1931
*May 1, 4.
*May 18.

THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (DEFENDANT) ..... } APPELLANT;

AND

MILDRED G. C. KEY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Collision between tram-car and automobile—Contributory negligence—Ultimate negligence—Jury trial—Findings—Evidence—New trial—Questions to the jury—Answers inconsistent—Counsel not objecting nor asking for direction by trial judge.

The respondent, with her husband and child, was proceeding easterly on 49th Avenue in Vancouver in their automobile, her husband driving. On approaching the track of the appellant company across the road and seeing a tram-car coming from the south, the husband stopped his car, but as he saw a platform upon which people were standing, he thought that the tram-car would stop and he started to cross the track. The tram-car did not stop and consequently struck the automobile. As a result of the collision, the husband and child were killed and the respondent suffered serious injuries. The jury found that the employees of the appellant company were guilty of negligence and that the husband was also guilty of contributory negligence; but that, notwithstanding such negligence of the driver of the automobile, the motorman of the tram-car could have avoided the accident by the exercise of reasonable care. The jury then assessed the damages for which judgment was entered; and this judgment was affirmed by the Court of Appeal. The appellant company then appealed to the Supreme Court of Canada mainly on the ground that the finding of the jury, in answer to question no. 8 (that, notwithstanding the negligence of the driver of the automobile, the appellant, by the exercise of reasonable care, could have avoided the accident), was inconsistent with the earlier findings of primary negligence of the appellant and contributory negligence of the respondent, and, moreover, that such finding on question no. 8 was not supported by evidence.

Held, Rinfret and Smith JJ. dissenting, that there was no conflict in the findings of the jury and that they were sufficiently warranted by the evidence.

Per Anglin C.J.C. and Newcombe and Cannon JJ.—The appellant's contention, that the questions prepared for the jury and the answers thereto were insufficient and conflicting with each other and that a new trial should, therefore, be ordered, cannot be upheld, as the questions were drafted by both counsel, approved by the trial judge and submitted to the jury, whose answers and verdict were accepted without complaint by both parties, the appellant's counsel, moreover, not having asked for a more complete direction by the judge as to question no. 8, at the time of his charge.

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ.

Per Rinfret and Smith (dissenting).—The issue as to ultimate negligence was not properly put to the jury, either in the questions as framed, or in the charge of the trial judge; and it is impossible to say precisely in what the jury would, if asked, have found the ultimate negligence consisted. This lack of proper instruction as to the law bearing on the questions at issue, coupled with the apportionment of the degree of negligence and the finding of ultimate negligence, indicates that there was confusion in the minds of the jury, which may have affected all the findings. There should be a new trial as to the claim under what is commonly referred to as *Lord Campbell's Act*.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of Gregory J. and maintaining the respondent's action for damages.

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

J. W. de B. Farris K.C. and *W. A. Riddell* for the appellant.

R. L. Maitland K.C. and *C. M. O'Brian K.C.* for the respondent.

The judgment of Anglin C.J.C. and Newcombe J. was delivered by

ANGLIN, C.J.C.—In this case the appellant confines its attack to finding no. 8 of the jury which, it contends, conflicts with the earlier findings of primary negligence of the defendant and contributory negligence of the plaintiff (which it did not challenge) and is not supported by the evidence. We can see no inconsistency in the findings.

The finding of "ultimate" negligence, viewed in the light suggested by counsel for the respondent (which was certainly an admissible position on the whole case as indicated by my brother Cannon) seems to be warranted by the evidence. It is true that the jury did not specify the particulars of that negligence; but, on the other hand, it is impossible to say that they were not right in answering the eighth question as they did, for there is evidence in support of the answer, and, in contrast with the finding upon the ninth question, it clearly indicates that it was the negligence of the defendant company which, in the opinion of the jury, caused the accident. (*B.C. Electric Rly. Co.* v. *Loach*) (2).

(1) (1931) 43 B.C. Rep. 288. (2) [1916] 1 A.C. 719, at 727 and 728.

1931

BRITISH COLUMBIA ELECTRIC RY. CO. v. KEY.

Anglin C.J.C.

