1920
Nov. 25.
Dec. 17.

THE OTTAWA ELECTRIC RAILWAY COMPANY (DEFENDANT)... } APPELLANT;

AND

FLORENCE MAY BOOTH AND OTHERS (PLAINTIFFS)..... } RESPONDENTS

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Negligence—Street railway—Contributory negligence—Jury trial—Judge's charge.

B, travelling on a street car on reaching the street where he wished to stop being in a hurry left the car while it was moving and went around it at the rear to cross the other track. Walking quickly with his head down he ran into a car travelling in the other direction and received injuries which caused his death. The latter car was going at excessive speed and its gong was not rung as the company's rules require. On the trial of an action by B's widow for damages the judge directed the jury that "stop look and listen" before crossing a railway track was not a prescribed rule of conduct in Canada; that they should find whether or not the excessive speed and non-sounding of the gong caused the accident which killed B.; and also whether or not B., when the gong could not be heard, acted as a reasonable and prudent man would in attempting to cross without ascertaining that it was safe to do so. A verdict was rendered against the company.

Held, Davies C. J. dissenting, that there was no misdirection in the charge of the trial Judge that called for an order for a new trial.

Per Davies C. J. The jury should have been told that whether the gong was sounded or not it was the duty of B. to look and listen before attempting to cross.

PRESENT:—Sir Louis Davies C. J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario maintaining the verdict at the trial in favour of the plaintiff.

The facts are sufficiently stated in the head-note.

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

Fripp K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—This is an appeal from the judgment of the first Appellate Division of Ontario dismissing an appeal from the judgment of the Chief Justice of the Exchequer Division, entered on the findings of the jury, awarding damages to the amount of $11,600 to the widow and children of Werner L. Booth for his death which the jury found to have been caused by the negligence of the defendants.

We have not the advantage of having any reasons given by the Appellate Division for the judgment appealed from, though the amount of $11,600 found by the jury and for which judgment was entered by the trial judge was reduced to $10,000.

I understood from Mr. McCarthy, counsel for the appellants, that the same points in support of the appeal were taken and argued by him in the appeal court as were taken and argued before us.

There is a double track of the defendant's railway on Elgin Street, Ottawa, on which the cars of the defendants ran north and south, but no tracks on Slater Street which crosses it.

The facts and circumstances of the accident, as I gather them from the statements of counsel and from the trial judge's charge and the evidence are substantially these.

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

The Chief Justice.

The deceased was a clerk in the Militia Department which then occupied a building on the south side of Slater Street, about 150 feet east of Elgin Street, and, on the morning of the day in question for the purpose of reaching his office, two blocks distant, he, in company with two fellow clerks, William J. Peary and Theo. D. Deblois—boarded a south bound Elgin Street car at the corner of Queen Street, all three having transferred from a Queen Street car.

It was then 8.12 or 8.13 a.m. and Booth and his fellow clerks were due at their office at 8.15 a.m., and there was a penalty attached to their being late. Consequently all three were "hurrying".

Street cars in Ottawa stop at the opposite or far side of the street intersections and as the car approached Slater Street one of them signalled for it to stop and as it was slowing up preparatory to stopping but before it had been brought to a stop, that is while it was still moving, Booth and his companions alighted. Booth left the car a second or two before the others and had proceeded about three feet when the other two alighted. After leaving the car Booth "ran", according to some witnesses, "trotted" according to another witness, or "walked briskly" according to another witness, but whether he "ran", "trotted" or "walked briskly" he certainly, according to all, went rapidly with his head down or bent forward around the rear end of the car which he had left, towards the east and almost immediately came in contact with a north bound car on the east track, his head striking the car and sustained the injuries from which he subsequently died.

When Booth alighted from the south bound car, it and the north bound car were "practically", that is almost, overlapping, and both cars were moving.

Both cars are of the same type, being 30 feet in length with vestibules at either end and crosswise seats, and the bodies of both overhang the rail twenty inches, so that when both cars are overlapping, the devil-strip being 4 feet, eight inches wide, there is a space of only sixteen inches between them. When, therefore, after leaving the south bound car, Booth moved rapidly around the rear end of it with his head down or bent forward, he came almost immediately in contact with the north bound car, that is to say, he had to travel only some 7 or 8 or, at the most, 9 feet, that is the width of the western track (four feet eight inches) plus the width of the devil strip (four feet eight inches) less the overhang of the north bound car (20 inches) and of this distance he had travelled some 3 feet before his companions left the car.

