ELSIE B. DEARING, Administratrix of the Estate of Landon Roy Burger, deceased (*Plaintiff*) ..... APPELLANT;

1957
*Oct. 17
Nov. 18

AND

CHARLES HEBERT (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Motor vehicles—Negligence—Statutory burden of proof—Whether burden discharged by defendant—Killing of pedestrian—The Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, s. 94(1).

The defendant, driving at night on a four-lane highway, struck B, a pedestrian, and inflicted injuries as a result of which B died. In an action brought by the administratrix of B's estate, the trial judge found that both B and the defendant had been negligent and apportioned the degrees of fault one-third to B and two-thirds to the defendant. On appeal by the defendant this judgment was reversed by a majority, which held that B alone had been negligent and dismissed the action accordingly. The plaintiff appealed.

Held (Kerwin C.J. and Abbott J. dissenting): The appeal should be allowed and the judgment of the trial judge should be restored, subject to a modification in the award of damages. In the circumstances it could not be said that the defendant had discharged the onus placed on him by s. 94(1) of *The Vehicles and Highway Traffic Act* of showing that the damages did not result from his negligence. *Winnipeg Electric Company v. Geel,* [1932] A.C. 690 at 695-6, applied.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ.

(1) [1957] Ex. C.R. 336.

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APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing a judgment of Primrose J. Appeal allowed.

W. G. Morrow, Q.C., for the plaintiff, appellant.

Marcel J. A. Lambert, for the defendant, respondent.

The judgment of Kerwin C.J. and Abbott J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—Omitting that part which deals with the question of damages and costs, the reasons for judgment of the trial judge read as follows:

> I find the Defendant proceeding North in the proper driving lane at a speed of 45 miles per hour and struck the Deceased Burger whom he did not see until the time of impact. The Defendant was negligent in failing to keep a proper lookout and has not satisfied the onus on him under S. 94 of the Vehicles & Highway Traffic Act. I find contributory negligence on the part of the Deceased Burger in proceeding across the highway in to the path of the Defendant's car.
>
> I apportion the negligence or degree of fault ⅓ to the Deceased Burger and ⅔ to the Defendant.

No question of credibility arises and therefore the Court of Appeal was, and this Court is, in as good a position as the trial judge to draw the proper inferences from the evidence.

In the statement of claim it is alleged that at the time of the occurrence the deceased was crossing the main highway from west to east and the evidence supports this allegation. After having considered the entire record I agree with the majority of the Court of Appeal that the respondent has satisfied the onus placed upon him by s. 94(1) of *The Vehicles and Highway Traffic Act*, R.S.A. 1942, c. 275.

The respondent was driving his automobile northerly in the easterly lane of a four-lane highway at a speed of about 45 miles per hour, well within the legal limit. When about 100 yards south of an intersecting secondary road, he slackened his speed and, as he was obliged by law to do, he dimmed his headlights because an automobile was approaching him from the north. The lights of that automobile "blinded him" so that he "would not be able to see very much", but it is not to be expected, and in fact would interfere with the flow of traffic, that under those circumstances the respondent should come to a stop. He was keeping a proper look-out as he was aware that "there

(1) (1957), 22 W.W.R. 455, 9 D.L.R. (2d) 697.

might be someone around" the intersection, at the south-west corner of which was a service-station. Except for the suggestion (as to which no evidence was forthcoming) that the respondent was returning from this service-station to his oil-truck, which he had parked off the travelled portion of the four-lane highway at the north-east corner of the intersection, the oil-truck does not enter the picture and, in any event, had nothing to do with the accident. The respondent could not anticipate that the deceased would suddenly step into the path of his car.

This conclusion renders it unnecessary to consider the other matters discussed and the appeal should be dismissed with costs.

TASCHEREAU J.:—I am satisfied that this appeal should be dismissed, if it had been established that the pedestrian, who is represented by the appellant in the present case, had been struck at a distance of approximately 100 feet from the intersection.

But, as I have considerable doubts as to the exact place where the accident happened, I think that the onus, of proving that the damage did not result from the respondent's negligence, has not been discharged. (*The Vehicles and Highway Traffic Act,* R.S.A. 1942, c. 275, s. 94(1).)

I would allow the appeal with costs, and restore the judgment at trial with the modification indicated in the judgment of my brother Locke.

LOCKE J.:—In this action, which was tried by Primrose J. without a jury, that learned judge found that the deceased Burger and the respondent had both been guilty of acts of negligence which contributed to the fatal accident and apportioned the degree of fault one-third to the deceased and two-thirds to the respondent.

