1958

*Oct. 20, 21
Nov. 19

RICHARD HAIG HUNT (*Plaintiff*) .....APPELLANT;

AND

MACLEOD CONSTRUCTION COMPANY LIMITED, S. HAJCHAK, GORDON L. WILSON AND WAINO KUMPULA (*Defendants*) ..... RESPONDENTS;

AND

B. R. WESTON .....THIRD PARTY.

MACLEOD CONSTRUCTION COMPANY LIMITED ..... PLAINTIFF BY COUNTERCLAIM;

AND

RICHARD HAIG HUNT, GORDON L. WILSON, WAINO KUMPULA AND B. R. WESTON ..... DEFENDANTS BY COUNTERCLAIM.

WALTER MAYO (*Plaintiff*) .....APPELLANT;

AND

MACLEOD CONSTRUCTION COMPANY LIMITED, S. HAJCHAK, GORDON L. WILSON AND WAINO KUMPULA (*Defendants*) ..... RESPONDENTS;

AND

B. R. WESTON .....THIRD PARTY.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Actions—Negligence—Several defendants—Motion of non-suit granted to two of the defendants—Motion made at conclusion of defence of remaining defendant and also after case on counterclaim of same defendant had been put in—Whole case on question of liability had been heard—Power of trial judge to rule on motion at that stage—Propriety of granting motion upon the evidence—Power correctly exercised by trial judge.

APPEALS from two judgments of the Court of Appeal for Ontario, reversing a judgment of Spence J. Appeals allowed, Rand and Cartwright JJ. dissenting in part.

J. J. Robinette, Q.C., and *G. B. Weiler, Q.C.*, for the plaintiffs, appellants.

H. Steen, Q.C., for the defendant G. L. Wilson, respondent.

*PRESENT: Rand, Cartwright, Abbott, Martland and Judson JJ.

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A. Petrone, for the defendant W. Kumpula, respondent.

P. B. C. Pepper, Q.C., and *W. Herridge,* for the third party B. R. Weston.

T. N. Phelan, Q.C., for the defendants MacLeod Construction Company Limited and S. Hajchak, respondents.

The judgment of Rand and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting in part*):—The relevant facts and the course followed at the trial are set out in the reasons of my brother Judson. For the reasons given by him I agree with his conclusion that there was nothing to prevent the learned trial judge from ruling on the application for a non-suit made by counsel for Wilson and Kumpula at the conclusion of the defence of MacLeod Construction and Hajchak, and that consequently the question becomes one of the propriety of granting the non-suit upon the evidence.

I have reached the conclusion that the non-suit should have been refused. The evidence established that the vehicles of Wilson and Kumpula were parked on the travelled portion of the highway in violation of s. 43(1) of *The Highway Traffic Act,* R.S.O. 1950, c. 167, which reads as follows:

> No person shall park or leave standing any vehicle whether attended or unattended, upon the travelled portion of a highway, outside of a city, town or village, when it is practicable to park or leave such vehicle off the travelled portion of such highway; provided, that in any event, no person shall park or leave standing any vehicle, whether attended or unattended, upon such a highway unless a clear view of such vehicle and of the highway for at least 400 feet beyond the vehicle may be obtained from a distance of at least 400 feet from the vehicle in each direction upon such highway.

The purpose of this provision is plain. It is, in the words of Rand J. in *Brooks v. Ward and The Queen*[1], "to rid the highways of unnecessary hazards". It was open to the jury to find that the place in which the vehicles mentioned were parked was one of peculiar danger, being at the crest of a hill and on a curve in the highway, on which east-bound or west-bound vehicles might lawfully be approaching each other at a combined speed of 100 miles

[1] [1956] S.C.R. 683 at 687, 4 D.L.R. (2d) 597.

per hour, and that so long as their drivers permitted them to remain in that position they were guilty of continuing negligence.

On all the evidence, I am unable to see how the jury, once they had exonerated Hunt from negligence, could fail to find Hajchak guilty of negligence which was an effective cause of the accident; but it was, in my opinion, open to them to take the view that the negligence of Wilson and Kumpula, which was clearly at least *causa sine qua non* of the accident, was also an effective cause.

