1913

*Nov. 10.
*Nov. 24.

WINNIPEG ELECTRIC RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ADELAIDE SCHWARTZ (PLAINTIFF) . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Findings of fact—Inferences by jury—Determining cause of accident —Evidence to support verdict—Practice.

Where the jury, drawing inferences, adopted one of several theories respecting the determining cause of the accident through which the plaintiff's injuries were sustained, and there was evidence to support their finding, the court refused to disturb the verdict.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Prendergast J., at the trial, which, on the verdict of the jury, ordered that judgment should be entered for the plaintiff.

The circumstances of the case are stated in the judgments now reported.

W. N. Tilley for the appellants.
Cohen for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Court of Appeal for Manitoba in an action for damages for personal injuries sustained by the plaintiff while travelling as a passenger in a tram-

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

(1) 23 Man. R. 60.

car of the defendants. The plaintiff's claim is based upon the allegation that her injuries were the consequences of a fall caused by the negligence of the motorman or conductor of the car which was started suddenly after having been brought to a stop to enable her to get off.

The plaintiff and one Winkler are the only witnesses who testify to the occurrence. At the close of the evidence for the plaintiff, counsel for the defendant company submitted there was no evidence of negligence. It appears that the plaintiff rang the bell as a signal for the car to stop at the corner of Bushnell street. Having failed, presumably, to attract the attention of the conductor or motorman, the car proceeded at high speed in the direction of Gunnell street when the plaintiff rang the bell a second time to manifest her desire to alight at that street. As the car was slowing down, plaintiff left her seat and moved in the direction of the door. When she reached that place the car was stopped; she says,

> my right foot I put on the first step and after that I do not remember anything.

The witness Winkler deposed that he heard a woman's scream and ran to the scene of the accident, where he found the plaintiff lying on the road covered with blood and apparently dead. The car in which the plaintiff had been a passenger was seen to be in motion proceeding on its journey a very short distance ahead.

The question is: In these facts was there evidence enough of an apparent cause to leave the case for the decision of the jury ?

The point is not free from difficulty, but I am of

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

The Chief Justice.

opinion that, in the circumstances, the trial judge was justified in leaving it to the jury to say whether the company being under a duty to stop the car in answer to her signal for a sufficient time to allow the plaintiff to alight, the inference of negligence should be drawn.

It is to be assumed that if proper care is used by the company a passenger may alight in safety from a tram-car, and, in the circumstances of this case, there is a rule of evidence which calls upon the carrier in the first instance to exonerate itself by negativing negligence.

If there was doubt on the evidence of the plaintiff and Winkler, the conduct of the officials of the company at the time of the accident may have served to turn the scale. The plaintiff was undoubtedly a passenger on the car and in attempting to alight the accident occurred, and there is further evidence in the record. The rules of the company required that in cases of accidents the motorman and conductor should render assistance and make a report of the occurrence. They did neither, and the reasonable presumption is that their omission in that respect was due to the fact that the accident must have happened without their knowledge. The jury would be justified in taking this circumstance into account when considering the probabilities of plaintiff's theory that she was thrown from the step by a violent jerk when the car was started suddenly by the officials in ignorance of the position in which she then was.

On the whole I am of opinion that this appeal should be dismissed with costs.

DAVIES J.—The question we have to determine is whether there was evidence to justify the findings of

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

Davies J.

the jury with respect to the fact that the car had stopped when the plaintiff attempted to alight from it and had negligently started again and thrown her to the ground before she had alighted.

On the first point we have the positive evidence of the plaintiff that the car had stopped, with an apparently clear and connected statement of the circumstances leading up to the stoppage. The only possible doubt as to the correctness of her statements arises from the rather uncertain and doubtful evidence of the only other witness called who speaks of the fact of the stoppage of the car. The jury surely had the right to accept the clear and unqualified statement of Mrs. Schwartz on the point.

Then, as to the finding of the negligent starting of the car having been the cause of her falling or being thrown to the pavement, Mrs. Schwartz frankly states that the shock she received from her fall completely destroyed or benumbed her memory of the facts immediately connected with her falling and that she could recall nothing which happened from the moment she attempted to step from the car till after her recovery from the shock caused by her fall to the pavement.

The company, at the close of plaintiff's case, moved for a nonsuit and that being refused did not call any witnesses. The question is whether, in the absence of direct evidence on this point of negligence, there should have been a nonsuit, or whether it was open to the jury to draw as a fair and reasonable inference from such facts as had been proved that the car had stopped and had started negligently, causing the plaintiff's fall.

