23, 1952

30767

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
... ... APPELLANT (Plaintiff)

and

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED
... ... RESPONDENT (Defendant)

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from the judgment of the Court of Appeal of British Columbia (Sloan, C.J.B.C., Sidney Smith and Bird, J.J.A.) delivered 30th April, 1951, unanimously allowing the appeal of the Defendant from the judgment of Wood, J. and a jury in the Supreme Court of British Columbia pronounced on 13th December, 1950. p. 183. p. 179.

2. The action was brought by the Appellant (Plaintiff) on 20th November, 1948 in the

Supreme Court of British Columbia claiming damages for injuries occasioned when the automobile which he was driving was in collision with a street car operated by the Respondent (Defendant) on Broadway, about 75 ft. east of Heather Street, in the City of Vancouver, British Columbia, about 5.45 P.M. on Friday, 6th August, 1948.

3. Broadway runs East and West. It is 63 ft. wide and fully paved, and there are street car tracks (one pair Eastbound and one pair Westbound) in the middle of the street. Heather Street runs North and South and is 30 ft. wide.

4. The Plaintiff was driving his car East on Broadway in the traffic lane South of and clear of
p.46. the street car tracks. About 75 ft. East of Heather Street he started to make a left turn across the tracks to enter a gas station on the North side of
p.47. Broadway. Traffic regulations in the City of Vancouver prohibit a turn of this kind, unless it can be done "without obstructing traffic" and unless "there is sufficient space for such movement to be made in safety". Before he was able to complete the turn, the Eastbound street car coming behind him struck the left side near the front of
P.17 L.31 to P.18 L.16. the automobile a glancing blow. The street car stopped in about 40 ft. with the automobile parallel

to it and near the front. The Plaintiff's left hand was outside his car at the time of the collision and was severely injured.

5. The accident occurred during the evening rush hour when there is heavy traffic on Broadway, particularly Westbound. Before commencing to turn the Plaintiff saw that he would have to stop to let some Westbound automobiles go by, and he knew that the street car was coming behind him but he thought that he might be able to get through before the street car reached him. At the last moment he realized that he could not get through, and says that he tried to back up but was too late.

6. The evidence of the street car motorman is that he first noticed the Plaintiff's automobile as the street car was crossing Heather Street. The automobile was stationary or moving very slowly and was clear (South) of the tracks, but so close to them that it would be fouled by the street car. He immediately applied the brakes and rang the gong, but was not able to stop in time. There is no finding of excess speed. p. 119. p. 120.

7. The jury found the street car motorman negligent, and absolved the Plaintiff of

negligence contributing to the accident, and awarded $20,688.50 damages. The specific findings against the motorman, in reply to questions, were as follows:- (1) Was the motorman or the Defendant Company guilty of negligence which contributed to the accident? A. Yes. (2) If so, of what did such negligence consist? A. The brakes were not applied in sufficient time. The motorman neglected to keep a proper look out. The Defendant appealed to the Court of Appeal for British Columbia on the question of contributory negligence and damages, and contended that the Trial Judge had misdirected the jury on the effect of "The Donkey Case" (Davies v. Mann (1842) 10 M & W 546; 152 E.R. 588).

8. The British Columbia Court of Appeal held unanimously that there had been misdirection, and were also unanimous in finding that the Plaintiff was guilty of contributory negligence causing the accident and that the Plaintiff and the motorman of the street car were equally at fault. The Court apportioned the damages accordingly, pursuant to the Contributory Negligence Act, R.S.B.C. 1948, Chap.68.

P.184 L.12.

9. The Court of Appeal did not alter the damages, and damages are not in issue on this Appeal.

The Defendant did not contend on the Appeal and does not now contend that the Defendant's motorman was not guilty of negligence. The only matter now in dispute is the question of contributory negligence. Counsel would prefer the Board to decide all the issues, rather than order a new trial on any issue.

10. The Respondent (Defendant) respectfully agrees with the Court of Appeal for British Columbia, and submits that the learned Trial Judge erred in instructing the jury as to the facts and as to the law.

11. A. Misdirection as to facts:

The learned Judge's comparison of "The Donkey Case" (Davies v. Mann (1842) 10 M & W 546; 152 E.R. 588) to the case at Bar clearly conveyed to the jury the impression that the Plaintiff's automobile was more or less stuck on the car track in the same predicament as was the donkey: P.171 L.9-L.34.

> "...the Plaintiff...was in much the same position as the donkey..." P.171 L.12.
>
> "Here this Plaintiff, according to his evidence, was more or less stuck there". P.171 L.33.

