G. W. LEECH (PLAINTIFF).....APPELLANT;

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May 12, 13.
June 7.

AND

THE CITY OF LETHBRIDGE (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

*Negligence—Collision—Tramways—Right of way—By-law—Obligation to look-out—Jury trial—Misdirection.*

The appellant, while driving an automobile, was injured by collision with a tram car operated by the respondent. In an action for damages, the jury found that both the appellant and the respondent were at fault. Evidence was adduced of a by-law giving the street car a right of way over other vehicles; and the trial judge in his charge said in substance that this by-law relieved the motorman, when travelling at a proper rate of speed, from the obligation to keep a look-out.

*Held*, Idington J. *contra*, that this was misdirection; but

*Held* also, Duff J. dissenting, that in view of the findings of the jury, read in the light of the evidence, no substantial wrong or miscarriage resulted therefrom.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta affirming the judgment of the trial judge with a jury and dismissing the appellant's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

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

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The Chief Justice.

*J. H. Leech K.C.* for the appellant.

*W. S. Ball* for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs. I think the findings of the jury are fully justified by the evidence.

A question was properly raised by appellant's counsel to the effect that there was misdirection on the part of the trial judge as to the street cars "right of way," but I do not think, looking at the case as a whole, that the jury were misled by any such misdirection, or that any substantial wrong or miscarriage resulted from it.

The plaintiff's negligence found by the jury on evidence fully warranting it was not affected by the misdirection complained of.

IDINGTON J.—The appellant driving an automobile on one of the streets of Lethbridge which crosses at right angles another street a hundred feet wide, whereon the respondent has a double track street railway, attempted to cross said railway. After crossing the first track in safety and getting on the second of said tracks, a street car moving thereon struck his car "amidships," as one of the witnesses aptly describes the results. This happened between one and two o'clock p.m. and not as a result of appellant's car being stalled or hampered in any way, or his vision obscured, unless by his own want of care in closing the side curtains of his automobile.

The appellant sued respondent herein for damages arising from said collision alleging they resulted from said street car being operated negligently, carelessly and recklessly, and at excessive speed, and, in contravention of the law, was in charge of a motorman whose

physical defects unfitted him for the proper discharge of his duties. These allegations were denied by the pleadings of the defendant (now respondent) and the latter alleged in its defence that the damages claimed were the result of reckless and careless driving by the plaintiff (now appellant) and that he was unable to see the street car by reason of the enclosed sort of car which he was driving and that he was driving at a high rate of speed and drove it into the street car of respondent.

The learned trial judge charged the jury in a most fair and impartial spirit though some isolated sentences may contain propositions liable to criticism as possibly capable of better expression of the exact law bearing on the subject. What charge is not?

None of such were, if the jury is to be assumed as possessed of common sense, at all likely to mislead in a case which required only the application of such sense to properly dispose of all involved.

He submitted five questions to the jury.

The only objection taken to the charge was to ask the correction of a statement relative to some minor matter of evidence, which was duly acceded to.

It was admitted in argument herein that the said questions had been submitted to the counsel engaged at the trial and no objection of any kind was taken thereto, or any request made for further questions.

The first three questions submitted were as follows and answered as appears set opposite each respectively:–

1. Was there any negligence on the part of the defendant? A. Yes.

2. If the answer to the first question be "Yes," in what respect was the defendant negligent? A. Inasmuch as the motorman did not exercise the necessary observation in failing to see plaintiff's car approaching from the north.

3. If there was any negligence on the part of the defendant, could the plaintiff have avoided the accident by the exercise of reasonable care and diligence? A. Decidedly yes.

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In light of the pleadings, the evidence, and the learned judge's charge, these answers would seem conclusively to dispose of the whole case.

The fourth question related to damages if assessed, but in the result no need therefor. I will refer to the fifth question presently.

It is to be observed that the first question does not distinctly raise the question of negligence of the defendant causing the accident.

One of the peculiarities of the case is that there is nothing proven as to the alleged excessive speed or anything in the way of neglect in way of outlook or otherwise, which could properly be held to have caused the accident if the plaintiff had observed common sense and prudence.

Hence the importance of the answer to the third question. The answers to the first two questions no doubt were the result of evidence as to the defective eyesight of the motorman upon which the learned trial judge made some pointed remarks in his charge.

The finding being confined to the outlook question all the other allegations of negligence on the part of respondent presumably failed and hence are impliedly negatived by the answer of the jury.

When we read the evidence of the appellant and find from his own story such a remarkable mass of evidence of neglect, on his part, of the exercise of ordinary care and prudence, we can realize the import of the answer "Decidedly yes."

