19,1951 30715

In the Privy Council.

No. 26 of 1950

ON APPEAL

FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

BETWEEN

ENA PEARL NANCE - - - - - - - - *Appellant*

AND

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED - - - - - - - - *Respondent*

AND BETWEEN

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED - - - - - - - - *Appellant*

AND

ENA PEARL NANCE - - - - - - - - *Respondent.*

(CONSOLIDATED)

Case for the Appellant and CROSS RESPONDENT

ENA PEARL NANCE.

RECORD.

1. This is an Appeal and Cross-appeal from the Judgment of the Court of Appeal for British Columbia (Gordon McG. Sloan, C.J., O'Halloran, J.A., and Sidney Smith, J.A.) dated the 23rd February 1950, allowing in part an appeal from a Judgment of Whittaker, J., dated the 24th June 1949, upon the trial of an action before a Special Jury, in which the Appellant Ena Pearl Nance (hereafter called "the Appellant") claimed damages against the Respondent British Columbia Electric Railway Company, Limited (hereinafter called "the Respondent") pursuant to the Families Compensation Act, R.S.B.C. 1948, cap. 116, in respect of the death of her husband, Samuel Joseph Nance (hereinafter called "the deceased") which occurred on the 18th January 1949 after the deceased had been knocked down by a street car, the property of the Respondent. The Appellant brought this action and prosecutes her appeal by leave of the Court of Appeal for British Columbia on her own behalf and on behalf of the children and step-children of the deceased. The Respondent duly obtained Special Leave to appeal subject to an undertaking not to seek to establish that there was no negligence on the part of the servant or agent of the Respondent.

p. 205.

p. 142, ll. 3-17; p. 10, ll. 11-23; p. 61, ll. 2-4.

2. Pursuant to the findings of the Special Jury that the death of the deceased was due entirely to the negligence of the servant of the
p. 205. Respondent (the driver of the said street-car), judgment was entered for the Appellant for $35,000 damages, the sum found by the Special Jury, such sum of $35,000 to be proportioned among the persons on whose behalf the action was brought.

p. 205. 3. The Respondent appealed from the Judgment of Whittaker, J., dated the 24th June 1949 to the Court of Appeal for British Columbia and in the result the appeal was allowed and the sum of $12,000 was substituted for the sum of $35,000.

p. 207, ll. 14–20. 4. In the Court of Appeal for British Columbia, the Honourable
p. 208, ll. 47–49; p. 209, ll. 1–10. the Chief Justice held that the amount of damages (on the basis that there was no contributory negligence) was excessive and should be reduced
p. 208, ll. 47–49; p. 209, ll. 1–10. to $20,000, but held further that there had been contributory negligence on the part of the deceased, the degree of such contributory negligence
p. 209, ll. 13–16. being 40%, so that the amount recoverable by the Appellant was
p. 209, ll. 30–40; p. 207, ll. 8–10; p. 212, ll. 13–15; p. 216, ll. 43–44. $12,000. O'Halloran, J.A., held that there was no contributory negligence by the deceased but would have remitted the action to the Supreme Court for re-trial upon the issue of damages which he regarded as excessive.
p. 207, l. 13. Sidney Smith, J.A., held with O'Halloran, J.A., that there was no contributory negligence by the deceased, and held that the proper damages
p. 219, ll. 28–30. on the basis that the Respondent was entirely to blame, was $12,000.

5. The Appellant now appeals from the judgment of the Court of Appeal for British Columbia and respectfully submits that the award of $35,000 by the Special Jury should be restored.

6. The question for determination is: whether the judgment of the Court of Appeal and the respective reasons for judgment of the learned Judges of that Court should prevail over and be substituted for the findings and judgment of the Court of first instance, following the Reasons hereinafter enlisted.

p. 142, ll. 3–17; p. 10, ll. 11–23; p. 61, ll. 2–4. 7. The accident the subject-matter of the action was at about 11.50 p.m. on the 17th January 1949 near the intersection of Kingsway
p. 194. and Gladstone Street in the City of Vancouver. The Appellant and the
p. 74, l. 22 to p. 75, l. 45. deceased were on their way to the Chateau Tourists' Motel near to the south-east corner of the said intersection and were crossing Kingsway from the north-east to the south-east corner. The Appellant had taken the left arm of the deceased. They reached the most southerly of the four tracks of the Respondent's street railway on Kingsway, the Respondent's street-cars all running on metal tracks. An east-bound street-car owned by the Respondent and driven and operated and under
p. 10, ll. 11–23. the control in the course of his employment by one Joseph Stephens
p. 75, ll. 42–45. (hereinafter called "the motorman") the servant or agent of the Respondent, ran into the deceased and knocked him down: the Appellant herself was thrown some distance and knocked down. Both the deceased and the Appellant were taken by ambulance to a hospital, where the
p. 34 and p. 35 to l. 10. deceased died from his injuries at about 9.40 a.m. on the following day.

