1941

MEDERIC LANDREVILLE AND ARTHUR GARDNER (DEFENDANTS) ..... APPELLANTS; * May 26, 27, 28. * June 26.

AND

ELMYES BROWN (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Plaintiff struck by motor car—Action for damages—Directions to jury—Jury's findings—Question as to negligence of plaintiff—Onus of proof on defendants as to negligence—Form of question to jury—Amount of damages awarded—New trial.

The action was for damages for injury to plaintiff caused by his being struck by a motor car while he was making a purchase at a bakery sleigh on a business street in the city of Ottawa. The jury, to the question: "Have the defendants satisfied you that the damages sustained by the plaintiff were not caused or contributed to by the negligence of [the driver of the car]?" answered "No"; and to the question: "Was the plaintiff guilty of any negligence which caused or contributed to the accident?" answered "No"; and assessed plaintiff's damages at $25,000, for which amount judgment was given. An appeal to the Court of Appeal for Ontario was dismissed, and defendants appealed to this Court.

This Court ordered a new trial.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis, Hudson and Taschereau JJ.

1941

LANDREVILLE ET AL. v. BROWN.

The Chief Justice (dissenting in part) would dismiss the appeal except as to damages, as regards which he would direct a new trial.

Per Rinfret and Crocket JJ.: Defendants' defence was not fairly put to the jury by the trial judge, particularly, in view of the circumstances and plaintiff's actions, with regard to the question as to plaintiff's negligence and with regard to the doctrine of contributory negligence. On these matters and also as to the degree of onus of proof on defendants under *The Highway Traffic Act* (R.S.O., 1937, c. 288, s. 48), there were statements or inadequate explanations amounting to misdirection in the trial judge's charge. The form of the first above quoted question to the jury, as the questions were put in this case, was calculated to mislead a jury. The fact that the Legislature has placed the onus of negativing negligence upon the defendant does not require the use of such a form of question. The amount of damages awarded was unreasonable, and unjustifiable in any conceivable view of the evidence.

Per Davis and Hudson JJ.: Some features of the trial were so highly unsatisfactory that there should be a new trial.

Per Taschereau J.: The verdict of the jury on the questions of contributory negligence and assessment of damages was not supported by the evidence, and no jury properly instructed and acting judicially could reasonably have reached it.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario dismissing their appeal from the judgment of McFarland J., upon the findings of the jury, at trial. The action was for damages for injury suffered by the plaintiff caused by his being struck by a motor car driven by the defendant Gardner, who was an employee of the defendant Landreville, and was, in the course of his employment, driving a taxi-cab owned by the defendant Landreville.

The plaintiff had called to the driver of a bakery sleigh which was proceeding westerly on the north part of Rideau street in the city of Ottawa, and the plaintiff crossed the street to purchase some pies and was in the act of purchasing them at the sleigh when the accident happened, being at about 4.50 p.m. on February 16, 1939. The taxi-cab was being driven westerly. The driver of it testified that he had got off the street car tracks to let a street car behind him pass, that he was driving at about 10 to 12 miles an hour, that the surface of the street was icy, that the sun was shining very brightly right in his eyes, and he did not see the bread sleigh until he was near to it, that he put on his brakes and the car skidded.

The plaintiff was badly injured, suffering a severe crushing of the right leg.

1941

LANDREVILLE ET AL. v. BROWN.

At the trial, the jury, to the question: "Have the defendants satisfied you that the damages sustained by the plaintiff were not caused or contributed to by the negligence of the defendant Gardner?" answered "No"; and to the question: "Was the plaintiff guilty of any negligence which caused or contributed to the accident?" answered "No." The jury assessed the damages sustained by the plaintiff at $25,000, for which amount judgment was given for the plaintiff.

The defendants appealed to the Court of Appeal for Ontario and their appeal was dismissed. The defendants appealed to this Court.

Auguste Lemieux K.C. for the appellants.

Walter F. Schroeder K.C. and *Lionel Choquette* for the respondent.

THE CHIEF JUSTICE (dissenting in part)—With great respect for my colleagues, who take a different view, I should dismiss this appeal except as to damages, as regards which I should direct a new trial.

The judgment of Rinfret and Crocket JJ. was delivered by

CROCKET J.—I think the record discloses that the appellants' defence was not fairly put to the jury. The gist of that defence was that the plaintiff's injury was solely caused by his own negligence, and that he was the author of his own regrettable misfortune. That was the vital issue as raised by the pleadings. It clearly necessitated for its intelligent consideration by a jury, not only a statement of the recognized definition of negligence generally, but a clear, precise and understandable exposition of the much more difficult doctrine of contributory negligence in its application to the facts and circumstances of the case. Yet the presiding judge, after telling the jury that they must accept his directions upon questions of law, and that the crucial question in the case was whether Gardner's act in driving blind on a street heavy with traffic for at least 100 feet was the act of a prudent man, distinctly told them that that was not the act of a prudent man. And this without directing their attention to any of the undisputed facts and circumstances, upon which

1941

LANDREVILLE ET AL. v. BROWN.

