

UNIVERSITY OF LONDON  
W.C.I.  
-9 JUL 1953  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

IN THE PRIVY COUNCIL

No. 3 of 1952

ON APPEAL FROM THE COURT OF APPEAL  
FOR BRITISH COLUMBIA

B E T W E E N

MARVIN SIGURDSON  
(Plaintiff) Appellant

- and -

BRITISH COLUMBIA ELECTRIC  
RAILWAY COMPANY LIMITED  
(Defendant) Respondent

10

CASE FOR THE APPELLANT

1. This is an Appeal from the Judgment of the Court of Appeal for British Columbia (Sloan, CJBC., Sidney Smith JA., and Bird, JA) delivered the 30th April, 1951, allowing in part the appeal of the Respondent from the Judgment of Wood J. and a common jury dated 13th December, 1950.

20

2. The action was brought by the Appellant as Plaintiff on 20th November, 1948, in the Supreme Court of British Columbia, claiming damages for injuries he suffered on 6th August, 1948, when his motorcar, which he was driving, was struck by a streetcar owned and operated by the Respondent.

30

3. The jury found that the Respondent's motorman was solely to blame for the accident, and that the Appellant was not guilty of any negligence which contributed to the accident. The jury fixed the Appellant's special damages at \$1,688.55 and his general damages at \$19,000.00. Judgment was accordingly given for the Appellant in the total sum of \$20,688.55 and costs.

4. From this Judgment the Respondent appealed to the Court of Appeal for British Columbia, both as to liability and quantum of damages.

5. On 30th April, 1951, the Court of Appeal for British Columbia delivered Judgment setting aside the verdict of the jury and finding the Appellant and the Respondent's motorman equally at fault, and apportioning the damages accordingly. The quantum was not disturbed.

P.171 L.24 -  
P.172 L.5.

6. Sloan CJBC, held that there had been misdirection to the Jury by the trial Judge in that he "erred in instructing the jury that, in the circumstances herein, the principal of Davies v. Mann (1842) 10 M & W 546 applied". In fact, the Trial Judge gave no such categorical instruction to the jury. Sloan CJBC then proceeded to make a finding of fact and adjudged the Appellant and the Respondent equally at fault, which Judgment he substituted for the jury's verdict.

10

7. Sidney Smith, JA, also held that the trial Judge had misdirected the jury on the effect of Davies v. Mann, and he too then proceeded to make a finding of fact and adjudged the Appellant and the Respondent's motorman equally at fault, which Judgment he substituted for the jury's verdict. However, his findings as to the nature of the alleged misdirection, and his findings of fact, were both in conflict with the findings of Sloan, CJBC, on those matters.

20

8. Bird, J.A., concurred in the result.

9. The Appellant now appeals from the Judgment of the Court of Appeal for British Columbia and respectfully submits that the verdict of the jury should be restored.

30

10. The Respondent concedes that its motorman was negligent and does not attach the quantum awarded and upheld. The question in issue therefore is whether or not the Appellant was guilty of negligence which contributed to the accident, and, if so, to what degree.

11. The Appellant contends here that, irrespective of any directions that were given by the Trial Judge, the verdict was the only one that a jury, dealing with the whole matter upon common-sense principles, could have reasonably reached upon the evidence that was before it.

40

12. The Appellant further contends that the jury was, in fact, properly instructed by the trial Judge.

13. The accident occurred on August 6th, 1948, at about 5.45 p.m. in broad daylight. Visibility was good. The streets were dry.

P.45 Ll.9 - 20  
P.126 Ll.2 - 7

14. The Appellant was driving his motorcar in an easterly direction on the south side of Broadway, a street in the City of Vancouver, Province of British Columbia. The vicinity in which the accident occurred is a semi-residential and semi-commercial area.

P.46 Ll.8-10  
Ex.1 and Ex.1A

15. The Respondent's streetcar was also proceeding in an easterly direction on Broadway and was, at all material times prior to the accident, to the rear of the Appellant's motor car.