In point of fact the Plaintiff was not stuck on the track like the fettered and unattended donkey on the road: the Plaintiff

was in his car with the engine running and, knowing the street car was coming behind him, he was free to stay off the track or, when the danger became imminent, to go ahead in safety. He voluntarily elected to take a chance. There was a complete absence of any "static position", as referred to by Viscount Simon in Boy Andrew v. St. Rognvald (1948) A.C. 140 (H.L.) at p.149.

P.72 L.10-L.23.
P.74 L.27 to P.76 L.12.
P.76 L.25 to P.77 L.7.
P.78 L.24 to P.80 L.8.
P.80 L.8 to P.81 L.5.
P.93 L.1 to P.95 L.18.

B. Misdirection on the law as to contributory negligence:

It is submitted that, not only did the learned Judge leave the jury with an entirely wrong understanding of the facts as to the opportunity of the Plaintiff to protect himself, both from his own negligence and that of the motorman, but he also misdirected the jury or failed to instruct them fully and properly on the question of contributory negligence. The learned Judge's charge in this respect

P.171 L.3 to P.173 L.11.

P.171 L.38 to P.172 L.2.

> "If there was that sort of situation as in the Donkey Case, if this man were there in his car in the middle of the track, it would not justify the motorman of the bus running over him. Once he saw and realized the man was in trouble and in a dangerous place he would naturally, of course, do his best to avoid the accident. If he had paid no attention and ran over him, the Company would be liable".

left the impression that "The Donkey Case" meant that, if the street car motorman had the so-called

last chance to avoid the accident, he alone would be liable. This is not the law.

Boy Andrew v. St. Rognvald (1948) A.C.140 (H.L.)

Viscount Simon at pp. 148-9:

> "The principle of Davies v. Mann has often been explained as amounting to a rule that when both parties are careless, the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable. The suggested test of 'last opportunity' seems to me inaptly phrased and likely in some cases to lead to error, as the Law Revision Committee said in their report (Cmd. 6032 of 1939, p.16): 'In truth, there is no such rule - the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?"

And see the article by Lord Wright on "Contributory Negligence" (1950) 13 Modern Law Review, p.2.

12. It is submitted that the learned Trial Judge should have made clear to the jury that, in order for the Defendant to be solely liable in these circumstances, it must have been proven that the motorman of the street car actually saw the automobile and realized that it was stuck on the track, and that, having seen and appreciated the predicament of the Plaintiff, the motorman had, at a time when he could have avoided the accident, purposely or recklessly failed to stop, so that the negligence of the Plaintiff had ceased to be an operating

factor in the collision.

Davies v. Swan (1949) 2 K.B. 291 (C.A.),

Evershed, L.J. at 317:

> "As I understand the Davies v. Mann principle, which indeed has already been stated by my Lord, it is this: In that case the plaintiff's negligence or fault consisted in placing the donkey upon the highway; but it having been observed in due time by the defendant, the defendant by colliding with it was treated as the person responsible for the accident, since by the exercise of ordinary care he could perfectly easily have avoided it: in other words, the negligence of the plaintiff had really ceased to be an operating factor in the collision. If I may apply a common phrase, the plaintiff in that case, as a negligent actor, was at the material time, functus officio - one might say functus culpa".

Davies v. Swan (supra) was approved by the Privy Council in Nance v. B. C. Electric (1951) 3 D.L.R. 705 at p.711.

Whitehead v. North Vancouver (No.2) (1939) 1 W.W.R. 369, where the British Columbia Court of Appeal considered itself bound by the decision of the Supreme Court of Canada in Greisman v. Gillingham and Shiffer-Hillman Clothing Mfg. Co. (1934) S.C.R. 375.

13. It makes no difference to the continuing operation of the Plaintiff's negligence whether the negligence of the motorman was in failure to keep a proper lookout, as the jury found (see judgment of Sidney Smith, J.A.,), or in failure to appreciate the possible impending danger and waiting too long before applying the brakes, as Chief Justice Sloan suggested, (although it is submitted with great respect that there is no evidence to

P. 188 L.4.

justify this suggestion). No valid distinction can be drawn between negligence after seeing the danger and negligence in not seeing it; the only valid distinction is between conduct which is purposeful or reckless and conduct which is merely negligent.

