1895

*Mar. 28.

*May. 6.

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

AND

ALBERT GRINSTED (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Negligence—Street railway—Wrongful ejectment from car—Exposure to cold—Consequent illness—Damages—Remoteness of cause.*

In an action for damages from being wrongfully ejected from a street car, illness resulting from exposure to cold in consequence of such ejectment is not too remote a cause for damages; and where the evidence was that the person ejected was properly clothed for protection against the severity of the weather, but was in a state of perspiration from an altercation with the conductor when he left the car and so liable to take cold, the jury were justified in finding that an attack of rheumatism and bronchitis which ensued was the natural and probable result of the ejectment, and in awarding damages therefor. Gwynne J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court (2) in favour of the plaintiff.

The action in this case was for damages in consequence of plaintiff being ejected from a street railway car to which he had been transferred from another car where he had paid his fare. After being ejected he went back to the transfer agent and had to wait some time for another car in order to reach his destination, and on leaving the latter car he called at a hotel on a matter of business and then walked home, the walk occupying twenty minutes. It was a very cold night and the next day he had an attack of bronchitis and

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 21 Ont. App. R. 578. (2) 24 O. R. 683

rheumatism which confined him to the house for some weeks.

At the trial the jury, under the direction of the judge, severed the damages, allowing $200 for the ejectment and $300 for the subsequent illness. The defendant company paid the $200 and appealed against the other assessment, contending that there was not sufficient evidence of the illness being the natural and probable result of the ejectment and that it was too remote a cause of damage. The verdict was sustained by the Divisional Court and the Court of Appeal.

*Bicknell* for the appellants, argued that the damages were too remote, citing *Williamson* v. *The Grand Trunk Railway Co.* (1); *Hobbs* v. *London & South Western Railway Co.* (2); *The Notting Hill* (3).

*McWhinney* for the respondent, referred to *Brisbane* v. *Martin* (4); *McMahon* v. *Field* (5); *Town of Prescott* v. *Connell* (6); *York* v. *The Canada Atlantic Steamship Co.* (7).

The judgment of the majority of the court was delivered by:

KING J.—The question in this case is as to the remoteness of damages. The plaintiff sued to recover damages for having been wrongfully put off a street car in the city of Toronto. The defendants' line has connecting branches. Plaintiff took a car on the main division and paid his fare, which entitled him to travel over the entire route. At the point where the branch line intersects, he got off and the servant of the company stationed there for the purpose of effecting transfers directed him into the car on the branch line.

(1) 17 U. C. C. P. 615.
(2) L. R. 10 Q. B. 111.
(3) 9 P. D. 105
(4) [1894] A. C. 249.
(5) 7 Q. B. D. 591.
(6) 22 Can. S. C. R. 147.
(7) 22 Can. S. C. R. 167.

1895

THE TORONTO RAILWAY COMPANY v. GRINSTED.

King J.

After starting upon the new route and proceeding several blocks, the conductor demanded his fare, and disputed his statement that he had been duly transferred. This led to an altercation, the conductor charging plaintiff with cheating, and the plaintiff in reply using very strong language. He had other tickets in his pocket, but he stood upon his rights, and finally was required by the conductor and driver to leave the car. He alleges that by reason of what had occurred, he was before leaving the car in a state of profuse perspiration. The night was one of extreme severity, but it is not suggested that plaintiff was inadequately clothed and the inference is otherwise, as he contemplated being upon the road twenty minutes after reaching the end of the car route.

When put off the car he went back to the point where he had taken the branch car, and complained of what had been done, and waited for the next car. He says that after waiting in the open air (the company providing no shelter at the point of transfer) for about twenty minutes, the branch line car came along and he was allowed to get in it as a transfer passenger and so travelled to the end of the route without further pay. There he left the car and after going to a hotel on business walked home. This occupied twenty minutes, and by the time he got home it was about 11 o'clock. He then felt that he had caught a severe cold. The next day he was feverish and went to his work but was not able to remain, and on the day following was found to be affected with bronchitis and rheumatism, by which he was confined to the house for several weeks and kept from work for a period considerably longer. As to the origin of his illness, he stated that he caught cold during the affair, and the physician who attended him being examined as to the effect of what took place, said that a person excited and over-

heated and going out into the cold air would be apt to suffer from some inflammatory trouble, and that such condition and exposure together would be sufficient to induce chronic bronchitis and rheumatism.

