MARY E. McLAUGHLIN, AND OTHERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ESTATE WM. McLAUGHLIN (DEFENDANTS) ..... APPELLANTS;

AND

EDWIN W. LONG AND JOSEPH JOHN LONG, AN INFANT BY EDWIN W. LONG, HIS NEXT FRIEND (PLAINTIFFS)..... RESPONDENTS.

1926
*Oct. 14.
1927
*Feb. 1.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Negligence—Contributory negligence—Motor vehicles—Motor Vehicle Law, 1915, c. 43, s. 4, as amended 1925, c. 10 (N.B.)—Liability of owner of motor truck for personal injury caused through servant's negligent driving—Boy injured while riding on running board of truck —Essentials to constitute contributory negligence—Causa proxima, non remota, spectatur—The Contributory Negligence Act, 1925, c. 41, s. 2 (N.B.)—Whether Act would apply to affect claim for damages of father of injured boy.

Under the *Motor Vehicle Law, 1915,* c. 43, s. 4, as amended 1925, c. 10 (N.B.), defendants were held liable in damages to a boy (the infant

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

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plaintiff) and to his father, for injury to the boy, while riding on the running board of defendants' motor truck, in an accident caused (according to jury findings sustained) through negligent driving of the truck by defendants' servant.

The benefit of s. 4 (1) of said Act is not confined to persons using the highway other than those in or upon a motor vehicle the operation of which causes injury.

The jury found the driver negligent in allowing the boy on the running board and in lack of proper attention to his duty of driving, but found contributory negligence in the boy "by staying on the car after having been asked to get off, and by standing on the running board of the car when it was moving." The courts below gave effect to the jury's findings and to *The Contributory Negligence Act*, 1925, c. 41 (N.B.) by reducing the damages otherwise recoverable.

Held, the evidence was consistent only with the view that the boy remained on the running board with the driver's tacit consent; and, further, the maxim *In lege causa proxima, non remota, spectator*, was not sufficiently adverted to in the courts below; there was no evidence on which the jury could find that fault of the boy was, in the legal sense, a cause of his injury; and his counsel's contentions in this respect at the trial should have been acceded to.

To constitute contributory negligence, it does not suffice that there be some fault on plaintiff's part without which the injury would not have been suffered; a cause which is merely a *sine qua non* is not adequate. As in the case of primary negligence, there must be proof, or at least evidence from which it can reasonably be inferred, that the negligence charged was a proximate, in the sense of an effective, cause of the injury (*Spaight* v. *Tedcastle*, 6 App. Cas. 217, at p. 219; Beven on Negligence—Can. Ed.—at p. 155; *Admiralty Commissioners* v. *SS. Volute* [1922] A.C. 129, at p. 136, and other cases, cited).

Damage or loss is "caused" by the fault of two or more persons, within the meaning of s. 2 of *The Contributory Negligence Act*, only when the fault of each is a proximate or efficient cause thereof; i.e., only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence (*Can. Pac. Ry. Co.* v. *Frêchette*, [1915] A.C. 871, at p. 879). *The Contributory Negligence Act* had no application to the case at bar.

Judgment of the Supreme Court of New Brunswick, Appeal Division, ([1926] 3 D.L.R. 918), reversed in part.

Quaere whether, assuming the boy's contributory fault, *The Contributory Negligence Act* would apply to affect the father's claim (which was to recover medical and other expenses for which defendants' negligence entailing injury to his son subjected him to legal liability). *McKittrick* v. *Byers* (58 Ont. L.R. 158), and *Knowlton* v. *Hydro Electric Power Commission of Ontario* (58 Ont. L.R. 80) commented on; the wording of s. 2 of the Act referred to.

Per Newcombe J.: S. 2 of *The Contributory Negligence Act* states a case where there is no liability at common law. It has applied to persons with relation to their liability for negligence, the wording of s. 2 of *The Maritime Conventions Act, 1914* (Dom.), which Act did not declare a liability where none previously existed, but regulated, as to each of the vessels at fault, the measure of damages in proportion to the degree of fault. *Quaere* whether the New Brunswick legislature,

having gone to the Admiralty provisions for the enunciation of the law, thereby adopts the Admiralty principles of contribution, including that expressed in *Admiralty Commissioners* v. *SS. Volute* ([1922] 1 A.C. 129 at p. 144).

