1962
*Dec. 14
1963
Jan. 22

JEAN ROBITAILLE (*Plaintiff*) .....APPELLANT;

AND

LE PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC (*Defendant*).....RESPONDENT.

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

*Motor vehicles—Car hitting cement block on shoulder of highway—Block at 4½ feet from paved portion—Driver killed—No eye witnesses—Whether liability of Roads Department.*

While driving with his wife on a provincial highway on a short trip, the plaintiff's car, driven by his wife who was an experienced and licensed driver, struck a cubical cement block measuring 2½ feet to 3 feet and weighing 2,400 pounds, which had been standing for a number of years on the right hand shoulder of the road at a distance of 4½ feet from the paved portion of the highway. The weather was fine and the pavement dry. At the time the plaintiff was leaning back in his seat and had closed his eyes but was not asleep. He estimated the speed of the car at no more than thirty miles per hour. His wife was instantly killed and he was seriously injured. There were no eye-witnesses. All that can be deduced from the physical facts is that while going down a slight grade and rounding a somewhat pronounced curve to the left at a speed in the neighbourhood of 50 miles per hour, the automobile left the pavement, proceeded on the shoulder for 45 feet and was turning to regain the pavement when it struck the cement block. The trial judge maintained the action, but this judgment was reversed by the Court of Queen's Bench. The plaintiff appealed to this Court.

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

*Per* Taschereau, Abbott, Martland and Ritchie JJ: There is no provincial statute which requires the Quebec Roads Department to provide roads under its control with a shoulder of any particular width or of any particular character. A motorist venturing on to such shoulder should proceed slowly and with care. At the time of the accident the appellant's car was well off the paved portion of the highway and was travelling at a speed which in the light of what happened must have been at least 50 miles per hour. This excessive speed was the real cause of the accident. There was no explanation as to why the car was being driven at such speed on the shoulder of the road. The plaintiff has failed to establish fault on the part of the defendant.

*Per* Cartwright J., *dissenting:* The evidence did not support a finding that the accident was caused by the negligence of the appellant's wife. Negligence is not presumed. All the known circumstances were more consistent with the absence of negligence than with its presence. Although the speed was not definitely ascertained, it was not in excess of 50 miles per hour which was a lawful one on this highway. There was nothing to suggest that any harm would have been caused by the manner in which the car was driven had it not been for the

*PRESENT: Taschereau, Cartwright, Abbott, Martland and Ritchie JJ.

presence of the cement block. The cement block was so situated that an automobile proceeding on the shoulder must inevitably strike it unless the driver should see it in time to stop or turn. It was at a point on the highway where it was the right, and might at times be the duty, of the driver of an automobile to proceed. It constituted a grave and obvious danger which it was the duty of the defendant to remove, and its presence rendered the defendant guilty of actionable fault.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Cliche, J. Appeal dismissed, Cartwright J. dissenting.

*Jean L. Peloquin,* for the plaintiff, appellant.

*Leonce Coté, Q.C.,* and *Yves Forest, Q.C.,* for the defendant, respondent.

The judgment of Taschereau, Abbott, Martland and Ritchie JJ. was delivered by

ABBOTT J.:—The facts leading up to the tragic accident, in which appellant's wife was killed, are fully set out in the reasons of my brother Cartwright and I need not repeat them. In their essential details they are not in dispute.

The record shows that at the place where the accident happened, the Stanstead-Sherbrooke Highway (the paved portion of which is 22 feet wide) makes a wide sweeping curve to the left looking toward Sherbrooke, and at that point is virtually level. The shoulder, on the side on which the appellant's car left the travelled portion of the highway, slopes gently towards a shallow ditch and is partly gravelled, partly grass-covered.

It is clear that at the time of the accident appellant's car was completely off the paved portion of the highway. A block of cement weighing 2,400 lbs. was thrown a distance of some 60 feet from the point of impact, after which the appellant's car, continuing on, struck and broke a telephone pole. It was established that this block of cement, in the form of a cube about $2\frac{1}{2}$ feet square, was located at a distance of $4\frac{1}{2}$ feet from the paved portion of the highway on the grass covered portion of the shoulder.

There is no provincial statute which requires the Quebec Roads Department to provide roads under its control with a shoulder of any particular width, or of any particular character and it is common knowledge that, in

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fact, on roads in the province such shoulders vary appreciably both as to width and as to character, depending in most cases upon the nature of the terrain.

In places where the shoulder of a road is appropriate for that purpose, it can be used for parking or in case of emergency may be driven along, but in either case, I share the view expressed in the Court[1] below that a motorist venturing on to such shoulder is obliged to proceed slowly and with care.

At the time of the accident, appellant's car was well off the paved portion of the highway and was travelling at a speed which—on the evidence of the witness Côté and in the light of what happened—must have been at least fifty miles per hour.

In my opinion this excessive speed was the real cause of this unfortunate accident. Appellant was dozing at the time, his wife was killed, there were no eye witnesses and therefore no explanation as to why the car was being driven at such speed on the shoulder of the road. The Court below found unanimously that appellant failed to establish fault on the part of respondent and I am in agreement with that finding.

