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*Feb. 13
June 26

TED ALLEN HARRIS, an infant, by his next friends, ARMAND HALL and LILLIAN HARRIS (*Plaintiffs*) ..... APPELLANTS;

AND

TORONTO TRANSIT COMMISSION and ALBERT MILLER (*Defendants*) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Bus driver negligent in pulling away from curb with result that bus brushed against steel pole—Passenger putting arm out of window in contravention of by-law and in disregard of notice—Passenger suffering physical injury—Parties at fault in equal degrees and damages apportioned accordingly.

The infant appellant sustained injuries when he was a passenger in a bus owned by the respondent Transit Commission and operated by its servant, the second respondent. As the bus in question pulled away from a bus stop, it brushed against a steel pole which was set in the sidewalk some 5½ inches from the curb with the result that the infant appellant's arm, which he had extended through a window in order to point out some object to his companion, was crushed and broken. In an action for damages brought on behalf of the infant appellant, the trial judge found that the negligence of the bus operator was a proximate cause of the collision but that the appellant was also guilty of negligence in putting his arm out of the window of the bus, having regard to the fact that a by-law of the respondent Commission, of which the appellant was aware, prohibited passengers from doing this and was posted in the bus together with a sign below the window

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

reading: "Keep arm in". The trial judge assessed the damages at $7,500 and would have divided the fault equally between the parties. On appeal, the Court of Appeal found that on the facts of the case there could be no recovery. With leave, an appeal was brought to this Court from the judgment of the Court of Appeal.

Held (Judson J. *dissenting*): The appeal should be allowed.

Per Cartwright, Martland, Ritchie and Spence JJ.: There may be circumstances in which a public carrier can discharge its duty to its passengers in relation to a specific danger by passing a prohibitory by-law and otherwise giving notice of the danger, but when, as in this case, the respondent's negligence was an effective cause of the accident and its driver should have foreseen the likelihood of children passengers extending their arms through the window notwithstanding the warning, different considerations apply and it becomes a case where the damages should be apportioned in proportion to the degree of fault found against the parties respectively.

As indicated, the negligence of the respondent's driver was an effective cause of the accident, but the appellant was also at fault in that he did not, in his own interest, take the care of himself which was prescribed by the by-law and he contributed by this want of care to his injury. There was no reason to disturb the conclusion of the trial judge that the parties were at fault in equal degrees and that the damages should be apportioned accordingly.

Per Judson J., *dissenting*: As held by the Court of Appeal, the cause, and the only cause, of this accident was that the boy deliberately put his arm out of the window. He was thirteen years of age at the time. He knew that what he was doing was both dangerous to his own safety and forbidden. He would not have been injured if he had kept his arm within the bus.

[*Hill v. The Grand Trunk Railway Co.* (1922), 52 O.L.R. 508, not followed; *National Coal Board v. England*, [1954] A.C. 403; *Ginty v. Belmont Building Supplies, Ltd.*, [1959] 1 All E.R. 414; *McMath v. Rimmer Brothers (Liverpool), Ltd.*, [1961] 3 All E.R. 1154, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Parker J. Appeal allowed, Judson J. dissenting.

G. F. Henderson, Q.C., and *B. A. Crane*, for the plaintiffs, appellants.

T. A. King, Q.C., and *J. W. Brown*, for the defendants, respondents.

The judgment of Cartwright, Martland, Ritchie and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for Ontario allowing an appeal from a judgment of Mr. Justice

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Parker and dismissing a claim made on behalf of the infant appellant for damages sustained by him when he was a passenger in a bus owned by the respondent Toronto Transit Commission and operated by its servant Albert Miller, who is the other respondent. As the bus in question pulled away from the bus stop at the corner of Bay and Dundas Streets in the City of Toronto, it brushed against a steel pole which was set in the sidewalk some $5\frac{1}{2}$ inches from the curb with the result that the infant appellant's arm, which he had extended through a window in order to point out some object to his companion, was crushed and broken. The collision also had the effect of breaking the right clearance light and denting the side of the bus behind the rear window.