There was no congestion of traffic at the street intersection at the time of the accident. There was neither vehicle nor pedestrian on the crossing. No one got on the south bound car and no one left it but Booth and his two companions and as these alighted while the car was in motion it went on over the crossing without stopping. No one got off the north bound car and as there was no one awaiting at the crossing to get on, it also passed over the crossing without stopping. As the morning was fine, there was nothing, therefore, in the condition of the weather, the traffic, the street, the tracks or the cars in any way contributing to the accident.

By Rule 5 of the schedule to chapter 76, 57 Victoria (Ontario), by which statute the operations of the defendants are governed, each car is required to be supplied with a gong which is to be sounded when the car approaches to within fifty feet of a crossing, but there is no requirement that the gong shall be

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

The Chief Justice.

sounded continuously until the crossing is passed. By Rule 99, however, of the Company's Rules and Regulations for the government of its employees, given in evidence on behalf of the plaintiffs, the motorman is directed to sound the gong on approaching a street crossing at least twenty-five yards therefrom, and to continue such sounding until the crossing is passed as a warning to the public who may be walking or driving on, or dangerously close to, the company's tracks.

The jury found the defendants guilty of negligence causing the accident, and that such negligence consisted in

> omittance of sounding gong and car travelling at excessive speed at crossing,

and no negligence on the part of deceased causing or contributing to the accident.

The findings of the jury as to the negligence of the defendants which caused the accident are not and could not be called in question on this appeal.

What is contended for, and it seems to me the only contention that can be successfully advanced here, is that the learned trial judge misdirected the jury on the point of the deceased's duty (when crossing around the rear end of the car he had left and before attempting to cross the devil-strip, as it is called, between the two tracks), to look and see whether any north bound car was coming along on that track.

The learned trial judge on this point charged the jury as follows:—

> Then you come to question number three, as to the deceased man's conduct. If a man is walking along the street and he sees a street car coming in a way that is negligent, it is his duty to avoid, if he can, the consequence of that negligence. The duty of the deceased was to exercise care when seeking to cross the easterly track; he should be

reasonably on the lookout but the law has never said, and it is not the law, that you are bound to stop, look and listen before crossing a track upon which there may be a train or a car. You must exercise reasonable care, and what would be "care" under one set of conditions, might not be "care" under another; so the test always is, where damage is sought to be recovered because of negligence in a railway accident, whether the plaintiff, under the circumstances of that particular case, was reasonably careful, was he acting as a man of ordinary prudence.

If the gong was not ringing, then what negligence was the deceased guilty of? If the gong was not ringing was that circumstance sufficient to tell him he might with safety cross those tracks; that there was no car coming? Is that the meaning to be attached to the non-ringing of the gong at a place where it ought to be rung? If the non-ringing of the gong, when it ought to be rung, is an invitation to cross, an intimation he might safely cross, then what negligence would the man be guilty of if, under those circumstances, he chooses to step across the tracks?

I mention these matters for your consideration. You must determine questions of fact, and you have to ask yourselves, what would a reasonable man do under the circumstances what interpretation would he place upon the fact that a warning was not given—if that was the case? I am not saying there was not a warning given; but if there was no warning, what interpretation would a reasonable man place upon that circumstance?

At the close of the judge's charge, the defendants' counsel took exception to that part of it relating to the deceased's negligence, saying:—

I submit your Lordship told the jury that if the gong was ringing and the man attempted to pass across the east track he was acting imprudently. I submit your Lordship should have told the jury, whether the gong was ringing or not, if he attempted to cross the east track at that point without care, without looking or listening, he was acting imprudently.

The answer of the learned judge was:—

Gentlemen of the Jury; Mr. McVeity wishes me to tell you that whether the gong was ringing or not, it was the duty of the deceased to have exercised care in crossing the east bound track. The question of exercising care is a question of fact and you must say, assuming the gong was not rung, whether the deceased was acting reasonably in doing what he did. It is not a question of law whether he acted reasonably, it is a question of fact, and for you to determine. I cannot set up a standard, and the court cannot set up a standard of facts which become so rigid as to determine the law; it remains a question of fact always whether the party exercised reasonable care or did not.

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

The Chief Justice.

