ROY BROOKS (*Third Party*) .....APPELLANT;

AND

CYRIL WARD (*Suppliant*);

AND

HER MAJESTY THE QUEEN (*Defendant*) ..... } RESPONDENT.

1956

*May 1
*Jun. 11

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Automobiles—Petition of right—Third party proceedings—Collision between two cars—Third party's car improperly parked on road—Whether contributory negligence of third party—Apportionment of liability—Highway Traffic Act, R.S.O. 1950, c. 167, s. 43(1).

While attempting to pass a truck, belonging to the appellant third party, and parked on the travelled portion of its right-hand side of the road, one evening, a Crown car, driven by an employee acting within the scope of his duties, collided with an oncoming car, belonging to the suppliant and driven at a very high speed. The driver of the oncoming car did not dim his lights until about to pass the parked truck, or reduce his speed. The driver of the Crown car, although so "blinded" by the lights of the oncoming car as to be unable to see the parked truck until too late, continued on without reducing his speed. In the action taken by the owner of the oncoming car, the trial judge apportioned liability at 20, 30 and 50 per cent. respectively against the driver of the Crown car, the driver of the oncoming car and the driver of the parked truck.

Held (Rand J. *dissenting in part*): The appeal of the driver of the parked truck should be allowed.

Per Taschereau, Fauteux, Abbott and Nolan JJ.: The driver of the Crown car was clearly negligent. He could and should have seen the tail-lights of the parked truck, which were plainly visible from a distance of 900 feet. When a driver sees a car in his path and has plenty of opportunity to avoid it but fails to do so, or if, by his own negligence, he disables himself from becoming aware of a danger and cannot therefore avoid the accident, he is the only party to blame. There was a clear line that could be drawn between the negligence of the appellant, if any, and that of the respondent, and therefore there could be no contributory negligence.

Per Rand J. (*dissenting in part*): There was no excuse for the driver of the parked truck for not placing his truck to a substantial extent off the pavement, and against that failure should be charged part of the responsibility for the accident. Such a violation of the law is not to be superseded by the contemporaneous negligence of an oncoming driver in failing at night to see the parked car. Otherwise, the regulations would be virtually nullified and their purpose defeated.

*PRESENT: Taschereau, Rand, Fauteux, Abbott and Nolan JJ.

1956

BROOKS v. WARD AND THE QUEEN

APPEAL from the judgment of Potter J. in the Exchequer Court of Canada (1), on a petition of right to recover damages resulting from a motor vehicle accident.

M. Robb, Q.C., for the appellant.

W. R. Jackett, Q.C., and *D. S. Maxwell*, for the respondent.

The judgment of Taschereau, Fauteux, Abbott and Nolan JJ. was delivered by

TASCHEREAU J.:—This is an appeal from the judgment of the Honourable Mr. Justice Potter of the Exchequer Court of Canada (1).

On the 13th day of October, 1952, the suppliant, owner of a Plymouth Sedan, was driving in a southerly direction upon a public highway, known as the Scoharie Road, in Prince Edward County, Ontario. On the opposite side of the highway, which was twenty-four feet wide, a truck belonging to the appellant (third party in the case) was stationed on the road, facing north, while the driver had gone on business for a few moments to a nearby school. The engine was still running. The highway was dry, and although it was dark, visibility was good.

The respondent's vehicle, which had excellent headlights showing two hundred feet away, was also proceeding in a northerly direction. The driver attempted to pass the appellant's truck, but in so doing, collided with the suppliant's car coming in the opposite direction.

The learned trial judge found that the loss suffered by the suppliant amounted to $860, but apportioned the damages between the three parties. He came to the conclusion that 30% should be borne by the suppliant; 50% by the third party, appellant in the present case, and 20% by the respondent. The formal judgment of the Exchequer Court was therefore, that the suppliant was entitled to recover from the respondent the sum of $602 being part of the relief sought by the petition of right together with costs, and that the third party should contribute to the respondent the sum of $430 *and 50% of the costs taxed as between the suppliant and the respondent,* which made an amount over and above the sum of $500 necessary to give

(1) [1954] Ex. C.R. 185.

(1) [1954] Ex. C.R. 185.

jurisdiction to this Court: *Caron* v. *Forgues et al.* (1). The third party was ordered to pay to the respondent five-sevenths of the costs of the third party proceedings.

The third party now appeals to this Court, but there is no appeal between the suppliant and the respondent. The third party contends that even if his car was stationed on the highway, this statutory breach of the law does not constitute effective negligence, and was not the *causa causans* of the accident.

It is in evidence that respondent's car was driven at a speed of 30 to 35 miles an hour, and that after having passed an elevation at a distance of 900 feet from the parked car, he saw the bright headlights of suppliant's car coming in the opposite direction. He immediately dimmed his lights, and raised them and dimmed them again, and the suppliant also dimmed his own. The respondent's driver says that after, he saw ahead of him for the first time, on his right hand side of the road, a motor vehicle, which was the parked truck. He had not noticed before the tail-lights of this truck which were lit, and in order to avoid hitting it, he swerved to the left, and collided with the oncoming car.