On appeal, this judgment was reversed and the action dismissed by a majority judgment of the Court (1). Macdonald and Porter JJ.A. would have dismissed the appeal. The fact that there has been this division of opinion as to the liability of the respondent and that the onus of proving that the damage did not result from the respondent's negligence lay upon him, by virtue of s. 94(1)

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of *The Vehicles and Highway Traffic Act,* R.S.A. 1942, c. 275, indicates the necessity of a close examination both of the evidence and of the pleadings upon which the parties went to trial. The onus section reads:

> When any loss or damage is sustained or incurred by any person by reason of a motor vehicle in motion, the onus of proof that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle.

The effect of the section cannot, in my opinion, be distinguished from the section of the *Motor Vehicle Act* of Manitoba considered by the Judicial Committee in *Winnipeg Electric Company v. Geel* (1), where its practical application is defined.

The statement of claim, which might have consisted, as pointed out in *Geel's Case,* merely of allegations that the deceased Burger, a pedestrian, had been struck and killed on the highway by a motor car driven by the respondent and of allegations of resulting damage, contained various counts of negligence, including that of failing to keep a proper look-out, failing to make proper use of the headlights of the car and driving at too high a rate of speed in the circumstances.

By the statement of defence the respondent alleged various acts of negligence on the part of Burger, including an allegation that he had run across the highway in the dark so that the respondent had no opportunity to stop his vehicle in time to avoid a collision. He further pleaded the provisions of *The Vehicles and Highway Traffic Act* and regulations made thereunder, without specifying what sections of the Act or parts of the regulations were relied upon. It is to be particularly noted that the respondent did not in the statement of defence claim that he had been blinded by the lights of an oncoming vehicle as an excuse for his failure to see Burger before the car struck him. In view of the terms of the onus section, if it was intended to rely upon any such ground as a defence it should have been pleaded.

The oral evidence as to how the accident occurred consisted of that given by the respondent and by one Fontaine who was driving with him at the time, seated to his right on

(1) [1932] A.C. 690, [1932] 4 D.L.R. 51, [1932] 3 W.W.R. 49, 40 C.R.C. 1.

the front seat. This was supplemented by evidence of marks of blood found on the pavement, from the position of which inferences of fact may be drawn. While there was a filling-station on the south-west corner of the intersection of the broad four-laned highway between Wetaskiwin and Edmonton, upon which the respondent was driving north, and a secondary road which intersected it at right angles, this was dimly lighted and, apparently, no one was there who saw Burger before the accident or witnessed the occurrence.

It was at about 10 o'clock on the evening of December 24, 1953, that the respondent, driving north towards Edmonton, approached the intersection in question. According to him, there was some traffic approaching from the north and, when about 100 yards distant from the intersection, he dimmed the lights of his car and saw standing off the highway on the north-east portion of the intersection a truck with its lights burning, which was later shown to be the truck driven by Burger.

The position of this truck is of importance. McBride J.A., with whose judgment Johnson J.A. agreed, said (1) that "the rear of the truck was about in line with the north boundary of this local road", which appears to me to be supported by the evidence of the photograph ex. 1. This photograph clearly shows part of the rear of the truck to be on the gravel on the north portion of the road from the east where it broadened out to join the north and south highway. The police officer Wheatley said that it was "parked on the cross-road".

It was a dark night and while s. 34(1)(*a*) of the Act required the motor vehicle to have headlamps providing sufficient light to make clearly visible objects on the highway at a distance of 300 feet ahead of the vehicle, Hebert did not see Burger before the car struck him. The following extracts from his examination for discovery deal with the matter:

Q. And which part of your car came in contact with him? A. Oh, I would say the left fender and part of the hood, I would say the fender and then the hood.

Q. And did he appear to come from the left, that is your left? A. Yes, he did.

(1) 22 W.W.R. at p. 465.

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Q. No question about that, is there? A. Well, that was, I didn't see him until he was on the car.

Q. And when you first saw him how far would you be from him if at all. If there is any distance at all? A. Well, actually the first time I did see him he was on the car.

Q. And what happened to the body when you hit him, what happened to him? A. Well, it seemed like as if he rolled over to the back of the hood or the side, I am not quite positive.

Q. Would that be down your left side? A. I believe it was, either over the hood or down to the back, I am not positive, but hit the hood [*sic*], the hood came down, I imagine he went over the back of the car.

