1972 CarswellBC 172
British Columbia Court of Appeal

Sinclair v. Nyehold

1972 CarswellBC 172, [1972] 5 W.W.R. 461, 29 D.L.R. (3d) 614

Sinclair et al. v. Nyehold

Tysoe, Maclean and Nemetz JJ.A.

Judgment: June 28, 1972

Counsel: *K. J. Smith*, for appellants.
I. E. Epstein, for respondent.

Subject: Torts

Headnote

Negligence --- Defences — Inevitable accident — Application of principles

Negligence — Automobile collision — Defendant's attention distracted by bee alighting on him — Failure to control his vehicle — Whether negligent — Defense of inevitable accident.

Appellants sued for injuries and damage suffered in a collision between their vehicle and the respondent's and their action, tried by a jury, was dismissed, the jury finding no negligence on respondent's part. Respondent was driving his car up a hill on a highway which contained 2 lanes for uphill traffic and one for downhill traffic; he was travelling in the right-hand lane at 30 m.p.h. and male appellant was approaching him from the opposite direction; the highway curved somewhat to respondent's left. As he entered the curve a bee flew through the car window and landed on his bare torso; such was his preoccupation with the bee that respondent did not apply his brakes or otherwise slacken his speed, and he failed, on coming out of the curve, to correct his steering so that his vehicle continued on a left-hand course and collided with appellant, who was on the extreme right-hand side of the highway.

Held that the appeal must be allowed and judgment entered for appellants, damages to be assessed; there was no evidence on which the jury, properly instructed as it was in the case at bar, and acting judicially, could reasonably have found that the respondent was not guilty of negligence which was the proximate cause of the damage sustained by the appellants. The defence of inevitable accident was of no application to the facts in the instant case: *Hackman v. Vecchio* (1969), 4 D.L.R. (3d) 444 (B.C. C.A.) applied.

The judgment of the Court was delivered by *Tysoe J.A.*:

1 This is an appeal from a judgment dismissing the appellants' action against the respondent for damages suffered in a collision between a motor vehicle driven by the respondent and one owned and driven by the male appellant and containing the female appellant as a passenger. The action was tried before a judge and jury. The jury found that there was no negligence on the part of the respondent driver.

2 The accident occurred during the afternoon of 31st July 1966, a clear, warm, sunny day, on the paved highway between Rossland and Trail in this province. The pavement consisted of 3 traffic lanes, each about 11 feet in width. Two of the lanes were for traffic proceeding uphill toward Rossland. The other lane was for traffic going downhill in the

opposite direction. The respondent was driving in the right lane of the two uphill lanes. The appellants were travelling downhill on the part of the road consisting of one lane. The collision occurred on what was, to the respondent, a curve to the left, and to the appellants a curve to the right, and when the appellants' car was stopped or nearly stopped three of its wheels were on the gravel shoulder on the appellants' right and the left rear wheel was still on the pavement of the highway. The respondent's car had travelled from the right of the two uphill lanes, across the other of those lanes and well into the downhill lane in which the appellants had been driving.

3 The appellants submitted that the collision occurring where it did, the onus rested upon the respondent to prove that it did not result from any negligence on his part. The appellants further submitted that there is no evidence tending to establish that the respondent was free of negligence which was a proximate cause of the collision. Alternatively, the appellants submitted that no jury, properly instructed and acting judicially, could reasonably find on the evidence adduced in this case that the respondent was not guilty of negligence which was the proximate cause of the damage sustained by the appellants. The appellants asked that the verdict of the jury be set aside and judgment entered for them against the respondent. In this Court counsel agreed that there is no issue as to credibility of witnesses and no dispute on the facts except, perhaps, such that might arise out of estimates of distances between the two approaching vehicles. I do not find any substantial differences in such estimates. The respondent conceded that there was no negligence whatever on the part of the appellants.

