DUNCAN GAVIN (PLAINTIFF).....APPELLANT;

AND

THE KETTLE VALLEY RAILWAY CO. (DEFENDANT).....RESPONDENT.

1919
*May 6.
*May 19.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

*Negligence—Joint negligence—Proper direction to jury—Practice and procedure—New ground on appeal—Costs against appellant—Statutory right—Question of costs—Duty of the Supreme Court to interfere—"Supreme Court Act" of British Columbia, R.S.B.C. 1911, c. 58, s. 55.*

In an action for damages, the jury found negligence on the part both of the defendant's employees and of the plaintiff's wife who was driving his automobile; and also found that, after these employees became aware, or should have become aware, that the automobile was in danger of being injured, they could have prevented such injury by the speedy application of the brakes.

*Held*, that the jury should also have been required to find whether or not the appellant's wife after she became, or should have become, aware of danger could herself have avoided the accident by the exercise of reasonable care, and therefore the Court of Appeal was justified in ordering a new trial.

Brodeur J. dissenting on the ground that, upon the evidence, the accident was entirely due to the negligence of appellant's wife; but

*Held*, Idington and Brodeur JJ. dissenting, that, as the "ground of objection" before the Court of Appeal had not been "taken at the trial," the order should have been granted with costs against the then appellant, now respondent, pursuant to section 55 of the "Supreme Court Act" of British Columbia.

*Per* Davies C.J., Anglin and Mignault JJ.—It is within the jurisdiction and duty of the Supreme Court of Canada to reverse an order as to costs, when a party, having a statutory right to receive his costs of certain proceedings from his opponent, has, on the contrary, been ordered to pay that opponent's costs, especially when the appeal to this court, its merits being arguable, was evidently not brought merely for the purpose of introducing the question of costs.

Judgment of the Court of Appeal, (43 D.L.R. 47; (1918) 3 W.W.R. 385,) affirmed as to merits, but reversed as to costs, Idington and Brodeur JJ. dissenting.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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APPEAL from a judgment of the Court of Appeal for British Columbia (1), rendered on an appeal from a judgment of Macdonald J. at the trial (2), and ordering a new trial.

The action is one for damages to a motor car driven by the wife of the appellant, through a collision between the car and a passenger train of the respondent. The questions put to the jury and the answers were as follows:—

Q.—Was the damage to the plaintiff's automobile caused by the negligence of the defendant? A.—Yes.

Q.—If so, in what did such negligence consist? A.—In delaying the application of brakes.

Q.—Could the driver of the automobile, by the exercise of reasonable care, have avoided the accident? A.—Yes.

Q.—If she might, in what respect was such driver negligent? A.—In not exercising sufficient watchfulness by looking to the right as well as to the left.

Q.—If, after the employees of defendant became aware or ought (if they had exercised reasonable care) to have become aware that the automobile was in danger of being injured, could they have prevented such injury by the exercise of reasonable care? A.—Yes.

Q.—If so, in what manner or by what means could they have prevented the accident? A.—By the speedy application of brakes.

Q.—Amount of damages? A.—$1,485.

After hearing argument the trial judge directed that judgment be entered for the appellant for $1,485 and costs of the action.

From this judgment the present respondent appealed to the Court of Appeal for British Columbia; and one of its grounds of appeal was that the trial judge should have submitted a further question to the jury

as to whether, when the driver of the automobile in question became aware, or ought, if she had exercised reasonable care, to have become aware, that the automobile was in danger of being hit by the train, she could have prevented the injury by the exercise of reasonable care.

Section 55 of the "Supreme Court Act" of British Columbia, R.S.B.C. (1911), c. 58, provides

(1) 43 D.L.R. 47; (1918) 3 W.W.R. 385.

(2) (1918) 1 W.W.R. 251.

that in the event of a new trial being granted by the Court of Appeal upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant * * *

The Court of Appeal, in this case, ordered a new trial, but directed the present appellant, then respondent, to pay the costs of the appeal.

*Martin Griffin* for the appellant.