P.46 Ll.17-28.  
P.119 Ll.3-13.

16. At all material times there was no other eastbound traffic moving on Broadway between the Appellant's motorcar and the Respondent's streetcar. The view of the motorman driving the Respondent's streetcar was unobstructed; he had nothing to watch but the Appellant's motorcar.

P.85 Ll.25-29.  
P.126 Ll.8-15.

17. The Appellant proceeded approximately seventy-five feet past the intersection of Broadway and Heather Streets, at which point he wished to turn left across the eastbound streetcar tracks, for the purpose of entering a garage on the opposite side of Broadway to get some gasoline for his motorcar.

P.46 Ll.2-7.  
P.46 L.35-  
P.47 L.4.

18. Before turning left across the streetcar tracks the Appellant observed that there were three or four motorcars proceeding in a westerly direction on the north side of Broadway. He knew that he would not be able to pass safely in front of the first of these approaching motorcars, but he noted that there was a large gap between the first and the second of these approaching motorcars, through which gap he could drive his motorcar with safety. There was no other eastbound traffic.

P.47 L.23 -  
P.48 L.8  
P.50 Ll.19-29  
P.75 Ll.7-13  
P.76 L.25 -  
P.78 L.15  
P.84 Ll.4-17  
P.85 Ll.1-7  
P.85 Ll.19-31  
P.88 L.26 -  
P.89 L.2

19. The Appellant also observed, before he turned his motorcar left across the streetcar tracks, that the streetcar was about to cross the intersection of Broadway and Willow Streets, a distance of six hundred feet to the rear of the Appellant's motorcar.

P.47 Ll.11-21  
P.50 Ll.8-16  
Ex. 1A.

P.89 Ll.11-30  
 P.19 Ll.5 - 7  
 P.47 Ll.5 - 10  
 P.47 Ll.20-21

20. Having ascertained that he could turn left across the street with safety and without obstructing traffic, the Appellant signalled that he was going to turn, then turned his motorcar left across the streetcar tracks.

P.48 Ll.3 - 8  
 P.49 Ll.17-31  
 Ex. 1A.  
 P.18 L.20 -  
 P.19 L.4  
 P.22 Ll.11-17  
 Ex.1  
 P.78 Ll.24-28  
 P.50 Ll.16-21  
 P.127 Ll.9-13

21. After his motorcar was on the streetcar tracks, the gap in the westbound traffic through which the Appellant expected to pass closed up, making it unsafe for him to proceed so he stopped. While stopped on the streetcar tracks he kept his left arm outside of the motorcar window and held vertically downwards, the proper signal to indicate that his vehicle was stopped.

10

P.48 Ll.9-13  
 P.49 L.32 -  
 P.50 L.5  
 P.50 Ll.16-18  
 Ex 1A  
 P.93 L.21 -  
 P.94 L.3

22. The Appellant then looked back at the streetcar and observed that it was still approximately two hundred to two hundred and fifty feet west of the position where his motorcar was stopped on the streetcar track, in full view of the streetcar motorman.

P.48 L.25 -  
 P.49 L.23

23. The Appellant then looked at the westbound motorcars again. He does not say how many of these westbound motorcars had yet to pass him but, in any case, he could find no gap between those that remained through which he could safely pass.

20

P.48 L.25 -  
 P.49 L.3  
 P.50 Ll.29-36  
 Ex. 1A  
 P.89 Ll.23-25  
 P.95 Ll.13-19

24. The Appellant then glanced at the streetcar for the third time and saw it coming fast across the intersection of Broadway and Heather Streets with the result that the Appellant's position which, up to that moment, appeared to be perfectly safe, now became one of imminent peril.

