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

1909
*Feb. 17, 18.
*March 29.

AND

BECKIE WALD (BY HER NEXT FRIEND MORRIS WALD) (PLAINTIFF) .... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

New trial—Misdirection—Questions for jury—Verdict on issues—Damages.

An order for a new trial should not be granted merely on account of error in the form of the questions submitted to the jury where no prejudice has been suffered in consequence of the manner in which the issues were presented by the charge of the judge at the trial and the jury has passed upon the questions of substance.

The judgment appealed from (18 Man. R. 134) was affirmed, the Chief Justice dissenting, and Davies J. *hesitante*, as to the quantum of the damages awarded.

APPEAL from the judgment of the Court of Appeal for Manitoba(1) affirming the judgment entered upon the findings of the jury, by Perdue J., at the trial, in favour of the plaintiff, for $8,000 damages, with costs.

The circumstances of the case and the questions in issue on this appeal are stated in the judgments now reported.

Watson K.C. and *Laird* for the appellants.

Cohen for the respondent.

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

(1) 18 Man. R. 134.

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The Chief Justice.

THE CHIEF JUSTICE (dissenting).—I agree with Mr. Justice Duff that, in the circumstances of this case, the question as to whether a child of tender years can be held at law to be incapable of contributory negligence does not arise. The judge clearly put to the jury the question of plaintiff's contributory negligence and properly directed them as to that issue.

I am, however, of opinion that the damages are grossly excessive and on that ground I would grant a new trial.

I wish further to express my astonishment at the defence put forward by the company to the effect that they are not bound to equip their cars with such fenders and guards as are generally considered indispensable for the protection of human life. Jurors can scarcely be blamed if, in cases arising in communities where such defences are raised, they take an exaggerated view of the companies' liability when accidents occur.

GIROUARD J.—I think this appeal should be dismissed with costs for the reasons stated by Mr. Justice Duff.

DAVIES J.—I adopt the reasoning and conclusion of my brother Duff with respect to the findings of the jury on the two incompatible theories or contentions submitted to them on behalf of the respective parties, and also with respect to the alleged contributory negligence of the child. It was quite open to the jury on the evidence to have accepted the version of facts contended for by either party as the true one.

The evidence was very conflicting and was fairly submitted to them by the trial judge. They accepted

the plaintiffs' theory and contention as to the facts which caused the accident, and in so doing necessarily negatived those of the defendants. That being so, their findings of negligence with respect to the defective fender and want of care in the motorman in keeping a proper lookout cannot now be impeached.

I also agree that on such findings of the jury, which there was ample evidence to sustain, the defence of contributory negligence must fail and is in fact practically eliminated from the case.

It becomes unnecessaryto consider, under these circumstances, what is the law with respect to contributory negligence on the part of a child six years of age or whether the learned judge misdirected the jury on that point when he held it to be a question of law for him to decide, as I agree, under the findings of the jury and the evidence, the appellants could not have sustained any prejudice from the judge's ruling on the point.

I am by no means, however, satisfied on the question of the damages awarded by the jury. In my opinion, considering the age, position in life and prospects of the injured child, the damages were grossly excessive. As, however, the Court of Appeal did not think a new trial should be granted on this ground and a majority of this court concurs in the same opinion, I will not formally dissent.

IDINGTON J.—This action was brought by an infant to recover damages arising from her being, when aged five years and eleven months, knocked down and so far run over and dragged by the appellants' electric street car on the main street of Winnipeg, that I am not sur-

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prised at the amount of the verdict when founded on such negligence as shewn to have caused such results.

The case was tried before Mr. Justice Purdue with a jury, who found by their answers to his questions that this accident was caused by the negligence of the defendants, now appellants; that the negligence consisted in

> defective-fender and negligence on the part of the company not having car wheels guarded and on the part of the motorman in not looking ahead and in not applying the brakes and in not using sand to stop the car; and they assessed the damages at $8,000.

The Court of Appeal for Manitoba having refused to disturb the judgment entered according to this verdict, we are asked to do so.

There was evidence that the fender failed to respond to the motorman's attempt to operate it, that the car wheels were not guarded as they might have been and as cars elsewhere had been and one car on appellants' line also was at the time, and also from which it might be inferred the motorman had not been looking or he might have seen and done more to save the girl.

