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*Nov. 7.
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THE LONDON STREET RAILWAY COMPANY (DEFENDANT)..... } APPELLANT;

AND

EDWARD C. BROWN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence.—Findings of jury.—Contributory negligence.

In an action founded on personal injuries caused by a street car the jury found that defendants' negligence was the cause of the accident and also that plaintiff had been negligent in not looking out for the car.

Held, reversing the judgment of the Court of Appeal (2 Ont. L. R. 53) that as the charge to the jury had properly explained the law as to contributory negligence the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence and he could not recover.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court in favour of the defendant and ordering a new trial.

The facts in this case are as follows:

The plaintiff was a mechanic returning from work to his home, about half-past five in the evening. He came to the corner of Colborne and Dundas Streets, in the City of London (Dundas Street being the main thoroughfare of the city, largely travelled, and shaded at this section with shade trees). Before starting across the road, going south, the plaintiff looked to his left (being towards the east) for a car and saw none. He then started to cross the street, diagonally, towards the south-west, being unable to go directly south owing

*PRESENT:—Taschereau, Gwynne, Sedgewick, Girouard and Davies JJ.

(1) 2 Ont. L. R. 53.

to repairs and obstructions in the highway. He had just reached the track when he was struck by a car of the defendant Company.

On the second trial of the action against the Street Railway Company for damages there was contradictory evidence as to the rate of speed at which the car was going at the time of the accident and also as to whether or not the bell was rung so as to warn the plaintiff of its approach. The jury's findings were as follows:

I. Were the defendants guilty of negligence? Yes.

II. If so, in what the negligence consist? Running at too high a rate of speed and not properly sounding the gong, also not having the car under proper control.

III. If the defendants were negligent was the injury to the plaintiff caused by their negligence? Yes.

IV. Was the plaintiff guilty of contributory negligence? Yes.

V. If so, in what does negligence consist? In not using more caution in crossing the railway tracks.

VI. Might the defendants' servants, after the position of the plaintiff became apparent, by the exercise of reasonable care have prevented the accident? No.

VII. At what sum to you assess the plaintiff's damages? Six hundred dollars.

On these findings the trial judge, Meredith C.J., ordered a verdict to be rendered for the defendants which was afterwards affirmed by the Divisional Court. The Court of Appeal reversed the latter judgment and set the verdict aside ordering a third trial of the action. The defendant company appealed to this court.

Hellmuth for the appellant.

Gibbons K.C. for the respondent.

TASCHEREAU J.—In my opinion this appeal should be allowed.

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Gwynne J.

GWYNNE J.—This is an appeal from the judgment of the Court of Appeal for Ontario, reversing a judgment rendered in favour of the defendants upon a trial before Meredith C.J. and ordering another trial of the case to be had. The case had been brought down to trial before when the jury having been unable to agree were dismissed and a second trial was ordered, at which trial, judgment having been entered for the defendants in accordance with the finding of the facts by the jury, the defendants insist that they are entitled in law to retain that judgment.

The action is for an injury sustained by the plaintiff occasioned, as he alleges, by the negligence of the defendants' servants in managing a street railway car running on Dundas street in the City of London, when the plaintiff was crossing the street on foot.

The plaintiff, having been examined as a witness on his own behalf, said that on the twentieth of July, 1899, he was going home from his work as a carpenter, and walked down the east side of Colborne street to where that street is crossed at right angles by Dundas street. That when he reached the curb-stone there at the north-east angle of Dundas and Colborne streets he stepped on to the street and looked round and saw no car on the railway and heard no bell, and that although within fourteen feet of the railway track on the ordinary footpath across the street in continuation of the side-walk on Colborne street which he had come down he immediately started to cross Dundas street diagonally to the south-west corner of Dundas and Colborne streets, and that when he had proceeded but half way, that is to say, about forty-five or fifty feet, he was struck on the left shoulder by a street railway car proceeding from east to west.

Another witness, called by the plaintiff, named Joseph Waugh, was engaged in dumping gravel on the side-

walk at the said north-east corner, when the plaintiff arrived there. This witness saw him enter on the street from the curb-stone and proceed diagonally across Dundas street. Witness immediately, while dumping his gravel, heard some one exclaim "they have killed a man." Whereupon witness turned and saw the plaintiff down on the street. Witness says that until then he heard no gong but that then the gong began to ring vigourously. Witness said that a car had just before passed going from the west to the east and that he heard no gong from it either, although he had passed close to it when hauling the gravel to the said north-east corner. He said also that the car which struck the plaintiff was running very fast, at a rate which he judged to be eighteen or twenty miles an hour. He said that his reason for saying that rate was the distance the car ran after the accident before it was stopped, which distance, he says, was the whole length of a block, where it reached a house called the Gustier House. Being asked how far the place where the car was stopped was from the place where the plaintiff was struck, he said, he would judge it to be one hundred and fifty or may be, two hundred *yards*, (that is to say, from four hundred and fifty to six hundred feet). Now, another witness called for the plaintiff, named John McLean, testified that he was standing at the side-walk on the *north-west corner* of Dundas and Colborne streets when the plaintiff stepped from the curb stone on to the street at the north-west corner; that while the plaintiff was there, a street car passed coming from the west, ringing its gong, and went on east, and at the same time, witness saw the car coming from the east; that the plaintiff, immediately upon his entering on to the street from the curb-stone, proceeded diagonally across the street and just as he reached the centre of Dundas and Colborne streets and was about to put