The appellant raised before us a complaint of non-direction with regard to the issue of ultimate negligence. It appears, however, that the learned trial judge, at the close of his charge, asked counsel if they had any objections, or suggestions, to make; and their answer was in the negative. Counsel had themselves framed and agreed upon the questions to be submitted to the jury. The burden was distinctly upon counsel for the appellant to satisfy this court that the answer to question no. 8 was unwarranted and, under the circumstances, he cannot complain of lack of specification by the jury of the particular ground upon which this finding is based, since he did not ask for any direction covering that point, nor that any question be put calling for such specification.

As was said by Lord Halsbury, in *Nevill* v. *Fine Art & General Insurance Co.* (1), counsel can never, as of right, ask for a new trial for mere non-direction. The granting of a new trial on that ground is purely discretionary; a request for that relief should only be acceded to by the court where the interests of substantial justice require that course to be taken. We are far from satisfied that that is the case here, counsel having failed to convince us that the jury's answer to question no. 8 must have proceeded on some ground not warranted by the evidence, or which, in law, would not amount to "ultimate" negligence.

Under all the circumstances, we think that a new trial, restricted to the issue raised by question no. 8, would probably be unsatisfactory and might involve the re-taking of all the evidence, except as to the quantum of the damages. We think the interests of justice in this case will be best served by putting an end to the litigation; and, accordingly, we dismiss the appeal with costs.

The view above expressed renders it unnecessary to consider the other question argued at bar, viz.: whether or not the *Contributory Negligence Act* applies to actions brought under *Lord Campbell's Act.*

CANNON J.—This is an appeal from the Court of Appeal for British Columbia, which confirmed a judgment of Mr. Justice Gregory, assisted by a jury, in favour of the plaintiff for $5,150 in respect of personal injuries sustained by

(1) [1897] A.C. 68, at 76.

her in a collision between a tramcar, owned and operated by the appellant, and an automobile in which she was driving with her husband and child, who both then lost their lives; the respondent recovered a further sum of $25,000 as executrix of her late husband, Frank Key. Counsel for both parties agreed as to the questions to be put to the jury; and no objections were taken at the trial against the jury's answers nor to the judge's charge.

The questions and answers are as follows:

1. Who was driving the auto?—A. Mr. Key.

2. Was the intersection—the scene of the accident in a thickly-peopled portion of the city of Vancouver?—A. Yes.

3. Was the defendant guilty of negligence which contributed to the accident?—A. Yes.

4. If so, what was such negligence?—A. Considering the place and the conditions as shown by the evidence, the motorman of the northbound train was negligent in failing to stop when he saw the Key automobile approaching the crossing from his left and then allowed his attention to be diverted by looking to his right.

5. Was the driver of the auto guilty of negligence which contributed to the accident?—A. Yes.

6. If so, what was such negligence?—A. Although the driver of the Key auto took reasonable care as shown in the evidence by stopping his automobile before arriving at the crossing, it is our decision he did not take all necessary precautions before proceeding.

7. If the defendant and the driver of the auto were both guilty of negligence, to what degree did the negligence of each contribute to the accident?—A. The degree of negligence, defendant 90 per cent; plaintiff, 10 per cent.

8. Notwithstanding the negligence of the driver of the auto, if any, could the defendant by the exercise of reasonable care have avoided the accident?—A. Yes.

9. Notwithstanding the negligence of the defendant, if any, could the driver of the auto by the exercise of reasonable care have avoided the accident?—A. No.

10. Damages, if any?

(*a*) In respect to the plaintiff for personal injury?—A. Section (*a*) in respect to the plaintiff for personal injury, pain and suffering, expenses $5,150 net.

(*b*) As executrix of the estate of the late Frank Key?—A. $200 per month to the plaintiff for the duration of her life to be paid by the defendant and guaranteed by a surety bond payable from date of accident, or alternatively, $25,000.00.

The appellant's case is based before this court on two propositions:

1. " That there is no evidence to support a finding of ultimate negligence as given in questions 8 and 9." This cannot be sustained on the motorman's evidence that he released his brakes at about the same time that his attention was fully turned to the motor moving very slowly

1931

BRITISH COLUMBIA ELECTRIC RY. CO. v. KEY.

