WINNIPEG ELECTRIC COMPANY (DEFENDANT) ..... } APPELLANT;

AND

JACOB GEEL (PLAINTIFF) ..... RESPONDENT.

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*Feb. 10.
*June 12.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Motor vehicles—Negligence—Injury caused by motor vehicle—Motor Vehicle Act, Man., C.A. 1924, c. 131, s. 62—Onus of proof as to negligence—Operation of the statutory presumption—Efficiency of brakes (s. 15)—Inspection—Evidence—Jury's findings—Particularizing of alleged negligence—Pleadings—Rule 334, c. 46, R.S.M. 1913.

Plaintiff, while in a motor car, was injured by defendant's motor bus striking the car, by reason, apparently, of the giving way of a small bolt or pin in the bus's braking appliances, rendering its brake ineffective. Defendant claimed that there had been proper inspection of the bus and equipment and that the collapse of the brake mechanism was owing to a latent defect in the pin not discoverable by careful inspection. The jury found negligence in defendant, causing the injury, and, asked in what particulars, as alleged by plaintiff, the negligence consisted, answered "In not keeping brakes and braking equipment in proper repair, and insufficient inspection of said brakes." Judgment at trial for damages to plaintiff was upheld by the Court of Appeal, Man., on a divided court (39 Man. R. 18). Defendant appealed.

Held: In view of the evidence, and the provisions of the *Motor Vehicle Act,* Man. (C.A. 1924, c. 131), the jury's verdict should not be set aside.

Per Duff and Lamont JJ.: S. 62 of said Act created against defendant a rebuttable presumption of negligence. Under its operation, the onus of disproving negligence remains throughout. If the evidence, when concluded, is too meagre or too evenly balanced to enable the tribunal to determine this issue, as a question of fact, then, by force of the statute, the plaintiff is entitled to succeed. This does not mean that defendant must "demonstrate its case"; it must give reasonable evidence in rebuttal of the legal presumption against it, and the evi-

*PRESENT:—Duff, Rinfret, Lamont and Cannon JJ., and Maclean J. *ad hoc.*

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dence must be such as to satisfy the judicial conscience of the tribunal of fact. Nor does it mean that necessarily, in all cases, defendant must shew precisely how, through the agency of its vehicle, the injury was brought about (the onus in this aspect discussed). As to the form of the verdict in the present case, the jury's answer to the first question (as to negligence in defendant, causing the injury) was really conclusive; its answer to the second question (as to particulars) could only be regarded as material if it tended (as, *held*, it did not) to shew that, in answering the first question, it had been misled into error. It was not necessary to require the jury to specify defendant's negligence, nor for plaintiff to have given particulars of negligence and established it as particularized. In fact, it is not incumbent on plaintiff, proceeding under the statute, to charge negligence in terms; for the law presumes negligence in his favour, and it is for defendant to rebut the presumption (Rule 334, c. 46, R.S.M. 1913).

Per Rinfret, Cannon and Maclean (*ad hoc*) JJ.: In view of s. 15 of the Act (requiring adequate brakes, sufficient to control at all times), and of s. 62 (as to onus), and on the evidence (as to sufficiency of brakes and of inspection), the jury had warrant for its findings, which should not be disturbed.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) dismissing, in the result, on a divided court, the defendant's appeal from the judgment, on trial of the action before Dysart J. and a jury, in favour of the plaintiff for $11,158.25, in an action for damages for personal injuries alleged to have been suffered by the plaintiff by reason of an automobile in which he was riding being struck, while it was standing, by a motor bus of the defendant, owing, as alleged, to defendant's negligence. The material facts of the case are sufficiently stated in the judgments now reported. The appeal was dismissed with costs.

W. N. Tilley K.C. for the appellant.

E. F. Newcombe K.C. for the respondent.

The judgment of Duff and Lamont JJ. was delivered by

DUFF J.—The facts are outlined in the judgment of Mr. Justice Robson (2) in these passages:

On the evening of Sunday, 22nd April, 1928, at about nine o'clock, the plaintiff had come from the Capitol Theatre and entered the Reo automobile of a friend, one Galsbeck, evidently to go home. The plaintiff was in the back seat. The Reo automobile proceeded a short space westerly towards the Donald Street intersection and stopped in a group of cars against which at the moment the signal was directed. While thus at

(1) 39 Man. R. 18; [1930] 2 W.W.R. 305.

(2) 39 Man. R. 18, at 36-37.

rest, the Reo was struck from behind with considerable force by a motor bus of the defendants and plaintiff suffered injuries.

* * *

The plaintiff called as witnesses certain occupants of the Galsbeck car and bystanders and medical men. The plaintiff also introduced as evidence part of the examination on discovery of Erhardt, the driver of the defendants' motor bus. This latter was the only testimony dealing with the bus mechanism adduced by plaintiff. The other witnesses on that phase were called by defendants and were Erhardt, Holmes, a bus and brake superintendent, Colyer, a mechanic, and Johnston, also a mechanic.