30

P.48 L.25 -  
 P.49 L.3  
 P.94 L.34 -  
 P.95 L.19  
 P.100 Ll.8-10  
 P.15 Ll.3-8  
 P.140 Ll.25-26  
 P.20 Ll.16-18  
 P.22 Ll.24-33  
 Ex.1  
 P.51 Ll.22-27

25. The Appellant immediately put his motorcar in reverse and attempted to back off the streetcar tracks, but he was unable to get clear in time. His motorcar was struck by the streetcar and pushed or dragged along the street about sixty feet, and demolished to the point where it had to be sold for scrap.

26. The Appellant's motorcar was stationary on the streetcar tracks for a period of fifteen to twenty seconds before the streetcar reached the Heather Street intersection, which was still approximately one hundred feet from the point of impact.

P.19 L.8 -  
P.20 L.1  
P.22 Ll.18-21  
Ex.1

27. The Appellant who was twenty-three years of age and a skilled millwright by trade, suffered a broken left arm and a crushed left hand. His left hand is seventy-five per cent disabled and he can no longer work at his trade and can obtain only unskilled light labour.

P.57 L.13 -  
P.58 L.10  
P.59 Ll.6-14  
P.38 L.3 -  
P.40 L.16  
P.41 L.17 -  
P.43 L.33

28. The streetcar motorman stated that he did not see the Appellant's motorcar until the streetcar was entering the Heather Street intersection, and that he immediately recognized the danger and immediately rang the streetcar gong and applied the brakes.

P.98 L.40 -  
P.99 L.12  
P.99 L.32 -  
P.100 L.14  
P.127 Ll.9-13  
P.124 Ll.1-14  
P.124 Ll.25-27  
P.119 L.30 -  
P.120 L.10

29. There is no evidence in contradiction of the streetcar motorman's assertion that, on seeing the motorcar, he knew at once that he could not get past it, and immediately rang the gong.

P.105 Ll.9-14  
P.107 Ll.2-9  
P.119 Ll.11-29  
P.123 Ll.19-30  
P.134 Ll.5-34

30. However, another witness, called by the respondent, gave evidence, supported by evidence given by the streetcar motorman himself, which shows conclusively that the streetcar motorman, although certainly guilty of not keeping a proper lookout, did, in fact, see the motorcar in a stationary position encroaching on the streetcar tracks and rang the gong long before the streetcar arrived at the Heather Street intersection. If he had applied the brakes of the streetcar at that time he could have stopped quite easily without hitting the motorcar.

31. There is also strong evidence on which a jury, without difficulty, could find that the brakes were not applied until the streetcar had reached the point of impact, if at all.

P.14 L.28 -  
P.15 L.7  
P.140 Ll.25-26  
P.19 L.26 -  
P.20 L.6  
P.20 Ll.16-18  
P.120 Ll.13-16  
P.99 Ll.26-28  
P.100 Ll.30-34  
P.51 Ll.22-27  
P.13 Ll.6-12  
P.21 Ll.16-31  
P.124 L.28 -  
P.125 L.1

32. On these facts the jury found the Respondent's motorman guilty of negligence which contributed to the accident, particulars of the negligence being:-

"The brakes were not applied in sufficient time  
The motorman neglected to keep a proper lookout."

The jury further found that the Appellant was not guilty of any negligence which contributed to the accident.

10

33. It is respectfully submitted that on the above evidence the jury could and did reasonably find that the Respondent's motorman was solely responsible for the accident.

P.46 L.20 -  
P.49 L.3  
P.49 L.7 -  
P.51 L.14  
Ex 1A.  
P.76 L.25 -  
P.79 L.15  
P.84 Ll.3-17  
P.87 L.28 -  
P.88 L.17  
P.88 L.26 -  
P.89 L.2  
P.89 Ll.11-30  
P.93 L.20 -  
P.94 L.3  
P.112 Ll.4-9

34. There was no negligence on the part of the Appellant. Before turning across the streetcar tracks he took all precautions required by the City of Vancouver By-law and then proceeded exactly as any prudent man, acting under similar circumstances, would have done. He had no reason to believe that he would not have completed the crossing of the street long before the streetcar arrived on the scene. It is not negligent not to foresee everything possible that might happen, such as the non-stop run of the streetcar and the extraordinary development that took place in the light west-bound traffic after his motorcar was already athwart the streetcar tracks.

