BRITISH COLUMBIA ELECTRIC RAILWAY Co. (DEFENDANT)..... } APPELLANT;

1919
*Oct. 15.
*Oct. 20.

AND

NELLIE F. DUNPHY (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Contributory—Collision—Automobile and street car—Jury's findings—Sufficiency.

The action is for damages for injuries suffered in a collision between an automobile driven by the respondent, and appellant's street car. At the trial one witness for the respondent, who was in the automobile, testified to having warned the respondent before the accident; and the respondent was not called to explain his failure to act upon this warning. The jury, after having found the appellant guilty of negligence, specified such negligence in the following terms: "Insufficient precaution on account of approaching crossing and conditions existing on morning in question."

Held, that the jury's findings, if read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge, were justified both as to appellant's negligence and as to absence of respondent's contributory negligence and were not too vague to support a judgment for respondent.

Per Duff J.—The practice in jury cases in British Columbia is that the jurors are not bound to believe the evidence of any witness; and they are not bound to believe the whole of the evidence of any witness; they may believe that part of a witness' evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him, unless there is an express or tacit admission that the whole of his account is to be taken as accurate. *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (3 App. Cas. 1155), followed.

Judgment of the Court of Appeal ((1919), 48 D.L.R. 38, [1919] 3 W.W.R. 201), affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of

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

(1) (1919) 48 D.L.R. 38; [1919] 3 W.W.R. 201.

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the trial court with a jury and maintaining the respondent's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

W. N. Tilley K.C. for the appellant.
Mayers for the respondent.

THE CHIEF JUSTICE.—I confess that at the close of the argument on this appeal I felt inclined to allow it on the grounds submitted by Mr. Tilley, first, that the evidence of Cross, one of the witnesses for the respondent and who was in the respondent's motor car at the time the collision with the street railway happened, shewed clearly that he, Cross, had seen the electric car approaching and had warned the respondent Dunphy who was driving the motor car about thirty or forty feet away from the track: "Look out, look out the car." (No evidence was given challenging or qualifying Cross's evidence as to his having given the warning or to the effect that it had not been heard by Dunphy), and secondly, that the jury had failed to find in answer to the question put to them as to what the negligence of the defendant company consisted of—anything definite or certain—and that their finding was altogether too vague and uncertain to uphold the verdict entered against the defendant.

However, after reading the evidence over and the judge's charge to the jury, which was very clear, and considering that in appreciating the weight to be given to Cross's evidence the jury had the advantage of having had a "view" of the locality where the collision occurred and of seeing and deciding as to the extent the alleged growing trees between the motor and the car would have prevented Clarke seeing from the motor

the approaching electric car, I am, but with some doubt, of the opinion that we would not be justified in allowing the appeal and either dismissing the action or granting a new trial.

Read in connection with the judge's charge to them, the jury's findings as to the defendant's negligence may be held to be definite enough and the evidence of Cross with respect to the warning shouted by him when he says he saw the electric car approaching would be much better understood and appreciated by the jurymen who had a view of the locality than it can possibly be by the judges of this court on the printed evidence and the conflicting contentions of counsel upon that evidence.

Not being convinced, therefore, that the judgment appealed from is clearly wrong, I will not dissent from the judgment dismissing the appeal.

IDINGTON J.—I find the answers of the jury quite intelligible when read in light of the evidence and the learned trial judge's charge to the jury.

The question of contributory negligence was one for the jury and their answer leaves no reason to rest the appeal thereon.

The appeal should be dismissed with costs.

DUFF J.—Mr. Tilley bases his appeal upon two grounds: First, he argues that the admissions made by a witness called on behalf of the plaintiff, and indeed admissions brought out by the plaintiff's counsel in examination-in-chief, conclusively establish the defence of contributory negligence.