I respectfully submit that, under the circumstances, the general charge that, assuming the gong was not rung, the jury must find whether the deceased was acting reasonably in doing what he did without directing them specifically on the question of his duty to look and see whether there was a car approaching from the south along the eastern track was misleading, and the more especially as he had already told them "that the law *has never said* and *it is not the law* that you are bound to stop

look and listen before crossing a track on which there may be a train or a car.

It is true the American rule, adopted in several of the States of the Union, requiring a person about to cross a railroad or car track to stop, look and listen, has not, to my knowledge, been directly formulated or adopted by our courts, but that part of it requiring a person so situated to look and see whether a train or car is approaching has been adopted.

Now in view of the deceased's knowledge that the cars of the company ran up the line he was about to cross every few minutes, I submit that the judge should have told the jury it was the duty of the deceased, after crossing around the rear end of his south bound car, not to attempt crossing the track of the north bound cars without looking to see if a car was approaching.

If there were any facts or circumstances which might excuse the deceased from discharging that duty, they might possibly be left to the jury under proper direction to determine. Here there were no such facts suggested.

I respectfully submit that this court has already decided the very point in the case of the *Wabash*

Railroad Co. v. *Misener* (1). In that case, in delivering the opinion of the majority of the court, I stated what we thought the law was, as follows:—

> I do not desire, even by implication, to cast a doubt upon the reasonable and salutary rule so frequently laid down by this court as to the duty which the law imposes upon persons travelling along a highway while passing or attempting to pass over a level railway crossing ing. They must act as reasonable and sentient beings and, unless excused by special circumstances, must look before attempting to cross to see whether they can do so with safety. If they choose blindly, recklessly or foolishly to run into danger, they must surely take the consequences.

I would not, of course, have quoted and relied upon an opinion of my own unless it had the approval of my colleagues, and in that case my opinion was expressly concurred in by my colleagues Idington and Duff JJ., constituting a majority of the court, which is my only reason for quoting it.

If that is a correct statement of the law respecting the duty of persons travelling a highway while passing or attempting to pass over a level railway crossing, how much stronger is the reason for applying that law to such a case as we have before us here where there are double tracks of a street railway, only a few feet apart, with cars passing each other north and south every few minutes and a passenger, with full knowledge of these facts, alighting from one car and passing around its rear either "ran" or "trotted" or "walked briskly" across the devil-strip, whichever pace the jury accepted as his, in the attempt to cross the adjoining track without looking to see if a car was approaching.

It has been suggested that the often cited case of *Slattery* v. *Dublin, &c., Ry. Co.* decided by the House of Lords, (2) is in point and governs this case. I

(1) 38 Can. S.C.R. 94.

(2) 3 App. Cas. 1155.

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

The Chief Justice.

respectfully submit it does nothing of the kind. As Lord Cairns, the Lord Chancellor, who voted with the majority in dismissing the railway company's appeal, so clearly pointed out in his judgment at page 1162 and again at page 1165 of the report, the only question before their Lordships in that appeal was

> whether the verdict should be entered for the defendants, the appellants, in the action.

There was no question before their Lordships as to whether the verdict was against the evidence or the weight of evidence or of misdirection by the trial judge, or of a new trial being granted. His Lordship at page 1166 says:—

> If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House in the case of *The Metropolitan Railway Company*, v. *Jackson* (1) an *incuria* but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction.

That statement of his Lordship appears to me peculiarly applicable to the case now before us, and I think it clear from what he says on page 1165 of the report that, if the question of whether the verdict was against the evidence or the weight of evidence was open in the House of Lords, he would

> without hesitation be of opinion that a verdict more directly against evidence he had seldom seen.

(1) 3 App. Cas. 193.

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

The Chief Justice.

I do not think this *Slattery Case* (1) at all adverse to the appellants in the appeal at bar, but rather the contrary, as if it had been open to their Lordships to grant a new trial the Lord Chancellor would have undisputably voted for granting it.

If I am right, as I think I am, in my statement of the law as to the duty of a person attempting to cross one of the double tracks of car lines of the defendants, appellants, under the circumstances in which the deceased attempted to do, to look before crossing whether a car was approaching, then the defendants' right to have the jury specifically instructed on the point is clear, and the appeal should be allowed and a new trial granted.

