1914

*June 10.
*June 19.

MARY LONG (PLAINTIFF) ..... APPELLANT;

AND

THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Negligence — Electric railway — Duty of motorman — Contributory negligence—Reasonable care.

L. started to cross a street traversed by an electric railway and proceeded in a north-westerly direction with his head down and apparently unconscious of his surroundings. A car was coming from the east and the motorman saw him when he left the curb at a distance of about fifty yards. Twenty yards further on he threw off the power and when L., still abstracted, crossed the devil strip and stepped on the track reversed being then about ten feet from him. The fender struck him before he crossed and he received injuries causing his death. On the trial of an action by his widow the jury found that the motorman was negligent in not having his car under proper control, that L. was negligent in not looking out for the car, but that the motorman could, notwithstanding, have avoided the accident by the exercise of reasonable care. A majority of them found, also, that L.'s negligence did not continue up to the moment of impact.

Held, Davies and Anglin JJ. dissenting, that the jury were entitled to find as they did; that when the motorman first saw L. he should have realized that he might attempt to cross the track and it was his duty, then, to have the car under control; and that his failure to do so was the direct and proximate cause of the accident for which the railway company was liable.

Held, per Davies J.—The motorman was not guilty of negligence prior to the negligence of L. which consisted in stepping on the track when the car was near and it was then too late to prevent the accident.

Held, per Anglin J.—The findings of the jury, especially the finding that L.'s "negligence was not a continuing act up to the moment

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

of the accident," were not satisfactory and there should be a new trial.

(Leave to appeal to the Privy Council was refused, 4th Aug., 1914.)

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario setting aside the verdict for the plaintiff at the trial and dismissing his action.

The facts of the case are stated in the above headnote.

Raney K.C., for the appellant. The jury could and did find that though the plaintiff was negligent the motorman could, by exercising reasonable care, have prevented the accident. This being so the plaintiff is entitled to the verdict. Pollock on Torts (9 ed.), pages 471 *et seq.* *Radley* v. *London & North Western Railway Co.*(1), at page 759; *The Bernina*(2).

Dewart K.C. for the respondents. On the evidence given the case should not have gone to the jury. See *Davey* v. *London & South Western Railway Co.*(3); *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (4); *Grand Trunk Railway Co.* v. *McAlpine*(5).

We also rely on *Jones* v. *Toronto & York Radial Railway Co.*(6); *Brenner* v. *Toronto Railway Co.*(7), at page 556.

THE CHIEF JUSTICE.—In view of the admitted negligence of the deceased, the question to be decided is: Could the motorman have prevented the accident by the exercise of ordinary prudence?

(1) 1 App. Cas. 754.
(2) 13 App. Cas. 1.
(3) 12 Q.B.D. 70.
(4) 3 App. Cas. 1155.
(5) [1913] A.C. 838.
(6) 23 Ont. L.R. 331; 25 Ont. L.R. 158.
(7) 40 Can S.C.R. 540.

1914

LONG
v.
TORONTO
RWAY. CO.

The Chief Justice.

The jury found in answer to questions 4, 5 and 6 that the plaintiff's husband was negligent in not looking for the car, but that notwithstanding such negligence, the accident might have been prevented if the car had been under proper control and the brakes had been put on. Those answers would have been more helpful if the jury had fixed the period of time at which this precaution with respect to the brakes should have been taken. But to appreciate their full significance, the answers must be considered in the light of the evidence. For instance, the motorman says that he had the deceased in view from the time the latter left the sidewalk up to the very moment of the accident, and that

he kept straight on crossing the street with his head down in the direction of the car absolutely absorbed, not thinking of what he was doing,

and this, notwithstanding the insistent ringing of the gong. The motorman also admits *that he realized almost immediately when he first saw the deceased* that there might be trouble, and notwithstanding, at a distance of thirty yards from the point of the accident, the car was moving at the rate of ten miles an hour. The motorman adds that

he realized the deceased was not going to stop in his attempt to cross the track when he was only ten feet from him,

and he then reversed his power and applied the brakes. In these circumstances, the unfortunate man is run down and the jury find that the car was not under proper control at the time of the accident and that the brakes should have been applied sooner.

It would be difficult to reach any other conclusion unless the jury were prepared to say that the motor-

man who admits he was fully aware of the possibility of trouble at a time when, by the exercise of reasonable care, he might have avoided the accident, was entitled to run the pedestrian down because the latter was negligently unconscious of the coming of the car.

The general effect of the answers to the first six questions is: Assuming that the negligence of the deceased began apparently when he left the sidewalk and continued until the moment of the accident; the motorman who says he anticipated danger from the moment he first saw the deceased coming towards the tracks was under a duty to be on the alert, and he should, in the circumstances have expected that the deceased would attempt to cross the track — which was indeed the only danger to be anticipated — and have been prepared for that emergency. The jury find that he failed in that duty. His negligence was, therefore, the immediate cause of the accident.

The answer to question seven, which was put by the judge of his own motion, has a tendency to create some confusion. That question and the answer thereto are as follows:—

> 7. Could the motorman and the deceased each of them up to the moment of the collision have prevented the accident by the use of reasonable care — in other words, was the negligence of deceased a contributing act up to the very moment of the accident?
>
> Answer.—10 say "No," and 2 say "Yes."

In his charge to the jury, the effect of that question is thus explained by the trial judge:—

> Now, the seventh question is a very peculiar one. Could the motorman and the deceased each of them up to the moment of the collision have prevented the accident by the use of reasonable care — in other words, was the negligence of the deceased a contributory act up to the very moment of the accident? I do not think I can make it any clearer than I have made it there. Did the unfortunate deceased's act contribute up to the moment of the accident? Well,

1914

LONG v. TORONTO RWAY. CO.

The Chief Justice.

in a sense, it did, physically, because he went right on, but that is not what is meant by this question. The question is: *Did he become aware that the car was approaching and was he able to avoid the danger?* That is the sense in which that question is put. We do not know anything about his condition of mind at all. Apparently there is a question of whether he was under the influence of liquor or not. The policeman says he was a short time before. The man who was with him says he was not. I do not think it makes a great deal of difference in any event, it is just what his state of mind was, which you are the judges of, from the best information that can be placed before you.

Although not completely satisfactory, I am disposed to think that the effect of the answer is that, at the moment of impact, the deceased was unconscious of the near approach of the car, and that the motorman who had the last opportunity to avoid the accident, failed in his duty.

The general effect of the verdict when read with the evidence and the charge of the trial judge is, therefore, that, notwithstanding the negligence of the deceased the motorman might have avoided the accident by the exercise of ordinary prudence and, in that view, the appeal should be allowed with costs here and below. *Tuff* v. *Warman*(1); *Radley* v. *London and Northwestern Railway Co.*(2).