APPEAL by the defendants, and cross-appeal by the plaintiffs, from the judgment of the Supreme Court of New Brunswick, Appeal Division (1) affirming, with a variation, the judgment of Crockett J.

The action was for damages for injury to the infant plaintiff, while riding on the defendants' motor truck, by reason of an accident caused, as alleged, through negligent driving of the truck by the defendants' servant.

The defendants conducted a bakery in the city of St. John, and delivered a portion of their goods by motor trucks to points outside the city. The accident in question occurred on a road some miles from the city. The truck plunged off the road, and the infant plaintiff, a boy about ten years of age, who was on the running board, was injured. The boy (by his father as next friend) and his father sued the defendants for damages.

The case was tried before Crockett J. with a jury. The following were the questions submitted to the jury at the close of the evidence, with the answers thereto:

1. Q. Was there any negligence on the part of the defendants' chauffeur Rogers?—A. Yes.

Q. If so, in what did such negligence consist?—A. First, in allowing the boy on the running board of the car.

Second, lack of proper attention to his duty of driving the car just previous to and at the time of the accident.

2. Q. Was the injury to the infant plaintiff entirely caused by the negligence set out in your answer to question one?—A. No.

3. Q. Was the infant plaintiff guilty of any contributory negligence without which the accident would not have happened?—A. Yes.

Q. If so, in what did such negligence consist?—A. By staying on the car after having been asked to get off, and by standing on the running board of the car when it was moving.

4. Q. If you find there was any contributory negligence on the part of the infant plaintiff, to what degree was he at fault?—A. Twenty-five per cent of the amount that otherwise would have been allowed.

5. Q. Was the infant plaintiff on the running board with the permission and consent of Rogers?—A. Yes.

6. Q. At what sum do you assess the damage to the father?—A. $559.75.

7. Q. At what amount do you assess the damage to the infant plaintiff?—A. $3,000.

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The jury explained that the amount awarded the infant plaintiff would have been about $4,000 had there been no contributory negligence; the $3,000 was awarded after deducting the 25 per cent.

S. 2 of *The Contributory Negligence Act* of New Brunswick, 1925, c. 41, provides that

> Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault: * * *

Crockett J. directed that a verdict be entered for $559.75 in favour of the plaintiff Edwin W. Long, and for $3,000 in favour of the infant plaintiff Joseph John Long by his next friend Edwin W. Long. He said

> I did not deal with the question as to whether the plaintiffs were entitled to have a verdict entered under the Motor Vehicle Act Amendment of 1925, because, in my view of the law, at common law the master would be liable.

On appeal by the defendants and cross-appeal by the plaintiffs to the Supreme Court of New Brunswick, Appeal Division, it was ordered that the verdict entered for the infant plaintiff for $3,000 should stand; that the verdict for the plaintiff Edwin W. Long for $559.75 be reduced to $419.83 (applying the 25 per cent reduction); and that the plaintiffs' cross-appeal (asking that the general damages awarded to the infant plaintiff be increased to $4,000) be dismissed.

The defendants appealed to the Supreme Court of Canada, asking that the verdict for the plaintiffs should be set aside, and a verdict entered for the defendants, or, failing that, asking for a new trial or reduction of the verdict; and the plaintiffs cross-appealed against the reduction of the damages of the plaintiff Edwin W. Long, and against the refusal of the appellate court to increase the infant plaintiff's damages to $4,000.

G. H. V. Belyea K.C. for the appellant.

R. S. Robertson K.C. and *W. R. Scott* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—The material facts of this case are fully stated in the judgment of the Appeal Division delivered

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by the learned Chief Justice of New Brunswick (1). Although other aspects of the action were presented in argument, the defendants' appeal may in our opinion be disposed of by determining whether liability has been established under the New Brunswick *Motor Vehicle Law, 1915,* (5 Geo. V, c. 43, s. 4—as amended by 15 Geo. V, c. 10, s. 3), and the respondents' cross-appeal as to the application of *The Contributory Negligence Act* (15 Geo. V, c. 41) by deciding whether the issue of contributory negligence should have been withdrawn from the jury on the ground that there was no evidence on which an affirmative finding could be based.

