if it had been lighted he would have seen the truck in sufficient time to have avoided the fatal collision. But for the misdirection as to onus I do not think that an appellate court could have interfered with the finding of fact that the tail-light was not lighted. My difficulty is that I cannot be certain that the learned trial judge would have made this finding if he had not ruled wrongly as to the burden of proof. There is in the written record evidence on which it might be found that the tail-light was lighted and there is also evidence on which the contrary could be found.

In my respectful view, it would be mere guess-work to make either finding from the written record; the only tribunal by which such a finding can safely be made is one that has seen and heard the witnesses. For this reason I have reluctantly reached the conclusion that a new trial should be directed, unless a further argument of the respondents to be dealt with hereafter is entitled to prevail.

If it were established that the tail-light was not lighted, it would be my opinion that there was evidence to support the finding of the learned trial judge that this failure was an effective cause of the collision. If at the new trial it is found as a fact that the tail-light was not lighted it will be for the judge on the evidence adduced before him to decide whether or not that failure was an effective cause of the collision.

The further argument of counsel for the respondents referred to above is that even if, contrary to their submission, it should be found that the tail-light was not lighted and that the failure to have it lighted was an effective cause of the collision the respondents are not to be found liable in the absence of evidence that the driver of the truck knew or ought to have known that the tail-light was out. In my opinion this argument is not entitled to prevail.

The decision of the House of Lords in *London Passenger Transport Board v. Upson*[1] appears to me to proceed on the basis that the breach by the driver of a motor vehicle of a statutory provision which is designed for the protection of other users of the highway gives a right of action to a user of the highway who is injured as a direct result of that breach. The statutory provision requiring a motor vehicle to have a lighted tail-light when it is travelling on a highway after dark is designed for the protection of other users of the highway, particularly the drivers of overtaking vehicles. Its primary purpose is to prevent the occurrence of such a disaster as that out of which this case arises.

In my opinion, the law on this question is so well settled that it is unnecessary to multiply citations of authority. There have been differences of opinion as to whether an action for breach of a statutory duty which involves the notion of taking precautions to prevent injury is more accurately described as an action for negligence or in the manner suggested by Lord Wright in *Upson's* case, at p. 168, in the following words:

> A claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense...

I do not find it necessary in this case to attempt to choose between these two views as to how this cause of action should be described. I think it plain that once it has been found (i) that the respondents committed a breach of the statutory duty to have the tail-light lighted, and (ii) that that breach was an effective cause of the

[1] [1949] A.C. 155.

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appellant's injuries, the respondents are *prima facie* liable for the damages suffered by the appellants. I wish to adopt two observations made in the House of Lords in *Lochgelly Iron and Coal Co. Ltd. v. M'Mullan*[1] as applicable to the case at bar.

At p. 23, Lord Wright said:

> In such a case as the present the liability is something which goes beyond and is on a different plane from the liability for breach of a duty under the ordinary law, apart from the statute, because not only is the duty one which cannot be delegated but, whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute...

At p. 9, Lord Atkin said:

> I cannot think that the true position is, as appears to be suggested, that in such cases negligence only exists where the tribunal of fact agrees with the Legislature that the precaution is one that ought to be taken. The very object of the legislation is to put that particular precaution beyond controversy.

I have used above the expression that once it is found that the breach of the statute was committed and was an effective cause of the collision the respondents are *prima facie* liable to the appellants. The question then arises whether the respondents can absolve themselves from liability by showing that they had done everything that a reasonable man could have done under the circumstances to prevent the occurrence of the breach. A passage in the judgment of Lord Uthwatt in *Upson's* case, at p. 173, seems to suggest that this can be done by showing that under the circumstances it was impossible for the defendants to avoid committing the breach so that the maxim *lex non cogit ad impossibilia* takes effect. On the other hand in *Galashiels Gas Co. Ltd. v. O'Donnell or Millar*[2] the House of Lords held the statutory duty there under consideration to be absolute.

I do not find it necessary in this case to decide whether the statutory duty to have the tail-light lighted was an absolute one or, if it be not absolute, to attempt to define the extent of the burden cast upon a person who has committed the breach because, even if it is not so heavy as Lord Uthwatt seems to suggest, I do not think it can be said that in the case at bar the respondents have discharged it. The position of the respondents is not that

[1] [1934] A.C. 1.

[2] [1949] A.C. 275.

there was a sufficient explanation to account for and excuse the fact that the light was not lighted, their position is that the light was in fact lighted at all relevant times. If the burden could be discharged simply by showing that the person upon whom it lay neither intended nor knew of the breach, the protection which it is the purpose of the statute to afford would in most cases prove illusory.

Before parting with this phase of the matter I think it desirable to refer to the three cases which were chiefly relied on by counsel for the respondents. These are *Falsetto v. Brown*[1]; *Grubbe v. Grubbe*[2], and *Fuller v. Nickel*[3].

