LEONARD A. KIRBY (DEFENDANT).....APPELLANT;

AND

PAUL KALYNIAK (PLAINTIFF).....RESPONDENT.

1948

*Jun. 11
*Oct. 5

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Motor vehicle—Negligence—Pedestrian struck by car making right-hand turn—Duty of driver—Statutory onus—The Highway Traffic Act, R.S.M. 1940, c. 93, s. 56 (1), 81 (1)—The Tortfeasors and Contributory Negligence Act, R.S.M. 1940, c. 215, s. 4 (3) 8.

Action for damages sustained by respondent when, at an intersection, he was struck by the projection of a grain box attached behind the cab of appellant's truck while it was making a right-hand turn onto the street respondent was crossing. The trial judge dismissed the action and the Court of Appeal held that respondent was entitled to recover the full amount of the damages assessed by the trial judge.

Held: The appellant's negligence in not complying with the provisions of section 56 (1) of the Highway Traffic Act and in not keeping a proper lookout, makes him liable for two-thirds of the damages; the respondent was also at fault for not keeping a proper lookout before entering the intersection.

Kellock and Locke JJ. would have allowed respondent one-half of his damages.

The Eurymedon 1938 Prob. 41 and Sershall *v.* Toronto Transportation Commission [1939] S.C.R. 287 referred to.

*PRESENT: Kerwin, Taschereau, Kellock, Estey and Locke JJ.

(1) (1848) D. & L. 669.
(2) (1862) 15 Moo. P.C. 181.
(3) (1897) 28 O.R. 528.
(4) (1904) 7 O.L.R. 451.
(5) (1768) 2 Wils. 382.
(6) (1932) 41 O.W.N. 399.

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APPEAL from the decision of the Court of Appeal for Manitoba (1), reversing (McPherson C.J.M. dissenting in part) the judgment of the trial judge, Williams C.J. K.B., and awarding plaintiff the full amount of the damages assessed.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

E. D. Honeyman K.C. for the appellant.

S. Greenberg for the respondent.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.: The respondent suffered personal injuries when struck by appellant's truck. His action for damages was dismissed at trial but allowed by the Court of Appeal in Manitoba (1) (McPherson, C.J.M., dissenting in part); therefore this further appeal.

About seven-thirty in the evening of August 13, 1946, the appellant drove his two and one-half ton truck in a northerly direction on Watt Street and turned eastward into Montrose Avenue in East Kildonan, Manitoba. Watt Street is sixty-six feet and Montrose Avenue thirty-three feet in width between the building lines. This truck was about twenty-two feet four inches in length and carried a grain box thirteen feet four inches long and eight feet five inches wide. From the front of this grain box to the front bumper was nine feet. The street was muddy and rough and appellant was proceeding at a low rate of speed. It was still daylight and visibility good. As he drove north he saw a boy at or near the intersection in question in the path of his truck. He sounded his horn and the boy moved westward. Because of the boy, however, he did slow down and continued to round the corner into Montrose Avenue at a speed of about five or six miles per hour.

The appellant had passed the respondent and one Tchir walking together in a northerly direction, as well as another man walking just behind them on the sidewalk along the east side of Watt Street somewhere between the lane (south of Montrose Avenue) and Montrose Avenue. He was

(1) [1947] 2 W.W.R. 993;
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proceeding slowly and thought respondent "just about kept up with me." Nevertheless, as he was about to turn into Montrose Avenue he looked and did not see the respondent nor any other person. He proceeded and as he "was just getting around the corner," or "just getting directly east on Montrose" he heard someone yelling, as a result of which he stopped in less than half the length of his truck and found that he had struck and passed over the respondent's leg. He then recognized him as one of the parties he had just passed on Watt Street.

The learned trial Judge found that when about fifteen feet from the intersection appellant sounded his horn "for the boy," who was on the highway in front of his truck at or near the intersection; he drove his truck around the corner in second gear at not more than five or six miles per hour and entered into the intersection before the respondent began to cross the highway (that portion of Montrose Avenue used by vehicles); that the front part of the truck, nine feet long, had passed over the sidewalk before the plaintiff was hit; that the respondent made one step from the east side of the sidewalk into the highway of Montrose Avenue and when he was taking the second step he was hit by the right front corner of the grain box; and that the appellant stopped his truck in a distance of less than half its length as soon as he heard "some yelling". These findings of fact are supported by the evidence and involve at least in part questions of credibility. Counsel for the appellant stressed that not only these findings but all findings of fact made by the learned trial Judge should not be disturbed by an appellate tribunal. The authorities support his contention where the findings are based upon questions of credibility. *Merchants Bank of Canada* v. *Wilson* (1); *Powell* v. *Streatham Manor Nursing Home* (2). But as stated by Lord Halsbury in *Montgomerie & Co.* v. *Wallace-James* (3):

> . . . where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.

