1963
*Oct. 24
1964
Jan. 28

MIKE MAMCZASZ AND C. MAMCZASZ, MAMCZASZ CONSTRUCTION, IRVING BABLITZ AND JOHN McBRIDE (*Defendants*) .. APPELLANTS;

AND

OLIVE BRUENS (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Motor vehicles—Motorist colliding at night with road construction equipment—No breach of statutory duty with respect to lighting of equipment—Negligence in failing to give adequate warning of presence of stationary packer on highway not established—The Vehicles and Highway Traffic Act, R.S.A. 1955, c. 356, ss. 42, 46.

The plaintiff brought an action for damages for personal injuries and property damage resulting from a collision between a motor vehicle, owned and operated by her, and a stationary packer, which was part of some road equipment being used on road construction work. The particular equipment involved consisted of a tractor behind which, in tandem, were two packers. The packers were owned by the defendants MM and CM who were the contractors carrying on the road construction. The defendant B owned the tractor and the defendant McB was the operator of the equipment.

The plaintiff's vehicle drove directly into the back of the rear packer. The accident occurred on a clear night; there was no dust and there was no other traffic in the vicinity. The trial judge found that the plaintiff's rate of speed was too fast for the area in question and this finding was not disturbed on appeal. Flare pots had been placed at certain positions on the stretch of the road under construction for the purpose of giving warning of danger, and similar flare pots had been placed on the top and at the corners of each of the two packers, two at the front of the first and two at the back corners of the rear one. The packers also had red reflectors on the rear end.

The action was dismissed at trial. On appeal the Appellate Division of the Supreme Court of Alberta held that there had been negligence on the part of the defendants as well as on the part of the plaintiff and that responsibility should be apportioned as to two-thirds to the defendants and as to one-third to the plaintiff. The defendants appealed to this Court.

Held: The appeal should be allowed and the judgment of the trial judge restored.

The conclusion reached by the Appellate Division was based in part upon the provisions of subss. (1) and (2) of s. 42 of *The Vehicles and Highway Traffic Act,* R.S.A. 1955, c. 356. However, these subsections related to the provision of equipment on vehicles, but did not lay down any statutory duty as to when that equipment was to be used. It was necessary to look elsewhere to ascertain the requirements of the Act as to

*PRESENT: Taschereau C.J. and Martland, Ritchie, Hall and Spence JJ.

lighting. The only provisions in relation to stationary vehicles on the highway which might be relevant in this case were paras. (*d*), (*e*) and (*f*) of s. 46. It was evident, from an examination of these provisions, that there had not been established, as against the defendants, any breach of a statutory duty with respect to the lighting of the rear packer.

On the remaining issue as to whether the plaintiff had successfully established negligence on the part of the defendants in failing to give adequate warning of the presence of the stationary packer on the highway, the trial judge had found that the construction area and the packers were adequately lighted so as to warn a reasonably careful driver. This finding was supported by the evidence. This Court did not infer from the evidence, as did the Appellate Division, that it was probable that the two flare pots placed at the back of the rear packer, some five to six feet apart, would induce confusion in the mind of an approaching driver, or mislead such driver as to the true danger.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], reversing a judgment of McLaurin C.J.T.D. Appeal allowed.

H. L. Irving, for the defendants, appellants.

H. P. Macdonald, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1], which reversed the judgment at the trial, which had dismissed the respondent's claim for damages for personal injuries and property damage resulting from a collision between a motor vehicle, owned and operated by her, and a stationary packer, sometimes referred to in the evidence as a "wobbly". The packer was a part of some road equipment being used on road construction work on provincial highway No. 13, near the town of Sedgwick, Alberta. The particular equipment involved in this case consisted of a tractor behind which, in tandem, were two packers. The appellants Mike Mamczasz and C. Mamczasz, carrying on business as Mamczasz Construction, were the contractors who were carrying on the road construction work and the owners of the packers. The appellant Bablitz owned the tractor and the appellant McBride was the operator of the equipment at the time the accident giving rise to the respondent's claim occurred.

This accident took place shortly after 10:00 p.m. on August 20, 1956. The respondent was driving her Austin

[1] (1962), 39 W.W.R. 157, 33 D.L.R. (2d) 209.

1964

MAMCZASZ et al. v. BRUENS

Martland J.

automobile west along provincial highway No. 13 which, in relation to the scene of the accident, runs generally in an east and west direction. The highway in question was under construction, at that time, for a distance of approximately three miles. The respondent had entered the construction area at its easterly end and had travelled, through the construction area, a distance of some two to two and one-half miles before the collision occurred.