*W. N. Tilley K.C.* and *A. J. Thomson* for the respondent.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J. (dissenting).—The question raised herein is whether or not the learned trial judge in his charge to the jury so adequately dealt with the problems of law presented by the facts for the consideration of the jury, that there was no necessity for a new trial as directed by the Court of Appeal.

If the finding of contributory negligence on the part of the appellant's agent in charge of the automobile, did not, as there is much reason for holding it did, deprive him of any right to recover, it could only be so by some very special circumstances, by no means self-evident in the case, requiring direction containing an explanation of the relevant law to enable the jury properly to deal with the possibilities of such a case.

If the facts had been such as to permit of the application of the principle acted upon in the *Loach Case* (1), referred to in the judgments below and properly held inapplicable, one might have expected an exposition of the law bearing thereon.

(1) (1916) 1 A.C. 719; 23 D.L.R. 4.

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There was nothing in the charge that would adequately fit such a case; probably because of the want of facts calling therefor.

If, as may possibly be arguable, the facts called for the application of the principle proceeded upon in the case of *Davies* v. *Mann* (1), and many like cases since then, there should have appeared in the charge something more than does appear.

The allusion to the illustration of the running down of the donkey tethered in the street should suffice for the lawyer conversant with the law of negligence, but I doubt if even the most intelligent jury would be enabled from what was said, intelligently to apply the principle in question. Indeed the result strongly suggests they did not.

I suspect it was the absence of the necessary facts in the case that caused the learned judge's terseness of allusion.

It is quite possible that the view suggested by Mr. Justice McPhillips which, strictly adhered to, would have involved a judgment of dismissal of the action, should have been the result in appeal. I pass no opinion thereupon, for as I view the case as presented to us there must be a new trial and the less said the better.

Had there been a cross-appeal claiming a dismissal, I should have felt bound to examine the evidence closely and determine for myself such issue.

The appellant is not, in my opinion, entitled to maintain the judgment so obtained and hence the new trial should be proceeded with.

The appellant's counsel submitted that in such event he was entitled to the costs of appeal because, as he alleged, and the Chief Justice seemed to admit, the

(1) 10 M. & W. 546.

counsel for respondent at the trial did not take the objection to the charge which he should have done.

In answer to my inquiry why he did not call the attention of the Court of Appeal to the non-application of the provision of the statute in that behalf, an explanation was given which leads me, in light thereof and of the fact that an objection was taken to the learned judge's charge which he practically disregarded, to infer there had been a misunderstanding.

There is, in fact, no ground in this case to apply the new rule adopted in British Columbia for penalizing the party who is silent in presence of a misdirection.

The substantial ground of quarrel with the learned judge's charge is that he did not adequately deal with the subject-matter and not that it was absolutely necessary in law to have two or more specific questions submitted than he saw fit to submit.

Though the learned Chief Justice expressed the view that when such supplementary questions were put another should also be put, the court did not adopt or carry out or proceed thereon, but exercised its substantial power to grant a new trial as it properly might by resting upon the view that it was necessary in order that justice might be done.

We have long observed a very salutary rule borrowed from the practice of the court above, never to entertain appeals either for mere errors of practice or procedure or judgments as to costs, unless in some extreme case which, in view of the grounds upon which the majority of the court proceeded, this is not.

The decisions are collected at pages 86 *et seq.* of Cameron's Practice, beginning at foot of said page 86.

It is not a question of jurisdiction but of the need to confine the litigious spirit within proper bounds.

The appeal should be dismissed with costs.

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ANGLIN J.—The jury having found negligence on the part both of the defendants' employees and of the plaintiff's wife, who was driving his automobile, in answer to two further questions (Nos. 5 and 6) found that after the employees of the defendants became aware, or ought to have become aware, that the automobile was in danger of being injured, they could have prevented such injury, in the exercise of reasonable care, by the speedy application of the brakes. On these findings the learned judge entered judgment for the plaintiff.