The passages relied upon are as follows:—

Q. When did you realize that the street car on the interurban was upon you, or was there? When did you first realize that it was coming? A. Well, I glanced up to the track, when we were about,

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I suppose, 30 or 40 feet away from the B.C. Electric tracks. I am not saying this definitely, but approximately, I glanced up to the track towards the east, and I saw the street car coming, and I shouted then to Mr. Dunphy: "Look out, look out, the car."

Q. And you saw the car coming? A. And I saw the car coming, yes.

Q. It would have been then about how far away? A. About three car lengths I should think. I could see the top of the car and not the bottom of it. It was the trolley pole I saw first.

Q. Well, how long after you shouted was it that you were struck by the other car? A. Well, it was so quick I could not say. It was not more than a second or a couple of seconds.

Q. From the time you shouted to Dunphy until the time you were struck? A. Yes.

The evidence as it stands affords no doubt very powerful support to the contention of the defendants that the plaintiff, if his attention had been reasonably alert to the situation as he was coming up to the railway track, must have had sufficient notice of the approach of the car in time to avoid a collision, and coupled with the observations of Mr. Taylor on the following page and with the fact that the plaintiff was not called to explain the failure to act upon Cross's attempt to warn him, it must, I think, be held to have established for all the purposes of the trial, the fact that Cross did shout to the plaintiff as he says he did. The discussion of the law to be found in the books on the effect of a statement made by a witness damaging to the party who calls him, is not entirely satisfactory. The Common Law Procedure Act of 1854, sec. 22, which is the parent of the corresponding statute in British Columbia, provides that a party may

> in case the witness produced by him shall, in the opinion of the judge prove adverse, contradict him by other evidence,

seeming, as Mr. Justice Stephens (Digest Note XLVII.) points out, to imply that the right to contradict his own witness in such circumstances rests upon the condition that the trial judge shall consider and hold

the witness to be adverse. This, however, Mr. Justice Stephens remarks "is not and never was law": *Greenough* v. *Eccles*(1). And the generally accepted rule appears to be that it is always open to a party to adduce evidence inconsistent with statements made by one of his witnesses, which, of course, is a very different thing from discrediting him by general evidence as to character.

There is a passage, however, in the judgment of Lord Sumner then Hamilton J. in *Sumner* v. *Brown*(2), which seems to enunciate a somewhat stricter rule:—

> Upon the question of the plaintiff Leivesley's evidence, Mr. Keogh had called him with his eyes open and with full knowledge of what he was likely to say, and that it was not competent for the defendants to contradict him on the vital point of contract or no contract. It was not as if unexpected evidence had been given or there had been some contradiction in details. When two equally credible witnesses called by the same side flatly contradicted each other, it was not competent for the persons calling them to pick and choose between them. They could not discredit one and accredit the other. That, in his opinion, although no decision might have been reported, had been the practice for some time.

Hamilton J. was, of course, speaking not only as a judge who had the responsibility of giving directions as to the law to be applied but as the tribunal of fact as well, and it may be doubted whether he meant to lay down a rule absolutely controlling the discretion of a jury.

The practice at all events in British Columbia in jury cases has followed the rule enunciated by Lord Blackburn in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery*(3), as follows:—

> The jurors are not bound to believe the evidence of any witness; and they are not bound to believe the whole of the evidence of any

(1) 5 C.B.N.S. 786.
(2) 25 Times L.R. 745.
(3) 3 App. Cas. 1155, at page. 1201.

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witness. They may believe that part of a witness' evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him, unless there is an express or tacit admission that the whole of his account is to be taken as accurate;

and the view expressed by Sir James F. Stephens.

Cross's evidence, however, as to locality and point of time—where and when the incident which he relates occurred—is vague and of course naturally so; what he says about the position of the motor car with reference to the track at the time he shouted is couched in language quite consistent with the conclusion that, although he was quite certain that the motor car was quite close to the track and that the collision followed very quickly, he had nevertheless no very precise notion of the exact position of the car.

