IVAN COSO (*Plaintiff*) .....APPELLANT;

AND

ALEXANDER POULOS (*Defendant*) .....RESPONDENT.

1969

*May 1, 2
June 10

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Damages—Pedestrian struck in crosswalk—Personal injuries—Degree of fault—Increased award by Court of Appeal further increased by Supreme Court of Canada.

The appellant was struck by the respondent's automobile as he was crossing a highway from north to south in an unmarked crosswalk at an intersection. The highway ran east and west and had six lanes, the two outside lanes being parking lanes. The appellant, as he was about to leave the curb at the northeast corner, saw a truck approaching from the east in the most northerly driving lane. The truck slowed down to permit him to cross. As he crossed in front of the truck, he looked to his left, and not seeing the respondent's automobile because it was still hidden by the truck concentrated his attention on traffic coming from the west. After he had taken a few steps from in front of the truck, he was hit by the respondent's automobile which was in the inside lane.

The appellant was severely bruised on his right hip and suffered a wrenched back with a probable extrusion of a lumbar disc. In hospital he underwent a painful operation and thereafter his injuries continued to cause him pain. About a year later he suffered an attack of phlebitis which was found to have been caused by the accident.

At the time he was injured the appellant was a man 29 years of age with the ability and opportunity to earn as much as $1,000 a month as a tunnel construction worker. The permanent and partially disabling nature of his injuries made it necessary that he avoid the field of heavy industry and he was thus reduced to less remunerative employment.

At trial, the respondent was found wholly responsible for the accident.

The appellant was awarded $7,000 general damages and $973 special damages. On appeal, the Court of Appeal increased the award of general damages to $12,000 and on the respondent's cross-appeal found the appellant 20 per cent at fault. The appellant then appealed to this Court against the 20 per cent finding of fault and for an increase in general damages beyond the $12,000 awarded by the Court of Appeal.

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

Per Cartwright C.J. and Ritchie, Hall and Spence JJ.: The finding by the trial judge that the respondent was solely at fault should be restored. The Court of Appeal had erred in saying that the trial judge had held that as the appellant entered the southerly lane he was running or walking fast. This was a recapitulation of what the respondent had said and not a finding of fact by the trial judge.

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*PRESENT: Cartwright C.J. and Abbott, Ritchie, Hall and Spence JJ.

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The appellant was entitled to a substantial award for pain and suffering and for loss of enjoyment of life apart altogether from loss of income prior to trial and for future loss by reason of the permanent nature of his injuries. The amount awarded by the Court of Appeal was inordinately low and such a wholly erroneous assessment that this Court was justified in increasing the award for general damages from $12,000 to $30,000.

Per Abbott J., *dissenting*: Very exceptional circumstances had not been established in the present case, and, except in such circumstances, a second appellate Court will not interfere with the amounts fixed by the first appellate Court where they differ from the damages assessed by the trial judge.

APPEAL from a judgment of the Court of Appeal for British Columbia, allowing an appeal and a cross-appeal from a judgment of Wilson C.J.S.C. Appeal allowed, Abbott J. dissenting.

B. W. F. McLoughlin, for the plaintiff, appellant.

J. A. Fraser, for the defendant, respondent.

The judgment of Cartwright C.J. and Ritchie, Hall and Spence JJ. was delivered by

HALL J.:—The appellant, a pedestrian, was injured when struck by the right front corner of the respondent's automobile as he was crossing Broadway Avenue in the City of Vancouver at about 2:30 p.m. on September 18, 1965. The day was bright and clear, visibility good and the pavement dry. He brought action against the respondent and recovered judgment for $7,000 as general damages and $973 special damages following a trial before Chief Justice Wilson of the Supreme Court of British Columbia who found the respondent wholly responsible for the accident.

The appellant appealed to the Court of Appeal for British Columbia, claiming the amount awarded for general damages was insufficient. The respondent cross-appealed on the issue of liability. The Court of Appeal increased the award for general damages to $12,000 and on the cross-appeal found the appellant 20 per cent at fault.

The appellant now appeals to this Court against the 20 per cent finding of fault and for an increase in general damages beyond the $12,000 awarded by the Court of Appeal.

