RODOJKA PETIJEVICH and MIKE PETIJEVICH (*Plaintiffs*) } APPELLANTS;

1968
*Oct. 10, 11
Nov. 21

AND

RICHARD JOHN LAW (*Defendant*) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Motor vehicles—Negligence—Pedestrian struck in crosswalk of traffic-controlled intersection—Failure of driver to give right-of-way—Motor-vehicle Act, R.S.B.C. 1960, c. 253, s. 128(9)(b), (11)(a).

Trial—Questions to jury as to negligence of parties—Usual order reversed—Effect thereof—Indication by trial judge that ultimate negligence doctrine could be invoked—Jury misled.

Evidence—Witness identifying injured person as woman seen running at intersection ten minutes before accident—Evidence improperly admitted.

The female plaintiff was injured when she was struck by an automobile owned and driven by the defendant while she was crossing an intersection of a main arterial highway running north and south and a road running east and west. The said intersection was a controlled intersection within the meaning of s. 128 of the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253. It was dark at the time of the accident and the plaintiff was crossing to the west in a crosswalk. She was wearing a long, light coloured winter coat. She testified that she looked to the north and to the south, and seeing no vehicles approaching, started to cross. She remembered taking a few steps but nothing more. She was rendered unconscious, sustaining extremely serious injuries.

The defendant was travelling southward on the west side of the highway. He said that he saw a form darting from his left to his right in the crosswalk area and immediately applied his brakes. The plaintiff was hit by the front of the car towards the left centre. She had travelled westward some 55 feet in the crosswalk before she was struck. The defendant knew of the crosswalk and that pedestrians might be expected to be crossing the highway at this point. He had been travelling at about 50 m.p.h. as he came southward, and as he approached the intersection took his foot off the accelerator and poised it over the brake pedal.

At the trial of the plaintiffs' action for damages, the jury found that the accident was caused solely by the negligence of the female plaintiff. The judgment dismissing the action was affirmed by the Court of Appeal and the plaintiffs then appealed to this Court.

Held: The appeal should be allowed and a new trial held limited to the question of damages.

The first question put to the jury should have been as to whether there was any negligence on the part of the defendant which caused or contributed to the accident. If the jury found negligence on the part

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Hall JJ.

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of the defendant and gave particulars, the next question would be whether there was any contributory negligence on the part of the plaintiff which caused or contributed to the accident. The reversing of this order had a serious effect upon the manner in which the trial judge charged the jury and in the jury's consideration of the whole question of liability.

It was a serious error on the part of the trial judge to indicate that the ultimate negligence doctrine could be invoked in this case, and evidence given by the driver of another car to the effect that some ten minutes before the accident he had seen a woman, whom he later identified as the injured person, run out from a curb at the intersection and then dart back was improperly admitted.

There was no evidence on which the jury could find or infer that the female plaintiff left a curb or other place of safety or that she walked or ran into the path of the defendant's vehicle and, accordingly, s. 169(2) of the *Motor-vehicle Act* did not apply.

The defendant had failed in his duty to (1) keep a proper look-out; (2) to enter the intersection at such a speed that he could slow down or stop, if necessary, before striking a pedestrian who was lawfully in the pedestrian crosswalk; and (3) to yield right-of-way to the pedestrian as he was required to do by s. 128(11)(*a*) of the Act. There being no evidence upon which a finding could be made that the female plaintiff started across the highway without looking to see if it was safe to do so or that she did anything to jeopardize her own safety, she was entitled to assume that the driver of the motor vehicle in question would obey the law and yield right-of-way.

Jardine v. Northern Co-operative Timber and Mill Association, [1945] 1 W.W.R. 533; *Toronto Railway Co. v. King*, [1908] A.C. 260, applied.

APPEAL from a judgment of the Court of Appeal for British Columbia, rejecting an appeal from a judgment of Macdonald J. with a jury, dismissing the appellants' action for damages. Appeal allowed and new trial ordered.

Thomas Braidwood and *Robert Brewer*, for the plaintiffs, appellants.

R. E. Ostlund, for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the Court of Appeal of British Columbia which rejected an appeal from a judgment of Macdonald J. with a jury, dismissing the appellants' action for damages. The appellants are husband and wife.