(Adopted by the Privy Council in *Dominion Trust Company* v. *New York Life Ins. Co.* (4)).

(1) [1925] 4 D.L.R. 200.
(2) [1935] A.C. 243.
(3) [1904] A.C. 73 at 75.
(4) [1919] A.C. 254 at 257.

There are at least two findings of the learned trial Judge in this case that are founded upon such evidence. First, "that the defendant kept a proper lookout," and second, "in the circumstances of this case there was no need to blow the horn as he entered the intersection". The first of these findings is based largely upon the evidence of appellant and his father-in-law Koblinsky, who was a passenger sitting beside him in the truck. There were in fact three men approaching this intersection from the south walking on the sidewalk on the east side of Watt Street—the respondent and Tchir together, and Stanford a few feet behind them—all of whom the appellant had noticed as he passed them. The appellant deposed:

Q. When you looked south did you see the men?
A. There was nobody in sight when I made my turn.

. . . . . .

Q. You say when you were making the turn you looked south?
A. Yes.
Q. And there was nobody there?
A. There was nobody at that corner.
Q. Did you look east?
A. Well, that would be south-east. When you are making that turn it would be south-east you are looking.
Q. You know now there were three men there. Can you give any explanation why you would not see them?
A. Because they were not there to be seen.

And again:

When I turned the corner it was all clear, not a soul in sight, and that is when this fellow walked into the truck.

. . . . . .

There was nobody there when I was making the turn.

The appellant was also asked when he found his truck had passed over respondent's leg:

Q. Had you seen this fellow previously?
A. I seen him on the street. He was about half way from the back lane on Montrose, just in between there when I passed him. I was going slow and I think he just about kept up with me. When I came to the corner there was no one in sight.

This evidence goes no further than to establish that the appellant looked and saw no person but does not in any way establish that he looked with that care that a reasonable man would have exercised under the same circumstances. This is the more apparent when considered with the evidence of Warda, who was at the intersection on the north side of Montrose Avenue, and whose evidence

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the learned trial Judge accepted. He saw the three men walking before he saw the truck and the last time he saw them they had passed a church near the south-east corner, (which church the photograph filed as an exhibit showed to be some feet south of the southerly sidewalk on Montrose Avenue), and at the same time the truck was swinging around the corner. This would indicate that even if it was as the learned trial Judge found, that the appellant's truck entered the intersection first, the respondent entered it immediately thereafter. Under these circumstances, the respondent and his companion Tchir would be well within the area over which a reasonably prudent driver would have made his observations. They would have been seen and their proximity to the highway and conduct would be factors which, for the reasonable man, would have largely determined whether he should proceed, and if so, what, if any, precautions he should take in order that he might proceed with safety.

This view is in accord with and strengthened by the finding of the learned trial Judge that the respondent was struck as he was taking the second step in the highway on Montrose Avenue and when about nine feet of the truck had passed over the pedestrian walk crossing that avenue. The turning of the truck into Montrose Avenue and the respondent stepping onto the highway would take, under the circumstances, not more than two or three seconds, which indicates the proximity of the respondent to the highway when appellant was making his observations. The conclusion appears unavoidable that the appellant was negligent in making his observations and therefore did not before turning from a direct line use reasonable care to ascertain that such movement might be made in safety as required by the provisions of section 56(1) of *The Highway Traffic Act*, (1940 R.S.M., c. 93).

> 56. (1) The driver of a vehicle upon a highway before starting, stopping or turning from a direct line shall use reasonable care to ascertain that such movement can be made in safety and shall reasonably indicate his intention by an audible or visible signal.

Moreover, in turning eastward into Montrose Avenue the appellant made a "turning from a direct line" within the meaning of section 56(1) and did not "reasonably indicate his intention by an audible or visible signal" as

required by section 56(1). It is true he sounded his horn "for the boy" who was on the highway in front of his truck. That sounding of his horn would not indicate even to one observing the truck that the driver intended to make a turn at that intersection. He does not suggest any other conduct on his part that would constitute an audible or visible signal.

The learned trial Judge found "in the circumstances of this case there was no need to blow the horn". That finding is closely associated with and arises largely out of the same evidence as that the appellant "kept a proper lookout". If the defendant had seen, as a person exercising reasonable care in the circumstances would have seen, the respondent and Tchir walking practically at the intersection in a manner that would indicate they had no knowledge of the appellant's presence, and being in the area where if both the appellant and respondent continued a collision might happen, as in fact it did, he should have sounded his horn or taken other appropriate precautions.

The learned trial Judge found that the respondent was walking on the east side of Tchir (who stated that had he not jumped back he would have been struck first), and that the respondent made one step from the east side of the sidewalk into the highway on Montrose Avenue, and that as he was taking the second step he was hit with the right front corner of the grain box, and that the respondent "did not look before he stepped into the roadway and that he walked into the truck." This necessarily involves a finding, which is fully supported by the evidence, that the respondent did not himself keep a proper lookout and that his negligence in this regard also contributed to his own injuries.

This is a case in which both parties were negligent in that neither maintained a proper lookout. That the negligence of each persisted to the moment of impact and constituted a contributing cause thereto. Section 81(1) of the said *Highway Traffic Act* places the onus of proof in a case of this type upon the appellant to prove that "the loss or damage did not arise entirely or solely through" his negligence or improper conduct. In this regard the language of Chief Justice Duff in *McMillan* v. *Murray* (1),

(1) [1935] S.C.R. 572.

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though the language of the statute under consideration was somewhat different, is appropriate where he stated at p. 575:

> We think that, under the statute, standing by itself, the defendant may acquit himself of the onus cast upon him by establishing . . . that the mischief was directly caused by the negligence of the plaintiff as well as that of himself co-operating together.

I am therefore in agreement with the learned Chief Justice in the Appellate Court (1) that both parties were negligent and I agree with his apportionment of the fault, two-thirds against the appellant and one-third against the respondent. The learned trial Judge fixed the respondent's damages: special $707.90 and general $1,600. No question was raised in this Court as to the respective amounts and the respondent will therefore receive special damages $471.95 and general damages $1,066.65.

In my opinion the respondent should have the costs of the trial and the appeal to the Court of Appeal, and the appellant one-third of his costs in this Court.

TASCHEREAU J.:—I have come to the conclusion that this appeal should be allowed in part.

For the reasons given by Chief Justice McPherson (1), I think that both parties were negligent and that the liability should be apportioned one-third against the plaintiff-respondent and two-thirds against the defendant-appellant.

The respondent should have the costs of the trial and the appeal to the Court of Appeal, and the appellant one-third of his costs in this Court.

KELLOCK J. (dissenting in part):—Accepting as I do the findings of fact of the learned trial judge as to negligence on the part of the respondent, the appeal must succeed to that extent. With respect to the appellant, however, I draw a different inference on the facts as found than did the learned trial judge.

The appellant said in evidence:

> Q. You were going north on Watt Street in second gear and what happened? A. Well, I was going no more than six miles an hour and just before I got to Montrose, starting to make my turn, there was a young kid just ahead, right near the truck, and when he seen me he

(1) [1947] 2 W.W.R. 993;
[1948] 1 D.L.R. 464.

didn't know just where to go, whether to cross or to go back, and I had to slow up for him, so I just about stopped and he went across. I tooted my horn about eighteen feet before that corner and I tooted my horn for this young fellow.

Q. What do you mean by tooting your horn? A. Well, it is the average horn. I just had it installed two weeks before the accident. I just had a new horn put in.

Q. And what happened that? A. Well, the young kid started to go across the street and I proceeded on and if anybody was there they should have heard my horn. When I turned the corner it was all clear, not a soul in sight, and that is when this fellow walked into the truck.

Q. Had you seen this fellow previously? A. I seen him on the street. He was about half way from the back lane on Montrose, just in between there when I passed him. I was going slow and I think he just about kept up with me. When I came to the corner there was no one in sight.

Q. And what happened? A. This man must have walked into my truck. I heard some yelling and I stopped right away.

. . . . . .

Q. What do you say about the turn into Montrose? How did you make the turn? A. I made just the average turn. I didn't have much clearance, on account of a car on the corner and there was also a pile of gravel. I couldn't take a long turn, I had to make it fairly close.

Q. And you say you stopped at one time? A. I didn't stop. I came to about a stop.

Q. Did you look to see where these three men were before turning into Montrose? A. I didn't make my turn right then. I had to proceed at least ten feet more.

Q. All right. When you were about to make the turn did you look to see where these three men were? A. Yes. I always do.

Q. Just at the time you were about to make the turn you did look? A. Yes.

Q. Which way did you look? A. I looked south. That would be south.

Q. When you looked south did you see the men? A. There was nobody in sight when I made my turn.

The learned trial judge in the course of his reasons for judgment in speaking of the appellant said:

He said he looked into Montrose before he made the turn and also looked south when about to make the turn; that there was nobody at the corner when he was turning. I believe him. Tchir's evidence—which I have set out—shows conclusively that the Defendant (appellant) had driven the front of the truck across the intersection before the two men arrived at the roadway. This confirms the Defendant's statement that there was no one to be seen at the intersection when the truck entered it. I find that the Defendant kept a proper look-out. I find also that in the circumstances of this case there was no need to blow the horn as he entered the intersection.

The learned judge also found that the respondent made one step into the roadway of Montrose Street and that as he was taking a second he was hit by the right front corner of the grain box of the truck. In speaking

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of taking a step into the "roadway", I understand that the learned judge is speaking of that part of Montrose Street lying immediately to the north of the northerly edge of the sidewalk on the south side of that street.

Accordingly, from the point where the respondent and his companion reached the southerly edge of the south sidewalk on Montrose Street to the point of impact there was a distance of roughly ten or twelve feet only. During the time taken by the respondent to traverse this distance the appellant's truck was also moving at the rate of five or six miles an hour and the front of the truck had reached a point some nine feet beyond the actual point of impact. For the front of the truck to travel from the point, some ten feet from the corner where it had come to "about a stop", to the point it had reached when the accident occurred would have taken approximately three seconds at the speed it was travelling. In my opinion the respondent and his companions must have been clearly visible to the truck driver had he looked as he said he looked. If he did look he must have proceeded on the assumption that while the respondent showed no indication of having heard the horn or realized the intention of the truck to proceed into Montrose Street he would do so before reaching the truck. In my opinion this was negligence and the appellant has failed to meet the obligation resting upon the driver by section 56, subsection 1 of the *Highway Traffic Act,* R.S.M., 1940, cap. 93. In my opinion the parties were equally negligent.

I would therefore allow the appeal and direct the entry of judgment in favour of the respondent for one-half of the damages as ascertained by the learned trial judge, namely, $1,152.95. The respondent should have his costs in the Court of King's Bench and one-half the costs in the Court of Appeal. The respondent should have one-half the costs of the appeal to this court.

LOCKE J. (dissenting in part):—The appellant's account of the accident is that when he was approaching the intersection, driving the truck in second gear at a rate not exceeding five or six miles an hour, he sounded the horn to warn a child who was in the intersection, this being done at a time when the front of the truck was about

fifteen feet to the south of the southerly limit of the intersection, and that thereafter he turned into Montrose Avenue after looking to his right and seeing no one at the corner or crossing. The appellant had seen the respondent and his two companions walking north on the sidewalk on the east side of Watt Street and had passed them when they were a little to the north of the lane in the block between Montrose Avenue and Harbison Avenue to the south. The evidence does not show the distance between this lane and the crossing where the accident occurred but the appellant said that when he passed them he was travelling about five miles an hour and that the respondent just about kept up with him and, in view of the fact that he says he checked his speed by reason of the presence of the child in the intersection, he was undoubtedly aware that the respondent and his companions would be at least quite close to the point of intersection of the concrete sidewalks on Montrose Avenue and Watt Street at the time he turned his truck to the east. In explaining his failure to see the respondent, the appellant said: "When I turned the corner it was all clear, not a soul in sight, and that is when this fellow walked into the truck", and again: "When I came to the corner there was no one in sight" and on cross-examination: "They were not in sight of my vision when I made my turn", and again, when asked if he could explain how it was that he had not seen them, said: "I cannot give you any explanation because there was no one there in my sight when I made my turn". The learned trial Judge found as a fact that the appellant did look to his right as he was turning into Montrose Avenue and while the description of the cab of the truck is unfortunately inadequate and there is no evidence as to the size of the windows, either at the back or on the right side of it, I think the conclusion is irresistible that the appellant's field of vision was so restricted by it that he could not see the respondent and the others who were approaching from his right on the sidewalk as he turned. Watt Street is sixty-six feet in width and a single street car line runs down the center of it. The portion of the roadway reserved for traffic between the most easterly car track and the concrete sidewalk was sixteen feet five inches in width. Montrose Avenue, where it intersects with Watt Street, is thirty-

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three feet in width and the travelled portion of the roadway reserved for vehicles is something less than twenty-seven feet in width, there being small ditches on each side of it. No plan of the intersection is in evidence but a photograph which was filed shows that a telephone pole stands on the south east portion of the intersection, apparently in line with the westerly limit of the sidewalk on the east side of Watt Street and some two or three feet to the north of the north west corner of the intersection of the two sidewalks. The appellant admittedly made the turning in such a manner that the right side of the grain box on the truck passed within a foot and a half of this telephone pole. In explaining this he said that he did not have much clearance since there was a car on the corner and a pile of gravel, though where these were placed is not stated. The photograph which, with the information as to the width of these streets, is the only material available in considering the matter does not indicate any reason why the truck should have been driven so close to the telephone pole and thus so close to the intersection of the sidewalks which the respondent and his companions had either reached or were about to reach as the truck was turned into Montrose Avenue: while the truck was some twenty-two feet four inches in length and the grain box eight feet five inches wide, there was ample room to permit it being driven across the center of the crossing into Montrose Avenue. While the horn had been sounded before the vehicle reached the intersection, this in itself would not indicate to the respondent an intention to turn. The fact that the appellant did not know just how far distant were the pedestrians from the point where he proposed to enter Montrose Avenue cast a duty upon him under these circumstances, in my opinion, to warn them that he was turning to the right and he failed in that duty. The learned trial Judge found that the respondent was struck by the right front end of the grain box as he was taking his second step to the north of the sidewalk intersection: he would then be just slightly to the north of the telephone pole. Had the horn been sounded as the truck turned, the accident would not, in my opinion, have occurred. With great respect for the contrary opinion of the learned trial Judge, I think this appellant was guilty of negligence which materially contributed to the occurrence of the accident.

It was found as a fact at the trial that the appellant had entered into the intersection with his truck before the respondent began to cross the highway used for the passage of vehicles, that the latter did not look before he stepped into the roadway and that he walked into the truck. Since it was also found that the truck was not proceeding at more than five miles an hour as it turned into Montrose Avenue and that the plaintiff was struck by the right front portion of the grain box which was some nine feet back from the bumper of the car, it is apparent that the truck was in the process of turning and that the front wheels were either at or very close to the crossing when the respondent stepped from the north of the sidewalk intersection into the crossing. The findings on this point are, in my opinion, fully supported by the evidence. The respondent says that he did not see the truck before the impact, which can only mean that he did not keep any lookout: had he done so the accident would not have occurred. Coyne, J.A. (1) in dealing with this aspect of the matter has said that assuming that the respondent should have looked and that he did not, such lack of care would not have been the cause of the accident, nor would it in a legal sense have "contributed" to it because the appellant by exercise of reasonable care and skill on his part could have avoided the accident notwithstanding the respondent's negligence. In *The Eurymedon* (2), Greer, L.J. summarized the law arising out of what he called the principle in *Davies* v. *Mann* (3), and said in part that if one of the parties in a common law action actually knows from observation the negligence of the other party, he is solely responsible if he fails to exercise reasonable care towards the negligent plaintiff, and that this rule applies where one party is not in fact aware of the other party's negligence but could by reasonable care have become aware of it and by exercising reasonable care could have avoided causing damage to the other party. In the present case, however, the negligence of the respondent as found by the learned trial Judge was in failing to keep any lookout and

(1) [1947] 2 W.W.R. 993; [1948] 1 D.L.R. 464.
(2) 1938 Prob. 41, 48.
(3) 10 M. & W. 546.

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in walking into the side of the truck. The appellant did not know and, even had he seen the respondent as the latter came to the sidewalk intersection, could not I think have discerned, either that the latter was not keeping any lookout or that he intended to step into the roadway. I do not, therefore, think that this is a case where the rule of law as stated by Greer, L.J. (1) which, it may be noted, was adopted by Davis, J. in *Sershall* v. *Toronto Transportation Commission* (2), is applicable. The acts of negligence of the parties were, in my opinion, either contemporaneous or came so closely together, the second act of negligence being so much mixed up with the state of things brought about by the first act, as to make it a case for contribution within the rule as stated by Viscount Birkenhead, L.C. in *Admiralty Commissioners* v. *S. S. Volute* (3), and *The Tortfeasors and Contributory Negligence Act,* cap. 215, R.S.M. 1940, applies. I am further of the opinion that this is a case where subsection 3 of section 4 of the *Act* should be applied and the parties held equally at fault.

Section 8 of the *Act* provides that where the damages are occasioned by the negligence of more than one party the court shall have power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just. In the present case I think justice will be done between the parties if the respondent is awarded one half of his taxable costs of the trial: one half of his taxable costs in the Court of Appeal and the appellant one half of his taxable costs in this Court.

Appeal allowed in part.

Solicitors for the appellant: *Scarth & Honeyman.*

Solicitors for the respondent: *Greenberg & Rice.*

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(1) 1938 Prob. 41, 48.
(2) [1939] S.C.R. 287 at 303.
(3) [1922] 1 A.C. 129, 137, 144.