Privy Council Appeal No. 3 *of* 1952

Marvin Sigurdson - - - - - - - - - *Appellant*

v.

British Columbia Electric Railway Company Limited - *Respondent*

FROM

THE COURT OF APPEAL FOR BRITISH COLUMBIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JULY, 1952

Present at the Hearing :

VISCOUNT SIMON
LORD NORMAND
LORD OAKSEY
LORD TUCKER

[*Delivered by* LORD TUCKER]

On 20th November, 1948, the appellant brought an action in the Supreme Court of British Columbia claiming damages for personal injuries suffered by him on 6th August, 1948, and for damage to his motor car, by reason of the alleged negligence of the driver of a street car owned and operated by the respondent.

The action was heard by Wood J. and a Common Jury and on 13th December, 1950, judgment was entered for the plaintiff for $20,688.55 and costs, the jury having found that the defendant's driver was guilty of negligence which caused the plaintiff's injuries and that the plaintiff was not guilty of negligence which contributed to the accident.

The defendant appealed to the Court of Appeal for British Columbia both as to liability and quantum of damages and on 30th April, 1951, the Court of Appeal allowed the appeal in part, setting aside the verdict of the jury and finding the plaintiff and the defendant's driver equally to blame and apportioning the damages accordingly. The quantum was not disturbed.

Sloan (C.J.B.C.) found there had been misdirection of the jury. Sidney Smith, J.A. held that properly interpreted the verdict of the jury was in conflict with the evidence and was in substance perverse, and that in any event there had been misdirection. Bird, J.A. agreed with the result and subsequently handed down his reasons in which he stated his concurrence with the views expressed by the Chief Justice.

All the Judges in the Court of Appeal, having regard to the view they took, appear to have felt no difficulty in substituting their own findings on matters of fact for the verdict of the jury without ordering a new trial.

The plaintiff now appeals to Her Majesty in Council asking that the judgment of the Court of Appeal be set aside and the verdict and judgment at the trial restored.

Having regard to the fact that the jury must be assumed to have taken a view of the facts favourable to the plaintiff wherever there was a conflict of evidence or room for doubt it will suffice to set out the facts proved by the plaintiff and his witnesses together with any evidence for the defence tending to support his case. They were as follows:—

The accident occurred on 6th August, 1948, at about 5.45 p.m. on Broadway in the City of Vancouver in broad daylight. Visibility was good and the road dry. The plaintiff was driving his motor car on the south side of Broadway in an easterly direction. The defendant's street car was travelling on the right hand set of lines in the centre portion of the road also moving in an easterly direction. The street car was at all material times to the rear of the plaintiff's motor car and the driver (or motorman as he is called) had an unobstructed view between his street car and the plaintiff's motor. The plaintiff was minded to turn to his left to cross to the north side of Broadway to get some gasolene at a garage on that side at a point about 75 feet beyond the intersection of Heather Street and Broadway. This would necessitate his crossing the track which the defendant's street car would follow. Before turning to his left the plaintiff observed the defendant's street car at the intersection of Broadway and Willow Street, a distance of 600 feet to the rear of his motor car. There was no other eastbound traffic. At the same time he saw three or four motor cars approaching in a westerly direction on the north side of Broadway. He judged he would not be able to pass safely in front of the first of these motor cars, but observed a wide gap between the first and second of the cars through which he considered he could proceed with safety. The plaintiff accordingly gave the appropriate sign indicating his intention to turn to his left across the street car tracks and proceeded to do so. When on the track the gap in the westerly moving line of motor cars closed up making it unsafe to proceed further. He accordingly stopped his car on the tracks giving the appropriate hand signal. At this moment the street car was between 200 and 250 feet away to the west with a still unobstructed view. The plaintiff looked again at the westbound traffic, found it still unsafe to cross and so remained stationary where he was and glanced back again at the street car which was by now passing fast across the intersection of Heather Street. Seeing he was then in imminent peril he attempted to back off the track but before he could do so the street car struck him a violent blow dragging or pushing his motor car a distance of some 60 feet and demolishing it to such an extent that it had to be sold for scrap.

The defendant did not dispute the finding of negligence on its part contributing to the accident either in the Court of Appeal or before their Lordships' Board. The sole question in debate has been whether the verdict absolving the plaintiff from blame should stand.