In the portion of the Erhardt examination introduced by plaintiff, Erhardt said the bus was of the "White" make and was about four or five years old; that defendant had had it since late in 1925; that they bought it from a private individual in Winnipeg and used it about half time; that at the time of the accident he (Erhardt) was on his regular route between Winnipeg and Transcona and was just on his way from Transcona to the Winnipeg Terminal on Hargrave street; that the bus a twenty-five passenger one, but that he had only one passenger at the time. The bus was gas propelled, and weighed, Erhardt thought, between five and six tons. He said he had been proceeding along Portage Avenue at about twelve or fifteen miles an hour; that that was his usual speed and he couldn't go any faster in that traffic; that he was about to stop for the intersection when something gave way and the brake was then ineffective, hence the collision. This was attributed to the giving way of a small bolt or pin in the braking appliances, but whether it was the breaking of the bolt or its loss from its position, is not clear.

The defence of the appellants in substance was, that the equipment of the motor bus was adequate, and that the collapse of the brake mechanism by reason of which the driver lost control of the vehicle, was due to the fracture of a brake pin, owing to a latent defect in the pin, not discoverable by careful inspection; and, that the bus and its equipment had been subjected to a proper inspection, which had revealed nothing pointing to any deficiency in the machinery. The trial judge directed the jury thus:

So I repeat, this action is based upon negligence. One thing is clear; there was no negligence on the part of the plaintiff himself. There was nothing that he did that was in violation of any duty towards the defendant, and there was nothing that he ought to have done in the circumstances. That narrows the field of inquiry down to the question, which I have already mentioned, "Was there any breach of duty on the part of the defendant which caused the injury to the plaintiff?"

We have in this province for our guidance a Motor Vehicle Act, section 63 [62] of which states: "When any loss, damage or injury is caused to any person by a motor vehicle, the onus of proof that such loss, damage or injury did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle * * * shall be upon the owner or driver of the motor vehicle." In other words, by reason of that enactment the onus is now upon the defendant to show that it was not negligent, whereas normally in other cases it would be upon the plaintiff to show that the defendant was negligent. The result of that is that if

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the evidence is evenly balanced both ways the defendant has not shown that there was no negligence, and having failed in that, it could be held liable for negligence or a breach of duty, because the duty on the defendant is to free itself from the imputation of negligence. In doing that, the defendant has not to carry it to any unreasonable extremes; it is just a mere preponderance in the balancing of the evidence. If the weight is with the defendant, it should have the benefit.

The verdict of the jury was given in answer to specific questions, which, with the answers, were these:—

(1) Was there any negligence on the part of the defendant which caused the injury to the plaintiff?—A. Yes.

(2) If you find there was such negligence, in what particulars as alleged in the statement of claim did that negligence consist? Answer: Paragraph (*f*), In not keeping brakes and braking equipment in proper repair, and insufficient inspection of said brakes.

(3) If you find such negligence, at what do you assess the damages of the plaintiff?—A. Ten thousand dollars ($10,000) plus expenses as agreed to by counsel.

I have no doubt that the learned trial judge was right in directing the jury as he did, that, by force of the statute cited, the plaintiff, having proved that he had suffered injuries caused by a motor vehicle owned by the appellants and driven by their servant, was entitled to recover reparation from the appellants unless they established that these injuries "did not arise through the negligence or improper conduct" of the appellants or their driver. The statute creates, as against the owners and drivers of motor vehicles, in the conditions therein laid down, a rebuttable presumption of negligence. The onus of disproving negligence remains throughout the proceedings. If, at the conclusion of the evidence, it is too meagre or too evenly balanced to enable the tribunal to determine this issue, as a question of fact, then, by force of the statute, the plaintiff is entitled to succeed.

This does not mean, of course, that the defendants "must demonstrate their case." They must given reasonable evidence in rebuttal of the legal presumption against them, and the evidence must be such as to satisfy the judicial conscience of the tribunal of fact. Nor does it mean that it is necessarily, in all cases, incumbent upon the owner or driver, against whom the statute is invoked, to adduce evidence, shewing precisely how, through the agency of the motor bus, "the loss, damage or injury" was brought about; the circumstances may be such that the proper course, or, indeed, the only course open to the defendants,

is to prove affirmatively that the duty cast upon them by law to exercise proper care in order to avoid such "loss, damage or injury" was duly discharged. The sufficiency of the explanations advanced will be considered by the tribunal in light of the opportunities of knowledge possessed by the parties respectively, and due consideration will be given to care or absence of care in respect of the preservation and production of available material evidence.