Q. I see, but you don't know which side? A. I couldn't say, I know that he must have fell off partways to the back of the car, I don't know for sure.

Giving evidence in his own defence, he said that he first saw the man when he was on the car.

Asked if he had then passed the truck he said:

It is quite possible, I believe I did.

Fontaine, called for the defence, said as to Burger:

I actually didn't notice him until he was right alongside the car.

and that:

It was just a split second and he was on the car.

He said that from this momentary glimpse he thought that Burger was running or trotting and that he was coming from the left hand side. Asked by the respondent's counsel as to where Hebert's car was at that time, he said:

It would be pretty nearly directly across from the truck and may be a little in front.

Q. You mean a bit to the north? A. Yes, a bit to the north.

On cross-examination, however, he was asked:

Q. Where was the truck at that time relevant to the car you were in? A. It would be on the north side.

Q. Are you sure? Beside you or ahead of you? A. Could be ahead of us a little bit.

Fontaine said further that after the car struck the man:

. . . it appeared to me like he came up on the hood and came down on the fender, that is what more or less appeared to me.

The mounted police officer, Wheatley, said that the truck on the north-east part of the intersection was facing north 3 feet to the east of the edge of the main highway. He described its position as being "parked at the intersection" which the evidence of the photographs supports.

At a position on the lane immediately to the east of the centre-line of the highway and 16 feet distant from the easterly limit of the highway, the police officers found a

large quantity of blood. Burger's body had been removed, apparently, before the police officers arrived, and it is only a matter of inference that it was at this point that his body was lying after the impact. Constable Wheatley, who took the measurements, said that this large bloodstain was 118 feet from the intersection. Whether he meant from the centre or from the northern limit of the intersection was not stated. Some few feet to the south of it, there was another and smaller bloodstain. Hebert had stopped his car on the right side of the most easterly lane at a point described as 142 feet from the large bloodstain.

According to the respondent, his vehicle was in good condition and the lights were functioning and it is to be assumed, in the absence of evidence to the contrary, that they complied with the requirements of the Act and would make clearly visible an object at a distance of 300 feet ahead. There is no evidence as to how far they would make such an object visible when they were dimmed. In answer to a question asked by his own counsel as to whether any car had actually met him south of the service-station, he said:

> Well, I believe he did pass me, come to think of it, I am not positive but I believe he did.

Again, asked as to why he kept the lights dimmed, he said:

> Well, I kept them on dim for the—well, just as this car passed me I had them on dim and just a short period after that is when he actually came up on my car, you see.

And again:

> Q. Well, you met this car and there was a short time afterwards there was this accident? A. That is right.

He estimated his speed as he approached the intersection at between 40 and 45 miles per hour and, while he did not apply his brake, he said that he had taken his foot off the accelerator.

It is of some importance to note that not a word was said by the respondent in giving his evidence in chief to suggest that the lights of the car, which he thought he had met south of the service-station, had affected his sight in any way or had anything to do with the accident. This and the fact that it had, as pointed out, not been raised as a ground of defence would indicate that nothing of the kind had

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occurred and that the defendant did not rely upon anything of the kind to negative negligence on his part. However, on cross-examination, he was asked:

> Q. Now, at some distance before you passed this car you were blinded by the lights? A. Yes, I was blinded.

And, in answer to a further question as to how many car-lengths before he passed the other vehicle he had experienced this blindness, he said:

> It might have lasted two car lengths, more or less.

There was no evidence as to the length of the car, which was a 1946 Chevrolet. It may be assumed that it was some 15 to 17 feet. As this had been suggested for the first time in cross-examination, his own counsel re-examined him on the point, when the following appears:

> Q. Did you tell me Mr. Hebert that after having made, met this oncoming car that you kept your lights on dim because there were other vehicles coming behind? A. Yes.
>
> Q. And this so called blindness by the other car, you were on a four lane highway, are you not? A. Yes.
>
> Q. And is it a total blindness, or partially clear [*sic*]? A. Well, I wouldn't say total blindness but enough you wouldn't be able to see very much.
>
> Q. And that passes immediately you have passed the other car? A. That is right.

McBride J.A., who found that Burger was solely to blame for the accident, drew the inference from the evidence that he had been struck some 30 yards to the north of the intersection. Dealing with this aspect of the matter, he said that the respondent had given evidence that the point of impact was north of the oil-truck. As his evidence above quoted shows, he simply said that it was "quite possible" it had passed the truck and that he believed that it had. Again, it is said that the passenger Fontaine placed the point of impact at a bit to the north of the oil-truck. The passage from his evidence in which this statement appears is quoted above but the learned judge appears to have overlooked the fact that on cross-examination he had said that the truck was on the north side of the car at the time and it "could be ahead of us a little bit".