The attack made upon the findings of the jury, that the injury to the infant plaintiff was caused by negligence of the defendants' driver, consisting first "in allowing the boy on the running board of the car," and, second, in "lack of proper attention to his duty of driving the car just previous to and at the time of the accident," was ineffective. There is abundant evidence to sustain these findings and there can be no doubt that they establish that the defendants' motor vehicle was operated by their servant on a public highway " so as to endanger the life or limb " of the infant plaintiff.

Subsection 1 of section 4 of the New Brunswick *Motor Vehicle Law, 1915,* reads in part as follows:

> 4. (1) No person shall operate a motor vehicle on a public highway at a greater rate of speed than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person, or the safety of any property * * *

Subsection 6 (added to section 4 in 1925) provides that:

> (6) The owner of a motor vehicle shall be responsible civilly as well as hereunder for any violation of any provision of this Act or of any regulation made under this Act, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner, without his consent, expressed or implied, and the driver of a motor vehicle not being the owner, shall also be responsible for any such violation, provided that no such owner shall be liable to imprisonment in respect of such violation.

The motor vehicle at the time of the occurrence in question was admittedly in possession of the driver with the owners' consent.

It has been suggested that the benefit of subsection 1 of section 4 should be confined to persons using the highway

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other than those in or upon a motor vehicle the operation of which causes injury. While such persons may have been the immediate object of solicitude by the legislature in enacting the *Motor Vehicle Law,* we fail to find in the statute anything which would justify placing such a restriction on the comprehensive words "any person" in the clause "so as to endanger the life or limb of any person." Nor does it seem material in connection with this statutory liability to determine the precise legal status of the infant plaintiff while riding on the running board of the motor truck, although it by no means follows that contributory negligence on his part, if established, would not afford a defence to his claim as has been held in regard to other statutes imposing similar liability, for instance, in the well-known cases under the Factories' Acts.

The facts alleged in the statement of claim suffice to bring the case within the ambit of s. 4 of the *Motor Vehicle Law, 1915.* Paragraph 5 reads:

> The said motor truck was driven so recklessly, incapably, negligently and without exercising reasonable and proper care, it plunged off the road and struck a tree and a telegraph pole and badly injured the said infant plaintiff.

No doubt liability at common law of the defendants as masters and employers of the driver was chiefly stressed at the trial. But the right of the plaintiffs to invoke the *Motor Vehicle Law, 1915,* was also distinctly asserted by their counsel and the learned trial judge expressly stated that he refrained from dealing with that aspect of the matter only because he was quite convinced of the defendants' liability at common law. The case was fully tried out. There is no suggestion that if possible liability under the statute had been earlier or more pointedly brought to the attention of the defendants' counsel any other or further evidence would have been adduced, or that such evidence is now available. We see no valid reason for excluding the plaintiffs in this action from the benefit of the *Motor Vehicle Law, 1915,* and that statute is, in our opinion (subject to the question of contributory negligence presently to be considered), conclusive of the liability of the defendants as owners of the motor vehicle the negligent operation of which caused injury to the infant plaintiff resulting in the loss of his arm.

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The plaintiffs' challenge of the finding of contributory negligence affects both the appeal and the cross-appeal. If there is no evidence to support that finding the plaintiffs' right to recover is clear and no question of apportioning the damages can arise. The contributory negligence of the infant plaintiff as found by the jury was "by staying on the car after having been asked to get off, and by standing on the running board of the car when it was moving." They had already found the driver negligent "in allowing the boy on the running board of the car." The evidence is consistent only with the view that the boy remained on the running board with the tacit consent of the driver.

At the trial, counsel for the plaintiffs distinctly asked for the withdrawal of the issue of contributory negligence from the jury before the learned judge made his charge, and again at its conclusion in these words:

> Mr. Scott: I wish it to be distinctly understood and noted that I am objecting to any question of contributory negligence in this case going to the jury.
>
> The Court: That is clear. If there is no such evidence as would warrant me in submitting the question to the jury, it would be open to you whether you objected or not.

Again, in his argument on the motion for entry of verdict counsel for the plaintiffs took this position:

> There was no act of Jackie Long's which was the decisive cause of the injury to himself or which materially contributed to it or affected it in any way. * * * Contributory negligence must in effect have been the decisive cause of the collision * * *. The act of getting up on the running board * * * is separate and distinct from the negligence which was the decisive cause of the injury, namely the so handling the car that it ran off the road and collided with the tree.

