Privy Council Appeal No. 13 *of* 1932.

The Winnipeg Electric Company - - - - - - - - *Appellants*

v.

Jacob Geel - - - - - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1932.

Present at the Hearing:

LORD TOMLIN.
LORD THANKERTON.
LORD MACMILLAN.
LORD WRIGHT.
SIR GEORGE LOWNDES.

[*Delivered by* LORD WRIGHT.]

In this case the respondent who was plaintiff in the action was awarded by a jury the sum of $11,158·25 as damages for personal injuries sustained by him by reason of the negligence of the appellants, who were owners of the motor omnibus which caused the injuries. The judgment for these damages was upheld by a majority of the Court of Appeal for Manitoba and that judgment was affirmed by the Supreme Court of Canada. The appellants by this appeal are raising questions on the construction of certain sections of the Act in force at all material times, the Manitoba Motor Vehicle Act. The material section is section 62 which is in the following terms:—

> "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."

Reference was also made to section 15 which reads as follows :—

"Every motor vehicle shall be equipped with adequate brakes, sufficient to control such motor vehicle at all times, and with a wind-shield 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."

That section, however, is a penal clause involving penalties for its breach under section 52 of the Act, and is not material in a case of civil liability such as the present : it may accordingly be disregarded for the present purpose.

The facts of the case are very simple : On the 22nd April 1928, at about 9 p.m. in Winnipeg, the respondent was sitting in the rear seat of an open touring car which was held up for the moment at a street-crossing by the traffic signals. While thus stationary the car was heavily run into from behind by the appellants' motor omnibus. The respondent sustained serious cerebral injuries as the result of the violent jerk, which developed into paralysis agitans involving it may be total and permanent disablement.

It appeared that the brakes of the omnibus had failed to act, so that notwithstanding the efforts of the driver, the omnibus crashed into the back of the car in which the respondent was seated. The failure of the brakes was, according to some of the appellants' evidence, due to the loss or breaking of a small pin in one end of the brake evener or equaliser, thereby interrupting the operation of the braking system, both in regard to the pedal or service brake and to the hand or emergency brake, since both depended on the same evener. But the evidence led on this point by the appellants may be thought to have failed in accuracy and completeness. The pin itself was not preserved or produced and the evidence of the mechanic who repaired the omnibus later is difficult to reconcile with that of the appellants' superintendent of the bus and brake equipment. The omnibus itself was the only one of that type owned by the appellants, who operated in all 49 omnibuses, and had been bought second-hand some few years before. The appellants had no other omnibuses equipped with similar braking apparatus. Evidence as to inspection of the omnibus was given by the appellants ; the practice was stated to be to give the machinery what was called a light inspection after every 750 miles of running, and a complete overhaul after every 5,000 miles, but the omnibus in question had nevertheless run 1,000 miles since the last light inspection, about 2 months before : the pin was said to be one about which, as it did not wear and had no lost motion, the inspectors would not bother, except just to see that it was all right and had got a cotter pin in it. The evidence was that up to the moment of the accident the brakes had worked efficiently, but the appellants' witnesses who spoke of the inspec-

tions may well have produced in the jury's mind the impression that they had no specific recollection and were rather speaking of routine and from records.

The jury at the trial after a direction from the Trial Judge, which was not objected to before this Board, gave their verdict as follows :—

(1) Was there any negligence on the part of the defendants which caused the injury to the plaintiff ?—*Answer*. 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 ?—*Answer*. Ten thousand dollars ($10,000·00), plus expenses as agreed to by Counsel.

The jury added the following rider :—We find that the driver did everything possible under the circumstances to avoid this accident, and we wish to exonerate him from any blame. This rider was not, however, included in the verdict.

On this verdict judgment was entered on the 5th December, 1929, for the respondent for $11,158·25 and costs.

By his statement of claim the respondent had given very detailed particulars of negligence, but it was not contended before this Board that by doing so he had in any way waived his right to rely as against the appellants on the statutory presumption of negligence contained in section 62 of the Act quoted above, though having regard to that presumption specific particulars of negligence need not have been pleaded. The appellants, in addition to formal denials, pleaded by way of defence to the whole cause of action, "that the accident in question was inevitable." This plea depended on the allegation that the accident was due to a latent defect in the braking mechanism, that is, to something which could not have been avoided by the exercise of ordinary care and caution and skill, to paraphrase the definition given in *The Marpesia* [1872] L.R. 4 P.C. 212, and repeated in *The Merchant Prince* [1892] P. 179 by Fry L.J. at p. 190. In support of this plea, the appellants relied on evidence that all proper inspections had been made. It is clear from the findings of the jury that the jury did not accept this plea.