In *Falsetto v. Brown* an automobile had run into the rear of a stationary truck in darkness. Kingstone J., the trial judge, found that the tail-light of the truck was not lighted. He found that the driver of the automobile was negligent in driving too fast under the weather conditions and in not keeping a proper look-out. He found both parties equally to blame. He stated his reasons for imposing liability on the driver and the owner of the truck as follows:

> Notwithstanding the fact that the driver may not have been aware that his light was out...the driver of the truck and the truck owner are still responsible to any person who, by reason of the failure of the rear light under such circumstances, collides with a vehicle ahead of it, whether stationary or in motion.

An appeal by the owner and driver of the truck was allowed by the Court of Appeal, composed of Latchford C.J. and Riddell and Davis JJ.A., Riddell J.A., dissenting in part. The complete reasons of Latchford C.J. are as follows:

> I agree with the result reached by my brother Davis on the ground that the efficient cause of the accident, the causing cause, was the negligence of the driver of the sedan.

Davis J.A. examined the evidence in considerable detail and reached the following conclusion, at p. 658 of the report:

> I am satisfied that the negligence of the driver of the sedan was solely responsible for the accident which gave rise to the damages sued for in these actions. He was driving, without having regard to the conditions existing at the time, at such a rate of speed and in such a manner as to be unable to control his car within the range of visibility. On his own evidence he did not see the truck when he should have seen it had he been looking, and when he did see it was unable to control his car and crashed into the truck.

[1] [1933] O.R. 645.
[2] [1953] O.W.N. 626.
[3] [1949] S.C.R. 601.

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Davis J.A. had opened the preceding paragraph of his reasons, on the same page, with the words:

> But assuming that there was negligence, the plaintiffs in order to succeed must show that the negligence had a causal connection with the loss or damage that arose out of the accident.

No one would quarrel with this result on the view of the facts taken by the learned Justice of Appeal. It is not suggested that the breach of a statutory duty, any more than the breach of a duty owed under the ordinary law, gives a right of action to a plaintiff unless the breach has been a cause of the damage which he has suffered.

However, Davis J.A. gave an additional reason for allowing the appeal which is summarized in the following sentence at p. 656:

> The statutory duty to have a red tail lamp burning at certain times imposed by the statute is a public duty only to be enforced by the penalty imposed for a breach of it, and it was not the intention of the Legislature that everyone injured through a breach of any statutory requirement should have a right of civil action against the owner for damages.

While this statement was not necessary for the decision of the appeal, it was a ground on which Davis J.A. based his decision and cannot be regarded as having been said *obiter*. It was not, however, the judgment of the Court. It has already been shewn that Latchford C.J. refrained from agreeing with it and proceeded on the other ground on which Davis J.A. founded his judgment; Riddell J.A. disagreed with it, holding that the owner and driver of the truck were liable to the passengers in the sedan but not to the driver of the sedan because, in his view, the latter was guilty of ultimate negligence.

Later in the same year a similar question came before the Court of Appeal in *Irvine v. Metropolitan Transport Co. Ltd.*[1] The breach of statutory duty committed by the defendant was leaving its truck parked on the travelled portion of the highway contrary to s. 35*a* of *The Highway Traffic Act* then in force. The plaintiff's vehicle ran into the parked truck from behind. The trial judge found both parties at fault and apportioned the blame 75 per cent to the defendant and 25 per cent to the plaintiff.

The Court of Appeal was composed of Mulock C.J.O. and Riddell and Masten JJ.A. The defendant's appeal was dismissed, Riddell J.A. dissenting. In dealing with the

[1] [1933] O.R. 823.

question whether the defendant's breach of the statutory provision gave the plaintiff a right of action, Masten J.A. said at p. 833:

> In considering this phase of the appeal I have not overlooked subsec. 4 of sec. 35 (*a*) which imposes a penalty for violation of any of the provisions of the section.
>
> Upon a consideration of the whole section, I think that, notwithstanding that it prescribes a penalty for breach of the duty imposed, it also creates a cause of action in favour of a particular class of persons, namely, those who are travelling on the highway and suffer damage from breach of the statute. My reasons are (1) that the legislation is for the protection of one particular class of the community; (2) that the penalty is not payable to the party injured; (3) that a penalty of $5.00 up to $50.00 would in most cases be a wholly inadequate compensation for the damages suffered.

The learned Justice of Appeal then referred to a number of authorities and continued at pp. 833 and 834:

> I am therefore of opinion that sec. 35 (*a*) of the Traffic Act applies against the defendant, and that its breach of statutory duty was a wrong which continued down to the moment when plaintiff's car ran into the rear of the truck... Thus this defendant is liable unless the plaintiff was the sole cause of his own injury...

Mulock C.J.O. concluded his reasons as follows at p. 827:

> If I had tried this case I think I would not have found the plaintiff guilty of any negligence, but I am not prepared to overrule the learned trial Judge's finding and, therefore, I approve of the judgment of my brother Masten.

