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*Oct. 15, 16.

H. M. COTTINGHAM (DEFENDANT) . . . APPELLANT;

AND

ALICE LONGMAN AND OTHERS (PLAINTIFFS) . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Appeal—Findings of jury—Review by appellate court.

Where a case has been properly allowed to go to the jury and there is evidence before them from which they could reasonably draw the conclusion at which they arrived, the verdict should not be disturbed on an appeal.

Judgment appealed from (18 B.C. Rep. 184) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment entered by Morrison J. at the trial, on the verdict of the jury, in favour of the plaintiffs for $5,000 damages and costs.

The principal question, on the evidence at the trial, was as to the identification of the defendant's motor-car by which, it was alleged, the deceased, the husband of the plaintiff, Alice Longman, and the father of the infant plaintiffs, had been killed on account of the defendant's negligent driving. The accident happened while deceased was at work on a highway bridge at night and employed there by the Corporation of the City of Vancouver. When submitting

*PRESENT:—Sir Charles Fitzpatrick C.J., and Idington, Duff, Anglin and Brodeur JJ.

(1) 18 B.C. Rep. 184.

the case to the jury the learned trial judge did not address them upon the question of negligence. He said: "I purposely avoided it because it seems to me that this is entirely a question of identification of that car, and, if you are not satisfied that it was Cottingham's car, of course, there was no possibility of his doing this. There were other cars about that time, and it is for you to say, within what periods, and the situation on the bridge, not ignoring the other circumstances on the bridge of that four-horse rig. If you believe the evidence, then see what you can make of it."

The jury returned a verdict for the plaintiffs and awarded them $5,000 damages—$3,000 for the widow and the balance divided among the children. The judgment entered upon this verdict was affirmed by the judgment now appealed from.

S. S. Taylor K.C. for the appellant.
George E. McCrossan for the respondents.

After hearing counsel on behalf of the appellant and without calling upon the respondents for any argument, the appeal was dismissed with costs.

THE CHIEF JUSTICE.—To establish liability it is not necessary, in an action of damages for tort, that there should be an eye-witness to the accident. A series of facts may be proved in evidence from which the jury may reach a conclusion, as to the cause of the mishap, in some respects more satisfactory than if they were obliged to depend upon the deposition of an eye-witness. It has so frequently been held here that one must almost apologize for repeating it, that the

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function of an appellate court is to consider in each case whether there was evidence before the jury from which they could reasonably draw the conclusion at which they arrived.

Here the finding of the jury has the approval of the provincial Court of Appeal as well as of the trial judge.

Nothing was said here, nor can I see anything in the factum which would justify us in reversing.

Having regard to the principle which I have just stated, the appeal is dismissed with costs.

IDINGTON J. concurred in the dismissal of the appeal.

DUFF J.—I think this appeal ought to be dismissed with costs.

There is a fallacy in the argument presented on behalf of the appellant which resides in the proposition stated by his counsel almost in so many words that in a civil action complaining of a tort it is incumbent upon the plaintiff to demonstrate the culpability of the defendant. It ought not to be necessary to controvert so obvious an error. But although seldom put forward in a form so unqualified, this proposition has unquestionably often enough in the past been the tacit assumption upon which the defence in such cases as this has been based and, sometimes, it is to be feared that it has formed the real basis of judicial pronouncements in such actions. The subject of the nature of proof upon which a jury is entitled to act in civil cases was fully discussed in some recent judgments (see *Grand Trunk Railway Co.* v. *Griffiths*(1),

(1) 45 Can. S.C.R. 380.

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and *Jones* v. *The Canadian Pacific Railway Co.*(1), but, notwithstanding these judgments, the error will doubtless survive. The burden resting upon the plaintiff is, of course, to establish facts from which the jury may reasonably draw the inferences necessary to sustain the plaintiff's case. In this case the plaintiffs unquestionably acquitted themselves of this onus.

ANGLIN J.—The only question upon this appeal is whether there was sufficient evidence to enable the jury to infer (otherwise than by a mere guess or conjecture) that it was the defendant's automobile which killed the husband and father of the plaintiffs. In my opinion there was.

The appeal, therefore, fails and should be dismissed with costs.

BRODEUR J.—I am of opinion to dismiss this appeal for the reasons given by Mr. Justice Duff.

Appeal dismissed with costs.

Solicitors for appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for the respondents: *McCrossan & Harper.*

(1) 29 Times L.R. 773.