With the utmost respect, it would appear that in the courts below the application to a charge of contributory negligence of the maxim, *in lege causa proxima, non remota, spectatur,* was not sufficiently adverted to.

In *Spaight* v. *Tedcastle* (1), Lord Chancellor Selborne said, at p. 219,

> Great injustice might be done, if, in applying the doctrine of contributory negligence * * * the maxim, *causa proxima, non remota spectatur,* were lost sight of * * *. An omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendants' fault, and if it had no proper connection as a cause with the damage which followed as its effect.

(1) (1881) 6 App. Cas. 217.

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In order to constitute contributory negligence it does not suffice that there should be some fault on the part of the plaintiff without which the injury that he complains of would not have been suffered; a cause which is merely a *sine qua non* is not adequate. As in the case of primary negligence charged against the defendant, there must be proof, or at least evidence from which it can reasonably be inferred, that the negligence charged was a proximate, in the sense of an effective, cause of such injury. The law on this point is admirably stated by Mr. Beven in his work on "Negligence" in the following passage: (Canadian Edition, at p. 155):

> Much of the difficulty in fixing the meaning of contributory negligence arises from the ambiguous use of the phrase, "contributing to the injury." This may indicate any of the whole set of antecedents necessary to produce the effect, or that one of them which marks their final completion and the actual calling into being of the effect. The *causa sine qua non* of an accident is not that on which depends the legal imputability of the accident. The liability depends not on that but on the *causa efficiens*. In fact the same test is applicable to the ascertaining what negligence contributes to an injury, as we have already applied to the ascertaining negligence itself. We must trace the negligent consequences to the last responsible agent, who, either seeing the negligent consequences or negligently refusing to see them, has put into motion the force by which the injury was produced.

Not only would any injurious consequences of the infant plaintiff's fault in standing on the running board of the car probably have been avoided by the exercise of ordinary care and caution by the defendants' driver (*Tuff* v. *Warman* (1)), but no view is possible on the evidence before us other than that it was the failure of the driver to take such ordinary care and caution in the operation of the motor vehicle which was the sole direct cause—*causa causans*—or, as Lord Sumner suggested in *B.C. Electric Ry. Co.* v. *Loach* (2), "the cause" of the infant plaintiff's injury.

> A. is suing for damages * * * . He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. (the defendant) had not been subsequently and severably negligent. A. recovers in full.
> (*Admiralty Commissioners* v. *SS. Volute* (3)).

We are for these reasons of the opinion that there was no evidence to submit to the jury on the issue of contribu-

(1) (1858) 5 C.B. (N.S.) 573, at p. 585.

(2) [1916] 1 A.C. 719, at p. 728.

(3) [1922] 1 A.C. 129, at p. 136.

tory negligence—no evidence on which they could find that fault of the infant plaintiff was in the legal sense a cause of his injury; and that the learned judge should accordingly have acceded to the request of the plaintiffs' counsel that the questions on that issue should be withdrawn, and, failing that, should have acceded to his subsequent motion that judgment be entered in favour of the plaintiffs for the full amount of the damages found by the jury regardless of the finding of contributory negligence.

In our opinion, within the meaning of s. 2 of *The Contributory Negligence Act* of New Brunswick (1925, c. 41) damage or loss is "caused" by the fault of two or more persons only when the fault of each of such persons is a proximate or efficient cause of such damage or loss, i.e., only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence. *Canadian Pacific Ry. Co.* v. *Frêchette* (1). It follows that *The Contributory Negligence Act* has no application to the case at bar.

To avoid misapprehension we should, perhaps, add that neither approval of, nor dissent from, the opinion of the New Brunswick Appeal Division that, on the finding of the infant plaintiff's contributory fault, *The Contributory Negligence Act* would apply also to the case of the adult plaintiff may be inferred from the present judgment. The claim of the father is to recover medical and other expenses for which the negligence of the defendants entailing injury to his infant son subjected him to legal liability. There is recent judicial authority for the view that contributory negligence of the infant plaintiff in the case at bar would at common law preclude the father's recovery upon his own claim. *McKittrick* v. *Byers* (2); *Knowlton* v. *Hydro Electric Power Commission of Ontario* (3). In these cases the position of the father is assimilated to that of a master who sues for tortious injury to his servant. That analogy is perhaps questionable and there is not a little to be said for the view that instead of the negligence of the infant plaintiff being attributable to his father so as to bar his recovery, the former and the defendants are, *quoad* the

(1) [1915] A.C. 871, at p. 879. (2) (1925) 58 Ont. L.R. 158.
(3) (1925) 58 Ont. L.R. 80.