In his dissenting judgment, Riddell J.A. makes no criticism of the propositions of law enunciated by Masten J.A. but takes the view that on the facts the sole *causa causans* of the accident was the ultimate negligence of the plaintiff. *Falsetto v. Brown* was referred to in argument by counsel for the appellant in *Irvine's case* and also in the reasons for judgment of Riddell J.A. I think it clear that the majority of the Court must have disagreed with the proposition of law on the point now under consideration stated by Davis J.A. in *Falsetto v. Brown*. In my respectful view the reasoning of Masten J.A. on this point in *Irvine* is to be preferred to that of Davis J.A. in *Falsetto*.

In *Grubbe v. Grubbe, supra*, the plaintiff had run into the rear of the defendant's motor vehicle which had stopped on the highway without a lighted tail-light. The trial judge found the defendant solely to blame. The Court of Appeal reversed this judgment and held that the negligence of the plaintiff in driving too fast and not having his motor vehicle under proper control was "the sole cause of the

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damages suffered by the parties". The following passage in the reasons of Laidlaw J.A., who delivered the unanimous judgment of the Court, appears to lend some support to the view expressed by Davis J.A. in *Falsetto*. At p. 627, Laidlaw J.A. says:

> With much respect for the judgment of the learned trial Judge, I express the view that he has not approached the determination of the issues in this case in a proper manner. I accept his finding of fact that the rear light of the defendant's vehicle was not lighted when the vehicles stopped on the highway. But it appears to me that the learned judge was improperly influenced to the conclusion that there was negligence on the part of the defendant merely because the rear light of his vehicle was out. That fact alone does not impose liability on the defendant: *Falsetto v. Brown et al.* [1933] O.R. 645.

The note of the case does not shew whether the judgment was delivered at the conclusion of the argument. The reasons refer to no authority other than *Falsetto*. Reading the reasons as a whole I think that it appears that the *ratio* of the decision was that on the facts the absence of a tail-light was not a *causa causans* of the collision. I cannot think that the Court intended to depart from the principles enunciated in *Irvine's* case, *supra,* and in *London Passenger Transport Board v. Upson, supra,* when the reasons make no reference to either of these decisions.

The case of *Fuller v. Nickel, supra,* does not assist the respondents. The following sentence, from the judgment of Estey J., who gave the judgment of the majority, was referred to:

> The appellant's infractions of the *Vehicles and Highway Traffic Act,* both in failing to display clearance lights and having upon his truck a rack 3½ inches too wide, may justify the imposition of penalties, but in fixing the responsibility for a collision in an action between parties they are important only if they constitute a direct cause of that collision.

There is nothing in any of the judgments delivered in that case to suggest that the infractions of the statute would not have rendered the appellant liable if they had been an effective cause of the collision.

It is always unfortunate when a new trial has to be ordered. It is particularly so in this case where so long a time has elapsed since the collision out of which it arises. I can, however, find no escape from the conclusion that the vital question whether or not the tail-light was lighted at the relevant time cannot be safely answered from a perusal of the writen record. At the new trial it will be

taken as decided that Postma was negligent and that Brown was not negligent. The question of the quantum of damages was fully argued before us but I do not think we should deal with it. If the appellants fail at the new trial it will be unnecessary; if they succeed the damages should be assessed in the light of the evidence as to the condition of the appellant William John Brown existing at the time of the new trial.

I would allow the appeal, set aside the judgment of the Court of Appeal and the judgment at the trial except in so far as they find Postma liable to the appellants and direct that a new trial be had of the questions, (i) whether the respondents are liable to the appellants, (ii) if the respondents are found liable to the appellants, the degrees of fault as between the respondents and Postma, and (iii) the quantum of the appellants' damages. It was necessary for the respondents to appeal to the Court of Appeal and the order of that Court as to the costs of the appeal should stand. The appellants shall recover their costs of the appeal to this Court from the respondents. The costs of the former trial as between the appellants and the respondents shall be disposed of by the judge presiding at the new trial hereby directed.

The judgment of Judson and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario allowing the appeal of the executrix of Fred A. Little and Frederick H. Little personally from a judgment of Moorhouse J. whereby he had found Frederick H. Little as owner and Fred A. Little as driver of a Dodge truck, jointly and severally liable with the defendant, Henry Postma, for damages in the amount of $166,720, which he found to have been sustained by the plaintiffs as a result of a collision between a 1953 Meteor sedan, owned and operated by Henry Postma and a 1956 Volkswagen, owned and operated by the plaintiff, William Brown, as a result of which Mrs. Brown was killed and Mr. Brown sustained very extensive permanent injuries.

As between the defendants, the learned trial judge attributed one third to the negligence of Fred A. Little and two thirds to that of Postma. The effect of the judgment of the Court of Appeal is to dismiss the action as against the

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Littles. The defendant Postma did not appeal to the Court of Appeal and has not appealed to this Court.