I do not enter upon a discussion of facts. Sufficient is said in the judgment of Mr. Justice Robson, to shew that, on the evidence, a finding by the jury that the appellants had not acquitted themselves of the onus cast upon them, could not, as the law governing such matters stands, be set aside by an appellate court as a perverse or unreasonable verdict.

As to the form of the verdict, the finding of the jury in answer to the first question is really conclusive. The answer to the second question could only be regarded as material, if it tended to shew that, in answering the first question, the jury had been misled into error. For the reasons given by Mr. Justice Robson, that is, I think, a proposition which cannot be maintained. But I think it should be noticed, perhaps, that the learned trial judge, while his charge to the jury left nothing to be desired in point of fairness, went beyond what was demanded of him in requiring the jury to specify the negligence of the appellants. In saying this, it must be added, that counsel for the plaintiff, as well as counsel for the defendants, proceeded from the beginning of the action, in their pleadings and down to the end of the trial, upon the assumption that, notwithstanding the statute, it was the duty of the respondent to give particulars of negligence, and to establish the existence of negligence as particularized. In truth, it is not incumbent upon the plaintiff, proceeding under the statute, to charge negligence in terms; for the reason that the law presumes negligence in his favour, and the burden of rebutting the presumption lies upon the defendant. Marginal Rule, 334, ch. 46. R.S.M. 1913, reads thus:

> Neither party need in any pleading allege any matter of fact which the law presumes in its favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

The appeal should be dismissed with costs.

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The judgment of Rinfret, Cannon and Maclean (*ad hoc*), JJ., was delivered by

CANNON J.—The respondent sued the appellant company to recover damages for injuries suffered by him, on or about the 22nd day of April, 1928, by reason of a collision between a bus operated by the appellant and an automobile in which the respondent was driving. The version of the accident, as given by the driver of the bus, was adopted by both parties as follows:

Q. Well then, the cause of the accident was the trouble with the brake?—A. The little bolt, it is in the brake evener on the brake rods, I call it the brake mechanism; I don't know whether it was in the brake evener or the rod itself; it broke as I applied the brakes, letting my brake pedal go right through the floor board with no pressure on the brake.

Q. This is the mechanism that is connected with the pedal?—A. Yes.

Q. Didn't you have an emergency brake on?—A. The emergency and the pedal brake of that car are on the one brake evener.

Q. Did you try to use the emergency?—A. I did put it on; as soon as I hit for the curb I put the emergency on.

Q. And that didn't hold up?—A. It held it up but not enough to stop me in time.

The respondent's solicitor, before the case went to the jury, insisted that the jury should be left free to return a general verdict, because, in this case, the onus being on the defendant to clear itself entirely, if the latter did not do so, the jury might find in a general way that the appellant was guilty of negligence. The judge, however, asked the jury to answer certain questions, to which they did as follows:

1. Was there any negligence on the part of the defendant which caused the injury to the plaintiff?—A. Yes.

2. If you find there was such negligence, in what particulars as alleged in the statement of claim did that negligence consist?—A. Paragraph (*f*), In not keeping brakes and braking equipment in proper repair and insufficient inspection of said brakes.

Thereupon judgment was entered for the respondent for $11,158.25 and costs.

The defendant appealed from this judgment and verdict to the Court of Appeal for Manitoba, which dismissed the appeal without costs, dismissal of the appeal being favoured by Prendergast C.J.M. and Robson J.A., while Fullerton and Dennistoun JJ.A., would have allowed the appeal; Trueman J.A., held that the verdict and judgment could not be upheld, and favoured a new trial (1).

(1) 39 Man. R. 18; [1930] 2 W.W.R. 305.

The appellant alleges the following reasons to support the appeal:

1. There was no negligence on the part of the defendant, and the verdict and judgment are not supported by the evidence.

2. The learned trial judge failed to properly or sufficiently direct the jury as to the duty of the defendant to keep brakes and braking equipment in repair and proper condition, and as to inspection thereof, and should have told the jury the defendant was under no higher duty to the plaintiff than the ordinary careful motor car owner or driver.

3. The learned trial judge should have instructed the jury that, inasmuch as the evidence submitted established the cause of the accident, the question of onus as a determining factor of the liability did not arise.

4. The Court of Appeal having differed in opinion, the majority in favour of the appellant should have allowed the appeal and set aside the verdict and judgment, failing which a new trial of the action should have been ordered.

5. The damages awarded by the jury were excessive.

The learned counsel for the appellant gave up the branch of the appeal concerning the quantum of damages, and very ably gave reasons why the verdict of the jury should be set aside as contrary to the evidence.