The Court of Appeal ordered a new trial. Galliher J.A. and Eberts J.A. assigned no reasons for this order. Martin J.A., while at first inclined to the view that the answers of the jury to the 5th and 6th questions could not be supported on the evidence, thought it safer to order a new trial apparently because in his opinion the trial judge should have complied with the request of counsel for the defendants to direct the jury in accordance with the views expressed by the Supreme Court of Nova Scotia in *Morrison* v. *Dominion Iron & Steel Co.* (1). McPhillips J.A., while stating at some length reasons which would appear to warrant a judgment dismissing the action on the ground that the evidence did not sustain the answers to the 5th and 6th questions, and that the accident was ascribable solely to the reckless carelessness of the driver of the automobile, concurred in the order for a new trial on the ground that the jury should have been instructed that it was the duty of the driver of the motor car as well as that of the railway employees to have taken all reasonable care to avoid the collision when the danger of it became, or should have been, apparent, and that questions as to her conduct at that stage of the occurrence similar

(1) 45 N.S.R. 466.

to those with regard to the conduct of the railway employees (Nos. 5 and 6) should have been submitted to the jury. The learned Chief Justice bases his judgment solely on the failure of the learned trial judge to instruct the jury as to

> the duty of the driver of the automobile to take reasonable care to avoid the collision after she became aware of the danger. * * * As the case was left to the jury, though the obligation of the defendants was submitted, that of Mrs. Gavin was ignored. While no objection in this connection was taken by defendant's counsel at the trial yet it was the duty of the learned judge to leave the issues to the jury with proper and complete directions on the law and as to the evidence applicable to such issues: "Supreme Court Act," sec. 55.

The court ordered a new trial and directed that the costs of the appeal be paid by the plaintiff and that those of the former trial should abide the event of the new trial.

On examining the charge of the learned trial judge, I find that while it might, no doubt, have been more definite and explicit on these points, it contains the substance of the law as stated in the *Morrison Case* (1), referred to by Martin J.A., both as to the duties of a traveller on the highway and as to the rights and responsibilities of those in charge of railway trains when approaching highway crossings. An order for a new trial based solely on the ground of non-direction in these particulars, in my opinion, could not be supported. But although the learned trial judge alludes to the duty of a traveller on a highway to be more than ordinarily alert and observant when approaching a railway crossing, and to the allegation of the defence that Mrs. Gavin,

> after she became aware of the danger, was not able, or could not, on account of incompetency, avoid the danger, and thus brought the accident on herself,

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adding,

> There are two phases you have to consider in connection with her conduct that afternoon, *i.e.*, first as to her conduct before she saw the car or was aware of the approach of the car, and as to her conduct afterwards. I think I can hardly be of any further assistance to you on that branch of the case,

when dealing with the 5th and 6th questions, while he discusses the duty of the brakesman to have taken all reasonable means to stop the train when he came, or should have come, to the conclusion that there was danger of collision, he says not a word of the corresponding obligation of the driver of the motor car. As the case was left to the jury the true issue as to "ultimate negligence" under the circumstances in evidence, in my opinion, was not fairly submitted to them. I agree, therefore, that a new trial was properly ordered on that ground.

But the appellant complains, and I think with reason, that he has been ordered to pay the costs of the appeal to the Court of Appeal in contravention of an explicit provision of sec. 55 of the "Supreme Court Act" (R.S.B.C. 1911, ch. 58). That section is as follows:—

> 55. Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues: provided also that the said right may be enforced by appeal, as provided by the "Court of Appeal Act," this Act, or Rules of Court, without any exception having been taken at the trial; provided further that in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the court.

I have carefully read the objections taken by counsel at the close of the learned judge's charge and I find the statement of the learned Chief Justice, as is usual, fully borne out that

no objection in this connection was taken by defendants' counsel at the trial.

The questions put to the jury had been submitted to counsel before they made their addresses and counsel for the defendants accepted them as satisfactory. The order for a new trial, if not granted by the Court of Appeal on a "ground of objection not taken at the trial," is, in my opinion, maintainable only on such a ground and it follows that under section 55 of the "Supreme Court Act" of British Columbia the appellant (plaintiff) was entitled to the costs of the appeal to the Court of Appeal and was wrongfully deprived of them by that court, either through inadvertence or possibly because the majority of the court (Martin, Galliher and Eberts JJ.A.) were of the opinion that the ground indicated by Mr. Justice Martin, which had been taken by counsel for the defendant in his objections to the learned judge's charge, sufficed to support the order for a new trial.