The accident giving rise to this litigation occurred after dark (*i.e.*, between 5.20 and 5.30 p.m.) on the evening of December 19, 1959, at a point about two miles west of Trenton, Ontario, on highway No. 2 which runs generally east and west. The night was clear and the highway, which has a paved surface 20 feet in width and 10-foot gravel shoulders, was dry and straight so that from the crest of a knoll more than 420 feet to the east of the estimated point of collision there was clear visibility looking west for a half-a-mile to one mile. On the evening in question, Henry Postma was proceeding in a westerly direction on his way from Trenton to Brighton at a speed of "at least 50 to 55 miles per hour" when, after breasting the knoll above referred to, and having been momentarily blinded by the headlights of an on-coming car, he saw "a flicker of a light" ahead of him and then noticed for the first time the presence of what turned out to be the westbound Little truck proceeding slowly and only three or four car lengths ahead. He applied his brakes and his car skidded a distance of 122 to 124 feet on his own side of the road when, fearful of hitting the truck, he veered to the left and skidded a further 14 to 16 feet before colliding with the Brown vehicle which was proceeding in an easterly direction on its own side of the highway and the lights of which, according to Postma, had not been seen by him until he turned into the eastbound lane.

The usual difficulties in attempting to reconstruct the events immediately before and at the time of an automobile accident are magnified in the present case by the fact that of the drivers of the three vehicles concerned, Brown has no recollection of the accident, Fred A. Little died before trial and Postma was described by the learned trial judge as " a very confused young man". The task is not made easier by the fact that the distances given by the investigating policeman are in terms of estimate rather than measurement.

There has, however, never been any appeal by the plaintiff or Henry Postma from the finding of the trial judge that Postma was chiefly to blame for the collision, and the only question raised by this appeal is whether or not any degree of fault should attach to the Little vehicle.

Mr. and Mrs. Little had been shopping in Trenton on the afternoon of the accident and were returning to their farm, the entrance to which opens off the south side of highway No. 2 at a point estimated to be 50 or 60 feet to the eastward of the point of collision. There is no doubt that it was as Fred A. Little was slowing down preparatory to turning across the main road into his own driveway, that Postma applied his brakes and started his skid, but there are conflicting accounts of the movements of the truck immediately before and after the collision, of which the trial judge has accepted that given to Constable Graham of the Provincial Police two days after the accident. In so doing the learned judge makes the following finding:

> Fred A. Little's statement to the police some two days after the accident is of importance, and I take this from the evidence of Police Constable Graham;
>
> > I was proceeding west on No. 2 about to make a left turn and at the same time saw the vehicle . . .
>
> he did not say, but I put in there that it was the Postma vehicle I assumed, and I revert now again to his statement,
>
> > . . . coming from the rear at a high rate of speed. I pumped my brake light to show the car I was stopping. After oncoming vehicle passed I made turn and was in the driveway when I heard collision.
>
> Mrs. Olive Little, his widow, is an elderly woman appearing, perhaps, more than her actual years. Her memory was not good. I prefer the above version of what transpired. It is confirmed, in part, by Postma when he referred to the "flickering light".

Under all the circumstances I find it difficult to understand how, after the Brown vehicle had passed him travelling to the east, Little could have turned his truck to the left, driven it across 20 feet of highway and a 10-foot shoulder and attained his own driveway before Brown had travelled 50 or 60 feet to collide with the oncoming, skidding Postma Meteor sedan.

The version accepted by the trial judge was an account given by Constable Graham of a conversation which had taken place two years previously. It could not be tested by cross-examination of Little and it conflicted with the story told by him at a subsequent hearing of a charge against Postma under *The Highway Traffic Act*. I am bound to say that the story told by Mrs. Little of her husband's actions appears to me to be more consistent with the circumstances. She said:

> We drove up on the north hand side of the road and as he got near home he said something about a car, and then he slowed down to make the turn into Lafferty's driveway, which is across from us,

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and he put out his arm and he put on his brakes and we drove... Into Lafferty's driveway across from ours, and then I heard the screeching of tires and glass being broken, and then we drove over to our own driveway which is across on a slant, and then I went around—he left the lights on and I went around to the back and got my bag of groceries out, and he left the lights on for me to get part way up the driveway, and then he turned them off and he said, " I am going back, there is an accident".

In the course of her evidence, Mrs. Little also testified that it was her husband's custom to make the turn into his own driveway from the north shoulder of the highway; and as to the condition of the rear light on the truck she said:

Q. When you went around to get your groceries, did you notice anything in particular? A. Yes, I noticed the light was on.

Q. What light? A. Well, what do you call them, spot—no, dash light, or spot light.

Q. What colour was the light? A. It was a bright red, a red light.

Q. Where was it located? A. On the left hand side.

Q. Where, in relation to the licence plate, was it located? A. It was just above it.

Mrs. Little was subjected to searching cross-examination by two counsel and from the record it does not appear that she was shaken in any vital particular of her story. I am, however, conscious of the advantage which was enjoyed by the trial judge in seeing and hearing this witness and of the fact that the frailty of her memory, to which he refers, would not necessarily appear from a reading of the record. While her story of how and why the turn was made into the Little driveway appears to me as the most likely one, I do not base my decision on this construction of the evidence.

