53, 1932

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

BETWEEN:

WINNIPEG ELECTRIC COMPANY
(Defendant) Appellant,

AND

JACOB GEEL
(Plaintiff) Respondent.

Respondent's Factum

MESSRS. GUY, CHAPPELL & TURNER,
Appellant's Solicitors.

MESSRS. LARMONTH & OLMSTEAD,
Ottawa Agents for Appellant's Solicitors.

MESSRS. CHAPMAN, THORNTON & CHAPMAN,
Respondent's Solicitors.

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RESPONDENT'S FACTUM.

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Respondent's Factum

PART I.

Statement of Facts

On April 22nd, 1928, shortly after 9 o'clock in the evening, the Plaintiff was sitting with others in the rear seat of an automobile standing on Portage Avenue in the City of Winnipeg in compliance with the traffic signal when a motor bus of the Defendant Company, operated by a servant of the Company, ran into the rear end of the automobile, injuring the Plaintiff. The Plaintiff has not since been able to resume his occupation as a painter and 20 decorator. A few weeks after the accident he developed Paralysis Agitans. It is stated that he will never recover and will probably die in about five years from the date of the accident.

The Plaintiff brought this action against the Company for damages for the injuries so received. The claim was based on negligence on the part of the Defendant Company in the operating and equipment of the motor bus and under The Manitoba Motor Vehicles Act.

The case was tried in Winnipeg before Mr. Justice Dysart 30 and a jury. In answer to questions submitted by the Trial Judge the following answers were given by the jury in their verdict:

(1) Was there any negligence on the part of the Defendant Company 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 negli-

gence consist? A. 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. $11,158.25.

On this verdict judgment was entered for the Plaintiff for $11,158.25 and costs. The Defendant Company, the Appellant herein, appealed. The appeal was argued before the Court of Appeal for Manitoba, which dismissed the said appeal without 10 costs. From this judgment of the Court of Appeal the Defendant is now appealing.

PART II.

The Respondent relies on the reasons for judgment of Prendergast, C.J.M., and Mr. Justice Robson dismissing the appeal. With regard to the dissenting judgment of Mr. Justice Fullerton, with whom Mr. Justice Dennistoun concurred, the Respondent submits that he erred:

(a) In holding that private owners of cars do not have periodical inspection of their cars with the view to discovering 20 structural defects that may cause accidents. There was no evidence to that effect and even if there had been, it would not be sufficient to say that the negligence of other owners of cars would excuse the Defendant.

(b) In holding that the accident was due to a defect in the brakes that could not have been reasonably discovered by the Defendant.

It is submitted that Mr. Justice Trueman erred:

(a) In holding that a verdict of negligence based on the breaking of the bolt and insufficient inspection cannot be 30 upheld.

(b) In not deciding that the reasons he gave for holding the trial abortive were sufficient to sustain the verdict.

(c) In holding that there should be a new trial.

(d) In not holding that the Defendant failed to satisfy the statutory onus.

PART III.

Argument

The Plaintiff relies upon The Motor Vehicles Act 1924 C. A. Cap. 131, Sections 15 and 62.

40 "Sec. 15. 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. R.S.M. c. 131, s. 15"

"Sec. 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
10 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. R.S.M. c. 131, s. 63; 1923, c. 32, s. 8."

The Plaintiff submits that the Defendant has not satisfied the statutory onus. The bus driver said that the bolt in the brake evener broke as he applied the brake letting the brake pedal go right through the floor board with no pressure on the brake. Examination for discovery of Henry Leonard Erhardt, questions and answers 55 and 128 (Case P. 37 L. 18-25 and P. 39 L. 20-23).
20 Evidence of Henry Leonard Erhardt (Case P. 130 L. 38 and 39 and P. 132 L. 21 and P. 136 L. 34 to P. 137 L. 6). He saw the bolt lying on the pavement but did not pick it up and did not know what became of it. Examination for discovery of Henry Leonard Erhardt, questions and answers 71 to 74 (Case P. 37 L. 44 to P. 38 L. 2). The bus was an old one taken over by the Defendant from a private party in 1925. Examination for discovery of Henry Leonard Erhardt, questions and answers 114, 115 and 116 (Case P. 38 L. 43 to P. 39 L. 3).

The Defendant endeavored to discharge the onus by showing
30 the sufficiency of its inspection. The superintendent of bus and brake equipment explained the braking system and the effect of the pin coming out. Evidence of George A. Holmes (Case P. 138 L. 10 to P. 142 L. 9). He also said that the system was to give this bus a greasing inspection every 750 miles and a thorough inspection every 5,000 miles. Evidence of George A. Holmes (Case P. 142 L. 30-33). The evidence showed, however, that it had run about 1,000 miles without any inspection. Evidence of George A. Holmes (Case P. 143 L. 30-35). There was no evidence that it had ever been thoroughly inspected after the
40 Company bought it.