The case, therefore, could not have been properly withdrawn, in regard to any one of these causes of complaint, from the jury.

They were with those of excessive speed and failure to ring the gong the questions properly raised by the pleadings and the evidence.

The additional findings are harmless surplusage and neither add to nor detract from the strength of the others and possibly are germane to the question of speed and doubtless form the answer the jury found as to the charge of high speed.

The contention that inasmuch as the city authori-

ties had not, as the contract between the appellant and the city empowers them, directed a specified fender to be used, none need be used, is so untenable, I am surprised to find it raised as an arguable point of law in this case; though for the second time such a contention has been set up in this court within the past sixteen months.

The only other question seriously raised as to the conduct of the trial arises out of the refusal of the learned trial judge to submit to the jury some sort of question as to whether or not the plaintiff could by the exercise of reasonable care have avoided the injuries; and instead of doing so telling the jury that

> this little child only six years old is not accountable for negligence like a grown person,

to which the defendant's counsel at the trial took "very strong exceptions."

Counsel, on the learned judge's explaining what he had said as to such a contention, modified his demands and put it in a more reasonable way yet inaccurate in law and asked his lordship

> to tell the jury that the child is responsible for its acts as far as it realizes what it is doing.

The jury, thereupon, were recalled by the learned judge when he removed from the case all ground for reasonable objection in putting the matter as I am about to quote from this supplementary charge.

To understand it one must appreciate the issues of fact he presented to the jury.

On the one hand the plaintiff's witnesses shewed that she had gone across the track in course of going to school and, when on the strip seven feet wide between the tracks, saw cars coming in opposite direc-

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tions and got frightened at that, hesitated, retraced her steps to return to the side whence she had come and got caught in the result by the car. The fender failed to trip, and she fell underneath instead of above it as she might have done if it had operated properly.

On the other hand the defendant's witnesses, including the motorman, pretended she never had come in front of the car, but was between the sidewalk and the track, running from a boy snowballing her; and had with her shawl over her head run against the side of the car or vestibule of the car, got knocked under it and hence her injuries.

Now the judge speaking of these conflicting presentations of the facts said as follows:

> Now if you believe that (referring to the latter one) and the other witnesses for the defence the company would not be guilty of negligence. I thought I had made that clear to you, but if you believe the defendants' account of how the accident occurred, that the child ran across in that way and struck the vestibule of the car before the motorman could stop it, and that he did take steps to stop it, then the defendants would not be guilty of negligence. Then your proper answer to the first question would be "No."

No objection was made to this as a proper disposition of counsel's objection.

It was impossible for the jury to find for the plaintiff on this charge except by first finding the story of defendants' witnesses untrue, and if that is thus eliminated no evidence remains that would have justified a finding of contributory negligence of the kind any child of five years and eleven months old can conceivably have attributed to it.

The hesitation, doubt and trepidation she evidently felt and exhibited would have been excusable in one much older.

To appreciate the legal bearing of what we have to

deal with let us see what the law, so far as developed, really is.

Though the law fixes an age limit for responsibility in some cases, none for the application of the doctrine of contributory negligence has yet been so definitely fixed as to furnish a uniform rule of law to guide us in all possible emergencies that may arise in the conduct of children.

The same sort of reasoning that led to fixed ages as lines at which responsibility may be drawn in some cases tends with the progress of changed and changing conditions to develop a fixity of law. What has so far happened in legal development as to contributory negligence also is briefly this.

Just one hundred years ago a great master of English law and language is said (in *Butterfield* v. *Forrester*(1)) to have formulated for the first time, so far as reported cases give us the law, the doctrine of contributory negligence. His comprehensive proposition, doubtless the result of earlier law, has been qualified as the exigencies of time and place and occasion seemed to furnish reason therefor.

The case of *Lynch* v. *Nurdin*(2), thirty years later, raised and settled in a large measure the necessary qualification where infants as plaintiffs were concerned. That case was one where a lad nearly, but under seven years, had with a playmate jumped into a cart, left unattended on the street by the owner's servant, who ought to have been in charge, and the horses spurred up by the playmate moved on and the plaintiff boy received in the result a broken leg.

No one claimed at the trial of that case to raise as such the question of contributory negligence as a bar

(1) 11 East 60. (2) 1 Q.B. 29.