Postma, who was the only eye-witness to the accident called by the plaintiffs, made the following answers on cross-examination:

Q. Mr. Postma, am I right in thinking that the only thing, the thing you suggest that the truck driver did wrong, or might have done otherwise, was the failure to have a rear light on the vehicle, is that correct? A. Yes.

Q. Is that correct? A. Yes, it is.

Q. And so far as you are concerned, that is the only thing that you suggest was something done, or not done on the part of the truck driver which had anything to do with the causing of the accident? A. No, sir, I think it was just the light.

Q. It was the lack of the light? A. Yes.

Q. It was the only thing that you suggest against the truck driver, isn't that right? A. Yes.

In its passage through two Courts, the case against the Littles has been treated as being dependent on whether or not the plaintiffs have discharged, or indeed were required to discharge, the burden of proving that the negligent operation of the Little truck contributed to the accident.

In this latter regard the learned trial Judge made the following finding:

> In the instant case the defendants, Little, made it part of their case to prove the tail-light was on. The burden of proving that then, in my opinion, in this case was transferred to them. Postma's evidence cast doubt upon that fact and the Littles then assumed the burden of proving it. In that I must find they have not succeeded. I refer to the case of *Kuhnle v. Ottawa Electric Railway,* [1946] 3 D.L.R. 681.

In commenting on this passage in the factum, counsel for the appellants says:

> The trial judge clearly concluded that the defendants Little had not satisfied the onus of proving that the tail-light was on and expressly found that their truck was not equipped with a reflector as required by *the Highway Traffic Act. It is conceded that the learned trial judge misapplied the case of Kuhnle v. Ottawa Electric Railway* as an authority for his finding that the defendants Little had not satisfied the onus, but it is submitted that as the evidence of the defendant Little left him in doubt as to 'the nature and effectiveness of the rear light' he should properly have reached the same result by properly applying section 51 of *The Highway Traffic Act* and the case of *Foster v. Registrar of Motor Vehicles,* [1961] O.R. 551.

The well-known provisions of s. 51 read as follows:

> 51(1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.
>
> (2) This section shall not apply in case of a collision between motor vehicles on the highway nor to an action brought by a passenger in a motor vehicle in respect of any injuries sustained by him while a passenger.

The appellants state their argument in regard to this section in their factum in the following terms:

> The plaintiff William John Brown and his wife sustained loss or damage by reason of the Little and Postma motor vehicles on a highway. There was no collision between the Brown and Little vehicles: the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner (Frederick H. Little) and the driver (the late Fred A. Little) was accordingly upon the said owner and driver.

This proposition involves construing s. 51 (1) so that its provisions apply not only to the motor vehicle which is alleged to have inflicted the loss or damage, but also to

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any and all other motor vehicles which were present on the highway, and which might have contributed to the damage having been sustained.

This was "a collision between motor vehicles on a highway" and in order to invoke the provisions of s. 51 at all in the present case it is necessary to construe subs. (2) of that section as only applying to the two motor vehicles which actually collided so that the words "This section shall not apply in case of a collision between motor vehicles on the highway" are to be read as meaning that the section shall not apply to the owners and drivers of two motor vehicles so colliding, but that it shall apply in respect of other motor vehicles which, although not directly involved, are alleged, by reason of their presence on the highway, to have contributed to the collision. It appears to me that if such a construction were placed on the statute it would mean that whenever a driver on the highways of Ontario was involved in an accident as a result of having pulled out to pass a car ahead of him in the face of oncoming traffic, the owner or driver of the car which he passed could become involved by a mere allegation of negligence in a lawsuit in which he would be required to assume the burden of disproving his own negligence.

I cannot believe that the legislature intended any such meaning to be attached to the provisions of s. 51 of *The Highway Traffic Act*, nor do I think that the case of *Foster v. Registrar of Motor Vehicles, supra,* affords any authority for such a proposition as that case did not involve "a collision between motor vehicles on a highway".

It will be seen that I do not consider the provisions of s. 51 of *The Highway Traffic Act* to be any more effective than the decision in *Kuhnle v. Ottawa Electric Railway Co. and Green, supra,* to relieve the plaintiffs from the burden which they assumed on the pleading of proving that the negligence of Fred A. Little, combined with that of Postma to cause the collision and resulting damage.

As I have indicated, the only evidence given on behalf of the plaintiffs as to the absence of a tail-light on the truck was that given by Postma, and as this only served to raise a doubt in the learned trial judge's mind, I agree with the conclusion reached by Schroeder J.A., speaking on behalf of the Court of Appeal, when he said that:

> The onus cast upon them to prove this allegation was not satisfied.

The only other allegation of negligence contained in the statement of claim which appears to me to find any support in the evidence is that Little "was in the process of making an unusual manoeuvre without first ascertaining that it could be done in safety". It is, however, apparent that the learned trial judge did not place this construction on the movements of the Little truck. In dealing with this branch of the case, Moorhouse J. said:

> It is alleged that Little was negligent in making an unusual movement on the highway without first seeing such movement could be made in safety. I cannot make such a finding in the face of Postma's evidence that the only thing Little did wrong was his failure to have illuminated a rear light.

