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In the Priby Council.

No. 13 of 1932.

APPELLANT'S CASE

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

WINNIPEG ELECTRIC COMPANY ... ... (*Defendants*) *Appellants*,

AND

JACOB GEEL ... ... (*Plaintiff*) *Respondent*.

CASE OF THE APPELLANTS.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada (Duff, Rinfret, Lamont, Cannon and Maclean JJ.) dated the 12th June, 1931, affirming a judgment of the Court of Appeal for Manitoba (Prendergast C.J.M., Fullerton, Dennistoun, Trueman and Robson, JJ.A.) dated the 13th May, 1930, which dismissed an appeal from the judgment of the Court of King's Bench for the Province of Manitoba (Dysart J.) dated the 14th December, 1929. Record. p. 203. p. 172. p. 171.

2. The action was brought by the Respondent as Plaintiff on the 29th November, 1928, in the Court of King's Bench, to recover damages for personal injuries suffered by the Respondent as the result of a collision which took place in the City of Winnipeg in the Province of Manitoba on the 22nd April, 1928, between an automobile in which he was a passenger and a motor omnibus belonging to the Appellants. pp. 1-3.

3. Section 62 of the Manitoba Motor Vehicle Act (Consolidated Amendments, 1924, chapter 131) is as follows :—

"62. 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

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" 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."

Section 15 of the same Act, as amended in 1927, chapter 39, is as follows :—

" 15. 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."

4. The principal questions involved in the appeal are as to the effect of the statutory provisions as to the onus of proof quoted above, and in particular as to whether such provisions increase the actual degree of care required apart from the statute from owners and drivers of motor vehicles, and as to whether the section of the statute dealing with brake equipment creates an absolute liability to individual citizens in respect of any failure of brakes irrespective of negligence.

5. Immediately before the accident the automobile in which the
p. 15, ll. 36-40. Respondent was a passenger had stopped at a crossing, owing to an adverse (automatic) traffic signal. While stationary it was struck from behind by
p. 36, ll. 8-10. the Appellants' motor omnibus. The driver of the omnibus stated that immediately before the accident his speed was from twelve to fifteen miles
p. 133, ll. 37-39. an hour ; that at this speed he could ordinarily have stopped in four feet ;
p. 134, ll. 1-3. that on the day of the accident he had made four or five trips in the omnibus ;
p. 128, ll. 22-25. and that a short distance before arriving at the place of the accident the
p. 129, ll. 19-20. brakes had worked properly.

p. 37, ll. 6-34. **6.** The driver's account of the accident, which has been adopted by both parties, is as follows :—

" As I went to stop . . . in applying my brakes it seemed as " though all of a sudden something broke at the same time ; I don't " know what it was, and the brake pedal went right through the floor " board. I realised something had gone wrong. I couldn't go straight " ahead because there were two cars alongside one another, directly in " front ; so I hit for the curb to bring the car to a stop. As I hit the " curb with my right front wheel, I hit the right rear fender of the Reo " car with my left front wheel, just with the fender, bending the fenders " down on both cars, on mine and also the Reo.

" *Q.* And that was the automobile the Plaintiff was sitting in ?— " *A.* Yes.

" *Q.* Well, then, the cause of the accident was the trouble with " the brake ?—*A.* The little bolt, it is in the brake evener on the brake " rods, I call it the brake mechanism ; I don't know whether it was " in the brake evener or the rod itself ; it broke as I applied the brakes,

" letting my brake pedal go right through the floor board with no " pressure on the brake. Record.

" *Q.* This is the mechanism that is connected with the pedal ?—" *A.* Yes.

" *Q.* Didn't you have an emergency brake on ?—*A.* The emergency " and the pedal brake of that car are on the one brake evener.

" *Q.* Did you try to use the emergency ? *A.* I did put it on ; as " soon as I hit for the curb I put the emergency on.

" *Q.* And that didn't hold up ?—*A.* It held it up but not enough " to stop me in time.

" *Q.* To avoid a crash with the automobile ?—*A.* With the curb " and the automobile at the same moment."

7. Evidence in regard to the inspection of the omnibus was given by Colyer, one of the Appellants' employees, who has inspected the omnibus on the 5th March, 1928, as follows :—

" By the Court : p. 148, ll. 10-21.

" Did you examine any pins on this occasion ?—*A.* Yes, we go over " them all.

" *Q.* How do you examine a pin ?—*A.* You can tell if there is any " lost motion, whether it is worn at all.

" *Q.* And that is what you do ?—*A.* Yes.

" *Q.* You just attempt to see if there was any wear in it ?—*A.* Yes.

" *Q.* If it is a pin that can't wear at all, what do you do ? Some " pins are in places where they won't wear at all ?—*A.* Well, we do not " bother about them. If there is any lost motion anywhere we generally " check it up and see where it is.

" *Q.* But if it is a pin that won't wear you don't do anything with " it ?—*A.* We just see it is all right, and has got a cotter pin in it."

The Appellants' Superintendent of omnibus and brake equipment, Holmes, gave the following evidence :—

" *Q.* Can you tell me in the ordinary course of things how long one p. 142, " of these brake pins—I think is the technical term, is it not ?—*A.* Yes. ll. 10-34.

