THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ALEXANDER MULVANEY AND MARY MULVANEY (PLAINTIFFS) } RESPONDENTS.

1906
*Nov. 23.
1907
*Feb. 19.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Street railway—Excessive speed—Gong not sounded—Contributory negligence—Damages.

A passenger on a street car in Toronto going west alighted on the side farthest from the other track and passed in front of the car to cross to the opposite side of the street. The space between the two tracks was very narrow and seeing a car coming from the west as she was about to step on the track, she recoiled, and at the same time the car she had left started and she was crushed between two, receiving injuries from which she died. In an action by her father and mother for damages the jury found that the company was negligent in running the east bound car at excessive speed and starting the west bound car and not sounding the gong in proper time. They found also that deceased was negligent, but that the company could, nevertheless, have avoided the accident by the exercise of reasonable care.

Held, that the case having been submitted to the jury with a charge not objected to by the defendants and the evidence justifying the findings the verdict for the plaintiffs should not be disturbed.

The plaintiffs should not have had the funeral and other expenses incurred by the father of deceased allowed as damages in the action.

APPEAL from a decision of the Court of Appeal for Ontario maintaining the verdict at the trial in favour of the plaintiffs.

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*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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The Court of Appeal in delivering judgment stated the facts as follows:

The action was brought by the plaintiffs, the father and mother of Lillian Mulvaney, to recover damages for the death of their daughter, caused by the alleged negligence of the defendants in operating their street railway.

The facts are, that on the 23rd March, 1905, at about 8 o'clock in the evening, the deceased, Lillian Mulvaney, aged twenty years, was a passenger on a west bound car, and alighted from it at the corner of Queen and Soho streets, intending to go south across Queen street. She, after alighting, crossed in front of the car which she had left, and while upon or near the south track was struck by an east bound car and so injured that she shortly thereafter died. She was seen by the motorman in charge of the west bound car to pass in front of his car, but she was not apparently seen by the motorman of the east bound car until he was within about 12 feet away. After the deceased had passed in front of the car which she had left it was moved forward a short distance. The east bound car was then coming at a rapid rate estimated by some of the witnesses up to as high as twenty miles an hour. When upon the devil strip, as it is called, that is the strip between the two tracks, or possibly when she had actually stepped upon the south track, some one shouted and this apparently directed her attention to the rapidly approaching east bound car, with the result that she attempted to retrace her steps, but her retreat had then been cut off by the forward movement of the west bound car.

On the trial questions were submitted to the jury which, with their answers, were as follows:

1. Were the injuries which resulted in the death of Lillian Mulvaney caused by any negligence of the defendants?

Answer—Yes.

2. If so, wherein did such negligence consist?

Answer—The excessive rate of speed of the eastbound car, and the moving of the westbound car and the gong not sounding in the proper time.

3. Or, were such injuries caused by the negligence of the said Lillian Mulvaney?

Answer—No.

4. Was the said Lillian Mulvaney guilty of contributory negligence?

Answer—Yes.

5. If you find that she was guilty of contributory negligence, nevertheless could the defendants by the exercise of reasonable care have avoided the accident?

Answer—Yes.

6. If the plaintiffs are held to be entitled to succeed, at what sum do you assess the damages?

Answer—$2,000.

First—To Alexander Mulvaney, $500.

Second—To Mary Mulvaney, $1,500.

The trial judge directed a verdict to be entered for plaintiff with the damages assessed by the jury. An appeal to the Court of Appeal was dismissed.

Nesbitt K.C. for the appellants. The negligence immediately causing the accident was that of the plaintiff, and the fifth question should not have been left the jury. *Butterfield* v. *Forrester*(1); *Davies* v. *Mann*(2); *Halifax Street Railway Co.* v. *Inglis*(3).

The damages were excessive considering the relation of the deceased towards support of the family. Certainly the funeral expenses should not have been allowed. *Clark* v. *London General Omnibus Co.*(4).

(1) 11 East 60.
(2) 10 M. & W. 546.
(3) 30 Can. S.C.R. 256, 261.
(4) 22 Times L.R. 691, reversing 21 Times L.R. 505.