Where one party, A, has negligently created a dangerous situation and another, B, after becoming aware of the danger or after he should by the exercise of reasonable care have become aware of it, could by the exercise of reasonable care have avoided the danger but fails to do so, B may be solely responsible for the resulting damage. Whether he will be solely responsible depends upon the answer to the question, whether a clear line can be drawn between the negligence of A and that of B; and that question is one of fact.

In the case at bar, in my opinion, if it had been left to the jury, on a proper direction, to say whether a clear line could be drawn between the negligence of Wilson and Kumpula and that of Hajchak they might, acting reasonably, have answered the question either in the affirmative or in the negative. I am, therefore, of opinion that the learned trial judge erred in withdrawing this question from them.

I am, however, unable to agree with the view of the Court of Appeal that there should be a new trial of all the issues. The jury, after a proper charge, have absolved Hunt and Weston of negligence and have assessed the damages of Hunt and Mayo. I have already indicated my view that no jury acting reasonably could have failed to find Hajchak guilty of some negligence which was an effective cause of the accident. In these circumstances I am of opinion that the judgments entered at the trial in favour of Hunt and Mayo against MacLeod Construction Company Limited and Hajchak should stand, but that a new trial should be directed to determine whether, and if so to what extent, MacLeod Construction Company

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Limited and Hajchak are entitled to contribution from Wilson and Kumpula in respect of the amounts payable by them to Hunt and Mayo, such new trial to be before a jury unless all parties agree that it should be without a jury. The making of such an order is authorized by s. 29 of *The Judicature Act,* R.S.O. 1950, c. 190, which reads:

> A new trial may be ordered upon any question without interfering with the decision upon any other question.

I would therefore allow the appeals, set aside the judgments of the Court of Appeal, and, subject to the right of election hereinafter mentioned, direct as follows. In the Hunt action, paras. 1, 2, 5 and 6 of the judgment of the learned trial judge should be restored and paras. 3 and 4 thereof should be vacated and set aside. In the Mayo action paras. 1, 2 and 5 of the judgment of the learned trial judge should be restored and paras. 3 and 4 thereof should be vacated and set aside. In both actions there should be a new trial limited to the issue as to whether MacLeod Construction Company Limited and Hajchak are entitled to contribution from Wilson and Kumpula or either of them, and if so to what extent, in respect of the amounts payable by them to Hunt and Mayo. The appellants and the third party will recover their costs in the Court of Appeal and in this Court from MacLeod Construction Company Limited and Hajchak. MacLeod Construction Company Limited and Hajchak will recover their costs in the Court of Appeal and in this Court from Wilson and Kumpula, and the costs of the first trial as to the issues between these parties shall be disposed of by the Judge presiding at the new trial.

As it is possible that the respondents MacLeod Construction Company Limited and Hajchak will not desire a new trial limited as set out above, I would direct that if MacLeod Construction Company Limited and Hajchak so elect within two weeks from the delivery of judgment in these appeals, the appeals should be disposed of as above set out but that failing such election the judgments of the learned trial judge should be restored with costs throughout.

The judgment of Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—For an understanding of the issues involved in this appeal it is necessary to set out the facts in some detail. The accident happened on the Trans-Canada highway a short distance west of Fort William on July 1, 1954, at 7.30 p.m. in good summer weather. One Richard Hunt was driving in a westerly direction on the north side of the highway with a passenger Walter Mayo. At the scene of the accident there were two parked vehicles partly on the travelled portion of the highway and partly on the shoulder, both facing east. One of these vehicles was a truck owned by W. Kumpula and the other a car owned by G. L. Wilson. Wilson's car had broken down and Kumpula's truck had towed it into the position in which the vehicles were at the time of the accident. The MacLeod Construction Company's truck was travelling in an easterly direction driven by S. Hajchak. As it approached the parked vehicles the driver noticed the situation but he was waved on by a bystander, B. R. Weston, who had been a passenger in the Wilson car. Hajchak followed Weston's signal and swung to the north side of the highway directly into the path of the west-bound Hunt car and there was a head-on collision wholly on the north side of the highway. Both Hunt and Mayo started separate actions. Hunt sued MacLeod Construction, the driver Hajchak, Wilson, the owner of the parked car, and Kumpula, the owner of the parked truck. MacLeod Construction brought in Weston as third party and claimed indemnity against him. It also counterclaimed against Hunt, Wilson, Kumpula and Weston for damage to its truck. The separate action of Mayo, Hunt's passenger, was constituted in the same way with the exception that there was no counterclaim in this action for damage to the truck.