The British Columbia Contributory Negligence Act (which was passed before the corresponding United Kingdom Act) so far as material reads as follows:—

"Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault: Provided that:

"(*a*) If having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally".

The following By-laws and traffic regulations were relied upon by the defendant in support of its allegations of negligence against the plaintiff:—

Section 41 of the City of Vancouver Street and Traffic By-law No. 2849 provides:—

> " No driver of a vehicle shall drive such vehicle from one side of a street to the other at any place other than at an intersection or street, unless such driver shall have first ascertained that such movement can be made without obstructing traffic and can be made in safety having regard to the nature, condition, and use of the roadway, and the traffic which actually is at the time or might reasonably be expected to be on the highway ".

Section 3 (*j*) of the regulations pursuant to the Motor Vehicles Act reads:—

> " Before turning, stopping, or changing the course on the highway of any motor vehicle, and before turning such vehicle when starting the same, it shall be the duty of the operator thereof first to ascertain whether there is sufficient space for such movement to be made in safety, and the operator shall give a signal plainly visible to the operators of other vehicles of his intention to turn, stop, or change his course ".

Reliance was also placed on Section 38 of the Consolidated Railway Company's Act, 1896, which gives the right of way to a street car.

The evidence of the defendant's motorman was that he did not notice the plaintiff's car until he was at the Heather Street intersection (which would be about 75 feet away), that he then applied his brakes and sounded the gong but could not avoid running into the motor car. The following questions were left to the jury and their answers thereto appear below:—

1. Q. " Was the motorman or the defendant Company guilty of negligence which contributed to the accident? "—A. " Yes ".

2. Q. " 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 ".

3. Q. " Was the plaintiff guilty of negligence which contributed to the accident? "—A. " No ".

The trial Judge directed the jury fully and adequately with regard to what constitutes negligence in law, he explained to them the provisions of the Contributory Negligence Act, referred them to the traffic regulations relied upon by the defendant and reminded them of the evidence of the witnesses. It was, however, contended by Counsel for the respondent that he had misdirected the jury in four different respects.

1. It was said that his charge to the jury viewed in relation to the facts was calculated to leave the impression that if the motorman was negligent in not seeing the plaintiff on the track or not stopping soon enough when seen the defendant would be solely liable in spite of any negligence on the part of the plaintiff.

2. It was further submitted that the charge viewed in relation to the facts was calculated to create the impression that the plaintiff in the present case was " stuck " on the track in a position comparable to that of the fettered donkey in the case of *Davies* v. *Mann* (1842) 10 M. and W. 546 to which the Judge had made reference.

3. It was submitted that the Judge had failed to make clear to the jury that one party is not solely liable in a case where both parties have been negligent unless he saw and recognised the negligence of the other party leading to the danger and thereafter failed to avoid it when he could have done so by the exercise of reasonable care and skill.

4. And it was submitted that the Judge failed to tell the jury that the proper test of liability in such cases as these is whether in the plain and ordinary common sense of the matter both parties were partly at fault in causing the accident or whether it was only one, and that if there was no clearly severable line between the two there should be an apportionment.

Before turning to examine the summing-up in the light of these criticisms it may be well to observe that the issues involved in this and other similar cases turn upon questions of fact and that when a jury is the tribunal of fact to which those issues are committed their findings—subject to questions of misdirection or misreception of evidence—cannot be set aside unless they are of such a nature that having regard to the evidence no reasonable men could have arrived thereat. It is not for an appellate court however much it may differ from the conclusions reached by the jury to substitute its own findings for those of the jury.

There is, perhaps, no class of case which more nearly affects the average citizen in his daily life and which for this reason should, so far as possible, be kept free from legal subtleties and philosophical discussions on the theory of causation which, however fascinating, only tend to perplex and confuse the average juryman. Thirty years ago Viscount Birkenhead in the "*Volute*" [1922] A.C. 129 at pages 144 and 145 had occasion to observe:—"Upon the whole I think that the question of contributory negligence must be dealt with 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 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".

And again "the '*Volute*,' in the ordinary plain common sense of this business, having contributed to the accident, it would be right for your Lordships to hold both vessels to blame for the collision."