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to recovery; but the boy's acts and age were considered by the jury under the direction of the trial judge and the jury then and thus possessed of the whole case found a verdict for the boy.

This was moved against and the whole subject dealt with by the court when it was expressly found that whether contributory negligence or however looked at it, the child's act, was only what might be expected of a child of such tender years and hence furnished no bar to the action.

That decision leaves all that is to be found in this case well within the limits of the due allowance to be made when applying the law of contributory negligence in the case of infants suing for damage done them by reason of the negligence of another.

It has been maintained as good law down to this time. The only two expressions of doubt as to it each related to the negligence of a defendant and not that of a child's contributory negligence, and even that doubt it is said is attributed in one of these cases erroneously to Lord Esher. See page 163 (*n*), of Canadian edition of Beven. Besides it is referred to in *Engelhart* v. *Farrant*(1), at page 247, by Rigby L.J., as if law, and I find Lord Esher, one of the court, disposing of the case in which this happens.

It was accepted as law in the case of *Sangster* v. *T. Eaton Co.*(2), upheld on appeal here(3).

In *Ricketts* v. *Markdale*(4) the late Mr. Justice Ferguson, whose care and accuracy were most notable, wrote the judgment fully concurred in by the whole court, dealing with this phase of the law.

(1) (1897) 1 Q.B. 240.
(2) 21 Ont. App. R. 624; 25 O.R. 78.
(3) 24 Can. S.C.R. 708.
(4) 31 O.R. 180, 610.

He quoted approvingly American and other authorities the gist of which is that no more can in any event be required than that the child should do what might be expected of an ordinary, careful and prudent child; that everywhere a child of six or seven years is presumed to be incapable of contributory negligence; and that it is not attributable to a child of tender years.

No one now pretends to support literally the defendant's contentions at the trial, but it is claimed that a varying standard as set up for older infants in many cases, ought to extend to this child. No such rule can be found to have been laid down in English or Canadian cases as law in the case of child under seven. The cases chiefly relied upon are American. It may be hard enough to reconcile the utterances of our own high authorities without going abroad.

The learned trial judge evidently had in view, in dealing with the facts presented to him, the law as laid down by this court in the case of *Merritt* v. *Hepenstal* (1), at pages 152, when the court through the then Chief Justice, Sir Henry Strong, adopted the law as laid down in *Gardner* v. *Grace* (2), by Channell B. as follows:

> The cases shew that the doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover it must be shewn that the injury was occasioned entirely by his own negligence.

I find on reference to the original record of the *Merritt Case* (1) that the child in question there was only three years of age.

Yet so far as it goes the law there laid down is binding on us and must be applied as our guide as I infer the learned trial judge tried to apply it.

(1) 25 Can. S.C.R. 150. (2) 1 F. & F. 359.

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The term "an infant of tender age" there used is that which is most widely used as to various ages up to six or seven years in the cases most carefully thought out. In *Lynch* v. *Nurdin* (1) the plaintiff was referred to as "a child of very tender age between six and seven." I incline, therefore, to hold we might well follow the proposition just quoted and that the learned judge's reason for excluding the question of contributory negligence was right.

It is not necessary to say more than this that, on his view of the facts, the proper question was to determine not as to contributory negligence, but whether or not the injury was within the above rule and occasioned entirely by the negligence of the child.

Mere refusal at the request of a defendant to submit a question relative to contributory negligence to the jury is not in itself misdirection; for the first question the judge has to solve is whether or not there is any evidence bearing on the point.

Submitting needless questions or issues for consideration, only tends to confusion and perplexity in the minds of the jury.

Here the remark addressed to the jury as to contributory negligence was absolutely harmless, and although beside the question also quite correct so far as it went.

The appellants' counsel were pressed in argument here to specify the facts in evidence on which they relied to furnish ground for a direction as to contributory negligence and resorted to the evidence for the defence which the learned judge as above set forth told the jury if true furnished a complete defence. He

(1) 1 Q.B. 29.

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chose to treat that evidence as bringing the case within the second branch of the rule quoted above. The appellant cannot surely complain of this. I would not desire to commit myself to its absolute accuracy as to its bearing on the plaintiff's case, but the course the jury were directed to pursue was exactly what would have been the case had the learned judge called what he spoke of contributory negligence instead of substituting, not in actual words but in truth, injury occasioned wholly by the child's own act. Many such cases have been passed upon already. Treating this as of that class of defence, could not, did not, mislead the jury.

