E. W. O'BRIEN (*Plaintiff*) .....APPELLANT;

AND

ERNEST MAILHOT (*Defendant*) .....RESPONDENT.

1965

*Nov. 1, 2
Dec. 14

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Motor vehicles—Intersection—Constable—Signal to change direction of traffic—Infant pedestrian struck by car while crossing street—Standard of care—Whether presumption rebutted—Aggravation of damages—Motor Vehicle Act, R.S.Q. 1941, c. 142, s. 53.

The plaintiff's minor son was injured when struck by a car driven by the defendant. The victim, who was coming out of school at the same time as other pupils, attempted to cross a street from west to east after the

*PRESENT: Fauteux, Abbott, Ritchie, Hall and Spence JJ.

[1] (1873), 8 Ch. App. 650.

[2] [1949] 1 All E.R. 176 at 183-4.

1965

O'BRIEN v. MAILHOT

southbound traffic had been given the signal to advance by a constable on duty at the intersetion. A southbound bus was parked close to the west sidewalk, at a short distance from the intersection. The defendant had stopped his car with its front about even with the rear of the bus. The victim had to pass in front of the bus. When the front of the automobile was about in line with the front of the bus, the defendant saw the victim for the first time and, although he applied his brakes immediately, he could not avoid hitting him. It was further alleged against the defendant that he aggravated the victim's damages by permitting him, while driving him home after the accident, to walk, at the boy's own suggestion, the last part of the way to his home. The trial judge dismissed the action. This judgment was affirmed by a majority decision in the Court of Appeal. The plaintiff appealed to this Court.

Held (Hall J. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott, Ritchie and Spence JJ.: The question in such cases was whether the driver fell short of the standard of care that would be expected of a reasonable man under the circumstances. A driver might escape liability if he could establish that he had conformed with that standard. The defendant has successfully rebutted any presumption that he was at fault. The defendant's conduct subsequent to the accident did not constitute a fault even though it may have resulted in aggravating the injuries.

Per Hall J. *dissenting*: The defendant has not successfully rebutted the presumption under s. 53 of the *Motor Vehicle Act* that he was at fault. Any time a driver in a school zone, in broad daylight, at a time when young pupils are leaving adjacent school premises and some had to cross in front of him and who admits, as the defendant did, that he did not see any of the children who crossed in front of his car as he sat there stationary from 50 to 60 seconds and who says further that he did not see the boy which his vehicle struck until the moment of the impact, that driver has not rebutted the presumption of fault which the statute imposes on him. The traffic officer's signal did not relieve the defendant from his duty to keep a sharp lookout for school children who might emerge in front of the bus.

Automobiles—Intersection—Agent de circulation—Signal pour changer la direction du trafic—Jeune piéton frappé par une automobile alors qu'il traversait la rue—Norme des soins requis—La présomption a-t-elle été réfutée—Aggravation des dommages—Code de la Route, S.R.Q. 1941, c. 142, art. 53.

Le fils mineur du demandeur fut blessé lorsqu'il fut frappé par une automobile conduite par le défendeur. La victime, qui sortait de l'école en même temps que d'autres écoliers, a tenté de traverser une rue de l'ouest à l'est après qu'un agent de circulation qui était en devoir à l'intersection eut donné au trafic se dirigeant vers le sud le signal d'avancer. Un autobus pointant vers le sud était stationné près du trottoir ouest, à une courte distance de l'intersection. L'avant de la voiture du défendeur se trouvait près de l'arrière de l'autobus. La victime devait passer en avant de l'autobus. Lorsque l'avant de l'automobile était en ligne avec l'avant de l'autobus, le défendeur a vu la victime pour la première fois et, malgré qu'il ait appliqué les freins immédiatement, il n'a pu s'empêcher de frapper le jeune gar-

çon. Il fut aussi allégué contre le défendeur qu'il avait aggravé les dommages du garçon en lui permettant, alors qu'il le reconduisait chez lui après l'accident, de marcher une partie du trajet, et ceci à la propre suggestion du garçon. Le juge au procès a rejeté l'action. Ce jugement fut confirmé par une décision majoritaire de la Cour d'Appel. Le demandeur en appela devant cette Cour.