In coming to his conclusion that the impact had been probably 30 yards north of the intersection, the learned judge said in part (1):

> The suggestion was canvassed at trial that deceased may have been hit some distance to the south and carried north on the hood of appellant's car. There is nothing in the evidence to support this suggestion. This again is simply speculation and Constable Wheatley quite definitely disposes of it in his evidence.

This indicates that the evidence of the respondent, that he did not see Burger until "he was on the car and that it seemed like as if he rolled over to the back of the hood or the side", and that of Fontaine that Burger was on the car and that it appeared as if he came up on the hood and came down on the fender, was overlooked. As to the statement that the evidence of Constable Wheatley disposed of the suggestion, this again is not borne out by the evidence. Indeed, that Burger after being struck was carried some distance on top of the car which, admittedly, was going 35 miles an hour, was apparently the view of the counsel for the respondent at the trial, as the following passage from the cross-examination of the constable indicates:

> Q. Well now, let's suppose an automobile is driving in the right hand northbound lane, reasonably close to the parking lane and when an obstruction is struck by the left front edge, as would appear from Exhibit 4 was the case in this accident, and that pedestrian rolls up on the hood which again is suggested by Exhibit 4, again suggested by the dent and then rolls off to the side, that would place the body in which? A. The passing lane.
>
> Q. That is a fair suspicion [*sic*]? A. It is consistent with the facts.
>
> Q. Have you, from your experience, any idea of how far a man might be carried on the hood of a car? A. It is hard to say. It varies. Sometimes they will be thrown off immediately, sometimes off to the side, sometimes they will be carried for a considerable distance, depending on the speed and the conditions.

Exhibit 4 was a photograph of the respondent's car taken after the accident that night by the constable and shows a considerable dent on the left front side of the hood, not far distant from the radiator-cap.

If the respondent's evidence that he was driving at about 35 miles an hour when he reached the intersection be accepted, his car would travel approximately 52 feet in a second. The evidence being clear and uncontradicted that when the man was struck his body was on the hood or fender before falling off, the learned trial judge, in view of

(1) 22 W.W.R. at p. 466.

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Fontaine's statement on cross-examination that they were to the south of the truck when the man was struck, might properly draw the inference that he had fallen off the hood or fender of the car at the point where the most southerly of the bloodstains was situate, which was apparently about 110 feet to the north of the intersection, and that it was the violence of his fall off the car that caused him to roll forward the few feet to the place where the large quantity of his blood was found. He would be carried that distance by the car in about 2 seconds.

While it was no part of the appellant's obligation to prove that the respondent had by his negligence caused the collision, it is to be noted that if Burger was crossing the highway at the intersection, as the evidence clearly suggests, he was entitled to the right of way over traffic on the highway by reason of subs. 2 of s. 59 of *The Vehicles and Highway Traffic Act* and, accordingly, entitled to assume that a vehicle such as that of the respondent coming from the south would comply with the statutory requirement. Its terms are clear and explicit:

> The operator of a vehicle . . . shall yield the right-of-way to a pedestrian crossing the roadway upon or within any crossing at an intersection.

McBride J.A., having reached the conclusion that the collision had taken place well to the north of the intersection, held that Burger was at fault in that subs. 4 of s. 59 requires that every pedestrian crossing a roadway at any point other than within a marked or unmarked crossing shall yield the right of way to vehicles upon the roadway. But the application of this was based on the assumption that Burger had not been carried on the car some distance from the point of impact, which appears to me to be contrary to the evidence.

I have dealt at some length with the evidence in this case as I think it to be of importance that there should be no departure from the manner of the application of the onus section as directed by the Judicial Committee in *Winnipeg Electric Company v. Geel, supra.* I refer in particular to the passage from the judgment, delivered by Lord Wright, which is reported at pp. 695-6 and from which I extract the following:

> Apart from the section, a plaintiff claiming damages for personal injury in a running-down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss

and damage; hence, unless he succeeded in establishing all these matters, he must fail. In virtue, however, of the statute he need only establish the first and the third elements—i.e., that he was injured by the defendant and the extent of his damages; as to the second, the onus is removed from his shoulders, and if he establishes the two matters in respect of which the onus still remains on him, he may close his case, because it is then for the defendant to establish to the reasonable satisfaction of the jury that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants.