> Davies v. Swan Motor Co. (1949) 2 K.B. 291, Denning, L.J. at 323-4; Bucknill, L.J. at p.313-4 approving Henley v. Cameron (1949) 65 T.L.R. 17 (C.A.).
>
> Harvey v. Road Haulage Executive 1951 W.N. 588 at 589. (C.A.).
>
> Toronto Transportation Commission v. Rosenberg (1950) 4 D.L.R. 449.
>
> And see the article on "The 'Last Opportunity' Rule" by Prof. A.L. Goodhart, Editor of the Law Quarterly Review (1949) 65 L.Q.R. 237 at p.247; and pp.318 and 449.

14. It is submitted that the learned Trial Judge should have instructed the jury to consider whether "in the ordinary plain common sense of this business" the Plaintiff had contributed to the accident, Admiralty Commissioners v. S.S. Volute (1922) 1 A.C. 129 (H.L.), Viscount Birkenhead, L.C. at p.145; and should also have added words substantially to the effect of those used by Lord Birkenhead in the Volute (supra) at p.144:

> "Upon the whole I think that the question of contributory negligence must be dealtwith somewhat broadly and upon

> common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the Bywell Castle rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution".

Failure to so instruct the jury amounted to misdirection on a vital issue.

> Henley v. Cameron (1949) (65) T.L.R.17 (C.A.), Tucker, L.J. at p.19.
>
> Davies v. Swan Motor Co. (1949) 2 K.B. 291 (C.A.) Bucknill, L.J. at pp.311-313.

15. It is submitted that a jury properly so instructed could not have failed to have found the Plaintiff guilty of some fault causing the accident (Contributory Negligence Act, R.S.B.C. 1948, Chapter 68, Sec.2) except by a perverse verdict.

16. There is no evidence that the Defendant's motorman purposely or recklessly ran down the Plaintiff. The jury found in fact that the motorman did not apply the brakes in time because of failure to keep a proper lookout, and see reasons for judgment of Sidney Smith, J.A.) The only evidence on the point is that of the motorman, and he says that he applied the brakes as soon as he saw the Plaintiff's automobile near the track

P.177 L.7-12.
P.188 L.4.
P.119 L.11 to P.120 L.12.

There is strong evidence upon which the jury could have found that the motorman was not negligent at all. (See Sidney Smith, J.A.) P.187 L.33.

The motorman might with good reason not notice the Plaintiff's automobile, although it was on the street in front of him, because his duty was to look for intending passengers at Heather Street, and he would also be looking right and left for traffic on Heather Street and elsewhere. P.119 L.14 to L.23.

The Plaintiff's automobile would not register on the motorman's mind as a danger, because the automobile did not make the approach for his turn on the car tracks but kept clear of them, and the weight of evidence is that his automobile was never more than slightly foul of the most Southerly rail, so that the motorman would not see him till the last moment. P.87 L.4. to L.25. P.24 L.24 to P.25 L.12. P.26 L.15 to P.27 L.5.

17. The Plaintiff was clearly negligent

(a) Breach of traffic laws:

The traffic laws prohibit a turn of the kind which the Plaintiff was attempting, unless it can be made "without obstructing traffic" and unless "there is sufficient space for such movement to be made in safety".

Sec. 41 of the City of Vancouver Street and Traffic Bylaw P.197 L.28.

Sec. 3 (j) of the Regulations Pursuant to the Motor-vehicle Act P.198

RECORD

P. 199. Sec. 38 of the Consolidated Railway Company's Act, 1896

P. 87 L.26 L. 32 to P. 88 L.1. P. 46 L.20. to L.25. P.85 L.33 to P.86 L.30. P.87 L.3 to L.25. P.91 L.21-L.28. P.48 L.1 to L.13. P.86 L.16 to L.19.

The Plaintiff knew that the street car was coming behind, he knew that he could not make a left turn without stopping for Westbound traffic and, instead of making the approach for the turn across the street in the centre lane along the street car tracks so the motorman would have a proper opportunity to see him, he turned across the street from the curb lane This is contrary to safe driving practice: see sec. 36 of the City of Vancouver Street and Traffic By-law (Exhibit 11). He knew he couldn't get through in safety when, as he says, the street car was far off, but he stopped instead of going on. These statutory traffic laws are for the purpose of enabling traffic to proceed expediently and in safety; the risk of accident is placed clearly upon those who choose to take a chance with the rules. The Plaintiff, according to his own story, took such a chance:

"Q. Did you have to wait for more than one car?

A. Well, as I say, I thought there might be a break anyway.

Q. So that you could get through?

A. Yes"

and P.92 L.13 to L.17.

