1958
*Dec.10
1959
Jan. 27

CLARA M. WILLIAMS (*Plaintiff*) .....APPELLANT;

AND

STEVEN FEDORYSHIN (*Defendant*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Pedestrian injured—Statutory onus of driver—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 51.

The plaintiff was injured by an automobile owned and driven by the defendant. The plaintiff was crossing a highway 21 feet wide and was about 2 feet from the other side when she was struck by the

right front fender of the car. The area was well illuminated. The plaintiff testified that she looked in both directions before crossing the highway but did not see the car. The driver testified that he saw the plaintiff commencing to cross when he was about 150 feet away and travelling at approximately 45 m.p.h. The trial judge found the defendant 75 per cent. to blame. This judgment was reversed by the Court of Appeal which held that the plaintiff was solely responsible for the accident.

Held: The judgment at trial should be restored. This was a case in which s. 51 of *The Highway Traffic Act,* the "onus" section, was applicable. In the light of the evidence, the trial judge had been properly entitled to reach the conclusion that the defendant had failed to satisfy the onus placed upon him of proving that the loss or damage had not arisen as a result of his negligence. He was aware of the plaintiff's intention to cross the highway, he failed to sound his horn, and he made no attempt to turn to his right although this could have been done safely. He failed to prove that the plaintiff placed herself in his way in such a manner that he could not reasonably have avoided her. The plaintiff, under the circumstances, was not the sole proximate cause of her damages.

The apportionment of blame, as found by the trial judge, should not be varied.

APPEAL from a judgment of the Court of Appeal for Ontario, reversing a judgment of Treleaven J. Appeal allowed.

W. B. Williston, Q.C., and *H. L. Schreiber,* for the plaintiff, appellant.

F. R. Murgatroyd, Q.C., and *W. N. Callaghan,* for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, which set aside the judgment at the trial of Treleaven J. and dismissed the appellant's claim against the respondent.

The action arose out of an accident which occurred shortly after 6.00 p.m. on December 12, 1955. The appellant, a widow, 69 years of age, was struck by an automobile, owned and driven by the respondent, when she had nearly crossed provincial highway no. 8 at a place on the highway about one-half a mile east of the Village of Stoney Creek in the County of Wentworth.

The road in question is paved. It is 21 feet wide, running east and west, and was straight for a considerable distance in each direction from the place where the accident occurred.

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There was evidence that it was dry. The appellant was walking across it from north to south and the respondent was driving east at approximately 45 miles an hour. She was about two feet from the south edge of the road when she was struck by the right front fender of the respondent's car. This vehicle was a new Meteor, having been purchased in August 1955. It was in good mechanical condition, including the brakes and headlights.

On the south side of the road, toward which the appellant was walking, there were two gas stations, a restaurant and other places of business located about 50 feet south of the south side of the road. There is a gravelled area in front of these buildings level with the highway, which extended for about 300 feet west from the place where the accident occurred, which was opposite the restaurant. The lights from these places of business illuminated the road as far as its north side.

The respondent testified that there were ridges of ice, about three feet south of the south edge of the highway, about two feet in height, which blocked access to the gravelled area, except for two entrances about 15 to 30 feet in width. The police constable who investigated the accident and the appellant's son both gave evidence that there were no ridges which would prevent a car from being driven off the road on to the gravelled area at any point along the portion of the road adjoining that area.

In her evidence the appellant stated that she looked both toward the east and the west before crossing the road and did not see the respondent's car. The respondent says that he first saw the appellant when she was on the north shoulder of the road. He saw her commencing to cross the road. He states that he was approximately 150 feet west of her when he first observed her.

When he saw the appellant the respondent applied his brakes hard and proceeded straight east down the highway to the point of impact. He did not sound his horn or attempt to swerve either to the right or to the left. He stated that an approaching vehicle made it impossible for him to make a turn toward his left. Following the accident there were skid marks on the road 37 feet in length running

straight back from the point where the respondent's automobile had stopped. At the place where it stopped, approximately parallel to the south edge of the road, the right front wheel was about two feet north of the south edge of the road.