Arrêt: L'appel doit être rejeté, le Juge Hall étant dissident.

Les Juges Fauteux, Abbott, Ritchie et Spence: La question à débattre dans de tels cas est de savoir si le conducteur a manqué à la norme des soins qui sont requis d'un homme raisonnable dans les circonstances. Un conducteur peut être libéré de toute responsabilité s'il peut établir qu'il s'est conformé à cette norme. Le défendeur a réfuté avec succès toute présomption qu'il était en faute. La conduite du défendeur subséquemment à l'accident n'a pas constitué une faute même s'il en est résulté une aggravation des blessures.

Le Juge Hall, *dissident*: Le défendeur n'a pas réfuté avec succès la présomption établie par l'art. 53 du *Code de la Route* qu'il était en faute. Lorsqu'un conducteur dans une zone d'école, en plein jour, à un temps où des jeunes écoliers sortent des écoles et que certains de ceux-ci doivent traverser en avant de lui et qu'il admet, comme le défendeur l'a admis, qu'il n'a vu aucun des enfants qui ont traversé en avant de sa voiture alors que celle-ci était stationnaire de 50 à 60 secondes et qui dit de plus qu'il n'a vu le garçon que seulement au moment de la collision avec sa voiture, ce conducteur n'a pas réfuté la présomption de faute que la loi lui impute. Le signal donné par l'agent de circulation n'a pas relevé le défendeur de son devoir de se tenir aux aguets au cas où des écoliers surgiraient en avant de l'autobus.

APPEL d'un jugement majoritaire de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Jolicœur. Appel rejeté, le Juge Hall étant dissident.

APPEAL from a majority judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Jolicœur J. Appeal dismissed, Hall J. dissenting.

T. P. Slattery, Q.C., and *F. E. Barnard, Q.C.*, for the plaintiff, appellant.

Rémi Taschereau, Q.C., for the defendant, respondent.

The judgment of Fauteux, Abbott, Ritchie and Spence JJ. was delivered by

ABBOTT J.:—This appeal is from a majority judgment of the Court of Queen's Bench[1], confirming a judgment of the Superior Court which dismissed an action by appellant acting in his quality of tutor to his minor son Patrick

[1] [1964] Que. Q.B. 340.

1965

O'BRIEN v. MAILHOT

Abbott J.

O'Brien, claiming damages in the sum of $75,000 alleged to have been suffered as a result of the said Patrick O'Brien having been struck by an automobile owned and driven by the respondent.

Owen J. dissenting, held that both respondent and Patrick O'Brien were at fault and responsible for the accident, in the proportions of one-third and two-thirds respectively. He assessed the damages at $26,941.80. He would therefore have allowed the appeal with costs and condemned respondent to pay to appellant ès qualité the sum of $8,980.60 with interest and costs.

The facts are not now seriously in dispute. They are recited by Owen J. in his dissenting judgment, as follows:

On the 13th March 1958, at approximately 11.30 A.M., Patrick O'Brien, 10½ years of age, came out of St. Patrick High School at Thetford Mines with the other pupils. From the school he went to the North-West corner of the intersection of Dumais St., (which runs East to West) and Notre Dame St. (which runs North and South). He wanted to cross Notre Dame St. from West to East. A Southbound autobus was parked on the West side of Notre Dame St. a short distance to the North of Dumais St. The defendant Mailhot was driving his automobile from North to South on Notre Dame St. When a constable at the intersection stopped the traffic on Notre Dame St., Mailhot brought his automobile to a stop with its front about even with the rear of the autobus and to the East of the autobus. There were no other motor vehicles in the traffic lane in front of Mailhot's automobile.