20

See: Ouellet vs. Cloutier 1947 S.C.R.521 at 526

P.83 Ll.15-21  
P.85 Ll.24-29

35. The making of this left turn across the streetcar tracks is the sole act of negligence that Sidney Smith, J.A. finds against the Appellant, but he bases his finding on two erroneous assumptions of fact. First, he states that 'the attempt to take this course on a busy street like Broadway at approximately 6.00 o'clock l.m. (when the accident occurred) was such a reckless and foolhardy operation that the Plaintiff was clearly inviting trouble'. There is, in fact, absolutely no evidence that the street was busy at the time of the accident; the evidence is directly to the contrary. Second, Sidney Smith, J.A., states that the motorman was 'not bound to keep such a lookout that he will instantly see any person who may suddenly, in violation of the law, drive his car across the rails, especially when he has no reason

30

40

whatever to anticipate such a move'. Again, there is no evidence at all that the Appellant suddenly drove his motor car across the tracks; even the streetcar motorman does not suggest this; the evidence is that the motor car was encroaching on or near the streetcar tracks in a stationary position for approximately 20 seconds before it was hit.

10 36. Sloan, CJBC, finds the Appellant negligent in not removing his motorcar from the streetcar tracks before the streetcar was upon him. It is submitted that the learned Chief Justice is thereby imposing upon the Appellant an obligation to anticipate the negligent and reckless conduct of the streetcar motorman and to take extraordinary precautions against this. That this is not the law, see Ouellet vs. Cloutier (Supra).

20 37. Before the Appellant can be condemned for failing to take steps to avoid the consequences of the motorman's negligence sooner than he did, it is submitted, that it must be shown that he knew or should have known of the existence of that negligence sooner than he did.

30 38. In this case, the evidence is that the moment the Appellant became aware of the streetcar motorman's negligence he immediately tried to get his motorcar off the streetcar tracks, but did not have time. There is no evidence that he could have become aware of the motorman's negligence sooner than he did.

P.48 L.25 -  
P.49 L.3  
P.95 Ll.13-19  
Ex.10

39. It is respectfully submitted that on this evidence the jury could and did reasonably find that the Appellant was not guilty of negligence at all. If this is so, then the alleged misdirection by the trial Judge is immaterial.

40 40. However, if the jury found, as did the learned Justices of Appeal, that the Appellant was negligent, the negligence was, according to the verdict of the jury, not negligence which contributed to the accident. In this it is respectfully submitted that the verdict of the jury is correct and that the findings of the learned Justices of Appeal are in error.

41. The negligence of the Appellant, if such there was, created a position where nothing that

he could do, when the negligence of the streetcar motorman became apparent and collision threatened, would have avoided the result. He did try immediately to escape. His negligence, if any, was merely a causa sine qua non.

42. The Respondent's motorman, on the other hand, saw the Appellant's stationary motorcar in sufficient time in which, by the exercise of ordinary care, he could easily have avoided colliding with it. Under such circumstances, *Davies vs. Mann* (1842) 10 M and W 546 is still the law 10

See also: *Anglo Newfoundland Development Company Limited v. Pacific Steam Navigation Company*, 1924 A.C. 406

131 L T 258

*McLean v. Bell* 147 L T 262

43. Sloan CJBC, held that *Davies v. Mann* (Supra) does not apply because the Appellant had it in his power to escape the impending peril. This is, in effect, a finding that the Appellant knew, or should have known, from the very beginning that the streetcar motorman would recklessly and carelessly run him down if he remained on the tracks. This, being contrary to the practice of streetcar motormen who daily encounter motorcars on the streetcar tracks, is a possibility which would never occur to the mind of a prudent and reasonable man. It is respectfully submitted that the learned Chief Justice of British Columbia erred in finding that it should. 20 30

