1932
*Dec. 7.
1933
*Feb. 7.

ETHEL NIXON (PLAINTIFF).....APPELLANT;

AND

THE OTTAWA ELECTRIC RAILWAY COMPANY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Person struck by street car while crossing track in front of car, intending to board it—Liability of railway company—Jury's findings—Jury's apportionment of fault (The Negligence Act, 1930, Ont., c. 27, s. 7).

Plaintiff sued for damages for injuries caused by her being struck by defendant's street car while she was crossing on a concrete walk traversing defendant's double-tracked right of way from the north platform to the south platform at defendant's Ottawa Civic Hospital terminal station, intending to board the car. The station and tracks were in a field beyond the city limits. It was daytime. The car was going easterly. Passengers waiting at the station to return to the city were allowed to board cars from the south platform, when the cars stopped at the station, before proceeding east to turn west at a loop about 700 feet beyond the station. Plaintiff, before she reached the station, had seen the car coming and persons standing on the south platform. The jury found defendant negligent in not having the car under proper control, and plaintiff negligent in not taking a second look before crossing, and apportioned the blame for the injuries, 90% to defendant and 10% to plaintiff. The trial judge, however, dismissed the action on the ground that there was no evidence upon which a reasonable jury could find for the plaintiff. His judgment was affirmed by the Court of Appeal, Ont., [1932] O.R. 389. Plaintiff appealed.

Held (reversing the judgments below): Plaintiff should have judgment in accordance with the jury's findings, which there was evidence to support.

As to defendant's negligence—It was not a question as to its motorman being under a duty to stop at the south platform or to expect that any person desiring to board his car for return to the city would be coming to the south platform; but a question whether, having regard to all the circumstances and conditions obtaining at the time and of which he was or should have been aware, he exercised due care in approaching and rushing through the station at the speed he did. There was clear evidence of negligence in his approaching and passing through the station at a speed which disabled him from exercising that degree of control which, under the circumstances, he should have been able to exercise for the reasonable safety of people whom he might have expected to be passing, as they had a right to do, over the walk to the south platform to board the car.

The jury's apportionment of fault (*The Negligence Act, 1930*, Ont., 20 Geo. V, c. 27, s. 7) must stand as the basis for the apportionment of the damages, the court not being prepared to hold that it was one which could not fairly and honestly be made in any reasonable view of the evidence.

*PRESENT:—Rinfret, Lamont, Smith, Crocket and Maclean (*ad hoc*) JJ.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1), dismissing her appeal from the Judgment of McEvoy J., dismissing her action, which was brought for damages for personal injuries caused by her being struck by defendant's street car. The action was tried with a jury, and certain questions were submitted to and answered by them, as set out in the judgment now reported. They found negligence on the part of the defendant and negligence on the part of the plaintiff, and assigned 90% of the blame to defendant and 10% to plaintiff. They assessed the whole damage suffered by the plaintiff at $17,557.15. The trial judge, however, giving effect to a motion for non-suit on which he had reserved judgment, gave judgment dismissing the action, upon the ground that there was no evidence upon which a reasonable jury could find for the plaintiff.

The material facts and circumstances of the case are sufficiently stated in the judgment now reported. The appeal to this Court was allowed and judgment directed to be entered for the plaintiff for $15,801.45 (nine-tenths of the damages as found by the jury), with costs throughout.*

A. W. Beament for the appellant.

R. Quain K.C. for the respondent.

The judgment of the court was delivered by

CROCKET J.—The plaintiff brought this action to recover damages for personal injuries sustained by her as a result of being struck by one of the defendant company's electric street cars while crossing a concrete walk traversing the company's double-tracked right of way from the north passenger platform to the south passenger platform of what is known as the company's Ottawa Civic Hospital terminal station in the township of Nepean, a suburb of the city of Ottawa, shortly before one o'clock p.m. on January 29, 1931.

On the trial before McEvoy J. and a jury, the defendant's counsel at the close of the plaintiff's case announced that he did not propose to call any witnesses and moved

*Leave to appeal was refused by the Judicial Committee of the Privy Council, March 9, 1933.

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for a non-suit. After a lengthy argument, His Lordship decided that he ought to take the opinion of the jury on questions he proposed to submit to them on the case as it stood, and reserved judgment on the motion in the meantime. He thereupon charged the jury and gave them eight questions to answer. These questions and the jury's answers thereto are as follows:—

1. Were the plaintiff's injuries caused wholly or in part by any negligence on the part of the defendant or of its servants?—Ans. Yes.

2. If you answer question 1 "yes," then state fully in what such negligence consisted?— Ans. Car not under proper control. According to evidence submitted car travelled about 400 feet from time brakes were applied until it came to a full stop.

3. Were the plaintiff's injuries caused wholly or in part by any negligence on the part of the plaintiff?—Ans. Yes.

4. If you answer question 3 "yes," then state fully in what such negligence consisted?—Ans. Plaintiff neglected to exercise due precaution in not taking a second look before stepping on tracks.

5. If after he became aware, or if he had exercised care he ought to have been aware, that the plaintiff was in a position of danger; could the defendant's motorman have prevented the accident by the exercise of reasonable care?—Ans. Yes.