As she proceeded west, at the commencement of the construction area, the respondent would pass five signs, each of which was marked with a flare pot, warning of the existence of construction ahead and advising of a speed limit in the construction area of 25 miles per hour. She would then reach a section of the highway where there was a gravel windrow extending down the centre of the road. It was marked by flare pots placed upon it at intervals of 300 to 400 yards.

On the night in question the respondent drove past a tractor, to which were attached two wobblies in tandem, which was also proceeding west and which was travelling between the centre windrow and the north side of the highway. The rear packer was marked by two flare pots, one at each side of the back of the packer, and by two reflectors. The respondent, in passing this equipment, drove to the south of the centre windrow. The operator of the equipment had seen her pass by earlier in the evening, when she had been driving in an easterly direction through the construction area toward Lougheed.

After passing this equipment the respondent returned to the north side of the centre windrow and proceeded up a rise in the road. After reaching the crest of this rise there was a gradual descent for a distance of some 400 to 500 yards to the scene of the collision.

Prior to the collision the respondent had travelled beyond the west end of the centre windrow from where, for a distance of a few hundred feet, there was no obstruction on the highway. She then reached the east end of another windrow which was located along the north boundary of the highway. This windrow was some seven feet in width, occupying that amount of what otherwise would have been a part of the travelled road surface. It was approximately one and one-half feet in height and it continued along the north

boundary of the highway for a distance of about 2,000 feet to the west. It was marked at its easterly end by two flare pots and was then marked along its length by further flare pots placed upon it and spaced about 300 to 400 yards apart. At the west end of the construction area there were also warning signs placed on the south side of the road, each of which was marked by a flare pot.

The packer with which the respondent's automobile collided was standing facing west alongside and close to the north windrow and about 200 feet from the easterly end of that windrow. The packer consisted of a box-type body, filled with gravel, mounted on axles front and back, on each of which were eight to ten rubber-tired wheels. The box was yellow in colour and had red reflectors some three to four inches in diameter on its rear end. Flare pots, similar to those on the ground and upon the windrows, were placed on the top and at the corners of each of the two wobblies, two at the front of the first and two at the back corners of the rear one.

The appellant McBride, the operator of this equipment, shortly before the accident, had been proceeding east along the highway. He proceeded to turn in order to travel west and, while turning, observed a light glow on the top of the rise in the highway to the east. He completed his turn and observed that the glow had been caused by two headlights which were those on the respondent's vehicle. In making the turn he had noticed that one tire on the wobbly did not seem to be packing properly and accordingly he drove alongside the north windrow and stopped, waiting to dismount until the approaching vehicle should pass the equipment. Instead of passing, the respondent's vehicle drove directly into the rear of the back wobbly with sufficient force to move the wobbly slightly toward the left and toward the front and to cause substantial damage to it. The front end of the respondent's automobile was demolished.

The highway at the point of collision was 39½ feet wide. The travelled portion, allowing for the seven-foot windrow, was 32½ feet. The distance from the left rear wheel of the wobbly to the south edge of the road was 22 feet four inches.

The night was clear, there was no dust and there was no other traffic in the vicinity when the accident occurred. There were no marks on the surface of the highway to

1964

MAMCZASZ *et al.* v. BRUENS

Martland J.

indicate that the brakes of the respondent's car had been applied prior to the collision occurring.

There was some evidence as to the speed of the respondent's vehicle, on the basis of which the learned trial judge made a finding that the respondent's rate of speed was too fast for the area in question. This finding was not disturbed on appeal.

The learned trial judge stated the issue in the case and his conclusion as follows:

> The simple question arises as to whether the road, a construction area, and the wobblies, were adequately lighted so as to warn any reasonably careful driver. In all the surrounding circumstances it appears to me that the driver Bruens was negligent, and that the road operators were without fault.

On appeal the Appellate Division of the Supreme Court of Alberta held that there had been negligence on the part of the appellants as well as on the part of the respondent and that the responsibility should be apportioned as to two-thirds to the appellants and as to one-third to the respondent. This conclusion was based in part upon the provisions of subss. (1) and (2) of s. 42 of *The Vehicles and Highway Traffic Act*, R.S.A. 1955, c. 356, which provide as follows:

> 42. (1) A motor vehicle, any trailer and any vehicle being drawn at the end of a train of vehicles, shall be equipped with at least one tail lamp mounted on the rear and capable, when lighted as required by this Act, of emitting a red light plainly visible from a distance of five hundred feet to the rear.
>
> (2) Notwithstanding subsection (1), in the case of a train of vehicles, only the tail lamp on the rear-most vehicle need be seen from a distance of five hundred feet to the rear.