44. Sidney Smith JA, held that *Davies v. Mann* (Supra) does not apply for two entirely different reasons. He states, first, that in *Davies v. Mann* it is questionable whether there was any negligence by the Plaintiff whereas in this case the Appellant was negligent. In fact, it was held in *Davies v. Mann* that the Defendant was solely liable whether or not the Plaintiff was also negligent.

45. Sidney Smith JA, then stated, secondly, that in *Davies v. Mann* "the defendant must be taken to have seen the donkey in time to avoid it; here the motorman did not see the Plaintiff until it was too late". This finding of fact that the streetcar motorman did not see the Appellant until it was too late to avoid the accident is directly 40



contrary to the finding made by Sloan CJBC. It is also contrary to the finding made by the Jury and contrary to the preponderance of evidence.

10 46. It is respectfully submitted that Sidney Smith JA, erred in placing a narrow construction on the language in which the jury expressed its findings on the streetcar motorman's negligence. It is clear from the pleadings, the evidence and the Judge's charge to the jury that the poor look-out by the motorman and the failure to apply the streetcar brakes in time to avoid the accident were placed before the jury as separate items of alleged negligence. Particulars of negligence as found by the jury must be construed in the light of the pleadings, the evidence and the Judge's charge to the jury.

See: Bludoff v. C.N.R. 1928 2 W.W.R. 519  
34 C.R.C. 421

Giddings v. C.N.R. 1920 2 W.W.R. 849

20 47. It is submitted therefore that the trial Judge's charge to the jury was a proper one in all respects.

48. In any event, the Trial Judge did not, in fact, say categorically that Davies v. Mann (Supra) did apply. After referring to that case he merely indicated that it would have some application "if there was that sort of situation as in the donkey case".

P.171 L.33 -  
P.172 L.5

30 49. If there was any part of the trial Judge's charge which might be construed as misdirection it was cured by the summing-up as a whole.

50. The verdict of the jury resulted in no substantial wrong or miscarriage of justice.

51. The Appellant therefore respectfully submits that the appeal should be allowed and that the Judgment of the Court of Appeal for British Columbia should be set aside, reversed, or varied and that the verdict of the jury should be restored for the following amongst other

R E A S O N S

40 1. The Appellant was not guilty of any negligence.

2. The jury was right in finding that the Appellant was not guilty of any negligence which contributed to the accident.

3. The negligence of the Respondent's motorman was solely responsible for and the real and sole proximate cause of the accident.

4. The learned Justices of Appeal have set aside the jury's unanimous findings of fact and substituted therefor conclusions of fact which are mutually conflicting and, in some cases, unsupported by evidence of any kind. 10

5. The verdict of the jury has been set aside on grounds of misdirection by the trial Judge, but the learned Justices of Appeal have handed down conflicting opinions on the nature of the alleged misdirection.

6. The jury was, in fact, properly instructed and reached a reasonable and just verdict, plainly supported by the evidence before it.

7. Whether or not there was misdirection, no substantial wrong or miscarriage of justice has resulted from it. 20

HARRY C.F. SPRING.

No. 3 of 1952

IN THE PRIVY COUNCIL

ON APPEAL  
FROM THE COURT OF APPEAL FOR  
BRITISH COLUMBIA

B E T W E E N

MARVIN SIGURDSON (Plaintiff)  
Appellant

- and -

BRITISH COLUMBIA ELECTRIC  
RAILWAY COMPANY LIMITED  
(Defendant)  
Respondent

---

CASE FOR THE APPELLANT

---

BLAKE & REDDEN,  
17, Victoria Street,  
Westminster, S.W.1.  
Solicitors for the Appellant