In a carefully prepared opinion, Mr. Justice Parker found that the negligence of the bus operator was a proximate cause of the collision but that the infant appellant was also guilty of negligence in putting his arm out of the window of the bus, having regard to the fact that a by-law of the Toronto Transit Commission, of which the appellant was aware, prohibited passengers from doing this and was posted in the bus together with a sign below the window reading: "Keep arm in". The trial judge would have divided the fault equally between the parties.

The decision of the Court of Appeal was rendered orally by Laskin J.A. at the conclusion of the argument. The learned judge did not refer to any authorities but reached his conclusion on the following grounds:

> We are of the opinion that there was no negligence in this case attributable to the defendants which, as a matter of law, operated in favour of the infant plaintiff. On the facts, he was the author of his own misfortune. We do not think that the bus operator could reasonably be expected to foresee that the infant plaintiff would have his arm in the position in which it was outside the window when he pulled away from the curb. The evidence is clear that the infant plaintiff knew of the warning which was posted on the window ledge to keep his arm in, and it was his carelessness for his own safety and not any carelessness that may have existed in the way in which the driver pulled away from the curb that was the operative cause of the accident.

In the present respondent's notice of appeal to the Court of Appeal the only two grounds taken which made express reference to the negligence of the infant appellant were:

> (4) the learned judge erred in holding that the plaintiffs were entitled to recover notwithstanding the breach by the infant plaintiff of the

statutory prohibition against putting his arm out of the window of the bus contrary to the bylaw in that behalf of the defendant company and section 167 of The Railway Act, R.S.O. 1950, Chapter 331;

(5) the learned judge ought to have found that the injuries sustained by the infant plaintiff were solely due to his own negligence and breach of the said statutory prohibition; . . .

The only finding of negligence on the part of the appellant which the Court of Appeal had before it was the trial judge's finding that the appellant "knew and appreciated the danger and voluntarily accepted the risk".

If by using the phrase "he was the author of his own misfortune" the Court of Appeal intended to convey the opinion that the breach of the statutory prohibition by the infant appellant disentitled him to recover against the Commission for the damage which he suffered through the negligence of the Commission's servant then, as will hereafter appear, I am in respectful disagreement with this finding. If, on the other hand, the phrase is used to indicate that the boy voluntarily accepted the risk of his injury and cannot recover on this ground, then it is perhaps well to mention the decision in *Lehnert v. Stein*[1], where Mr. Justice Cartwright, speaking for the majority of this Court, at p. 44, adopted the following comments on the defence of *volenti non fit injuria*, which were made by Mr. Glanville Williams in his work on Joint Torts and Contributory Negligence (1951) at p. 308:

It is submitted that the key to an understanding of the true scope of the *volens* maxim lies in drawing a distinction between what may be called physical and legal risk. Physical risk is the risk of damage in fact; legal risk is the risk of damage in fact for which there will be no redress in law.

* * *

To put this in general terms, the defence of *volens* does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence.

I do not think that the circumstances in the present case justify the conclusion that the injured boy entered into a bargain express or implied whereby he gave up his right of action for negligence against the respondents.

[1] [1963] S.C.R. 38.

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It will also be observed that Mr. Justice Laskin did not consider that the bus driver could reasonably be expected to foresee that the little boy's arm would have been out of the window.

In my opinion we are relieved from the task of speculating on whether the bus driver could reasonably have foreseen such a thing by reason of the fact that he indicates in his own evidence that he was aware of the propensity of children on his own bus to put their arms and indeed their heads out of the window, notwithstanding the warning which the Commission had posted.

In the course of his cross-examination, the respondent, Albert Miller, who was driving the bus, made the following answers:

> Q. Did you ever remind any passenger not to put his arm or her arm out of the window?
> A. Yes—if I see them put their arm out—or children with their heads out or anything, I always go back and tell them not to.
> Q. Do you have instructions to watch for this?
> A. Well, we are supposed to watch for anything unusual on the bus.

