Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Toronto Railway Company v. *King and another, from the Court of Appeal for Ontario; delivered the 13th March* 1908.

Present at the Hearing:

LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD COLLINS.
SIR ARTHUR WILSON.

[*Delivered by Lord Atkinson.*]

The action out of which this appeal arises was brought by the Respondents, the representatives of one David King, deceased, who lost his life in a collision between a delivery van, which he was driving, and an electric tramcar belonging to the Defendants (the Appellant Company), brought about (as it is alleged) by the negligent management of the tramcar by the servant of the Company employed to drive it.

The street in Toronto along which the tramway on which the car ran is named Yonge Street. It runs north and south, and is intersected at right angles by a street called Adelaide Street running east and west. The collision took place "between lights," as it is said, early on the morning of the 21st December 1904. Yonge Street, as it approaches the intersection of the streets, has an upward gradient to the north of 1¼ in 100. Immediately before the collision the tramcar, having passed the line of the houses in Adelaide Street on its southern side, proceeded northward along Yonge Street on the

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right-hand line of rails. The deceased was coming along Adelaide Street from the west at, it is alleged, from 6 to 8 miles an hour. It is obvious that he sought to cross in front of the tramcar. He nearly succeeded, for it was the after part of his vehicle which was struck. A second more would have saved him. The two vehicles, however, came into collision at a spot nearly midway between the lines of the buildings on the northern and southern sides of Adelaide Street, and the waggon was struck with such force that it was pushed along sideways for a distance of over 20 to 30 feet, with the result that the deceased was thrown out upon the road and killed.

There is no substantial conflict of evidence in the case. The important facts are, in the main, not disputed.

At the close of the Plaintiffs' case the Defendants asked for a non-suit on two grounds : (1) on the ground that there was no evidence to go to jury that the driver of the tramcar had been guilty of any negligence in the driving or management of his car, and (2) on the ground that during the progress of the Plaintiffs' case facts were proved, by the evidence of their own witnesses, which clearly established that it was the negligence of the deceased which caused the accident, and that the Defendants were therefore entitled to a direction according to the principle established by the cases of *The Metropolitan Railway Company* v. *Jackson* (3 A.C. 193) and *The Dublin, Wicklow, and Wexford Railway Company* v. *Slattery* (3 A.C. 1155), or, in other words, that, though there might be evidence to go to the jury that the driver had negligently driven and managed the tramcar, it was clear from the Plaintiffs' own evidence that it was not the negligence of which the driver was guilty which caused the accident, but the folly and

recklessness of the deceased himself. The learned judge at the trial, Meredith, C.J., refused to non-suit the Plaintiffs, and at the close of the Defendants' case left to the jury seven questions which, with the answers given to them, were as follows:—

Q. 1. Was the injury to the deceased caused by the negligence of—

(1) The motorman alone?—*A.* Yes.

(2) The deceased alone?—*A.* No.

Or

Q. 2. Was it due to the negligence of both of them?—*A.* No.

Q. 3. In what did any negligence which you find consist?—*A.* We find the motorman negligent, after slowing up at Adelaide Street, in again putting on power at this point without observing the approach of the deceased's waggon.

Q. 4. Could the motorman, after the danger of collision being imminent became apparent to him, have avoided the accident by the exercise of reasonable care on his part?—*A.* Yes.

Q. 5. Ought the motorman, if he had exercised reasonable care, to have apprehended sooner than he did that a collision was imminent?—*A.* Yes.

Q. 6. If you answer "yes" to Question 5, could the motorman, when, in your opinion, he should have apprehended that a collision was imminent, have avoided the accident by the exercise of reasonable care on his part?—*A.* Yes.

Q. 7. Damages?—*A.* The widow $3,000; the daughter $1,500.

Upon these findings, Meredith, C.J., after consideration, and apparently with some doubt, entered judgment for the Plaintiffs for the two sums of $3,000 and $1,500 respectively.

From this judgment the Appellant Company appealed to the Court of Appeal for Ontario, contending (1) that the Plaintiffs should at the trial have been non-suited, and (2) that the verdict entered up should be set aside on the ground (amongst others) that the damages were excessive.

Two of the judges in the Court of Appeal, viz., Osler and Garrow, JJ.A., were of opinion that the verdict and judgment entered for the Plaintiffs should be set aside, and a verdict and judgment entered for the Defendants. The effect of the judgment of the three judges who formed the majority of the Court is summed in the following passage from the judgment of Meredith, J.A.:—

> "There was evidence to go to the jury on the question of negligence on the part of the driver of the car, in not seeing the deceased approaching, and the jury have found the Defendants guilty of negligence in this respect.
>
> "There being, then, negligence on both sides, the Plaintiffs' action fails, unless, in the circumstances of this case, the driver of the car became aware of the man's danger, and notwithstanding the latter's negligence, might, by the exercise of ordinary care, have avoided the accident.
>
> "The trial judge was of opinion that there was no evidence to go to the jury upon that question, but submitted it to them, and they have very plainly found it in the Plaintiffs' favour. I am not quite able to agree in that opinion, but the whole of the findings of the jury, including the assessment of the damages, satisfy me that the Defendants had not a fair and unprejudiced trial, and that the judgment and verdict should be set aside, and a new trial awarded."

Owing to certain proceedings subsequently taken by the parties, the damages have by order been reduced to $3,999, viz., $2,750 for the widow and $1,249 for the infant child, and on the hearing of this appeal no argument was addressed to their Lordships in reference to the alleged excessiveness of the damages found.