The female appellant was injured when she was struck by an automobile owned and driven by the respondent while she was crossing from east to west on the King George Highway near Vancouver at the intersection of the highway with what is known as Kennedy Road (88th

Avenue). King George Highway is a main arterial highway. There are residential areas on either side. Provision for pedestrians to cross was made at the intersection of Kennedy Road by a pedestrian crosswalk on the south side of the intersection. This crosswalk was outlined by lines painted on the pavement.

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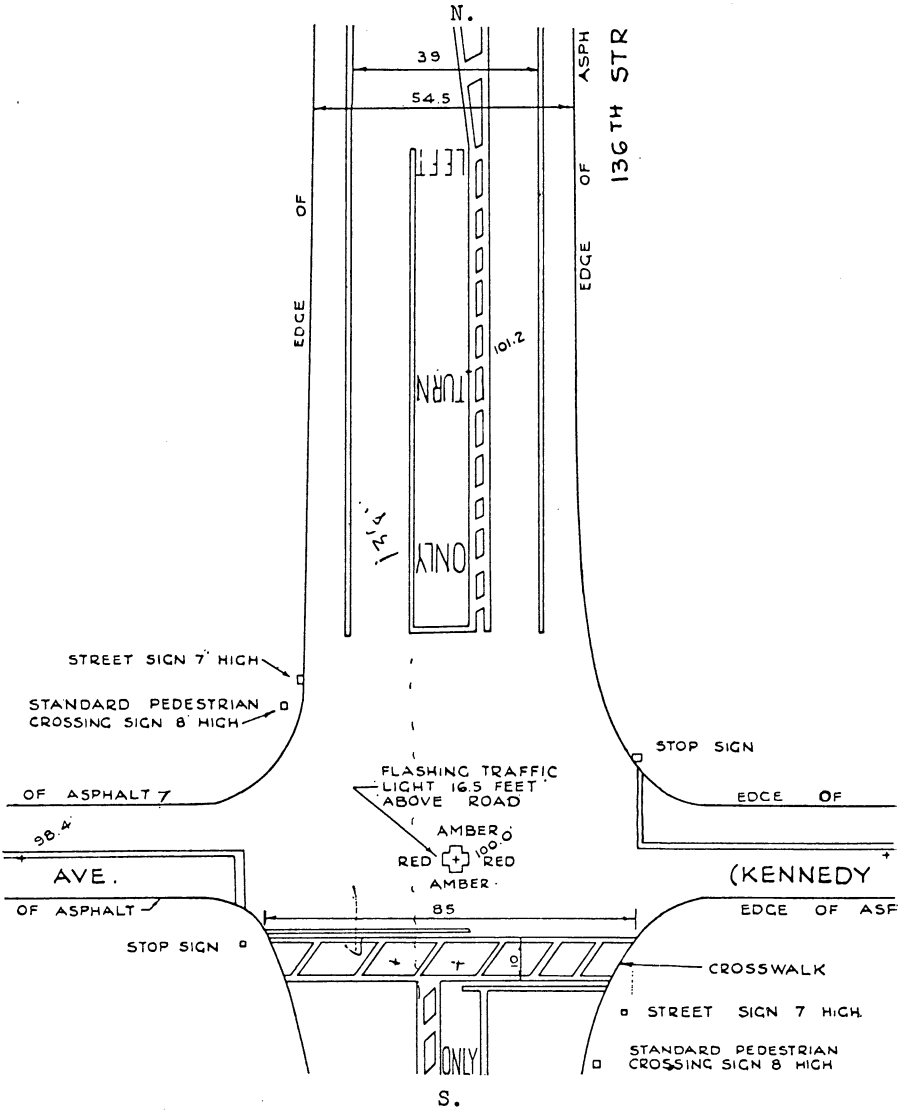
The situation at the intersection in question was as shown on the following plan:



There was no safety island or curbed area in the centre of the highway, only the painted lines as indicated.

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At or about 5:30 p.m. on December 16, 1963, the female appellant, age 51, was on her way home from visiting her daughter who lives in the area east of the King George Highway. She had to cross the highway to reach her home which was on Kennedy Road west of the highway. On her way home she purchased some loaves of bread and arrived at the south-east corner of the intersection of the highway and Kennedy Road where she proceeded to cross to the west in the crosswalk shown on the plan. It was dark at this time. She was wearing a long, light coloured winter coat and carrying the bread in a paper bag. She testified that she looked to the north and to the south, and seeing no vehicles approaching, started to cross. She remembers taking a few steps but nothing more. She was rendered unconscious, sustaining extremely serious injuries and she remained unconscious for several days.

