

1913  
 \*Oct. 15. THE CITY OF CALGARY (DEFEND- } APPELLANT;  
 ANT) .....

AND

LUPO HARNOVIS AND DAVE HER- } RESPONDENTS.  
 COVISH (PLAINTIFFS) .....

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

*Negligence—Operation of tramway—Carelessness of person injured  
 —Reckless conduct of motorman.*

The carelessness of the plaintiffs in driving across the tracks of a tramway was, in this case, excused by the reckless conduct of the defendant's motorman in failing to use proper precautions to avoid the consequences of their negligence after he had become aware of it. Judgment appealed from (11 D.L.R. 3; 4 West. W.R. 263) affirmed.

APPEAL from the judgment of the Supreme Court of Alberta(1), whereby, on an equal division of opinion among the judges, the judgment of Beck J. at the trial(2) in favour of the plaintiffs stood affirmed.

The action was brought by the respondents to recover damages for injuries to themselves and their lunch-van occasioned by a collision with a city tram-car at a subway-crossing of one of the public streets under the tracks of the Canadian Pacific Railway in the City of Calgary. The tramway, operated on the street where the collision occurred, entered the subway from one end about the same time that the plaintiffs' van was passing through the subway from the

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

(1) 11 D.L.R. 3; 4 West. W.R. 263.

(2) 7 D.L.R. 789; 2 West. W.R. 312.

other end. It was shewn that the plaintiffs had carelessly driven the van across the tracks of the tramway but it also appeared that the motorman who was driving the electric tramcar was able to see the van approaching in the opposite direction and that, by using the appliances on his car promptly, he might have reduced the speed of the car, or brought it to a stop, and thus avoided the accident from which the injuries resulted. At the trial, before Mr. Justice Beck without a jury, the plaintiffs' action was maintained, \$1,000 being awarded to Lupo Harnovis and \$120 to Dave Hercovich, without costs. On the appeal to the court *in banco*, on equal division of opinion among the judges, the decision of the trial judge in favour of the plaintiffs was affirmed and his judgment was varied by giving the defendant, appellant, costs up to the date of the trial.

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The principal grounds urged on the present appeal were that the judgment was against the weight of evidence and that the courts below had erred in holding that the case was governed by the decision in the case of *The Halifax Tramway Co. v. Inglis* (1).

*D. S. Moffat* for the appellant.

*G. H. Ross K.C.* appeared for the respondents, but was not called upon by the court for any argument.

THE CHIEF JUSTICE concurred with Duff J.

IDINGTON J. concurred in the result of the judgment.

DUFF J.—There was evidence from which the learned trial judge was entitled to find and did find

(1) 30 Can. S.C.R. 256.

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(and I may add that I agree with his finding) that the motorman, when he saw the respondents' van heading across the track, might with the exercise of reasonable skill and diligence have avoided the collision or, at all events, the substantial harm caused by it.

The learned judge also took the view that the respondents, when they directed their horse across the street, were sitting in their van carelessly oblivious of the dangers, actual or possible, of the car-track. The view of the learned trial judge was that, although the respondents were in fault to such a degree as would have debarred them from recovering had it not been for the conduct of the motorman after their negligence became apparent, yet (in the circumstances of this case) as the motorman could have avoided the consequences of the respondents' negligence after he became aware of it, the plaintiffs were entitled to recover. In a word, the decisive negligence was found by him to have been that of the motorman. I agree with this view and I should dismiss the appeal with costs.

ANGLIN J.—There was evidence sufficient to support the finding that the determining cause of the accident in this case was the negligence of the defendant's motorman, but for which he might have prevented the collision after he became or should have been aware of the plaintiffs' danger.

The appeal fails and should be dismissed with costs.

BRODEUR J. also concurred.

*Appeal dismissed with costs.*

Solicitor for the appellant: *D. S. Moffat.*

Solicitor for the respondents: *H. C. B. Forsyth.*