This view of the matter was not disturbed by the Court of Appeal and the evidence does not satisfy me that any negligent manoeuvre by Little caused or contributed to the accident so that the case can be disposed of as it was by the Court of Appeal on the ground that the plaintiffs failed to discharge the burden of proving that the tail-light on the Little truck was either not operating or defective, and that this constituted negligence which contributed to the accident.

My opinion is that the Court of Appeal was right in its reversal of the learned trial judge on both grounds: First, that he was in error in putting the burden of proof on the Littles and, second, in his failure to find that Postma's negligence was the sole effective cause of the accident.

In the view I take of this appeal, it is unnecessary to consider the effect of a breach of the statutory duty for which provision is made in s. 40(2) of *The Highway Traffic Act*. If it were necessary, I would adopt the analysis of the conflicting decisions in *Falsetto v. Brown*[1] and *Irvine v. Metropolitan Transport Co. Ltd*[2]., contained in the reasons of Cartwright J., and hold that once it is found that the tail-light was unlit, the problem then is one of causation.

I agree with my brothers Cartwright, Hall and Spence that the ordering of a new trial is particularly unfortunate in the present case, but unlike the majority of the Court, I am not persuaded that such a course is necessary.

It appears to me that the decision of the learned trial judge was founded on his having wrongly imposed the burden of proof on the Littles with respect to the condition

[1] [1933] O.R. 645. [2] [1933] O.R. 823.

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of the tail-light on their truck and that he did not consider the evidence of Postma to be sufficiently strong to do more than "cast a doubt upon that fact" and was therefore not prepared to base his judgment on an acceptance of that evidence. Postma's was the only evidence to the effect that the tail-light was out. This evidence, having been considered and found wanting by the learned trial judge as a basis for making a finding in this regard, I am, with the greatest respect for those who take a different view, unable to see that a new trial is likely to accomplish anything more than the obtaining of a further opinion from another judge, sitting three years later and five years after the accident, as to the weight which is to be attached to the evidence of a witness who was characterized as "a very confused young man" at the time of the last trial. In my view the effect of such a new trial insofar as the Littles are concerned would be to require them to re-litigate an issue the determination of which is dependent upon a reassessment of evidence which has already been passed upon and found insufficient to fix them with liability.

For these reasons I would dismiss this appeal with costs.

HALL J.:—I agree with the reasons and conclusions of my brother Cartwright. I do, however, wish to add a few words on the necessity for a new trial.

On December 19, 1959, William John Brown was driving his motor vehicle accompanied by his wife, the late Dorothy Margaret Brown, when he was crippled for life and his wife killed in a highway collision for which he was in no way responsible. The Browns just happened to be passing on their own side of the road when, through the negligence of the respondent Postma or through the combined negligence of the respondent Postma and of Frederick A. Little, deceased, the driver of the Fred H. Little truck, the Brown vehicle was struck by the Postma vehicle.

The learned trial judge found negligence on the part of Postma and the deceased Frederick A. Little, whose death prior to the trial was not related to the accident, but in so doing, he erred in holding that there was a burden on the Littles to establish that the tail-light was lighted.

In the Court of Appeal an equally serious error arose when, in dealing with the question as to whether the tail-light was lighted or not, the Court proceeded on the as-

sumption that certain answers made by Frederick A. Little on his examination for discovery had been admitted in evidence and were in fact evidence against the appellants.

There are many cogent reasons why a new trial after such a long delay should not ordinarily be ordered, but all of these are negatived by the dominant fact here that the merits of the appellants' cause have not been tried according to law.

SPENCE J.:—This is an appeal by the Sterling Trusts Corporation, executor of Dorothy Margaret Brown, deceased, and William John Brown, from the judgment of the Court of Appeal for Ontario dated December 12, 1962. In that judgment the Court of Appeal had allowed an appeal from the judgment of Moorhouse J. dated December 1, 1961, in which he had found that the accident which resulted in the action had been caused by the negligence of both the defendant Henry Postma and the late Fred A. Little for whose negligence the defendant Frederick H. Little was responsible in law.

By the judgment of the Court of Appeal for Ontario, the appeal of the defendants Olive Russell Little, as executrix of the estate of the late Fred A. Little, and Frederick H. Little was allowed and so, in the result, the defendant Henry Postma was held alone liable for the damages as fixed by the judgment of Moorhouse J.

Notice of this appeal to the Court of Appeal for Ontario was given to the defendant Henry Postma but he did not appear upon the appeal nor has he appeared on the further appeal to this Court although again notice of appeal to this Court was served upon him by the appellants, the Sterling Trusts Corporation and William John Brown.

I have had the opportunity of reading the reasons of my brother Ritchie and, to avoid repetition, I shall adopt the statement of facts set out therein referring only to such matters as I desire to deal with in more detail.

The appellant, in the argument before this Court, sought to assess liability against the respondents, Olive Little, as executrix of the estate of the late Fred A. Little, and Frederick H. Little, upon several acts of negligence, arguing that the appellants were not limited to the single act of negligence alleged by the defendant, here respondent, Postma. It is, of course, true that the appellants are not

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so limited but that is a proposition of law and it must be considered in the view of the circumstances. The appellant William John Brown suffered injuries which resulted in his failure to remember anything for some time before the impact and, therefore, could give no evidence of negligence of any party.