I think effect must be given to Mr. Mayers' contention that the evidence of the plaintiff and Hammond describing the occurrences accompanying the accident and the succession of events as the motor car approached the track, was evidence which it is impossible to say it was the duty of a jury to disregard and from that point of view I am unable to assent to the conclusion that the defence of contributory negligence was established with such certainty as to necessitate setting aside the verdict.

The onus of proving contributory negligence in the first instance lies on the defendant and it would be the duty of the jury to find the issue in favour of the plaintiff unless satisfied that the defence had been affirmatively proved.

Mr. Tilley's second contention was that the findings were insufficient to support the judgment. I concur with the opinion of the learned trial judge, Macdonald J. that the verdict presents no difficulty. It is quite

true that the jury did not respond to an invitation by the learned trial judge to particularize the charges of negligence which they found to be proved. But as the learned trial judge observed in pronouncing judgment upon the motion for judgment, when the answer to the second question is read with the charge, it becomes perfectly intelligible.

I may add that the answers to these questions read together are equivalent to an affirmation that the plaintiff's injuries were due to the negligence of the defendant company and that the plaintiff is entitled to recover as damages the amount mentioned. Read together the answers constitute a perfectly good finding for the plaintiff for that sum. There can be no practical difficulty in giving effect to this as a general verdict because the instructions in the charge were quite sufficient to enable the jury intelligently to return a general verdict.

Had the answers been objected to as insufficient at the time they were given, the trial judge, no doubt, could have presented to the jury the alternative of specifying their findings of negligence more particularly, or returning a general verdict in the usual form. No such exception having been taken, it is not, I think, open to the defendants to take exception to the form—albeit an unusual form—in which the jury have expressed their findings.

The appeal should be dismissed with costs.

ANGLIN J.—The defendant appeals on two grounds from the judgment of the Court of Appeal for British Columbia dismissing its appeal from the judgment for the plaintiff entered by Macdonald J. on the findings of the jury. It contends that the evidence of the witness Cross called by the plaintiff established con-

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tributory negligence on his part and that upon it the judge should have withdrawn the case from the jury. Accepting Cross's statement that he shouted a warning to the plaintiff, it is not clear that he did so in time to enable the plaintiff to avoid the collision; nor is it quite certain that the plaintiff heard the warning. Passages in the plaintiff's evidence as well as in that of Hammond rather indicate that he did not. The question of contributory negligence was in my opinion by no means concluded against the plaintiff by Cross's testimony and was therefore properly submitted to the jury and their verdict negativing it cannot be impeached.

The second point made by Mr. Tilley is that the jury, having found the defendant guilty of negligence which caused the accident, failed, in answer to the second question—"If so, in what did such negligence consist?"—to specify the negligence. They said—"Insufficient precaution on account of approaching crossing and conditions on morning in question." As Mr. Mayers very properly pointed out the words "in approaching crossing" make it clear that it was negligence on the part of the motorman which the jury had in mind. Only two faults on his part were charged—failure to sound the air-whistle and excessive speed—both of them matters of more than usual importance in view of the "conditions on the morning in question," by which the jury, no doubt, meant the failure of the automatic warning signals at the crossing known to the motorman. The learned trial judge in his charge distinctly warned the jury that they must confine themselves to the negligence charged and should not import matter "in the nature of a suggestion * * * that some other precaution could have been taken." We may not assume that the jury

ignored this direction and unless we do so it would seem reasonably certain that the motorman's failure to sound his air-whistle and to moderate the speed of his car was the "insufficient precaution" which, in the jury's opinion, constituted the "negligence which was the cause of the accident." Meticulous criticisms of a jury's findings are not admissible and they must always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge. While it might have been more satisfactory had the second finding been more specific, if dealt with in the manner I have indicated it seems to be sufficiently certain what the jury meant by it.

I would dismiss the appeal.

BRODEUR J.—This is a street railway accident, and a jury trial found the appellant company guilty of negligence. There is some evidence given by the plaintiff's own witness which would shew that the victim had been guilty of contributory negligence. But the evidence of that witness is somewhat conflicting and the jury were properly charged as to its consideration. It was for the jury to determine in those circumstances whether there was contributory negligence or not; and their finding in that regard is not such that we would consider it as perverse.