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N. Ferrar Davidson for the respondents. The findings of the jury should not be disturbed, especially when approved by the Court of Appeal. *George Matthews Co.* v. *Bouchard*(1); *Grand Trunk Railway Co.* v. *Rainville*(2); *Price* v. *Ordway*(3).

The gong was not sounded on the east bound car nor the speed slackened both of which were required by the rules. See *Grand Trunk Railway Co.* v. *Hainer* (4); *Sims* v. *Grand Trunk Railway Co.*(5).

The damages assessed were reasonable and proper. *St. Lawrence & Ottawa Railway Co.* v. *Lett*(6); *Lambkin* v. *South Eastern Railway Co.*(7); *Johnston* v. *Great Western Railway Co.*(8).

The judgment of the court was delivered by

MACLENNAN J.—Action for damages for the death of their unmarried daughter, by the father and mother of Lillian Mulvaney, about twenty years of age, who was injured so that she died within a week afterwards, by the appellants' cars at a street crossing in the City of Toronto. Verdict of the jury of $500 for the father and $1,500 for the mother. Judgment affirmed by the Court of Appeal, and now appealed to this court.

The deceased was a passenger on a car of the defendants going west upon Queen street, intending to alight, and to go south upon Peter street, which intersects Queen street on its south side. The time was about eight o'clock in the evening of the 23rd of

(1) 28 Can. S.C.R. 580.
(2) 29 Can. S.C.R. 201.
(3) 34 Can. S.C.R. 145.
(4) 36 Can. S.C.R. 180.
(5) 10 Ont. L.R. 330.
(6) 11 Ont. App. R. 1; 11 Can. S.C.R. 422.
(7) 5 App. Cas. 352.
(8) [1904] 2 K.B. 250.

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March. The line on Queen street is double tracked, the space between tracks being very narrow, little more than sufficient to allow meeting cars to pass each other with safety. The west bound car on which the deceased was riding ran upon the north track so that she required to cross the south track to go to Peter street. The company's practice is to stop at the near side of crossings, and passengers may alight either at the front or rear, but on the right or outer side of the car. The car in question stopped at the near side of Peter street; and the deceased alighted at the front of the car, and proceeded to cross in front of the car towards Peter street. At this moment another car was coming from the west on the south track, by which the deceased was struck and received the injury from which she died. The east bound tram passed at a high speed, and was not stopped until it had proceeded a number of car lengths eastward. The injuries to the deceased were about the head and feet, and she was found lying at the rear of the west bound car with one foot pinned under a wheel. There was evidence that when the deceased was about to step from the south track she recoiled and drew back seeing the east bound car approaching, and at that moment the west bound car started forward, the result being that she was crushed between the two.

After a very full and careful charge by the learned Chief Justice, questions were submitted to the jury, which, with their answers are as follows:

1. Were the injuries which resulted in the death of Lillian Mulvaney caused by any negligence of the defendants?

Answer—Yes.

2. If so, wherein did such negligence consist?

Answer—The excessive rate of speed of the eastbound car, and

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the moving of the westbound car and the gong not sounding in the proper time.

3. Or, were such injuries caused by the negligence of the said Lillian Mulvaney?

Answer—No.

4. Was the said Lillian Mulvaney guilty of contributory negligence?

Answer—Yes.

5. If you find that she was guilty of contributory negligence, nevertheless could the defendants by the exercise of reasonable care have avoided the accident?

Answer—Yes.

6. If the plaintiffs are held to be entitled to succeed, at what sum do you assess the damages?

Answer—$2,000.

First—To Alexander Mulvaney, $500.

Second—To Mary Mulvaney, $1,500.