After referring to some of the various manners in which this may be done, the judgment continues:

But the onus which the section places on the defendant is not in law a shifting or transitory onus: it cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence, however credible, is not sufficient reasonably to satisfy the jury that he was not negligent: the burden remains on the defendant until the very end of the case, when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If, on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment; if, however, the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him.

Their Lordships further expressly approved a passage from the judgment of Turgeon J.A. in a case under similar legislation in *Stanley v. National Fruit Company* (1), which, after stating the fact that the section placed the onus of proof upon the defendants, said:

This means that the defendants must lose if no evidence of the circumstances of the accident is given at all, or if the evidence leaves the Court in a state of real doubt as to negligence or no neligence, or is so evenly balanced that the Court can come to no sure conclusion as to which of the parties to the accident is to blame.

In the present matter, that there was room for doubt as to the effect of the evidence would appear evident from the fact that three of the learned judges of the Supreme Court of Alberta have considered that the respondent had not discharged the statutory onus cast upon him while three have reached a different conclusion, considering that Burger was solely to blame.

With great respect, I think the learned judges who agreed in allowing the appeal proceeded on a misapprehension as to the effect of the evidence given by the respondent, Fontaine and Constable Wheatley, which appears to me

(1) 24 Sask. L.R. 137 at 141, [1929] 3 W.W.R. 522, [1930] 2 D.L.R. 106, reversed [1931] S.C.R. 60, [1931] 1 D.L.R. 306.

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to negative any contention that the man was struck to the north of the intersection. I am of the opinion, in agreement with the trial judge and Macdonald and Porter JJ.A., that the evidence given on behalf of the respondent failed completely to discharge the onus, as it is defined in the judgment of the Judicial Committee.

In view of the terms of the onus section which would impose liability upon the respondent for this fatal accident in the absence of proof that it had not been occasioned entirely or solely through his negligence, had he intended to rebut the presumption by claiming that he had been blinded by the lights of an oncoming car, Rule 150 of the Supreme Court of Alberta, which requires that every pleading shall contain the material facts on which the party claiming relies for his defence, would require such facts to be pleaded. As I have already pointed out, the respondent said nothing about this when giving his evidence in chief and Fontaine, while asked if they had met some traffic from the north, was not asked and said nothing as to the lights of any oncoming car. Had the experienced counsel who appeared for the respondent at the trial intended to raise this as a matter of defence, no doubt, in addition to pleading it, the evidence would have been directed to showing clearly where it was that the respondent had passed the southbound car, whether the lights of that car were bright or on high beam and had not been dimmed, and how far the respondent had driven after passing the other car before striking Burger. In addition, I would expect that some evidence would be given as to the field of vision afforded by the lights of the respondent's car when they were dimmed, and there was no such evidence.

It is, no doubt, for the reason that this did not form any part of the defence that the evidence as to where the respondent passed the southbound car is so vague. It is to be remembered that the service-station was in the southwest portion of the intersection and the question directed to him by his own counsel when giving evidence in chief was whether he had met a car south of the service-station. The vague nature of the answer which is above quoted indicated that he was not sure that he had. He was not asked in chief to say how far after this incident his car had struck Burger. On his cross-examination, when it was sug-

gested to him that he had been blinded by the lights of the oncoming car, he was asked how far his car had travelled after passing the oncoming car: the vague answer to this was "anywhere from four, five, maybe six car lengths, it is possible" and that after being first blinded he had gone "maybe ten car lengths or more" before he had passed the other car. The vehicle standing at the north-east corner of the intersection was a tank-truck and the respondent might reasonably assume that it had stopped there for some purpose not unconnected with the filling-station and he admitted in evidence that he might have expected there would be someone around in the vicinity of the intersection, and a duty lay upon him by reason of the statute to afford the right of way to pedestrians crossing the highway at the intersection. Had it been open to the respondent to negative the presumption of negligence by evidence that he had been temporarily blinded in the manner suggested, and I think it was not, the evidence was totally insufficient, in my opinion, to discharge the onus. I feel sure that the reason for the lack of further evidence is that above stated.

The appellant did not appeal from the judgment which attributed one-third of the blame to Burger and that matter is, accordingly, not in issue. As to the award of damages other than the allowance for funeral expenses, which the appellant abandoned, I see no ground upon which the judgment at the trial should be interfered with.

I would allow this appeal with costs and direct that the judgment at the trial, with the exception noted, be restored.