Cannon J.

towards the track. He says he could have stopped in seventy-five feet, but that he did not do so because the auto, in his judgment, showed every indication of waiting there until he had got past. He wrongly thought it would be all right to go ahead—and must have kept his head turned to the other side until the collision took place. On this version of the appellant's employee, the jury exculpated the victim from the moment the motorman decided to go ahead without stopping at the station, on the rash assumption, in the jury's view, that the motor would stop and wait.

2. "The plaintiff cannot succeed in an action under the *Families Compensation Act* where there is a finding of contributory negligence against the deceased." In my opinion, the finding is one of ultimate negligence against the appellant and this ground also fails.

But, the appellant also contends that question 8 in connection with ultimate negligence

> Could the defendant by the exercise of reasonable care, notwithstanding the negligence of the plaintiff, have avoided the accident?

is not sufficient and that there should have been added to it these words: "at a time when the plaintiff no longer could have so avoided it". Besides, the appellant claimed that the answers to questions 3, 4, 5 and 6 established contributory negligence of both parties and cannot be reconciled with the answer to question 8, in view of the failure of the jury to determine what the defendant could have done to avoid the accident notwithstanding the negligence of the victim.

The contention that the questions prepared for the jury and that the answers thereto were insufficient is fully met by the fact that the questions were drafted by counsel, approved of by the judge and submitted to the jury, whose answers and verdict were accepted without complaint by both parties. If the appellant desired a more complete direction as to question 8, or a fuller answer to it, it ought to have applied for it when it was possible to obtain it. Having been silent during the trial and when the answers were given, it waived the objection, if any, which it had a right to make and cannot now be allowed to urge such grounds for a new trial.

In the case of *Williams* v. *Wilcox* (1), Lord Denman observed:

(1) (1838) 35 E.C.L.R. 609, at 620.

It is the business of the counsel to take care that the judge's attention is drawn to any objection, on which he intends afterwards to rely. In the present case the jury gave a unanimous verdict to which no objection was made at the time and now all this labour is to be set aside in order, at the cost and delay of a new trial, to get fuller answers which might have been obtained without delay, trouble or expense when the jury were in the box. I am therefore of opinion that we ought not now to maintain such objections to the questions or to the answers of the jury.

There is no appeal against the verdict for $5,000 awarded plaintiff for the personal injuries, which has been paid in full. It would therefore be impossible to retry this issue. Moreover, in its factum, the appellant does not ask for a new trial; it seeks to benefit from some alleged ambiguity in the findings to secure the dismissal of the whole claim for $25,000. This is not a case, in my view, where we would be justified, although competent to do so, in ordering a new trial, even restricted to the issue of ultimate negligence and of what it consisted in. To use Lord Halsbury's language in *Nevill* v. *Fine Art and General Insurance Company* (1):

> what puts him (appellant) out of court in that respect is this, that where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you have an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough, you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect.

I would therefore dismiss the appeal with costs.

The judgment of Rinfret and Smith JJ. (dissenting) was delivered by

SMITH, J.—In this case the issue as to ultimate negligence was not properly put to the jury, either in the questions as framed, or in the charge of the learned trial judge; and it is impossible to say precisely in what the jury would, if asked, have found the ultimate negligence consisted.

In my view, this lack of proper instruction as to the law bearing on the questions at issue, coupled with the apportionment of the degree of negligence and the finding of ultimate negligence, indicates that there was confusion in the minds of the jury, which may have affected all the

(1) [1897] A.C. 73, at 76.

1931

BRITISH COLUMBIA ELECTRIC RY. CO. v. KEY.

Smith J.

findings. It is suggested to us that the jury was asked to apportion the degree of negligence merely in order to prevent the necessity of a new trial in case it should be finally held that a finding of ultimate negligence was not warranted. Nothing of this kind appears on the record, and there is no reference to it in the questions as asked, nor in the charge of the learned judge to the jury. I am therefore of opinion that there should be a new trial as to the claim under what is commonly referred to as *Lord Campbell's Act*.

Counsel on both sides were responsible for the questions as framed, and neither of them directed the attention of the learned trial judge to his failure to explain the law to the jury.

In view of this joint responsibility, the costs of this appeal should be costs in the cause.

Appeal dismissed with costs.

Solicitor for the appellant: *V. Laursen.*

Solicitor for the respondent: *C. M. O'Brian.*