Their Lordships are of opinion, with all respect for the decision of the Court of Appeal, that no valid reason has been shown for directing a new trial. The jury were fully and properly instructed by the learned Chief Justice. There is no preponderance of evidence in the case against which the jury have found. The facts

are in the main admitted, or not disputed; the real matters in controversy are the inferences which it is proper to draw from those facts. It appears to their Lordships that the verdict and judgment must be entered either for the Plaintiffs or for the Defendants, and that the middle course of directing a new trial is not open.

Their Lordships think that there was evidence in the case proper to be submitted to the jury that the driver of the tramcar was guilty of negligence causing the accident, though, of course, they recognise that this is a question which may present itself differently to different minds.

Rule 58 of the Defendant Company's published Rules is as follows:—

> Curves and Crossings.—When approaching crossings and crowded places where there is a possibility of accidents, the speed must be reduced and the car kept carefully under control.
>
> Go very slowly over all curves, switches, and intersections; never faster than three miles an hour, and extra caution must be used in handling double truck cars at such places.
>
> An intersection must never be taken when another car is approaching.
>
> Cross streets must not be blocked, nor must any crossing be taken until the road ahead is clear.

The driver of the tramcar, one James King, states in his evidence that when about the office of the "World," some distance from the intersection of the two streets, he saw at least one waggon pass along Adelaide Street from west to east and cross the tram track he was about to traverse; that when he got within two or three lengths of his car from Adelaide Street he threw off the power, and allowed his car to roll on by its own momentum up the slight incline, so that he might slow coming to the crossing; that the speed of the car was lessening; that

when he was about a car's length (about 30 feet) south of the line of the buildings in Adelaide Street, he looked along that street east and west for the first and only time, but saw nothing approaching, and seeing, as he thought, a clear space, just as he himself was in line with the south line of Adelaide Street, he put on his power gradually to proceed on his route. At pp. 46 and 47 of his evidence there is this passage :—

> *Q.* Then your story is that at the south line—street line—of Adelaide, you started to put on your power, put it on gradually till you got it up to five, when you saw the rig about half a car length ahead of you?—*A.* About 20 feet; just on an angle across.
>
> *Q.* Where was the horse when you first caught sight of the —— *A.* Just coming on to the west rail of the west track.
>
> *Q.* Is that what you mean?—*A.* Yes.
>
> *Q.* The width of the devil strip is about three feet. Then we had it said the width of the railway line is four feet eight and a half. That would be about eight feet, then, west of the rail?—*A.* Yes.
>
> *Q.* And you were about fifteen feet, then, from that point. Did he come along just the same pace that you had seen him going?—*A.* That was the first time I had seen him.
>
> *Q.* And he was going along about that pace you are telling me of, and kept that pace up till the accident?—*A.* Yes,
>
> *Q.* Did not slow up?—*A.* No.
>
> *Q.* Did not hasten up. Just went at the same pace?—*A.* Yes.
>
> *Q.* Whereabouts did you hit the waggon?—*A.* Just in front of the hind wheel; struck the hind wheel just in front of the hub.

From the distance which the waggon was carried or pushed after it was struck, it is evident that the tramcar must have acquired considerable way before the collision. It is vital to consider what was the driver's field of vision at the time he looked up and down Adelaide

Street. If the map be at all accurate, he could not possibly have seen more than 100 feet, about 33 yards, down that street to the west. If the deceased were driving even at the rate of 6 miles an hour he would traverse this space in about 10 seconds, yet the driver, without looking again, concluded the space was clear, proceeded again to put on his power and cut across this thoroughfare. It appears to their Lordships impossible, having regard to these facts, to hold that there was not evidence to go to the jury of actionable negligence on the driver's part. Their Lordships are further of opinion that the deceased, in attempting to cross in front of the tramcar, as the driver of the latter in the above quoted passage says he did (the man, unfortunately, cannot speak for himself), was not clearly guilty of the "folly and recklessness" causing his death which Lord Cairns, in his judgment in *The Dublin, Wicklow, and Wexford Railway Company* v. *Slattery* (at p. 1166), refers to as sufficient to entitle the Defendants to a direction. 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, 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 of these two streets, is quite another thing.

It may well be that the driver, when he saw the deceased, did everything possible to avert the accident. Meredith, C.J., was of opinion that there was no evidence to sustain the finding that he was guilty of negligence in this respect. But it was then too late. Despite his efforts the way was not taken off the car sufficiently to prevent its striking the waggon with a force the nature of which is manifested by the result.

Their Lordships are, therefore, of the opinion that the Defendants were not entitled to a non-suit, that there was evidence to go to the jury on the two issues (1) whether the driver of the tramcar was guilty of negligence causing the accident; and (2) whether the deceased was guilty of contributory negligence. The jury have practically found these issues in favour of the Plaintiffs. They are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought not to be disturbed because they are not such as judges sitting in courts of appeal might themselves have arrived at. In their Lordships' opinion there is no ground in this case for setting aside the jury's findings. The Plaintiffs, they think, are entitled to have a verdict entered for them for the reduced sum at which the damages have been fixed.

Their Lordships will humbly advise His Majesty that the judgment of the Court of Appeal of Ontario ought to be discharged with costs and the judgment of the High Court confirmed, with the substitution of $2,750 for $3,000 and $1,249 for $1,500. The Appellants will pay the costs of this Appeal.

The Respondents in their printed case asked that the judgment of the Court of Appeal might

be set aside, and the verdict of the jury restored. Some doubts having arisen whether they were competent to do so on this Appeal, without having first lodged a cross-petition in that behalf, their Lordships, being of opinion that the necessary relief would undoubtedly have been granted to them if they had applied for it at the time when the Appellants obtained special leave to appeal, allowed the Respondents at the hearing to put in such a petition *nunc pro tunc*, and they will humbly advise His Majesty to grant this relief.