" *Q.* How long one of those brake pins would last in a chassis or " in an automobile ?—*A.* In the average automobile a person would " never know it was there. It would last longer than the automobile. " It would never wear out.

" *Q.* Why would it never wear out ?—*A.* There is no particular " wear on it. It is not a moving part. It is merely stationary. Your " rod pulls on it, but there is no movement in it or no friction at all.

" *Q.* It is because it does not move that it would not wear ?—" *A.* Exactly.

" *Q.* Does it move to any extent ?—*A.* None whatever.

* * * * * * *

" *Q.* What inspection is made of this bus ?—*A.* It is inspected " every 750 miles, and it is greased thoroughly by two men. Every " 5,000 miles it is pulled into the shop and thoroughly gone over by a

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" bunch of trained mechanics ; mechanics trained for their particular " job.

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p. 142, l. 44 to p. 143, l. 14.

" *Q.* What is the customary or usual frequency of inspection of " automobiles ?

" The Court : Does the witness know that ?

" The Witness : Yes, in the average transportation company, and " I presume that is what he means.

* * * * * * *

" *Q.* All right ; just tell us ?—*A.* I was with the Pickwick stages " at Los Angeles, the well-known transportation company. Those " busses and equipment were always greased every 1,500 miles and " inspected once every 10,000 miles. From there I was with the Shore " Line Motor Coach line of Chicago, the Insull properties. Our " greasing there was every 1,000 miles, and our inspection was every " 7,500 miles."

The Appellants' witnesses were not cross-examined upon the above statements and there was no conflict of evidence on the subject of inspection.

8. The questions submitted to the jury and the answers thereto were as follows :—

p. 169, ll. 13-22.

" (1) Was there any negligence on the part of the Defendant " which caused the injury to the Plaintiff ?—*A.* 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 :—

p. 169, ll. 29-31.

" We find that the driver did everything possible under the " circumstances to avoid this accident, and we wish to exonerate him " from any blame."

p. 169, l. 35 to p. 170, l.1. p. 171.

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 and costs.

9. The Appellants appealed to the Court of Appeal for the Province of Manitoba (Prendergast C.J., Fullerton, Dennistoun, Trueman and Robson

p. 172.

JJ.A.) and on the 13th May, 1930, judgment was delivered affirming by a majority the decision of the Court of King's Bench and dismissing the appeal without costs. Prendergast C.J.M. and Robson J.A. were in favour of dismissing the appeal with costs. Trueman J.A. would have ordered a new trial. Fullerton and Dennistoun JJ.A. would have allowed the appeal.

10. The learned Judges gave the following among other reasons for the judgment :— Record.

Chief Justice Prendergast expressed some doubt and did not find it necessary to say whether there was justification for the verdict of " Insufficient inspection of brakes." Although that might be a proper inference from the other part of the verdict he considered that the finding of negligence " in not keeping brakes and braking equipment in proper order," which meant that the Appellants did not rebut the statutory presumption against them in this respect, was justified by the evidence and sufficient to support the judgment. He would accordingly have dismissed the appeal with costs. pp. 173-176.

Mr. Justice Fullerton, dissenting, held that section 15 of the Motor Vehicle Act does not create an absolute duty on the part of the owner of the motor vehicle, although the failure of the brakes to control the motor vehicle might afford *prima facie* evidence of negligence. At the very outside it would be the duty of the Defendants towards strangers to take reasonable care to see that the brakes of their omnibus were in working condition. Reasonable care is the care that a reasonably prudent man would take. No one suggests that the defect which caused the accident was a usual one or one that should have been anticipated and guarded against. The Plaintiff was a stranger to the Defendants and towards him they owed no greater duty to take care than does the private owner of a motor car. The Plaintiff made his *prima facie* case by proving that his injuries were caused by the Defendants' omnibus and the case was, he thought, met by the Defendants showing that the accident was due to a defect in the brakes that could not reasonably have been discovered by the Defendants. The witnesses called by the Defendants were not cross-examined on the question of inspection and the Plaintiff called no evidence on the point. The jury found " Insufficient inspection of said brakes." The jury cannot set up an arbitrary standard of their own as to what constitutes sufficient inspection. They must decide according to the evidence in the light of the duty that the Defendants owed to the Plaintiff. He considered that the finding of the jury was not supported by the evidence and would have allowed the appeal with costs. pp. 176-181. p. 177, l. 37. p. 180, l. 27. p. 181, l. 3. p. 181, l. 34.

Mr. Justice Dennistoun concurred with Mr. Justice Fullerton. p. 181, l. 43.

Mr. Justice Trueman held that looking at the course of the trial it could be gathered that the jury's finding of negligence was based on the breaking of the bolt and default in inspection, that a verdict so found could not be upheld and that the evidence was uncontradicted that it was not to be apprehended that the bolt would prove insecure, and that a better inspection than that made was not required. pp. 182-185. p. 184, l. 29.

