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*April 8.
*May 6.

THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM FLEMING (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence — Street railway — Explosion — Defective controller — Inspection.

S. was riding on the end of the seat of an open street car in Toronto when an explosion occurred. The car was still in motion when other passengers in the same seat, apparently in a panic, cried to S. to get off, and when he did not do so, endeavoured to get past him whereby he was pushed off and injured. In an action for damages it appeared that the explosion was caused by a defective controller and that the motorman at once cut off the current but did not apply the brakes, and the jury found the company negligent in using a rebuilt controller in a defective condition and not properly inspected, and the motorman negligent in not applying the brakes.

Held, affirming the judgment of the Court of Appeal (27 Ont. L.R. 332), that the evidence justified the jury in finding that the controller had not been properly inspected and that a proper inspection might have avoided the accident.

Held, per Idington and Brodeur JJ., Anglin and Davies JJ. contra, that the motorman was guilty of negligence in not applying the brakes.

APPEAL from a decision of the Court of Appeal for Ontario (1) maintaining the verdict for the plaintiff at the trial.

The facts of the case are sufficiently stated in the above head-note.

D. L. McCarthy K.C. for the appellants.

Gamble K.C. for the respondent.

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

(1) 27 Ont. L.R. 332.

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THE CHIEF JUSTICE.—The case is not free from doubt, but on the whole I am of opinion that we should not interfere.

DAVIES J. concurred in the opinion stated by Anglin J.

IDINGTON J.—The respondent has recovered a verdict and judgment for damages suffered in consequence of being pushed off an open street railway car by passengers whom a panic had seized on the occasion of an electric explosion therein and its results. It is claimed all this was consequent on the negligence of appellants.

The panic and its consequences so far as we are concerned was, I think, the natural result of the explosion and its results, and hence if appellants are liable at all, the damages are not too remote.

The jury found, amongst other things, as follows:

Q. 2. If they were, of what negligence were they guilty. (If there are in your opinion more than one act of negligence, state them all fully.) A. For using a rebuilt controller in a defective condition, and not being properly inspected.

The explosion and fire creating all the excitement and confusion in question were the result of a short circuit caused by some defect in the electric controller or wires connected therewith, in use in said car. The controller was not a year old. It was of an approved kind. It had been a couple of months before this accident overhauled so that it might be correctly described as rebuilt according to its pattern. It was in daily use thereafter till the accident and supposed to be inspected daily.

Mr. McCrae, the master mechanic of appellants, who has supervision of the maintenance and inspection

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of the company's cars, says he never knew of so serious an explosion and loss of control of the electric current as happened on the occasion in question.

He was called by respondent and suggests one possible cause of the accident.

Mr. Richmond, an electrical engineer, also examined as an expert on behalf of the respondent suggests another possible cause thereof. Both agree it was the result of a short circuit produced by some defect.

Either man may unconsciously be biased by his peculiar views as to the exact cause of the accident.

No intelligent person experienced in such tasks as involved in considering evidence, can read their evidence without feeling that both are absolutely honest in all they say in regard to the conclusions they have reached. Their mode of thought or point of view may account for the divergent results of their evidence.

In either result it seems to me we are forced to the conclusion that there is evidence presented by them both that rendered it impossible for the learned trial judge to withdraw the case from the jury.

The broad facts appear that the accident was the result of some defect in the controller or wires connected therewith, and that there was no external cause, suddenly supervening, such as an electric storm or collision, for examples, to account for such defect, or abnormal results.

It seems to me the whole matter is reduced to one of whether or not due and proper inspection the night before should not, if had, have averted the accident.

It is almost incredible that if such due care had been used, as ought to have been, in the inspection,

that either of the only possible causes suggested could have existed without detection by the inspector.

It is not difficult to see how in his routine way of discharging his duties, the inspector may have failed to observe the defect on its first appearance. But the question of whether or not he, or his employers, could be reasonably excused therefor or not, is one for the jury.

It seems to me that a trial judge presuming to decide that question would clearly be going beyond his duty. Indeed, to hold that on such facts there could only be that conjecture which alone would justify a nonsuit, would in every case free the negligent and the careful inspector alike and his employers, from responsibility in every case of the kind where a doubt may exist as to exactly what might have been discovered.

