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*Mar. 29.

*May 6.

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

AND

EDWARD GOSNELL (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Street railway car—Collision with vehicle—Excessive speed—Contributory negligence.

Persons crossing the street railway tracks are entitled to assume that the cars running over them will be driven moderately and prudently, and if an accident happens through a car going at an excessive rate of speed the Street Railway Company is responsible.

The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching if, in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross. Gwynne J. dissenting.

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

The action in this case was brought in consequence of a street railway car having run into plaintiff's cart which he was driving across the track whereby he was thrown out and hurt, and the cart badly damaged. The company denied the negligence charged in the driving of their car, and alleged that plaintiff was himself negligent in not looking to see if a car was approaching before going on the track. There was evidence that the car which struck the plaintiff's cart was going at an excessive rate of speed, and the jury so found and they found that plaintiff could have

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

(1) 21 Ont. App. R. 553.

crossed if the car had been driven moderately, and that he was not guilty of contributory negligence. The verdict was sustained by the Divisional Court and by the Court of Appeal.

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Osler Q.C. and *Laidlaw* Q.C. for the appellants.

Fullerton Q.C. for the respondent.

THE CHIEF JUSTICE concurred in the judgment of Mr. Justice King.

TASCHEREAU J.—The appeal in this case is from the unanimous judgment of the Court of Appeal, upholding a unanimous judgment of the Common Pleas Division, which maintained the verdict and judgment obtained against this company. The appellants would contend that they are not bound by any particular rate of speed, that they can go as fast as they please, that persons entering upon, crossing, or otherwise using portions of any roadway covered by their tracks do so at their own peril, *caveat viator*. These astounding propositions, it is not surprising, have not found the assent of a single judge out of the eight who had to pass on the case in the courts below, and it is not complimentary to this court, that the appellants must be assumed to have believed that we might here countenance their contentions. They were wrong, however, and they will have to abandon such unreasonable claims, and act accordingly in the future.

There was ample evidence for the jury that the cars were going at an unreasonable rate of speed. In fact, I should say, the evidence is overwhelming on the point. Their finding that the plaintiff was not guilty of contributory negligence is also one that we cannot interfere with, more especially after the concurrent approval of those findings by the two courts below. These street railway companies must remember that

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they have not the exclusive right of way, and that the private traveller in the streets of the city is justified in assuming that the cars will be kept under control and driven moderately and prudently.

GWYNNE J.—The impression left upon my mind from the consideration of this case is, that if this judgment should be maintained and should this become a precedent to govern future cases it is quite illusory for the defendants to expect to be able to set up a successful defence to any action brought against them for injury to an individual sustained by collision with one of their cars in motion. With the judgment of the learned Chief Justice of Ontario I entirely concur that there was no case to go to a jury apart from the evidence of the witness who testified that in his opinion immediately before the accident and at the distance of about 80 or 90 yards from where it occurred, the railway car which came into collision with the plaintiff's wagon was going at the rate of twenty miles an hour—and I must say that I find it difficult to understand how any jury should adopt the evidence of that witness, who admits that he neither saw the accident occurring, nor the plaintiff with his wagon upon the track at all, in the face of all the other testimony in the case given by persons who had the best possible opportunity of observing and who did observe the movements of the plaintiff and of the defendants' car from the moment of the plaintiff entering with his wagon upon the railway track until the accident. But while I so concur in the judgment of the learned Chief Justice of Ontario, I am of opinion that this case does not turn upon a question as to the rate of speed at which the railway car was going immediately preceding the occurrence of the accident, but rather upon the conduct of the plaintiff himself in entering upon the railway track at the time he did;