The trial, in his opinion, was abortive. Reading the verdict in the light of the charge, there was no finding on an essential branch of the case put forward by the Defendants. The Defendants needed a finding upon it in their favour, if they were to be exonerated from negligence, and were equally concerned with the Plaintiff in having it dealt with by the jury. He would have ordered a new trial. p. 185, l. 5.

Mr. Justice Robson did not consider that the jury went against the evidence in finding, in effect, that the Defendants had not satisfied them, as the tribunal of fact, that all proper precautions had been taken in order pp. 185-195. p. 194, l. 9.

Record. to provide against risks which might reasonably have been anticipated. Although insufficient inspection was not charged in express language in the Statement of Claim, it was naturally involved in clause (f) of paragraph 5, to which the jury alluded in their finding. The matter of inspection was introduced by Defendants in seeking to meet the onus on them. He was in favour of dismissing the appeal with costs.

p. 203. **11.** The Appellants appealed to the Supreme Court of Canada (Duff, Rinfret, Lamont, Cannon and Maclean JJ.) and on the 12th June, 1931, judgment was given dismissing the appeal.

pp. 204-207. **12.** Mr. Justice Duff, with whom Mr. Justice Lamont concurred, stated :—

p. 204, l. 41 to p. 205, l. 3. " The defence of the Appellants in substance was, that the equip-
" ment of the motor bus was adequate, and that the collapse of the
" brake mechanism, by reason of which the driver lost control of the
" vehicle, was due to the fracture of a brake pin, owing to a latent
" defect in the pin, not discoverable by careful inspection, and that
" the bus and its equipment had been subjected to a proper inspection,
" which had revealed nothing pointing to any deficiency in the
" machinery."

p. 205, l. 43 to p. 206, l. 10. He considered that the trial judge rightly directed the jury and that section 62 of the Motor Vehicle Act created, as against the owners and drivers of motor vehicles, in the conditions therein laid down, a rebuttable presumption of negligence ; that the onus of disproving negligence remains throughout the proceedings ; and that 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.

p. 206, ll. 27-31. The learned Judge did not discuss the facts. He considered that sufficient had been said in the judgment of Mr. Justice Robson in the Court of Appeal for Manitoba to show that on the evidence a finding by the jury that the Appellants had not acquitted themselves of the onus cast upon them could not, as the law governing such matters stands, be set aside by an Appellate Court as a perverse or unreasonable verdict.

p. 206, ll. 32-35. As to the form of the verdict the learned Judge considered the finding of the jury in answer to the first question conclusive and the answer to the second question could only be regarded as material if it tended to show that, in answering the first question, the jury had been misled into error.

pp. 207-210. **13.** Mr. Justice Cannon, with whom Mr. Justice Rinfret and Mr. Justice Maclean concurred, quoted with approval the following statement as to the effect of the statutory onus imposed on the Appellants :—

p. 210, ll. 2-4. They had " to produce evidence reasonably satisfying the tribunal
" of fact that all proper precautions had been taken in order to provide
" against risks which might reasonably be anticipated."

He considered that a Company using omnibuses of a capacity of twenty-five persons for the conveyance of the public was bound to inspect minutely the braking apparatus, and he said :— Record. p. 210, ll. 10-12.

" The Courts' discretion was restricted by the Legislature when it " imposed the duty on the driver of having brakes sufficient ' at all " times ' to control these dangerous machines. It was the duty of the " Defendant to equip all its motor vehicles with adequate brake service " to control such vehicles *at all times*. In order to be sure that the " brakes were efficient and sufficient at all times, it may be necessary " to inspect them daily or even several times a day." p. 210, ll. 19-26.

14. The Appellants submit that the judgment of the Supreme Court should be reversed and the action dismissed for the following, among other

REASONS.

1. Because section 62 of the Manitoba Motor Vehicle Act does not increase the actual degree of care required apart from the Statute from owners and drivers of motor omnibuses or any other motor vehicles.

2. Because section 15 of the same Act as amended in 1927 dealing with brake equipment does not create an absolute or " insurers' " liability to individual citizens in respect of any failure of brakes.

3. Because there was no negligence on the part of the Appellants.

4. Because the Appellants disproved negligence.

5. Because there was no evidence on which the jury could find that the Appellants were negligent.

6. Because the uncontradicted and unchallenged evidence was " all one way " on the questions of keeping braking equipment in proper repair and of inspection of brakes.

7. Because the answer of the jury to the second question shows that the jury had been misled into error.

8. Because legislation as to the onus of proof should not be so construed or applied as to lead to decisions inconsistent with the common law as to negligence where no question of onus remains.

9. For the reasons appearing in the judgment of Dennistoun J.A. concurred in by Fullerton J.A. in the Court of Appeal.

D. N. PRITT.
E. H. COLEMAN.

In the Privy Council.

No. 13 of 1932.

On Appeal from the Supreme Court of Canada.

BETWEEN

WINNIPEG ELECTRIC COMPANY (*Defendants*) *Appellants,*

AND

JACOB GEEL - (*Plaintiff*) *Respondent.*

CASE OF THE APPELLANTS.

BLAKE & REDDEN,
17, Victoria Street,
S.W.1.