IDINGTON J.—I think the learned trial judge's charge was quite sufficient to enable the jury to understand their duties in regard to the question of contributory negligence, as well as all else in the case, even before counsel for the defence took the exception he did.

And then the learned trial judge repeated concisely all that need, as matter of law, be said on such a subject. I do not think that there is any reasonable ground for complaint or any need for a new trial.

I would, therefore, dismiss the appeal with costs.

DUFF J.—This appeal should be dismissed with costs. No doubt there is evidence pointing with little uncertainty to the conclusion that the unfortunate victim of the accident out of which the litigation arose did pass behind the car from which he alighted and went towards the parallel track where the car was advancing by which he was struck without looking

(1) 3 App. Cas. 1155.

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

Duff J.

ahead of him or taking any precaution to meet the risk of collision with vehicles on that side. It was a question for the jury whether that was or was not negligence which was the *causa causans* of the accident; on the other hand it was for the jury in passing upon that question to consider whether or not the gong was rung and whether or not the north bound car was, having regard to the circumstances and the locality, moving at an excessive speed. I am inclined to think that the concrete question on which the jury ought to have been asked to concentrate their attention was whether if they found the issue of reckless want of precaution on the part of the victim in favour of the company, and the issues touching the ringing of the gong and the speed of the car in favour of the plaintiff, the real cause of the plaintiff's injury was the recklessness of the victim, or the negligence of the company in respect of speed and failure to give warning. Whether or not, in other words, notwithstanding the recklessness of the victim he would probably have been roused to attention if the motorman had exercised proper prudence in respect of speed and given due warning by sounding the gong. The trial judge seems rather to have directed the attention of the jury to a somewhat different question, namely, whether the victim was misled by the fact that the gong was not sounded into thinking that the line on that side was clear. That was no doubt a proper point for the jury to consider but I am inclined to think, having regard to the evidence as a whole, it was not the precise point of fact on which the jury ought to have considered the case to turn. That question was, I think, to adopt the language of Lord Cairns in *Slattery's Case* (1) at page 1167, whether

(1) 3 App. Cas. 1155.

the failure to sound the gong coupled with the excessive speed of the car on the one hand or, on the other hand, the want of reasonable care on the part of the deceased, was the *causa causans* of the accident.

These considerations, however, do not afford a sufficient ground for allowing the appeal. There was no misdirection, that is to say, there was no misstatement of the law; on the contrary the trial judge's statement of the law was accurate, and the trial judge was not asked to suggest to the jury that they should consider the case from the point of view of the above observations. The counsel for the company evidently preferred to have the jury consider the case from the point of view suggested in the charge of the trial judge.

ANGLIN J.—W. L. Booth, the husband of the adult, and father of the infant plaintiffs, died as the result of injuries sustained by his being struck by a tramcar of the appellant company. At a second trial of this action, brought under the Fatal Accidents Act (R.S.O. c. 157) the plaintiffs recovered a verdict for $10,000 for the damages resulting to them and $1,600 to cover cost of nursing, medical attendance and hospital expenses. By a unanimous judgment a divisional court of the Appellate Division upheld this verdict as to the award of $10,000, but disallowed the item of $1,600 because not covered by the statute.

The defendants now appeal from this judgment. Mr. McCarthy, representing them, very frankly conceded that he could not hope successfully to attack the findings of negligence against his clients—excessive speed of a tramcar and omission to sound its gong when approaching a crossing—but he contended that

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

Anglin J.

the proximate cause of the injuries to the late W. L. Booth which resulted in his death was not any fault of theirs but his own recklessness and he also strongly urged that there had been misdirection on the issue of contributory negligence raised by the defence.

On alighting from a south bound car at the corner of Elgin and Slater Streets, in the City of Ottawa, Booth crossed immediately behind it and was struck by a north bound car, which the jury found was travelling at an excessive speed and without sounding the gong as prescribed by the company's rules. Failure to take reasonable precautions before stepping on to the eastern or north bound track after passing behind the street car was the negligence charged by the defendants against the deceased.

The misdirection alleged by counsel for the appellant consists in the omission of the learned Chief Justice of the Exchequer Division, who presided at the trial, to instruct the jury that if the deceased failed to look and listen before attempting to cross the eastern tracks he was negligent.

The learned judge had told the jury that

> it is not the law that you are bound to stop, look and listen before crossing a track on which there may be a train or car.