Broadway Avenue is a six-lane highway running east and west, the two outside lanes being parking lanes. The accident occurred at the intersection of Broadway Avenue and Laurel Street which intersects Broadway Avenue at right

angles. The appellant was at the northeast corner of the intersection and intended crossing to the southeast corner. There were no traffic-control signals at this intersection. Accordingly, s. 169 of the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253, as it read in 1965 applied. The section then read:

169. (1) Subject to section 170, where traffic-control signals are not in place or not in operation when a pedestrian is crossing the highway within a crosswalk and the pedestrian is upon the half of the highway upon which the vehicle is travelling or is approaching so closely from the other half of the highway that he is in danger, the driver of the vehicle shall yield the right-of-way to the pedestrian.

(2) 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.

(3) Where a vehicle is slowing down or stopped at a crosswalk or at an intersection to permit a pedestrian to cross the highway, no driver of another vehicle approaching from the rear shall overtake and pass the vehicle which is slowing down or stopped.

(4) The driver of a motor-vehicle shall obey the instruction of school pupils acting as members of school patrols provided under the *Public Schools Act*.

A crosswalk is defined by s. 121 of the *Motor-vehicle Act* as follows:

"crosswalk means"

(*a*) any portion of the roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by signs or by lines or other markings on the surface; or

(*b*) the portion of a highway at an intersection that is included within the connection of the lateral lines of the sidewalks on the opposite sides of the highway, or within the extension of the lateral lines of the sidewalk on one side of the highway, measured from the curbs or, in the absence of curbs, from the edges of the roadway;

As he was about to cross Broadway Avenue, the appellant saw a truck approaching from his left (east). It was in the most northerly driving lane. This truck slowed down and appellant accepted this as an indication that it was safe for him to proceed to cross the intersection in the unmarked crosswalk. The appellant saw no other vehicle approaching from the east. The respondent's automobile was actually approaching from the east and catching up to the truck, but it was hidden from appellant's view by the truck. As he crossed in front of the truck, the appellant looked to his left, and not seeing the respondent's automobile because it was still hidden by the truck concentrated his attention on traffic coming from the west which might affect him once he was at or over the centre of the street. After he

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had taken a few steps from in front of the truck, he was hit by respondent's automobile which was in the inside lane. The truck which had slowed down to allow the appellant to cross in front of it continued westward its driver apparently unaware that the pedestrian who had just passed in front of his truck had been struck.

The respondent appears to have seen the pedestrian (the appellant) because he applied his brakes and skidded some 24 feet before striking the appellant. There is no question of the respondent's negligence. He was clearly in breach of s. 169 of the Act in that, having seen the truck slow down at the approach to the intersection, he proceeded to overtake and pass the truck and did not abate his speed sufficiently until it was too late for him to avoid hitting the appellant who was lawfully in the crosswalk and had right-of-way over approaching vehicles.

The learned trial judge said in this regard:

> This is one of the most common situations in city motoring. The defendant could not, because of the truck, see to the right where the plaintiff was. When he saw the truck on his right slow or stop he ought at once to have known that danger was present and that in all probability the danger was that of striking a pedestrian coming from the north of the truck, where he had no view. It became his duty at once to slow or stop his car to avert the possibility of an accident and he did not do so but drove on until he saw the plaintiff when it was too late to stop. His speed, reasonable under other circumstances, was excessive, because, so soon as he saw the truck slow or stop (and he was behind it) he should have so controlled his car as to avoid any chance of striking a pedestrian in the crosswalk.

and regarding the allegation of contributory negligence made against the appellant, he said:

> Was the plaintiff guilty of contributory negligence? He had the right-of-way and was entitled to expect that motorists would respect it. The truck did respect it. Was he not then entitled to expect that vehicles to the south of the truck would observe the action of the truck and act accordingly? I think he was. I do not say that he might not, by the exercise of extreme vigilance, have avoided this accident, but I do not think that in the circumstances such a degree of vigilance was required of him. I find that the defendant is wholly liable.

