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Sterling Trusts Corporation et al. v. Postma and Little, [1965] S.C.R. 324

J. Ronald Smith

Sterling Trusts Corporation et al. v. Postma and Little, [1965] S.C.R. 324.

MOTOR VEHICLES — NEGLIGENCE — TRUCK INVOLVED IN COLLISION BETWEEN TWO AUTOMOBILES — OWNER AND DRIVER OF TRUCK FOUND JOINTLY AND SEVERALLY LIABLE WITH DRIVER OF ONE OF THE AUTOMOBILES — DRIVER OF AUTOMOBILE ALONE HELD LIABLE ON APPEAL — NEW TRIAL ORDERED BY SUPREME COURT ON CERTAIN QUESTIONS.

In the case of *Sterling Trusts Corporation et al. v. Postma and Little*,[1] the Supreme Court of Canada had to determine the effect of breach by the driver of a motor vehicle of a statutory provision (*i.e.* The Highway Traffic Act[2]) designed for the protection of other users of the highway (*viz.* failing to have illuminated a tail light at night).

The accident giving rise to this litigation occurred on the evening of December 19, 1959, after dark at a point about two miles west of Trenton, Ontario on highway No. 2. The night was clear and the paved highway was dry and straight so that from the crest of a knoll more than 420 feet to the east of the estimated point of collision there was clear visibility. Henry Postma was proceeding west in his 1953 Meteor at a speed of "at least 50 to 55 miles per hour" when,

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29 *Supra*, footnote 2.

30 C. A. Wright (1945), 23 Can. Bar Rev. 344, at p. 347.

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1 [1965] S.C.R. 324, 48 D.L.R. (2d) 423.

2 R.S.O. 1960, c. 172. S. 33(1) "When on a highway at any time from one-half hour after sunset to one half-hour before sunrise every motor vehicle shall carry three lighted lamps in a conspicuous position, one on each side of the front which shall cast a white, green or amber coloured light only, and one on the back of the vehicle which shall cast from its face a red light only, . . . and any lamp so used shall be clearly visible at a distance of at least 500 feet from the front or rear as the case may be."

after breasting the knoll he was momentarily blinded by the headlights of an oncoming car. He saw "a flicker of a light" ahead of him and then noticed for the first time the presence of what turned out to be the westbound truck, driven by Fred A. Little, proceeding slowly and only three or four car lengths ahead. He applied his brakes and skidded a distance of 125 feet on his own side of the road when, fearful of hitting the truck, he veered to the left and skidded a further 15 feet before colliding with the Brown vehicle, a 1956 Volkswagen, which was proceeding in an easterly direction on its own side of the highway and the lights of which, according to Postma, had not been seen by him until he turned into the eastbound lane. As a result of the accident, Mrs. Brown was killed and Mr. Brown was permanently injured.

Prior to this decision, the law in Ontario with respect to breach of The Highway Traffic Act[3] being evidence of negligence, was that the breach must be shown to be a proximate cause of the injury complained of, and whether such breach is negligence causing or contributing to the accident is a question of fact depending on the circumstances in each case.[4] And, even if a failure to comply with the provisions of the Act is found to have caused or contributed to the accident, no civil liability will attach if such failure was not an act of conscious volition.[5] The plaintiff, claiming damages, had to allege and prove negligence in the operation of the motor vehicle and it was insufficient merely to rely upon a breach of a statutory duty; it was not the intention of the Legislature that everyone injured through a breach of any statutory requirement should have a right of civil action against the offender for damages.[6] The Supreme Court of Canada, in *Sterling Trusts Corporation v. Postma and Little*,[7] decided otherwise.

Two unchallenged findings were that (i) Postma, by his negligence caused the collision, and (ii) Brown was not guilty of negligence. The primary issue with respect to Little was whether or not the tail light on his vehicle was lit.

The trial judge found Postma liable for negligence and also found Little liable on that ground that he failed to satisfy the onus of showing that his tail light was lit. The Court of Appeal affirmed Postma's liability but allowed Little's appeal on the ground that the trial judge had misdirected himself in holding that there was a burden on Little to establish that the tail light was illuminated, and on the ground of certain answers made by Little on examination for discovery when he stated that the tail light had been working. The Court of Appeal itself erred when it acted upon statements made on examination for discovery which had not been adduced in evidence

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3 *Ibid.*
4 *Bruce v. McIntyre*, [1954] O.R. 265, at p. 277 (Ont. C.A.); aff'd. [1955] S.C.R. 251.
5 *York v. Heffernan*, [1962] O.W.N. 169.
6 *Falsetto v. Brown*, [1933] O.R. 645.
7 *Supra*, footnote 1.

at trial. The appeal of Sterling Trusts Corporation was allowed by the Supreme Court of Canada and a new trial ordered to answer the vital question whether or not their tail light was lit at the relevant time.

Mr. Justice Cartwright (for the majority) stated that if it were established at this new trial that the tail light was not lit, then there was evidence to support the finding of the trial judge that this statutory breach was an effective cause of the collision. If this were established, then, according to *Lochgelly Iron & Coal Co. Ltd. v. M'Mullan*,[8] the respondents would be *prima facie* liable for the damages suffered by the appellants. The question, therefore, arises whether Little can absolve himself from liability by showing that he had done everything that a reasonable man could have done under the circumstances to prevent the occurrence of the breach. The case of *London Passenger Transport Board v. Upson*[9] seems to suggest that this can be done by showing that under the circumstances it was impossible for the defendants to avoid committing the breach so that the maxim *lex non cogit ad impossibilia* applies. On the other hand, in *Galashiels Gas Co. Ltd. v. O'Donnell (or Millar)*,[10] the House of Lords held the statutory duty, there under consideration, to be absolute. Mr. Justice Cartwright felt that it was not necessary to decide whether the statutory duty to have the tail light illuminated was absolute, because the respondent had not discharged the burden of proof. Little's position was not that there was a sufficient explanation to account for and excuse the fact that the light was not on; rather, his position was that the light was in fact on at all relevant times. If the burden could be discharged simply by showing that the person upon whom it lay neither intended nor knew of the breach, the protection which it is the statute's purpose to afford would in most cases prove illusory.