and indeed the rate of speed at which the railway car was moving, assuming it to have been excessive, would seem to me to make the conduct of the plaintiff in entering upon the railway track just in front of a car going at such excessive speed only the more inexcusable. The evidence is, I think, overwhelming and uncontradicted upon the point that when the plaintiff entered upon the railway track with his wagon the car which came into collision with him was coming down the railway at the distance of 70 or 80 feet behind him. If he had looked in that direction he must have seen it and had he seen it, whatever its rate of speed, his entering upon the track just in front of it would have been inexcusable; and if it was moving at such a rate of speed as is suggested by the one witness who estimated it at thirty miles an hour, that would have supplied a stronger reason why the plaintiff should not have entered upon the railway. As, however, there was but that one witness of several who saw the car in motion who estimated its rate of speed at thirty miles an hour, it is not likely that the plaintiff would have formed such an estimate if he had looked in the direction of the car, but he did not look in that direction at all but blindly incurred the risk, and so he cannot, I think, claim to be in any better position than if he had looked and had seen the car coming down as the other witnesses who have testified did, one of whom swears that immediately upon the plaintiff entering upon the track he called out to him to look out—that the motor was coming, and he adds that as the plaintiff was trying to get off the track and go round a buggy in front of Mr. Prettie's store, either the horse had not energy enough to get off or the plaintiff had not energy enough to drive him, and so the car struck the hind wheel of the plaintiff's wagon before he got off and thus the accident occurred. The evidence upon

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this point of several witnesses who saw the accident occurring may be said to be uncontradicted, and being so establishes, I think, beyond all question that the accident was due to the very inconsiderate, to say the least, conduct of the plaintiff in having entered upon the railway track just in front of a moving railway car—and the more excessive the speed of that car is shown to be the indiscretion of the plaintiff becomes greater in having entered upon the railway track just in front of it. The plaintiff cannot excuse himself by saying that he did not look in the direction of the coming car. Between his not looking, and his entering upon the railway track having seen the car coming as he must have if he had looked, I can see no difference as regards the liability of the defendants in this action. I am of opinion therefore that the appeal should be allowed and the action dismissed as one which under the circumstances should not have been submitted to the jury.

SEDGEWICK J.—I am of opinion that this appeal should be dismissed for the reasons given in the judgment of Mr. Justice King.

KING J.—At the time that a collision appeared imminent the position of things was this: The plaintiff's vehicle, a loaded coal cart, had gone in upon the street railway track for the purpose of passing a team that had just turned into Yonge from Scollard street. The electric car was coming up behind and distant about sixty or seventy feet. According to the defendants' witnesses, the motor-man in charge of the electric car then put on the brakes and did his best to stop the car. But before the car could be stopped it struck the hind wheel of the plaintiff's cart which was just about leav-

ing the track. It is manifest that in a few moments more the cart would have gone entirely clear. It is proved by defendants' witnesses that a car going at the usual rate of speed can be stopped within a space of about thirty-two feet. How then did it happen that this car was not stopped in double that distance although the man in charge was doing his best to stop it? The rail was indeed wet, but, as against this, there was an up grade. The answer is to be found in the evidence of plaintiff's witnesses that the car was going at an excessive rate of speed and so the jury have found. There is therefore a finding of negligence upon sufficient evidence.

Then it is contended that there is conclusive proof of contributory negligence on plaintiff's part. This is said to consist in his not having looked back before going upon the track. But he can be in no worse position than if he had looked back and had seen the car.

In the case from the State of New York *Hegan* v. *Eighth Avenue Railroad Co.* (1) cited by Mr. Justice Osler, it is well said:

> It is not unreasonable for the private traveller to assume that the ar will be driven moderately and prudently. He can calculate distance and the time required to effect his own change of position in order to prevent injury in such cases.

The excessive speed of the car would not be readily discernible by one directly in front and in plaintiff's position. If he had looked and had seen the car behind him, can we say upon the facts proved that he might not reasonably have calculated that, with the car going at a moderate speed, as he might fairly assume was the case, he would be able to quit the track in time?

But further, in cases of this sort, where the public use of a street is concerned, we are to be careful not to fetter the public right by rules of law as to what

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specifically constitutes reasonable care or the want of it. The matter is essentially one for the jury, and in this case they have negatived want of care on plaintiff's part.

The appeal should therefore be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Laidlaw, Kappele & Bicknell.*

Solicitors for respondent: *Fullerton, Neville & Wallace.*