Holmes' evidence also was that this was the only bus of the Company with brakes constructed with only one evener. Evidence of George A. Holmes (Case P. 145 L. 32-42). The diagrams show that the standard equipment called for two eveners. (Exhibits 10 and 11). Having both brakes on one evener would

call for greater care and more thorough and more frequent inspection.

The mechanic who made the inspection, told what he did, but the evidence was not sufficiently clear and positive to convince the jury that a sufficient inspection had been made. On cross-examination he admitted that on the inspection this bus had, they only did what appeared to be necessary, but that it was only on the other inspection that they went over the different parts in detail. Evidence of Albert Colyer (Case P. 147 L. 38 to P. 148 L. 6).

10 The mechanic who towed the bus to the garage said that he found the brake pin missing out of one of the brake arms of the foot brake. Evidence of Howard Johnson (Case P. 150 L. 10-23). He showed the position of the missing pin to be different from the one spoken of by the other witnesses. Evidence of Howard Johnson (Case P. 150 L. 39 to P. 152 L. 18). Evidence of George A. Holmes (Case P. 139 L. 43 to P. 140 L. 16 and P. 141 L. 17-20). There is no evidence as to the condition of the cotter pin and the jury were warranted in finding that such flimsy fastening would need more care. Evidence of Howard Johnson (Case P. 150 L. 20 25-37). The whole evidence on the part of the Appellant was insufficient to discharge the onus.

The statute should be construed according to the ordinary grammatical meaning of the words used. G.T.P. Ry. vs. Dearborn (1919) 58 S.C.R. 315 per Davies C.J. at 320, 321; Walch vs. Trebilcock (1894) 23 S.C.R. 695 per Strong C.J. at 705.

The word "shall" is imperative. The Manitoba Interpretation Act Cap. 105 Sec. 27(a). It is therefore submitted that Sec. 15 of the Motor Vehicles Act is obligatory and that no Court will cut down the extent of the duty imposed. There is no discretion 30 left in the Court as to the sufficiency of the brakes by reason of the use of the words "at all times." The Legislature restricted the Court's discretion. The effect of Section 15 is to create a statutory duty by the owner or driver in favor of every member of the public. It extends to common law liability and makes the owner or driver an insurer of the brakes.

The failure of the brakes to control the automobile is evidence of negligence. Phillips vs. Britannia Hygienic Laundry Co. (1923) 1 K.B. 539 at 548-9. The statute on which that case was decided may be distinguished from the Manitoba statute in that the 40 English rule left the discretion of the Court unhampered. It is submitted that Mr. Justice Fullerton erred in applying the result in that case and other cases cited by him to the Manitoba statute.

Inspection alone is no answer to the statute. There is no exception which can be found in the statute nor will the Court read an exception into the Statute and thereby defeat it. The statute was enacted in the interests of the public and against the

interests of the owner and driver of a motor vehicle and makes the failure of the brakes not prima face evidence of negligence but a conclusive presumption. The onus was on the Defendant in three ways:

(a) By maxim *res ipsa loquitur,*

(b) By the fact that the machine causing the injury was under its management and control,

(c) By the statute.

The statute was enacted with the other principles in mind 10 and casts an onus on the owner of the vehicle greater than by (a) and (b).

The jury found that the negligence consisted in not keeping the brakes and braking equipment in proper repair and insufficient inspection of said brakes. It is submitted that the jury referred to the efficiency of the braking system as well as to the sufficiency and frequency of the inspection. This is shown by the use of the conjunction "and." Had the jury used the conjunction "or" the last portion of the answer might have been construed as it appears to have been read by Mr. Justice Fullerton. 20 It is submitted that Mr. Justice Fullerton erred in this respect and that the answer of the jury read in this manner correlates with the Plaintiff's interpretation of Section 15 without straining either the finding or the statute. The words "inefficient" and "insufficient" become interchangeable, in view of the evidence submitted by the Defendant as to the inspection actually carried out.

From the explanation made by Appellant's superintendent of brakes, George A. Holmes (Case P. 142 L. 10-24) and by the mechanic who made the inspection of the bus, Albert Colyer (Case 30 P. 148 L. 12-21) it seems clear that this bolt or pin, being regarded as a part not subject to movement or wear, was not given any inspection. It was further explained by the driver of the bus, Henry Leonard Erhardt (Case P. 136 L. 34 to P. 137 L. 6) that owing to the design of the equalizing bar, the breaking of the pin would destroy the efficiency of all brakes.

It may fairly be found on the evidence that the jury's finding would also extend to the faulty design of the braking equipment. Mr. Justice Trueman held that on this point a new trial was necessary (Case P. 192 L. 29 to P. 193 L. 10). With respect 40 it is submitted that a new trial would be a grave burden to put upon the Plaintiff and that in fact no new trial should be had. The Defendant has had its opportunity of submitting evidence. That evidence was not considered satisfactory by the jury. In fact, the witnesses differed as to the design of the brakes. There was no duty on the Plaintiff to make this evidence for the Defendant unless the defence had been raised that the manufacturer was

responsible for defective design or material. The Defendant could not claim this in view of the statute which makes the owner and driver responsible.