It seems clear that eighteen years' experience of a capable, vigilant man, in so wide a field of experience having brought to the court and jury the results thereof that his story demonstrates due care can avert such results as produced on this occasion.

In the finding I quote there is an apparent resting upon the fact of the rebuilding of the controller. That seems to me only apparently so, for it is the non-inspection of such a rebuilt controller that is charged.

No doubt greater care is perhaps due in case of an old or rebuilt controller than in the case of one quite new, but the reason given does not affect the finding of negligence.

I cannot agree with the Court of Appeal that a motorman able to turn round and go back to warn passengers is excused by reason of shock from applying the brake.

I think the appeal should be dismissed with costs.

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DUFF J.—I think there was evidence from which the jury, if they accepted it, might conclude that a short circuit, such as that to which the accident seems to be attributable, would not ordinarily occur if the controller were properly constructed and properly inspected.

If the jury took this view it was for them to say whether the company had acquitted itself of the onus which rested upon it to shew that in these respects proper care and skill had been exercised.

ANGLIN J.—This action is brought to recover damages for personal injuries sustained by the plaintiff as the result of his being thrown from a moving car in a panic caused by an explosion and fire resulting from a short circuit in the controller of the car. The controller, originally purchased from the Canadian General Electric Company, was admittedly of an approved type. It had been overhauled or rebuilt by the defendant company, according to their ordinary custom, about two months before the plaintiff was injured and had been in regular use during that period. The accident resulted in such a complete destruction of the wires and parts of the controller that it was not possible afterwards from inspection of them to determine its precise cause. The evidence clearly establishes, however — it was in fact admitted — that the short circuit could not have happened unless there had been a defect in the controller. The plaintiff charges that this defect was due to negligence in the rebuilding of the motor by the defendant company, or, if not, that it was of such a character that proper inspection would have discovered it. He also charges that the defendants' motorman was negligent in not applying

the brake of his car so as to stop it immediately after the explosion.

The first trial of the action took place before Middleton J. It resulted in a verdict for the plaintiff for $1,200. That verdict was set aside by the Court of Appeal and a new trial ordered (1), on the ground that certain evidence tendered by the defendants had been improperly rejected.

At the second trial before Sir William Meredith C.J.C.P., the jury again found for the plaintiff. The damages were assessed at $1,100. The negligence attributed to the defendants consisted in their

using a rebuilt controller in a defective condition and not being properly inspected.

The motorman was also found to have been negligent "in not applying his brake." The Court of Appeal upheld this verdict and from its judgment the present appeal is taken.

Counsel for the defendants contended that there was no evidence upon which any finding of negligence against his clients could properly be based; and he further argued that the injuries sustained by the plaintiff were not the direct or proximate result of the explosion or fire, but were caused by an independent and voluntary act of two passengers who deliberately pushed him from the car.

While the evidence may be susceptible of the view that the plaintiff was thus pushed from the car, it is quite open also to the construction that the two passengers were impelled by fear of injury to themselves to escape from the car and that in the course of doing so, owing to the narrowness of the space between the seats, they necessarily pushed against the plaintiff,

(1) 25 Ont. L.R. 317.

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who was sitting at the outside of the seat, and involuntarily caused him to fall from the car. I find no allusion in the charge of the learned Chief Justice to this contention on behalf of the defendants and it is not referred to either in their reasons for appeal to the Court of Appeal or in the reasons for judgment given by that court. Counsel for the plaintiff stated at bar that it was presented by the defendants for the first time in this court, and his statement was not controverted. Under these circumstances it would not, in my opinion, be proper to give effect to this defence even if the evidence sufficiently established it, which I do not think it does.