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his foot upon the railway, he was struck by the right hand corner of the car which the witness had seen coming from the east; had one step been then withheld, the accident could not have happened. The gong, he says, of that car may have been ringing before the plaintiff was struck but witness was very much excited, as he said, and did not notice it, but when the plaintiff was struck it was ringing violently. This witness also judged of the speed at which the car was running, to be from fifteen to eighteen miles an hour, from the distance which it ran before it was stopped, which the witness also put near the Gustier House, which he estimated to be *probably*, three hundred feet from where the accident had occurred.

Another witness called by the plaintiff testified that he also was at the north-east angle of Dundas and Colborne streets when he saw the plaintiff start diagonally across the street. Witness immediately turned to pick up his dinner bucket and, as he did so, saw the car coming and, instantly, he heard the crashing of tools, (in a bag which the plaintiff carried on his shoulder). He says he did not hear the gong until he heard the crash of the tools.

From all this evidence it is clear that the plaintiff was struck almost instantaneously after his starting from the curb-stone on the north-east corner of Dundas and Colborne streets, during which time the car, as testified to by McLean, was plainly visible, coming from the east.

Now, on the part of the defence, the motorman and the conductor both swore that the gong was rung when the car had reached within from seventy-five to one hundred feet of Colborne street, and the motorman added that the car was going at the ordinary rate of about eight miles an hour and that it was stopped

within three cars length ; that is, within one hundred feet from his applying the brakes.

A witness named Carrie Grantham, who lived on Dundas street and knew, as she said, the locality well, and was on the car at the time, testified that as the car approached Colborne street the gong was ringing and that, immediately before the accident, it was ringing vigourously and, while it was so ringing, she felt the shock of the accident. Of this she entertained no doubt. S also testified that she observed the place where the car stopped, and that this was a long distance east of the Gustier House and that, as well as she could judge, the car had not gone quite a quarter of a block from where the accident occurred until it was stopped. What the length of the block was, was not asked and did not appear.

Now, upon this evidence the jury, upon a charge to which the plaintiff has no just ground of complaint, have found that the injury suffered by the plaintiff was due to negligence of which the defendants were guilty in running at too high a rate of speed and not properly ringing the gong and not having the car under proper control, and that the plaintiff himself was guilty of contributory negligence in not using more caution in crossing the railway tracks and that the defendants' servants could not, after the position of the plaintiff became apparent, have by the exercise of reasonable care prevented the accident.

The finding of the jury, upon the question of the plaintiff's own negligence having contributed to the accident, is much more in accord with the evidence than was their finding upon the question as to the defendants' negligence, the evidence offered upon which question was, it must be admitted, of a most contradictory and not very satisfactory character.

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Upon the above findings the learned Chief Justice rendered judgment for the defendants dismissing the action.

The Court of Appeal for Ontario has reversed that judgment and ordered another trial, upon the ground, that they thought the finding of the jury upon the question of the contributory negligence of the plaintiff not satisfactory.

Now, that question, and what would constitute contributory negligence, appears in nearly two hundred pages of printed matter in the case before us to have been so very fully and clearly explained by the learned Chief Justice to the jury in a charge to which the plaintiff can have no reasonable ground of complaint, that we can see no reason to doubt that the jury in finding the plaintiff guilty of contributory negligence meant that the plaintiff was guilty of negligence without which, notwithstanding the negligence of which they found the defendants guilty, the accident could not have occurred, and in so finding, they were acting in accordance with the explanation of the term "contributory negligence" as explained to them by the learned Chief Justice, in his charge.

That finding was, we think, most fully justified by the evidence, and with a finding of the jury in perfect accord with the evidence upon that point, we do not think that the defendants should be remitted to the third trial in this case.

The appeal must therefore be allowed with costs and the judgment of the learned Chief Justice at the trial restored.

SEDGEWICK and GIROUARD JJ. concurred in the judgment allowing the appeal.

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Davies J.