After several school children had crossed Notre Dame Street from West to East the constable apparently gave the signal to permit traffic on Notre Dame Street to move. Mr. Mailhot started his automobile, advanced in a Southerly direction alongside the autobus which remained stationary on his right. When the front of the automobile was about abreast of the front of the autobus Mailhot, for the first time, saw young O'Brien in front of and very close to his automobile. The automobile was being driven at a moderate speed, less than 10 miles per hour, and although Mailhot applied the brakes as soon as he was aware of the danger he was unable to avoid hitting the boy and knocking him down with the front of the automobile. Young O'Brien had crossed in front of the stationary autobus and did not see the automobile coming from his left until it was on top of him.

The evidence is contradictory as to whether the boy was walking quickly or running just prior to the accident. The evidence is also contradictory as to the distance between the boy and the front of the stationary bus when he crossed in front of the bus. The bus driver Walker said that his bus was about seven or eight feet from the corner and that young O'Brien passed right in front of his bus no more than a foot away. However according to the witness Donovan the accident happened at a point about 15 to 20 feet to the South of the front of the stationary autobus.

As Montgomery J. points out, the bus driver Walker was perhaps best situated to see what happened. He described the accident as follows:

> J'ai arrêté, et puis j'ai vu un petit bonhomme sauter devant l'autobus, il y avait un constable qui faisait la circulation, il n'y en avait plus, il a fait signe à monsieur Mailhot, il a passé, j'ai vu arriver le petit bonhomme à la course, il a sauté devant le char à Monsieur Mailhot.

As to the distance between the boy and the autobus when he passed in front of it, Walker's evidence on cross-examination was as follows:

> Q. A quelle distance, à combien de pieds le jeune O'Brien passait-il devant votre autobus quand vous l'avez vu?
>
> R. Il n'y avait certainement pas plus qu'un pied, il passait juste en avant.
>
> Q. Et, après l'accident, de combien de pieds à peu près, le devant de l'automobile de monsieur Mailhot dépassait-il le devant de votre autobus?
>
> R. Monsieur Mailhot ne devait pas avoir plus d'un pied et demi en avant de mon autobus, je n'ai pas mesuré, mais...

His testimony was confirmed on this point by that of other witnesses.

The legal principle to be applied in order to determine whether Mailhot had successfully rebutted any presumption that he was at fault, was correctly stated by Montgomery J. in the following passage of his judgment:

> In any case where the driver of an automobile strikes a pedestrian, it is difficult to find with certainty that the driver could not have avoided the accident by taking some extra precautions. In my opinion, this is not the test. The question in each case is whether the driver fell in any way short of the standard of care that would be expected of a reasonable man under the circumstances. While our courts are ready to condemn the driver for even a slight deviation from this standard, he may escape liability if he can establish that he has conformed with it.

Among other grounds, counsel for appellant submitted that Mailhot was at fault in stopping his car at the rear rather than at the front of the autobus. This ground does not appear to have been pressed in the Courts below and is not dealt with in the judgments. In any event I am unable to agree with this submission. It is obvious that Mailhot could have stopped abreast of or about abreast of the front of the autobus, but in my view there was no particular reason why he should have done so. On the facts above set out, it is clear that the accident must have happened a fraction of a second after the front of the Mailhot car passed the front of the stationary autobus. Moreover in

1965
O'BRIEN
v.
MAILHOT
Abbott J.

order for Mailhot to have seen the approach of young O'Brien, before putting his car in motion, it is clear that the front of his car would have had to project at least five or six feet in front of the bus.

Applying the test to which I have referred, in my opinion, the majority in the Court below were correct in holding that respondent had successfully rebutted any presumption that he was at fault. Similarly, I agree that respondent's conduct subsequent to this unfortunate accident did not constitute a fault even though it may have resulted in aggravating the injury.

Having considered the evidence, the arguments of counsel and the authorities to which they referred, I find myself in agreement with the conclusion and reasons of Montgomery J. I do not think that anything would be gained by attempting to summarize or re-state those reasons and I am content to adopt them.