4 The respondent's explanation for this unfortunate accident was that as he was driving in the curve at slightly over 30 m.p.h. — a very proper rate of speed — with the window of his car on his immediate left open, a bee flew into the car and landed on his bare torso (he was not wearing a shirt). He glanced down and observed it was alive and crawling up his stomach. He "sort of froze right there" and, instead of straightening out his car as it came out of the curve, he continue towards his left and into the lane in which the appellants' car had been travelling. The respondent was so engrossed with the bee that he made no attempt to apply his brakes or to hold his car to its proper course. Making "a random guess", the respondent estimated that from the time the bee landed on him to the time of the collision his car travelled between 100 and 150 feet along the highway and then across the two lanes immediately to his left. The male appellant, in his evidence, said that when the respondent's car left its far right-hand lane the distance between the two vehicles was "possibly 250 to 300 feet". Estimates of distances when the circumstances are such as existed in this case are notoriously unreliable. However, bearing in mind that the speed of the appellants' car became markedly reduced and that of the respondent's car was not reduced at all, I think it proper to infer from the totality of the evidence that from the time the bee alighted on the respondent his car travelled at the least very close to 200 feet. At its speed it could have been stopped in less than that distance. The respondent was aware of approaching traffic and he knew that traffic following was "quite a ways" behind him. He had been driving in the general area for some years and had experienced insects flying into his car during the summer.

5 I agree that in the circumstances of this case, on proof that the collision occurred in the traffic lane properly occupied by the appellants, the onus shifted to the respondent to establish that there was no negligence on his part which was a proximate cause of the damage sustained by the appellants. The learned trial Judge so charged the jury. In *Hackman v. Vecchio* (1969), 4 D.L.R. (3d) 444, Davey C.J.B.C., speaking for this Court, said at p. 446:

> I doubt if the defence advanced by the respondent is truly one of inevitable accident. What the parties mean by the defence of inevitable accident in the circumstances of this case is that the respondent attempted to rebut an inference of negligence that arose from the fact that he collided with the truck on his wrong side of the road, by advancing an explanation of how the collision may have happened reasonably (not, did happen), without negligence on his part. If respondent's explanation for the skid does not show how it may have happened without negligence on his part, it does not rebut the inference of negligence that ought to be drawn from the fact that his car skidded and crashed into the truck on his wrong side of the road: *Gauthier & Co. v. The King*, [1945] S.C.R. 143 at 152, 153, 156, [1945] 2 D.L.R. 48 at 55-7, 59, *per* Kellock, J.

6 In my view in the case at bar the defence advanced by the respondent is not truly one of inevitable accident. Whether this be so or not, we are not concerned with "how the collision may have happened reasonably (not, did happen), without negligence on his part", for we know precisely how and why it happened.

7 In *Carter v. Van Camp et al.*, [1930] S.C.R. 156, [1929] 4 D.L.R. 625, Duff J., as he then was, said at p. 167:

> Anderson owed a duty not only to persons using the carriage way, but to persons on the sidewalk as well. Such persons, everyone of them, had an independent right to be free from unnecessary molestation in their use of the King's highway; and Anderson's duty as the driver of a motor car — his duty to such pedestrians — was so to conduct himself as not to expose them to unnecessary risk of harm by default in the management of his car in respect of reasonable care, reasonable skill or *reasonable self-possession*, whether in emergencies or in ordinary circumstances. All this is involved in the proposition, that having assumed the responsibility of driving a motor car through a street frequented by pedestrians, he was under a duty to act reasonably with a view to the safety of such persons. If he was not a person of competent skill or *competent self-command*, he ought not to have attempted to drive a motor car in such a place. Having undertaken to do so, he was bound at his peril to exercise those qualities. If he did not, he is answerable in precisely the same way as if he had been driving a car, which he knew, or ought to have known, to be insufficiently equipped with brakes or other ordinary safety appliances.
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> There seems to have been nothing in the circumstances of the collision which would have so completely deprived a reasonably competent driver of his mental equilibrium.