The only person who could give evidence as to any conduct of the late Fred A. Little which in any way affected him and thereby caused or contributed to the accident is the respondent Postma. Therefore, on that basis, the only evidence upon negligence before the Court to consider is the evidence of Postma complaining of the fact that the tail-light on the truck driven by the late Fred A. Little was not illuminated. That is the only conduct which he swore affected him in any way. This view is reflected in the judgment of the learned trial judge when he said:

> It is alleged that Little was negligent in making an unusual movement on the highway without first seeing such movement could be made in safety. I cannot make such a finding in the face of Postma's evidence that the only thing Little did wrong was his failure to have illuminated a rear light. I must find too that the Little vehicle had no reflector, as required by the Highway Traffic Act.

Moreover, the late Fred A. Little, on any evidence given at the trial, whether it be his story as recounted to the constable and recounted by the constable at trial, his evidence in the Police Court during the trial of Postma upon a charge under *The Highway Traffic Act* of Ontario, or taken from Mrs. Olive Little's evidence at trial, showed no other actionable negligence than failure to have the tail-light illuminated. He was making a left turn into his driveway and for the purpose of doing so was approaching the point where the driveway left highway no. 2 driving slowly just to the right of the centre line of the road. This would appear to be in accordance with the provisions of *The Highway Traffic Act*. No conduct of the late Fred A. Little, which renders him liable in law, caused or contributed to the accident apart from his possible liability due to failure to have the tail-light on the truck illuminated.

Another ground of negligence of the late Fred A. Little alleged by the plaintiffs was that there was not upon the truck driven by him a reflector as required by s. 40(2) of *The Highway Traffic Act*. At trial, Moorhouse J. found as a fact that there was no reflector on the Little truck and, of course, as a necessary part of that finding that such a

condition was known to Little Sr., and Little Jr. but, having found that the tail-light was not lighted and that this was an effective cause of the collision, Moorhouse J. did not deal further with any liability which could result from the failure to have the said reflector in proper position on the said truck. There remains, therefore, the third and main ground upon which the appellants submit that the defendants Olive Little and Frederick H. Little are liable to the plaintiff, *i.e.*, their allegation that the tail-light on the truck was not lighted at the time of the accident. This allegation raises three questions. Firstly, was the tail-light on the Little truck lighted or not; secondly, if not, was the failure to have it lighted an effective cause of the collision, and thirdly, if the tail-light was not lighted and the failure to have it lighted was an effective cause of the collision, are the respondents liable for the damages caused to the appellants.

Moorhouse J., at trial, put the onus of proving that the tail-light was illuminated upon the defendants, here respondents, Olive Little and Frederick H. Little. The learned trial judge did so because of his interpretation of the decision in *Kuhnle v. Ottawa Electric Railway Co. and Green*[1]. I am in agreement with the view expressed by Schroeder J.A. giving the unanimous judgment of the Court of Appeal when he said:

> The judgment relied upon by the learned judge does not support that proposition, and this was readily conceded by respondents' counsel.

The Court of Appeal for Ontario found that the appellants here (respondents in that Court) had failed to discharge the onus of proof which the Court put upon them to prove that the tail-light had not been lit at the time of the accident. In doing so, the Court considered as evidence part of the examination for discovery of the defendant, here respondent, Frederick H. Little, as follows:

> 194 Q. Did he ask you at that time to check his lights? A. No.
>
> 195 Q. Did you subsequently check to see whether or not his tail-lights were operating? A. Yes.
>
> 196 Q. When? A. Next morning.
>
> 197 Q. Why? MR. CASS: Don't answer the question.
>
> 198 Q. Did you have some conversation with your father as to the accident after the conversation you have told me about before you checked the lights on the truck? A. No.

[1] [1946] 3 D.L.R. 681.

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199 Q. Did you have any conversation with your father the next morning, prior to checking the truck? A. No.

200 Q. Did you have any conversation with your father after checking the truck before the accident? A. Well different times.

201 Q. How soon after checking the lights in the truck? A. I don't recall off hand.

202 Q. Did your father ask you to check the lights of your truck? A. No.

* * *

208 Q. Then you have told us you checked the lights, did you? That is what you have told us didn't you? A. The next morning I did check the lights.

209 Q. And what lights did you check the next morning? A. The head-lights and tail-lights.

210 Q. Did you check any other lights? A. No.

211 Q. And how did you check them? A. Well I turned them on, looked to see if they were going.

212 Q. What time in the morning did you check them? A. Oh perhaps around eight.

213 Q. Was it before breakfast or after breakfast? A. It would be after.

214 Q. And what lights were there on the truck? A. They were working.

215 Q. That wasn't my question Mr. Little, what lights were on the truck? A. Two head lights and one tail light.

What had occurred was this: The plaintiff as part of his case read into the evidence questions numbered 194 to 197 in the examination for discovery of the said respondent Frederick H. Little.