The respondent was travelling southward on the west side of the highway, and as he came towards the intersection in question he was in the lane to the west of the left turn lane as shown on the plan. He knew the intersection well and that there was a pedestrian crosswalk on the south side of the intersection. It was the only pedestrian crosswalk for a considerable distance north or south of the area. He had driven over this intersection a great many times. He said he saw "this form darting from my left to my right" in the crosswalk area and immediately applied his brakes. Skid marks extending from 40 feet north of the crosswalk were identified and traced to his car which came to rest some 91 feet south of the crosswalk. The overall skid marks measured 141 feet. The skid marks north of the crosswalk came in a straight line, showing that the car had not been turned nor had it swerved either to right or to left. The respondent said that his car struck this form or object at about the south side of the crosswalk at a point some 8 to 10 feet into the lane for southbound traffic. It was only then that he realized that it was a pedestrian that had been hit. His evidence as to this was as follows: "Yes, I hit at this time an object. I understand later it was a pedestrian, and I carried her on the hood of my car for some distance..." The female appellant was hit by the front of the car towards the left centre. The distance from the edge of the asphalt at the north side of the crosswalk

was, as the plan shows, some 85 feet. This means that the pedestrian had travelled westward at least 55 feet in the cross-walk before she was struck. The respondent also testified that when he first saw her, she was running and that she moved about 8 or 9 feet from when he first saw her until the car hit her. His testimony as to the impact was as follows:

Q. How many steps would you say you saw this object move before you struck it?
A. I don't believe I would even attempt to—as soon as I saw this object I tried to avoid it.
Q. Did you continue to look at this object or did you direct your attention to something else?
A. I tried to avoid it.
Q. I am asking you what you did with your eyes, with your vision. Did you continue to look at this object or did you direct—
A. You naturally look at it.
Q. You did continue to look at it until you struck it?
A. Yes.
Q. And you cannot say how far you saw it move or how many steps at any rate?
A. No.
Q. Can you say how far you saw it move in terms of feet or yards?
A. Well, it was—I first saw it in through my windshield running from my left to my right.
Q. Yes. How far did you see it?
A. Now, it hit the left front of my car.
Q. Or may we also put it this way, the left front of your car hit the pedestrian?
A. Well, I say the pedestrian was running.
Q. Yes?
A. My car, we'll put it this way, my car came in contact or vice versa, we came in contact.
Q. How far did you see this object move, can you say?
A. A very short distance from when I first saw it.

On his examination for discovery he said:

175 Q. Now, what was she doing when you first saw her?
A. Moving rapidly from my left to my right, and I presume she was running.

The respondent said that he did not see the pedestrian (object) sooner because the lighting conditions at the intersection were bad; that the intermittent flashing amber light suspended above the intersection as indicated on the plan caused a blind area to the south which was the area which contained the crosswalk. He knew the crosswalk was there and that pedestrians might be expected to be crossing

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the highway at this point. He had been travelling at about 50 miles per hour as he came southward, and as he approached the intersection took his foot off the accelerator and poised it over the brake pedal. He estimates that his speed was reduced to about 45 miles per hour. However, it must be noted that the highway in question has a slight downhill grade from north to south at this point which could negative the effect of taking the foot off the accelerator. Other than the respondent, no eye witness gave evidence as to the impact.

As the intersection in question was a controlled intersection within the meaning of s. 128 of the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253, the provisions of subss. 9(*b*) and 11(*a*) apply. These read:

> (9) When rapid intermittent flashes of red light are exhibited at an intersection by a control signal,
>
> (*b*) A pedestrian facing the flashes of red light may proceed across the roadway within a marked or unmarked crosswalk with caution.
>
> (11) When rapid intermittent flashes of yellow light are exhibited at an intersection by a traffic-control signal,
>
> (*a*) The driver of a vehicle facing the flashes of yellow light may cause the vehicle to enter the intersection and proceed only with caution, but shall yield the right-of-way to pedestrians lawfully within the intersection or an adjacent crosswalk;

The learned trial judge put the following questions to the jury and these questions were answered as shown:

> THE CLERK: Number one, was the plaintiff Rodojka Petijevich guilty of negligence which caused or contributed to the cause of the accident? Yes. If so, what was her negligence? One, proceeded without reasonable caution through crosswalk. Two, by running through crosswalk. Three, did not employ an evasive action, such as stopping or stepping back.
>
> Two, was the defendant guilty of negligence which caused or contributed to the cause of the accident? No. If so, what was his negligence? None.