While this court ordinarily refuses to entertain an appeal which merely involves costs, where, as here, a party entitled by statute to receive his costs of certain proceedings from his opponent has been ordered to pay that opponent's costs, I think it is our duty to interfere. The disposition of the costs in question was in no wise in the discretion of the Court of Appeal. They were erroneously disposed of because of a mistake on a matter of law which affected them. *Archbald* v. *DeLisle* (1); *Delta* v. *Vancouver Railway Co.* (2). If not, this is an extreme case; a statutory right has been ignored and a gross error would appear to have been made. The jurisdiction and duty of this court under such circumstances to reverse an order as to costs, although not interfering with the disposition

(1) 25 Can. S.C.R. 1, at pages 14-15.

(2) Cameron's S.C. Practice 90.

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made of the case itself, has, so far as I am aware, never been disaffirmed. See *Smith* v. *Saint John City Rly. Co.* (1). Moreover, the present appeal was not for costs only. On the merits it was fairly arguable that the answers to the 5th and 6th questions entitled the plaintiff to judgment. This appeal was not brought on colourable grounds merely for the purpose of introducing the question of costs. *Inglis* v. *Mansfield* (2).

While sustaining the order for a new trial, therefore, I would set aside the order as to the costs of the appeal to the Court of Appeal and would substitute for it an order that the appellant's (plaintiff's) costs of that appeal should be paid by the respondents (defendants). The plaintiff was obliged to come to this court for redress and is, therefore, entitled to his costs of this appeal.

BRODEUR J. (dissenting). — This action was brought by the appellant to recover damages for the destruction of his automobile as the result of a collision with a train of the railway company respondent, on Winnipeg Street, in the Town of Penticton.

The action was tried by a jury which found:—

1. That the damage was caused by the negligence of the defendant in delaying the application of the brakes;

2. That the driver of the automobile was also guilty of negligence in not looking properly before attempting to cross the railway track; and

3. That the employees of the railway company could have prevented the injury by a speedy application of brakes after they had become aware that the automobile was in danger of being injured.

(1) 28 Can. S.C.R. 603, at p. 605.

(2) 3 Cl. & F. 362, at p. 371.

The evidence shews that the train which struck the automobile was moving reversely and, as required by sec. 276 of the "Railway Act" there was stationed, on the part of the train which was then foremost, employees to warn persons crossing, or about to cross, the track of the railway.

The speed at which the train was moving was a moderate one and was likely less than the one at which it is authorized to run in the towns.

No negligence on the part of the railway company could be found, or has been found in that respect.

It seems to me that the only cause of the accident was that the driver of the automobile, Mrs. Gavin, did not look properly to see whether there was danger for her in crossing the track. She gives us an excuse that she had been informed that no train was expected from the right and that she had been looking only to her left.

A person approaching a highway crossing a railroad track should look and listen for approaching trains with the care and caution of an ordinarily prudent man. She must make a vigilant use of her senses, and she must look in every direction from which danger may be apprehended, and it would be very imprudent for her to rely then on the information of some person who has nothing to do with the administration of the railway. Some judgments go so far as to state that if the person does not look and listen, the court will draw the inference that his act contributed to the injury and will apply this rule although the railway company failed to give the proper cautionary signals, or was guilty of other acts of negligence concurring to cause the injury. *Damrill* v. *St. Louis & San Francisco Ray Co.* (1). A railway train

(1) 27 Mo. App. Reports 202.

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is not bound to stop or to moderate its speed at every highway crossing. The law imposes upon the company the obligation to make some signals. However, it is an obligation on the company to use ordinary care and prudence to protect the person at a highway crossing after discovery of his presence.

The travellers and employees who were on the platform of the train when they first saw the automobile never suspected that there was danger of the machine running upon the railway track. They all thought it would stop and in fact it would certainly have stopped if the driver had not been so negligent. When the brakesman of the train saw, however, that there was danger, he warned the driver of the automobile and some pedestrians near by did the same thing. The brakesman at the same time signalled the engineer of the train to stop the train. The brakes were applied, but, unfortunately, it was too late.

The evidence, according to my opinion, is very conclusive and discloses the fact that the accident was due entirely to the negligence of the driver of the automobile. The action, in my opinion, should have been dismissed.