The word "vehicle" is defined in this Act, in s. 2(*t*), as follows:

> "vehicle" means a motor vehicle, trailer, traction engine and any vehicle drawn, propelled, or driven by any kind of power, including muscular power, but does not include the cars of electric or steam railways running only upon rails.

The Court held that the equipment in question constituted a "train of vehicles" within the meaning of s. 42(1) and that there had been a breach by the appellants of the statutory duty imposed upon them by that subsection which had contributed to the accident. The Court was of the opinion that the appellants had substituted their own

method of providing protection for users of the highway and held that they did so at their own peril.

With respect, I am unable to agree that the appellants were in breach of any statutory duty imposed upon them which could be held to be a cause of this accident. Subsections (1) and (2) of s. 42 of the Act require that, in the case of a train of vehicles, the rear-most vehicle be equipped with a tail lamp at the rear. They provide that such light must be capable, *when lighted as required by the Act,* of emitting a red light visible at a distance of 500 feet to the rear. These subsections relate to the provision of equipment on vehicles, but do not lay down any statutory duty as to when that equipment must be used. It is necessary to look elsewhere to ascertain the requirements of the Act as to lighting. These requirements are contained in s. 46. Subsection (1)(*c*) of that section states:

> 46. (1) At any time during the period between one hour after sunset and one hour before sunrise or at any other time when atmospheric conditions are such that objects on the highway are not plainly visible at a distance of three hundred feet
>
> * * *
>
> (*c*) no motor vehicle or tractor shall be in motion upon any highway unless the tail lamp with which it is required to be equipped is alight,

This is the only provision which contains a requirement as to the lighting of the tail lamp which is mentioned in subss. (1) and (2) of s. 42.

Section 46 contains separate provisions in relation to stationary vehicles on the highway. The only ones which might be relevant in this case are paras. (*d*), (*e*) and (*f*), which provide that, during the period defined in subs. (1),

> (*d*) no motor vehicle or tractor shall be stationary on any highway outside the corporate limits of any city, town or village unless either
>
> (i) it has a lighted tail lamp, or
>
> (ii) it has affixed to the left of the rear thereof a reflector of any type approved by the Lieutenant Governor in Council and so fixed as to reflect the lights of any motor vehicle approaching the stationary vehicle from the rear,
>
> (*e*) no vehicle other than a motor vehicle, motor cycle or bicycle shall be upon any highway whether in motion or stationary unless there is displayed thereon at least one light visible at a distance of at least one hundred feet from the front of and behind that vehicle, or in the alternative, there are affixed thereon one reflector towards the front and one reflector at the rear thereof of a type approved by the Lieutenant Governor in Council, so fixed as to reflect the

1964

MAMCZASZ *et al.* v. BRUENS

Martland J.

lights of any motor vehicle approaching from the front and the other so fixed as to reflect the lights of any motor vehicle approaching from the rear,

(*f*) no vehicle drawn by or attached to a motor vehicle and commonly known as a trailer shall be upon any highway unless it has affixed at the rear thereof a reflector of a type approved by the Lieutenant Governor in Council so fixed as to reflect the lights of any motor vehicle approaching from the rear,

In the result, therefore, there has not been established, as against the appellants, any breach of a statutory duty with respect to the lighting of the rear packer.

Apart from the issue as to statutory duty, there remains the question as to whether the respondent has successfully established negligence on the part of the appellants in failing to give adequate warning of the presence of the stationary packer on the highway. On this issue the learned trial judge has found that the construction area and the wobblies were adequately lighted so as to warn a reasonably careful driver. In my opinion this finding is supported by the evidence.

I do not infer from the evidence, as did the Appellate Division, that it is probable that the two flare pots placed at the rear of the back wobbly, some five to six feet apart, would induce confusion in the mind of an approaching driver, or mislead such driver as to the true danger. The respondent had travelled past 21 flare pots before the collision occurred, each of which had obviously been placed in its position for the purpose of giving warning of danger. She had passed, shortly earlier, similar road equipment, which had been similarly marked. At no place along the road under construction, to the point of the accident, had flare pots been placed on each side of the travelled route so as to mark a course between them. I do not, therefore, draw the inference that the two flare pots at the rear of the wobbly, situated some two and one-half feet higher than those which marked the right-hand windrow, would have led an approaching driver, taking reasonable care for her own safety, to conclude that they constituted an invitation to pass between them.

In my opinion, the appeal should be allowed and the judgment of the learned trial judge restored with costs to

the appellants in the Appellate Division of the Supreme Court of Alberta and in this Court.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Clement, Parlee, Whittaker, Irving, Mustard & Rodney, Edmonton.

Solicitors for the plaintiff, respondent: Macdonald & Dean, Edmonton.