It will be observed that the usual order of questions was reversed. The first question should have been as to whether there was any negligence on the part of the defendant which caused or contributed to the accident. This is the prime question. If the answer is "No" that ends the matter. The foundation of the action are the allegations of negligence made against the defendant. Then, if the jury finds

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negligence on the part of the defendant and gives particulars, the next question would be whether there was any contributory negligence on the part of the plaintiff which caused or contributed to the accident. This reversing of the order had, I think, a serious effect upon the manner in which the learned trial judge charged the jury and in the jury's consideration of the whole question of liability.

Although a question involving ultimate negligence was not put to the jury, the learned trial judge, in charging the jury, indicated that the ultimate negligence doctrine could be invoked, and he proceeded to tell the jury that they might, in effect, find that the female appellant had had the last clear chance to avoid the accident. This was not a case for the application of the ultimate negligence doctrine. It was a serious error which, apart from everything else, must have misled the jury and which, according to the record, caused the jury to ask questions which showed that they did not correctly understand the law applicable to the case.

Evidence was tendered on behalf of the respondent and received without objection from one Jack Melvin Shaw to the effect that some minutes before the female appellant was struck he had been driving westward on Kennedy Road intending to turn north on the King George Highway. He had come to a stop before entering the highway as he was required to do and he said that as he started up a woman ran out from the curb at the north-east corner of the intersection and that when she saw his vehicle was moving towards her, she darted back. He continued northward, picked up a passenger and returned some 10 minutes later to the intersection, and seeing that an accident had happened, stopped and said he identified the injured person as the woman he had seen a few minutes before by recognizing the coat she was wearing. That was his only item of identification. Now, regardless of whether he was able to identify the woman or not, his evidence was not admissible and its admission was, in my view, fatal to the verdict because not only was the evidence improperly admitted, but in his charge to the jury the learned trial judge said:

> Then the defendant says to you that she failed to take reasonable care for her own safety because she was running, and points out to you

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that this is the evidence that the defendant Law gave. The defendant says that you should infer from what happened according to Mr. Shaw's evidence, when he testified that he saw the female plaintiff running from the northeast corner in a westerly direction, and from evidence suggesting that she was late in getting home, that from these things you should infer that she was running just before impact in this case.

Norris J.A., in his reasons for judgment in the Court of Appeal, stated that in his opinion the evidence of Shaw was admissible as part of the *res gestae*. I cannot agree. He also said that in any event, even if the evidence was not admissible, no substantial wrong or miscarriage of justice was occasioned thereby. With respect, I am of the view that the admission of this evidence, coupled with the reference thereto in the learned trial judge's charge to the jury, was bound to have an adverse effect on the appellants' case with the jury.

In addition to quoting the relevant subsections of s. 128 to the jury, the learned trial judge instructed the jury that s. 169(2) of the *Motor-vehicle Act* of British Columbia applied in the instant case and had to be considered. Section 169(2) reads:

> No pedestrian shall leave a curb or other place of safety and walk or run into the path of a vehicle that is so close that it is impracticable for the driver to yield the right-of-way.

There was no evidence on which the jury could find or infer that the female appellant left a curb or other place of safety or that she walked or ran into the path of respondent's vehicle. She was more than half way across the intersection when she was hit and was at least 55 feet from the curb or east edge of the highway and had only two or three steps to go before she would be clear of the path of respondent's vehicle and out of harm's way. Accordingly, s. 169(2) was not applicable in the circumstances of this case.