Upon the trial the learned judge asked the jury to separate between the damages for the assault and expulsion and the damages in respect of the illness, telling them that they might give damages of the latter kind if they should think that the illness was the natural or probable result of defendants' act. The jury found for the plaintiff, awarding $200 for the assault, &c., and $300 in respect of the illness. The Divisional Court upheld the verdict as did the Court of Appeal, Hagarty C.J. dissenting, the learned Chief Justice basing his dissent upon the case of *Hobbs* v. *London & South Western Railway Co.* (1).

The only question in this appeal is as to the damages in respect of the illness. Two questions appear to be involved: First, whether the recovery is precluded by reason of any established rule of law; and secondly, whether the conclusion of fact is so entirely without substantial support from the evidence as to be wholly unreasonable. As to the first point, the appellant contends that the right that was interfered with was one of contract, and that as the illness was not reasonably contemplated by the parties at the time of entering into the contract as a probable consequence of the breach, it was not a subject of compensation.

When one, whether in performance of a contract or not, takes charge of the person or property of another, there arises a duty of reasonable care. *Foulkes* v. *Metropolitan District Railway Co.* (2). And if by his own act he creates circumstances of danger and subjects the person or property to risk without exercising reasonable care to guard against injury or damage, he is re-

(1) L.R. 10 Q.B. 111. (2) 4 C. P. D. 267.

1895

THE TORONTO RAILWAY COMPANY v. GRINSTED.

King J.

sponsible for such injury and damage to the person or property as arises as the direct or natural and probable consequence of the wrongful act.

It would indeed be startling to learn that bronchitis and rheumatism follow as a natural and probable result upon the putting a man suitably clothed off a car in the streets of Toronto in any kind of weather. The natural and probable result would not be different whether he is put off or gets off of his own accord, or whether he gets off during the trip or at the end of the route. But whatever of strength there is in plaintiff's case lies in this, that, according to him, he was at the time he was put off the car, and as the result of the defendants' conduct, in a bodily state which predisposed him to receive physical injury as the result of his being suddenly exposed to the very low temperature that then prevailed.

The circumstances intervening between the act complained of and the illness are all in evidence, and there is the uncontradicted statement of the physician that the act of exposure operating upon a person in an excited and overheated state would be sufficient to induce such an illness. If this is so, it follows that the plaintiff was subjected to the risk of such illness by the unlawful act of the defendants. They created the circumstances of damage for him and subjected him to the risk. Then as to the connection between their act and plaintiff's illness, it was for the jury to examine the entire circumstances, in order to see if there was any intervening independent cause. Finding none, sufficient to satisfy them, they were entitled to refer the illness to the only thing referred to in the evidence as a sufficing cause.

There was in such case, evidence from which they might conclude either that the act of the defendants was the direct cause or that it was the efficient cause,

1895

THE TORONTO RAILWAY COMPANY v. GRINSTED.

King J.

the *causa causans* followed by the illness as the natural and probable result without the intervention of any independent cause.

I share in the doubts that have been expressed by the Court of Appeal in England, respecting the conclusiveness of the reasoning in *Hobbs* v. *London & South Western Railway Co.* (1), but this case does not rest upon like facts and admits of decision independently of it.

I therefore think that the appeal should be dismissed.

GWYNNE J.—The plaintiff's cause of action, as stated in his statement of claim, is that upon the night of the 10th January, 1893, which was an intensely cold night, he became a passenger, for a fare duly paid, upon the Toronto Street Railway to be carried along Queen Street to Spadina Avenue, and thence by Spadina Avenue to King Street, and along King Street to the corner of Simcoe Street which was his destination; that by the regulations of the company and by virtue of their agreement with the corporation of the city of Toronto, subject to which they enjoyed their franchise, he was entitled, by notifying the conductor of the car which he had entered on Queen Street of his desire, to be transferred at the corner of Queen Street and Spadina Avenue into a car going south along Spadina Avenue and King Street to Simcoe Street; that he did so notify such conductor of the car on Queen Street; that such conductor upon arriving at Spadina Avenue placed the plaintiff in charge of an agent of the defendants stationed there for the purpose of looking after the passengers requiring to be transferred there, from one line to the other; that such transfer agent did duly transfer the plaintiff to a Spadina Avenue car running south, and advised the conductor of that car that the plaintiff was a transfer passenger; that the conductor of this lat-

(1) L. R. 10 Q. B. 111.

1895

THE TORONTO RAILWAY COMPANY v. GRINSTED.