Duff C.J.

the defence relied as an excuse for his doing so. He had already plainly told the jury that all three of the persons involved in the collision (Gardner, the driver of the horse drawn bakery delivery sleigh and the plaintiff) had a right to be where they were (presumably immediately before the collision). And this, notwithstanding the fact, as he later pointed out, that he personally would accept the evidence of the driver of the delivery sleigh, and of the plaintiff himself, as against the testimony of a passing witness, whose evidence was to the contrary, and that the situation was this, as he saw it:

> the sleigh is there, there is a car parked between it and the curb, so we may take it that the left side of the sleigh (that is the south side) was probably 12 to 14 feet south of the north curb of the street.

This close to five o'clock in the afternoon on one of the principal and most congested streets in Ottawa with a double line of electric car tracks and trams constantly running along each line. In my opinion, these statements constituted positive misdirection.

Moreover, two questions, upon which the appellant's liability depended, were left to the jury. They were:—

> 1. Have the defendants satisfied you that the damages sustained by the plaintiff were not caused or contributed to by the negligence of the defendant Gardner?
>
> 2. Was the plaintiff guilty of any negligence which caused or contributed to the accident?
>
> If your answer to that question is "Yes," then state fully the particulars of such negligence.

All His Lordship said in leaving these two decisive questions to the jury was:—

> You, gentlemen, know that in actions of this kind, for damages, and so on, the onus is upon the plaintiff, the man who brings the action; he is under the necessity of satisfying the jury, beyond a reasonable doubt, that the defendant was negligent. But some years ago, on account of the tremendous increase in accidents involving pedestrians and motor-cars, and the tremendous slaughter on the highways, the legislature in its wisdom saw fit to change that, and consequently they enacted a new section, which is in the Highway Traffic Act, which governs these affairs. The effect of that section is that there are issues involved which arise out of the contact of a motor-car with a pedestrian on a highway, the onus is shifted, and the necessity is upon the driver of the car to prove that he was not guilty of negligence; that the vehicle was not operated in a manner which constituted negligence on his part.

Having instructed the jury that had it not been for the action of the legislature, "on account of the tremendous

increase in accidents involving pedestrians and motor-cars, and the tremendous slaughter on the highways," in shifting the onus which formerly lay upon the plaintiff in an action against the owner or driver of a motor-car of satisfying the jury "beyond a reasonable doubt," the jury could not very well be expected to draw any other inference from this language than that the owner or driver of a car, upon whom the onus is now placed, must satisfy the jury that he was not guilty of negligence by the same degree of proof, viz., proof "beyond reasonable doubt." No such result, of course, follows the shifting of the onus from the plaintiff to the defendant in any civil action for damages.

This to my mind was further misdirection.

Having regard to the undisputed fact that it was the plaintiff himself who, from the sidewalk on the opposite side of the street, signalled the bakery delivery to stop in order that he might buy some pies on the street, and that he detained the covered sleigh in the position described by him beside a parked automobile while he inspected the pies the driver was showing him after opening the rear doors of the delivery sleigh, and to the continuous movement of automobiles and electric cars along that side of the street, I cannot think that the presiding judge was warranted in practically withdrawing from the jury, as he did, the question of negligence on the part of the plaintiff himself. The icy condition of the street pavement, and the fact that all automobiles moving westward would have to swerve from the northerly railway track when signalled by approaching electric cars and make room for them to pass, must surely have been as patent to him as to anybody else. By his own evidence he not only made the first move in the creation of the obstruction of the highway, but he caused its continuance for his own private convenience regardless of the inconvenience and danger it might cause to others.

The suggestion that the plaintiff could not in law be held either to have caused or to have materially contributed to cause the accident by so unnecessarily stopping a horse drawn baker's delivery at such a time and place and in such circumstances and detaining it while he leisurely proceeded to make his desired purchase in the middle of

1941

LANDREVILLE ET AL. v. BROWN.

Crocket J.

the street without regard either to his own safety or the danger he was thereby creating for others, cannot to my mind be entertained.