I would dismiss the appeal with costs.

CARTWRIGHT J. *(dissenting)*:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side) for the Province of Quebec[1] which reversed the judgment of Cliche J. and dismissed the appellant's action.

Cliche J. had given judgment for the appellant personally for the sum of $10,088.80 and as tutor for his infant children for the sum of $2,900 for the child Michelle Robitaille and for the sum of $2,100 for the child France Robitaille. As to these last two items counsel for the appellant asks for leave to appeal.

On June 24, 1958, the appellant and his wife were driving in his automobile from Rock Island to Sherbrooke on provincial highway number 5. The distance between these places is about 35 miles. At the commencement of their journey which was at about 10.30 p.m. the appellant was driving but after a time at his wife's suggestion he allowed

[1] [1962] Que. Q.B. 545.

her to drive. He said he was glad to do this as he was tired. The wife was an experienced and licensed driver. The weather was fine and the pavement dry. The appellant leaned back in his seat and closed his eyes but did not fall asleep. At a point close to the junction of the Waterville Road with highway number 5 he heard sounds suggesting to him that the car had left the paved portion of the highway. His impression was that the car was proceeding at not more than 30 miles per hour. He lifted his head but had no time to see anything. He recovered consciousness in the hospital the following morning.

No eye-witnesses of the accident were called to give evidence but, subject to a question as to the speed of the automobile, what actually occurred is established by marks on the surface of the shoulder and the physical facts.

On the south-easterly shoulder of highway number 5, that is on the right-hand side as the automobile in question was being driven, there stood a block of cement cubical in shape measuring $2\frac{1}{2}$ to 3 feet and its weight being about 2400 lbs. The distance from the edge of the paved portion of the highway to the nearest part of this cement block was $4\frac{1}{2}$ feet. It had been in that position for a number of years. The appellant's automobile struck the block of cement with the result that his wife was instantly killed, he seriously injured and the automobile demolished.

The evidence of a witness called by the respondent, traffic officer Daigle who investigated the accident and made a number of measurements, was accepted by the learned trial judge and is of importance. He testified that there were tire marks made by the automobile shewing that it was driven for 45 feet with all four wheels on the shoulder of the road up to the point where it struck the cement block and that these tire marks before reaching the spot where the block was were curving slightly to the left indicating that the automobile was being turned back towards the paved portion of the highway. As to the condition of the shoulder this witness said:

Q. Alors, le terrain sur lequel cette automobile-là a circulé, est-ce que le terrain n'était pas à peu près au même niveau que la surface pavée? R. Elle pouvait l'être, mais peut-être un peu plus bas.

Q. Combien? Un pouce (1")? R. Un pouce (1").

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Q. Alors, il n'y avait pas de différence substantielle entre l'endroit ou l'automobile a circulé et la route pavée? R. Non, la seule différence qu'il y a, c'est un peu plus bas.

Q. Et s'il y avait un fossé, il serait encore à droite de la machine? R. Si vous voulez appeler un vrai fossé plus creux, ç'aurait été à droite du chemin.

Q. Alors, cette automobile-là ne circulait pas dans ce qui était un fossé mais sur la route pavée ou substantiellement au même niveau que la route pavée? R. Ou presque.

This witness also testified, as indeed seems obvious, that had it been necessary for the driver of the automobile to leave the paved portion of the highway the place in which it was being driven up to the point of striking the block was a proper one. His measurements shewed that the cement block had been moved 60 feet by the impact, that the automobile had continued 45 feet from the point of impact with the block and had come to rest against a telephone pole which it struck and broke.

The paved portion of the highway opposite the block was 22 feet in width; the condition of the surface on the right-hand side of the paved portion has been described above. The inference to be drawn from all the evidence of the witness Daigle is that but for the presence of the cement block the automobile would have regained the paved surface of the highway and proceeded on its way without mishap.

The plan of the highway filed as an exhibit indicates that at and approaching the point of the accident the highway, as one goes towards Sherbrooke, was sloping slightly downwards and curving pronouncedly to the left.

Two questions present themselves (i) at what rate of speed was the automobile being driven, and (ii) for what reason was it driven off the paved portion of the highway.

On the first question the evidence of the appellant places the rate of speed at about 30 miles per hour. The respondent's witness, the engineer Côté, as a result of calculations from the distance the cement block was driven expressed the opinion that the rate of speed was about 50 miles an hour. If one takes the higher of these estimates the rate of speed was a lawful one on this highway.

The second question is more difficult. All that is known is that while going down a slight grade and rounding a somewhat pronounced curve to the left at a speed not

definitely ascertained but not in excess of 50 miles per hour, the automobile did leave the pavement, proceeded on the shoulder for 45 feet and was turning to regain the pavement when it struck the cement block.