And later:

> Q. Did you ever, except perhaps when you had a whole load of children, stop your bus and go back and request them not to have their arm out the window?
> A. Yes, when I have had children—school-work and that.

I have no difficulty in drawing the conclusion from this evidence that the bus driver knew that children had a tendency to put their arms out of the windows and that he could therefore reasonably be expected to foresee that such a thing would happen in the case of the infant plaintiff.

The standard of care required of common carriers is stated in the following terms by Hudson J. in *Day v. Toronto Transportation Commission*[1], at p. 441, where he said:

> Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree.

Substantially the same proposition is stated in slightly different language in the reasons for judgment of Kerwin C.J.,

[1] [1940] S.C.R. 433.

speaking on behalf of himself and Judson J. in *Kauffman v. Toronto Transit Commission*[1], at p. 255, where he said:

> While the obligation upon carriers of persons is to use all due, proper and reasonable care and the care required is of a very high degree, such carriers are not insurers of the safety of the persons whom they carry. The law is correctly set forth in Halsbury, 3rd ed., vol. 4, p. 174, para. 445, that they do not warrant the soundness or sufficiency of their vehicles, but their undertaking is to take all due care and to carry safely as far as reasonable care and forethought can attain that end.

There can, in my opinion, be no doubt that in operating the bus in such manner as to bring it into forceful contact with the steel pole, the respondent Miller exhibited a marked departure from the standard of care which the operators of public vehicles owe to their passengers, and I agree with the learned trial judge that his conduct in this regard was an effective cause of the accident.

The relevant by-law of the respondent Commission, which was approved by the Ontario Municipal Board and therefore has the force of law by virtue of s. 167 of *The Railway Act,* R.S.O. 1950, c. 331, provided as follows:

> No person shall ride or stand on any exterior portion of any car or bus operated by the Commission nor lean out of or project any portion of his body through any window of such car or bus nor enter any such bus at other than the designated entries.

It was contended on behalf of the respondent that by passing this by-law and otherwise giving notice to its passengers of the danger of projecting any portion of their body through any window of the bus, the respondent Commission had fully discharged its duty of care in relation to the dangers involved in such conduct and that it owed no further duty to them in this regard. There may be circumstances in which a public carrier can discharge its duty to its passengers in relation to a specific danger by passing such a by-law and giving such notice, but when, as in this case, the respondent's negligence was an effective cause of the accident and its driver should have foreseen the likelihood of children passengers extending their arms through the window notwithstanding the warning, different considerations apply and in my opinion it becomes a case where the damages should be apportioned in proportion to the degree of fault found against the parties respectively.

[1] [1960] S.C.R. 251.

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As was pointed out by the learned trial judge, the case of *Hill v. The Grand Trunk Railway Company*[1] was one in which the plaintiff stepped off a moving train at her destination and was injured and it was there held that notwithstanding the jury's finding as to the negligence of the defendants and the absence of contributory negligence by the plaintiff, the plaintiff was nevertheless not entitled to recover because her action in leaving the moving train contravened a by-law of the railway company. In that case, Masten J.A. said:

> ...I think that the question is not one of contributory negligence at all, but rather of the contravention by the plaintiff of an absolute statutory prohibition, which precludes her from asserting a claim arising out of the risks with which her act was attended.

In so deciding, Masten J.A. purported to follow the reasoning of the Privy Council in *Grand Trunk Railway Company of Canada v. Barnett*[2], which turned in large measure upon the finding that the injured plaintiff was a trespasser to whom the railway company owed no duty.