Counsel for the plaintiffs suggests that this observation was elicited by some statement to the contrary made by counsel for the defendants in addressing the jury—and that was not improbably the case. The learned judge immediately added

> You must exercise reasonable care, and what would be care under one set of conditions, might not be care under another; so the test always is, where damage is sought to be recovered because of negligence in a railway accident, whether the plaintiff, under the circumstances of that particular case, was reasonably careful, was he acting as a man of ordinary prudence.

Afterwards he practically told the jury that if the gong of the north bound car was ringing and, presumably, was heard by him, there would be no excuse for the deceased doing what he did, but added that they should ask themselves whether the omission to ring the gong, if they should find it had not been sounded, might be regarded by the deceased as an intimation that he might safely cross; and he concluded this part of his charge with these words—

> I mention these matters for your consideration. You must determine questions of fact, and you have to ask yourselves, what would a reasonable man do under the circumstances; what interpretation would he place upon the fact that a warning was not given—if that was the case? I am not saying there was not a warning given; but if there was no warning, what interpretation would a reasonable man place upon that circumstance?

Counsel for the defendant took the following exception to the charge:

> I submit your Lordship should have told the jury, whether the gong was ringing or not if he attempted to cross the east track at that point without care, without looking or listening, he was acting imprudently.

The learned Chief Justice thereupon added this observation—

> Gentlemen of the Jury; Mr. McVeity wishes me to tell you whether the gong was ringing or not, it was the duty of the deceased to have exercised care in crossing the east-bound track. The question of exercising care is a question of fact and you must say, assuming the gong was not rung, whether the deceased was acting resasonably in doing what he did. It is not a question of law whether he acted reasonably, it is a question of fact, and for you to determine. I cannot set up a standard, and the court cannot set up a standard of facts which become so rigid as to determine the law; it remains a question of fact always whether the party exercised reasonable care or did not.

Counsel for the appellants urges that the refusal to state explicitly that it was the duty of the deceased to

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

Anglin J.

look and listen as the standard of care which the circumstances imposed upon him was misdirection in view of the explicit statement that it was not the law that a person about to cross a track on which there may be an approaching train or car is bound to stop, look and listen and the distinction which was drawn between the case where the gong is sounded and that where it is not rung.

There is no authority for the proposition that a duty to look and listen before crossing a railway or tramway track exists under all circumstances. No doubt ordinary prudence would dictate such a precaution unless there were something exceptional to warrant a belief that it was unnecessary or to excuse its not being taken. But the direction of the learned Chief Justice was strictly in accord with the law. The only standard is "reasonable care, having regard to all the circumstances." If under the circumstances the duty of taking reasonable care involved looking and listening before attempting to cross, the existence of that obligation was necessarily implied in the direction given. For aught that we know the jury may have found that the deceased did in fact both look and listen so far as reasonable care required him to do so and that he nevertheless was not negligent in attempting to cross possibly because he failed to realize the excessive speed at which the north bound car was approaching. *Toronto Rly. Co.* v *King* (1) at page 269. We should not assume the contrary. Neither should it be taken for granted that he did not in fact both look and listen.

The whole duty of the deceased was involved in the statement that he was bound to exercise reasonable

(1) [1908] A. C. 260.

care having regard to all the circumstances. There was, in my opinion, no misdirection—and certainly none of which it can be predicated that

> some substantial wrong or miscarriage has been thereby occasioned.

the condition of granting a new trial for misdirection imposed by section 28 (1) of the Ontario Judicature Act.

Whether the deceased was or was not negligent under the circumstances is eminently a question for the jury. While, if trying the case upon the printed evidence now before us, I should strongly incline to think that contributory negligence had been established and should probably on that ground have dismissed the action, I am not prepared to hold that on the undisputed facts contributory negligence of the deceased is so clear that no reasonable jury could refuse to find it proven—that the verdict negativing it unanimously accepted by the learned judges of the Appellate Divisional Court is so perverse and contributory negligence so indisputably shown that the trial judge erred in failing to take the case from the jury and dismiss the action. That conclusion would be involved in directing judgment for the defendants *non obstante veredicto* either on the ground of contributory negligence or on the ground that the only possible conclusion from the evidence as a whole is that the sole proximate cause of the injuries sustained by W. L. Booth, which resulted in his death, was his own recklessness.