He also acknowledged the onus imposed upon the appellant by the *Motor Vehicle Act* at the time in force in Manitoba, cap. 131, 1924 Consolidated Amendments, section 62, which provides:

62. When any loss, damage or injury is caused to any person by a motor vehicle the onus of proof that such loss, damage or injury did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle, and that the same had not been operated at a rate of speed greater than was reasonable and proper having regard to the traffic and use of the highway or place where the accident happened, or so as to endanger or be likely to endanger the life or limb of any person or the safety of any property, shall be upon the owner or driver of the motor vehicle.

Section 15 of the same Act says:

Every motor vehicle shall be equipped with adequate brakes sufficient to control such motor vehicle at all times, and with a windshield wiper, and also with suitable bell, gong, horn or other device which shall be sounded whenever it shall be reasonably necessary to notify pedestrians or others of the approach of any such vehicle.

According to the evidence of the appellant's own witnesses, the bus in question was not provided with independent service and emergency brakes; but both the emergency and the pedal brakes of that car were dependent on one simple brake evener, which was found to be out of commission when a certain bolt broke or left its place. The appellant, in its attempt to exculpate itself, proved that the car had been inspected on the 5th of March, 1928, by one Albert Colyer. It appears that, on the above date,

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a "light" inspection took place when all clevises and pins in the brakes and brade rods were supposed to be overhauled. The pin in question, according to the appellant, was in a place where it would not wear at all, and this witness Colyer, who is supposed to have made the inspection, says:

Q. How do you examine a pin?—A. You can tell if there is any lost motion, whether it is worn at all.

Q. And that is what you do?—A. Yes.

Q. You just attempt to see if there was any wear in it?—A. Yes.

Q. If it is a pin that can't wear at all, what do you do? Some pins are in places where they won't wear at all?—A. Well, we do not bother about them. If there is any lost motion anywhere we generally check it up and see where it is.

Q. But if it is a pin that won't wear you don't do anything with it?—A. We just see it is all right, and has got a cotter pin in it.

The accident took place on the 22nd April, 1928, and the car had not been inspected at that time since the 5th March. It was also proven by the appellant that the car should be inspected after running 750 miles. Holmes, appellant's superintendent of bus and brake equipment, said that this White bus was to be inspected every 750 miles and greased thoroughly by two men. He says, however:

Q. How many miles did the bus operate subsequent to that inspection and before the accident?—A. In the neighbourhood of 1,000 miles. I can't be positive of that. I know it did about 500 miles in the month of March, and about 500 miles in the month of April.

Q. You have record of that?—A. We have records of that, yes.

The jury on this evidence could reasonably reach the conclusion that, at the time of the accident, an inspection was past due; that if it had been made with thoroughness, the defect in the bolt in question might have been located and remedied. The appellant acknowledges that they had to prove to the satisfaction of the jury that they had not been negligent; or, to use the words of my brother Duff in *Canadian Westinghouse Co.* v. *Can. Pac. Ry. Co.* (1), they had to "produce evidence reasonably satisfying the tribunal of fact that all proper precautions had been taken in order to provide against risks which might reasonably be anticipated."

The tribunal of fact in this case, the jury, thought there was negligence on the part of the appellant, which consisted in not keeping brakes and braking equipment in proper repair, and insufficient inspection of said brakes.

(1) [1925] Can. S.C.R. 579, at 585.

A company using busses of a capacity of twenty-five persons for the conveyance of the public was bound to inspect minutely the braking apparatus, especially in view of the fact that this particular White car was not provided with two independent braking systems and that both service and emergency brakes were dependent entirely for their operation on a perfect state of maintenance and repair.

The legislature of Manitoba has laid down an imperative rule which is in very clear terms; we do not need, in order to understand them, to have recourse to the interpretation given by English or other tribunals to regulations which are not perhaps couched in the same terms. The courts' discretion was restricted by the legislature when it imposed the duty on the driver of having brakes sufficient "at all times" to control these dangerous machines. It was the duty of the defendant to equip all its motor vehicles with adequate brake service to control such vehicles *at all times*. In order to be sure that the brakes were efficient and sufficient at all times, it may be necessary to inspect them daily or even several times a day. The only evidence brought forward by the appellant was that they had done a "light" inspection of the car several weeks before the accident. The jury found this defence insufficient and took the trouble to say so in answering the question which requested particulars of negligence. Although insufficient inspection did not appear in the particulars given by respondent, the learned counsel for the appellant very fairly stated that appellant would not quibble on this point, as inspection was discussed by the judge and was before the jury. The latter, in finding that the brakes and braking equipment were not kept in proper repair, added, as a necessary consequence, that the inspection of the brakes had been insufficient, in view of the statutory obligation to keep the braking apparatus sufficient, i.e., efficient at all times to control appellant's motor bus.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Guy, Chappell & Turner.*

Solicitors for the respondent: *Chapman, Thornton & Chapman.*