DAVIES J. (dissenting).—I think the judgment of the Court of Appeal was correct and that this appeal should be dismissed.

In my opinion the evidence and the findings of the jury upon it are conclusive that not the negligence of the company, but the reckless negligence of the deceased caused his death.

In answer to the questions put to them the jury found, first, that the death of the plaintiff's husband

(1) 5 C.B.N.S. 573.

(2) 1 App. Cas. 754.

was not caused by any negligence on the part of the respondent company *prior to the negligence of the deceased;* secondly, that the negligence of the plaintiff's husband (deceased) which caused or contributed to the accident, was such that without it the accident would not have happened; and thirdly, that such negligence consisted "in not looking for the car."

The last answer necessarily refers to the moment when the deceased stepped on to the car track in front of the car.

These three findings of the jury negativing negligence on the company's part prior to the negligence found on the deceased's part which caused or contributed to his death, seem to me to settle the question that up to the moment when the motorman ought reasonably to have apprehended that the deceased was going to step on to the track in front of the car, there was no negligence on the company's part.

In this connection I may say that it was proved to be the daily practice for people to cross the street from the sidewalks out to the car tracks and there await the passing of the car. The street was double tracked. People were, of course, within their rights in so acting and this practice did not ordinarily call for any special precaution on the part of the motorman of the cars. Special conditions and circumstances no doubt would call for special precautions, such for instance as a man evidently running so as to cross the tracks, or a drunken man incapable of taking full care of himself and looking as if he intended to cross the tracks, or a child apparently so small and young as to be incapable of appreciating danger. In this case it was contended that the deceased was crossing the street slowly with his head bent down and not looking

1914

LONG
v.
TORONTO
RWAY. CO.

Davies J.

for the car, and that this condition threw an additional onus upon the motorman as to the degree of care he was to take, especially as he admitted throwing off the power and so reducing the speed when he saw the deceased approaching the car tracks. But there was nothing to indicate any intention on the part of the man to cross the tracks in front of the car and the throwing off of the power was at the most only a commendable and prudent precaution.

Reliance, however, was placed upon the findings of the jury in answer to questions 5 and 6, that notwithstanding the deceased's negligence in stepping on the track without looking for the car, the defendants could by the exercise of reasonable care have averted the collision

by putting on the brakes and having the car under proper control.

These findings of negligence, properly construed, seem to me without any evidence whatever to support them. They cannot be construed as imputing negligence to the defendants prior to that of the deceased because the jury's answer to question one emphatically negatived any such negligence. They can only mean that after the motorman ought to have apprehended danger from the deceased stepping on the track he should have put on the brakes. But it was not until the man was in the act of stepping from the south track on to the devil strip and the north track, that the motorman should have apprehended any such action, and any attempt to stop or control the car's speed at that moment by putting on the brakes would have been perfectly useless. The motorman's evidence is to the effect that the deceased was about ten feet in front of the car when he first apprehended that de-

ceased intended crossing the track and *that he immediately reversed.* If he was right, or approximately right, in this no doubt can exist that the action he took in reversing was the only possible effective action he could have taken. Putting on the brakes at that moment would have been absolutely useless.

Appellant's counsel contended that at the inquest the motorman had stated that when he reversed the car was a car length or a car length and a half from the deceased and that the jury had a right to believe the statement alleged to have been made at the inquest as to the distance. But Stevens, the motorman, when questioned at the trial respecting this alleged statement read to him from the reporter's notes of the evidence, swore that the report was a mistake and that he never did say that. No attempt was made to contradict him or to prove that he had said so.

No witness suggests even that the deceased was a car length or a car length and a half in front of the car when he stepped on the track. If he had been he would certainly, in view of the speed at which the car was moving at the time, have got safely across. Charles Allen, who saw the accident, says:—

> I seen the gentleman just as he stepped on to the car tracks, just as he seemed to put his foot on to the car track, the north track.

And being asked what then happened, he said:—

> I seen the gentleman seemed to throw out his hands as though he had realized his danger on the instant and the round part of the fender on the north side seemed to catch him.

Beyond the cross-examination of the motorman as to his statement at the inquest, our attention was not called to any evidence of any kind as justifying the contention that the deceased was further away from the car when the motorman reversed than he said he

1914

LONG
v.
TORONTO
RWAY. CO.

Davies J.

was. The width of the car tracks, the speed of the car, and the distance the car ran after the accident, coupled with the evidence I have quoted above, compel the conclusion that the motorman's statement of the distance the deceased was from the car when he first apprehended he was stepping on to the track was approximately correct. I do not see any ground or justification for any inference to the contrary.

I, therefore, conclude that there was no evidence whatever to support the jury's answer to question 6 if the meaning and effect of that answer is that the accident could have been averted after the motorman ought reasonably to have apprehended that the deceased man contemplated stepping on the track in front of the car.

I think the motorman took the only possible effective means of averting the accident by reversing when he did and that to have applied the brakes instead would have been necessarily ineffective and useless.

I confess myself unable to understand the real meaning of the seventh question even when read in light of the charge of the trial judge. It seems to me clear that considering the distance between the deceased and the car at the time he stepped on the track his negligence in so stepping without looking for the car must be held to be contributory negligence and is so found by the jury. Nothing that then or afterwards could be done by the motorman could have averted the accident. The deceased might possibly have stepped back and so averted it, but that the negligence of the deceased in stepping on the track in front of the car without looking, and attempting to cross, as found by the jury, was a continuing contributory act

up to the moment of the accident, I have not heard anything to cause me to doubt.

It is important to observe that there is no finding that the motorman did not sound his gong, as he swears he did, or that he did not reverse as soon as he should have done. The finding that he should have applied the brakes and had the car under better control can only mean, read in the light of their previous findings, that the motorman should have applied the brakes instead of reversing when he did. But there is not a scintilla of evidence to warrant that finding. Indeed, the evidence shews that reversing was then the only possible available means of averting the accident under the circumstances proved.

The contributory negligence of the deceased being a direct and effective cause of the accident is a complete answer to the action, unless there was something done or omitted afterwards by the motorman which he ought not to have done or omitted which could have prevented the accident.

The jury do not say that the motorman did not reverse as soon as he ought reasonably to have apprehended that the deceased intended to step on the track. If, instead of reversing when he did, he had then applied the brakes he might well have been found guilty of negligence.

Then with reference to the throwing off of the power and so reducing the speed of the car at about 35 or 40 yards before reaching the place of the accident which the motorman swears he did as a matter of precaution, the jury do not find that there was any negligence with regard to that.

My own judgment is that the jury intended their answer as to want of reasonable care in not putting on

1914

LONG v. TORONTO RWAY. CO.

