1933

* Dec. 1, 4.
* Dec. 22.

PHILIP J. RISTOW (DEFENDANT).... APPELLANT;

AND

HELEN WETSTEIN, AN INFANT, BY HER NEXT FRIEND, LOUIS WETSTEIN, AND THE SAID LOUIS WETSTEIN (PLAINTIFFS) ..... } RESPONDENTS;

AND

DANIEL McINTYRE (DEFENDANT).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Evidence—Misdirection in charge to jury—Objection not taken at trial, to the charge—Miscarriage of justice—New trial.

M., while driving appellant's motor car on a city street at night (3.30 a.m.) in a heavy rainstorm and very poor visibility, ran into a steel post which was four inches inside the curb off the travelled highway. The impact rendered M. unconscious and injured W., an occupant, and damaged the car. M. testified that he was driving that night at 15 to 18 miles per hour. W. sued appellant and M. for damages. The trial judge, in charging the jury, said: "There is no suggestion, apparently, that he was going too fast, that is, that he was exceeding any speed limit; and there is no evidence as to just how fast he was going when he went down Bathurst St. So that I think, on the whole, you may take it safely for granted that there is no evidence that he was going too fast, either in exceeding the definite speed limit, or under the circumstances." The jury found that the accident was not caused by negligence of M., and the action was dismissed. The Court of Appeal ordered a new trial. Appellant appealed.

Held: The above facts in evidence constituted evidence that should have been considered by the jury as to whether or not M. was driving too fast under the circumstances (*Tart* v. *Chitty*, 102 L.J.K.B. 568; *Baker* v. *Longhurst*, 102 L.J.K.B. 573), and should have been directed to their attention; and the above quoted part of the charge amounted to a withdrawal of those facts from their consideration, and was a misdirection, involving a mistrial and a miscarriage of justice in the sense that the plaintiff's case was not properly submitted to the jury; therefore it was proper to order a new trial, notwithstanding that no objection was taken at the trial to the charge.

APPEAL by the defendant Ristow from the judgment of the Court of Appeal for Ontario granting a new trial to the plaintiffs upon their appeal from the judgment of Kerwin J. dismissing the action upon a jury's finding. The action was for damages for injury to the plaintiff Helen Wetstein caused by the collision of a motor car, in which

* PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

she was riding, with a steel post, on September 4, 1932, in Toronto, Ontario. The motor car was being driven by the defendant McIntyre and was owned by the defendant (appellant) Ristow. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

T. J. Agar, K.C., for the appellant.

I. Levinter for the respondents.

The judgment of the court was delivered by

SMITH J.—The action was brought on behalf of the infant respondent by her next friend for damages sustained by her while being driven in a motor car owned by the appellant and driven by one McIntyre.

The infant, seventeen years of age, was sitting in the front seat with the driver, and a Mr. Brown and Miss Kosky were in the rear seat. The party was returning from Swansea into the city of Toronto about 3.30 in the morning of the 4th of September, 1932, in a heavy rainstorm. They drove along Dundas street and turned to the right into Bathurst street, and McIntyre says that "six or seven" or "four or five" doors south of Dundas street, or "midway between that block", he ran into the steel post of the Toronto Transportation Commission, which is about four inches inside of the curb, that is, to the right of the travelled part of the highway. He says that on that particular night it had been raining all night, and that it was one of the worst rainstorms during the year. Visibility was very poor at the time of the accident, the windows of the car were closed; the wiper worked sometimes, and sometimes you had to start it off with your hand. Visibility on the right hand side of the car was poor, and it was difficult to see the curb, and he says that he was driving that night at from fifteen to eighteen miles per hour. He further says that the impact was so severe that his chest broke off the steering wheel, and he was "knocked out" temporarily, so that he did not know what happened to the other occupants of the car until he went to the hospital. He further states that the radiator of the car was damaged and had to be replaced, and that the cross members of the chassis, which are heavy pieces of material, were bent.

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The infant respondent had some teeth knocked out, others loosened, and sustained cuts and scars about the face, limbs and body.

The questions put to the jury, with the answers, were:

(1) Was the accident caused by the negligence of the defendant McIntyre? A. No.

(2) If so—that is, if you think it was caused by McIntyre's negligence—wherein did such negligence consist? No answer.

(3) Was the motor vehicle in McIntyre's possession without Ristow's consent? No answer.

The jury was directed that if they answered "No" to the first question, they need not answer the others.

On the answer to the first question, judgment was entered, dismissing the action with costs.

An appeal was taken to the Court of Appeal, which ordered a new trial, and from that judgment the defendant Ristow brings this appeal.

It is argued upon behalf of the appellant that the finding of the jury in favour of the defendant and dismissal of the action upon that finding constitute a right which can only be interfered with on proper legal grounds. The grounds for a new trial set out in the Court of Appeal are that the accident

may have been caused by the defective condition of the car, the wiper or the steering gear not working properly, and a question as to the car's condition should have been submitted to the jury;

and

a further question should also have been submitted to the jury as to whether McIntyre was using the car with the consent of Ristow.

