Ontario Supreme Court [Court of Appeal]

Shapiro v. Wilkinson

[1943] O.R. 806, [1944] 1 D.L.R. 139

Shapiro et al. v. Wilkinson

Riddell, Gillanders and Laidlaw JJ.A.

Heard: November 2, 1943
Judgment: November 18, 1943

Counsel: *I. Levinter, K.C.*, for the plaintiffs, appellants
E. L. Haines, for the defendant respondent

Riddell J.A. **(dissenting):**

1 In this appeal from the judgment at the trial dismissing the action, the sole ground of appeal argued before us was the alleged failure of the learned trial judge, Mr. Justice McFarland, properly to charge.

2 That a failure to properly charge the jury is a perfectly good ground for interfering with the finding of a jury by a Court of Appeal cannot be doubted — and that, even if the charge is to the satisfaction of the counsel at the trial. We must, therefore, examine the charge, and if it appears improper give the relief sought, if possible on the evidence.

3 In the present case, it cannot be said that the jury would not have been justified in finding the facts adversely to the defendant; and the charge becomes, perhaps, more important.

4 It is the case of a motor accident and so comes within the provisions of The Highway Traffic Act, R.S.O. 1937, c. 288, s. 48(1).

5 Examining the charge, I find nothing to find fault with. The learned judge near the beginning of his excellent charge points out the difference between his function and that of the jury, he being concerned with the law, they with the facts. Then, stating that the action was based upon alleged negligence, he carefully defines negligence. He then says:

> Now you have been told, as the fact is, that there is a very radical difference in this case from certain other cases involving motor accidents. The Legislature have deemed it wise to, what is called, shift the onus. Ordinarily when a plaintiff comes into court and claims damages, alleging a negligent act or acts on the part of the defendant, the plaintiff must prove, to your satisfaction, the negligence alleged on the part of the defendant. That is what is called 'the onus of proof.' Ordinarily the onus of proof is on the plaintiff, but in cases involving contact between a motor car and a pedestrian, and certain others, the Legislature has made special provision. S. 48(1) of The Highway Traffic Act reads as follows:

> 48. (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.

In this case, to put it frankly, the onus is upon the defendant Wilkinson to satisfy you that the injuries to the plaintiff were not caused by his negligence.

6 There was nothing in the charge that in any way modified this statement of what the law called upon the defendant to do, and question No. 1 put to the jury is beyond question — it reads and is answered:

7 ”1. Has the defendant Angus Wilkinson satisfied you that the loss or damage of the plaintiffs did not arise through negligence or improper conduct on his part? Answer Yes or No.” Answer: “Yes.”

8 Being unable to find fault with the charge, question or answer, I think that the appeal must be dismissed with costs.

***Gillanders J.A.*:**

9 Reluctant as I am to direct a new trial I think that must be the result. I agree with the reasons given and the disposition made by my brother Laidlaw.

***Laidlaw J.A.*:**

10 This is an appeal from a judgment of McFarland J., dated 9th June 1943, after a trial with a jury, at Toronto. On the findings made by the jury the learned trial judge dismissed the action with costs, and the appellants now ask for a new trial.

11 The appellants seek to recover damages for injuries sustained by the appellant Mary Shapiro, and for expenses incurred by her husband, the appellant Joseph Shapiro, as a result of an accident on or about 27th September 1942. It is alleged in the statement of claim that “The Plaintiff Mary Shapiro was proceeding across the highway known as Bloor Street West . . . from the north to the south side . . . and was at a point between the centre line of the said highway and the southerly curb when she was struck by the motor car owned and operated by the said Defendant, which said motor car was proceeding in an easterly direction on the said highway.” The defendant says in the statement of defence, *inter alia*, that there was no breach of duty on his part; that “such motor vehicle was being operated carefully, prudently, at a reasonable rate of speed and in accordance with all the laws pertaining to the operation of such motor vehicle upon a highway, and . . . that the Plaintiffs’ damages were caused solely by the negligence of the Plaintiff Mary Shapiro”.

12 The jury found that it was satisfied by the defendant that the loss or damage of the plaintiffs did not arise through negligence or improper conduct on his part.

13 The appellants argue that there was misdirection and nondirection by the learned trial judge to the jury. It is said that there was not proper or sufficient instruction to the jury as to the onus of proof resting on the defendant under s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288; that, in effect, the case was put to the jury “on the basis that the plaintiffs were

alleging negligence"; and other grounds of objection were urged which need not now be considered. S. 48(1) of The Highway Traffic Act reads as follows:

> 48. (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.

14 The learned judge said in his charge: "In this case, to put it frankly, the onus is upon the defendant Wilkinson to satisfy you that the injuries to the plaintiff were not caused by his negligence." No objection could possibly be made to that statement, but the learned judge continues at once: "I should also go on to say that when a defendant is called upon to prove that the damage was not caused by his negligence or improper conduct, he might prove it by showing that it was caused, in whole or in part by the negligence of the plaintiff. And that is the allegation set up here." The defendant cannot discharge the onus upon him under s. 48(1) of The Highway Traffic Act by showing that the plaintiffs' loss or damage was caused in part by the negligence of the plaintiff. That can only be done by the defendant showing that there was no negligence or misconduct on his part. If the loss or damage sustained by the plaintiffs arose in part by the negligence of the plaintiff Mary Shapiro, and in part by the negligence of the defendant, the jury must find that the defendant has not satisfied the onus of proof as provided in the statute, and answer the appropriate question in the negative.