But Mr. Pritt has strenuously argued on various grounds that that plea should have succeeded. His contentions may be thus summarised : while admitting that section 62 of the Act places the burden on the appellants to disprove negligence, yet, he contended, if there is no evidence of negligence apart from the statutory presumption, and the defendants adduce evidence by witnesses whose credibility is not attacked, that they

were not negligent, then the onus is discharged by the defendants and, if the matter rests there, the judge ought to withdraw the case from the jury and non-suit the plaintiff on the ground that the evidence as to negligence is all one way ; in other words what Mr. Pritt has contended is that the defendants' evidence, being the only evidence on the issue of negligence, has displaced the statutory presumption, and constitutes a preponderance of evidence on that issue which justifies, or indeed requires, a judgment to be entered for the defendants.

Their Lordships cannot accept this view of the operation of the section. Apart from the section, a plaintiff claiming damages for personal injury in a running-down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage ; hence, unless he succeeded in establishing all these matters, he must fail. In virtue, however, of the statute he need only establish the first and the third elements, *i.e.*, that he was injured by the defendant and the extent of his damages : as to the second, the onus is removed from his shoulders and if he establishes the two matters in respect of which the onus still remains on him, he may close his case because it is then for the defendant to establish to the reasonable satisfaction of the jury, that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants. This the defendant may do in various ways, as for instance, by satisfactory proof of a latent defect, or by proof that the plaintiff was the author of his own injury ; for example, by placing himself in the way of the defendant's vehicle in such a manner that the defendant could not reasonably avoid the impact, or by proof that the circumstances were such that neither party was to blame because neither party could avoid the other. But the onus which the section places on the defendant is not in law a shifting or transitory onus : it cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence however credible is not sufficient reasonably to satisfy the jury that he was not negligent : the burden remains on the defendant until the very end of the case, when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If, on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment : if however the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. *A fortiori* the defendant will be held liable, if the evidence actually establishes his negligence. No doubt the question of onus need not be considered, if at the end of the case the tribunal can come to a clear conclusion one way or the other, but it must remain to the end the determining factor unless the issue of

negligence is cleared up beyond doubt to the satisfaction of the jury.

Furthermore in their Lordships' judgment, there is no justification for Mr. Pritt's contention that the judge should have withdrawn the case from the jury because the plaintiff tendered no evidence of negligence, but left the appellants' evidence that there was no negligence to stand as the only evidence on that issue. The judge could not non-suit the respondent as plaintiff on the issue of negligence, because the plaintiff was entitled to rely on the statutory presumption that the defendants were negligent, and to leave them to discharge that onus if they could. No doubt the plaintiff could have been non-suited if he had brought no evidence that he was injured, but he could not be non-suited on the ground that he had called no evidence of negligence, because on that issue the onus was not on him. Nor could the judge non-suit the plaintiff, even if he believed the defendants' witnesses and accepted the view that these witnesses established absence of negligence on the defendants' part. So to do, would be for the judge to usurp the functions of the jury, who are judges of fact both as to the credibility of witnesses and as to the sufficiency of evidence to establish a case or discharge an onus. A judge, confronted by a jury, can indeed say in proper cases what evidence is in law not sufficient to be considered by a jury, but he cannot decide that the evidence is such that it is sufficient to satisfy the jury, nor can he non-suit a plaintiff because he thinks the defendant has discharged the onus which rests upon him. In the words of Willes J. in *Ryder* v. *Wombwell* [1868] L.R. 4 Ex. 32 at p. 38, quoted with approval by Lord Atkinson in *Banbury* v. *Bank of Montreal* [1918] A.C. 626 at p. 670. the question,

> " in so far as it is a question of fact must be determined by the jury, subject no doubt to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury ; but there is in every case . . . a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a non-suit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant."

