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

AND

ARCHIBALD E. BALFOUR (PLAINTIFF)..... } RESPONDENT.

1902
*Mar 19,
*May 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Question of procedure—Verdict—Weight of evidence.

The Supreme Court of Canada refused to interfere with a decision of the Court of Appeal for Ontario in a matter of procedure, namely, whether a verdict of a jury was a general or special verdict.

The court also refused to disturb the verdict on the ground that it was against the weight of evidence after it had been affirmed by the trial judge and the Court of Appeal.

APPEAL from a decision of the Court of Appeal for Ontario affirming the verdict for the plaintiff at the trial.

The action was brought for damages for personal injuries sustained by the respondent on the 23rd of August, 1899.

The respondent alleged that at the time of the injury the appellants were negligently, improperly and unlawfully driving an electric motor car at an unusual and excessive rate of speed, and operating the car unlawfully by running the same in a wrong direction on the easterly track, contrary to the contract with the City of Toronto and the general usage of said cars in that locality.

The accident occurred on Dufferin Street, about midway between King Street and the tracks of the Grand Trunk Railway Company. On this portion of Dufferin Street there is laid two lines of track belonging to

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

1902

TORONTO RAILWAY COMPANY v. BALFOUR.

the appellants, leading to the grounds of the Toronto Industrial Exhibition Association. These lines of tracks do not form a part of the appellants' system of railway in daily operation, but are used only for short periods of time in each year.

At the time of the accident the opening of the Exhibition for the 1899 was approaching, and the appellants established on Dufferin street, between King Street and the Exhibition Grounds, what is called a "stub service," namely, one car running between two points, receiving and transferring passengers from and to the main line of the appellants' railway on King Street, and confining its operations to a single track, namely, the easterly track on Dufferin Street.

About 8.30 a.m. on the 23rd August, 1899, a car was proceeding south on the said easterly track.

The respondent was at the time driving with one Thomas Crashley down the westerly track. He was seated upon the driving seat of the waggon, which was a high seat in the front thereof with no dashboard in front, having merely a board for the feet. Crashley heard the car coming, and not looking back, supposed that it was on the westerly track, and turned out of the track, but instead of turning to the right, as is usual and as required by the Act to regulate travelling on public highways and bridges, R. S. O. ch. 236, turned to the left and thereby placed his waggon immediately in front of the car coming down the easterly track. There was no reason for this as there was plenty of room on the right, and there was, in fact, no vehicle or other thing obstructing the passage upon the roadway for vehicles to the west of the westerly track.

The motorman immediately sounded the gong, and the respondent, then looking around for the first time,

saw that the car was on the easterly track and warned Crashley of his danger. Crashley immediately turned to the right to get out of the way. The car struck the waggon and the respondent fell out, either from the effect of the sudden turn to the right or from the impact of the waggon with the car and was badly hurt.

At the trial which took place before the Honourable Chief Justice Falconbridge on 9th February, 1900, two specific grounds of negligence was alleged against the appellants:

(1) The car was running unlawfully and improperly down the easterly track.

(2) The car was running at an excessive speed.

The learned judge in charging the jury upon the two grounds of negligence charged as follows: (1) It is alleged as one of the grounds of negligence against the company that their car on that morning was being propelled upon the east track, that is the left hand track as the car was proceeding south.

(2) The other element of negligence claimed is as to the rate of speed.

He then in the course of his charge said: "I shall direct the clerk of the court—for another judge will be here—to ask you, in the event of your returning a verdict for the plaintiff, what negligence you point to."

The counsel for the plaintiff did not object to the jury being required to state upon what ground they found for the plaintiff, in case they came to the conclusion that he was entitled to a verdict.

The jury found as follows: "We find that the Street Railway Company were responsible for the accident for the following two reasons: that the car was on the wrong track according to the general custom; second, that the motorman and his appliances were in the rear of the car instead of the front, the car being reversed."

1902

TORONTO RAILWAY COMPANY v. BALFOUR.