At the trial the plaintiffs put in their case and the defendant, MacLeod Construction and its driver put in their complete defence and the case on the counterclaim, which included the calling as a witness of the third party, Weston. At this stage the owners of the two parked vehicles, Wilson and Kumpula, moved for a non-suit in

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the action and counterclaim, and Weston moved for a non-suit. The learned trial judge granted the applications of Wilson and Kumpula and dismissed them from the action and counterclaim. Weston's application for a non-suit was dismissed. The jury's finding was that Hajchak, the driver of the MacLeod Construction truck, was negligent and that Hunt and Weston were not negligent. The exoneration of Weston from negligence in this matter occurred in the counterclaim. There was no jury notice in the third party proceedings.

As a result, Hunt and Mayo obtained judgment in full for their claims. The counterclaim of MacLeod Construction Company for damages to its truck was dismissed and the third party proceedings against Weston were dismissed, the learned trial judge accepting the verdict of the jury exonerating Weston from negligence. MacLeod Construction Company and its driver were therefore found 100 per cent. responsible for this accident.

MacLeod Construction Company appealed to the Court of Appeal from this finding and a new trial was ordered on all the issues. It is stated in the unanimous reasons of the Court of Appeal that the non-suit was granted at the conclusion of the plaintiff's case and that on the authority of *McCarroll v. Powell*[1], a non-suit should not be granted at the conclusion of the plaintiff's case against one defendant when the plaintiff is claiming against two defendants alleging fault on the part of both of them, because a non-suit against one prevents the assertion by the other defendant of his claim to have the degrees of fault apportioned between the two defendants pursuant to the provisions of *The Negligence Act*. The impropriety of the non-suit at this stage of the proceedings is thoroughly understandable. Even though the plaintiff may not have put in a case to go to the jury against both defendants, one defendant still has the right to assert by way of defence that this is a case for apportionment of responsibility by the jury and his evidence might even show the other defendant to be solely to blame.

The judgment of the Court of Appeal in the present case is based upon the assumption that the non-suit was granted in favour of Wilson and Kumpula at the close of

[1] [1955] O.W.N. 281, 4 D.L.R. 631.

the plaintiff's case. It was in fact granted at the conclusion of the defence of MacLeod Construction and Hajchak. They had no further evidence to offer on the question of liability and it was expressly so stated by their counsel. At this stage of the proceedings, when the motions for non-suit were made, the learned trial judge was of the opinion that the plaintiff had no case to go to the jury against Wilson and Kumpula and that MacLeod Construction and Hajchak in their defence had likewise failed to prove a case for apportionment fit for submission to the jury against these two defendants. The whole case on the question of liability had then been heard. There was at that point nothing to prevent the learned trial judge from ruling on a non-suit. *McCarroll v. Powell* has no application. There could be no impairment of the right of MacLeod Construction and Hajchak to assert a claim for apportionment of negligence against the co-defendants because this opportunity has been given and the right fully exercised.

The question therefore becomes one of the propriety of the non-suit in the circumstances of the case. Wilson and Kumpula had been parked for some time at the scene of the accident. The MacLeod Construction truck was the only east-bound vehicle. The driver admits that he saw the parked vehicles in plenty of time to stop. Whether he should stop or whether he should go around and how he should go around were matters entirely within his choice. The jury has exonerated Weston, the bystander. My opinion is that the learned trial judge correctly exercised his power to grant a non-suit and that there is no ground for interference with his ruling.

I would therefore allow the appeals with costs both here and in the Court of Appeal and restore the judgments granted at the trial.

Appeals allowed with costs, RAND *and* CARTWRIGHT JJ. *dissenting in part.*

Solicitors for the plaintiff Hunt, appellant: Weiler & Weiler, Fort William.

Solicitor for the plaintiff Mayo, appellant: Bernard Shaffer, Fort William.

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Solicitor for the defendants MacLeod Construction Co. Ltd. and S. Hajchak, respondents: James F. W. Ross, Port Arthur.

Solicitors for the defendant Wilson, respondent: Hughes, Agar, Amys & Steen, Toronto.

Solicitor for the defendant Kumpula, respondent: Alfred A. Petrone, Port Arthur.

Solicitor for third party: Harold G. Blanchard, Port Arthur.

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*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Abbott JJ.

**The Chief Justice, owing to illness, took no part in the judgment.