ROBERT C. DAWES AND CRESCENT CREAMERY CO. LTD. (PLAINTIFFS). } APPELLANTS;

AND

ARTHUR N. GAYE (DEFENDANT) .....RESPONDENT.

1942

* May 21, 22.
* Oct. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Motor vehicles—Negligence—Collision at street intersection—Responsibility for the accident—Duties of drivers—Nature of roads and intersection—Advantages of trial judge on questions of fact—Visit by trial judge to site of accident—Duties as to yielding right of way, stopping before turning, and (s. 52 (1) of Highway Traffic Act, Man.) as to driving "wherever practicable" on right half of highway.

In an action for damages arising out of a collision at a street intersection between plaintiff company's truck, proceeding westerly, and defendant's automobile, which had been proceeding northerly and was turning right to go easterly, the trial judge (Adamson J.) gave judgment for the plaintiffs (49 Man. R. 288, at 289-290), which was reversed (by a majority) in the Court of Appeal for Manitoba (49 Man. R. 288). The Supreme Court of Canada now restored the judgment of the trial judge, holding that his findings should be accepted because, the questions involved being almost entirely questions of fact, he manifestly had advantages over an appellate tribunal and had the additional advantage of having visited the site of the accident, the visit having been considered by counsel and the judge to be necessary in order to appreciate the evidence. This Court agreed with the trial judge that defendant was negligent in not stopping and giving the truck driver the right of way. As to conduct of the truck driver, this Court held that, even assuming (contrary to

* PRESENT:—Rinfret, Kerwin, Hudson, Taschereau and Gillanders (*ad hoc*) JJ.

1942

DAWES v. GAYE.

the trial judge's view) that it was "practicable" for him to drive upon the right half of the highway (as required, "wherever practicable," by s. 52 (1) of the *Highway Traffic Act*, Man.), yet the actual position of his vehicle was merely a *sine qua non* and not a *causa causans*.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Manitoba (1) which, by a majority of three to two, reversed the judgment of Adamson J. at trial (2).

The action was brought to recover damages for injuries and damage suffered in a collision between the defendant's automobile, driven by the defendant, and a truck driven by the plaintiff Dawes and owned by the plaintiff company, Dawes' employer.

The collision occurred on January 10, 1940, about 12.15 o'clock in the afternoon, at or near the intersection of Fisher avenue and Third avenue, in Portage la Prairie, Manitoba. The plaintiff Dawes was driving westerly on Fisher avenue and his intended course was to drive on westerly past Third avenue. Third avenue does not go northward beyond Fisher avenue. The defendant had been driving northerly on Third avenue and his intended course was to turn to the right and drive easterly on Fisher avenue. There was conflicting evidence as to just at what spot or in what manner the collision occurred and as to the position, speed or movement of the cars at the time. The plaintiffs alleged that the accident was caused solely by negligence of the defendant, and the defendant alleged that it was caused solely by negligence of the plaintiff Dawes, or, if defendant was negligent, which was denied, that Dawes was guilty of contributory negligence which should be taken into account when awarding damages, if any, to plaintiffs, and also that Dawes had in law the last opportunity of avoiding the accident, of which opportunity he deprived himself by his own actions.

The trial took place in June, 1941, before Adamson J., who, at the request of counsel for both parties, visited the scene of the accident. He found, in his reasons for judgment, that said two streets, neither of which was paved, were "just like an ordinary country road with a slight

(1) 49 Man. R. 288; [1942] 1 W.W.R. 273; [1942] 1 D.L.R. 792.
(2) 49 Man. R. 288, at 289-290; [1941] 2 W.W.R. 588.

grade," that "it is possible to drive down on the side of the road [Fisher Ave.], but, in the ordinary way and especially in winter when there is snow on the street as there was at this time, that is not done." He found that the accident took place at the intersection, and he held that defendant should have stopped and given Dawes the right of way, "not only by the rules of the road, but that course was also dictated by the obvious situation"; that "the plaintiff was right in assuming that the defendant would stop." He gave judgment for the plaintiffs, to Dawes for $2,489.65 for personal injuries, and to the company for $515.76 for damage to its truck.