At the close of the plaintiff's case, Mr. Cass, as counsel for the said Frederick H. Little, moved to dismiss the action on the ground that the plaintiffs had not proved that the truck in question was owned by the said Frederick H. Little. That motion was dismissed and Mr. Cass declared his intention not to call any evidence. Mr. Nourse acting as counsel for the respondent, Olive Russell Little, as executrix of the estate of Fred A. Little, deceased, adduced evidence and then read the examination for discovery of the defendant Postma. I find that course rather startling in view of the fact that Postma had given evidence and been cross-examined for a very lengthy period by the same Mr. Nourse. I am of the opinion that such a course is not permitted in the practice in the Province of Ontario. With that the production of evidence ended, counsel addressed the Court, and the Court was adjourned until the next morning for judgment.

On the opening of the Court the next morning, Mr. Nourse as counsel for Olive Little, executrix of the estate of the late Fred A. Little, pointed out that Mr. Haines, as counsel for the plaintiffs, had criticized the failure of Frederick H. Little to give evidence, and had inferred that Mr. Cass's refusal to permit his client to answer question 197 in the examination for discovery as aforesaid was because the answer, if given, would be unfavourable to his cause. Mr. Nourse, therefore, requested the right to read other questions in the said examination for discovery of the said Frederick H. Little, advancing R. 329 as being the basis for such application. That rule of the Ontario Rules of Practice permits any party to read, in whole or in part, the examination of an *opposite* party. I cannot imagine how the interest of Mr. Nourse's client, the executrix of the estate of the driver, could be considered as opposite to that of the owner and it was the owner's examination which he sought to read.

The trial judge then permitted questions 198 to 215 of the said examination for discovery to be read, subject to the objection, but in his reasons for judgment, said:

> The defendant Frederick H. Little examined this light the next morning about eight o'clock. The vehicle belonged to him. This question was of vital interest to him yet there is no evidence before me as to the result of the examination.

I am of the opinion that in this statement the learned trial judge expressed the view that the reading of questions and answers 198 to 215 by the counsel for the executrix of Frederick A. Little after the close of the case and after the opportunity to cross-examine or to adduce evidence *contra* had passed was the production of inadmissible evidence to which he did not intend to pay any attention in coming to his conclusion. I am in accord with that view.

The situation, therefore, before this Court is this: The trial judge, with respect, in error, found that the tail-light had not been lit by putting the onus on the defendants Olive Little and Frederick H. Little and again, with respect, the Court of Appeal in error, although putting the onus correctly on the appellants here, found that the tail-light had been lighted on the basis of inadmissible evidence.

I have made an exhaustive analysis of all the admissible evidence upon the question of whether the tail-light of the

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Little truck was illuminated at the time of the accident, and I have come to the reluctant conclusion that I am unable, from a perusal of the record, to make such a finding of fact and that a new trial is necessary.

I have come to this conclusion with the utmost reluctance, realizing that the accident occurred on December 19, 1959, and that Fred A. Little died even before the trial of the action took place, that William John Brown, the plaintiff, is unable to give any evidence whatsoever as to what caused the accident, and that Henry Postma was characterized by the learned trial judge in his reasons for judgment as a "very confused young man". Giving weight, however, to all of these factors, I can see no other alternative for the sound determination of the most important question as to whether or not the tail-light was illuminated at the relevant time than to have a new trial upon that issue.

The new trial will be concerned with the three issues as to the said tail-light to which I have referred above, *i.e.*, was the said tail-light lit or unlit at the time of the accident and if it were unlit was such a condition an effective cause of the collision? I agree with my brother Cartwright, whose reasons I have had the privilege of reading, that if the Court upon the retrial were to find that the tail-light were unlit and that such unlit condition was an effective cause of the collision, there is a *prima facie* liability upon the defendants Olive Russell Little and Frederick H. Little. I am not prepared to say that that liability is an absolute one and that the said defendants would be unable to discharge it by showing that such condition occurred without negligence for which they are in law responsible as all of the evidence which I have perused in reference to the tail-light was not addressed to the question of whether it was unlit because of negligence but to the question of whether it was lit or unlit. I agree with my brother Cartwright that such evidence is not even relevant upon the issue of whether the tail-light, if unlit, was unlit due to any negligence.

I therefore agree that there must be a new trial upon the questions as outlined by my brother Cartwright in his reasons for judgment, including the contribution, if any, between the defendant Henry Postma on the one hand, and the defendants Olive Russell Little and Frederick H. Little

on the other hand, and further including the quantum of the appellants' damages. I also agree with my brother Cartwright's disposition of the costs.

Appeal allowed and new trial ordered, JUDSON *and* RITCHIE JJ. *dissenting.*

Solicitors for the plaintiffs, appellants: Haines, Thomson, Rogers, Howie & Freeman, Toronto.

Solicitors for the defendants, respondents: Fasken, Calvin, Mackenzie, Williston & Swackhamer, Toronto.