This was an Admiralty case, but now that Common Law Courts have to apply the same principles to cases of collisions on land it seems to their Lordships that this language will be found particularly suited to the exposition to a jury of the principles which they have to apply in these cases, and is much to be preferred to attempts to classify acts in relation to one another with reference to time or with regard to the knowledge of one party at a particular moment of the negligence of the other party and his appreciation of the resulting danger and by such tests to create categories in some of which one party is solely liable and others in which both parties are liable. Time and knowledge may often be decisive factors but it is for the jury or other tribunal of fact to decide whether in any particular case the existence of one of these factors results or does not result in the ascertainment of that clear line to which Viscount Birkenhead referred—moreover, their Lordships do not read him as intending to lay down that the existence of "subsequent" negligence will alone enable that clear line to be found.

To turn now to the Judge's charge to the jury. It is not, of course, possible or desirable to set it out in full. It covers 15 pages in the Record and must be considered as a whole but the criticisms of Counsel for the respondent and the judgments of the Court of Appeal cannot be properly appreciated without setting out some parts in extenso. At page 167 he dealt with the defendant's allegations of negligence against the plaintiff in these words:—

> "Now the next question for you is whether or not the plaintiff was guilty of negligence which contributed to the accident, and if so, of what did such negligence consist? The defendant says with regard to that that the action of the plaintiff absolves the motorman and the Company because of his basic fault in turning in the middle of the block knowing that the street car was coming down that grade and that he did that contrary to the law, contrary to the regulations, which I will refer to directly. That is the first thing the defendant says—that he turned there knowing that that car was coming down the grade

behind him. The second thing is that he took chances with the knowledge that he could not get across. The street car had (?not) stopped and there was the traffic coming the other way. You have heard all the evidence on that ".

He then went on to refer to the traffic By-laws and regulations. He dealt with the onus of proof of negligence and contributory negligence, and went on to deal with the Contributory Negligence Act, the material provisions of which he read, and then at pages 171 and 172 he used the language at which the criticisms are principally directed. He said:—

" Now in dealing with the question of negligence, I would like just to say this: It has been alleged by the defendant that the plaintiff was the author of his own wrong, that he drove out there wrongfully into the pathway of the street car ; but it does not follow necessarily from that that he has no cause of action. There is a very old case which is known as the Donkey case ". (The learned Judge shortly stated the facts in *Davies* v. *Mann*) and proceeded:—" He (the defendant) disputed the claim because, forsooth, the donkey had no business there. The court did not see it that way and they held that if the jury was of opinion that the accident was 'caused by the default of the defendant's servant in driving too fast, or which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action'.

" 'All that is perfectly correct, for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there'.

" Here this plaintiff, according to his evidence, was more or less stuck there. He says he was right across the track. The defendants say that he was just at the edge of the track and starting to make this turn with his hand out. It is for you to decide on this evidence just what happened. If there was that sort of situation as in the donkey case, if this man was 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 realised 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 ".

He then dealt with the evidence of the motorman to the effect that as soon as he perceived the motor car and appreciated the danger he sounded his gong and applied his brakes but could not avoid running into the car. The learned Judge went on:—

" Now the question is whether or not there was any negligence on his part, whether or not his negligence was such as to make the Company entirely liable, whether after seeing he was astraddle the car tracks where he was bound to be run over if he did not stop when he could have stopped, or whether or not he was negligent at all. If he is not negligent at all, of course the action will be dismissed. Or whether or not on the other hand he was guilty of negligence which contributed to the accident in failing to keep a proper look out or not applying his brakes when he should, or that he was not properly trained. It is for you to say some one or other of those things and if there is more than one you should show one or more of those things of which the motorman or Company was negligent and that that negligence contributed to the accident ; and whether or not the plaintiff also was guilty of some negligence which contributed to the accident in any of the ways that have been put forward by the defendant: that he was the author of his own injury knowing that the street car was coming along there and driving in front of it contrary to the By-law and contrary to the other regulations ; in crossing the street aside altogether from the question of the regulations and taking chances of crossing there under the circumstances ".

Their Lordships consider that the Judge's reference to *Davies* v. *Mann* was a perfectly correct summary of the facts and statement of the effect of that decision and can find nothing in the context to suggest that it amounted to a direction that as a matter of law if they accepted the plaintiff's evidence the present action must necessarily result in the defendant being solely responsible. The statement is prefaced by the observation " it does not follow necessarily from that that he has no cause of action ". The emphasis is, of course, on the word " necessarily " as is made plain from what follows.