I would dismiss the appeal with costs.

HALL J. (*dissenting*):—To the facts stated by Owen J. in his dissenting judgment as set out in the judgment of my brother Abbott, certain further facts ought, I think, to be noted, namely: (1) The intersection in question was, to the knowledge of Mailhot, in a school zone and he was aware that at the time in question in this action the pupils were leaving the school premises and heading homewards for lunch and that some would have to cross Notre Dame Street from west to east on their way home; (2) The O'Brien boy was in the pedestrian cross-walk area when struck. He was partially crippled and walked with a limp; (3) A man named Louis Donovan was sitting at the wheel of his car on the east side of Notre Dame north of Dumais Street waiting for his daughter to take her home for lunch. Ellen Donovan crossed from west to east. The O'Brien boy was right behind her as she started to cross. Seeing her father, she ran towards her father's car. She had not reached her father before young O'Brien was struck.

Mailhot testified that he was not aware of having seen Ellen Donovan or any other children cross Notre Dame Street as he sat waiting for the signal to go ahead although it was beyond question that Ellen was immediately ahead of the O'Brien boy as they started across, and that several other children had in fact crossed from in front of the bus

before Ellen. That a number of children had crossed Notre Dame Street after Mailhot arrived on the scene is fully established by the evidence of Leopold Poulin, the officer directing traffic at the intersection in question. He said:

Q. Voulez-vous nous raconter, monsieur, ce qui s'est passé?

R. En faisant la circulation, j'avais donné le signal d'arrêt à l'automobiliste monsieur Mailhot pour laisser passer les jeunes enfants, des enfants de huit à dix ans.

* * *

Q. Avant l'accident, je comprends que vous aviez laissé traverser les enfants du coin ouest de la rue Dumais vers le coin est de la rue Dumais, traverser Notre-Dame?

R. Oui monsieur.

Q. Un groupe d'enfants ensemble?

R. Oui monsieur.

Q. Est-ce qu'ils étaient nombreux?

R. Ils étaient six ou huit.

Q. Est-ce que c'était le seul groupe d'enfants que vous faisiez traverser dans ce sens-là depuis la sortie des classes?

R. Non, ils étaient presque tous sortis.

Q. Il en était passé plusieurs?

R. Oui.

Q. Monsieur Mailhot était arrêté depuis combien de temps?

R. Environ cinquante à soixante secondes autour d'une minute.

Mailhot's evidence was that he did not see the boy at all until the impact. He testified as follows:

PAR LA COUR:

Q. Où était-il par rapport à votre automobile, par rapport à l'autobus ou par rapport au trottoir, la première fois que vous l'avez vu le jeune O'Brien?

R. La première fois que je l'ai vu, il est arrivé en avant de mon char en appuyant ses deux mains sur mon fanal.

Q. Vous ne l'avez pas vu ailleurs?

R. Je ne l'ai pas vu ailleurs.

* * *

Q. Vous avez, dans ce cas-là, aperçu l'enfant la première fois alors qu'il était devant votre véhicule?

R. Alors qu'il mettait ses mains sur le fanal droit de mon véhicule.

* * *

Q. Combien de temps à peu près avez-vous été stationnaire?

R. Peut-être 50, 50 à 60 secondes.

Q. Pendant que vous étiez stationnaire, comme ça, avez-vous vu des enfants traverser la rue?

R. Je peux en avoir vu, mais je n'ai pas remarqué, j'ai remarqué seulement le constable, en attendant mon signal.

* * *

1965

O'BRIEN v. MAILHOT

Hall J.

Q. Vous avez longé le flanc gauche de l'autobus?

R. Oui monsieur.

Q. A quelle distance, à peu près?

R. A peu près un pied et demi de l'autobus.

* * *

Q. Avez-vous d'autre chose à ajouter?

R. Parce que je n'avais pas de visibilité pour voir venir l'enfant, je ne pouvais pas voir de l'autre côté de l'autobus, en avant de l'autobus, de la manière que mon char était placé....