The findings of the jury should not be interfered with. Trial by jury was specially ordered in this case (Manitoba K. B. Act Sec. 49) and they are the proper tribunal to decide. If the evidence of the Appellant was such that there was no question about it, the Trial Judge should have been asked so to direct the jury, but instead of that he was asked by the Appellant to submit the 10 question of negligence to the jury and the jury was unable to come to a determinate conclusion that the loss or damage did not arise through the negligence or improper conduct of the owner of the motor vehicle. Robins vs. National Trust (1927) 1 W.W.R. 692, 881; (1927) D.L.R. 97 quoted by Ford J. in Schonberner vs. Barron (1927) 2 W.W.R. 417 at 422; The Phoenix Insurance Co. vs. McGhee 18 S.C.R. 61 per Strong J. at 73.

The evidence was such that it cannot be said that the jury were bound to find on it for the Defendant. The jury were justified in holding that (paraphrasing the words of Anglin C.J. in 20 Scottish Metropolitan Assurance Co vs. Canada Steamship Lines Ltd. (1930) S.C.R. 262 at P. 277) either their inspection of the braking system was of such a casual and perfunctory character that they failed to discover the defect, or having noticed it they failed to discharge the plain duty of either replacing the defective bolt or making it fit for use, if that were possible.

The Court should not disturb the verdict unless it is such that reasonable men could not have found as the jury did. Cottingham vs. Longman (1913) 48 S.C.R. 542 per Fitzpatrick C. J. at 543.

30 No evidence whatever was given of latent defect. It was the duty of the Appellant to prove this plea but they did not produce the pin although they could have done so and the onus is therefore not discharged. Examination for discovery of Henry Leonard Erhardt questions and answers 71 to 73 (Case P. 37 L. 44 to P. 38 L. 2).

It was not inevitable accident. It would be inevitable accident only if it had been due to some external condition such as weather, over which the Defendant had no control. Weather was a factor in Phelan vs. G.T.P. Ry. Co. 51 S.C.R. 113, Pacific 40 Stages Ltd. vs. Jones (1928) S.C.R. 92, but the cause of the accident in this case was something which the Appellant could have foreseen and prevented. The Merchant Prince (1892) P.D. 179.

There is no question of contributory negligence on the part of the Plaintiff. Neither can it be said that he was not acting within his legal rights at the time of the accident.

The Defendant by its pleadings and the conduct of the trial claimed that the Plaintiff's condition was not the result of the accident. That question was fairly tried and decided by the jury and the verdict should not be interfered with on that issue. The evidence for the Plaintiff showed that up to the time of the accident he was in good health and working every day and that immediately after the accident he took to his bed and has been continuously ill ever since. Evidence of Fred Colsbeck (Case P. 18 L. 15-39). Archibald Gillis (Case P. 19 L. 30-35 and P. 20 L.
10 28-30). Elizabeth Sulkers (Case P 28 L. 29-34). Sipko Voorsmit (Case P. 31 L. 13 to P. 33 L. 32). George Garbut (Case P. 41 L. 19 to P. 42 L. 28). Jacob Geel (Case P. 46 L. 29 to P. 47 L. 45). Margaret Geel (Case P. 48 L. 26 to P. 49 L. 6). Henry Yonker (Case P. 54 L. 36 to P. 58 L. 42). In addition there was the evidence of the other medical experts.

The Respondent submits therefore that the verdict should not be interfered with in this respect as this issue has been so fairly and fully tried and there is no fault to find with the charge of the Trial Judge in this respect.

20 The damages are not excessive. The evidence showed that he was a man of 45 or 46 years old, married and has four children. Evidence of Jacob Geel (Case P. 46 L. 27 and 28). At the time of the accident he was in good health, working continuously at his trade as a painter earning a regular wage of 85c and 90c an hour. Evidence of Sipko Voorsmit (Case P. 31 L. 23 to 39). It was the unanimous opinion of the medical witnesses on both sides that his condition is incurable and that he cannot live more than five or ten years after suffering all that time from Paralysis Agitans. The evidence of Henry Yonker (Case P. 58 L. 30-42),
30 Robert R. Swan (Case P. 65 L. 35 to P. 66 L. 11), Frederick Armstrong Young (Case P. 74 L. 28-41), Alvin T. Mathers (Case P. 96 L. 38-43, P. 106 L. 38-45), James Douglas Adamson (Case P. 127 L. 10-16, 40-41). The Court will not interfere with the amount of the damages unless the damages are so large that no reasonable men ought to have given them as damages. Pread vs. Graham (1889) 24, Q.B.D. 53 at 55; 59 L.J.Q.B. 230 quoting from L.J. reports before Lord Esher M. R. also quoted in Bloudoff vs. C.N.R. (1928) 2 W.W.R. 519 per McKay J. A. at 524.

The Respondent submits that the Appelant's appeal should
40 be dismissed with costs.

Winnipeg, September 8th, 1930.

Of Counsel for the Respondent.