The appeal should be dismissed with costs.

MIGNAULT J.—Mr. Tilley attacked the judgment of the Court of Appeal and the judgment thereby affirmed of Mr. Justice Macdonald giving effect to the verdict of the jury on two grounds:

1. That the judgment should have been in favour of the defendant, appellant, for the reason that the evidence at the trial disclosed the fact that Dunphy

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drove into the street car after a warning received from Cross that it was coming and without looking to see where it was.

2. That after finding that the accident was caused by the negligence of the appellant, the jury entirely failed to state in what such negligence consisted.

First ground. This ground is based on the evidence of Cross who was riding in the motor car with Dunphy and the latter's brother-in-law, Hammond. Cross swore that when they were about thirty or forty feet away from the track—but he adds that he was not saying this definitely but approximately—he saw the street car coming and then shouted to Dunphy: "Look out, look out, the car." Further on Cross states that after shouting it was not more than a second or two before they were struck by the car.

Although Dunphy and Hammond were not asked whether they had heard this shout, they both swear that the first thing they knew was that the car struck them. The latter was running, on approaching the crossing, at a speed of 18 to 20 miles an hour, and at the best from Cross's own story it is impossible to say whether his warning was given in time to be of any avail.

Under these circumstances, after the learned trial judge had fairly left to the jury the question of the warning received from Cross, the latter found that the accident was the result of the appellant's negligence, the majority stating that Dunphy was not guilty of contributory negligence. I cannot say that this finding is clearly wrong, and, on this first ground, I would not disturb the verdict.

Second ground. This objection is at first sight more serious. The jury, after answering that the appellant was guilty of negligence which caused the accident,

were asked in what such negligence consisted. They replied: "Insufficient precaution on account of approaching crossing and conditions existing on morning in question."

This answer seems very vague, but taken in connection with the judge's charge, I think it sufficiently assigns the lack of sufficient precautions which in the jury's opinion caused the accident. The learned trial judge fairly placed the matter before the jury and explained the conditions which, according to the evidence, prevailed on that morning at the crossing. He said:—

> Then you have to consider whether the rate of speed which would not have been too great ordinarily, was upon the morning in question too high a rate of speed, and whether this rate of speed is one subject to the surroundings. You have had pictured to you, and probably you have vizualized yourselves the condition of affairs that morning. There seems to be no question that the British Columbia Electric had, as an extra precaution for the safety of those using that highway, installed not only bells that would ring automatically on the approach of a street car, but also a light which would give evidence of the approach of a street car. On this particular morning, to the knowledge, however, of the motorman, those safeguards were not in operation; so that it left a condition of affairs which it may well be argued, and you may conclude, that required a precaution on the part of the motorman different from that he would have required to pursue, say, the day before.
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> Then, again, you have the question of the bushes growing up in that locality, and obstructing, more or less, the view of the approaching street car. I instruct you, as far as the question of crossing is concerned, there is no law resting on the railway company to clear its right of way. That is a matter that pertains, and has to do with another branch of the duties placed upon a railway company operating in the country; but it is a fact that you can take into consideration when you determine whether or not, at that point, the motorman, upon the occasion in question, having in view that situation, was acting with due regard to those entitled to use the highway.

When, therefore, the jury found that the appellant had not taken sufficient precautions on account of the approaching crossing and the conditions existing on the morning in question, I think that their answer

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clearly means that in view of the fact that, to the knowledge of the motorman, the bell and the light at the crossing were not in working order that morning and that the bushes obstructed the view, the motorman had not taken sufficient precautions for the protection of persons entitled to use the highway. I would therefore conclude that Mr. Tilley's attack on this answer is not a reason for setting aside the verdict.

My opinion consequently is that the appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McPhillips & Smith.*

Solicitors for the respondent: *Taylor, Mayers, Stockton & Smith.*