6. If you answer question 5 "yes," then state fully what he did or omitted to do that would have prevented the accident?—Ans. He should have approached at a slower rate of speed so as to be in a position to stop the car in a reasonable distance.

7. If you answer questions 1 and 3 both "yes," what proportion of the blame do you assign to,—

(*a*) The plaintiff?—Ans. 10 per cent.

(*b*) The defendant or its motorman?—Ans. 90 per cent.

8. At what amount do you assess the whole damage suffered by the plaintiff?—Ans. $17,557.15.

The jury attached a memorandum shewing how they made up this amount. They allowed the amount of the hospital and medical bills at $2,113.15; salary eighteen months at $198 per month, $3,564; 50 per cent. regular salary for ten years, $11,880, making a total of $17,557.15.

The plaintiff's counsel moved for judgment for the full amount of the damages as assessed by the jury. His Lordship refused this motion and endorsed on the record the following memorandum, which discloses the only reasons assigned for his judgment:—

At the close of the argument in this case, I was not able to see any principle of law upon which I could charge the jury in a way that would enable them to find and assess damages to the plaintiff. There was a motion for non-suit at the close of the plaintiff's case, and I reserved the question of non-suit until after hearing further about the matter. I am now of opinion that there should be judgment of non-suit with costs upon the ground that there is no evidence upon which a reasonable jury could find for the plaintiff.

This appeal is from the judgment of the Ontario Court of Appeal (1) affirming the dismissal of the action by the learned trial judge.

We think there was ample evidence to support the jury's findings upon questions 1 and 2, which, read together, undoubtedly mean that the defendant's motorman was guilty of negligence in not having the car under proper control when he approached the Civic Hospital station, and that this negligence on his part materially contributed to cause the plaintiff's injuries.

The answer to question 2 not only states the fact of this negligence but it indicates the evidence which proves it, viz: that the car travelled about 400 feet from the time the motorman applied his brakes until the car came to a full stop, and this notwithstanding the fact that the car hit the plaintiff at a point about 90 feet east of the trolley pole where he sounded the gong and presumably applied the brakes, and dragged her along the track under the front guard, a distance of 300 feet. This is established conclusively by the evidence of the witness, Carson. Although there is no definite testimony that the motorman did apply his brakes, it is a fair inference from Carson's testimony that he did so immediately after sounding the gong when passing the trolley pole, which the evidence and the plan of the locus shewed was 86½ feet west of the west side of the concrete walk connecting the two passenger platforms.

The written admission (Ex. 6), signed by the solicitors of both parties, contains the statement that the plaintiff was entitled to come upon the platform or walks at the scene of the accident for the purpose of taking a street car. The purpose of the filing of this admission is not clear, but, apart from it entirely, the evidence leaves no question that passengers waiting at this station for cars to return to the city were allowed to board cars from the south passengers' platform, when they stopped at the station, before proceeding east to turn west around the loop about 700 feet beyond the station. The witness, Robinson, a motorman in the defendant's employ, stated not only that there was such a practice, but that an order had actually been issued by the company to that effect when there was an eight or ten minute service around that end of the line,

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and that he presumed this was done because in the winter it got very cold in the open shelter on the north side of the tracks. There was no evidence that this order had ever been cancelled, or of any notices posted about the station forbidding passengers from boarding the cars when they stopped at the south platform.

The plaintiff swore that she saw three people waiting on the south platform to get on the car, two gentlemen and a lady, and that then she started to run across to get the car because she was cold. The witness, Carson, was one of them, and it was while standing on the south platform with the lady and the other gentleman waiting to board the car, that he saw it approaching the station at what he described as a fierce speed, which he estimated to be 30 miles an hour, and hit the plaintiff. He was watching the car as it approached and did not see the plaintiff until he turned his head and saw the plaintiff for the first time at almost the instant she was struck. The car was right on her, he said, before he noticed her, only two paces from the car. When the motorman sounded the gong over 80 feet west of the platform he said he saw from the speed it was going there was no chance of it stopping at the station.

The station and the connecting concrete walk between the two platforms, as indicated by the plan, themselves clearly shew that passengers were expected to use the walk as a passage from one platform to the other, and it is clear from the evidence of the plaintiff and Carson that the latter and the lady and other gentleman who were standing on the south platform with him had crossed over from the north platform before the plaintiff started to cross, for the purpose of boarding the car on the south side. There was no road or walk leading to this platform from the south. There were no houses to the south, only a bare open field, so that it is self-evident that the concrete walk across the company's right of way was ordinarily used only by passengers disembarking from or boarding the company's cars.

The local jurymen were no doubt themselves well aware of the practice which obtained regarding the taking on of passengers at this station, and the danger which might reasonably be anticipated from the running of cars at excessive speed through a station which so many employees of and visitors to such an institution as the Civic Hospital so often frequented.