BRODEUR J.—The main ground of appeal which was argued is that there was misdirection by the trial judge in his charge. It is claimed that he has not properly expressed the law nor declared that a person crossing a street car line is obliged to stop, look and listen.

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

Brodeur J.

The trial judge in his charge stated in most emphatic terms that this rule—stop, look and listen—was not the law of the country, and he said that when damages are claimed because of negligence in a railway accident the true rule is that a person must exercise reasonable care and what would be care under one set of conditions might not be care under another; so the test always is whether the plaintiff, under the circumstances of that case, was acting as a man of ordinary prudence.

In the present case the plaintiff was alighting from a south bound car on Elgin Street, in Ottawa, and having passed behind this car he tried to cross over the other track on which a car was running by which he was struck.

It is also claimed on the part of the company that the man was negligent because he should have looked and listened.

On the other hand, it was stated that the failure to sound the gong on the part of the railway company was the real cause of the accident.

After the jury was charged, objection was made and it was stated that the jury should have been told that whether the gong was rung or not if the victim attempted to cross the track at that point without care, without looking or listening, he was negligent. His Lordship, the trial judge, in view of this objection, took up the question again and stated to the jury

> the question of exercising care is a question of fact and you must say, assuming the gong was not rung, whether the deceased was acting reasonably in doing what he did.

It seems to me that after such a charge it cannot be contended that there was misdirection.

As to the question of contributory negligence that is a question of fact which the jury had a right to decide as they did.

The appeal should be dismissed with costs.

MIGNAULT J.—The argument of Mr. McCarthy for the appellant was chiefly directed to show that there had been misdirection by the learned trial judge in his charge to the jury, but he also argued that the verdict that the deceased was not guilty of contributory negligence was one which the jury could not reasonably find and should be disregarded and the plaintiff's action dismissed.

The alleged misdirection was in reference to the duty of reasonable care incumbent upon the deceased when, after alighting from the south-bound tramcar on the west side of Elgin Street, Ottawa, at its intersection with Slater Street, he attempted to cross the tracks on the east side of the street in order to continue east on Slater Street to the building occupied by the Militia Department, and was struck by a car of the appellant going north. The jury found as a fact that the gong of the north bound car had not been sounded as the car approached Slater Street and that it was travelling at an excessive speed at the crossing. The learned trial judge gave in his charge the following instruction to the jury as to the duty of the deceased to exercise reasonable care:

> Then you come to question number three, as to the deceased man's conduct. If a man is walking upon the street and he sees a street car coming in a way that is negligent, it is his duty to avoid, if he can, the consequence of that negligence. The duty of the deceased was to exercise care when seeking to cross the easterly track; he should be reasonably on the lookout but the law has never said, and it is not the law, that your are bound to stop, look and listen before crossing a track upon which there may be a train or a car. You must exercise reasonable care, and what would be "care" under one set of conditions, might not be "care" under another; so the test always is, where damage is sought to be recovered because of negligence in a railway accident, whether the plaintiff, under the circumstances of that particular case, was reasonably careful, was he acting as a man of ordinary prudence?

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

Mignault J.

And further on the learned judge said:

Now as to the alleged negligence of the deceased man. Was it negligence on his part to have stepped into a point of possible danger, under the circumstances of this case? What would a reasonable man have done under the circumstances that you may find to have existed at that time? Suppose that the bell was ringing; was Booth exercising reasonable care, under the circumstances, in stepping in front of that car, or running against it, or however it happened. It would seem to have been a highly dangerous and imprudent act, if the gong was ringing, and if he heard it, or ought to have heard it; it would be running a terrible risk on his part with the sound of the gong so near at hand for him to go beyond the protection of the car that was moving away and step across the devil-strip in front of the approaching northbound car. If that gong was ringing what excuse had he for putting himself in that place of danger; doing what led to his death?

If the gong was not ringing, then what negligence was the deceased guilty of? If the gong was not ringing was that circumstance sufficient to tell him he might with safety cross those tracks; that there was no car coming? Is that the meaning to be attached to the non-ringing of the gong at a place where it ought to be rung? If the non-ringing of the gong, when it ought to be rung, is an invitation to cross, an intimattion he might safely cross, then what negligence would the man be guilty of if, under those circumstances, he chooses to step across the tracks?

