ELIZA DAY (PLAINTIFF) ..... APPELLANT;

AND

TORONTO TRANSPORTATION COMMISSION AND ERNEST R. CLARKSON (DEFENDANTS) ..... RESPONDENTS.

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*Mar. 11, 12.
*May 21.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Street railways—Passenger in street car injured by sudden application of emergency brake—Brake applied because of alleged negligent conduct of an automobile driver—Claim for damages against street car company—Judgment at trial on jury's findings—Reversal by appellate court—Want of justification for reversal.

Plaintiff, a passenger in a street car of defendant corporation, while standing and picking up a parcel preparatory to disembarking, was thrown to the floor and injured by the sudden application of the emergency brake, and claimed damages. Defendant corporation con-

*PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

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tended that the application of the brake was made necessary by the negligent conduct of the driver of an automobile with which the street car collided. The jury found that plaintiff's injuries were due solely to negligence of the corporation's motorman, in that he was "negligent in not looking or observing the road ahead of him; if he (the motorman) had been observing properly he would not have found it necessary to apply the emergency brake at all, thus avoiding the injury to the plaintiff"; and judgment was given for plaintiff against the corporation. That judgment was reversed by the Court of Appeal for Ontario, on the ground that, on the evidence, the jury's finding was such that no twelve men with a proper appreciation of their obligations and duties could arrive at. Plaintiff appealed.

Held: The appeal should be allowed and the judgment at trial restored. There was evidence on which the jury were entitled to find as they did.

Per Crocket J.: A study of the printed record might very well produce upon the mind of a trained judge sitting on appeal an impression contrary to the jury's finding, but that would not warrant him in substituting his own opinion upon a pure question of credibility for that of the jury, who heard the evidence and had the advantage of observing the witnesses' demeanour, unless he were convinced that the finding was one which was so manifestly wrong that no jury, which fully appreciated its duty as a sworn body, could have conscientiously made it; and, on the evidence, the reversal of the jury's finding was not warranted.

Per Hudson J.: Although the carrier of passengers is not an insurer, yet if an accident occurs and a passenger is injured, there is a heavy burden on the carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario reversing the judgment of MacKay J. at trial, on the findings of the jury, in favour of the plaintiff against the defendant Toronto Transportation Commission. The plaintiff, a passenger in a street car of the defendant Commission, while standing and picking up a parcel preparatory to disembarking, was thrown to the floor and injured by the sudden application of the emergency brake. It was contended by the defendant Commission that the application of the brake was caused entirely by the negligent conduct of one Clarkson, the driver of an automobile with which the street car collided, who was added as a party defendant. The jury found that the plaintiff's injuries were due to negligence on the part of the Commission's motorman in that he was "negligent in not looking or observing the road ahead of

him; if he (the motorman) had been observing properly he would not have found it necessary to apply the emergency brake at all, thus avoiding the injury to the plaintiff"; that defendant Clarkson had satisfied the jury that the injuries of the plaintiff did not arise through any fault or negligence on his part. The jury assessed the plaintiff's damages at $1,800, for which amount judgment was given for the plaintiff against the defendant Commission (the action being dismissed as against Clarkson). The Court of Appeal for Ontario (*per* Fisher and Henderson JJ.A.; Middleton J.A. dissenting) allowed the defendant Commission's appeal and dismissed the action as against it, and gave judgment for the plaintiff against the defendant Clarkson. Henderson J.A., in the course of his reasons, stated that he was of opinion that the jury's answers (to the questions put to them by the trial judge) were "such that no twelve men with a proper appreciation of their obligations and duties could arrive at" and "I can find no evidence on the record on which the jury could make the finding they did." Fisher J.A. agreed with the reasoning and conclusions of Henderson J.A. and at the conclusion of his reasons stated: "Clarkson's conduct threw the motorman into an emergency at a time, according to the evidence, when it was impossible for him to avoid an impact. The jury's finding that the driver of the street car was solely to blame is a perverse finding, and I can find no evidence to support it." Middleton J.A., dissenting, held that there was evidence from which the jury might properly find the motorman at fault; that "if the motorman had been alert, he would have seen [Clarkson] sufficiently far away to have avoided the stringent application of his brakes followed by the throwing of the plaintiff to the floor of the car." Special leave to appeal to the Supreme Court of Canada was granted to the plaintiff by the Court of Appeal for Ontario.

D. H. Porter and *T. R. Deacon* for the appellant.

I. S. Fairty K.C. and *G. A. McGillivray* for the respondent Toronto Transportation Commission.

RINFRET J.—I would allow the appeal and restore the judgment at the trial with costs throughout.

