1964

*May 19
June 10

RONALD MAZE (*Plaintiff*) .....APPELLANT;

AND

JAMES EMPSON (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Trials—Evidence—Plaintiff's evidence diametrically opposed to that of defendant—Trial judge's findings of fact not followed by appeal Court—Duty of appellate Court to defer to trial judge's findings of fact unless plainly wrong.

An action was brought against the defendant for damages which the plaintiff claimed he had sustained as a result of a collision between two motor vehicles, one being driven by the plaintiff and the other by the defendant. The accounts of the accident that the two parties gave at the trial were diametrically opposed to one another. The trial judge accepted the plaintiff's evidence and rejected that of the defendant. On appeal, the Court of Appeal allowed the appeal and ordered a new trial; the Court refused to follow the findings of fact made by the trial judge and it was held that he was wrong in rejecting the evidence of an independent witness. The plaintiff appealed to this Court.

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

There was evidence to support the trial judge's findings that the defendant was on the wrong side of the road just prior to the impact and that the effective cause of the accident was the negligence of the defendant. An examination of the evidence of the independent witness showed that the trial judge was correct in placing little reliance on it.

If the judges of an appellate Court cannot be satisfied that the trial judge, with the advantage of having heard and tried the case, was plainly wrong in his findings of fact, then it is their duty to defer to his judgment. In the present case it could not be said that the trial judge was plainly wrong in his findings of fact. *Clarke v. Edinburgh and District Tramways Co.*, [1919] S.C. (H.L.) 35, applied.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from Greschuk J. Appeal allowed.

John Bassie, for the plaintiff, appellant.

W. G. Morrow, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] allow-

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

[1] (1964), 47 W.W.R. 684.

ing an appeal with costs and directing a new trial in respect of a judgment by Greschuk J. in which he had awarded the appellant damages in the sum of $32,967.40 for injuries received and damages sustained as a result of a collision of two motor vehicles, one being driven by the appellant and the other by the respondent.

The collision occurred at about 3:45 a.m. on September 3, 1961. Prior to the impact the appellant had been driving in an easterly direction on Highway 16 some 30 miles west of Edmonton in the Province of Alberta. The respondent was driving in a westerly direction on the same highway and they met on a stretch of road just after the appellant's motor vehicle had come out of a slight curve. Highway 16 at this point was 46 feet in width. There were two driving lanes each 13 feet 6 inches in width and on the outside of each of the driving lanes there were parking lanes marked by continuous orange lines.

The evidence of the appellant was that he was driving at about 45-50 miles an hour on his own side of the road (the south side) and as he emerged from the curve he became aware that the respondent's vehicle, whose headlights he had previously seen, was coming towards him on the south side. He said it continued on this course until it was directly in front of him, and, in order to avoid a head-on collision, he swung to his left across to the north side of the road. He continued that at this same moment the respondent swung his vehicle to the right and onto the north side of the road and this brought the two vehicles into collision at an angle on the north side of the centre line.

The respondent's evidence was that he was driving at about 50 miles an hour on his own side of the road (the north side) and that the appellant emerged from the curve on the north side of the centre line and that the appellant maintained his course on the north side. The respondent further testified that at the time of the impact which he says was virtually head-on, his vehicle was straddling the orange line which was the dividing line between the north lane proper and the parking lane on the north side of the road. He continued that he was endeavouring to get on the north shoulder to avoid the collision which he knew was imminent when he saw that the appellant was maintaining his course in the north lane.

1964

MAZE v. EMPSON

Hall J.

These two stories were diametrically opposed to one another. Both could not be true. The learned trial judge had the responsibility of determining which story should be accepted. He believed the appellant. He was impressed with the manner in which the appellant gave his evidence and he found that the appellant's evidence was in harmony and in accordance with the balance of probabilities in the case. He did not accept the evidence of the respondent and found that the respondent was in the south lane a second or so and for some time before the impact occurred. He stated that the evidence of the respondent did not impress him while, on the other hand, he found that the appellant gave his evidence in a truthful and straightforward manner.

The Court of Appeal refused to follow the findings of fact made by Greschuk J., and after an analysis of the evidence, concluded that the respondent's version of the collision was the more likely one. Johnson J.A., with whom Porter J.A. concurred, held that the learned trial judge should not have rejected the evidence of one Royce who had testified that the appellant had overtaken him about two minutes prior to the collision, and that at that time the appellant was going in excess of 60 miles an hour. An examination of Royce's evidence leaves me with the view that the learned trial judge was correct in placing little reliance on Royce's evidence. The man told two different stories, first, that he was travelling well within the speed limit which was 50 miles an hour when overtaken by the appellant, and then that he was travelling over the speed limit when overtaken. The learned trial judge had this witness before him and the opportunity to weigh at first hand the effect of Royce's contradictory testimony. It cannot be said that the learned trial judge could not reasonably have come to the conclusion that he did in respect of Royce. There was evidence upon which the learned trial judge could find, as he did find, that the respondent was on the south side of the road just prior to the impact; that the appellant went over to the north side at the last moment and in an attempt to avoid a head-on collision and that the effective cause of the collision was the negligence of the respondent in maintaining his position on the south side of the road until so close to the oncoming vehicle of the appellant that a collision became inevitable. This is a case

where the statement of Lord Shaw of Dunfermline in *Clarke v. Edinburgh and District Tramways Co., Ltd.*[1], at p. 37:

> In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

is particularly apt.

I do not think it can be said here that Greschuk J. was plainly wrong in his findings of fact. There was no cross-appeal as to damages. Counsel for the respondent did not ask that the amount awarded be disturbed. I would accordingly allow the appeal with costs and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Bassie, Kempo, Hochachka & Shewchuk, Edmonton.

Solicitors for the defendant, respondent: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

[1] [1919] S.C. (H.L.) 35.