All the learned Judges of the Court of Queen's Bench were of the opinion that the circumstances of the case put the appellant in the position of having to offer a satisfactory explanation of the happening of the accident, that he had failed to do this and that this necessitated a finding that the negligence of the wife of the appellant was the sole cause of the accident. In reaching this conclusion they purported to apply the principle succinctly stated by my brother Taschereau in *Parent v. Lapointe*[1]:

> . . . . Quand, dans le cours normal des choses, un événement ne doit pas se produire, mais arrive tout de même, et cause un dommage à autrui, et quand il est évident qu'il ne serait pas arrivé s'il n'y avait pas eu de négligence, alors, c'est à l'auteur de ce fait à démontrer qu'il y a une cause étrangère, dont il ne peut être tenu responsable et qui est la source de ce dommage. Si celui qui avait le contrôle de la chose réussit à établir à la satisfaction de la Cour, l'existence du fait extrinsèque, il aura droit au bénéfice de l'exonération.

The principle is not questioned, but I agree with the submission of counsel for the appellant that in the case at bar the circumstances established in evidence do not call for its application.

In *Parent's* case the car which the defendant was driving while his passengers were asleep left the road and after turning over several times came to rest in a field about 50 feet from the highway. That these facts called for an explanation is not questioned.

In the case at bar there is nothing to suggest that any harm would have been caused by the manner in which the car was driven had it not been for the presence of the cement block. The car would presumably have returned to the paved portion of the road and continued without incident. Driving on the shoulder of the highway is not *per se* either negligent or unlawful. There are times when it is the duty of a driver to do so.

[1] [1952] 1 S.C.R. 376 at 381.

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There are a number of possibilities; an approaching car passing another car may have caused the driver of the appellant's car to turn onto the shoulder to avoid a collision; it may be that, as suggested in the defence of the respondent, "elle fut aveuglée dans la courbe par les lumières d'un véhicule circulant en sens inverse" and so failed momentarily to realize the sharpness of the curve in the highway. In neither of these supposed cases would she have been guilty of negligence. She might have fallen asleep, which would have been negligent, but this seems unlikely as the journey was a short one and she herself had been driving for only a few miles. Negligence is not presumed; it may, of course, be proved by circumstantial evidence as well as by direct evidence; but in my opinion all the known circumstances are more consistent with the absence of negligence on the part of the driver of the appellant's automobile than with its presence. I have reached the conclusion that the finding of the Court of Queen's Bench that the accident was caused by the negligence of the appellant's wife is not supported by the evidence and should be set aside.

It remains to consider whether the respondent was guilty of actionable fault. As to this I agree with the conclusion of the learned trial judge and I am in substantial agreement with his reasons but as I am differing from the view of the Court of Queen's Bench I will state my reasons briefly in my own words.

The block of cement had been in the position in which it was when struck by the appellant's automobile for a number of years. Its size and position have already been described. Its colour was such that it would not be readily visible at night. It was so situated that an automobile proceeding on the shoulder with its left-hand wheels just off the paved portion of the highway must inevitably strike it unless the driver saw it in time to stop or turn. It was at a point on the highway where it was the right, and might at times be the duty, of the driver of an automobile to proceed. It constituted a grave and obvious danger which it was the duty of the respondent to remove.

Article 35 of Chapter 141 of the Revised Statutes of Québec (1941) provides as follows:

35. Work necessary for the maintenance and repair of provincial highways, regional highways or improved roads, means: . . .

3. The maintenance and repair of shoulders.

I agree with and wish to adopt the following passage in the reasons of the learned trial judge:

La preuve n'établit pas pourquoi l'épouse défunte du Requérant a conduit le véhicule qui les transportait sur l'accotement de la route à ce moment. Comme dit l'ingénieur Côté dans son témoignage, l'accotement du chemin est lui-même une surface de roulement. 'C'est une de ses fonctions' dit-il 'd'y recevoir les véhicules en cas d'urgence pour y rouler ou y stationner.' Bien que la Cour ne sache pas pourquoi le véhicule a circulé sur l'accotement à ce moment, il reste que c'était son droit d'y circuler en cas d'urgence et d'y trouver une surface de roulement dépourvue d'obstacle semblable.

Après avoir considéré la preuve dans son ensemble, la Cour arrive à la conclusion que cet accident et les dommages qui en sont résultés ont été causés uniquement par la faute des préposés à l'entretien de cette route nationale, dont l'Intimé est responsable, pour avoir laissé subsister, durant de nombreuses années, cette obstruction dangereuse sur la surface de roulement d'urgence qui présentait l'accotement de la route à cet endroit et sur lequel le véhicule concerné, en cette occasion, a percuté, causant la mort de l'épouse du requérant, les blessures graves de ce dernier et le bris de son véhicule.

The assessment of damages made by the learned trial judge was not attacked.

I would grant the application for leave to appeal as to the sums awarded by the learned trial judge for the infants Michelle Robitaille and France Robitaille. I would allow the appeal, set aside the judgment of the Court of Queen's Bench and restore the judgment of the learned trial judge with costs throughout.

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

*Attorneys for the plaintiff, appellant: Blanchette, Péloquin & Roberge, Sherbrooke.*

*Attorney for the defendant, respondent: L. Côté, Sherbrooke.*