This disposes of the first two criticisms of Counsel for the respondent.

It was his third criticism upon which he mainly relied and it was upon this that Sidney Smith J.A. in the Court of Appeal held that there had been misdirection. The proposition is that where one party (A) actually knows of the dangerous situation created by the negligence of another (B) and fails by the exercise of reasonable care thereafter to avoid the danger A is generally speaking solely liable, but that if A by reason of his own negligence did not actually know of the danger or by his own negligence or deliberate act has disabled himself from becoming aware of the danger he can only be held liable for a proportion of the resulting damage.

No authority was cited to their Lordships for such a far-reaching proposition, which, if correct, would seem to provide the Respondent in such a case as the present with a means of escaping its 100 per cent. liability by relying on the failure of its motorman to keep a proper look-out. It can hardly be the consequence of such a collision that, if the Respondent's motorman had kept a good look-out but had nevertheless continued to drive at an excessive speed, he might be treated as solely to blame, but that by failing to keep a good look-out until it was too late to avoid the accident the measure of the Respondent's liability would be reduced. Moreover, the proposition is directly contrary to the second of the rules propounded by Greer L.J. as useful tests in the *Eurymedon* (1938) P. 41, although it is true to say that it is not altogether easy to reconcile rules 2 and 4 as there stated. However this may be their Lordships are satisfied that no criticism can properly be directed to the Judge's charge to the jury on the ground that it was unfavourable to the defendant in this respect since the learned Judge seems to have accepted the contention of the defendant's counsel by directing the jury that in considering whether the defendant Company was solely liable they should consider whether the motorman did not stop when he could have after seeing the motor car astraddle the tracks, which he contrasted with failure to keep a proper look-out or apply the brakes which might amount to negligence contributing to the accident.

Their Lordships are of opinion that the only criticism of this direction which can properly be made is that it was unduly favourable to the defendant.

They do not interpret the jury's answer as necessarily involving a finding that the failure to apply the brakes in time was due to the motorman not having seen the motor car until too late to pull up. They may or may not have accepted the motorman's evidence that he did not see the motor car until he was at Heather Street. They may have thought that he must have seen it earlier but none the less thereafter failed to keep its movements under sufficient observation or to apply his brakes to check speed before danger was imminent. It is idle to speculate about such matters where a case has been tried by a jury. On the other hand, the jury were entitled to come to the conclusion, taking a broad view of the case as a whole, that the negligence of the motorman was in the circumstances the sole cause of the accident irrespective of the precise moment at which he became aware of the danger.

In so saying their Lordships must not be taken as in any way dissenting from the expressions of opinion of those Judges in British Columbia who, with their knowledge of local conditions, have emphasised the importance of strict adherence to the traffic regulations, nor are they to be taken as

indicating what view they might have formed on the facts if it had been open to them to review the evidence and re-try the case.

The last of the criticisms of the summing up is hardly consistent with the earlier propositions contended for. It is in effect that the Judge did not use the language of the "*Volute*" which their Lordships have already indicated as being in their view useful and appropriate in such cases, but the mere omission to use this language does not of itself amount to a misdirection where the summing-up is, as in the present case, in all other respects full, accurate and careful.

Their Lordships have not considered it necessary to review the numerous authorities in which the so-called principle of *Davies* v. *Mann* (which in the present context amounts to no more than that the mere fact that the plaintiff's motor car was wrongly on the track does not necessarily mean that the plaintiff has no cause of action) has been discussed.

It suffices to state that this principle remains unaffected by the British Columbia Contributory Negligence Act and other similar enactments, though it may well be that in practice this legislation may have tended to encourage the application of those broad principles of common sense in the apportionment of blame unless the dividing line is clearly visible. Whether or not it emerges with clarity or is so blurred as to be barely distinguishable from the surrounding mass is a question of fact in each case for the tribunal charged with the duty of determining such questions.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the Court of Appeal for British Columbia set aside and the verdict of the jury and the judgment of the Supreme Court of British Columbia in favour of the plaintiff for the sum of $20,688.55 restored.

The respondent Company must pay the appellant's costs of the present appeal and of the appeal to the Court of Appeal for British Columbia.

(16003) Wt. 8096—1 100 8/52 D.L./Pl/3

In the Privy Council

MARVIN SIGURDSON

v.

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED

[DELIVERED BY LORD TUCKER]

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