1927

*Oct. 5.
*Oct. 6.

PACIFIC STAGES LIMITED (DEFENDANT) APPELLANT;

AND

HENRY H. JONES (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Negligence—Motor vehicle—Injury to passenger—Autobus—Defence of inevitable accident—Knowledge of driver as to icy condition of street.*

The appellant's motor "bus" was being driven down a steep incline on a frosty and foggy morning, the street being in an icy condition, when the driver saw that a street car had stopped in front of him. He tried to stop the "bus" and in order to avoid a collision ran it sharply to the right over the curb and sidewalk, struck a telephone pole and injured the respondent who was a passenger in the bus. The trial judge held that "having regard to the conditions, the short range of visability, the fact that there was a street car line upon the road, and the condition of the pavement, as it was, *or ought to have been known* to the driver, the motor bus ought to have been and might have been kept under such control that it could have been stopped without doing any damage," and he gave judgment in favour of the respondent, which judgment was affirmed by the Court of Appeal.

*Held* that there was not sufficient evidence to support the finding of the trial judge. Under the circumstances of this case it cannot be reasonably said that the driver knew or ought to have known the icy condition of the pavement, as he had been faced with an unexpected situation such that, had it not existed, no difficulty would have been experienced in negotiating the hill.

Judgment of the Court of Appeal ([1927] 2 W.W.R. 692) rev.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, D. A. McDonald J. (2), and maintaining the respondent's action for damages for personal injuries caused by negligence.

The material facts of the case, as stated by the trial judge and his findings on the evidence are the following:

"This is an action for damages for injuries suffered by a passenger proceeding from Port Moody to Vancouver in a motor bus operated by the defendant for hire.

"The decision of the case rests not I think upon the credibility of any of the witnesses, for I believe that all the witnesses told the truth, as best they could, but rather

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

(1) [1927] 2 W.W.R. 692. (2) (1926) 38 B.C. Rep. 81.

upon the inferences to be drawn from the evidence given. The motor bus in question, having earlier in the morning proceeded from Vancouver to Port Moody, was returning over the same route at about 9 o'clock through a dense fog through which the range of visibility was from 40 to 50 feet. Having climbed a grade to the intersection of Slocan street with Hastings street the motor bus proceeded over the brow down a grade of 5.44 per cent toward Clinton street. When nearing Clinton street it was noticed by the driver that a street car had stopped immediately in front to take on passengers, and that a Ford truck had stopped behind the street car. The driver of the motor bus, in his effort to stop, lost control and, in order to avoid a collision, turned sharply to the right, mounted a 6-inch curb and brought his motor bus to rest with its left side against a telegraph post and its front against a store building. There seems no doubt that when the emergency arose the driver handled his car in the best possible manner. Immediately following the motor bus came the chief of police driven by his expert chauffeur, who also, on trying to bring his car to a stop, met with difficulties and skidded into the Ford truck driving it across the street. The chief of police ran back to flag any further cars coming down the hill with the result that the drivers of some eight or ten cars, suddenly faced with this alarming signal, lost control of their cars and skidded down the hill or across the street. The only car that came down the hill safely and rested behind the street car was the Ford truck.

"Admittedly the street, which consisted of a wooden block pavement, was in a very slippery and icy condition. The evidence goes to show that this condition was not observable to a driver, and it is suggested that this particular block was in worse condition than any other part of the road. It seems difficult to understand why this should be so.

"The driver says that he went down the hill in second gear at about ten or twelve miles an hour. In my opinion, on the whole of the evidence, the motor bus was proceeding at too great a rate of speed."

*W. N. Tilley K.C.* and *J. de G. Audette* for the appellant.

*C. W. Craig K.C.* for the respondent.

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PACIFIC STAGES LTD. v. JONES.

The judgment of the court was orally delivered by

ANGLIN C.J.C.—There is no finding of fact in this case as to the rate of speed at which the defendant's omnibus was moving. There is a finding by the learned trial judge that it was travelling at an excessive speed, having regard to all the conditions—short range of visibility, the fact that there was a tram car line upon the street, and (the crucial point), the condition of the pavement, which, in his opinion, was, or ought to have been, known to the driver. He makes no finding apart from that. The case really turns upon the question whether or not the icy condition was, or ought to have been, known to the driver. That it was not in fact known to him seems abundantly clear. We are also of opinion that it cannot be said that it ought to have been known to him. That the condition of the pavement was quite abnormal and not to be expected is shown by the evidence of half a dozen witnesses. The driver of the bus realized the existence of that icy condition only when he came to apply his brakes. It was then too late to avoid the accident because the wheels of the bus "skidded" on the icy surface of the road way.

Mr. Justice Galliher who dissented seems to us to have best realized what the situation was. He points out, what I have already alluded to, the learned trial judge's assumption that the driver ought to have known the condition of the highway. "The main feature," he then goes on to say is, did the driver know, or should he have known, of the icy condition of the pavement? He had passed over the same pavement an hour or two before that same morning. Other witnesses had done the same and they all say that the condition of the pavement had undergone a marked change in the meantime not observable until they attempted to stop, and when we find that all but one of a number of cars that came over the brow of the hill at that time and attempted to stop, mixed up and got out of control, it would seem to indicate that no one expected to encounter the conditions they were met with. Under such circumstances can it reasonably be said that the driver knew, or ought to have known, the condition of the pavement? I think the driver was faced with an unexpected situation which, had it not existed, no difficulty would have been experienced in negotiating the hill, and it should not be held that he knew, or ought to have known, of the condition of the pavement.

With that statement, having regard to the evidence, I, and I believe my learned brothers also, are fully in accord. In our opinion there is not sufficient evidence to support the finding of the learned trial judge.

The appeal is allowed with costs here and in the Court of Appeal, and the action is dismissed with costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Walsh, McKim, Housser & Molson.*

Solicitor for the respondent: *R. P. Stockton.*