Moreover, the station plan and the oral evidence shew that the north platform, which is of the same length as the south platform (58 feet), and is for about half its length twice as wide, has upon it near its westerly end a roofed shelter enclosed by three walls, 6′ 7″ high, on the west, north and east sides. It is obvious that the west wall of this shelter would completely hide from the view of the motorman passengers standing behind it, any of whom might at any moment emerge from it, carelessly or otherwise, to cross the walk to the south platform.

In the light of all these facts which, on the defendant's motion for a non-suit, must be taken as admitted, we cannot agree with the learned trial judge that there was no evidence upon which a reasonable jury could find for the plaintiff. We think there was clear evidence of negligence on the part of the motorman in approaching and passing through such a station at a speed which disabled him from exercising that degree of control over his car which, under the circumstances, he should have been able to exercise for the reasonable safety of people whom he might have expected to be passing, as they had a right to do, over the concrete walk to the south platform to board his car.

If he was keeping a proper look-out and exercising any thought whatever, he must have seen the three passengers standing on the south platform and known that they were there with the expectation that the car would stop to take them on, and that the plaintiff was rushing to the station for the purpose of joining them.

It is not a question, however, of the motorman being under a duty to stop at the south platform or under a duty to expect that any person desiring to board his car for return to Ottawa would be coming to the south platform, as is suggested in the reasons for judgment of the Appeal Court, but a question whether the motorman, having regard to all the circumstances and conditions obtaining at the time and of which he was or should have been aware, exercised due care in approaching and rushing through the station at such a rate of speed as above indicated—a rate of speed which undoubtedly made it impossible for him to bring it to a stop in a distance of less than 300 feet after running the plaintiff down. This was a clear question of fact for the jury's determination and upon which, for the reasons stated, there was abundant evidence to support the finding they made.

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Whether this negligence of the motorman caused or materially contributed to cause the plaintiff's injuries was also a clear question of fact for the jury's determination in the light of all the circumstances proved. They found in answer to question 1 that it did, and in answer to questions 3 and 4 that there was negligence on the part of the plaintiff as well, which also materially contributed to cause the injuries complained of, such negligence on her part being her failure to look a second time before stepping on the tracks. We think that there was evidence to support this latter finding also.

This being the case, the plaintiff is clearly not entitled to rely upon the answers to questions 5 and 6 as a finding of ultimate negligence to which her injuries must solely be attributed. It is evident that the answer to question 6 indicates precisely the same negligence as the jury found in answer to question 2, viz: that at the time he saw or ought to have seen the plaintiff stepping off the north platform to cross the tracks the motorman, by reason of the excessive speed at which he was then running the car towards the station, was unable to stop it within a reasonable distance, i.e., he did not have the car under proper control. Obviously this had no reference to the motorman's failure to do any particular thing, subsequently to the plaintiff's negligence, by which he could have avoided its consequences.

Section 7 of the Ontario Contributory Negligence Act (*The Negligence Act, 1930*), 20 George V, cap. 27, provides that in any action tried with a jury the degree of fault or negligence of the respective parties shall be a question of fact for the jury. The jury here assigned 10% of the blame to the plaintiff and 90% to the motorman.

Where damage is caused by the combined negligence of two or more persons it is by no means an easy task to accurately determine the percentage of fault which should be assigned to each. The Contributory Negligence Act, however, has expressly declared it to be the special function of the jury to do so on a jury trial. The jury in this case has made its apportionment. Unless it is one which we are clearly satisfied could not fairly or honestly be made in any reasonable view of the evidence, we would not be justified in rejecting it.

For my part, I can understand how the jury may very well have concluded that the plaintiff's conduct, in the circumstances, was much less inexcusable than the motorman's. Leaving the hospital on an apparently very cold day with a hat fitting closely over her ears and her coat collar turned up, she saw to her right as she ran across Carling Avenue, the car turning the corner at Holland Avenue, and at the same time or later, while proceeding along the concrete walk leading from the former street to the railway station, a distance of about 60 feet, observed the lady and two men on the south platform. Naturally assuming that the car would slow up and stop, she rushed across the north platform and on to the walk traversing the right of way, in order to escape the cold and board the heated car with the others at the earliest opportunity.

While upon other considerations it may perhaps seem that the apportionment of fault was unduly favourable to the plaintiff, I am not prepared to hold that the apportionment was one which could not fairly and honestly be made in any reasonable view of the evidence. In this view it must stand as the basis for the apportionment of the damages between the parties under the provisions of the Contributory Negligence Act.

No exception can be taken to the jury's assessment of damages, in view of the seriousness of the plaintiff's injuries, which included a fracture of the base of the skull, the fracture of her right thigh, permanent injury to the central nervous system, and complete and permanent deafness in one ear, resulting, according to the medical testimony, in the impairment of her earning capacity as a trained nurse to the extent of at least 50 per cent.

Judgment should, therefore, be entered for the plaintiff under the provisions of sec. 4 of the Contributory Negligence Act, for $15,801.45—nine-tenths of the damages as found by the jury.

The appeal should be allowed with costs and judgment entered for the plaintiff for the above amount with costs of the trial and of the appeal to the Appeal Court.

Appeal allowed with costs.

Solicitors for the appellant: *Beament & Beament.*

Solicitors for the respondent: *Quain & Wilson.*