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The appellant suffered serious injuries. The learned trial judge decided that the respondent was 75 per cent. to blame for the accident and gave judgment in favour of the appellant for $8,903.55 with costs. The Court of Appeal unanimously held that the appellant was solely responsible for the accident on the basis that if she had looked in a prudent and careful manner she should have seen the respondent's vehicle approaching, would then have realized the danger of proceeding across the road and, if she had waited until the respondent's car had passed, the accident would not have occurred. It was held that her negligence was the sole cause of her damages. It is from this judgment that the present appeal is brought.

This is a case in which the "onus" section, s. 51, of *The Highway Traffic Act,* R.S.O. 1950, c. 167, is applicable. The respondent had the burden of proving that the appellant's loss or damage did not arise through his negligence. The learned trial judge found that the respondent had failed to satisfy that onus.

In my opinion he was properly entitled to reach that conclusion in the light of the evidence adduced. The respondent was aware of the appellant's intention to cross the highway from the moment that she commenced to walk on to the road. He was then at least 150 feet away, driving a new car in good mechanical condition and equipped with good brakes. He says that his speed was approximately 45 miles per hour. He failed to sound his horn to warn her of his approach. He made no attempt to turn to his right, though there was evidence to show that this could have been done safely. He proceeded in a straight line down the highway until he collided with her.

The learned trial judge went on to find that there was some contributory negligence on the part of the appellant, which finding is not questioned on this appeal. He stated that it could not be said how far away the respondent's car was when she started to cross the road. He was inclined

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to think that it was a little further back than the respondent had said and it was closer than the appellant had said. He concluded that the appellant either did not look or failed to look carefully enough. He said that it would have been the part of prudence to wait until the car had passed, but that the appellant had the right to assume that, at the distance it was, the respondent would let her get across the road in safety.

In his well known judgment in *Winnipeg Electric Company v. Geel*[1], Lord Wright, in discussing how a defendant might meet the onus imposed by s. 62 of the *Manitoba Motor Vehicles Act,* says:

> This the defendant may do in various ways, as for instance, by satisfactory proof of a latent defect, or by proof that the plaintiff was the author of his own injury; for example, by placing himself in the way of the defendant's vehicle in such a manner that the defendant could not reasonably avoid the impact, or by proof that the circumstances were such that neither party was to blame, because neither party could avoid the other.

In the present case the respondent has not proved that the appellant placed herself in the way of his vehicle in such a manner that he could not reasonably avoid her.

The Court of Appeal took the position that the appellant was the sole proximate cause of her damage, because, if she had waited until the respondent's car had passed, there would have been no damage. While it is obvious that there would not have been an accident if the appellant had waited until the respondent's car had passed, I do not think it follows that she was, therefore, the sole proximate cause of the damage she sustained. The point is that, although erroneously as it turned out, she believed that she could proceed safely across the road. Having started to cross the road, the respondent then had a duty to take all reasonable means to avoid colliding with her. He did run into her and thereby the onus rested upon him to establish that he could not have reasonably avoided the impact. From the moment she started to cross the road the appellant had been seen by the respondent, who then took no steps to warn her of his approach, or, save by the application of his brakes, to avoid striking her. He failed to satisfy the onus placed upon him.

[1] [1932] A.C. 690 at 695.

The respondent stated in his notice of appeal to the Court of Appeal that, if that Court held he had not met the statutory onus, he did not appeal in respect of the percentage of negligence assessed against him. On the present appeal he contended that, if he were liable at all, the percentage should be reduced. Objection was not taken to the submission of argument on this point before this Court. Assuming that the respondent is entitled to raise this issue at this stage (and I do not think he was so entitled), I would say that the learned trial judge has made his finding on this point and in the light of the evidence there does not appear to be any reason why his conclusions in that regard should be varied.

No question was raised on this appeal as to the quantum of damages.

In the result I would allow the appeal with costs in this Court and in the Court of Appeal and direct that the trial judgment be restored.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: Henry L. Schreiber, Hamilton.

Solicitors for the defendant, respondent: Murgatroyd & Callaghan, Hamilton.

PRESENT: Rand, Locke, Cartwright, Abbott and Judson JJ.