The boy did not, of course, come from the other side of the bus or around the front of it. He had come on the sidewalk from ahead and to the right of the bus which was stationary at all relevant times.

Section 53 of *The Motor Vehicle Act* of the Province of Quebec in force at the time reads:

Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

The learned trial judge held that in the circumstances of this case this burden of proof section did not apply. In this he was completely in error. The Court of Appeal applied the section, but by a majority judgment held that the respondent had successfully rebutted the presumption.

Owen J. dissented, saying:

On the evidence I am of the opinion that young O'Brien was at fault. He attempted to cross Notre Dame Street against the signal of the constable. If he had stopped before emerging from the protection afforded by the stationary autobus and looked to his left he could have seen Mailhot's automobile and remained in a position of safety. This he failed to do. These faults were determining causes of the accident.

The problem which has given me such difficulty is deciding whether Mailhot also committed any fault or faults which contributed to the accident. Mailhot had lived in Thetford Mines for a number of years. He was familiar with the intersection and knew that it was a school zone. In the circumstances a high standard of care was required of him when passing alongside the stationary autobus which obstructed his vision of any pedestrian who might come from his right where the school was located. After studying his testimony I am of the opinion that Mailhot placed too much dependence on the signal from the constable in charge of traffic and failed to take proper precautions by keeping his automobile under absolute control and keeping a very strict lookout for anything that might be coming from his right. In this case it was foreseeable, as far as Mailhot was concerned, that some child coming out of the school at noon-hour would cross in front of the stationary autobus even after the constable had given his signal to change the direction of the flow of traffic. I have come to the conclusion that Mailhot was at fault and that his fault contributed to the accident. In my opinion the fault of the child was greater than that of the

motorist and I would hold Mailhot liable to pay one-third of the damages suffered by young O'Brien.

I agree with Owen J., and it follows that Mailhot has not successfully rebutted the presumption that he was at fault. For myself, and with deference to contrary opinion, I am of the view that any time a driver in the situation that Mailhot was in here, i.e., in a school zone, in broad daylight, at a time when young pupils were leaving adjacent school premises and some had to cross in front of him and who admits, as Mailhot did, that he did not see any of the children who crossed in front of his car as he sat there stationary for from 50 to 60 seconds and who says further that he did not see the boy which his vehicle struck until the moment of the impact, that driver has not rebutted the presumption of fault which the statute imposes on him.

It was not, in my view, negligence *per se* for him to stop in line with the rear of the bus nor was it negligence *per se* to drive so closely (about 18 inches) to the left side of the bus as he says he did as he moved forward toward the crossing after receiving the traffic officer's signal, but having elected to stop where he did in a position where his visibility of pedestrian traffic from the west was restricted by the bus, and having elected to hug the left side of the bus when there was ample room and no other traffic between his vehicle and the centre of the street, he was under a heavy duty to be on the lookout for school children who might emerge from in front of the bus. Had he been keeping the lookout which the special circumstances then existing demanded, he would have seen the boy before the vehicle was actually in contact with him.

The traffic officer's signal did not relieve him from his duty to keep a sharp lookout for school children who might emerge from in front of the bus. The statement by Lord du Parcq in *London Passenger Transport Board v. Upson*[1] as follows:

> A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are in fact likely to do.

is especially applicable here.

I would, therefore, allow the appeal and enter judgment for the appellant ès qualité in the sum of $8,980.60 as fixed

[1] [1949] A.C. 155 at 176.

1965

O'BRIEN v. MAILHOT

Hall J.

by Owen J. with interest and with costs in this Court and in the Courts below.

Appeal dismissed with costs, HALL J. *dissenting.*

Attorneys for the plaintiff, appellant: Leblanc, Delorme, Barnard, Leblanc, Bédard & Fournier, Sherbrooke.

Attorneys for the defendant, respondent: Taschereau, Dussault & Drouin, Quebec.