If these words are applied to the case now under discussion, it is clear that the judge could not non-suit the plaintiff for the reason that the onus of negligence did not rest on the plaintiff nor could he enter judgment for the defendants simply because the defendants had called some evidence in order to satisfy the onus which rested on them, *i.e.*, to disprove that they had been negligent. It was for the jury to give their verdict on that evidence. Hence there was in this case no question of withdrawing the case from the jury. The matter having been duly put to the jury, their Lordships do not think it can be said that the verdict of the

jury was perverse, or without evidence or contrary to the weight of the evidence, because the plaintiff had at his command the statutory presumption and it was entirely for the jury to say whether they were satisfied on the evidence, which in this case may well have left room for doubt, that the defendants had discharged that onus.

Mr. Pritt relied in support of his contentions on the language of Harvey, C.J., in *Carnat* v. *Matthews*, 16 Alberta Law Reports 275 at p. 277, in a case under similar words in the corresponding statute of Alberta. The learned Chief Justice says :

> " In a case such as this where the rule of the statute applies, the plaintiff in the first instance need do no more than show that he sustained damage from a motor vehicle. Then in the absence of evidence by the defence he is entitled to succeed because the statute makes a case of presumptive negligence, but when the defendant gives his evidence, if it is sufficient by itself to make a *prima-facie* case of absence of negligence, and the plaintiff his evidence in rebuttal (*sic*), the case is much the same as any damage action. The side which has the preponderance of evidence on the question of negligence should win.
>
> " It should thus appear that when once the defendant has made out a *prima-facie* case of absence of negligence, by evidence, which, of course, the Court or jury accepts as reliable, the rule *res ipsa loquitur*, or, in this case the rule of the statute, has no further application."

Their Lordships cannot for reasons already given accept this as a correct statement of the law. In their Lordships' opinion the rule applicable in such cases is correctly stated by Turgeon, J.A., in a case under similar legislation in Saskatchewan, *viz.*, *Stanley* v. *National Fruit Coy.*, 24 Saskat. L.R. 137 at p. 141 :

> " Section 13 of the Act places the onus of proof upon the defendants. This means that the defendants must lose if no evidence of the circumstances of the accident is given at all, or if the evidence leaves the Court in a state of real doubt as to negligence or no negligence, or is so evenly balanced that the Court can come to no sure conclusion as to which of the parties to the accident is to blame. But if evidence for and against is given upon the points in question, the rule in favour of the preponderance of evidence should be applied as in ordinary civil cases, and the statutory onus will cease to be a factor in the case if the Court can come to a definite conclusion one way or the other, after hearing and weighing the whole of the testimony. Nor does this statutory onus increase the degree of diligence required in the owner or driver of a motor vehicle. His duty to others remains the same, notwithstanding the shifting of the burden of proof. He must exercise at all times the same measure of caution as might be expected, in like circumstances, of a reasonably prudent man. He must take proper precautions to guard against risks that might reasonably be anticipated to arise from time to time as he proceeds on his way. This degree of care, and nothing more, is required of him except in cases specially provided for, with which we are not concerned here.

Their Lordships also agree with the statement of the principle made by Duff, J., in the following words in his judgment in the Supreme Court in the present case :

> " The statute creates, as against the owners and drivers of motor vehicles, in the condition 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."

The position of the defendants under the statute is thus analogous to the position of the defendant in a case to which the principle often called *res ipsa loquitur* applies. The law applicable to such a case is thus, for example, stated by Fry, L.J., in *The Merchant Prince* [1892], 179, at p. 189 :—

"It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* 11 P.D. 114, it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this, they are liable in damages. The burden rests on the defendants to show inevitable accident."

The learned Lord Justice proceeds to show how serious that burden may be. It is not necessary in the present case to decide whether or not the matter is one to which the principle *res ipsa loquitur* applies, but the rule as to burden of proof is the same under the statute. Nor is it necessary further to emphasize that in some running down cases under the statute the defendant may discharge the burden, as already explained, by other evidence than that of inevitable accident.

The two judges in the Court of Appeal who dissented appear to have proceeded on the ground that the verdict of the jury was perverse. Their Lordships do not take this view, but in any case, on the view taken by these learned judges, the proper order would not have been to dismiss the claim but to order that there should be a new trial, for reasons already set forth.

Their Lordships are of opinion in the result, that the appeal should be dismissed. The appellants will pay the costs, which, in accordance with the undertaking given by the appellants when special leave to appeal was granted, will be upon the scale of solicitor and client.

Their Lordships will humbly so advise His Majesty.

In the Privy Council.

THE WINNIPEG ELECTRIC COMPANY

v.

JACOB GEEL.

DELIVERED BY LORD WRIGHT.

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