1960

*June 8
June 24

JAMES HERD (*Defendant*) .....APPELLANT;

AND

ZVONE TERKUC (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trial—Practice—Jury sent back to reconsider their answers to questions submitted to them—Whether course followed by trial judge a proper one.

In the course of a trial in a motor negligence action certain questions were submitted to the jury. The trial judge was dissatisfied with the answers and, without referring to counsel, instructed the jury to reconsider their findings. On the second set of answers judgment was given dismissing the action with costs. The Court of Appeal, by a majority, who were of opinion that the course followed by the trial judge was not a proper one, allowed the plaintiff's appeal and directed a new trial. The defendant then appealed to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

The first set of answers, read in the light of the evidence and of the charge, made it apparent that the jury had failed to grapple with the essential point which they were required to determine. In these circumstances, the trial judge had the power and it was his duty to instruct the jury to reconsider their answers. *Napier v. Daniel and Welsh,* (1837), 6 L.J.C.P. 62 at 63, and *Regina v. Meany,* (1862), 9 Cox C.C. 231 at 233, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wells J. and directing a new trial. Appeal allowed.

A. T. Hewitt, Q.C., and J. L. Nesbitt, for the defendant, appellant.

D. Boyle, for the plaintiff, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of of the Court of Appeal for Ontario which, by a majority, allowed the plaintiff's appeal from a judgment of Wells J. dismissing the action and directed a new trial; Schroeder J.A. dissenting, would have dismissed the appeal.

*PRESENT: Locke, Cartwright, Martland, Judson and Ritchie JJ.

[1] [1958] O.R. 37, 11 D.L.R. (2d) 371.

The action was for damages for personal injuries suffered by the respondent in a collision between a motor car owned and driven by one Menard, in which the respondent was a passenger carried gratuitously, and a motor car owned and driven by the appellant.

The collision occurred in the City of Ottawa at the intersection of Laurier Avenue and Waller Street, on September 26, 1955, at about 6.30 a.m. Laurier Avenue runs east and west; Waller Street runs north and south. The movement of traffic at this intersection is controlled by signal lights, as provided by s. 41(2) of the *Highway Traffic Act,* R.S.O. 1950 c. 167. The car in which the respondent was carried was being driven south on Waller Street and the appellant was driving west on Laurier Avenue. Each driver claimed that he entered the intersection with the green signal light in his favour and the crucial question was as to which of them was right in this assertion. The evidence of the two drivers on this point was definite and in direct conflict. One of them must have been mistaken.

In the course of an admirable charge the learned trial judge repeatedly impressed upon the jury that their main task was to decide which driver had the traffic light in his favour. He said, for example:—

> You will have to decide which of these stories you believe, that is the key to this case, because whoever did not have the green light was negligent, I think it is as simple as that.
>
> * * *
>
> There is a concrete wall apparently 8 feet high obscuring vision until you are fairly close to the intersection, but if Menard had a green light, even if he saw Herd coming along, he was entitled to proceed through and entitled to assume Herd would stop. That applies equally to Herd who couldn't see up Waller because of that wall, and who had every right to assume, if the light was green, any traffic coming up or down Waller would stop on the red light. I think the whole key to the question is who had the light and the man who went through on the red light is negligent.

The learned trial judge did not withdraw the question of contributory negligence from the jury; he instructed them accurately and adequately as to the duty of a driver who has the signal light in his favour and went on to tell them, quite properly, that on the evidence there was little room for a finding of negligence on the part of whichever driver did in fact have the signal light in his favour.

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The following questions were submitted to the jury:

1. Was there any negligence on the part of the defendant driver, James Herd, which caused or contributed to the injuries suffered by the plaintiff, Zvone Terkuc? Answer Yes or No.

2. If your answer to Question No. 1 is "Yes" then state fully, giving the facts on which you base your conclusions, the particulars of such negligence.

3. Was there any negligence on the part of the driver of the Plaintiff's car, Jacques Menard, which caused or contributed to the injuries suffered by the Plaintiff? Answer Yes or No.