The Court of Appeal accepted the learned trial judge's finding that the respondent was negligent, but found the appellant guilty of contributory negligence and fixed his percentage of fault at 20 per cent. In so doing, the Court of Appeal said:

> The appellant did not see the respondent's car as he left the curb because, as other evidence establishes, the pickup truck, which the appellant saw, was running about a length ahead of the respondent's car and

obscured his vision. The respondent did not see the appellant until it was too late to avoid the collision, and the appellant never did see the respondent's car. It is quite apparent, however, that if he had paused momentarily and looked to his left before entering the southerly westbound lane he would have seen the respondent's car. *The learned Trial Judge has held that as the appellant entered the southerly lane he was running or walking fast.* It seems to me that a quick look before entering the southerly lane would have sufficed to enable him to avoid being struck down.

(Emphasis added.)

The Court of Appeal was in error in saying: "The learned Trial Judge has held that as the appellant entered the southerly lane he was running or walking fast." It is clear from the record that no such finding was made by Wilson C.J.S.C. He did say when recapitulating the evidence of the respondent that the respondent had said: "He (the appellant) was running or walking fast" but that was a statement of what the respondent had said and not a finding of fact, and Wilson C.J.S.C. did not say that he accepted the respondent's evidence in this regard for it is evident that he did not do so. He chose instead to accept the evidence of Preovolos who was a passenger in the respondent's automobile.

This error appears to have influenced the Court of Appeal to find the appellant partly at fault to the extent of 20 per cent. I do not think that the Court of Appeal was justified in disturbing the learned trial judge's finding that the appellant was not at fault on the basis of this misreading of Wilson C.J.S.C.'s reasons. I would accordingly allow the appeal on this aspect of the case and restore the finding that the respondent was solely at fault.

The Court of Appeal's award of $12,000 as general damages is also challenged by the appellant as being a wholly erroneous assessment in the light of the injuries sustained by the appellant and the permanent and partially disabling nature of those injuries as established in evidence. The evidence as to the injuries sustained by the appellant is fully reviewed by the Court of Appeal as follows:

The accident happened on the 18th of September, 1965. The plaintiff (appellant), then an active man of 29 years of age, was struck by the respondent's car, thrown into the air and landed on the ground. He was severely bruised on the right hip and suffered a wrenched back with a probable extrusion of a lumbar disc. He has suffered extreme pain in the lower back area. He was in the hospital for 29 days and was at home for another two weeks without being able to move very much. Following this period he was partially mobile at home for a period of some six weeks.

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While in hospital the appellant underwent an operation whereby fluid was extracted from his spine and a pigment inserted for the purpose of tracing the flow of pigment in order to assist the diagnosis of his lower back injuries. The operation caused the appellant excruciating pain. The injury to the lower back caused pain right up to the time of trial. The pain radiated down into his right leg.

On November 30th, 1966, the appellant suffered an attack of phlebitis at Prince George shortly after he had taken a bus ride from Vancouver. Following this attack he could not work for the following seven months.

Up to November, 1966, the physician looking after the appellant had considered his principal difficulty to be that arising from the injury to his lower spine. The presence of phlebitis had not been suspected but when the phlebitis attack took place on November 30th, 1966, it became apparent that the appellant's principal complaint arose from the phlebitis in his right leg. In view of the fact that the appellant's phlebitis was not diagnosed as such until after a year from the date of the accident, there was some conflict of medical opinion as to whether the condition was caused by the accident. However, there was a sound basis for the learned trial Judge's finding that the accident caused the phlebitis.

Dr. Sladen, a vascular specialist, described in some detail the damage caused by the disease to the appellant's right leg and he said that the leg was permanently damaged. The best that he could hold out for the patient was that he could control the effects of the trouble by keeping the leg raised at night and by the application of a rubber bandage by day. Failure to take these precautions may bring about a throbbing sensation which could be followed by ulceration. Further, the doctor said that the patient's condition would be a handicap to him in his work, and that heavy lifting increased the pressure and therefore the reflux.

Later in his evidence he said:

A. . . . The leg itself, the basic pathology, is certainly not improving. It's there. And the same problem will re-occur any time that he stresses this leg. And I think if you talk to him you will find that he has tried to work and it has swollen up on him during this period. So I don't think the leg is any better really than when I saw him initially.