I agree with Mr. Justice Garrow that if the verdict for the plaintiff depended on the finding of the motorman's negligence the evidence would not support it. It is very questionable whether owing to the fire which immediately resulted from the explosion it was possible for the motorman to apply his brake. The only evidence on this point is his own and it indicates that he could not have done so. In the exercise of his judgment in the emergency he appears to have considered that the most important thing to do promptly was to cut off the current from the car. He immediately shut off the controller with one hand and tried to reach the hood-switch at the top of the vestibule with the other, but was prevented from doing so by the fire. He then leaned out of the vestibule and called to the conductor to pull the trolley pole off the wire, simultaneously shouting to the passengers not to attempt to get off the car. Having regard to all the circumstances I think the evidence does not support a finding of negligence on the part of the motorman. He appears to have done all that he could or, at all events, what he

thought best in the emergency to prevent injury either to the passengers or to the property of his employers.

There was, however, in my opinion, evidence from which the jury might reasonably infer that an efficient inspection of the controller would have revealed the defect which caused the short circuit. They may, for the reasons which he gave, have not improperly accepted the view of the witness Richmond as to the place where the short circuit occurred and as the probable cause of it. Unless it should be held that where an accident results in the destruction of the physical evidence of its cause an injured person cannot recover — a position which the Judicial Committee has decided to be not maintainable (*McArthur* v. *The Dominion Cartridge Co.*(1)) — a jury must be allowed to act upon evidence such as that which was put before them by the plaintiff in the present case. The defendants attempted to meet that evidence by shewing that they had a regular and adequate system of inspection of controllers and that the controller in question had been inspected on the 2nd of August, and again on the 7th of August. The accident happened on the 10th of August. Of neither inspection was the evidence offered entirely satisfactory. There certainly was room for the contention made on behalf of the plaintiff that the report of the inspection of the 2nd of August indicated that the controllers had not then been inspected. The evidence of the inspection of the 7th of August was still more unsatisfactory in that the man who made it was not called as a witness and the foreman, who was called, was unable to speak from personal knowledge as to its thoroughness or extent. I doubt whether the report of

(1) [1905] A.C. 72.

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the inspection which was put in was admissible in evidence. But, if it was, the jury may not improperly have reached the conclusion that the plaintiff had sufficiently established that the defect was one which proper inspection would have disclosed and that the defendants had failed to satisfactorily establish that there had been such inspection.

This suffices to dispose of the case and renders it unnecessary to consider the other finding of the jury that the defendants were negligent in using a rebuilt controller in a defective condition. In regard to that finding I desire merely to remark that if by it the jury meant that the existence of the defect in the controller was due to negligence in rebuilding it, I am not satisfied that the evidence would support such a finding.

In the result the appeal fails and must be dismissed with costs.

BRODEUR J.—The jury in stating that the company defendant was guilty of negligence by using a rebuilt controller in a defective condition and by not inspecting it properly, have returned a verdict that could be reasonably found on the evidence.

It seems to me that if the equipment had been minutely inspected the defect would have been detected and the injury would have been avoided. Besides, when the short circuit occurred and the fire started the motorman should have applied the brakes and stopped the car in order that the passengers could get off without fear and without accident.

In the circumstances of the case the principle laid down in *Scott* v. *London and St. Katherine Docks Co.* (1) should apply. The car was under the management of the defendants and their servants and the acci-

(1) 3 H. & C. 596.

dent is such as in the ordinary course of things would not have happened if those who had the management used proper care. It affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

The *onus probandi* that fell upon the appellants has not been fulfilled to the satisfaction of the jury and a verdict of negligence has been given.

It is claimed by the appellants that the shoving of the plaintiff off the car by the other passengers was not the natural and direct outcome of the explosion, because the passengers took hold of the respondent and pushed him off.

It is pretty evident that the passengers who pushed off the respondent were panic-stricken on account of the explosion and in trying to get off the car to reach the street and save their lives, they removed the respondent from his seat and he fell on the street.

A similar case came before the Supreme Court in Illinois, and it was held as follows:—

Where the passengers in a street car when an explosion occurred in the controller rushed to rear door in a panic, and the plaintiff being one of them was pushed and thrown from the car and injured, there was *primâ facie* evidence of negligence on the part of the railway company under the doctrine of *res ipsa loquitur*, and judgment for the plaintiff was affirmed. (*Chicago Union Traction Co.* v. *Newmiller*(1).)

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *C. & H. D. Gamble.*

(1) 18 Am. Neg. Rep. 380.