"Q. You knew there were these motor cars coming?

A. Yes.

Q. Why didn't you wait until they got by?

A. <u>They might have been by</u> before the street car got there".

(b) The weight of evidence is that the Plaintiff's story is incorrect, and that he was not stopped for more than two or three seconds while the street car went the 75 to 100 ft. from the intersection to the point of collision - in short, that he put out his hand and turned in front of the approaching street car.

(c) Alternatively, the weight of the evidence is that he never was across the tracks as he said he was, but was only slightly over on the track, so that the motorman would not see his predicament until the last moment P.24 L.24 to P.25 L.11. P.26 L.16 to P.27 L.5.

(d) The Plaintiff was negligent in failing to drive out of the way of the approaching street car, instead of waiting and then trying to back up, and the learned Judge erred in instructing the jury P.105 L.16 to L.27. P.15 L.26 to L.30.

"I don't know that it makes very P.172 L.41 to L.45

> much difference whether the Westbound traffic was on the street car track or on the space between the street car and the cars on the North side of the street. I do not quite see what difference that makes".

If the Westbound traffic had been on the Westbound Street car tracks, as the Plaintiff said on Discovery, although he changed his evidence at the trial, it would support the Defendant's proposition that the Plaintiff never did get on to the devil strip and that he never did back up, but that he put out his hand and started to make a turn and was struck by the street car. This was a vital point and there was a conflict of evidence on this point, and it is submitted with respect that the Defendant was entitled to have the issue presented fairly to the jury.

P.76 L.29 to P.77 L.11. P.31 L.25 to P.34 L.30.

The learned Judge should have instructed the jury that, if the Plaintiff was astraddle the track for a period long enough to enable the motorman to see and realize the danger, it followed that the Plaintiff was there long enough before the accident to enable him to have driven his car out of danger.

18. The evidence was contrary on many relevant points. It admits of different views as to what actually happened, and of what the parties

did or ought to have done under the circumstances. It is submitted that the jury could not, except perversely, find under these circumstances that there was present that "clear line" between the negligence of the Plaintiff and the negligence of the motorman, which is necessary to make one party solely liable. See Admiralty Commissioners v. S.S. Volute (1922) 1 A.C. 129 (H.L.), Viscount Birkenhead, L.C. at p.144.

19. It is submitted that, whatever view of the evidence is taken, the Plaintiff's negligence in deliberately and unnecessarily stopping his automobile on the track contrary to the traffic regulations and in face of the known danger of the approaching street car and the impossibility of getting through the West-bound traffic and in voluntarily neglecting to move out of danger was a contributing factor to the accident in a degree of fault at least equal to that of the Defendant.

Davies v. Swan Motor Co. (1949) 2 K.B. 291, Bucknill, L.J. at 307:

> "I think in this case that the deceased man ought reasonably to have had the drivers of other vehicles in contemplation, as being affected by the very dangerous and quite unnecessary position which he took up on the lorry".

and "The Eurymedon" 1938 L.Q.R. p.41, Greer, L.J. at pp.47-8:

> "In my view the conduct of those in charge of the Corstar in lying in this position was negligent. They were behaving in such a way as to make a collision probable with vessels proceeding up or down the river, and <u>their conduct was not caused by any necessity</u> but merely by lack of good seamanship and failure to take ordinary precautions to avoid risk of collision".

There was no necessity whatever for the Plaintiff to make the very dangerous manoeuvre which he did.

P.79 L.5 to P.80 L.8.

The Defendant respectfully agrees with Sidney Smith, J.A. that it does not lie in the Plaintiff's mouth to complain that the motorman was not 100% vigilant to save him from the results of his own misconduct and folly: the motorman's fault was mere negligence, the Plaintiff deliberately ran the risk.

REASONS FOR DISALLOWING THE APPEAL

1. The learned Trial Judge misdirected the jury as to the facts and failed to present all the issues of fact clearly to the jury.

2. The learned Trial Judge misdirected the jury on the question of the law of contributory negligence and failed to instruct them fully and adequately in this respect.

3. The Plaintiff was guilty not only of negligence, but of deliberately incurring the

risk of collision, and a properly and adequately instructed jury could not have failed to find him guilty of fault causing the accident, except by a perverse verdict.

4. The Court of Appeal for British Columbia was correct in holding that the Plaintiff was guilty of negligence contributing to the accident and that his degree of fault was at least 50%.

10 W.H.Q. CAMERON.

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CASE FOR THE RESPONDENT

LINKLATERS & PAINES,
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