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father, rather in the position of joint tortfeasors. But, if the view taken in the two Ontario cases be sound, is the father one "of two or more persons" whose fault caused injury "to one or more of them" within s. 2 of the statute? It is unnecessary, however, to deal further with this question, interesting as it is, in view of our conclusion that the finding of contributory negligence on the part of the infant plaintiff cannot be sustained.

It is sufficiently clear upon the record that the jury meant to find that the total damages of the infant plaintiff amounted to $4,000, and reduced their verdict in his favour to $3,000 solely by making a reduction of 25% under *The Contributory Negligence Act.*

The appeal should be dismissed with costs, and the cross-appeal allowed with costs, and judgment should be entered for the plaintiff Joseph John Long for $4,000, and for the plaintiff Edwin W. Long for $559.70, and also for their costs of the action and of the appeal and cross-appeal to the Appeal Division of the Supreme Court of New Brunswick.

NEWCOMBE J.—*The Contributory Negligence Act* of New Brunswick, ch. 41 of 1925, s. 2, enacts that:

> Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault.

It thus states a case where there is no liability at common law. Lord Blackburn in *Cayzer* v. *Carron* (1), said:

> Where the cause of the accident is the fault of one party and one party only, Admiralty and Common Law both agree in saying that that one party who is to blame shall bear the whole damage of the other. When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of Admiralty and the rule of Common Law. The rule of Common Law says, as each occasioned the accident neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss it shall be brought into hotchpotch and divided between the two. Until the case of *Hay* v. *Le Neve* (2), which has been referred to in the argument, there was a question in the Admiralty Court whether you were not to apportion it according to the degree in which they were to blame; but now it is, I think, quite settled, and there is no dispute about it, that the rule of the Admiralty is, that if there is blame causing the accident on both sides they are to divide the loss equally, just as the rule of law is

(1) (1884) 9 App. Cas. 873, at p. 881.

(2) (1824) 2 Shaw, Sc. App. 395.

that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls.

Therefore, at common law, there was no contribution, but in Admiralty, although the question of fault was regulated by the same principles as those prevailing at common law, a plaintiff against whom contributory fault had been found, could, by the law maritime, recover half his loss.

The Maritime Conventions Act, 1914, of Canada, ch. 13 of 1914, s. 2, does not declare a liability where none previously existed. It regulates, as to each of the vessels at fault, the measure of damages in proportion to the degree of fault. Now the New Brunswick Legislature has applied this Act, *ipsissima verba,* to persons with relation to their liability for negligence. When the question arises as to what is the effect of this, the language will, presumably, be construed so that if possible the enactment may have a reasonable application, and therefore, if there be no conceivable common law liability in the case stated by the statute, the court may, not improbably, find an intention to impose statutory liability in such cases; but, if so, seeing that the legislature has gone to the Admiralty provisions for the enunciation of the law, does it thereby adopt the Admiralty principles of contribution?—including that expressed by Lord Birkenhead in the House of Lords in *Admiralty Commissioners* v. *SS. Volute* (1), as follows:

> I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the Bywell Castle rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. And the Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect.

These questions may, as I have said, be decided when they arise; but in this case we heard no argument upon the interpretation of the statute, and I do not find it necessary to assent to more, upon the point involved in *The Contributory Negligence Act,* than that, in my opinion,

(1) [1922] 1 A.C. 129, at p. 144.

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the infant plaintiff's negligence was not a cause, or any part of the cause, of the injury which he suffered, and therefore that *The Contributory Negligence Act* has nothing to do with the case.

Appeal dismissed with costs, and cross-appeal allowed with costs.

Solicitor for the appellants: *W. J. Mahoney.*

Solicitor for the respondents: *W. R. Scott.*