There were decisions given by this court before

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

Davies J.

that of the Judicial Committee in the case of *McArthur* v. *The Dominion Cartridge Company* (1), to the effect that positive evidence of specific negligence causing the injuries complained of must be given to enable an injured person to recover damages. Since that decision, however, this court has followed the rule or principle there laid down, namely, that where the circumstances are such that positive and direct evidence on specific negligence cannot be given it is open to a jury, if the facts as proved are sufficient, to find such negligence as a fair reasonable inference from those facts. It was upon that rule we decided the case of *The Grand Trunk Railway Co.* v. *Hainer* (2), and many cases since then.

Now, in the case before us, what have we had proved ? First, the high speed at which the car was moving and its stoppage after the second signal from the plaintiff to permit her to alight. Secondly, the passenger's progress during the slowing-down of the car towards the door of exit and, on the stoppage, her attempt to step to the ground, in which attempt she either fell from, as is suggested by the appellants, a sudden attack of vertigo, or, as found by the jury, was thrown down by the sudden, negligent starting of the car. There was no evidence whatever of any negligence on the passenger's part or facts proved from which a fair inference of negligence could be drawn. Thirdly, the fact that the car rapidly moved on its way after stopping without those controlling it presumably having knowledge of the accident.

It is inconceivable that with such knowledge the car should have been allowed to proceed and no aid

(1) [1905] A.C. 72. (2) 36 Can. S.C.R. 180.

or assistance tendered the injured passenger left lying on or alongside of the car track. The presumption of ignorance of the accident on the part of the car-men is overwhelming; especially when considered in light of the fact that another car was following very close after them. They probably thought the passenger had safely alighted.

Under those circumstances, and without any other suggested possible inference than that the violent fall to the pavement might have been caused by a sudden attack of vertigo, I have no difficulty in concluding that the finding of the jury has a preponderating weight in its favour, because it is the more fair and reasonable inference from the proved facts. The other suggested inferences seem to me rather to be classed as conjectures than fair inferences.

A jury cannot, of course, select as between equally probable and fair inferences one which they prefer. It is essential that their finding should not only be fair and reasonable, but that it should be of preponderating weight over other possible inferences.

IDINGTON J.—This appeal ought to be dismissed with costs.

DUFF J.—I think there is evidence in support of the verdict. It is no part of my duty to say whether I think it is right or not.

ANGLIN J.—The sole question raised upon this appeal is whether there was evidence sufficient to warrant the finding of the jury that the plaintiff fell from the step of the defendants' car, as she was in the course of alighting from it at a proper stopping place

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

Anglin J.

and while it was stationary, and their inference that this was due to the negligence of the defendants' servants in improperly starting the car before the plaintiff had reached the ground. From the plaintiff herself we have direct evidence that the car had stopped (the jury was entitled to disregard the evidence given by Winkler, if it is really in conflict with that of the plaintiff on this point), that she was in course of alighting and had one foot on the first step and the other either on the platform or in the air on its way to the second step. At that point her knowledge of what occurred ceased. That she fell violently to the ground is undisputed. That the company's servants in charge of the car from which she fell were ignorant of her fall is an irresistible inference from the fact that they proceeded on their way leaving her lying seriously injured on the ground, unless we are to assume on their part a callousness and disregard of the company's rules almost incredible. A moment or two later she is found lying dangerously near the track, so much so that the conductor of a following car moved her body out of the way. According to her evidence the plaintiff was proceeding to alight with care. There is no evidence to warrant any suggestion of vertigo, fainting, tripping or being run down by a passing vehicle as the cause of her fall and injuries. The inference that her fall was caused, as the jury have found, is not only fair and reasonable; it seems to be the most probable inference that could be drawn from all the facts. The negligence involved in starting a car from which a passenger is properly alighting before ascertaining that she has reached the ground is indisputable.

1913

WINNIPEG ELECTRIC RWAY. CO. v. SCHWARTZ.

Brodeur J.

The appeal fails and should be dismissed with costs.

BRODEUR J.—The only question is whether the jury could from the facts established infer that the street railway company is guilty of negligence.

The plaintiff, respondent, Mrs. Schwartz, was alighting from a street car of the company defendant. She states in her evidence that she rang the bell to stop the car; that the car stopped, and that she started to alight from the car, and she states, moreover, that from that moment until some days afterwards when she found herself on a hospital bed with serious injuries as a result of her fall on the street, she was unconscious.

The jury returned a verdict that the employees caused the car to start when the plaintiff was proceeding to alight.

The company did not find it advisable to bring those employees to testify that they had given to that lady all the time necessary to safely alight.

That lady fell on account of her fainting or on account of the starting of the car before she alighted. The accident is necessarily due to one of those circumstances. The jury could draw the inferences from all the circumstances of the case that the company was negligent.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Moran, Anderson & Guy.*
Solicitors for the respondent: *Crichton, McClure & Cohen.*