C. H. McFADDEN (DEFENDANT).....APPELLANT;

AND

JOHN R. McGILLIVRAY (PLAINTIFF)...RESPONDENT.

1939
* Nov. 13.
1940
* Feb. 26.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Collision—Trial judge's charge to jury—Alleged misdirection—Rate of speed—Question as to need of car lights burning—Substantial wrong or miscarriage—New trial.

The action arose from a collision between appellant's and respondent's motor cars. Each party claimed that the collision was caused entirely by the other's negligence and claimed damages. Judgment was given at trial on the jury's findings in favour of respondent and an appeal to the Court of Appeal for Ontario was dismissed. Appeal was brought to this Court on the ground of misdirection in the trial judge's charge to the jury.

Held (the Chief Justice dissenting): There should be a new trial, on the ground of misdirection.

Per Rinfret and Kerwin JJ.: On construction of the trial judge's charge, there was misdirection in that he told the jury that appellant's allegation that respondent was travelling at an excessive rate of speed under the circumstances was not open to them since respondent was not exceeding the statutory limit of 50 miles per hour; also in that he told the jury that respondent was under no obligation to have his car lights burning, and said: "As I remember it, every witness said that they could see 100 yards. Why would lights need be on if you could see 100 yards without lights. There is no law in this province requiring lights on under those circumstances—that is, at any rate, after dawn and before dusk—during the day-time." Such misdirection occasioned substantial wrong or miscarriage. Appellant was entitled to a finding from the jury, not merely on the question as to negligent driving of his own car but also on the question of respondent's negligence, and in particular as to whether both drivers were negligent. Two allegations of negligence on the part of respondent

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

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were really withdrawn from consideration of the jury, and the Court should not place itself in the position of attempting to determine what, on a proper direction, would be solely within the province of the jury on these vital matters.

Per Davis J.: The trial judge's directions virtually withdrew from the jury a consideration of the vital question as to the degree of care reasonably to be expected from both drivers under the fog conditions existing at the time.

Per the Chief Justice (dissenting): The trial judge told the jury in the most pointed way that, if they accepted appellant's account, then respondent's conduct amounted to negligence which was the cause of the collision. The issue at the trial was an issue of credibility and, the jury having rejected appellant's case, he ought not to have an opportunity of putting the same case or another case before another jury because of inaccuracies in the charge which must, in view of the nature of the critical issue and the manner in which that issue was placed before the jury, have been quite innocuous.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of Kelly J. at trial, upon the findings of the jury, in favour of the plaintiff for $6,530.69 damages. The action arose out of a collision between two motor cars, owned by the plaintiff and defendant respectively. Plaintiff was the sole occupant of his car. Defendant and the driver, Larsen, who was killed in the accident, were the occupants of defendant's car. Each party claimed that the collision was caused entirely by negligence of the other party, and each claimed damages (the defendant by way of counterclaim) for personal injuries and for destruction of his car. The accident occurred on Ontario provincial highway no. 2 about three miles east of Bowmanville on the morning of October 15, 1938, at about 7.30 o'clock, as alleged by plaintiff, or seven o'clock, as alleged by defendant. There was evidence that there was intermittent fog. The jury found that the driver of defendant's car was, and that plaintiff was not, guilty of negligence causing or contributing to the accident. The grounds of the appeal to this Court were alleged misdirections in the trial judge's charge to the jury.

P. E. F. Smily K.C. and *R. B. Burgess* for the appellant.

J. M. Bullen K.C. and *J. D. Conover* for the respondent.

THE CHIEF JUSTICE (dissenting)—I find myself unable to concur in the judgment of the majority of the Court.

I do not enter at large upon my reasons because I cannot state them fully without a discussion of the details of the evidence, which is inadvisable in view of the fact that there is to be a new trial. I will say simply that the appellant at the trial advanced a case which was based upon his own evidence. The learned trial judge told the jury in the most pointed way that, if they accepted the appellant's account of what occurred, then the respondent's conduct amounted to negligence which was the cause of the collision. The jury found that the respondent was not chargeable with any negligence either causing or contributing to the collision. I think the issue at the trial was an issue of credibility, and, the jury having rejected the appellant's case, he ought not to have an opportunity of putting the same case or another case before another jury because of inaccuracies in the charge which must, I think, in view of the nature of the critical issue and the manner in which that issue was placed before the jury, have been quite innocuous.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—I would allow the appeal and order a new trial. In view of this, it would be inadvisable to discuss the evidence and I restrict my remarks, therefore, to a short statement of the reasons why I consider such an order should be made.

After considering the charge of the learned trial judge in its entirety, I have concluded the jury were there told that the allegation of the appellant (defendant) that the respondent (plaintiff) was travelling at an excessive rate of speed under the circumstances, was not open to them since the respondent was not exceeding the statutory limit of fifty miles per hour. This, of course, was misdirection.

I have also come to the conclusion that there was misdirection in the charge where the jury were told that the respondent was under no obligation to have the lights on his automobile burning. The learned trial judge continued:—

> As I remember it, every witness said that they could see one hundred yards. Why would lights need be on if you could see one hundred yards without lights. There is no law in this province requiring lights on under those circumstances,—that is, at any rate, after dawn and before dusk,—during the day-time.

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This was really withdrawing from the jury another allegation of negligence made by the appellant against the respondent, and this defect was not cured by other passages in the charge.

Objection was taken by the appellant that the jury had been given a wrong basis for the calculation of damages,—damages of both parties,—when the trial judge told them to be generous. This was probably corrected when the jury were recalled and they were told that they should not, in that connection, be unreasonable.

Under section 27 of the Ontario *Judicature Act* a new trial is not to be granted on the ground of misdirection "unless some substantial wrong or miscarriage has been thereby occasioned." I take it that it was really on this ground that the Court of Appeal affirmed the judgment at the trial, because Mr. Justice Riddell, after pointing out

> that it would have been well had the learned judge been more explicit on the question of negligence and drawn the attention of the jury to the necessity and obligation of other duty in respect of care according to the circumstances of the case,

continues:—

> But we are unable to see that this resulted in injury to the case of the defendant.

With great respect, I find myself unable to agree with this conclusion. The appellant was entitled to a finding from the jury, not merely on the question of the negligence of the driver of his own car but also on the question of the negligence of the respondent, and in particular as to whether both drivers were negligent. Two allegations of negligence on the part of the respondent were really withdrawn from the consideration of the jury, and the Court should not place itself in the position of attempting to determine what, on a proper direction, would be solely within the province of the jury on these vital matters.

The appellant is entitled to his costs of the appeal to the Court of Appeal and to this Court. The costs of the first trial should abide the result of the new trial.

DAVIS J.—The directions of the learned trial judge virtually withdrew from the jury a consideration by them of the vital question as to the degree of care reasonably to

be expected from both drivers under the fog conditions existing at the time.

The appeal should be allowed and a new trial directed. The appellant is entitled to the costs of his appeal to the Court of Appeal and to this Court. The costs of the first trial should abide the event of the new trial.

HUDSON J.—I agree that the appeal should be allowed and a new trial directed on the ground of misdirection of the jury by the learned trial judge. I refrain from making any observations in regard to the evidence.

Appeal allowed with costs; new trial ordered.

Solicitors for the appellant: *Johnston, Grant, Dods, Smily & Adams.*

Solicitor for the respondent: *J. D. Conover.*