Davies J.

the brakes, to apply to a period anterior to the negligence of deceased in stepping on the car track, because it seems absurd to apply it to a time coincident with or subsequent to the deceased's negligence, when it must have been ineffective in preventing the accident. The plan adopted of reversing was much more effective then and was apparently the only possible thing to have done. But if that is what the jury meant, as I think it was, then it is not only in direct conflict with their first finding that the defendant company was not guilty of any negligence prior to the negligence of the deceased, but it could not, in my judgment, have any effect given to it in this action where subsequent contributory negligence constituting a direct and effective cause of the accident is found. If, on the contrary, it meant, what the question and answer read together seem reasonably to imply, that "notwithstanding the negligence of the deceased" the company were guilty of negligence in not afterwards applying the brakes, then I think the finding is utterly without evidence or warrant to support it and that what was done after deceased's negligence, namely, "reversing," was the only possible effective thing that could be done.

The answers of the jury, therefore, to questions 5 and 6, whether held applicable to a time anterior to the contributory negligence of the deceased man or subsequent to it, cannot affect the result. There is no evidence whatever to justify a finding that the brakes should have been applied after the contributory negligence of the deceased occurred or that such action could possibly at that time have averted the accident. If, on the other hand, the finding applies to the time anterior to the contributory negligence of the deceased

which was a direct and effective cause of the accident, it cannot entitle the plaintiff to succeed.

That has been the principle on which this court has for years acted and it is one sanctioned and approved by the highest authorities in England.

The London Street Railway Co. v. *Brown*(1); *Brenner* v. *Toronto Railway Co.*(2); *Spaight* v. *Tedcastle*(3), at page 226; *The Bernina*(4), and specially pages 88 and 89.

IDINGTON J.—I accept the law as being correctly laid down in Pollock on Torts, 9th ed., page 473, as follows:—

> If the defendant could finally have avoided the mischief by ordinary diligence, it matters not how careless the plaintiff may have been at the last or any preceding stage.

The deceased according to evidence the jury were entitled to accept was crossing from the southerly to the northerly side of Queen street, in an oblique line tending westerly when respondent's car, running from the east to the west, struck and killed him.

The line thus taken by deceased tended to prevent him, when evidently from some cause or other in an unobservant mood, from as readily seeing the coming car as he otherwise might have done.

The motorman says he saw him from the time he stepped off the sidewalk to pursue the path he took, and kept him in his eye till he was struck.

The story is a striking one and, to comprehend clearly and accurately the issue now presented for our solution, better be given in the language of the man

(1) 31 Can. S.C.R. 642.
(2) 40 Can. S.C.R. 540.
(3) 6 App. Cas. 217.
(4) 12 P.D. 58.

1914

LONG v. TORONTO RWAY. CO.

Idington J.

who ought to know the facts. The same man had been examined before the coroner, who had held an inquest. The stenographer's report of his examination at the inquest was referred to at the trial hereof and material parts of it read to him and his assent, or dissent, as the case might be, got. This is to be borne in mind in estimating both the value of the witness's evidence and his integrity. The following are extracts from the stenographic record at the trial.

Mr. Raney: Q. This is what you said at the inquest, Mr. Stephen, page 13, the question was: "Tell us how the accident happened as you saw it," and your answer was, "Well, as I was going west on Queen street between John and Peter streets or Soho street, I seen a man leave the sidewalk with the intention of crossing the track. I guess I was about 50 yards from him when I see him first, well, I started ringing my gong and he was going with his head down, looking downwards. He never paid any attention and I throwed off my power and kept ringing my gong, but he did not seem to take any notice at all. So when I seen that there was danger I reversed my car, but it did not stop quick enough to save hitting him and he was struck with the north-west corner of the fender"—

* * * * * * *

Q. Was that a truthful answer, Mr. Stephens ? A. Yes.

* * * * * * *

Q. You said your speed on this night when you came up from John to Peter was about fifteen miles an hour — I suppose that is more or less of a guess, is it ? A. Yes, just about the ordinary.

* * * * * * *

Mr. Raney: Q. And you threw your power off, and when did you begin to ring your gong. A. Just when I threw my power off.

Q. Just when you threw your power off — and did you throw your power off as soon as you saw the man stepping off the sidewalk with his head down ? A. I just threw my power off after I seen him coming towards the track.

* * * * * * *

Q. How long after ? A. Just as soon as he got off.

Q. At the inquest you were asked, "when did you change your speed"— how far did you go when you changed your speed ? A. I threw my power off — when I started ringing my gong.

Q. When did you start ringing your gong ? A. When I saw him approaching the track.

Q. How far were you from him then ? A. "I was about, when I

seen him approaching the track I was about fifty yards"— is that right ? A. When I seen him first I was about fifty yards.

Q. Would you say it was as near ? A. I was about fifty yards when I seen him first.

Q. It was then you threw your power off? A. Well, I was getting closer all the time.

Q. We will read what you say ? "You did not throw off your power then did you ? Did you throw your power off fifty yards from him ? A. Well, as soon as I seen he was going to approach the track I threw off my power. Q. And then you were fifty yards away ? A. Of course, I was getting closer, you know, I would be about thirty at that time. Q. And he seemed still to keep on walking in a north-westerly direction," and you say, "Yes," of course it must be north-westerly according to your evidence. Now was there anything to obstruct your view of the man ? A. No.

Q. You had a clear view of him all the time ? A. Yes.

Q. From the moment he left the sidewalk until you hit him ? A. Yes.

Q. And during that time you had him always in sight ? A. Yes.

* * * * * * *

Q. And did he ever give the least sign of apprehending the approach of your car — did he ever give the least sign that he knew that your car was approaching him ? A. No, I do not think he did.

* * * * * * *

Q. If any car passed would it pass east before ? A. Before I saw him ?

Q. Before you got him in line ? A. Yes.

Q. No traffic at all in the street ? A. No.

Q. Then you were asked again — these are the Crown's questions to you — page 15, two-thirds of the way down — "How far were you from him when you started gonging ? Were you the full fifty yards away ?" And you said, "Yes," "And you kept gonging him until you got to Soho street ?" and your answer was "Yes, gonging him all the time." "Q. Did he give any sign of having heard you ?" and your answer was, "No, he never heard at all, kept going ahead with his head down." These answers are true ? A. Well, yes.

* * * * * * *

Q. Now how far were you away from him when you reversed ? A. Ten feet.

Q. Ten feet ? A. I reversed as soon as I seen he was in danger.

Q. How long is your car ? A. About thirty feet.

Q. About thirty feet long ? A. Yes.

Q. Now I see on page 17 of your evidence at the inquest you were asked, "How far away were you from him when you reversed ?" and you answered, "About a car length." A. That is a mistake, I never did say that.