15 In my opinion the learned trial judge was in error in the instruction he gave to the jury, as quoted. The error is one going to the very basis of their proper understanding of the burden of proof cast by law on the defendant. I think that after such a statement, and in the absence of explicit correction of the error, a jury could not properly and justly answer the question as to whether the defendant had satisfied the onus of proof. An answer following that incorrect instruction cannot be permitted to form the basis of a judgment of the Court.

16 Counsel for the appellants argues that the learned trial judge put the case to the jury as if the plaintiffs were alleging negligence on the part of the defendant. I quote from the charge the portion to which objection is particularly made:

> I am now going to comment, not at any great length, on some phases of the evidence. As to the facts of the accident, I think you are very well aware. I may perhaps say something about that later, but as I see it, the negligence of the defendant, alleged by the plaintiff, was, first of all, not keeping a proper lookout. And that is the main one. Secondly, she says that the lights on the car were dim; although I am bound to say that that evidence was offered by nobody else; on the contrary, the policeman said that the lights were burning brightly. Thirdly, the question of speed: whether he was travelling at a speed which, under the circumstances, was a reasonable speed, having in mind the condition of the pavement, the heavy rain, the alleged inadequate lighting on the street, and all the circumstances in connection with the unfortunate accident. And the question you must answer in considering that is: what did he fail to do that a prudent man would have done, or what did he do that a prudent man would not have done?
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> Happily there is no question arising as to his physical condition at the time, nor, apparently, as to the fact that the car was properly equipped with lights, brakes, and so on; because tests were carried out immediately after the accident by the police and the car was found to be satisfactory in every respect. The evidence showed that the windshield wiper was working satisfactorily on each side of his windshield, and that both windows in the doors of the car were wide open. . . .
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> I think you have heard enough to enable you to come to a decision as to whose negligence caused the accident, or whether both were negligent.

17 The plaintiffs did not make any allegations of negligence in the statement of claim. It may be that counsel for the plaintiffs, in his address to the jury, urged that certain acts or omissions constituted negligence of the defendant, and that, in consequence, the jury should answer the question relating to the onus of proof in the negative. Be that as it may, the jurymen

need not confine their deliberations within the scope of particular allegations. The conduct of the defendant in each case must be considered by the jurymen from the standpoint of all acts done by him, or omitted to be done by him, under the particular circumstances. There must be no negligence or misconduct on his part. He does not discharge the statutory onus by showing that he was not guilty of negligence or misconduct in certain particulars. The duty of the jurymen is not to examine detailed items of negligence, but to enquire into the whole conduct of the defendant.

18 I have read and re-read the charge to the jury, a number of times, and tried to put myself in the position of a juryman. In that position I am left with a definite impression and understanding from the charge that I am to examine the conduct of the defendant in certain particulars only. It is not made clear that a juryman may consider acts or omissions of the defendant not suggested by counsel or the learned judge. Moreover, after considering the whole conduct of the defendant, a juryman might be unable to find any specific act or omission constituting negligence or misconduct of the defendant, but, nevertheless, not be satisfied that the loss or damage sustained by the plaintiffs did not arise by reason of negligence or misconduct on his part. In that event a juryman must answer the question relating to onus in the negative, and the jury should be so instructed: *Newell et al. v. Acme Farmers Dairy Ltd.*, [1939] O.R. 36, [1939] 1 D.L.R. 51; *Bronson v. Evans and Evans*, [1943] O.R. 248 at 277, [1943] 2 D.L.R. 371.

19 After objection made by counsel on behalf of the plaintiff, the learned judge charged the jury, "I have been asked to make it quite clear to you again that the onus rests squarely on the defendant to prove to your satisfaction that there was no negligence on his part. That onus rests upon him. Any verdict brought in by you must be based upon whether or not the defendant has sustained that onus." But the errors, as discussed, in the charge were not, in my opinion, adequately corrected by this further instruction.

20 It is further argued that the learned trial judge improperly omitted to charge the jury in the following matters, *viz.*: that the onus of proof under s. 48(1) continues to be on the defendant to the very end of the case, and is not a shifting onus; and that each juryman may have a different reason for his answer to the question as to whether or not the defendant has satisfied the onus resting on him.

21 There can be no doubt as to the nature of the statutory onus created by s. 48(1) of The Highway Traffic Act. Lord Wright in *Winnipeg Electric Company v. Geel*, [1932] A.C. 690 at 695, [1932] 4 D.L.R. 51, 40 C.R.C. 1, [1932] 3 W.W.R. 49, quoted by Kellock J.A. in *Bronson v. Evans and Evans*, [1943] O.R. 248 at 275, [1943] 2 D.L.R. 371, says: —

> But the onus which the section places on the defendant is not in law a shifting or transitory onus: it cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence, however credible, is not sufficient reasonably to satisfy the jury that he was not negligent: the burden remains on the defendant until the very end of the case, when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If, on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment; if, however, the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. A fortiori the defendant will be held liable if the evidence actually establishes his negligence.

22 Also it is plain that it is not necessary for ten jurymen to agree on their reasons for an answer to the question relating to the statutory onus. On the contrary, each juryman may have a different ground for his answer: *Newell et al. v. Acme Farmers Dairy Ltd., supra*.

23 It is desirable that the principles stated in the above quoted cases should be explained to the jury by the learned judge presiding at trial in such a case as this.

24 It is unnecessary, however, in this particular case to determine whether or not this ground of appeal is well founded. For the reasons given, it is my view that the appeal must be allowed, with costs, and a new trial had between the parties. The costs of the former trial and of the new trial should be in the discretion of the judge presiding at the new trial.

Appeal allowed and new trial ordered, Riddell J.A. dissenting.

Solicitors of record:
Solicitor for the plaintiffs, appellants: *J. M. Fedman*, Toronto.
Solicitors for the defendant, respondent: *Haines & Haines*, Toronto.