MONTREAL TRAMWAYS COMPANY (DEFENDANT) ..... APPELLANT;

v.

DAME HANNA LINDNER (PLAINTIFF) .. RESPONDENT.

1939

* May 8, 9.
* June 27.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Practice and procedure—Accident—Husband killed by tramway—Action for damages brought by wife and children—Whether such action susceptible of being tried by a jury—Article 1056 C.C.—Article 421 C.C.P.

An action for damages, brought under article 1056 C.C. by dependents of a person whose death was caused by the commission of an offence or a quasi-offence, is an action "resulting from personal wrongs" within the meaning of article 421 C.C.P., and therefore susceptible of being tried by a jury.

Montreal Tramways Co. v. *Séguin*, (1915) 42 S.C.R. 644, foll.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment rendered by Rhéaume J., upon the verdict of the jury at the trial in favour of the respondent.

The respondent brought this action claiming damages on behalf of herself and as tutrix of her minor children, in consequence of the death of her husband, the father of the children, caused as alleged by the negligence of the appellant.

Jean Letourneau for the appellant.

John L. O'Brien for the respondent.

The judgment of the Chief Justice and of Rinfret, Davis and Kerwin JJ. was delivered by

RINFRET J.—The grounds of appeal submitted to the Court were as follows:

1. The plaintiff offered no evidence upon which the jury could find a verdict; and the motion for non-suit presented at the conclusion of the plaintiff's enquête should have been granted by the trial judge;

2. The respondent had lost her right, if any, to a jury trial on account of the expiration of the delays provided for in article 442 of the Code of Civil Procedure;

3. The overruling of the challenge to the array was erroneous;

4. The finding against the appellant did not constitute a fault duly alleged and proved.

5. The amount awarded was so excessive as to warrant interference by the Court.

6. The case was not susceptible of being tried by a jury.

We will now discuss each of these points in order.

On the first ground: The motion for non-suit having been disallowed, the appellant proceeded with the case and produced evidence on its own behalf. Under the circumstances, in dealing with this point, an appellate court may not be restricted to a consideration of the evidence as it stood when the motion was presented, but the court must have regard to the whole of the evidence submitted to the jury.

In that view of the matter, it cannot be said that there was no evidence to go to the jury. It is sufficient for the present purpose to refer to the many extracts of the testimony quoted in the judgment of the trial judge and to the careful review of the facts made in the Court of King's Bench by Mr. Justice Hall, with whom the other judges either concurred or agreed in a separate judgment.

We would not feel warranted in reversing and setting aside the verdict on that first ground.

It is unnecessary to expose in detail the somewhat complicated incidents upon which the appellant based his second and third grounds of appeal, for we indicated at the hearing that, in our view, these were strictly questions of practice and procedure in respect to which we would not interfere with the unanimous decision of the Court of King's Bench; and counsel for the respondent was told that he need not present any argument on these points.

As to the fourth ground: The rule invariably followed in this Court is that the findings of a jury must be read in the light of the pleadings, the evidence and the charge of the trial judge; it must receive a fair interpretation and must not be submitted to a "rigorous critical method." So construed, the verdict in this case undoubtedly constitutes a fault in law and it is a proper finding of negligence.

The fault found by the jury was sufficiently alleged, and we have already stated in discussing the first ground of appeal, that there was evidence upon which the jury could find as it did.

There is no inconsistency in the findings against each of the parties, since the verdict is to the effect that each of them directly contributed to the accident.

Coming to the fifth ground of appeal, it may be stated that a court of appeal, more particularly this Court sitting as a second court of appeal should be slow in interfering with the amount of damages awarded.

The rule as laid down by the Code of Civil Procedure (art. 502) is that

> a new trial is granted whenever the amount is so grossly excessive or insufficient that it is evident that the jurors have been influenced by improper motives or led into error.

On this point, the Court of King's Bench was unanimous in refusing a new trial. In the premises, it is not easy to see how we could declare that it was "evident that the jurors have been influenced by improper motives." But the appellant says that they were "led into error" by the learned trial judge, in his charge, when he referred to a passage in the judgment of Mr. Justice

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Anglin, as he then was, in the case of *Canadian Pacific Ry. Co.* v. *Lachance* (1), as a result of which the jury was induced to include in its award items of damages not contemplated by article 1056 of the Civil Code.

This, however, is the equivalent of a complaint of misdirection and under the Code of Civil Procedure, it could be given effect to, only if "the party complaining duly excepted to the misdirection" (Art. 498, subp. 3, C.C.P.).

In the Court of King's Bench, Mr. Justice Barclay was of opinion that no exception was taken. The other judges did not express any opinion on this point. We would be inclined to think that the exception was not insisted upon in the course of the discussion which followed the learned judge's charge.

But the main difficulty in which the appellant finds itself is that *Canadian Pacific Ry Co.* v. *Lachance* (1) is a case in this Court. The citation referred to by the trial judge and to which the appellant objects is taken from a judgment delivered in this Court. On the pertinent point, the judgments of the other members of the Court were along the same lines, and we would not see our way clear to differ from what was said in those judgments.

The remaining ground of appeal is that this case was not susceptible of being tried by a jury.

So far as this Court is concerned, we consider that the matter is concluded by the decision in *Montreal Tramways Co.* v. *Séguin* (1). No doubt one of the reasons in that case was that the point had been taken too late by the appellant, but the majority of the Court also decided that a jury was competent to try an action brought under art. 1056 of the Civil Code.

This disposes of all the grounds of the appellant; and, as a result, the appeal fails and should be dismissed with costs.

CROCKET J.—While I doubt very much whether the jury's answer to question 4 is a sufficient specification of the particular fault on the part of the motorman, which contributed to the accident, to enable the Court to determine with any degree of certainty whether it was his antecedent negligence in failing to keep a proper look-

(1) (1909) 42 S.C.R. 205. (1) (1915) 52 S.C.R. 644.

out, or some other antecedent fault, it is quite as definite as their specification in the same answer of the deceased's own contributory negligence, which has not been questioned on this appeal. For this reason I am not disposed to rely upon this point as a sufficient ground for dissenting from the conclusion of my brother Rinfret that the appeal should be dismissed, particularly as I am fully in accord with his view that there was evidence, which the jury apparently believed, and which would warrant a finding that there was some negligence on the part of the motorman, which caused or materially contributed to cause the unfortunate accident.

Appeal dismissed with costs.

Solicitors for the appellant: *Vallée, Letourneau & Tansey.*
Solicitors for the respondent: *Audette & O'Brien.*