4. If your answer to Question No. 3 is "Yes", then state fully, giving the facts on which you base your conclusions, the particulars of such negligence.

5. If your answer should disclose that there was negligence on the part of both drivers which caused or contributed to the injuries suffered by the plaintiff, then state in percentage the respective degrees of negligence of each:

James Herd %
Jacques Menard %

100%

6. At what amount and irrespective of any other consideration do you assess the total damages suffered by the Plaintiff, Zvone Terkuc?

After deliberating for some two hours the jury returned to the court room and stated that they had reached a verdict. The list of questions was handed to the learned trial judge and contained the following answers:

To Question 1: Yes.
To Question 2: Excess of speed shown by force of impact.
To Question 3: Yes.
To Question 4: Failure in looking for cross-bound traffic.
To Question 5: James Herd 60%
Jacques Menard 40%

100%

To Question 6: $16,940.00

The learned trial judge without referring to counsel or inviting any submission from them said to the jury:

You see your difficulty is you haven't answered the essential questions. You say "Yes" to Question 1 and say "excessive speed shown by force of impact". In so far as this driver is concerned, if he had the green light he was entitled to go through. If he had the traffic light he did not have to look for anything unless it was apparent to him that something was coming through against the light. Try to grapple with the essential points in this case. You have a duty to do; now try and do it.

The jury thereupon retired and after deliberating for a further two hours returned the following answers to the questions:

To Question 1: No.
To Question 2: No answer.
To Question 3: Yes.
To Question 4: Failure to stop at red light.
To Question 5: No answer.
To Question 6: $16,940.00

On these answers the learned trial judge, on motion of counsel for the defendant gave judgment dismissing the action with costs.

The majority in the Court of Appeal were of opinion that the course followed by the learned trial judge was not a proper one. With respect, I am unable to agree with this conclusion.

The answers of a jury must, of course, be read in the light of the evidence and of the charge; on so reading the answers first made by the jury it was apparent that they had failed to grapple with the question as to which driver had the signal light in his favour which had been clearly presented to them as the essential point which they were required to determine. In these circumstances the learned trial judge had the power and it was his duty to instruct the jury to deal with that question. Particularly in view of the full and accurate charge which he had given on this point, his redirection, which is quoted in full above, while brief was adequate.

That the learned judge had the power to send the jury back to reconsider their answers is made plain by the authorities collected in the reasons of Schroeder J.A. I would add a reference to two decisions relied upon by counsel for the appellant. In *Napier v. Daniel and Welsh*[1], Tindal C.J. said:

> I have always understood the rule to be, that the jury are at liberty to alter the verdict before it is recorded, but not after. This is laid down in Co. Litt. fol. 227, *b*, where it is said, "after the verdict recorded, the jury cannot vary from it, but before it be recorded they may vary from the first offer of their verdict, and that verdict which is recorded shall stand."

[1] (1837), 6 L.J.C.P. 62 at 63, 3 Bing. N.C. 77.

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In *Regina v. Meany*[1], Pollock C.B. said:

> There is no doubt that a Judge, both in a civil and criminal court, has a perfect right, and sometimes it is his bounden duty, to tell the jury to reconsider their verdict. He may send them back any number of times to reconsider their finding. The Judge is not bound to record the first verdict unless the jury insist upon its being recorded. If they find another verdict that is the true verdict.

While no doubt this power is not one to be used lightly, the circumstances of the case at bar appear to me to have required its exercise and I conclude, as did Schroeder J.A., that the course followed by the learned trial judge was a proper one.

For the above reasons and for those given by Schroeder J.A. with which I am in substantial agreement I would allow the appeal and restore the judgment of the learned trial judge. The appellant is entitled to his costs in the Court of Appeal and in this Court.

Appeal allowed with costs.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the respondent: Guertin, Guertin and Boyle, Ottawa.

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

[1] (1862), 9 Cox C.C. 231 at 233, 32 L.J.M.C. 24.