THE ROYAL TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF SAMUEL WALTER ABBOTT, DECEASED (PLAINTIFF) ..... APPELLANT;

AND

TORONTO TRANSPORTATION COMMISSION (DEFENDANT) ..... RESPONDENT.

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*June 11.
*June 24.

THE ROYAL TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF SAMUEL WALTER ABBOTT, DECEASED, AND LOUISA ALEXANDRA ABBOTT (PLAINTIFFS) ..... APPELLANTS;

AND

TORONTO TRANSPORTATION COMMISSION (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Street railways—Motor vehicles—Collision at street intersection between street car and automobile—Right of way for street car—Duties of automobile driver and street car motorman—Joint negligence.

An automobile going easterly and defendant's street car going southerly collided at a street intersection in the city of Toronto, causing the

*PRESENT:—Duff C.J. and Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc.*

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automobile driver's death. In actions against defendant for damages, the trial judge found that defendant's motorman and the automobile driver were each negligent to the extent of fifty per cent., and gave judgment against the defendant (for one-half the total damages assessed). The Court of Appeal for Ontario held that on the evidence defendant could not be found guilty of any negligence causing the accident, and dismissed the actions. On appeal to this Court:

Held: The appeal should be allowed and the judgment at trial restored.

Per Duff C.J., Cannon and Davis JJ. and Dysart J. *ad hoc:* Generally speaking, a street car motorman is entitled to assume that a pedestrian or motorist approaching the track will stop to permit the street car to pass by, and there was in the present case a statutory right of way in favour of the street car; but the existence of a right of way does not entitle the motorman to disregard an apparent danger that confronts him. In the circumstances appearing in the present case, the motorman should have seen the automobile and realized the probability of its driver continuing in his course across the track at the approaching intersection. Had either the motorman or the motorist used due care or caution, the collision would not have occurred.

Per Duff C.J. and Crocket J.: The real effective cause of the collision was the joint negligence of the motorist and motorman. It was the motorman's duty in approaching the street intersection to have his street car under such control as to enable him to stop in order to avoid hitting any person venturing across the street in his path, as it was the duty of the motorist to have his car under similar control. On the evidence, both approached the intersection at such a rate of speed as to create at the intersection a peril which it was then too late for either to avoid.

APPEALS (a consolidation of two appeals) by the plaintiffs from judgments of the Court of Appeal for Ontario allowing the defendant's appeal from judgments of McEvoy J. on the trial.

The actions were brought against defendant in the Supreme Court of Ontario, and arose from a collision between an automobile driven by S. W. Abbott and a street car of defendant on the evening of November 22, 1932, at the intersection of Harbour and Bay streets in the city of Toronto, causing injuries to Mr. Abbott from which he died.

The first action was brought by the administrator of Mr. Abbott's estate to recover damages under the *Fatal Accidents Act,* R.S.O. 1927, c. 183, and the second action was brought by the said administrator to recover damages for medical and nursing expenses and by Mr. Abbott's widow to recover for damages to the automobile which belonged to her.

The actions were tried together before McEvoy J., who found that defendant (by its motorman) and Mr. Abbott, deceased, were each negligent to the extent of fifty per cent., and in the first action gave judgment for the plaintiff for $10,000, and in the second action gave judgment for the plaintiff administrator for $124.40 and for the plaintiff Mrs. Abbott for $300 (the said sums being in each case one-half the total damages assessed).

The defendant appealed to the Court of Appeal for Ontario in both actions and the appeals were heard together. The Court of Appeal held that on the evidence the defendant could not be found guilty of any negligence causing the accident, and allowed the appeals and dismissed the actions.

The Court of Appeal granted to the plaintiffs special leave to appeal to the Supreme Court of Canada in the second action.

The material facts of the case are sufficiently stated in the judgment of Davis J. now reported. The appeal to this Court was allowed and the judgment of the trial Judge restored, with costs throughout.

D. L. McCarthy K.C. and *G. M. Huycke* for the appellants.

Irving S. Fairty K.C. and *Geo. A. McGillivray* for the respondent.

DUFF C.J.—I concur with the conclusions and the reasons of my brother Crocket and of my brother Davis.

CROCKET J. (Concurred in by Duff C.J.)—I entirely concur in the view of the learned trial Judge that the real effective cause of this unfortunate collision was the joint negligence of the deceased driver of the automobile and of the motorman of the street car. It was the duty of the motorman in approaching the street intersection to have his car under such control as to enable him to stop in order to avoid hitting any person venturing across Bay street in his path, as it was the duty of the driver of the automobile to have his car under similar control. The evidence shows clearly, I think, that both approached the inter-

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section at such a rate of speed as to create at the intersection a peril which it was then too late for either to avoid. With deference, I think it is a clear case for the application of the provisions of the Contributory Negligence Act and would therefore allow the appeal and restore the trial judgment with costs throughout.

DAVIS J. (Concurred in by Duff C.J. and Cannon J. and Dysart J. *ad hoc*).—I cannot escape from the view which I formed during the hearing of this appeal and which is confirmed upon a careful reading of the evidence and a review of the authorities discussed before us, that the motorman on the street car should have seen the automobile and realized the probability of its driver continuing in his course across the street car track at the approaching intersection.