The latter question was submitted to the jury, but not answered, in view of the answer to the first question.

Appellant's counsel contends that the failure to submit a question to the jury as to the condition of the car does not in law constitute a ground for a new trial, as no request was made to have such a question submitted, and no objection was made to the questions as submitted.

The Court of Appeal, however, further found that there had been a mistrial.

Looking at the learned judge's charge to the jury, he said:

There is no suggestion, apparently, that he was going too fast, that is, that he was exceeding any speed limit; and there is no evidence as to just how fast he was going when he went down Bathurst street. So that I think, on the whole, you may take it safely for granted that there is no evidence that he was going too fast, either in exceeding the definite speed limit, or under the circumstances.

This, to my mind, is a clear misdirection. The evidence quoted above surely constitutes evidence that should have been taken into consideration by the jury as to whether or not the driver was going too fast under the circumstances. The great force of the impact, as disclosed by the result, is cogent evidence as to the speed, and the speed at which a car should be driven depends upon the circumstances. Here, the driver had difficulty in seeing where he was going, by reason of the conditions, and he does not say that he reduced speed, or took any precautions in view of these prevailing conditions. He ran into this steel post, off the travelled highway, without having seen it at all, with the force indicated by the results. The learned judge's charge amounted to a withdrawal from the consideration of the jury of the most vital facts established by the evidence in favour of the plaintiff's case. If the jury had given an affirmative instead of a negative answer to the first question, and in answer to the second question had said that McIntyre was driving too fast under the conditions of invisibility that prevailed, could a Court of Appeal have set aside a judgment for the plaintiff on such answers? In other words, could it have been contended that there was no evidence upon which the jury could reasonably base such answers? It seems clear that such findings on this evidence could not have been disturbed.

As to the cogency of the evidence which the learned judge told the jury that they might disregard, some recent cases in England may be cited:

In *Tart* v. *Chitty & Co.* (1): After lighting up time, a wagon pulled up in a street fourteen feet wide, nine inches from the curb, the rear light having gone out. It was raining, and a motor cyclist, whose light threw a beam fifteen yards, crashed into the back of the wagon, and sustained injury. The County Court Judge held that defendants' servants were negligent, but that defendants had not shown that the plaintiff was negligent. On appeal, held:

That there was no evidence upon which a judgment could be founded that the plaintiff was not guilty of contributory negligence. Either he did not keep a proper lookout, or he was travelling at such a speed that he was unable to stop his motorcycle or to swerve so as to avoid the collision.

(1) (1931) 102 L.J.K.B. 568.

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Butterfield v. *Forrester* (1) and *Page* v. *Richards and Draper* (2) followed.

In *Baker* v. *Longhurst & Sons Ltd.* (3): A person driving at night must drive at such a speed that he can pull up within his limits of vision; accordingly, on his colliding with anything, he is faced with the dilemma that either he was driving at an undue speed or he was not keeping an adequate lookout, unless there is some other factor causative of the collision. In this case a horse tip-cart proceeding on its near side of the road at night, but without a light, was run into from behind by a motor-cyclist. In an action brought by the plaintiff against the owner of the cart for damages, based on the negligence of the driver of the cart in being without a light, the plaintiff said that his speed was 15-20 miles per hour, and that he could stop easily within ten yards. The beam of his lamp showed thirty yards ahead. He said that he never actually saw that it was a cart. He saw a dark object loom up, and swerved to avoid it:—Held, that the plaintiff, when proving the negligence of the defendants' servant, had established his own contributory negligence and, there being no contest of fact, judgment must be for the defendants.

In the present case the learned judge, instead of, in effect, withdrawing from the consideration of the jury evidence of the most vital kind on the question of the driver's negligence, should have directed their attention to the evidence bearing on that question; that is, to the evidence that the driver ran off the travelled highway and into the post without seeing it at all; that he was driving that night under the conditions described at 15 to 18 miles per hour and does not say that he reduced speed when unable to see clearly, and that he struck the post with the force and results mentioned.

There was a complete failure to direct the attention of the jury to this evidence on which a finding of negligence on the part of the driver might have been properly based, and in addition there was an express direction that the jury might disregard the most vital part of it. This was misdirection involving a mistrial and a miscarriage of justice in the sense that the plaintiff's case was not properly

(1) (1809) 11 East. 60. (2) (1920) (unreported).
(3) (1932) 102 L.J.K.B. 573-C.A.

submitted to the jury. A new trial was therefore properly ordered, notwithstanding the fact that no objection was taken to the charge.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Agar & Thompson.*

Solicitors for the respondents: *Luxenberg & Levinter.*

* PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ.