1944

*Apr. 1, 2.
*June 22.

HARRY BOXENBAUM (PLAINTIFF)..... APPELLANT;

AND

ALEXANDER WISE AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Automobile—Negligence—Collision—Injury to pedestrian—Accident at intersection of street—Traffic governed by light signals—Accident following collision between two motor cars—One car having right of way and the other going against red light—Action against owner and driver of both cars—Presumption of fault—Burden of proof—Motor Vehicles Act, R.S.Q., 1925, c. 35, s. 53, ss. 2.

The appellant's minor son, when crossing St. Lawrence boulevard, at the intersection of Sherbrooke street, on the north side of that street, in the city of Montreal, was struck and severely injured, after two automobiles had collided at that point. One of the automobiles belonging to one Gignac and driven by his employee Pelchat was going in a northerly direction, and the other automobile owned by the respondent Alexander Wise, and in charge of his brother, the other respondent, was proceeding towards the west on Sherbrooke street. At that intersection, the traffic is governed by light signals; and, at the moment of the impact, the respondent's automobile, as well as the appellant's son, had the right of way, the green light being in their favour. It was also proven that Gignac's automobile was hit on the right side, a few inches behind the rear axle. After the collision, the appellant's son was found under a tramway facing a southerly direction, but which had stopped in obedience to the red signal. On behalf of his son, the appellant brought an action for damages against the owners and drivers of both automobiles. The trial judge condemned the respondents and Pelchat jointly and severally to $17,447.20, but dismissed the action against Gignac on the ground that, at the moment of the accident, Pelchat was not in the performance of his employment. The appellate court, allowing the respondents' appeal, dismissed the action as to them. The appeal against Gignac before that court is still pending, Pelchat having filed no appeal.

Held, affirming the judgment appealed from, that, upon the evidence, the respondents have committed no fault; and, also, that any presumption of fault, if such presumption did exist, has been rebutted by them.

Subsection 2 of section 53 of the *Motor Vehicles Act* (R.S.Q., 1925, c. 35) provides that "Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver".

Per the Chief Justice and Taschereau J.: The presumption which the law thus creates is not a presumption that the driver of an automo-

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

bile has caused *damage*. It is a presumption that he is *liable* when it is proven that he has caused damage, and he has therefore the onus of showing that he committed no fault which contributed to the accident. But, before such presumption of liability may arise, it is incumbent upon the plaintiff to establish that it is the person, from whom the damage is claimed, that is the author of such damage. There must necessarily exist a relation between the driver of the automobile, and the damage suffered by the victim. And in order to establish such a connection between the driver and the damage suffered, it is not of course necessary in all cases, for the plaintiff, to show that he was struck by defendant's automobile. It may very well happen, as it does often, that the damage may be attributed to a driver who does not actually hit the victim, but acts in such a way that he causes another one to run over a pedestrian. But it is only when such or similar facts are shown to exist that the presumption created by section 53 of the *Motor Vehicles Act* starts to operate, because then only the driver is linked in some way to the mishap. In the present case, nothing of the kind is revealed by the evidence. But, even if such a presumption would exist, it has been rebutted by the respondents.

Per Kerwin J.: There is no question, as to the person at fault, involved in the construction of section 53 (*Maitland* v. *McKenzie,* 28 O.L.R. 506): that is, while the appellant must prove that loss or damage was sustained by reason of respondent's automobile, the tribunal of fact need not determine, so far as the onus is concerned, whether the driver operated the car in a negligent manner or not. There is no evidence that the appellant's son would have been struck by Pelchat's car, even if respondent's car had not been on the highway, and no such inference may properly be drawn. The victim was struck after the collision between the two cars occurred; and the respondents, in view of the evidence on that point, were bound to displace the onus that rested upon them under section 53. But, upon the evidence, the respondents have satisfied such onus.

Per Hudson J.: The plain meaning of section 53 is that a plaintiff must first satisfy the court that the loss or damage was sustained by reason of the motor vehicle; and, once the court is so satisfied, then the onus is on the defendant (owner or driver) to prove if he can that the loss or damage did not arise through his improper conduct.

Per Rand J.: Assuming there was such evidence of a nexus in fact between the collision and the injury as to give rise to the statutory presumption against the respondents, and also that their automobile was proceeding through the intersection at a speed greater than that permitted by the civic by-laws or the motor law of the province, there was no evidence of a dangerous speed nor that the driver was negligent after he became aware of the other car. Upon the evidence, the respondents have exculpated themselves from the presumed responsibility enacted by section 53.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Bertrand J. and dismissing the appellant's action against the respondents for

1944

BOXENBAUM v. WISE.

damages resulting from injuries sustained by appellant's minor son as a result of a collision between two automobiles, one of them owned by one of the respondents and driven by the other.

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

Marcus M. Sperber K.C., Louis Fitch K.C., R. Pinard and *C. R. Gross* for the appellant.

Aimé Geoffrion K.C., P. Meyerovitch K.C. and *N. Charbonneau K.C.* for the respondents.

The judgment of the Chief Justice and Taschereau J. was delivered by

TASCHEREAU J.—The present case arises out of an automobile accident which occurred on the 5th of December, 1938, at the intersection of Sherbrooke street and St. Lawrence boulevard, in the city of Montreal.

Appellant's minor son was crossing St. Lawrence boulevard, on the north pedestrian lane, when he was struck and severely injured, after two automobiles had collided at the intersection. One of the automobiles belonging to one Gignac, and driven by his employee Emile Pelchat, was going in a northerly direction, and the other automobile owned by Alexander Wise, and in charge of his brother I. Wise, was proceeding towards the west on Sherbrooke street.

At this intersection, the traffic is governed by light signals, and it cannot be disputed that at the moment of the impact, Wise's automobile on Sherbrooke street had the right of way, the green light being in its favour. It is also abundantly proven that Gignac's automobile was hit on the right side, a few inches behind the rear axle. After the collision, appellant's son was found under a tramway facing a southerly direction, but which had stopped in obedience to the red signal.

In the Superior Court, Mr. Justice Bertrand condemned Issie Wise, Alex. Wise and Emile Pelchat jointly and severally to $17,447.20, but dismissed the action against

Phydime Gignac, on the ground that at the moment of the accident Pelchat, his employee, was not in the performance of his duties.

The Court of King's Bench allowed the appeal of Issie Wise and Alex. Wise, and dismissed the action as to them. Pelchat filed no appeal, and the appeal against Gignac is still pending before the Court of King's Bench. We have, therefore, before this Court, to deal only with the liability of Issie and Alexander Wise.

A very important question raised in this case is whether the legal presumption of article 53 of the *Motor Vehicle Act* applies against both drivers. This article is as follows:

> (53) (2): Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle, shall be upon such owner or driver.

This presumption which the law creates is not a presumption that the driver of an automobile has caused *damage*. It is a presumption that he is *liable* when it is proven that he has caused damage, and he has therefore the onus of showing that he committed no fault which contributed to the accident. But before such presumption of liability may arise, it is incumbent upon the plaintiff to establish that it is the person, from whom the damage is claimed, that is the author of such damage.

There must necessarily exist a relation between the driver of the automobile, and the damage suffered by the victim. And in order to establish such a connection between the driver and the damage suffered, it is not of course necessary in all cases, for the plaintiff, to show that he was struck by defendant's automobile. It may very well happen, as it does often, that the damage may be attributed to a driver who does not actually hit the victim, but acts in such a way that he causes another one to run over a pedestrian.

But it is only when such or similar facts are shown to exist, that the presumption created by article 53 of the *Motor Vehicles Act* starts to operate, because then only the driver is linked in some way to the mishap.

1944

BOXENBAUM v. WISE.

Taschereau J.

In the present case, nothing of the kind is revealed by the evidence. Before reaching the intersection Wise was invited to cross St. Lawrence boulevard, having the green light in his favour. He was proceeding on the right side of Sherbrooke street, and oncoming traffic prevented him from seeing any car coming on his left. He was also entitled to assume that he had the right of way, and that no one would be imprudent enough to proceed in defiance of the red light. He was acting within his rights, and his assumption was one which would occur to the mind of a reasonable person. It was in complete disregard of the traffic laws, that Gignac's automobile crossed Sherbrooke street. The red signal was against it, and its speed was excessive. I have no doubt, and I agree fully with Mr. Justice Barclay, that it was Gignac's automobile that struck the boy, as a result of this double imprudence. Any other suggestion is untenable.

Gignac's automobile was proceeding north astride the railway tracks, and the boy was right in its path, while Wise's automobile never reached the point where he was walking. It is quite true, that both vehicles came in contact, the front of Wise's automobile hitting the rear end of Gignac's, but this fact did not contribute in any way to the damage done, which has not been suffered by reason of the operation of Wise's automobile. It follows that no presumption of liability lies against the respondents.

But even if such a presumption did exist, without hesitation, I come to the conclusion that it has been rebutted by the respondents.

Wise reached the intersection at a very reasonable rate of speed. Seeing the green light, which in certain judgments has been termed "a command to go ahead" in heavy traffic, he committed no fault by slightly accelerating his speed. As it has been held in *Joseph Eva, Limited* v. *Reeves* (1):

> When therefore a driver entered the cross-roads with the green light in his favour and accelerated to pass, * * * until it was too late to avoid a collision with a vehicle which had entered the cross-roads from the left against the red light, he was not guilty of contributory negligence.

(1) [1938] 2 K.B. 393.

The respondents have clearly shown that they have committed no fault, and that the sole determining cause of the accident was the imprudent and, I dare say, reckless way in which Gignac's automobile was driven.

The appeal should be dismissed with costs.

KERWIN J.—About half-past four in the afternoon of December 5th, 1938, Jack Boxenbaum was returning home from school, walking on the north side of Sherbrooke street, in the city of Montreal, proceeding easterly. In due course he reached the northwest corner of Sherbrooke street and St. Lawrence boulevard. At the intersection of the street and boulevard, traffic lights had been installed. The one facing Jack was green and he proceeded to cross St. Lawrence boulevard on the north pedestrian lane. There are double street car tracks on Sherbrooke street and St. Lawrence boulevard and on the south-bound, that is westerly, tracks on the boulevard a street car was standing at the northwest corner. Jack walked in front of this street car. It is uncertain how far he had travelled beyond it but one thing is certain and that is that he was struck and flung in front of the standing street car, sustaining severe injuries. On his behalf his father brought an action for damages against the owners and drivers of two automobiles, claiming that under subsection 2 of section 53 of the Quebec *Motor Vehicles Act,* R.S.Q. 1925, chapter 35, such damages had been sustained by reason of the two motor vehicles on a public highway. One motor vehicle, owned by the respondent Alexander Wise and driven by the respondent Izzy Wise, was proceeding westerly on the north part of Sherbrooke street. While it was crossing the intersection of St. Lawrence boulevard a collision occurred between that car and the other automobile, owned by the defendant Gignac and driven by the defendant Pelchat, which was proceeding northerly in the easterly half of St. Lawrence boulevard.

It is convenient at this stage to quote the words of subsection 2 of section 53 of the *Motor Vehicles Act* as well in the French as in the English version:

2. Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such

1944

BOXENBAUM v. WISE.

Kerwin J.

loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

2. Quand un véhicle automobile cause une perte ou un dommage à quelque personne dans un chemin public, le fardeau de la preuve que cette perte ou ce dommage n'est pas dû à la négligence ou à la conduite répréhensible du propriétaire ou de la personne qui conduit ce véhicule automobile, incombe au propriétaire ou à la personne qui conduit le véhicule automobile.

In addition to relying on this enactment, the plaintiff claimed that Jack Boxenbaum was struck by the Pelchat car and alleged specific acts of negligence against the driver of that car as well as the driver of the Wise car.

The trial took place before Mr. Justice Bertrand who determined that the onus section applied; that it was quite clear that Pelchat was negligent and that Izzy Wise had failed to satisfy the onus placed upon him. He also found the latter to be negligent in several respects, which will be adverted to later. Judgment was given for $17,447.20 against Pelchat and Alexander and Izzy Wise but the action was dismissed against Gignac. The plaintiff appealed as to this dismissal and that appeal is still pending before the Court of King's Bench. Pelchat did not appeal but Alexander and Izzy Wise did, and the Court of King's Bench dismissed the action as against them on the ground that the onus section did not apply and that the plaintiff had failed to prove any negligence on their part. Mr. Justice St. Jacques was the only one who stated that even if it did apply the onus had been satisfied.

From that judgment the plaintiff now appeals. While the trial judge made no finding on the point, it must be found on the evidence that the Gignac car, driven by Pelchat, was the one that actually struck the boy. That, however, does not dispose of the point as to whether the loss or damage was also sustained by reason of the Wise motor vehicle on a public highway. Sir William Meredith, speaking on behalf of the Ontario Court of Appeal, in *Maitland* v. *McKenzie* (1), with reference to a similar Ontario enactment, stated as to this point at page 510:

I do not understand that any question as to the person at fault is involved in the determination of it.

(1) (1913) 28 O.L.R. 506.

No different construction should be placed on the Quebec statute because the wording of the French version is "cause une perte" while in the English version it is "by reason of a motor vehicle". That is, while the plaintiff in this case must prove that loss or damage was sustained by reason of the Wise automobile, the tribunal of fact need not determine, so far as the onus is concerned, whether Izzy Wise operated the car in a negligent manner or not. I never understood that there was ever any question about this proposition. In *Juraitis* v. *Arsenault* (2), Mr. Justice MacKinnon referred to the *Maitland* case (1) and also to a decision of Mr. Justice Mercier in *Lalumière* v. *Durocher* (3). In *Carter* v. *Van Camp* (4), Chief Justice Anglin referring to the driver of an automobile which had been in a collision but which had not actually struck a pedestrian on a sidewalk, stated that

> a like onus would have rested on Carter as to his responsibility for the collision had it been in issue.

Not only can I not find any evidence in the record that Jack Boxenbaum would have been struck by the Pelchat car, even if the Wise car had not been on the highway, but in my view no such inference may properly be drawn. The boy was struck after the collision between the two cars occurred, and in my view of the evidence on this point, the respondents were charged with the duty of displacing the onus.

The evidence discloses that while Jack Boxenbaum was crossing St. Lawrence boulevard from west to east with the green light, Izzy Wise was crossing the boulevard from east to west. That is, Wise had the right to cross, and with respect to the trial judge who found otherwise, there was no negligence on Wise's part in not anticipating that Pelchat would attempt to cross from south to north with the red light showing against him, or in not seeing Pelchat's car sooner than he did. The only other negligence on the part of Izzy Wise, found by the trial judge, was that he was crossing the intersection at a speed greater than that allowed by subsection 1 of section 41 of the Quebec *Motor Vehicles Act* as it stood at the time. This provided that

> on a curve or steep descent, or at the intersection of roads, or when crossing a bridge, the speed of the motor vehicle shall not exceed eight miles an hour.

(2) (1940) Q.R. 78 S.C. 53. (3) (1931) 37 R.L. N.S. 388.
(4) [1930] S.C.R. 156 at 162.

1944

BOXENBAUM v. WISE.

Kerwin J.

As judges we are not permitted to consider as unreasonable a limitation of eight miles per hour on a certain street where traffic is heavy and where a motorist is crossing with the green light in his favour, when such limitation has been enacted by competent legislative authority, any more than we could, at some time in the future, consider unreasonable the present limitation of twenty miles per hour as provided by an amendment to the statute enacted since the date of this accident. All that we can do is to apply the law as we find it. The question is, however, whether the speed of the Wise car, in excess of the existing statutory limit, caused or contributed to Jack Boxenbaum's injuries. This is not the same inquiry as to whether they were sustained by reason of the presence of the Wise car on the street. A careful examination of the record has satisfied me that the question should be answered in the negative.

In my opinion the respondents have satisfied the onus that rested upon them and the appeal should be dismissed with costs.

HUDSON J.—I have had an opportunity of reading the judgments prepared by my brothers Kerwin and Taschereau and agree with them that this appeal should be dismissed with costs.

Some question has arisen about the interpretation to be placed upon subsection 2 of section 53 of the *Motor Vehicles Act* which reads as follows:

> Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle, shall be upon such owner or driver.

It seems to me that the plain meaning of this provision is that the plaintiff must first satisfy the court that the loss or damage was sustained by reason of the motor vehicle. Once the court is so satisfied, then the onus is on the defendant (owner or driver) to prove if he can that the loss or damage did not arise through his improper conduct.

The first question is a clear question of fact and, in the present case, I am not satisfied that the plaintiff established that the loss or damage was sustained by reason of the defendant's motor vehicle but, even if I am wrong in this,

I am of the opinion that on the evidence it has been established that the injuries to the plaintiff's son did not arise through any improper conduct of the defendant Wise.

RAND J.—For the purposes of this appeal I assume there is such evidence of a nexus in fact between the collision and the injury as gives rise to the statutory presumption against the respondents; and also that their automobile was proceeding through the intersection at a speed greater than that permitted by the by-law of the city or the motor law of the province. There is no evidence of a dangerous speed nor that the driver was negligent after he became aware of the other car. The question then is whether the respondents have exculpated themselves from that presumed responsibility.

The westbound car was running on a green light and the driver was under no duty to anticipate one coming from a cross direction. The sudden and illegal incursion of the northbound car proceeding in the face of a red signal can be taken only as a new and intervening agency. The consequences chargeable to it are those naturally and directly resulting from its impact on the conditions present on Sherbrooke street. In other words, the Pelchat car undertook to cut across a stream of traffic; the only part played by the westbound car was to deflect its course; and the mere fact that the speed of the westbound car exceeded eight miles per hour was quite insufficient to convert it from a circumstance to be expected by Pelchat to a new force of culpability. Treating the speed restriction as a measure of safety toward the son of the appellant, its contravention carried no casual connection with the son's injury. The sole legal cause of the accident remained the intrusion of the Pelchat car upon ordinary street conditions, producing the injury and bringing upon itself liability. The appeal, therefore, should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Sperber & Godine.*

Solicitors for the respondents: *P. Meyerovitch, N. Charbonneau.*