The facts, that there was no objection as now taken to the learned judge's charge, or to the questions put, or request for further questions thus submitted, would have furnished at almost any of said respective stages in the development of these aspects of trial by jury, an impassable barrier to the plaintiff seeking a new trial.

But to put an end, if possible, to such departures from that violation thereof as had become too common, an imperative prohibition was introduced in England and other jurisdictions into the rules against granting new trials, unless some substantial wrong or miscarriage had been occasioned on the trial.

That so far as Alberta is concerned appears in section 329 of its Judicature Ordinance, as follows:—

> 329.—A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court to which application is made some substantial wrong or miscarriage has been thereby occasioned on the trial; and if it appears to such court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or some or one only of the parties and direct a new trial as to the other part only or as to the other party or parties.

Having, in order to be able to observe the terms of this rule, read the entire evidence, I fail to understand how any claim can be reasonably made on the part of one so far disregarding, as appellant did, the most ordinary rules of prudence and thereby placing himself where he and his car were injured.

Not only is it quite obvious that he must not have exercised due care, looking from where he claims he did, to see if a street car was in sight, but that his venturing to cross at a moment when, if he had looked or listened properly, he must have realized collision was inevitable unless he stopped or turned his car aside.

Indeed the street cars in Lethbridge may, by some secret method unexplained, travel in silence instead of making the noise the like cars make elsewhere, especially if running at high speed as charged, quite enough to awaken any ordinary dreamer gliding quietly along in his auto.

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There is no evidence on that point, but I rather think from the evidence we have of Commissioner Freedman that the use of whistles and gongs is forbidden unless in case of absolute necessity that might serve a useful purpose, as in the case of an auto driver threatening to intrude upon the right of way of the street cars as they in moving make quite enough noise.

Notwithstanding the said evidence the appellant swore as to such warnings, as follows:—

Q.—Do you know whether that is the custom where there is any one crossing the track?

A.—I could not say as to that; I know it is customary to get a signal at an intersection; I know we have been saved a good many times; I am saying that from my own experience.

Q.—That is, if crossing a track you get a signal?

A.—Not always, but I know I have scores of times got a signal as I was approaching a street car on an avenue or street, which has in many cases saved me.

Is it to be inferred that he must have been habitually an offender by getting in the way of street cars?

However all that may be I am not surprised that the Appellate Division, possessed of local general knowledge which we are not, dismissed his appeal without making any remarks.

The fifth question submitted to the jury, and answer thereto is as follows:—

5. If there was negligence on the part of the defendant and contributory negligence on the part of the plaintiff, could the motorman have then avoided the accident by reasonable care?

A.—No. As the motorman had right of way.

There was in the evidence no need of this question as very often exists to elicit the facts as to possible ultimate negligence.

The appellant's car came in sight of the motorman of the street car when, as he expresses it, the two were within six or eight feet of each other and he

instantly reversed and did all possible to save the situation, and that is corroborated by the uncontradicted evidence of the mechanical condition of the street car when examined after the accident.

The reference in the answer to the motorman having the right of way must be read in light of the learned judge's charge correctly stating the law as fixed by the bylaws when travelling at a reasonable rate of speed.

I submit the appeal should be dismissed with costs.

DUFF J. (dissenting):—The learned trial judge seems to have misstated the law to the jury in a very important point. Nothing in the city by-law could excuse the failure of the motorman to keep a proper lookout; and to tell the jury that this was not required so long as a moderate speed was maintained necessarily must have had the effect of misleading them in respect of the material issues.

The failure to take the objection does not, I think, preclude the appellant from raising the point on appeal. Even when the error complained of is misdirection this is not the necessary consequence of failure to take the objection at the trial; *White* v. *Victoria Lumber & Manufacturing Co.* (1); and it seems that, the learned trial judge having explained his view in the clear, precise and concrete terms used by him, no objection taken by counsel was at all likely to lead to an amendment.

The point to be considered is whether it is clear that there has been no substantial wrong or miscarriage of justice. Now it is plain enough that on the evidence it was quite open to the jury to find excessive speed and furthermore to find that by reason of excessive speed the motorman had disabled himself from avoiding

(1) [1910] A.C. 606.

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the consequences of appellant's negligence; *Columbia Bithulitic Limited* v. *British Columbia Electric Ry. Co.* (1); and also that the motorman by failing to maintain a proper lookout had negligently prevented himself becoming aware of the appellant's negligence in time to avoid the consequences of it. In other words, on the evidence it was quite open to the jury to have found the facts in such a way as to bring the case within *Loach's Case* (2). In truth the jury probably thought there was excessive speed; otherwise the jury's finding is not easily to be understood. And at all events the finding in answer to the last question is obviously the result of the learned judge's erroneous direction as to the necessity of a proper lookout.