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CROCKET J.—This action was originally brought by the appellant plaintiff against the respondent Transportation Commission to recover damages from it for injuries sustained by her while travelling as a passenger on one of the Commission's street cars in the City of Toronto. In her statement of claim the plaintiff alleged that the street car collided violently with a motor car, which was proceeding in the same direction, and that that collision was caused solely by the negligence of the respondent Commission, its servants or agents, as a result of which negligence she, while standing in the street car in the act of picking up a parcel preparatory to disembarking from the car, was thrown violently to the floor and seriously injured. The respondent in its statement of defence alleged that the motor car, with which the street car collided, was owned and operated by one, Ernest R. Clarkson, and that the collision in question was entirely caused by the latter's negligence. The appellant joined issue upon this defence and subsequently the respondent applied for and obtained from a Master of the Supreme Court of Ontario, under the *Negligence Act,* R.S.O., 1937, ch. 115, an order adding Clarkson as a party defendant to the action. The respondent defendant's solicitor thereupon consented to the plaintiff amending the statement of claim so as to claim damages (in the alternative) against Clarkson. Clarkson, having been served with a writ and amended statement of claim in pursuance of the Master's order, entered a statement of defence, in which he denied all negligence on his part and alleged that the accident was the result of the negligence of the Commission's motorman in (*a*) driving the street car at an excessive rate of speed; (*b*) not keeping a proper lookout; (*c*) failing to apply his brakes; and (*d*) failing to give adequate warning when he saw or should have seen him making a turn. When the trial came on before Mr. Justice MacKay, sitting with a jury, the Commission's statement of defence seems to have been amended with the consent of counsel, so as to open the question as to whether the plaintiff's injuries were or were not entirely attributable to the negligence of Clarkson in making it necessary for the motorman in his attempt to avoid the collision with the motor car to suddenly apply the emer-

gency brake of the street car, which obviously was the immediate cause of the appellant's injuries. This, apart from the quantum of damages, was the real issue to which the evidence adduced at the trial was directed, as is so clearly shown by the questions submitted to the jury by the learned trial judge and their answers thereto. These questions and answers were as follows:

1. Were the plaintiff's injuries due to any negligence on the part of the motorman of the Transportation Commission?

A. Yes.

If your answer is "yes" in what did such negligence consist?

A. The motorman was negligent in not looking or observing the road ahead of him; if he (the motorman) had been observing properly he would not have found it necessary to apply the emergency brake at all, thus avoiding the injury to the plaintiff.

2. Has the defendant Clarkson satisfied you that the injuries of the plaintiff did not arise through any fault or negligence on his part?

A. Yes.

The jury assessed the damages at $1,800, for which judgment was entered against the Commission with costs, while the action was dismissed as against Clarkson and the Commission ordered to pay Clarkson his costs of the action.

An appeal having been taken from this judgment by the Transportation Commission, the Court of Appeal, *per* Fisher and Henderson, JJ.A., Middleton, J.A., dissenting, allowed the appeal with costs and directed the dismissal of the action against the respondent Commission with costs and the entry of judgment against Clarkson for the sum of $1,800 with costs, and further ordered that the appellant plaintiff recover from Clarkson any costs which she may have paid under the trial judgment to the respondent Commission as well as her costs on that appeal.

The present appeal, to which Clarkson is not a party, is from the latter judgment, which obviously is founded upon the complete reversal of the findings of the jury upon the principal issue tried before them.

With all respect, I am of opinion that the Appeal Court was not warranted in thus interfering with the jury's findings upon essential questions of fact, which the record shows depended entirely upon the credibility of witnesses examined before them. Although the evidence was such that the jury, if it chose, might well have found the other

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way, I agree with Middleton, J.A., who says in his dissenting judgment that there was evidence from which the jury might properly find that the motorman was at fault. His Lordship says that he does not himself accept Clarkson's evidence, because he thought he was so confused as to be unable to tell exactly what did happen, but adds that if the motorman had been alert he would have seen him (Clarkson) sufficiently far away to have avoided the stringent application of his brakes followed by the throwing of the plaintiff to the floor of the car. This is precisely what the jury found—a clear finding of ultimate negligence against the respondent's motorman, and can only mean that the jury, whether they fully accepted Clarkson's evidence or not, did not wholly credit that of the motorman. It must be borne in mind that there were other witnesses than Clarkson and the motorman and that, as my brother Kerwin points out, there was a conflict of testimony as to the operation of the motor car by Clarkson, which might very well have influenced the jury in its decision upon the whole evidence to reject the motorman's explanation of his sudden application of the emergency brake. This was really the crucial issue in the case, as appears from the whole conduct and course of the trial—an issue which it was the sole right and duty of the jury to determine according to the convictions produced upon the minds of its individual members by the whole evidence bearing thereon without reference to what they may have gathered from the learned trial judge's charge he personally may have believed, as the latter so fairly and clearly pointed out to them. A study of the printed record might very well produce a contrary impression upon the mind of a trained judge sitting on appeal, but that, of course, would not warrant him in substituting his own opinion upon a pure question of credibility for that of the jury, which heard the evidence of all the witnesses and had the advantage of observing their demeanour on the witness stand, unless he were convinced that the finding was one which was so manifestly wrong that no jury, which fully appreciated its duty as a sworn body, could have conscientiously made. That the jury fully comprehended the issue it was its duty to decide is shown by the preciseness of its statement of the particulars of the motorman's

negligence in answering question 1. For my part, I cannot think that a jury, which so comprehended the issue with which it was charged, did not equally appreciate the obligation which rested upon it to conscientiously find the true facts according to the evidence. The Court of Appeal was, therefore, to my mind not warranted in completely reversing the judgment of the trial court by directing the dismissal of the appellant's action against the respondent and the entry of judgment against its co-defendant in lieu thereof.