1914

LONG
v.
TORONTO
RWAY. CO.

Idington J.

Q. Then at page 21 you were asked that question, "How far" — I had better read the question before to get the context. "Q. Then what did you do ? A. Well, as soon as I seen he was in danger, as soon as I seen he was stepping on to my track I reversed. Q. How far were you from him then ? A. About a car length and a half." A. That is a mistake.

Q. That is a worse mistake ? A. I never said that.

Q. That is a worse mistake than the former one ? A. Yes.

Q. Now you say that you were within ten feet of him when you reversed ? A. Yes, that is where I was.

Q. Then how far did the car go after you hit him ? A. Pretty near half a car length.

* * * * * * *

Mr. Raney: Line 10. Q. "You were about one hundred and fifty feet back east of him when you first saw him ? A. Yes. Q. And he left the south side of Queen street with his head down in this way, absolutely absorbed, not thinking what he was doing? A. Yes. Q. And he walked across the street ? A. Yes. Q. And in a northerly direction ? A. North-westerly direction ?" A. North-easterly.

Q. You mean north-easterly ? A. Yes.

Q. "You had him in view all the time ? A. Yes. Q. Did you begin to gong him as soon as you saw him ? A. As soon as I saw him. Q. That was at one hundred and fifty feet away ? A. Yes. Q. Then you thought that there might be trouble and you threw off your power ? A. Yes. Q. How far were you away when you threw off your power ? A. Probably forty or thirty-five yards" — now are these answers correct with the exception of the correction you have just made, north-easterly for north-westerly ? A. Well, I never thought he was going to cross in front of the car.

* * * * * * *

Q. So the first thing you did was to gong him with your foot ? A. Yes.

Q. And then as he did not pay any attention you threw your power off ? A. And kept gonging him repeatedly.

Q. Now what was the character of the gonging that you did — was it a slow pressure or did you give it a rapid pressure A. Rapid pressure.

Q. All the time. A. Repeatedly.

Q. For the whole hundred and fifty feet, or fifty yards ? A. Repeatedly.

Q. And was that for the whole distance ? A. Yes.

* * * * * * *

Q. Did this man hesitate at all as he came across the street ? A. No, I do not think he did, he was walking so slowly.

Q. Never hesitated and never looked up ? A. No, he was just going with his head kind of hung.

Q. This is a question from a juror, "Q. This man that was crossing the track, did you notice he hesitated at all or did he keep going an even pace ? A. He never hesitated at all. Q. Kept going slowly ? A. Kept moving slowly. Q. Gave no sign that he heard you coming ? A. Never looked up" — these answers are true ? A. Yes.

Queen street is unusually wide and from the south curb to the track the car ran on is shewn to be twenty-eight feet six inches.

The issue presented to us is whether or not the man seeing another he thus described as so dead to his surroundings as to fail to respond to such desperate efforts as were made to arouse him, had duly and properly run him down. If we can say so then the judgment appealed from is quite right. And it seems to me we must be able to say so before we can uphold it.

It seems according to past instances from *Davies* v. *Mann*(1), down to the recent case of *O'Leary* v. *The Ottawa Electric Railway Co.*(2) (appeal from which judgment was dismissed by an equal division in this court) in a great variety of cases to have been held that it was for the jury to say whether or not, in a case where the defendant had apprehended, or ought to have apprehended, danger of injury to another who had been negligent of his person or his property, he (the defendant) had exercised ordinary care to avert such injury. Hence the law has hitherto been taken to be as laid down in the passage above quoted from Pollock.

The jury has said deceased was negligent but by answering another question, No. 5, seems clearly to intend that ultimately the respondent had not taken proper care to avert the accident — in other words — had not used that ordinary care the law required.

(1) 10 M. & W. 546.

(2) 12 Ont. W.R. 469.

1914

LONG v. TORONTO RWAY. CO.

Idington J.

Question No. 7, though, I submit with great respect, unhappily framed, yet evoked a reply confirmatory of the same view and minimized the negligence of deceased as viewed by the jury.

Such read in light of the charge seems clearly to be the result of these findings. And so read there can be no judgment dismissing the action unless the court comes to the conclusion it should never have been submitted to a jury but dismissed.

I cannot think that a man who realized, as the motorman professes, for such a length of time and space the danger he was in of injuring the deceased, whose movements and conduct he had kept steadily in his eye, was justified in running him down.

However that may be I can still less think that there was no case to submit to the jury.

I can conceive of men taking, as in fact the members of this very jury did, opposite views in such a case. And it seems to me that the learned Chief Justice who tried the case realized all the difficulties, used his long and wide experience of such cases, and ruled according to the law as it has been administered by him and others for a quarter of a century. The Court of Appeal has gone a long way in the direction of establishing (what railway companies have struggled so long to establish) the hard and fast rule of "stop, look and listen" as an impassable barrier in the way of future recovery by any persons, or their representatives, in cases where the so-called rule has not been observed.

It has never hitherto formed part of English or Canadian law. Each case with its attendant circumstances has been dealt with independently of such

rule, though elements in it may have formed part of the basis acted on in many cases.

There may be in the motorman's story a good deal of fiction. He may not in fact have been so very apprehensive and realized so well the danger as he says. Indeed, it would seem charitable to doubt it in looking at the results.

It does not, however, lie in the mouth of respondent to say we should do so.

Nor does his own intimation that he did not think the man would attempt to cross, conclude the matter, for the judge and jury were entitled to consider his acts of throwing off the power and continually ringing his gong as conclusive evidence that he thought there was danger of his crossing and being run down. And yet he failed to use that ordinary diligence motormen feeling such danger should have used.

If he had continued at the high rate of speed he was going, before realizing the danger, he would have passed the man without hurting him.

Apprehending what his conduct says he did, ordinary common sense dictated his doing more than he did.

There is in the evidence another and entirely different story which if correct might have been well accepted by the jury to justify a verdict for the defendant.

I am not concerned at all with that for it lay within the province of the jury to determine which story was right.

I am only concerned with the law and for the maintenance of the law and long established means of applying it by leaving to the jury the facts unless so

1914

LONG
v.
TORONTO RWAY. CO.

Idington J.

clear beyond peradventure that there is nothing to try.

It has been suggested this motorman exercised his judgment. Again it was for the jury to say whether such judgment could be held to be in conformity with what men of common sense exact, under the name of ordinary care or diligence.

The motorman's amending version that the deceased travelled north-easterly in his crossing, is in conflict with the evidence and surrounding circumstances. But if correct, then the deceased was facing the light of the coming car and a greater object of the motorman's pitying care than if going obliquely to the northwest. Is a man seeing another in such state entitled to shout at him and knock him down if he won't get out of the way ?