The appellant has I think suffered substantial wrong and there should be a new trial.

ANGLIN J.—Although there was undoubtedly grave misdirection in telling the jury that the by-law giving right of way to the defendants' street car on the streets of the town relieved their motorman when travelling at a proper rate of speed from keeping a lookout, the findings of the jury read in the light of all the evidence satisfy me that no substantial wrong or miscarriage on the trial resulted therefrom. (R. 329). The misdirection had to do only with the negligence of the defendants. The jury found that the defendants were negligent in that their "motorman did not exercise the necessary observation" and that finding was not challenged. The negligence charged and found against the plaintiff was not affected by the direction complained of. Apart from misdirection no ground for interference with that finding was suggested.

(1) [1917] 55 Can. S.C. R. 1. (2) [1916] 1 A. C. 719.

The only finding of the jury which could have been affected by the misdirection was that in regard to what has sometimes been termed "ultimate negligence." In answer to the question "if there was negligence on the part of the defendant and contributory negligence on the part of the plaintiff, could the motorman have then avoided the accident by reasonable care?" the jury said:—"No. As the motorman had right of way."

But the circumstances of the case were such that no issue of "ultimate" negligence on the part of the defendants arose.

Having regard to all the circumstances I think the finding that the plaintiff could by the exercise of reasonable care and diligence have avoided the accident was a sufficient finding of contributory negligence on his part.

The appeal in my opinion fails.

MIGNAULT J.—This is not a very satisfactory case. The appellant, who was driving an automobile in the streets of Lethbridge, was injured by coming in collision when crossing the street car line with a tram car operated by the respondent. The appellant's side curtains were closed and the only way he could see was through the glass windshield, which would give him a range of vision on either side of about 150 feet, and he says he looked when approximately 20 feet from the street on which the cars ran, but saw no car. The motorman saw the automobile only when it was on the track and then of course it was too late to avoid the collision. My impression is that he was not keeping a proper lookout, but on the other hand it seems to me that had the appellant

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acted as a reasonably prudent man would have done he should have seen the tram car in time to stop before reaching the tracks. After hearing the evidence, the jury came to the conclusion that both the appellant and the motorman were at fault, the latter because he did not exercise the necessary observation, and their reply to the third question, whether, if there was negligence on the part of the defendant, the plaintiff could have avoided the accident by the exercise of reasonable care and diligence, was "Decidedly yes." The appellant's action was dismissed, and the judgment of the learned trial judge was unanimously affirmed by the Appellate Division of the Supreme Court of Alberta.

The answer of the jury to the third question would be conclusive against the appellant if the jury were properly directed. That however is the difficulty here. The learned trial judge, referring to a by-law of the City of Lethbridge giving the street cars a right of way over all other vehicles travelling on the highway, said to the jury:—

> The effect of that is that travelling at a proper rate of speed when approaching a crossing it is the duty of the automobile owner to avoid a collision and not the duty of the motorman in travelling at a proper rate of speed to keep a lookout.

Further the learned trial judge stated:

> It appears to me that, although to a lesser extent, the street car having the right of way and proceeding at a reasonable rate of speed under the circumstances and an automobile comes in contact with it, the owner of the automobile is responsible for the damage sustained and that the owner of the street railway would not incur responsibility. That appears to me to be the effect of this by-law.

With all deference I cannot think that this was a proper direction to the jury. The by-law giving right of way to the street cars certainly did not relieve the

motorman, even when travelling at a proper rate of speed, from the obligation to keep a proper lookout in order to avoid coming in collision with vehicles crossing the car tracks.

The difficulty in the way of the appellant is however twofold.

In the first place no objection was taken on behalf of the appellant at the trial to this direction of the learned trial judge, and I cannot but believe that if such an objection had been made the learned judge would have found it advisable to qualify his statement. The appellant by failing to object seems to have taken the chance of the jury's verdict.

In the second place, the jury, notwithstanding the statements I have quoted, evidently thought the motorman should have taken a proper observation of the roadway, for they found the respondent negligent because he had not done so. And they considered the appellant guilty of the ultimate negligence which caused the accident. No miscarriage therefore occurred on account of the judge's charge.

As a result I would not interfere with the verdict and the appeal should in my opinion be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *John R. Palmer.*

Solicitor for the respondent: *W. S. Ball.*