These cases were decided at a time when contributory negligence on the part of a plaintiff was a complete defence and before the enactment of the statutory provisions respecting apportionment of damage between parties who are both at fault. I think the reasoning of Mr. Justice Masten is at variance with many of the cases which have been decided in England since the enactment of the *Law Reform (Contributory Negligence) Act, 1945* in which apportionment of the damages has been ordered notwithstanding the fact that the plaintiff was in breach of a statutory duty. In this regard reference can usefully be made to the decision of the House of Lords in *National Coal Board v. England*[3], and to the more recent cases of *Ginty v. Belmont Building Supplies, Ltd.*[4], and *McMath v. Rimmer Brothers (Liverpool), Ltd.*[5]. It is true that "fault" is defined in the English statute as including "breach of statutory duty... which gives rise to a liability in tort or would apart from this Act give rise to the defence of contributory negligence", but I do not think that the absence of such a

[1] (1922), 52 O.L.R. 508.
[2] [1911] A.C. 361.
[3] [1954] A.C. 403.
[4] [1959] 1 All E.R. 414.
[5] [1961] 3 All E.R. 1154.

definition in the Ontario Act justifies the conclusion that the word "fault" was there used in such a restricted sense as to exclude breach of a statutory duty. The relevant statutory provision in Ontario is contained in s. 4 of *The Negligence Act*, R.S.O. 1960, c. 261 which reads:

> 4. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

As I have indicated, I am satisfied that the negligence of the respondent's driver was an effective cause of the accident, but the appellant was also at fault in that he did not, in his own interest, take the care of himself which was prescribed by the by-law and he contributed by this want of care to his injury. I see no reason to disturb the conclusion of the learned trial judge that the parties were at fault in equal degrees and that the damages should be apportioned accordingly.

In view of all the above, I would allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment at trial.

The appellant is entitled to his costs in this Court and in the Court of Appeal.

JUDSON J. (*dissenting*):—The infant plaintiff was thirteen years of age at the date of the accident. He was riding south on Bay Street, Toronto, in a T.T.C. bus, seated at the right hand side of the back seat next to the window. This window could not be raised, but could be pushed forward horizontally some four inches, which was its position at the time. At the bottom of the window there was a warning sign reading "Keep arm in". This warning sign had been placed there pursuant to a by-law of the respondent, approved by the Ontario Municipal Board pursuant to s. 167 of *The Railway Act*, R.S.O. 1950, c. 331.

The bus stopped at the curb on the west side of Bay Street a short distance north of its intersection with Dundas Street, for the purpose of picking up and discharging passengers, and while so stopped the boy put his arm out beyond the elbow through the opening in the window to

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point out some object in a store window to a companion sitting beside him. He had ridden on similar buses on many previous occasions, had seen the warning sign on those occasions and admitted that he knew the sign was there to warn people to keep their arms in so that there would not be any chance of their being injured by any contact with things outside the bus.

After discharging and taking on passengers at the stop, the bus started up and as the front pulled away from the curb its rear swung slightly to the right and the upper right rear corner grazed the top of a steel pole set in the sidewalk near the curb. A small plastic clearance light at the upper rear corner of the bus was broken, and a small window near the top of the bus was cracked.

There was no impact between the bus and the pole in the area of the window through which the boy put his arm, but his arm was crushed between the pole and the side of the bus. The pole was one of a series located on either side of Bay Street for the purpose of suspending the electric trolley wires. The boy was familiar with the existence of these poles close to the curb on both sides of the street, and had seen them on many previous occasions.

On these facts, the trial judge assessed the damages at $7,500 and found that the injury was caused or contributed to in equal degrees by the fault or negligence of both the boy and the bus driver. The Court of Appeal found that there could be no recovery on the undisputed facts of the case.

The Court of Appeal said that the cause, and the only cause, of this accident was that the boy deliberately put his arm out of the window. He was thirteen years of age at the time. He knew that what he was doing was both dangerous to his own safety and forbidden. He would not have been injured if he had kept his arm within the bus.

I disagree with the reasons of Ritchie J. when he says that two possible inferences from the judgment of the Court of Appeal are:

(a) that the Court was saying that when the boy put his arm out of the window in contravention of the regula-

tions, he effectively extinguished all rights which he might otherwise have had, and

(b) that there was a voluntary acceptance of the risk.

I agree with the reasons delivered in the Court of Appeal and would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

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

Solicitor for the defendants, respondents: J. W. H. Day, Toronto.