

CANADIAN BREWERIES TRANS- PORT LIMITED AND JACK LACEY } (DEFENDANTS) .....	APPELLANTS; *May 9. *May 15.	1944
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AND

TORONTO TRANSPORTATION COM- MISSION (DEFENDANT) .....	} RESPONDENT;
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AND

GEORGE JOHNSON (PLAINTIFF).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Negligence—Damages—Collision between street car and truck—Action by injured passenger in street car for damages against owner and driver of truck and operators of street railway—Question as to whose negligence caused or contributed to the accident—Judgment at trial on findings of jury—Variation by Court of Appeal—Restoration of judgment at trial.*

APPEAL by the defendants Canadian Breweries Transport Ltd. and Lacey from the judgment of the Court of Appeal for Ontario (1) allowing (Kellock J.A. dissenting) the appeal of the defendant Toronto Transportation Commission from the judgment of Barlow J. on the findings of a jury.

The action was brought by the plaintiff, Johnson, against all the said defendants for damages for injuries received by reason of a collision between a truck of the defendant Canadian Breweries Transport Ltd., which was driven by the defendant Lacey, and a street car of the defendant Toronto Transportation Commission. The plaintiff was a passenger in the said street car. At the trial, the jury found against all the defendants, apportioned the blame, 50 per cent. to the defendants Canadian Breweries Transport Ltd. and Lacey and 50 per cent. to the defendant Toronto Transportation Commission, and assessed the plaintiff's damages at \$2,750; and judgment was given in accordance with those findings, the formal judgment providing for indemnification as between defendants in case of payment by the Company and Lacey, or by the Commission, of more than one-half of the amount awarded for damages or of the plaintiff's costs.

\*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

1944  
CANADIAN  
BREWeries  
TRANSPORT  
LTD.  
v.  
TORONTO  
TRANSPORTATION  
COMMISSION.

The defendant Toronto Transportation Commission appealed to the Court of Appeal for Ontario. That Court allowed the appeal (Kellock J.A. dissenting) and ordered that the action as against the Commission be dismissed and that the plaintiff recover against the other defendants the sum of \$2,750 and costs. (The jury's findings and the judgments below are more fully stated in the reasons for judgment *infra*.) The defendants Canadian Breweries Transport Ltd. and Lacey appealed to this Court, asking that the judgment at trial be restored. Leave to appeal was granted by the Court of Appeal for Ontario. The plaintiff, who was paid his judgment, was not a party to the present appeal.

*F. J. Hughes K.C.* and *J. W. Thompson K.C.* for the appellants.

*I. S. Fairty K.C.* for the respondent.

The judgment of the Court was delivered by

KERWIN J.—This is an appeal by special leave of the Court of Appeal for Ontario from a judgment of that Court reversing the judgment of Barlow J., after the trial of the action with a jury. The plaintiff in the action, George Johnson, is not a party to the appeal, as he has been paid the amount of judgment for damages for injuries sustained by him. His action was brought against the Transportation Commission, in one of whose street cars he was a passenger at the time it came into collision with a truck owned by one of the other defendants, Canadian Breweries Transport Limited, and driven by the third defendant, Jack Lacey. No objection is raised to the charge to the jury of the learned trial judge. In answer to questions submitted to them, the jury found that the defendants, the Transport Company and Lacey, had not satisfied them that the plaintiff's injuries were not caused by any negligence on the part of those defendants. This was on the basis of the onus imposed upon these defendants by the *Highway Traffic Act*. The jury found that the operator of the Commission's street car was guilty of negligence, causing or contributing to the plaintiff's injuries, in the following respects:—

Being aware of the icy condition of the road and knowing the difficulty of a truck driver to stop owing thereto, the operator was negligent in failing to bring street car to stop before continuing to drive said street car in path of oncoming truck.

They also found that the degree of negligence on the part of the defendants was fifty per centum as to the Transport Company and Lacey and fifty per centum as to the Commission. On these findings judgment was rendered in favour of the plaintiff against all defendants for the amount of the damages found by the jury, \$2,750, with costs. The judgment also provided that if the Transport Company and Lacey paid more than one-half of this sum, or more than one-half of the plaintiff's costs, they should be entitled to be indemnified as to such excess by the Commission, with an additional clause in case the excess was paid by the Commission. The only party to appeal from that judgment was the Commission and, as a result, the Court of Appeal varied the judgment by dismissing the action against the Commission, with costs, and giving judgment for the plaintiff against the Transport Company and Lacey for \$2,750 with a proviso that the two last named defendants should pay to the plaintiff his costs of the action, including the amount of costs required to be paid by the plaintiff to the Commission. The Court of Appeal further ordered that all the respondents pay to the Commission the latter's costs of its appeal.

In granting leave to the Transport Company and Lacey to appeal to this Court, the Chief Justice of Ontario, speaking for the Court of Appeal, stated that he did not know that the opinion of the majority of the judges who heard the appeal from the judgment of Barlow J., that there was no evidence to establish any cause of action against the Commission, was arrived at on a consideration of the evidence for the plaintiff alone, and that it might be that the whole of the evidence was considered, including that of the driver of the truck. This refers to the fact that at the close of the plaintiff's case a motion for non-suit was made by counsel for the Commission, consideration of which was adjourned until the end of the trial. Evidence was thereafter led on behalf of the Commission. Undoubtedly all of the judges that took part in the hearing of the appeal from Barlow J. were aware of the well-settled rule that in such circumstances the plaintiff is

1944

CANADIAN  
BREWERIES  
TRANSPORT  
LTD.

v.

TORONTO  
TRANSPOR-  
TATION  
COMMISSION

Kerwin J.

1944

CANADIAN  
BREWERIES  
TRANSPORT  
LTD.

v.

TORONTO  
TRANSPOR-  
TATION  
COMMISSION.

Kerwin J.

entitled to rely upon any evidence adduced on behalf of the defendant. However, the judgment of Mr. Justice Laidlaw, with whom Mr. Justice Riddell concurred, directs:—

The judgment should recite in appropriate form the motion for non-suit made on behalf of the Toronto Transportation Commission, and that no evidence was adduced in support of a finding of negligence on the part of the operator of the street car.

It was to these directions that the Chief Justice of Ontario referred when he said that they “seem \* \* \* to approve the adoption of a practice of doubtful propriety in such a case as this”.

However, the question as to “whether the Transportation Commission could be dismissed from the action until the evidence of the defendant Company had been heard and had been taken into consideration” does not arise in this appeal because the action was not so dismissed. Under these circumstances, this Court is confined to the determination of the question whether there was any evidence in the whole of the case upon which the jury could find as they did with respect to the defendant Commission. Mr. Fairty argued the appeal on that footing and sought to secure a negative answer to the question upon a correlation of distances and speeds. The result arrived at by such means cannot necessarily prevail against other evidence placed before the jury which they were entitled to consider. I agree with the following passage in the dissenting judgment of Mr. Justice Kellock:—

I take the answer of the jury to mean that at or before the motorman passed the point in the intersection, beyond which the street car, if it continued would be in the path of the approaching truck, he should have realized that the truck was not intending to, or could not, stop or slow down sufficiently, in the icy condition then prevailing, to allow the street car to clear in front of it. I am unable to say that it was not open to the jury to take that view.

The appeal should be allowed with costs and the judgment at the trial restored. The appellants are entitled to their costs of the appeal to the Court of Appeal.

*Appeal allowed with costs.*

Solicitors for the appellants: *Hughes, Agar, Thompson & Amys.*

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