I think the appeal should be allowed with costs and the judgment of the learned trial judge restored.

I wrote the foregoing opinion shortly after the first argument herein a year ago, and though a longer line of authorities has been cited on the second argument than on the first, I have heard nothing to shew that there has been any change in the operation of the clear legal principles so long established which I have referred to in the foregoing.

DUFF J.—Broadly, the rule as regards the effect of a plaintiff's negligence is that his want of care, assuming it to be of such a character as to constitute what is understood in law to be negligence, is a complete answer to a claim founded on the defendant's negligence, if it was in whole or in part the "proximate" or

"direct cause" of the plaintiff's misfortune. In *Walton* v. *London, Brighton & South Coast Railway*(1), at pp. 429 and 430, Mr. Justice Willes in the course of a discussion of the judgment of the Exchequer Chamber in *Tuff* v. *Warman*(2), says:—

If there is no evidence of negligence on the part of the plaintiff, then the only question is whether there has been negligence on the part of the defendant. But in cases where there has been negligence on the part of the plaintiff, the question is whether that was the direct cause of the accident or proximately contributed to it.

* * * * * * *

If there was evidence of negligence on the part of the plaintiff, the further question arises whether that negligence was the proximate or direct cause of the accident.

In his judgment in *The Bernina*(3), at p. 61, Lord Esher states the rule in these words:—

(5) If, although the plaintiff has himself or by his servants been guilty of negligence, such negligence did not directly partly cause the accident, as if, for example, the plaintiff or his servants having been negligent, the alleged wrongdoers might by reasonable care have avoided the accident, the plaintiff can maintain an action against the defendant. (6) If the plaintiff has been personally guilty of negligence which has partly directly caused the accident, he cannot maintain an action against any one.

And at pp. 88 and 89 Lord Justice Lindley discusses the subject in the following passage:—

If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by A. against B. for injury directly caused to A. by the want of care of A. and B. will not lie. As Pollock C.B. pointed out in *Greenland* v. *Chaplin*(4), the jury cannot take the consequences and divide them in proportion according to the negligence of the one or the other party. But if the plaintiff can shew that although he has himself been negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action, as

(1) H. & R. 424.
(2) 5 C.B.N.S. 573.
(3) 12 P.D. 58.
(4) 5 Ex. 243.

1914

LONG
v.
TORONTO
RWAY. CO.

Duff J.

is shewn not only by *Tuff* v. *Warman*(1), and *Radley* v. *London and North Western Railway Co.*(2), but also by the well-known case of *Davies* v. *Mann*(3), and other cases of that class. The cases which give rise to actions for negligence are primarily reducible to three classes as follows:—

1. A. without fault of his own is injured by the negligence of B., then B. is liable to A. 2. A. by his own fault is injured by B. without fault on his part, then B. is not liable to A. 3. A. is injured by B. by the fault more or less of both combined, then the following further distinctions have to be made: (*a*) if, notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B.: *Butterfield* v. *Forrester*(4); *Bridge* v. *Grand Junction Railway Co.*(5); *Dowell* v. *General Steam Navigation Co.*(6); (*b*) if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injurying A., A. can sue B.: *Tuff* v. *Warman*(1); *Radley* v. *London and North Western Railway Co.*(2); *Davies* v. *Mann*(3); (*c*) if there has been as much want of reasonable care on A.'s part as on B.'s or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A. cannot sue B. In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law.

I think the jury was entitled to find in this case the following facts: That the motorman became aware some time before the collision that if the deceased, Frank Long, continued in the direction in which he was going there was risk of collision between him and the car. He also became aware that the deceased was absorbed and quite inattentive to his surroundings. They were further entitled to take the view that if the motorman was a person competent to take charge of an electric car running on such a thoroughfare as Queen street, he ought to have realized (early enough to have enabled him to stop his car or to bring it under such control as would enable him to stop it without

(1) 5 C.B.N.S. 573.
(2) 1 App. Cas. 754.
(3) 10 M. & W. 546.
(4) 11 East 60.
(5) 3 M. & W. 244.
(6) 5 E. & B. 195.

risk of injury to the pedestrian) that in the circumstances it was his duty not to assume the risk of proceeding without taking such measures. They were also entitled to find that Long in fact did not become aware of the proximity of the car until the moment he was struck or immediately before. As to the question, these facts being established, as between Long's heedlessness and the motorman's failure to do his duty in the circumstances, Long's heedlessness was a direct or proximate cause of the accident, the broad common sense of the matter seems to dictate the answer that the negligence of the motorman (who saw Long's failure to realize the peril of pursuing his course and his state of abstraction, and who ought himself to have realized the peril) was, to use the language of Lord Justice Lindley, quoted above, "the real and proximate cause of the accident."

On the law the respondent's contention is that, assuming the facts to be as just stated, the case is within the specific rule (*a*) enunciated in the passage quoted above from Lord Justice Lindley's judgment as applicable to the third class of cases mentioned by him, viz., where A. is injured by B. through the fault more or less of both combined, then if notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B.; and that it is not within the rule enunciated by the Lord Justice as Rule (*b*). It cannot be doubted that if we take the moment when Long stepped across the south rail, or the latest moment, whenever it was, at which by hurrying across the track he could have escaped the car, as being the crucial moment, and confine our attention to the physical possibilities of the situation at the moment so taken, the case appears to be literally within the lan-

1914

LONG v. TORONTO RWAY. CO.

Duff J.

guage of the rule (*a*). Considered with reference exclusively to an external standard, Long's conduct at either of these moments unmistakably exhibits a want of ordinary care, and at either of these moments by the observance of such ordinary care the avoidance of the accident would have been physically possible. I should mention in passing that I am excluding the hypothesis of drunkenness. I think that after what occurred at the trial and before this court on the first argument the appellant's right to recover cannot properly be rested upon any such hypothesis.

Furthermore, treating Long's failure to observe ordinary precautions at these critical moments as negligence, within the meaning of rule (*b*), it seems to be literally true that from the first of those moments on, the motorman did everything that could be done to avoid the mishap, and that at that stage of the business he must be acquitted of negligence.