Upon these findings judgment was directed to be entered for the plaintiff. On appeal to the Court of Appeal it was contended by the company that the verdict was special and the jury should have stated the facts upon which their findings were based. The court held that it was a general verdict and dismissed the appeal. The company appealed to this court.

Bicknell for the appellants. The jury should not have given reasons for their verdict. *Walton* v. *Potter* (1). By 55 Vict. ch. 99 (Ont.) the company is given a right to the use of the tracks. And they may be used in any way that is convenient. *Altreuter* v. *Hudson River Railroad Co.* (2). Elliott on Roads, (2 ed.) secs. 828-833.

John Macgregor for the respondent. The court will not disturb the verdict when there is evidence to justify it. *Toronto Railway Co.* v. *Gosnell* (3).

TASCHEREAU J.—This appeal fails. The respondent's action was brought for personal injuries he suffered by the negligence of the appellants, as he contends, whilst driving on Dufferin Street in Toronto, in August, 1899. He alleged by his statement of claim that at the time of the injury the appellants were negligently, improperly and unlawfully driving their electric motor car at an unusual and excessive rate of speed, and operating the car unlawfully by running the same in a wrong direction on the easterly track, contrary to their contract with the City of Toronto and the general usage of said cars in that locality.

The case was tried before Chief Justice Falconbridge with a jury. The learned judge in charging the jury said:

(1) 3 Man. & G. 411. (2) 2 E. D. Smith (N.Y.) 151.
(3) 24 Can. S. C R. 582.

1902

TORONTO RAILWAY COMPANY v. BALFOUR.

Taschereau J.

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Upon these findings judgment was directed to be entered for the respondent.

The appellants contend that this finding is in the nature of a special verdict and that the question for the court to consider is whether upon the facts stated the appellants are liable to the respondent, which question, they contend, should be answered in their favour. The respondent, on the other hand, contends that this finding is in law a general verdict in his favour, and that the reasons given by the jury do not form part of it, and cannot affect its being a general verdict. The Court of Appeal have unanimously adopted the latter view, and affirmed the judgment of first instance in favour of the respondent for the amount of the verdict. The appellants are asking us to review that decision, that is to say, a decision upon what seems to me nothing else, under the circumstances of the case, but a question of practice, and consequently one with which, in accordance with the jurisprudence, we should not interfere. See *O'Donohoe* v. *Beatty* (1); *Williams* v. *Leonard & Sons* (2); *Price* v. *Fraser* (3).

(1) 19 Can. S. C. R. 356. (2) 26 Can. S. C. R. 406.
(3) 31 Can. S. C. R. 505.

1902

TORONTO RAILWAY COMPANY v. BALFOUR.

Taschereau J.

As to the other ground invoked by the appellants, that the verdict was against the weight of evidence, I refer to what the Privy Council said in *Lambkin* v. *The South Eastern Railway Co.* (1).

With respect to the verdict being against evidence, it appears to their Lordships * * * * that the question of negligence being one of fact for the jury, and the finding of the jury having been upheld, or at all events not set aside, by two courts, is not open under the ordinary practice to the defendants.

I would dismiss the appeal with costs.

SEDGEWICK, GIROUARD and DAVIES JJ. concurred in the judgment dismissing the appeal with costs.

MILLS J.—This is the case in which the respondent Balfour was thrown from a waggon and very severely injured by reason of the waggon in which he was riding being overtaken by a street car of the appellant company. It is alleged that the car was running on the wrong track and that it was running at too great a rate of speed. The jury found against the appellant on both these grounds. The car was running behind the waggon and, assuming that the car was running upon the accustomed track, the driver, Mr. Crashley, turned off the track on which the street car ought to have been running and went on the track upon which it was running and so put himself in the way of the car.

It is not necessary to enter into any lengthy discussion of the law applicable to the case or any analysis of the evidence given at the trial. I accept the judgment of Chief Justice Armour in the Court of Appeal as a correct statement of both the law and the evidence in the case. In my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *James Bicknell.*

Solicitor for the respondent: *H. M. East.*

(1) 5 App. Cas. 352.