DAVIES J.—This is an appeal from the judgment of the Court of Appeal for Ontario directing a new trial of the action and reversing the judgment of Chief Justice Meredith before whom the cause was tried, who had ordered judgment to be entered for the defendant. The action was brought for the recovery of damages for injuries sustained by the plaintiff owing to the alleged negligence of the appellants when attempting to cross the street railway track in the City of London.

The learned Chief Justice submitted to the jury a series of questions all of which were answered, and it was upon these answers that he directed the verdict to be entered for the defendants, the now appellants.

The questions and answers were as follows :

1. Were the defendants guilty of negligence ?

A. Yes.

2. If so, in what did the negligence consist ?

A. Running at too high a rate of speed and not properly sounding the gong, also not having the car under proper control.

3. If the defendants were negligent was the injury to the plaintiff caused by their negligence ?

A. Yes.

4. Was the plaintiff guilty of contributory negligence ?

A. Yes.

5. If so, in what does his negligence consist ?

A. In not using more caution in crossing the railway tracks.

6. Might the defendants' servants, after the position of the plaintiff became apparent, by the exercise of reasonable care, have prevented the accident ?

A. No.

7. At what sum to you assess the plaintiff's damages ?

A.. Six hundred dollars.

The learned judges of the Court of Appeal in Ontario thought that the findings of the jury were inconsistent.

Mr. Justice Osler in his opinion, in which Mr. Justice Moss concurred, says:

The express finding of the jury that the plaintiff's injury was caused by the specific acts of negligence of which the defendants were guilty

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makes it to my mind almost impossible to attribute to their further finding that the plaintiff should have used more caution in crossing the track the legal result of a finding of contributory negligence;

while Mr. Justice Lister found the finding of the jury "confused and unsatisfactory."

But if there is an apparent confusion and uncertainty or even of repugnance in the several findings of the jury, it will be found I think on a closer examination that it is only apparent and not real, and that it is to some extent inseparable from all findings, both of negligence on the defendants' part and contributory negligence on the plaintiff's. It would have perhaps been more satisfactory if the jury had pointed out more specifically the want of caution shewn by the plaintiff in crossing the track, but read as the answer must be in light of the evidence given at the trial and of the charge of the learned judge, there cannot be any doubt as to its meaning.

The findings of the jury on the whole amount to this, that while the accident would not have happened but for the negligence of the appellants, neither would it but for the negligence of the respondent, the plaintiff below. The learned Chief Justice in a comprehensive charge to the jury, in which he minutely reviewed all the facts, pointed out to them the nature of contributory negligence and its effect upon the plaintiff's action if found. The jury found specifically on evidence, which I think warranted the finding, that the plaintiff had been guilty of contributory negligence, and in answer to the next question say it consisted in want of caution in crossing the tracks. Read in the light of the facts as disclosed in the evidence, there can be no doubt as to the meaning of these answers. They find in effect that the plaintiff in crossing the track was careless and negligent, and did not take such ordinary precautions as a reasonable and prudent man under the circumstances should have taken. It is

equally true as found by them that the appellants were guilty of negligence in the running of their cars at the time and that but for such negligence the accident would not have occurred. But the rule of law in all such cases is too firmly established to admit of any doubt. Even if the accident is attributable in the first instance to the defendants' negligence, if it would not have occurred but for the negligence of the plaintiff himself he cannot recover.

The questions were peculiarly those proper for the consideration of a jury. They have found as stated above, after a full and fair trial and after having had the benefit of a carefully considered explanation of the law on the subject from the learned trial judge, a charge, the correctness of which, too, is not now challenged. I can see therefore no justification for sending the case back for further trial.

The case of *Rowan* v *Toronto Railway Co.* (1) referred to in the judgments below, does not seem to me to have any special application to the case now under review for the simple reason that in that case there was no finding of the jury specifically of contributory negligence as there is here.

The respondent's counsel, both in his factum and in his oral argument before this court, pressed very strongly the contention that the sixth question could have been put in an altogether different form and that the evidence shewed the negligence of the defendants' servants to have been so gross that no exercise of care on their part could have prevented the accident after the plaintiff's position on the track was discovered and that they therefore must be held liable. In support of this proposition he relied upon a statement made by Mr. Smith in his book on the law of negligence. But for this statement no authority was cited by Mr.

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Smith, and it does not seem to me at any rate applicable to a case such as this where the jury have really found that the accident would not have occurred but for the plaintiff's negligence. If any such doctrine could be invoked to destroy the legal consequence of a negligent act or want of action which was the proximate cause of the injury complained of, it would go far to destroy the doctrine of contributory negligence altogether.

I think the appeal should be allowed with costs and the judgment of the learned Chief Justice restored.

Appeal allowed with costs.

Solicitors for the appellant: *Hellmuth & Ivey.*

Solicitors for the respondent: *Gibbons & Harper.*