MICHAEL HARRISON and CLARE McKAY, an infant under the age of twenty-one years by his next friend, F. J. McKAY and the said F. J. McKAY (*Plaintiffs*) ..... APPELLANTS;

1958

*Oct. 23, 24
Nov. 19

AND

MARY A. BOURN (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Collision between car making left-hand turn across road and car coming in opposite direction—View of turning car not obstructed—Driver absolved from negligence by jury—Verdict unrea-

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sonable and unjust—Duty under s. 41(1)(d) of The Highway Traffic Act, R.S.O. 1950, c. 167—Objections to judge's charge—Real issue never put to jury—New trial directed.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment dismissing the action after a trial by jury.

H. G. Chappell and *A. F. Rodger,* for the plaintiffs, appellants.

T. N. Phelan, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from the judgment of the Court of Appeal for Ontario which affirmed a judgment dismissing the plaintiffs' action after a trial with jury. The plaintiff Harrison was the owner and driver of one of the cars and the plaintiff McKay was his passenger. This car collided with a car owned and driven by the defendant Mary A. Bourn on October 4, 1956, a little before 9 p.m. on No. 11 highway between Thornhill and Steele's Avenue. Harrison was south-bound and Miss Bourn was north-bound. No. 11 highway at this point is a four-lane highway, two lanes north and two lanes south, divided by a double white line. Miss Bourn was in the north-bound passing lane and made a left-hand turn from this lane across the two south-bound lanes, intending to enter the parking lot of Loblaw's store. The collision occurred when her car was pointing in a westerly direction with its front close to the entrance to the parking lot. She was blocking the south-bound driving or curb lane and also part of the south-bound passing lane. She says that she did not see the south-bound Harrison car until the moment of impact. The evidence is undisputed that she had a clear view to the north for seven or eight hundred feet.

The jury absolved Miss Bourn from negligence and found the plaintiff Harrison entirely to blame for the accident because he was travelling at an excessive speed through an area marked "Caution". The caution sign is some three hundred feet north of the Loblaw store on the west side of the highway and is undoubtedly intended to warn south-bound traffic of the existence of the store and the probability of traffic entering and leaving the parking lot attached to the store. The Court of Appeal dismissed

the appeal, the majority holding that it was open to the jury on the evidence adduced to exonerate Miss Bourn from any causative negligence. Mr. Justice F. G. MacKay dissented on the ground that on the whole of the evidence, no jury reasonably could have exonerated the respondent from some degree of negligence causing the accident. He would have granted a new trial.

My opinion, with respect, is the same as that of Mr. Justice F. G. MacKay. On the defendant's own story, she did not see the oncoming car until the moment of impact. On any view of the evidence this car was in view during the whole time when she was making her turn across the south-bound two lanes. Her duty in making this turn is clearly defined by s. 41(1)(*d*) of *The Highway Traffic Act:*

> (*d*) The driver or operator of a vehicle upon a highway before turning to the left or right from a direct line shall first see that such movement can be made in safety, and if the operation of any other vehicle may be affected by such movement shall give a signal plainly visible to the driver or operator of such other vehicle of the intention to make such movement.

There was a plain disregard by Miss Bourn of the direction given by the first part of this rule. Quite apart from the objections urged against the judge's charge, this case appears to me, as it did to the dissenting judge in the Court of Appeal, to be one which requires the intervention of an appellate Court as being "so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it"; *McCannell v. McLean*[1]; *Adam v. Campbell*[2].

It is also my opinion that the appellant's objections to the judge's charge are well founded. The issues here were very simple—the speed of the Harrison car, the propriety of Miss Bourn's turn and her duty to look and to see what was coming across her proposed path. Had she looked she could not have failed to see the lights of the oncoming

[1] [1937] S.C.R. 341, 343, 2 D.L.R. 639.
[2] [1950] 3 D.L.R. 449, 454.

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car. She says that she did look and that she did not see any such car. In these circumstances, there was real substance in the plaintiff's objection taken at the conclusion of the judge's charge that there had been failure to instruct the jury in accordance with *Swartz v. Wills*[1], to the effect that "where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible". Such an instruction was at no time given.

I do not think that the real issue with regard to the allegation of negligence against the defendant was ever put to the jury. The sections of *The Highway Traffic Act* having to do with left and right turns at intersections; left turns from a one-way highway into an intersecting two-way highway; left turns from a two-way highway into an intersecting one-way highway; moving from one lane to another—none of which were relevant to the issues in this case and all of which were submitted to the jury—could only serve to obscure the one section that had real relevancy and which the jury appears to have ignored completely.

I would allow the appeal with costs both here and in the Court of Appeal and direct a new trial. The costs of the first trial will be reserved to the trial judge.

Appeal allowed with costs, new trial directed.

Solicitors for the plaintiffs, appellants: Chappell, Walsh & Davidson, Toronto.

Solicitors for the defendant, respondent: Phelan, O'Brien, Phelan & Rutherford, Toronto.

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[1] [1935] S.C.R. 628 at 634, 3 D.L.R. 277.