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*Oct. 26.

LARRY LESTER CUTHBERTSON SUING BY HIS NEXT FRIEND, HUGH W. CUTHBERTSON, AND THE SAID HUGH W. CUTHBERTSON (PLAINTIFFS).. } APPELLANTS;

AND

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

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

Negligence—Evidence—Finding of negligence by jury—Sufficiency of evidence to justify finding—Sufficiency of corroboration.

The judgment of the Appellate Division, Alta., [1928] 1 W.W.R. 815, which reversed the judgment at trial on the findings of a jury, and held that plaintiffs were not entitled to recover damages for injury to the infant plaintiff, who was run over by defendant's street car, on the ground of want of the requisite corroboration of the evidence given by infant witnesses not under oath, to show that the accident was caused by negligence of defendant's motorman, was set aside, and the judgment at trial was restored, the Court holding that, apart altogether from the question of corroboration, there was sufficient in the evidence of the motorman himself, under the circumstances, to justify

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

the jury in drawing the inference that he was negligent; that there was, in any case, corroboration of the infant plaintiff's story of what happened just before the accident, sufficient to enable the jury to say that a proper watch was not kept; that the jury's finding that there was not sufficient lookout should not have been disturbed.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1) allowing (Beck and Clarke JJA., dissenting) the defendant's appeal from the judgment of Tweedie J., upon the verdict of a jury, given in favour of the plaintiffs, in an action for damages for injuries to the infant plaintiff, a boy of seven years of age, caused by his being run over by the defendant's street car, owing, as alleged by the plaintiffs, to the negligence of the defendant's motorman.

The accident happened about 2.30 o'clock in the afternoon of May 23, 1927, near the intersection of Ninth Avenue South and Twelfth Street South in the city of Lethbridge. The car was going westward on Ninth Avenue. The track on Ninth Avenue is a single track, and Ninth Avenue runs straight from Thirteenth Street westward to Sixth Street. The boy's leg was badly injured and had to be amputated.

According to the boy's story, he was running to catch the street car to go home on it. To get on the car he had to cross the track from the south side of it to the north side. He was wearing rubbers on his shoes, and as he was crossing the track, in front of the car, he got stuck in the mud, could not get his foot away, cried "help" and waved his arms, but the car ran over him. He said that before the car hit him he saw the motorman talking to a lady in the car, and looking towards her and not towards him.

According to the motorman's evidence, he did not see the boy at all, or anybody on the track; he was keeping a watch ahead, and there could not have been anything on the track without his seeing it; he knew nothing of the accident until his car returned to the same place, about seventeen minutes after the accident. He said that a lady came out into the vestibule of the car, and he applied his brakes, thinking she wanted to get off at Twelfth Street, but when they were at Twelfth Street she said "Not here. Ninth Street." His application of the brakes brought the

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car almost to a standstill, but at her said remark he released the brakes and went on. He said also, in the course of his evidence:

A. When I expected my car to come to a stop I attempted to open the door, and during the time I was attempting to open the door she said, "Not here."

Q. You did not actually open the door, though?

A. No; I was on the point of opening it and my head was turned at that time.

Q. So until that time which way had you been facing?

A. Straight to the front.

Q. And how long, or for how long a period did you turn your head towards Mrs. Younkers?

A. It might be a second. Just a matter of turning and going back.

The said lady, Mrs. Younkers, who was a witness for the plaintiff, testified that she came out into the vestibule and asked the motorman to let her off at Ninth Street, as she could not get off at Eighth Street (her usual place to get off) as it was so muddy, and he said "All right." She could not say whether or not she got up to come out (into the vestibule) before the car came to Twelfth Street, but it was "along there" that she went out into the vestibule. She did not see anybody on the track. She did not learn of the accident until afterwards.

A Mr. Wood, who was working in his garden at the North West corner of Twelfth Street and Ninth Avenue, heard, after the car had passed, the boy shouting "help me," and went and picked him up. The leg that was hurt was across the rail on the south side of the track. Blood was lying on the south side of the track inside the rails. A rubber was found in the mud.

Two men, who were on the car at the back, testified that they saw, from the back of the car, a boy lying on the roadway. One of these men was an employee of the defendant, but did not report the matter, as he did not connect it at the time with anything to do with the street railway.

The evidence of the infant plaintiff, and also the evidence of a girl of nine years of age (called on behalf of the plaintiffs) and of a girl of seven years of age (called on behalf of the defendant) was given not under oath, as provided for in s. 19 of *The Alberta Evidence Act*, R.S.A., 1922, c. 87, which reads as follows:

19. (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence

of such child may be received, though not given upon oath if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

The jury found that the motorman "was negligent by not being on a proper lookout," and judgment was entered for the plaintiffs for damages.

The Appellate Division (1), by a majority, reversed the judgment at trial, on the ground that, although the evidence established that the boy was run over by the street car in question at the place alleged, and as a result lost his leg, yet there was no evidence to corroborate the story of the infant witnesses for the plaintiffs going to show that the accident was caused by negligence of the defendant's motorman, and such corroborative evidence was necessary in order for the plaintiffs to succeed. Hyndman J.A., whose judgment was concurred in by Harvey C.J.A., and Mitchel J.A., said, in the course of his judgment (after referring to authorities):

In these cases it would appear that what is meant by "other material evidence," is material to the issue to be sustained by the party to be corroborated. In the case at bar since the substantial issue is negligence, it must mean, material to the issue of negligence. Every particular, of course, need not, and in most cases could not, be corroborated, but in some substantial respect the negligence complained of must be. It is not sufficient that some particular of the evidence given in the case be corroborated unless it is connected with the issue of negligence.

Just how this accident happened, apart from the infants' evidence, is to my mind left to conjecture and capable of different theories, and there is not the necessary corroboration of their testimony touching the heart of the question or issue involved in the action, namely, negligence.

Beck and Clarke JJA., dissented from the judgment of the majority of the Appellate Division.

The plaintiffs appealed to this Court.

A. M. Sinclair K.C. for the appellant.

W. S. Ball K.C. for the respondent.

Counsel for the appellant was stopped by the Court, and on the conclusion of the argument of respondent's counsel the judgment of the Court was orally delivered by

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ANGLIN C.J.C.—We are all of the opinion that the appeal must succeed, the judgment of the Appellate Division be set aside, and the judgment of the trial judge in favour of the plaintiffs restored. Apart altogether from the question of corroboration, we are of opinion that there was sufficient in the evidence of the motorman himself, under the circumstances, to justify the jury in drawing the inference that he was negligent. There is, in any case, corroboration of the boy's story of what happened just before the accident, sufficient to enable the jury to say that a proper watch was not kept. Their finding is that there was not a sufficient lookout. That finding is sustained by the evidence, and should not have been disturbed. The appeal is allowed, as indicated, with costs throughout.

Appeal allowed with costs.

Solicitor for the appellants: *J. C. Hendry.*

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