Section 128(11)(*a*) says that the driver of a vehicle facing flashes of yellow (amber) light may cause his vehicle to enter the intersection and proceed only with caution but *shall* yield right-of-way to pedestrians lawfully within the intersection or an adjacent crosswalk. The female appellant was lawfully in the crosswalk and the respondent was, accordingly, required to yield right-of-way to her. The reason he gave for not doing so was because he did not see

her soon enough and he did not see her sooner because the lighting conditions at the intersection in question were such that the crosswalk area was a blind area to him as he came from the north. His duty in those circumstances was to enter the intersection at such a speed and keeping such a look-out that if a pedestrian should be in the crosswalk he would be able to yield the right-of-way to that pedestrian. There is nothing in the evidence to justify any suggestion that the female appellant ran from the east side of the highway because she says she started across walking slowly, and the evidence as to her running comes at a time almost coincident with being struck and perhaps she was making a last second effort to avoid being hit.

I have no doubt that the jury's verdict cannot stand. The next question is whether there should be a new trial on the question of liability and damages or as to damages only. The Court of Appeal of British Columbia has the power to give the judgment which the trial court could have given: *Rex v. Hess (No. 2)*[1]. The power of the Court is discussed by O'Halloran J.A. at pp. 597 and 598 and this Court has the power to do the same. The principle to be applied in determining whether there should be a new trial as to liability or as to damages only was discussed by O'Halloran J.A. in *Jardine v. Northern Co-operative Timber and Mill Association*[2], where he says at p. 535:

> Where as here the evidence is of such a character that only one view can reasonably be taken of its effect, it is not a case for a new trial, see *McPhee v. E. & N. Ry. Co.* (1913) 5 W.W.R. 926, 49 S.C.R. 43, Duff, J. at p. 55 (with whom Sir Charles Fitzpatrick, C.J. and Brodeur, J. concurred) and also the decision of the old Full Court (Hunter, C.J., Irving and Martin, JJ.) in *Yorkshire Guar. & Securities Corpn. v. Fullbrook & Innes* (1902) 9 B.C.R. 270, but we ought now give the judgment which the plain facts proven conclusively at the trial demanded, and that is, judgment for the plaintiff-appellant as asked for in the statement of claim, less the sum of $286.48, mentioned shortly; see also *Paquin Ltd. v. Beauclerk* [1906] A.C. 148, 75 L.J.K.B. 395 (H.L.) and also *Canada Rice Mills Ltd. v. Union Marine and Gen. Insur. Co.* (No. 1) [1941] 3 W.W.R. 401, [1941] A.C. 55, 110 L.J.P.C. 1, Lord Wright at 65.

In the instant case all the evidence that could have any bearing on the liability of the respondent or on the contributory negligence, if any, of the female appellant was before the Court. There is no suggestion that anything new

[1] [1949] 1 W.W.R. 586.

[2] [1945] 1 W.W.R. 533.

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in the way of evidence would be forthcoming if the question of liability were to be retried. Any verdict which would exonerate the respondent from negligence in this case would, in my view, be perverse because on the evidence of the respondent himself, it is incontrovertible he failed in his duty to (1) keep a proper look-out; (2) to enter the intersection at such a speed that he could slow down or stop, if necessary, before striking a pedestrian who was lawfully in the pedestrian crosswalk; and (3) to yield right-of-way to the pedestrian as he was required to do by s. 128(11)(*a*) of the *Motor-vehicle Act*. On the other hand, the only evidence lawfully before the Court regarding the contributory negligence, if any, of the female appellant is that of the respondent that as he saw her she was running or walking very fast and this was, as he says, within "a very very short time" of the impact. There is no evidence upon which any finding could be made that the female appellant started across the highway in question without looking to see if it was safe to do so or that she did anything to jeopardize her own safety once she had made a substantial entry into that intersection. She was then entitled to assume that the driver of a motor vehicle coming from the north would obey the law and yield her right-of-way: *Toronto Railway Co. v. King*[3].

I would accordingly allow the appeal and direct a new trial limited to the question of damages only. The appellants will have judgment against the respondent for the damages so assessed. The appellants are entitled to their costs in this Court and in both Courts below.

Appeal allowed and new trial ordered with costs.

Solicitors for the plaintiffs, appellants: Braidwood, Nuttall & MacKenzie, Vancouver.

Solicitors for the defendant, respondent: Russell & DuMoulin, Vancouver.

[3] [1908] A.C. 260, 7 C.R.C. 408.