In *Falsetto v. Brown*,[11] where an automobile had run into the rear of a stationary truck in darkness, it was found that the efficient cause of the accident, the *causa causans* was the negligence of the driver of the sedan because he was driving too fast under the weather conditions and was not keeping a proper look-out. It made no difference that the tail light of the truck was not illuminated.

In the *Falsetto* case, Davis J.A., gave an additional reason for his decision:[12]

> The statutory duty to have a red tail lamp burning at certain times imposed by the statute is a public duty only to be enforced by the penalty imposed for a breach of it, and it was not the intention of the Legislature that everyone injured through a breach of any statutory requirement should have a right of civil action against the owner for damages.

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8 [1934] A.C. 1.

9 [1949] A.C. 155, at p. 173.

10 [1949] A.C. 275.

11 *Supra*, footnote 6.

12 *Ibid.*, at p. 656.

In *Irvine v. Metropolitan Transport Co.*,[13] Masten J.A., in dealing with the question whether the defendant's breach of the statutory provisions gave the plaintiff a right of action, said:[14]

> . . . I think that, notwithstanding that the section prescribes a penalty for breach of the duty imposed, it also creates a cause of action in favour of a particular class of persons, namely those who are travelling on the highway and suffer damage from breach of the statute. My reasons are (1) that the legislation is for the protection of one particular class of the community; (2) that the penalty is not payable to the party injured; (3) that a penalty of $5.00 up to $50.00 would in most cases be a wholly inadequate compensation for the damages suffered.

Mr. Justice Cartwright accepted the reasoning of Masten J.A., on this point in the *Irvine* case[15] over that of Davis J.A., in the *Falsetto* case[16] and expressed the view that a section might, notwithstanding that it prescribes a penalty for breach of the duty imposed, also create a cause of action in favor of persons who are travelling on the highway and suffer damage from the breach of the statute.

Mr. Justice Ritchie (Judson J. concurring) dissented on the grounds that he was not satisfied by the evidence that any negligent manoeuver by Little caused or contributed to the accident and he felt that the case could be disposed of as it was by the Court of Appeal on the ground that the plaintiffs failed to discharge the burden of proving that the tail light on the Little truck was either not operating or defective and that this constituted negligence which contributed to the accident.[17] As far as the effect of a breach of the statutory duty for which provision is made in s. 51(2) of The Highway Traffic Act,[18] both Ritchie and Judson JJ. adopted the reasoning of Mr. Justice Cartwright.

The decision to order a new trial was made by a slim majority of three to two.

It is submitted that the Supreme Court of Canada ought to have decided the liability of Little either to Postma or to Sterling Trusts Corporation rather than have ordered a new trial. First, it is doubtful whether any new evidence would be discovered. The accident occurred almost five years prior to the hearing before the Supreme Court of Canada and it would take longer still to have a new trial. Furthermore, Little had died in the interval, Mr. Brown the plaintiff, was unable to give any evidence whatsoever as to what caused the accident, Postma was characterized by the learned trial judge, Mr. Justice Moorehouse, in his reasons for judgment as a "very confused young man", and Mrs. Little was characterized as an elderly woman whose memory was not good. Secondly, it is dubious whether the important issue of the illumination of the tail light at the time of the accident, could be determined from the available admissible evidence. Thirdly,

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13 [1933] 4 D.L.R. 682, [1933] O.R. 823.
14 P. 694 (D.L.R.), 833 (O.R.).
15 *Supra*, footnote 13.
16 *Supra*, at p. 432 (D.L.R.), 333 (S.C.R.).
17 *Supra*, at p. 439 (D.L.R.), 341 (S.C.R.).
18 R.S.O. 1960, c. 172.

the prospect of the parties concerned embarking upon another long trial involving possibly many more years, seems quite unlikely. Some kind of settlement is a more probable result.[19] Finally, s. 106 of The Highway Traffic Act,[20] provides that, except in the case of a collision between motor vehicles, whenever damage is sustained by any person by reason of a motor vehicle on a highway, the onus is on the owner or driver thereof to disprove negligence. Brown argued that applying this section to the facts, Postma, swerved to avoid and pass a vehicle driven by Brown because there was no collision between his and Little's vehicle, the onus was upon the latter to disprove negligence on his part, and not upon Brown to prove it. If this reasoning were adopted it would mean that the owner or driver of the passed car could become involved, by a mere allegation of negligence, in an action in which he would be required to assume the burden of disproving his own negligence. It is submitted that the Legislature did not mean to have such a construction put on s. 106.[21] Consequently, the case could have been disposed of as by the Court of Appeal on the ground that the appellants failed to discharge the burden of proving that the tail-light on the truck was either inoperative or defective, and that that constituted negligence which contributed to the accident.

The Supreme Court of Canada was correct in unanimously holding that a breach, by the driver of a motor vehicle, of a statutory provision designed for the protection of other users of the highway (such as failing to have a lighted tail light when travelling at night), and which breach is an effective cause of an accident, imposes at least a *prima facie* liability on such driver.

One question left to be answered by some future decision is whether this liability may be discharged by showing that the breach occurred without negligence on the part of the driver.

J. RONALD SMITH*