In submitting the questions the learned Chief Justice carefully explained to the jury the meaning of contributory negligence, and used the following language:

The question for you to consider is: Was it after all the negligence of the Street Railway Company, or was it her own negligence in going around the front of that car to cross when she ought to be, you would thing probably, and probably was, looking right west? No doubt she would be looking southerly also crossing the tracks, but one would think that she would be looking westward. However, it is for you to say. Then there is the minor degree of negligence, not exactly negligence causing the accident, but negligence which contributes to the accident which the law says disentitles people to recover. Our technical name for that is contributory negligence and it is not so high a degree of negligence as the negligence which I have just spoken of, but it is negligence which contributes to the accident in the sense that it is the proximate and immediate cause of the accident, even if somebody else may be at fault and commit a breach of duty. The defence argues that at any rate even if she was not guilty of negligence that caused the accident, she was guilty of negligence which contributed to the accident in the sense which I have mentioned, and that is the question which I am putting to you here. It goes on round in a circle again, and the law says that even though a person was guilty of contributory negligence, yet if the person or corporation which was guilty

of the original negligence could have prevented the accident the person is still entitled to recover. What is meant is this: We will assume there is a primary negligence on the part of the street railway, then you find there was such primary negligence. Then we will suppose, just for the sake of argument, that you find she was guilty of contributory negligence, that is to say, that she contributed to her own accident to such an extent that her negligence was the immediate cause of the accident, although the railway company was negligent. Then the question arises: Is there anything more that the railway could have done, notwithstanding her negligence, is there any secondary negligence which caused the accident, even though she was negligent? It is not very easy to make it clear. It is one of these legal matters that are a little involved, but I have endeavoured to make it as clear as it can be. What secondary negligence is there here? Nothing exactly of a definite nature, but the argument is that the car was not under proper control, and if it had been even when she was going into the danger, that it might have been averted; so that with reference to that fifth question if you find she was guilty of contributory negligence, nevertheless could the defendant, by the exercise of reasonable care, have avoided the accident?—The argument for the plaintiff still is that the two causes again came in there to make a secondary kind of negligence, namely, the alleged excessive rate of speed, and the moving of the westbound car, if those things existed.

No objection was taken to this charge by counsel for the defendants, except that after the jury's answers to the questions were received, Mr. Bain submitted that on those findings the judgment should be entered for the defendants, and that the contributory negligence of the deceased was such as to disentitle the plaintiffs to succeed.

That was the main ground of the argument before us. It was strongly pressed that the final and ultimate negligence which caused the accident was that of the deceased and that the fifth question was improper and tended to confuse the jury. We do not think there is anything in this objection having regard to the evidence and the careful explanation of the nature of contributory negligence which the learned Chief Justice had made in his charge. It is plain also that the jury

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must have been led by the evidence to believe that but for the starting of the west bound car, when the deceased was, in the full view of the motorman of the car, in a place of great danger, having regard to the rapidly approaching car from the west, also in full view, the deceased would not have been hurt, notwithstanding her negligence.

The verdict, therefore, cannot be disturbed by reason of any objection to the manner in which it was presented to the jury.

It was also objected that the damages were excessive. But although they are large, I do not think them so excessive as to warrant us in setting the verdict aside.

It was, however, contended by counsel for the defendants, both in their factum and on the argument before us, that the damages allowed to the father ought to be reduced by a sum of $193, being the amount of the funeral and other expenses incurred by the father as a consequence of his daughter's death.

When evidence of these expenses was offered at the trial it was distinctly objected to by the defendants' counsel. Plaintiffs' counsel, however, supported his contention by the authority of a recent decision of *Clark* v. *The London General Omnibus Co.*(1), and to this authority the learned Chief Justice yielded and received the evidence.

In his address to the jury the learned Chief Justice told them that this part of the claim amounting to $193 was part of the damages, and belonged to the father and added:

> Then whatever small sum you like to add to that for him will be what you would give the father.

(1) 21 Times L.R. 505.

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I think we ought to agree with defendants' counsel that this sum of $193 must have been included by the jury in the $500 allowed by them as the father's damages. That this was improper, and that the charge of the learned judge was wrong is now not disputed inasmuch as the decision followed by the learned judge at the trial has since been reversed by the Court of Appeal(1), and it has been decided that such expenses cannot be recovered in such an action.

If the point had been taken in the Court of Appeal, doubtless effect would have been given to it either by directing a new trial, or by deducting the sum of $193 from the sum allowed by the jury to the father. The objection not having been taken in the Court of Appeal, I think we cannot give effect to it.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondents: *Henderson & Davidson.*

(1) 75 L.J. K.B. 907; 22 Times L.R. 691; [1906] 2 K.B. 648.