Q. You have described for us, Doctor, a number of events that might occur, having had this phlebitis condition. Is it fair to say that there are many people who suffer from phlebitis who can lead a normal life thereafter?

A. I don't think "normal" is the word. I think that everybody that has had this disease pays some sacrifice to it or some penalty for it. And it depends on its degree and the amount involved and the type of stress that the patient is going to put on it as to where they fall on the scale.

Dr. W. H. Sutherland, likewise a vascular specialist, confirmed the opinion of Dr. Sladen and said that: ". . . there is evidence of deep vein phlebitis in this leg; in fact, a very extensive amount of this disease."

He also said that:

"I would confirm exactly what Dr. Sladen said. Depending on the amount of the care he can give this limb, it will serve him reasonably well but will slowly progress. The less care he is able to give it the more rapid will be the progression."

Dealing again with the patient's ability to engage in heavy industry, he said:

> "I think heavy lifting would be troublesome to him by the end of the day. The problem about heavy industry or heavy labour is the real possibility of further injury to this limb."

As will be seen, the principal residual disability stems from the phlebitis which the learned trial judge found was caused by the accident. This finding was concurred in by the Court of Appeal and is fully supported by the evidence. The original low award of $7,000 arose, I think, from the learned trial judge's view that the appellant was regarded initially by his doctors as being guilty of emotional exaggeration of the extent of his pain and injuries. This assessment, now recognized to be erroneous of the appellant's condition and subsequent pain, was due to the fact that the phlebitis was not recognized and diagnosed as such until January 5, 1967, more than a year after the accident.

Once it is accepted that the appellant is suffering from phlebitis, the medical evidence conclusively establishes that he should avoid heavy lifting and violent movement. One of the medical witnesses suggested that a job as a bar tender would be about right for the appellant's capabilities. Maclean J.A. said in his reasons:

> It is of course obvious that the accident has considerably narrowed the field of employment open to the appellant. If he has any regard at all for his future welfare and health he must avoid the field of heavy industry in which he previously made his living, and he must take lighter employment even though it may be less remunerative.

It is on this basis that appellant's damages should be assessed. He was a man 29 years of age with the ability and opportunity to earn as much as $1,000 a month as a member of the Tunnel and Rock Workers' Union. Such an opportunity was available to him at the time he was injured and he would have been able to earn approximately $1,000 a month in the interval between the time he was injured and the date of the trial. He estimated this loss at $10,750. He had no assurance, of course, that such work would always be available in British Columbia or even in Canada or that he could work continuously at tunnelling work, and besides he was always subject to the hazards of illness and accident to which all men are liable. He suffered a great deal of pain and will have pain in the future. He is permanently reduced to employment from which his earnings

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will not nearly approximate what he could have made as a member of his union even if he did not work full time at tunnelling or similar jobs.

He was, by every standard, entitled to a substantial award for pain and suffering and for loss of enjoyment of life apart altogether from loss of income prior to trial and for future loss by reason of the permanent nature of his injuries. Taking everything into consideration, including his record of earnings for the five-year period preceding the accident, I am of the view that the amount awarded by the Court of Appeal is inordinately low and such a wholly erroneous assessment that this Court is justified in increasing the award for general damages from $12,000 to $30,000. I would give the appellant judgment for this amount plus his special damages. The judgment of the learned trial judge should be affirmed but varied by increasing the sum awarded by way of general damages to $30,000. The appellant should also have his costs in the Court of Appeal and in this Court.

Abbott J. (*dissenting*):—The facts are set out in the reasons of my brother Hall which I have had the advantage of considering. As he has stated, the Court of Appeal increased the award to appellant for general damages from $7,000 to $12,000, and on the cross-appeal found the appellant 20 per cent at fault. It is trite law of course that, as to the quantum of damages, a second appellate Court will not, except in very exceptional circumstances, interfere with the amounts fixed by the first appellate Court where they differ from the damages assessed by the trial judge. In my opinion, such exceptional circumstances have not been established in the present case and I would dismiss the appeal with costs.

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

Solicitors for the plaintiff, appellant: Lawrence & Shaw, Vancouver.

Solicitors for the defendant, respondent: Ladner, Downs & Co., Vancouver.