But I think the fallacy in this line of argument lies in the tacit assumption that the rules referred to as rules (*a*), and (*b*), constitute an exhaustive code of rules applicable to the third class of cases mentioned by the Lord Justice. It will be observed that Lord Justice Lindley is careful, as are Mr. Justice Willes and Lord Esher in the passages I have quoted from them respectively, to insist upon the broad general principle that the victim's negligence to be an answer must be a direct or proximate cause of the accident. Rules (*a*) and (*b*) are particular examples of the application of the general principle; rule (*c*) is in effect a restatement of the general principle. But — assuming that rule (*b*) is not applicable to the circumstances of this case, there are elements present here, the motorman's knowledge of facts from which

he ought to have foreseen the peril in time to have avoided the injury, the victim's ignorance of the peril and the motorman's knowledge of that ignorance, which cannot, I think, be left out of account in determining whose conduct was the proximate cause for the purpose of assigning responsibility which are not to be found in the cases in which the specific rule (*a*) has heretofore been enunciated and applied. I do not think there is any decision requiring one to hold that in a case in which such elements are present these specific rules (*a*) and (*b*) literally interpreted must be regarded as furnishing an exhaustive or exclusive interpretation of the general principle; on the other hand, there are decisions of this court, *Calgary* v. *Harnovis*(1), and *Canadian Pacific Railway Co.* v. *Hinrich*(2), supporting the view that in such cases such elements of knowledge and ignorance must be taken into account and that the victim's conduct must be viewed in its relation to the conduct of the defendant in determining whether it was a *causa proxima*. That view is supported by the decision of *Municipal Tramways Trust* v. *Buckley*(3), in the High Court of Australia. It receives some support also from the case of *Springett* v. *Ball*(4), and in *Mitchell* v. *Caledonia Railway Co.*(5), at p. 519, Lord Dunedin and Lord Kinnear seem to give the weight of their authority in favour of this way of looking at such cases. Perhaps the same may also be said of the judgments of Lord Cairns and Lord Penzance in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(6), at pp. 1166, 1167, and 1174. The subject has also been fully dis-

(1) 48 Can. S.C.R. 495.
(2) 48 Can. S.C.R. 557.
(3) 14 Aust. C.L.R. 731.
(4) 4 F. & F. 472.
(5) 46 Scot. L.R. 517.
(6) 3 App. Cas. 1155.

1914

LONG v. TORONTO RWAY. CO.

Duff J.

cussed in Ontario in *Sim* v. *City of Port Arthur*(1); *Rice* v. *Toronto Railway Co.*(2), and *Herron* v. *Toronto Railway Co.*(3). I ought also, I suppose, to refer to my own judgment in the case of *Brenner* v. *Toronto Railway Co.*(4), upon which Mr. Dewart strongly relied. I was there, of course, dealing only with the phase of the law of negligence which came into play in that case. Having re-examined the whole matter for the purposes of this appeal, I do not think I can honestly charge myself with inaccuracy, but it should be observed that the point of the observation quoted by Mr. Dewart (in its application to the present case) is that negligence of the victim, in order to be an answer, must be a "direct and effective contributing cause." In that case, I had no manner of doubt that the negligence of the unfortunate victim, who attempted to pass across the track in front of a car which she knew to be approaching, without looking at the last moment to see whether she could do so in safety and without giving any sign of intention to cross until it was too late for the motorman to stop his car, was a direct contributing cause. In this case, considering the conduct of the victim, in relation to the conduct of the motorman, and the elements of knowledge on the one hand, and ignorance on the other, above mentioned, I think the proper view is that the *causa proxima* or direct cause, or if you like, the *cause,* in the legal sense, was the failure of duty on the part of the motorman, and that Long's want of care ought rather to be considered one of the conditions or circumstances on which the motorman's failure of duty took effect.

(1) 2 Ont. W.N. 864.
(2) 22 Ont. L.R. 446.
(3) 28 Ont. L.R. 59.
(4) 40 Can. S.C.R. 540.

1914

LONG
v.
TORONTO
RWAY. CO.

DUFF J.

As to the facts: with great respect, I am unable to agree with the view of the facts taken by the Court of Appeal. I have read the evidence more than once with care and I will only say that I think the evidence of the motorman and of the superintendent support the verdict. One consideration appears to me to have been overlooked. There is no doubt that the motorman was placed in a difficult situation, and full allowance should be made for that. It is very important also in such cases to avoid confusing excusable error of judgment, the error being proved by the event, with want of competence or diligence; but on the other hand, a reasonable measure of competent judgment may be required from the respondent's employees in such emergencies. This is sufficient to dispose of the contentions advanced on behalf of the appellant. As to the matter of a new trial, I have only to say, that, agreeing as I do with the opinion of the learned Chief Justice who tried the case as to the law applicable, I think the charge was admirably calculated to instruct the jury fully and effectively as to their duties. No doubt the 7th question on its face is open to criticism. But I do not think the explanation given by the learned Chief Justice of the point he desired them to consider under that head could have been misapprehended. Even if I had felt some difficulty as to the construction of the answers — which I do not — I should have hesitated long about directing another trial of the action in view of the attitude of the very able counsel who appeared for the respondent who at no stage of the proceedings has suggested the propriety of a new trial, or taken any exception to the charge of the learned trial judge except to impugn the principles of law upon which he proceeded, an exception which

1914

LONG v. TORONTO RWAY. CO.

Anglin J.

if successful must have led to the dismissal of the action.

ANGLIN J. (dissenting).—After careful consideration and not without some doubt, I have come to the conclusion that there should be a new trial of this action, on the grounds that the finding of the jury, that the plaintiff's husband was "guilty of negligence which caused or contributed to the accident," read in the light of the admission on which it was based and the presentation of this branch of the case to the jury, is not satisfactory, and that it is not clear that all the considerations which should have affected their minds in dealing with the 5th question (in answer to which they found that, notwithstanding the negligence of the deceased, the defendants' motorman could by the exercise of reasonable care have prevented the collision) were presented to the jury, and also because of the unsatisfactory character of the 7th question and of the uncertainty, in view of the frame of that question, as to the meaning of the answer thereto.

The questions submitted to the jury with their answers are as follows:—

1. Was the death of the plaintiff's husband caused by any negligence of the defendants, prior to negligence of plaintiff's husband? A. No.

2. If so, wherein did such negligence consist?

3. Was the plaintiff's husband guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. Yes.

4. If you answer "yes" to the last question, wherein did his negligence consist? A. In not looking for a car.

5. Notwithstanding the negligence, if any, of the deceased, could the defendants by the exercise of reasonable care have prevented the collision? A. Yes.

6. If so what should they have done which they did not do or have left undone which they did do? A. By putting on the brakes and having the car under proper control.

7. Could the motorman and the deceased, each of them, up to the moment of collision have prevented the accident by the use of reasonable care — in other words, was the negligence of deceased a continuing act up to the very moment of the accident ? A. Ten say "No" and two say "Yes."

8. If the court should on your answers think the plaintiff entitled to damages what sum do you assess as damages, distributing it:—

(*a*) To the mother of the deceased, aged 71 years ?

(*b*) To the wife, aged 38 years ?

(*c*) To the daughter, age 8 years ? A. Ten for $4,000.