Then there is the further objection as to excessive damages. As to this the learned trial judge gave much fuller instructions, going into detail as to the plaintiff's occupation as a paper-hanger, painter and decorator, and his average earnings for a period before the accident (stated by him as being $100 a month); the loss of the rental value of an apartment; the expenses of medical, surgical and hospital treatment he had undergone, and the estimated cost of future treatment in the event of amputation of his leg becoming necessary, which one of the doctors placed at $1,000, including the cost of an artificial leg, and $1,500 in case it should not have to be amputated. Dealing with the question of the prospective loss of earnings as a painter, His Lordship directed the jury that they must consider the possibility of his securing some other employment. In this connection he pointed out that he was a man of only 33, who had impressed him as of fairly good education, keen and industrious, and suggested the probability of a man of his age and capability getting employment at some task in some other business, which might afford him a greater remuneration than his former business did. The jury, however, made a lump assessment of damages—no less than $25,000. This amount, I have no hesitation in saying I regard as altogether unreasonable and one which it is impossible to justify in any conceivable view of the evidence.

Counsel for the respondent submitted a statement in his factum to meet the objection regarding the abnormal amount of the assessment. This statement tries to show that approximately $10,000 of this amount was for special damages as estimated, including loss of earnings for two years more ($3,456, at $144 a month) and the $1,500 estimated for possible future hospital, medical and surgical expenses. Apparently counsel had then concluded that the leg would not have to be amputated, so the $1,500 is set down instead of the $1,000, had amputation been found necessary. Anyway it is submitted that the jury really awarded *only* $15,000 for general damages. The statement only shows, I think, the extreme difficulty the respondent's

counsel have had in their endeavours to find any justification for such an unprecedented award of damages for a comminuted fracture of a leg, or, as the plaintiff's attending surgeon described it, "an explosive fracture" of the leg—"The kind of fracture," the plaintiff's counsel immediately interjected, "that you would expect from a shell, that sort of blows the bone to pieces?" to which the attending surgeon at once replied "Yes, explodes it." It is, perhaps, not to be wondered at in view, not only of the harrowing nature of the injury, but of the apparently excruciating nature of the treatment the plaintiff was compelled to undergo, as depicted in this and other equally leading questions,—none of which seem to have been objected to,—that the jury should have felt it to be their duty, not only to indemnify the plaintiff, but to punish the defendant and his employer by saddling upon them such an amount of damages as it would be difficult to justify, even upon the basis of exemplary or punitive damages.

I do not say that there was no evidence, upon which a jury might perhaps find that there was some negligence on the part of the driver of the automobile, which contributed in the legal sense to the accident. For this reason the action could not now well be dismissed. I cannot understand, however, how the jury, had they been properly instructed upon the question of contributory negligence and had the question concerning the defendants' negligence been put to them in the same form as that which concerned the plaintiff's negligence, could reasonably find, in the face of the plaintiff's own testimony, that the plaintiff himself was not guilty of any negligence, which contributed to the accident. I understand that there have been some cases, in which a similar form of question has been used, but it seems to me that the form of question 1 is calculated to mislead a jury, especially when it is not accompanied by any direction, in the event of their answering "Yes," to state fully the particulars of such negligence, as the jury here were directed to do in question 2, and to place any defendant in such a case at a distinct disadvantage as implying that the court expected the answer to that question to be "No." The fact that the Legislature has placed the onus of negativing negli-

1941

LANDREVILLE ET AL. v. BROWN.

Crocket J.

gence upon the defendant does not require the use of such a form of question. Surely any trial judge could leave the question of the defendants' negligence in the same terms as those in which he leaves the question of the plaintiff's negligence, and instruct the jury as to the burden of proof, which the *Highway Traffic Act* has cast upon the driver or owner of a motor vehicle.

For all these reasons, my conclusion is that this appeal should be allowed, and the judgment of the Court of Appeal affirming the trial judgment set aside with costs here and in the Court of Appeal, and that the whole case should be sent back for a new trial. The costs of the abortive trial should be in the discretion of the judge at the new trial.

The judgment of Davis and Hudson JJ. was delivered by

DAVIS J.—I regard some features of the trial of this action as so highly unsatisfactory that I should direct a new trial.

I should therefore allow the appeal, set aside the judgment at the trial and the order of the Court of Appeal affirming that judgment, and direct a new trial. The appellants are entitled to their costs in the Court of Appeal and in this Court. The costs of the abortive trial should be in the discretion of the judge at the new trial.

TASCHEREAU J.—I believe that this appeal should be allowed and a new trial ordered.

The verdict of the jury on the questions of contributory negligence and assessment of damages is not supported by the evidence, and I am satisfied that no jury properly instructed and acting judicially could reasonably have reached it.

The appellants should be entitled to their costs in the Court of Appeal and in this Court. The costs of the abortive trial should be in the discretion of the judge at the new trial.

Appeal allowed with costs; new trial ordered.

Solicitor for the appellants: *Auguste Lemieux.*

Solicitor for the respondent: *Lionel Choquette.*