As to the respondent's contention that if this Court should come to the conclusion just stated we should order a new trial, I am of opinion that the whole case was fully and fairly tried; that there was no such misdirection, non-direction or improper admission of evidence as could well be held to warrant a new trial.

My conclusion, therefore, is that the appeal should be allowed and the trial judgment restored as originally entered, with costs throughout.

DAVIS J.—The appellant sustained personal injuries while a passenger in one of the respondent's street cars. No blame was suggested against the appellant herself. The street car was suddenly stopped by the application of its emergency brakes. What the respondent said was that the improper conduct of its co-defendant, Clarkson, who was driving a motor vehicle, was the real cause of the injury to the appellant.

The duty of the respondent to the appellant, its passenger, was to carry her safely as far as reasonable care and forethought could attain that end. I feel bound to hold that the evidence given entitled the jury to find, as they did, that the operator of the street car failed to exercise that reasonable care and forethought and that his negligence was the cause of the appellant's injuries.

The appeal should be allowed and the judgment entered at the trial against the respondent upon the jury's answers should be restored, with costs throughout.

KERWIN J.—By special leave of the Court of Appeal for Ontario, the plaintiff, Eliza Day, appeals from an order of that Court which set aside the judgment at the trial

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(following a jury's verdict), in favour of the appellant against the Toronto Transportation Commission, and directed judgment to be entered for the appellant against one Clarkson.

The appellant was a passenger on a street car of the Commission and as a result of a sudden application of the brakes by the motorman, was thrown to the floor of the car and injured. The motorman testified that he was obliged to apply the brakes in this manner because Clarkson had started his automobile from the position where it was parked and suddenly darted in front of the oncoming street car. Clarkson's story was that he had, before starting his automobile, looked back and observed the street car some distance away; that, considering that he had ample time he started to make a gradual U turn, first signalling with his arm, and that the motorman should have seen him and that, if he had done so, there would have been no necessity for the application of the brakes at all.

So far as Clarkson was concerned, the case went to the jury upon the basis that, under the Ontario *Highway Traffic Act,* the onus was upon him, Clarkson, to establish that the appellant's injuries had not been caused through any negligence or improper conduct on his part; so far as the Commission was concerned the case was left to the jury as an ordinary one in which the onus of establishing negligence would be upon the appellant. The jury determined that Clarkson had satisfied the onus cast upon him and that the appellant's injuries were due to negligence on the part of the motorman, such negligence being, according to the verdict:

> The motorman was negligent in not looking or observing the road ahead of him; if he (the motorman) had been observing properly he would not have found it necessary to apply the emergency brake at all, thus avoiding the injury to the plaintiff.

There was conflicting testimony as to the operation of the automobile by Clarkson. The witness Wright did not see the automobile or street car until the collision that subsequently ensued was imminent. The witness McDonald first saw the automobile, then noticed the street car, and when he next saw the automobile it was making a turn on to the street car tracks. It is clear, I think, from a

perusal of his evidence that there was a period of time during which he was not looking at the automobile and at what Clarkson in it was doing. The testimony of the motorman, as to the left front window of the motor car being down, was contradicted, and it may well be that that contradiction was weighed in the balance by the jury and finally determined their conclusion that Clarkson's story should be believed.

I find it impossible to say that there is no evidence upon which a jury doing their duty could find as they did. We were invited, in case we came to this conclusion, to direct a new trial but I can find no basis for such an order. I would allow the appeal and restore the judgment at the trial against the Toronto Transportation Commission, with costs throughout.

HUDSON J.—The appellant was a passenger on a street car of the defendant Commission and, as a result of the sudden application of the brakes by the motorman, she was thrown to the floor of the car and injured. The motorman gave evidence that he applied the brakes in the manner in which he did because a man named Clarkson had started his automobile from where it was parked, on the side of the street, and suddenly turned in front of the street car.

There was conflicting evidence and in the end the jury brought in a verdict holding the defendant guilty of negligence because

> the motorman was negligent in not looking or observing the road ahead of him; that if he (the motorman) had been observing properly he would not have found it necessary to apply the emergency brake at all, thus avoiding the injury to the plaintiff.

Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree: 4 Hals., p. 60, paras. 92 and 95. In an old case of *Jackson* v. *Tollett* (1), the rule was stated by Lord Ellenborough, at p. 38, as follows:

> Every person who contracts for the conveyance of others, is bound to use the utmost care and skill, and if, through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences.

(1) (1817) 2 Starkie 37.

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The question, then, for the jury was whether the motorman had used in a high degree all due, proper and reasonable care and skill under the circumstances. On conflicting evidence the jury chose to accept that part which was favourable to the plaintiff. I am of opinion that there was some evidence on which they could properly decide that the motorman had failed in his duty. I would, therefore, allow the appeal and restore the judgment at the trial, with costs here and below.

Appeal allowed with costs.

Solicitors for the appellant: *Deacon & Howell.*

Solicitor for the respondent Toronto Transportation Commission: *Irving S. Fairty.*