Upon these findings the learned trial judge entered judgment for the plaintiff. In the Appellate Division that judgment was set aside on the ground that there was no evidence to support the jury's answers to the 6th and 7th questions, and that, upon those answers being set aside, the finding of negligence on the part of the deceased precluded recovery.

That there was no negligence on the part of the defendants prior to the moment at which the peril of the deceased became or should have been apparent to the motorman, was undisputed. The first and second questions were put to the jury *pro formâ*.

The evidence disclosed that the deceased left the sidewalk on the south side of Queen street in an abstracted state of mind and that he continued in that condition until he was upon the car track in front of and only a few feet away from the approaching car, when he appears to have suddenly realized the danger, but too late to escape being struck by the north corner of the fender. The evidence of Charles Allen, apparently an independent witness and the only person other than the motorman who seems to have seen the deceased come upon the track, is as follows:—

Q. And you were four or six paces from the east sidewalk on Soho street ? A. Yes, that is it.

Q. What did you see ? A. Right out near the edge.

Q. What did you see ? A. I seen the gentleman just as he stepped

1914

LONG
v.
TORONTO
RWAY. CO.

Anglin J.

on to the car tracks, just as he seemed to put his foot on to the car track.

Q. What track ? A. The north track.

Q. That is the one upon which the westbound car was coming ? A. Yes, the westbound car.

Q. Then what happened ? A. I seen, the gentleman seemed to throw out his hands as though he had realized his danger on the instant and the round part of the fender on the north side seemed to catch him. I could not say which leg it was, but it was perhaps on both, or one, but it seemed to throw him, twist him around, throw him and I ran for the car immediately.

Q. Yes, when you speak of the round part of the fender do you mean the north-west corner of the fender ? A. Yes,

The evidence of Alexander Johnston makes it reasonably clear that the deceased left the sidewalk on the south side of Queen street about 20 yards east of the line of the face of the west wall of the house on the east side of Soho street. According to the diagram verified by the motorman, when struck he was almost opposite the kerb on the east side of Soho street. If so, it is clear that he was proceeding in a north-westerly direction as the motorman had originally stated at the inquest and not in a north-easterly direction as he stated at the trial and as the point of his departure from the sidewalk as marked upon the diagram would indicate. It follows that his back was partly towards the approaching west-bound car which struck him. The evidence of the motorman makes it clear that the deceased when leaving the sidewalk and up to a moment or two before he was struck, when the witness, Allen, saw him "throw out his hands," was unaware of the approaching car and that the persistent efforts which the motorman made to attract his attention were futile. After the close of the evidence, counsel for the plaintiff made this statement to the trial judge, which was taken as an admission of negligence on the part of the deceased,

the deceased was not wary in approaching the car tracks in crossing the street,

and he suggested that the first four questions should be eliminated and that question 5 should be put in this form:—

Notwithstanding the admitted negligence of the deceased, could the defendants by the exercise of reasonable care have avoided the accident or the collision ?

This is the only record of an admission of negligence on the part of the deceased.

In presenting the case to the jury the learned Chief Justice, whose charge was not objected to on this branch, said,

she (the plaintiff) admits frankly that her unfortunate husband who met with his death instantaneously on that occasion certainly was guilty of some negligence causing or contributing to the accident, but she says that after that negligence of the deceased there was supervening or ultimate negligence on the part of the motorman which caused the accident.

In submitting the 3rd and 4th questions to the jury, after reading them, the learned Chief Justice said:—

Well, admittedly, the plaintiff says that he (the deceased) proceeded from that curb on his way unwarily (which is the phrase used by the plaintiff's counsel) you can say recklessly, carelessly or without giving sufficient attention to what was going on, or any phrase that occurs to you to meet the circumstances. No doubt there was something that must be understood in some such word (*sic*).

In dealing with the 7th question, after reading it, the learned judge said:—

I do not think I can make it any clearer than I have made it there. Did the unfortunate deceased's act contribute up to the moment of the accident ? Well, in a sense it did, physically, because he went right on, but that is not what is meant by this question. The question is, "Did he become aware that the car was approaching and was he able to avoid the danger ?" that is the sense in which

1914

LONG
v.
TORONTO
RWAY. CO.

Anglin J.

that question is put. * * * Now, you will understand the sense in which that question is launched — that while it is true that physically, as far as his actions went, he did contribute, to it up to the last moment, but did he do it in that negligent sense that he became aware that the car was approaching and was he able then to avoid the danger ? * * * If you answer "Yes" to that question, so far as the deceased is concerned, that is the end of the plaintiff's case. What the plaintiff says you ought to answer is, that up to the last moment the motorman was negligent, but that the deceased was not up to the moment of the collision. It is for you to say.

Upon the admission as made by counsel for the plaintiff above quoted and the statement of that admission by the learned Chief Justice to the jury, having regard to what he said in discussing the 7th question, I find it difficult to understand just what the jury meant when they found in answer to questions 3 and 4 that the plaintiff's husband had been guilty of negligence which caused or contributed to the accident "in not looking for the car." Did they mean that he was negligent in

that he proceeded from that curb on his way unwarily,

as put by the learned Chief Justice ? Did they mean that the deceased was

not wary in approaching the car tracks in crossing the street,

as put by counsel for the plaintiff ? Read in the light of the charge and the admission upon which they were instructed to act it is questionable whether the jury meant more than this. Did they mean that the deceased was negligent in stepping upon the car track itself ? Negligence in stepping from the kerb and in crossing the street did not proximately cause or contribute to the accident. It was only in the act of stepping in front of the moving car that there could have been negligence on the part of the deceased of that kind. If, as the motorman says, the car was then only

ten feet away and he immediately reversed and did all in his power to stop, it is difficult to understand the findings of the jury in answer to the 5th and 6th questions, unless they meant that the motorman should have apprehended that the deceased was likely to step in front of the car and should sooner have taken measures to stop it. Unfortunately it does not seem to be sufficiently clear that this was what the jury really meant to find. Having regard to these findings, read in the light of the charge bearing upon them, and to the answer to the 7th question, I rather incline to the view that by the answer to the 4th question the jury meant, not that the deceased was negligent in stepping upon the car track, but that he was negligent in not looking for the car when he was leaving the sidewalk and crossing the street approaching the tracks. If that is the proper interpretation of the finding — and I think it is open to that view having regard to the admission of counsel for the plaintiff and the charge dealing with that admission — it is not, in my opinion, a satisfactory finding of

negligence on the part of the deceased which caused or contributed to the accident.