(The italics are mine.)

8 In *Adam v. Campbell*, [1950] 3 D.L.R. 449 (Can.), Cartwright J., as he then was, speaking for the majority of the Court, referred with approval to this passage in the judgment of Duff J.

9 The facts of the last-named case were these. The defendant, while proceeding along the roadway without excessive speed, was unexpectedly faced with a sudden failure of his service brake (without his fault). While reaching for his emergency brake he steered his car towards the sidewalk (although there was no other traffic presenting any danger of collision). His car struck the plaintiff, a pedestrian on the sidewalk, whom he first observed when 20 feet away. The action came on for trial before a judge and jury and the jury exonerated the defendant of any negligence. On appeal, the Court of Appeal refused to interfere with this verdict. The Supreme Court of Canada held that there was no causal connection between the failure of his service brake and the turning of the car on the sidewalk. Further, that even at the point at which the defendant observed the pedestrian the former had an opportunity of avoiding him by turning his car either to the right or left. The Court further held that there was no evidence upon which a jury acting reasonably could have found that the defendant had discharged the statutory onus resting upon him. It allowed the plaintiff's appeal, set aside the verdict of the jury and directed that judgment be entered for the plaintiff. The defendant had contended that "by reason of the sudden, unexpected and unanticipated failure of the braking system, the Plaintiff's damages, if any, were the result of an unavoidable or 'pure' accident and that the Defendant is therefore not in law liable to the Plaintiffs or to either of them". Cartwright J. referred to the oft-quoted dictum of Duff C.J.C. in *McCannell v. McLean*, [1937] S.C.R. 341 at 343, [1937] 2 D.L.R. 639, as to the rule applicable where interference with a jury's verdict is sought. At p. 459 Cartwright J. said:

> Making all due allowance for the fact that the respondent had no reason to expect the sudden failure of the brake, I can find no evidence to support the finding that a reasonably careful, skilful and self-possessed driver would by reason thereof have been unable to prevent his automobile striking Adam.

10 The circumstances in the case of *Adam v. Campbell* are not the same as those in the case before this Court, but the question is much the same, namely, was there any evidence to support a finding that a reasonably careful, skilful and self-possessed driver would, by reason of what occurred (in this case, the entry into the car of a bee and its alighting on the driver's bare torso), be unable to prevent his car colliding with the appellants' vehicle? Put in another way, could

a jury properly instructed and acting judicially reasonably come to the conclusion that the respondent had discharged the onus of proof that rested upon him?

11 In the course of his argument counsel for the respondent, in reply to a question put by the Court, said that he could not contend that the alighting of the bee on his client's torso gave rise to an emergency facing the respondent. He went no further than to submit that this was a sudden and unexpected event creating a situation with which a reasonably skilful and careful driver could not be expected to deal. I agree that there was no emergency in the sense in which that word is known in the law of negligence. As to the submission made by counsel, in my view it overlooks the duty that rests upon a driver so to conduct himself as not to expose other users of the highway to unnecessary risk of harm by default in the management of his car "in respect of reasonable care, reasonable skill or reasonable self-possession, whether in emergencies or in ordinary circumstances", to use the words of Duff J., as he then was, in *Carter v. Van Camp et al.*, supra. I am forced to the view that at the time in question the respondent inexcusably displayed a lack of "competent self-command". Had he exercised reasonable skill and care a collision with the appellants' car would have been avoided. He would either have stopped his vehicle or so directed its course that it remained on its proper side of the highway. His failure to do so was the cause of this unfortunate accident.

12 I have arrived at the conclusion that there is no evidence on which the jury, properly instructed as it was, and acting judicially, could reasonably find that the respondent was not guilty of negligence which was the proximate cause of the damage sustained by the appellants.

13 I would allow the appeal and direct a new trial limited to quantum of damages. The appellants will have judgment against the respondent for the damages so assessed. The appellants are entitled to their costs in this Court and in the Court below.

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