Counsel for the defendant, after the charge, objected that the learned judge should have told the jury that whether the gong was ringing or not, if the deceased attempted to cross the east track at that point without care, without looking or listening, he was acting imprudently, and the learned trial judge again addressed the jury as follows:

Gentleman of the Jury. Mr. McVeity wishes me to tell you whether the gong was ringing or not, it was the duty of the deceased to have exercised care in crossing the east-bound track. The question of exercising care is a question of fact and you must say, assuming the gong was not rung, whether the deceased was acting reasonably in doing what he did. It is not a question of law whether he acted reasonably, it is a question of fact, and for you to determine. I cannot set up a standard, and the court cannot set up a standard of facts which become so rigid as to determine the law; it remains a question of fact always whether the party exercised reasonable care or did not.

Taking all these passages of the learned trial judge's charge, together with the one I will quote further on, I am of opinion that the jury was not misdirected. The trial judge told them that the deceased was bound to exercise reasonable care, that what would be care under one set of conditions might not be care under another, that the question was whether the deceased, under the circumstances of this particular case, was reasonably careful, or was acting as a man of ordinary prudence would have done.

In *Toronto Railway Co.* v. *King* (1), a case where a man driving across a street in front of an approaching tramcar was struck and killed, their Lordships of the Judicial Committee were of the opinion that the deceased was not clearly guilty of that "folly and recklessness" causing his death to which Lord Cairns referred in *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (2) at page 1166, and they add, page 269, the following observations which are very pertinent to the present case:

> It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets. To cross in front of an approaching train, as was done by the deceased in Slattery's Case (3 App. Cas. 1155, at page 1166), is one thing; to cross in front of a tramcar bound to be driven under regulations such as those above quoted, at such a place as the junction to these two streets, is quite another thing.

(1) [1908] A. C. 260. (2) 3 App. Cas. 1155.

1920

THE OTTAWA ELECTRIC RAILWAY CO. v. BOOTH.

Mignault J.

Mr. McCarthy referred us to the decision of the Judicial Committee in *Grand Trunk Railway Co.* v. *McAlpine,* (1) where their Lordships found that the trial judge had misdirected the jury as to the duty to exercise care incumbent on persons crossing a railway track, and their Lordships (speaking by Lord Atkinson as in the case of *Toronto Railway Co.* v *King* (2) observed that the trial judge had not pointed out to the jury that it was necessary, in order that the plaintiff should recover, that the omission to whistle or to give the warning or both combined, and not the folly and recklessness of the plaintiff himself, caused the accident, and they add, page 846:—

> For all that appears, the omission to whistle might not have contributed in any way to the happening of the accident. The jury, instructed as they were, may well have been under the impression that the two alleged breaches by the company of its statutory duties—the two faults of which the jury found them guilty—rendered them liable whether or not those faults caused to any extent the injury to the plaintiff or the contrary.

Here the learned trial judge, after his charge, acceding to an objection made by counsel on behalf of the defendant that if the jury found the defendant guilty of negligence they should consider whether that negligence has caused the accident, stated to the jury as follows:

> Gentlemen of the Jury: Mr. McVeity is quite right in the point he has taken. I thought I made it pretty clear but no doubt omitted to do so. Speaking of acts of negligence, I have all along had it in my mind, and referred to acts of negligence which caused this accident. The defendants are only liable for such negligent acts as caused the accident; so when I say if you find that the defendants omitted to ring the gong, or the north-bound car was going at too high a speed, you will only answer "Yes" to question number one if you think that either of those acts of negligence caused the accident.

(1) [1913] A.C. 838. (2) [1908] A.C. 260.

I must therefore conclude that the learned trial judge's charge to the jury, measured by the test laid down by the Judicial Committee in both these cases, was a proper one and in effect left to the jury to decide, and it was eminently a question for them to determine, whether it was the negligence of the defendant or the folly and recklessness of the deceased which brought about the accident.

On the question whether the jury could reasonably find that the deceased was not guilty of any negligence which caused or contributed to the accident, while if I had to decide that question on my view of the evidence I would experience very great difficulty in arriving at the same conclusions as the jury, still this was a question for the jury to decide, and having held that they were properly directed by the learned trial judge, I cannot say that their finding is so perverse and unreasonable that it should be disregarded and judgment entered for the defendant.

I think therefore that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Taylor McVeity.*

Solicitors for the respondents: *Fripp & Magee.*