The jury refused to believe appellants' side of the case and that evidence is thus put out of consideration here.

The charge was lucid and fair, and so far as it omitted, at first, anything the defendant's counsel complained of was on the recall of the jury properly supplemented so far as in law it could be.

What happened as to the nature of the objections taken and the judge's charge in *Hansen* v. *Canadian Pacific Railway Co.*(1), are so similar to this case in that regard that what we did there might if need be referred to and followed.

The doctrine of the negligence of the parents being imputed to the child was set up in argument, but I confess to being unable to apprehend its bearing on this case if we have regard only to English and Canadian authorities. The American authorities are so conflicting as to help little if at all.

I think the appeal should be dismissed with costs.

(1) 40 Can. S.C.R. 194.

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DUFF J.—It is, I think, hopeless to impeach the verdict in this case as against the weight of evidence. A question, however, which requires examination is raised by the appellants' contention that the learned trial judge improperly withdrew from the jury the defence of contributory negligence pleaded by them.

The action was the outcome of an accident in which the infant respondent (a child not quite six years old) was run down by the appellants' car and seriously injured. The mishap occurred on Main Street, Winnipeg, just opposite the entrance to a cross street known as Stella Avenue. On Main Street, which runs north and south, the appellants have a double track; and the car referred to was, when the accident took place, running south on the westerly track. The respondent with other children had just come out of Stella Avenue, which opens into Main Street at its westerly boundary, and was crossing the latter street on her way to school.

Two wholly incompatible accounts of the occurrences were presented to the jury by the respective parties. According to the case presented on her behalf at the trial, the respondent crossed the westerly track in safety, but, seeing a car on the easterly track coming from the south, she became confused, and, attempting to return across the westerly track, was knocked down just as she reached the most westerly rail.

The appellants' case was that the respondent never crossed the westerly track at all; but, playing at snowballs with one of her companions—and not observing the car—ran against the side of the vestibule and slipped under the body of the car in front of the wheel that crushed her.

These were the rival cases presented to the jury;

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and the appellants' complaint which we have to consider is that the learned trial judge (holding that in law contributory negligence could not be imputed to a child of the respondent's years) withdrew that issue from the jury.

I do not think it is necessary to decide whether under the law of England, which on this subject prevails in Manitoba, the ruling of the learned judge on this point is open to objection.

In *Merritt* v. *Hepenstal* (1) this court seems to have held that, in such a case, in order to succeed the defendant must shew that the injury was occasioned entirely by the negligence of the child; and it was upon this view that the learned trial judge acted. I should prefer, however, to reserve for future consideration the exact effect of that decision and to rest my judgment on this appeal on other grounds.

The learned trial judge instructed the jury that if they accepted the account of the accident advanced by the appellants they should dismiss the action. In face of this instruction (even assuming the question of contributory negligence to be in such a case a question of fact, depending on the views of the jury and the ruling of the learned trial judge touching the degree of care to be expected from a child of tender years to the opposite effect therefore erroneous), I am not able to discover any ground upon which it can be said that the appellants have by reason of that ruling suffered any prejudice.

The learned judge, had he submitted to the jury the defence proposed, would unquestionably have told them that there was nothing in the facts to support

(1) 25 Can. S.C.R. 150.

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that defence, if they accepted the account of the child's movements just preceding the collision which was put forward on her behalf. He might, perhaps, have told them also that, if they accepted the appellants' account, it would be a question for them whether the plaintiff's conduct had fallen below the standard of reasonable care to be expected from a child of her years; but in point of fact the learned judge put the question in a form much more favourable to the appellants. He told them that if they accepted that account the action should be dismissed. This error—which was error in form only, if error at all—could not possibly prejudice the appellants.

In truth the verdict shews that the jury rejected the appellants' view of the accident and acted upon the respondent's account; and, on the hypothesis that the latter accorded with the facts, it is not open to dispute that the defence of contributory negligence must fail.

On this ground (that assuming the learned judge misdirected the jury an examination of the charge as a whole and of the findings of the jury shews that the misdirection was innocuous) I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants: *Munson, Allan, Laird & Davis.*

Solicitors for the respondent: *Bonnar, Hartley & Thornburn.*