Gwynne J.

ter car, notwithstanding, demanded a fare from the plaintiff, and upon the plaintiff informing him that he was a transfer passenger refused to recognize him as such, and upon the plaintiff persisting that he was and refusing to pay a fare assaulted the plaintiff and ejected him from the car; that thereupon he returned to the transfer agent at the corner of Queen Street and Spadina Avenue, who told the plaintiff that he had informed the conductor of the car on Spadina Avenue which the plaintiff had entered that he the plaintiff was a transfer passenger; that owing to having been so wrongfully removed from the car he was compelled to stand in the street and wait for another car for nearly half an hour, and in so doing contracted a severe cold which resulted in an attack of bronchitis and rheumatism, by which he was kept in-doors for several weeks.

Now the evidence given by the plaintiff upon this claim is that upon paying his fare by handing to the conductor one of several railway tickets of the defendants which the plaintiff had he told him that he wanted to be transferred at Spadina Avenue to a car going south; that upon getting off at Spadina Avenue the conductor signalled to the transfer agent that the plaintiff was a transfer; that plaintiff waited ten minutes before a car going south came down, when being told by the transfer agent that this was his car he got on to it, and there met a person with whom he was well acquainted who was also a passenger, and they spoke to each other; that in conversation with his friend the plaintiff said to him that he, the plaintiff, was a transfer; that the conductor who was standing close by thereupon said to plaintiff, "No, you are not," to which plaintiff replied, "I am," whereupon a discussion arose between plaintiff and the conductor who threatened plaintiff to put him off the car unless he should pay his fare, which plaintiff refused to do; that

the conductor then took him by the arm, and turned him round saying that he, plaintiff, would have to get off; that they continued in discussion, but eventually as the plaintiff says, wishing to avoid a row, he thought he had better get off, and he went out of the car. The conductor of this car unfortunately had gone to England, so that we have not his testimony of what occurred. We have, however, the evidence of the plaintiff's friend whom he met upon the car, whose account of what occurred is as follows. He says that while the car was in motion crossing Queen Street on its course south, the plaintiff came in to the car seemingly in a great hurry and cold, and seeing witness said to him, "How are you;" the car went on and when they got close to Adelaide Street, that is the next street west north of King Street, the conductor came collecting tickets. Witness then said to plaintiff, "I am a poor unfortunate and have only five cents or I would pay your fare," to which the plaintiff replied, "That is all right, old man, I am a transfer," whereupon the conductor said to him, "You are not," to which he replied "I am," and the conductor again replied, "You are not," and said that he would have to stop the car and put him off; witness said that then the plaintiff looked to him and asked him what he should do, and witness told him that he should pay his fare, take the numbers of the car and the conductor and report the matter to the company. He says thereupon there was a little talk, the car was stopped and plaintiff went off it himself—this is all, he says, that occurred. Now it is to be borne in mind that at this time the plaintiff, by his own evidence, had at least three railway tickets one of which would have paid his fare.

As to what took place when he left the car the plaintiff's evidence is that he went back to the transfer agent and told of his being turned off the car and

1895

THE TORONTO RAILWAY COMPANY v. GRINSTED.

Gwynne J.

asked him, "Did you tell that conductor there were no transfers, no passengers" and that he said he did not. That plaintiff then waited 20 minutes for a car going south upon which he was put by the transfer agent and was taken to the corner of King and Simcoe Street, where he left the car and went to the Avondale Hotel, which is on Simcoe Street. As to this evidence all that is necessary to say is—that it is wholly contradicted by the transfer agent, who says never to his knowledge did he see the plaintiff until he saw him in court at the trial, and that certainly he never came and conversed with him as the plaintiff said he did on the said 10th January—he denied it utterly, saying that if any such a thing had occurred as stated by the plaintiff he certainly would have remembered it, and he added that there never was such a delay as 20 minutes interval between the cars running on Spadina Avenue crossing Queen Street, that at the time in question, January, 1893, they arrived there every six minutes. This is the whole of the evidence as to the alleged assault and eviction from the car and upon it the jury have rendered a verdict for $200 damages. This verdict illustrates in a significant manner what little consideration companies like the defendants receive at the hands of juries, when an individual, even upon the most trifling and conflicting evidence, brings an action upon the ground that a servant of the company even innocently commits to the prejudice of the plaintiff the slightest infraction of law, but it may be added that even in cases of this description a plaintiff is seldom so fortunate as to succeed in realizing the sum of $200 out of the saving of a few cents. However, the defendants have submitted to this verdict so far and have paid the $200, but what the defendants appeal against is that the jury have given a further sum of $300 for the illness which the plaintiff complained of

1895

THE TORONTO RAILWAY COMPANY v. GRINSTED.