I think that the driver of the respondent's car was clearly negligent, and cannot escape liability. *He could and should have seen the tail-lights* of the truck, which according to the evidence were plainly visible from a distance of 900 feet. If he had noticed these tail-lights before, he could have stopped or reduced his speed in order to avoid the accident. But having failed to see these lights, he maintained his speed at 30 to 35 miles, and was compelled to take the wrong side of the highway, where the accident happened.

The learned trial judge says that the driver of respondent's car did not have time to form a judgment, because the elevation was only at a distance of *300 feet* from the place of the accident, and that at a speed of 30 to 35 miles an hour, he had only five or seven seconds to make a decision. The trial judge made an obvious error. The evidence is clear that the distance was 900 feet, and this was conceded by counsel at the hearing. It is very probable that if this error had not been committed, and if the learned trial

(1) [1944] S.C.R. 145.

1956

BROOKS v. WARD AND THE QUEEN

Taschereau J.

judge had thought that respondent's driver could have seen the tail-lights at a distance of 900 feet, he would have reached an entirely different conclusion.

I do not believe that the appellant can be charged with negligence which contributed to the accident. In a case of *McKee et al.* v. *Malenfant* (1), it was held by the majority of the Court that where a clear line can be drawn between the negligence of plaintiff and defendant, it is not a case of contributory negligence at all. When a driver sees a car in his path, and has plenty of opportunity to avoid it but fails to do so, there is no contributory negligence and he must bear the full responsibility. Or if, by his own negligence, he disables himself from becoming aware of a danger and cannot therefore avoid the accident, he is the only party to blame: *Sigurdson* v. *B.C. Electric Co.* (2). The same principles were applied by this Court in *Bruce* v. *McIntyre* (3). It is because the facts were unidentical that a different conclusion was reached.

In the present instance, the respondent had sufficient time to prevent this accident. Through his negligence he did not see the tail-lights of the parked car, which other witnesses could see; not having exercised a proper look-out, he continued at a speed of 30 to 35 miles an hour, and he placed himself in a situation where an accident was inevitable. There is, I think, a clear line that can be drawn between the negligence of the appellant, if any, and of the respondent, and there can be no contributory negligence.

I would allow the appeal. As the suppliant did not appeal, he will still bear 30% of his damages, but, the appellant (third party), will not as directed by the judgment of the trial judge, be called upon to contribute to the respondent the sum of $430 plus 50% of the costs taxed, between the suppliant and the respondent. The respondent will pay the costs of the appellant throughout.

RAND J. (*dissenting in part*):—Admittedly the judge at trial misapprehended an important fact of distance going to the determination of the degree of responsibility of the respondent and as between the latter and the appellant that matter is now open.

(1) [1954] S.C.R. 655. (2) [1953] A.C. 302.

(3) [1955] S.C.R. 251.

The negligence of the truck driver, the servant of the respondent, cannot be seriously disputed, but the question remains of the liability for the car left parked wholly on the pavement.

The law of the province, s. 43(1) of the *Highway Traffic Act*, R.S.O. 1950, c. 167, forbids a person to

> park or leave standing any vehicle whether attended or unattended upon the travelled portion of a highway outside of a city, town or village, when it is practicable to park or leave such vehicle off the travelled portion of such highway . . . .

In this case it was practicable to have placed the car, in large part at least, off the paved portion and if that had been done to the extent of three feet the accident would have been avoided. Is such a violation of the law to be superseded by a contemporaneous negligence of an oncoming driver in failing at night to see the parked car? I am unable to agree that that result follows. Such a ruling would virtually nullify the regulation whenever there was negligence on the moving vehicle. It would defeat the very purpose of these detailed regulations which have as their object to rid the highways of unnecessary hazards. Together they constitute an organic body of reciprocal safety measures and in the frightening multiplication of highway tragedies if their deliberate infringement does not call down accountability the regulation might almost as well be abolished.

It is not a question merely of causation in the rather simplified idea of that concept as it is so frequently expressed; causation must be associated with responsibility and the latter here issues from the mode of dealing with this evil adopted by the legislature: *Bruce* v. *MacIntyre* (1). There was no excuse whatever for not placing the car to a substantial extent off the pavement and against that failure should be charged part of the responsibility for the resulting consequences.

But I agree that the share in that of the respondent for the collision is greater than that of the appellant. As the petitioner has not appealed from the degree found against him of 30%, the remaining 70% is to be apportioned between the parties to this appeal. That I would make 50% against the respondent and 20% against the appellant.

(1) [1955] S.C.R. 251.

1956

BROOKS v. WARD AND THE QUEEN

Rand J.

The appeal should be allowed and the judgment below modified by reducing the proportion against the appellant of 50% to 20% and increasing the liability of the respondent from 20% to 50%. The appellant will be entitled to five-sevenths of his costs in this Court and he will pay to the respondent two-sevenths of the costs of the suppliant payable by the respondent and two-sevenths of the third party costs, in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellant: *Slaght, Robb & Hayes.*

Solicitor for the respondent: *F. P. Varcoe.*