In the Court of Appeal, that Court, *per* Prendergast C.J.M., and Dennistoun and Robson JJ.A. (Trueman and Richards JJ.A. dissenting), allowed the defendant's appeal and dismissed the action. Dennistoun J.A. held that, "when the cars came together the plaintiff was not on his proper right-hand side of the road. He was well over the crown of the road and so much to his left that there was no room for another car to pass him"; that this was the sole cause of the accident; that "the defendant when attempting to make his turn was proceeding at slow speed. His car never projected over the centre line of Fisher avenue. If the plaintiff had been in his proper place, there would have been no collision"; that the drivers saw each other before the turn was reached; and the position of defendant's car, close to his right-hand curb, was an indication that he proposed to make the right turn, and "that being so, it was the duty of the plaintiff to have moved to the right-hand side to leave clear room for the defendant. This he did not do." Robson J.A. held that "Dawes in plenty of time saw the defendant turning in on the east leg of the 'Y' to take to Fisher avenue and to go east. From that moment Dawes should have recognized that he had a joint occupant of the road proceeding to pass him, and he should have guided his car accordingly. He had no justification whatever for asserting a prior right to the road"; and, after referring to the evidence, held that "it was the plaintiff's own negligence that substantially caused the injury." Prendergast C.J.M. agreed with Dennistoun and Robson JJ.A. Trueman J.A., dissenting,

1942
DAWES
v.
GAYE.

agreed with the trial judge and with Richards J.A. Richards J.A., dissenting, agreed with the trial judge, and held that "it was possible to drive slowly along the north half of the road [Fisher Ave.]", but it was not "practicable"; that "it would set a very dangerous precedent to hold that paramount importance should be given to" s. 52 (1) of *The Highway Traffic Act*, R.S.M., 1940, c. 93 ("Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall wherever practicable drive it upon the right half of the highway * * *") to the exclusion of ss. 50 (1) (yielding right-of-way at intersection to vehicle on right) and s. 56 (1) (driver before turning from a direct line must use reasonable care to ascertain that such movement can be made in safety, and indicate intention by signal); that "the defendant saw or should have seen that the crown was the used portion of the road [Fisher Ave.] and that traffic would follow it", and that he should have stopped until any approaching car had passed. He stated that the law seemed to be settled in favour of the plaintiff by *Swartz Bros. Ltd.* v. *Wills* (1).

The plaintiffs appealed to this Court (special leave to do so being granted to the plaintiff company by the Court of Appeal for Manitoba).

Walter F. Schroeder K.C. and *P. G. DuVal K.C.* for the appellants.

B. V. Richardson K.C. for the respondent.

The judgment of the Court was delivered by

HUDSON J.—In this action there is a claim by the plaintiffs for damages arising from the collision of two motor cars at a street intersection in the City of Portage la Prairie. The action was tried before Mr. Justice Adamson without a jury. There was some conflict of oral evidence and a plan of the locality was put in but gave an inadequate picture of the scene of the accident. At the request of counsel for both parties, the learned trial judge visited the site and it appears from his judgment that his conclusions were influenced in a considerable degree by what he saw with his own eyes. The learned trial judge held that the defendant

(1) [1935] S.C.R. 628.

was guilty of negligence and that such negligence was the cause of the accident. He also held that the plaintiff Dawes who was driving the car in question was not guilty of negligence, and awarded damages to both plaintiffs.

In the Court of Appeal, by a majority of three to two, the judgment was reversed and the action dismissed.

The questions involved are almost entirely questions of fact. In actions of this kind the trial judge manifestly has advantages over an appellate tribunal and, to the advantages normally operating, there was here added the fact that the trial judge had an opportunity of visiting the site, which visit, according to the views of counsel for both parties and of the trial judge himself, was necessary in order to appreciate the evidence given at the trial. For that reason, I am of the opinion that the findings of the learned trial judge should be accepted.

On the question of negligence of the defendant, I agree entirely with the views of the trial judge. The latter considered that the plaintiff Dawes was not guilty of negligence because, in his view, it was not practicable for Dawes to drive his vehicle "upon the right half of the highway", as required by subsection 1 of section 52 of the Manitoba *Highway Traffic Act*. This conclusion is, perhaps, not entitled to as great weight, because the two highways were not in the same condition so far as regards snow at the time of the accident and at the time of the trial judge's view. However, assuming that it was practicable for Dawes to drive upon the right half of the highway, the actual position of his vehicle was merely a *sine qua non* and not a *causa causans*.

For this reason, I think the appeal should be allowed and the judgment at the trial restored, with costs here and below.

Appeal allowed and judgment at trial restored, with costs throughout.

Solicitors for the appellants: *Guy, Chappell, DuVal & McCrea.*

Solicitors for the respondent: *Richardson & Johnson.*