Gwynne J.

as having been suffered by him. Upon this point the learned judge who tried the case charged the jury that if they should find that the plaintiff's illness was the natural and probable result of his having been turned out of the car on that night, they should give the plaintiff damages upon that ground as well. He said that whether or not he was entitled to such damages might be a question of law and he therefore directed them, in order to avoid the necessity for a new trial, to keep the two heads separate and divide the damages, if any, they should give as follows:—1st. For the plaintiff having been turned out of the car and the trouble and inconvenience in waiting for the second car. 2nd. For the plaintiff's illness and his having to incur expenses in order to recover from the illness. Now, the evidence upon which this charge was given as effects the $300 awarded by the jury, besides the evidence of the plaintiff of his having walked back from the place where he was put off the car near Adelaide Street to Queen Street, and of the conversation which he said he had there with the transfer agent, but which the latter denied, and of his having waited there in the street for 20 minutes for another car going south, he further said that the car on which he then got took him to the corner of King and Simcoe Streets, where he got out as he wanted to call at the Avondale Hotel on Simcoe Street for letters, that finding none there he walked home to Toronto Street, which occupied he says 20 minutes more. Then the doctor who attended him during his illness says that what he was suffering from was chronic bronchitis and rheumatism, and he added that a little inflammation or severe cold might ensue upon exposure to cold upon the night of the 10th January, 1893, as spoken of by the plaintiff, that the effect would be different on different persons, that the exposure as spoken of by the plaintiff might be sufficient

1895

THE TORONTO RAILWAY COMPANY v. GRINSTED.

Gwynne J.

to induce chronic bronchitis and rheumatism, that a person who was very much excited and thereby overheated going out into the cold air would be apt to suffer from some inflammatory trouble. This was the whole of the evidence upon which the learned judge charged the jury that if they should be of opinion that the illness of the plaintiff was the natural and probable result of his eviction from the car in the manner above detailed in evidence, they might give damages independently of and apart from the damages they should give for the plaintiff being obliged to leave the car under the circumstances in evidence. Upon this charge the jury have given the $300 in addition to the $200, and it is against the recovery of this sum of $300 by the plaintiff that this appeal is taken, the verdict of the jury having been maintained by all the courts in Ontario.

I entirely concur in the dissenting judgment of the learned Chief Justice of Ontario in the Court of Appeal for Ontario, to the effect that this case is governed by *Hobbs* v. *London & South Western Railway Co.* (1), which is as good law now as ever it was, and is not nor was intended to be overruled by *McMahon* v. *Field* (2), and is conclusive that damages of the nature of that for which the jury have accorded the $300 were altogether too remote to be recoverable in this action. To what is said by the learned Chief Justice of Ontario, I desire merely to add that there is nothing in the evidence which in my opinion at all warranted the submission of the case to the jury in the manner in which it was submitted, or their finding upon the matter as so submitted. The medical expert gave no evidence to the effect that, nor could any reasonable person conscientiously say that, the illness of the plaintiff was the natural and probable result of the conduct of the

(1) L. R. 10 Q. B. 111. (2) 7 Q. B. D. 591.

defendants' servant in requiring the plaintiff to leave the car if he would not pay his fare when demanded, which, apart from the technical assault committed, according to the plaintiffs' own evidence, was all that the defendants' servant did, any more than that the illness was the natural and probable result of the plaintiff's own perverse, wilful and insensate conduct in electing, contrary to the advice of his own friend, to leave the car in preference to parting with one of the street railway tickets which he had in his possession wherewith he could have paid the five cents demanded, and in exposing himself to the intense cold of the night for full fifty minutes according to his own evidence—first in walking back from Adelaide Street to Queen Street, then in standing there for 20 minutes and spending further 20 minutes in walking home from Simcoe Street where he left the car which conveyed him there. This choice of the plaintiff so to expose himself to the cold of that severe night in preference to parting with a five cent railway ticket is an element in the case which cannot be, although it has been, overlooked. The appeal must, in my opinion, be allowed with costs, and the judgment left to stand for the $200 damages against which the defendants have not appealed.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitors for respondent: *McWhinney, Ridley & Co.*