CARTWRIGHT J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta (1) setting aside the judgment of Primrose J. and dismissing the action. The appeal raises only questions of fact.

At about 10 p.m. on December 24, 1953, the respondent was driving north on a paved four-lane highway in the Province of Alberta when his automobile struck and killed a pedestrian, Landon Roy Burger, hereinafter referred to as "the deceased". The deceased was the adopted son of the appellant who is a widow. She has been appointed administratrix of his estate, to the whole of which she, as his next-of-kin, is beneficially entitled.

(1) (1957), 22 W.W.R. 455, 9 D.L.R. (2d) 697.

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The learned trial judge found that the respondent was negligent in failing to keep a proper look-out and had not satisfied the onus, cast upon him by s. 94(1) of *The Vehicles and Highway Traffic Act,* R.S.A. 1942, c. 275, of proving that the accident did not arise through his negligence. The learned judge also found the deceased negligent in proceeding across the highway into the path of the respondent's car, and apportioned the fault one-third to the deceased and two-thirds to the respondent. He assessed the damages of the appellant under *The Fatal Accidents Act,* R.S.A. 1942, c. 125, at $3,000 and under *The Trustee Act,* R.S.A. 1942, c. 215, at $3,000 plus $415 for funeral expenses. Counsel agree that the last-mentioned item of $415 should be disallowed.

There were no eye-witnesses of the accident other than the respondent and a passenger in his car. Under these circumstances where the respondent and his passenger gave varying estimates as to times, distances or rates of speed, it was open to the learned trial judge to accept those least favourable to the respondent, and to act upon the view that the accident happened as follows: The respondent was proceeding north in the most easterly lane of a four-lane highway and was approaching an intersecting secondary road. An oil-truck, owned by the deceased, was parked to the east of the pavement in the north-east corner of the intersection. On the south-west corner was a service-station. The respondent was aware "that there might be someone around". He was talking to his passenger. He was proceeding at about 40 to 45 miles per hour. When about 100 yards south of the truck he slackened his speed to 30 to 35 miles per hour and dimmed his headlights because a car was approaching from the north, the lights of which "blinded him". He does not say in which of the westerly lanes the other car was being driven but in re-examination describes the degree of "blindness" as follows:

> Q. And this so-called blindness by the other car, you were on a four lane highway, are you not? A. Yes.
>
> Q. And is it a total blindness, or partially clear? A. Well, I wouldn't say total blindness but enough you wouldn't be able to see very much.
>
> Q. And that passes immediately you have passed the other car? A. That is right.

After the respondent had passed the car which caused the "blindness" referred to, he proceeded six car-lengths and then struck the deceased without seeing him until the instant of the impact. He offered no explanation for his failure to see the deceased after passing the other car other than the fact that his lights were still dimmed. The night was dark but it was clear.

Under these circumstances, in my opinion, not only was it open to the learned trial judge to find that the respondent was not keeping a proper look-out and had failed to satisfy the onus resting upon him but he was right in so holding. On the theory of the respondent the deceased was in the act of crossing the road from west to east and from the instant that the respondent passed the other car there was nothing to obstruct his view of the deceased. Had he seen him, as I think it was his duty to do, there would have been room on the highway for the respondent to manoeuvre so as to avoid striking the deceased even if he would not have had time to bring his car to a stop.

The finding that the deceased was guilty of contributory negligence was not questioned. I share the view of H. J. Macdonald J.A. that the apportionment of the degrees of negligence made by the learned trial judge should not be disturbed.

On the question of damages, the award under *The Trustee Act* was not challenged but it was argued that the amount assessed under *The Fatal Accidents Act* was excessive and resulted in a duplication of damages. On this branch of the matter I agree with the reasons and conclusion of Macdonald J.A., concurred in by Porter J.A., and, on this point, by Ford C.J.A. As mentioned above it was conceded that the item of $270, representing two-thirds of $415, ought not to have been awarded.

In the result I would allow the appeal and restore the judgment of the learned trial judge with costs throughout, subject to the modification that the judgment should be for $4,000 instead of $4,270.

Appeal allowed and judgment at trial restored with a modification, with costs throughout, KERWIN C.J. *and* ABBOTT J. *dissenting.*

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Solicitors for the plaintiff, appellant: Morrow, Morrow & Reynolds, Edmonton.

Solicitors for the defendant, respondent: Lindsay, Emery, Ford, Massie, Jamieson & Lambert, Edmonton.