I am, with great respect, unable to agree with the learned Chief Justice, who delivered the judgment of the Appellate Division, that there was no evidence to support the findings in answer to the 5th and 6th questions. According to his own story the motorman saw the deceased leave the kerb and had him continuously in view until he was struck by the fender. Immediately upon his leaving the kerb he says he thought there might be trouble and he, therefore, threw off his power and began to ring his gong to

1914

LONG
v.
TORONTO
RWAY. CO.

Anglin J.

warn the deceased. He says the car was then 50 yards from the point at which the unfortunate man was struck. The motorman says that he did his best to attract his attention with the gong; that he kept ringing it continuously; that the deceased

did not give the least sign that he knew that the car was approaching;

that he

walked straight on slowly with his head down;

that he

never heard at all, kept going ahead with his head down * * * absolutely absorbed

not thinking what he was doing. Although he is reported to have said at the inquest that when the deceased stepped in front of the car he was a car length and a half from it, at the trial he said that the car was then only ten feet away from him. He says he applied the reverse the moment the deceased stepped upon the south rail of the north track. The car stopped in one-half a car length after it struck the deceased. The motorman says that when he applied the reverse the car was running about six miles an hour. A witness, Marshall, however, who was a passenger on the car and felt the jar of the reverse, says that he noticed the speed immediately before he felt the jar of the reverse and would fix it at ten or twelve miles an hour. From all this evidence I think it was open to the jury to infer that the motorman was aware of the absorbed and abstracted state of mind of the deceased, that he knew that the strenuous ringing of the gong had failed to arouse his attention and that it was not improbable that a man crossing the street in that state of mind would walk in front of the car before he realized his danger, and

that he should, therefore, have reversed his power or applied the brakes and endeavoured to stop the car sooner than he did. I do not wish it to be understood that if trying the case myself such would have been my finding. Nor would that be a proper consideration in dealing with this appeal. The question is — was there evidence upon which a jury of reasonable men might draw such an inference? Was there evidence upon that aspect of the case which could not properly have been withdrawn from the jury? With great respect for the Appellate Division and for my learned colleague who entertains the contrary view, I am of the opinion that there was.

But I should have been better satisfied with the findings of the jury in answer to the 5th and 6th questions if it had been explained to them that the motorman should not be found to have been negligent merely because he had erred in judgment — that, before convicting him of negligence, they should be satisfied that, with the knowledge of conditions which he admittedly had, he had not merely erred in judgment but had taken an unnecessary and improper chance where human life was in peril. That idea probably underlies the statement of the learned Chief Justice that the question for the jury was whether

> there was negligence on the part of the motorman after the time when he apprehended or ought reasonably to have apprehended that man was going to cross his track.

But it would have been more satisfactory, I think, had the attention of the jury been pointedly drawn to the distinction between mere error of judgment and an improper taking of chances on the part of the motorman.

Again, it is possible that the jury may have ac-

1914

LONG v. TORONTO RWAY. CO.

Anglin J.

cepted the motorman's story at the inquest — that the car was a car length and a half from the deceased when he stepped on the track in front of it — as more likely to be correct than his version at the trial. Believing the former, they may have thought that the motorman could and should have stopped his car before it hit the deceased — that he should have applied the brakes or reversed his power not when only ten feet from the deceased, but when forty-five feet — a car length and a half—away, and that if he had done so the accident would have been avoided.

With very great respect it seems to me that the 7th question must have tended to confuse the jury. In it they are first asked:—

> Could the motorman and the deceased each of them up to the moment of the collision have prevented the accident by the use of reasonable care ?

and then an interpretation is put upon the question in its concluding phrase which confines it to the conduct of the deceased —

> in other words, was the negligence of the deceased a contributory act up to the very moment of the accident ?

The answer to this questions is,

> Ten say "No" and two say "Yes."

It is impossible to know whether the jury meant to answer the question as it was first put covering negligence of both the motorman and the deceased, or whether their answer is to be taken as confined to the interpretation put upon the question in the latter part which restricts it to negligence of the deceased. Assuming the latter to be the correct view, upon the evidence of Charles Allen it is clear that the deceased, after stepping upon the track and an instant or two

before he was struck, awoke to his danger. It was too late then for him to save himself. Does the answer to this question mean merely that he was not negligent after so becoming aware of his danger? It is clearly open to that interpretation upon the charge as quoted above, and upon all the evidence that would seem to be a fair conclusion. Does it mean that in stepping on the track and up to the moment when he became so aware of his danger the deceased had been actively negligent? If so, and if the accident could not then have been averted is he entitled to recover? *Brenner* v. *Toronto Street Railway Co.*(1). Or does it mean that although negligent in leaving the sidewalk and approaching the tracks he was not negligent in actually stepping in front of the car? It is perhaps a little diffcult to understand how the jury could thus differentiate between the degrees of responsibility on the part of the deceased in the several stages of his progress across the street. On the other hand, if the deceased was actively negligent up to the moment when the accident became inevitable it is still more difficult to understand how the motorman could be guilty of "ultimate negligence" such that it was the only true proximate cause of the collision and rendered the defendants liable notwithstanding the continuous negligence of the deceased.

Instead of asking whether the negligence contributed up to the very moment of the collision or accident it would, I would respectfully suggest, be better to ask whether the negligence actually contributed up to the moment when the accident or collision became

(1) 40 Can. S.C.R. 540, at page 556; 13 Ont. L.R. 423, at pages 425, 434.

1914

LONG
v.
TORONTO
RWAY. CO.

Anglin J.

inevitable, and to put separate questions covering this point with regard to the motorman and the deceased, or to confine it to the deceased.

The difficulty which I find in the way of entering judgment for the plaintiff on the 5th and 6th findings of the jury is that I am not satisfied that by them the jury really meant to impute to the motorman what would in law amount to "ultimate negligence." It is not clear that they meant to do more than find against him a fault similar to that which was suggested in the Divisional Court on the part of the motorman in the *Brenner Case*(1), but was held by this court, affirming the Court of Appeal, to be insufficient to warrant a verdict of ultimate negligence against the defendants. I am not certain that the jury meant in the present case that after the danger of the deceased became or should have been apparent to the motorman he could by the exercise of reasonable care have avoided running him down. It is uncertain whether they meant to find that the negligence of the motorman was the sole efficient cause of the accident which was really proximate.

On the whole I think that the result of the trial is not satisfactory and that it would be in the interests of justice that there should be a new trial, in the hope that it may result in findings such that, if not wholly free from doubt, it may at least be less doubtful than it now seems to be, whose fault or negligence was really the proximate cause of the accident.

(1) 40 Can. S.C.R. 540.

1914

LONG
v.
TORONTO
RWAY. CO.

Brodeur J.

BRODEUR J.—I concur in the opinion of my brother Duff.

Appeal allowed with costs.

Solicitors for the appellant: *Mills, Raney, Lucas & Hales.*

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