The Court of Appeal ordered a new trial on the ground that some additional question should have been submitted to the jury as to whether Mrs. Gavin, after she became aware of the danger, could have prevented the accident by the exercise of reasonable care and also on the ground that the trial judge should have charged, as he was asked to do, that those in charge of the train were entitled to rely upon the driver using due care.

It seems to me that the evidence does not justify a finding of negligence on the part of the company. There is no cross-appeal on the part of the company

and I must, therefore, purely and simply, dismiss the appeal. A new trial will then have to take place.

The appeal should be dismissed with costs.

MIGNAULT J.—The Court of Appeal of British Columbia has ordered a new trial in this case, on the appeal of the present respondent. The latter is apparently satisfied with the judgment and has not cross-appealed to this court. For that reason I will refrain from expressing any opinion as to the liability, on the findings of the jury, of the respondent.

After the verdict, the railway company appealed from the judgment of the learned trial judge condemning it to pay $1,485 to Gavin. Its grounds of appeal were five in number. The two first were grounds for the dismissal of the action. The third ground, referring to the alleged improper admission of evidence, and the fourth, pretending that the trial judge should have submitted a further question to the jury

as to whether, when the driver of the automobile in question became aware, or ought, if she had exercised reasonable care, to have become aware that the automobile was in danger of being hit by the train, she could have prevented the injury by the exercise of reasonable care.

were grounds for ordering a new trial. The fifth ground,

all other grounds appearing in the proceedings at the trial.

notwithstanding its generality, was urged, I should think, as a reason for demanding a new trial.

The learned Chief Justice of British Columbia adopted the fourth ground of appeal, and was of the opinion that a new trial should be ordered. Mr. Justice Martin favoured granting a new trial on the ground that a direction should be given to the jury as to the commonsense duty of persons crossing railway tracks and the reasonable anticipation of employees in charge of trains in accordance with the judgment of

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the Supreme Court of Nova Scotia in *Morrison* v. *Dominion Iron & Steel Co.* (1). Mr Justice Galliher and Mr. Justice Eberts gave no reasons, and although Mr. Justice McPhillips' opinion seems to lead to a conclusion favourable to the dismissal of the plaintiff's action, he concurred in ordering a new trial.

I take it that the charge to the jury of the learned trial judge was sufficient, but I am of the opinion that he should have put the question suggested by the fourth ground of appeal of the present respondent. I, therefore, think that a new trial was rightly ordered on that ground only.

But this ground was raised, not at the trial, but on the appeal. This brings me to consider the effect of sec. 55 of the "Supreme Court Act" of British Columbia, R.S.B.C., 1911, ch. 58, which reads as follows:—

> 55. Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues; provided also that the said right may be enforced by appeal, as provided by the "Court of Appeal Act," this Act, or Rules of Court, without any exception having been taken at the trial; provided further that in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the court.

This section directs that in the event of a new trial being granted upon grounds of objection not taken at the trial, the costs of the appeal *shall be paid by the appellant.*

Instead of following this imperative direction the Court of Appeal of British Columbia condemned the respondent on that appeal (the present appellant) to pay the costs of the appeal. I am of the opinion that it could not do so.

(1) 45 N.S.R. 466.

This adjudication of the costs of the appeal was not a matter lying within the discretion of the court below, which was bound to grant the costs of that appeal to the present appellant. The only discretion that the court below had was as to the costs of the abortive trial, and it directed that those costs abide the event of the new trial. But it could not, under the circumstances, condemn the present appellant to pay the costs of and occasioned by the appeal.

Much as I feel reluctant to interfere with a judgment on a question involving costs, I cannot escape doing so here, for the imperative requirement of the statute above referred to has been disregarded. I would, therefore, affirm the judgment appealed from in so far as it orders a new trial, but I would vary it so as to condemn the present respondent to pay the costs of his appeal to the British Columbia Court of Appeal. He should also pay the costs of the appellant here.

*Appeal allowed in part with costs.*

Solicitors for the appellant: *Martin Griffin & Co.*
Solicitor for the respondent: *N. F. Tunbridge.*