Generally speaking, a motorman on a street car is entitled to assume that a pedestrian or a motorist approaching the street car tracks will stop to permit the street car to pass by and there was in this case a statutory right of way in favour of the street car. But the existence of a right of way does not entitle the motorman on the street car to disregard an apparent danger that confronts him.

The facts are simple and are not in dispute. The collision occurred shortly after eleven o'clock at night at the intersection of Bay and Harbour streets in the city of Toronto at what may be described as the waterfront of the city. It was a clear, cold November night and the pavement was dry. The driver of the automobile was travelling along Harbour street in an easterly direction and the street car was travelling southerly on Bay street. Both streets are asphalt paved and of exceptional width, the width of Bay street being 54 feet from curb to curb and that of Harbour street being 60 feet from curb to curb. There is a street car line on Bay street but none on Harbour street. The view approaching the intersection from any direction is unobstructed by buildings or fences, the only building in the vicinity being the Harbour Commission Building on the north side of Harbour street, 159 feet west of the corner of Bay street. There are no grades of consequence at this point on either street and the intersection and approaches are well lighted. There was only one eye-

witness of the collision called to give evidence. He put the speed of the automobile at between thirty and thirty-five miles an hour and that of the street car prior to it entering the intersection at twenty-two miles an hour. He did not notice any passengers in the street car but at the point of collision he saw the conductor standing "about the joining position of the vestibule and the body of the car." He says the street car came to the intersection without slackening speed and the automobile failed to shew any indication to him of slackening its speed, until in such a position that an accident was inevitable. The headlights of the motor car were burning. The street car struck the motor car square-on, the glass in the headlight of the street car was broken and the door in the middle of the side of the motor car was jammed. The driver of the motor car was alone in his car; he never regained consciousness and died within a week as the direct result of the injuries sustained by him in the collision. That he was himself guilty of negligence is not in dispute. The question is whether the motorman on the street car was negligent. Neither the motorman nor the conductor on the street car was called as a witness and no explanation has been offered for their not being called although the defendant undertook the defence without making any motion for a non-suit at the close of the plaintiff's case. The defence consisted solely in the putting in of a by-law of the City of Toronto requiring all persons on any street to comply with the requirements of every sign erected for the purpose of regulating or directing traffic, and another by-law of the City entrusting to the respondent commission the control, maintenance, operation and management of the street railway system. The absence of any evidence from either the motorman or the conductor on the street car is not without significance, and we are entitled to draw reasonable inferences from such oral testimony as was given at the trial. The learned trial Judge in effect found that each driver was guilty of negligence and that the negligence of each was a direct cause of the accident and, treating the case as one of concurrent negligence, attributed fault equally between the parties. The appellants, who are the widow and the administrator of the estate of the deceased driver of the motor car, did

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not appeal from the judgment in their favour in the amount of one-half the damages assessed by the trial judge. The respondent did appeal from the judgment against it of one-half of the damages assessed and the Court of Appeal for Ontario allowed the appeal and dismissed the actions with costs. One action was by the administrator under the *Fatal Accidents Act* and the other action was brought by the administrator and the widow to recover medical and hospital expenses and damage to the automobile. The actions were tried together and the appeals in the two actions were consolidated by order of the Registrar of this Court. No question was raised as to the quantum of damages. The only question before us was the negligence, if any, of the motorman in the street car.

The learned trial Judge came to the conclusion that the motorman

> should have seen that at some stage as the automobile proceeded along the road there was a certainty that if the street car continued to go as it was going, and if the automobile continued on its course at the rate it was going, there was bound to be a collision. I think there was a time and place where the motorman should have realized that there was going to be an accident if he did not pay some attention to the fact that the driver of the automobile would arrive at the place at which the street car would arrive at such a time, and that it was necessary for him to be careful. I think there was a time—I am not necessarily called upon to say how long a time it was, but looking at the whole picture I think there was a time at which, by taking proper care and caution, the motorman could and ought to have stopped the street car and avoided this calamity.

The test that may well be applied to the facts of this case was stated by Lord Dunedin in the House of Lords in *Fardon* v. *Harcourt-Rivington* (1) in these words:

> The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

In the absence of any evidence from the motorman on the street car it is impossible to find in the evidence when he first saw the motor car or when he first applied his brakes or used sand or attempted to avert the accident. These were all matters of fact upon which the motorman could have thrown very considerable light. But the de-

(1) (1932) 48 Times L.R. 215, at 216.

fendant chose not to call him as a witness and we are left to draw whatever inferences are reasonable and proper from the oral testimony that was given at the trial.

In my view, had either the motorman on the street car or the driver of the automobile used due care or caution, the collision would not have taken place; and that was substantially the view taken by the learned trial Judge. The appeal should be allowed and the judgment of the trial Judge restored with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Osler, Hoskin and Harcourt.*

Solicitor for the respondent: *I. S. Fairty.*