8. Kingsway at this intersection runs in a direction which for the purposes of the action has been called east and west. Gladstone Street intersects Kingsway at right angles in a direction which has been taken as north and south. The weather at the time of the accident was clear and very cold; there was snow on the ground. The whole surface of both streets was covered with a thin film of ice which made walking difficult and dangerous. The intersection is one of the best-lighted in Vancouver and has an effective electric lamp at each of the four corners. There was nothing to obstruct the motorman's vision. p. 194. p. 194. p. 19, ll. 32 to 40. p. 19, l. 41 to p. 20, l. 32.

9. The deceased was a very big man. He was wearing brown clothing and it is submitted that to one seated in the position of the motorman the deceased must have been clearly discernible against the background. Indeed the Respondent does not now seek to contend that the motorman was not negligent. p. 74, ll. 9–14; p. 91, l. 31.

10. The street-car had stopped at the south-west corner of the intersection to take on passengers. Gladstone Street is 30 feet wide from curb to curb. The Appellant and the deceased were in the imaginary cross-walk formed by the southward extension of the lateral lines of the sidewalk along the east side of Gladstone Street on the north side of Kingsway. A pathway through the snow had been made by the trampling of other pedestrians, from the north-east to the south-east corners, and from the latter corner to the objective of the Appellant and the deceased, the entrance to the Motel. p. 133, ll. 25–34. p. 194. p. 109, ll. 15–39. p. 19, ll. 22–29. p. 17, ll. 25, 26.

11. Due mainly to the fact that the snow was piled to a height of about 12 inches on both sides of the cross-walk (except at the travelled portion of Kingsway) the Appellant and the deceased were taking the shortest route across Kingsway. This meant that they were not more than 15 feet east of the east curbline of Gladstone Street when the accident occurred. Blood from the deceased was found 30 feet from the east curbline of Gladstone Street, so that the street-car apparently travelled about 60 feet after picking up its passengers, to the point of impact. p. 76, l. 37 to p. 77, l. 12. p. 109, l. 30. p. 15, l. 44 to p. 16, l. 10.

12. The street-car was a new, improved kind of "one-man" car, weighing over 10 tons, with rapid acceleration and good braking-power. It was of a special design and faster than others used in Vancouver and Calgary (from near where the deceased had come to Vancouver). Its acceleration power was equal to that of any passenger model of American automobile, and it rapidly reached its full running-speed from a dead stop. The motorman had been operating street-cars for over 4 years and cars of this design for over 3 years. p. 22, l. 34 to p. 23, l. 15. p. 135, ll. 3–16. p. 132, ll. 15–28.

13. The "one-man" car required the attention of the motorman to other matters and things than traffic. p. 137, ll. 3–15.

14. The motorman knew of the slippery condition of the streets and of the difficulty pedestrians had in walking. p. 133, l. 32 to p. 134 l. 10.

15. The motorman did not see the Appellant or the deceased before the accident; he could not explain his failure to do so and there is no p. 136, ll. 37–45, and *passim*.

p. 135, l. 25 to p. 136, l. 36. p. 138, l. 24 to p. 139 l. 29. explanation anywhere in the evidence. He could have stopped the street-car and avoided the accident had he applied his brakes as little as 20 feet from the point of impact.

16. There was no evidence whether the deceased did or did not p. 140, ll. 12–18. see the street-car. As the motorman was not keeping a proper lookout, he cannot and does not say that the deceased did not see him. There is no direct evidence that the deceased was not keeping a proper lookout p. 180, ll. 3–15. and the Special Jury by its verdict found that he was, or at any rate, if he was not, that his failure to do so did not contribute towards the accident. It is respectfully submitted that from one point of view this case falls into a very narrow compass in that if the motorman had been keeping a proper lookout (as it was his duty to do and as he admittedly was not doing) the accident would never have occurred. In the weather and conditions prevailing at the time of the accident, and in the absence of any direct evidence against the deceased, it is further submitted that the deceased could not be said to be negligent at all.

17. No direct evidence exists to the effect that the deceased was not observant and was not exercising due care for his own safety. The p. 180, ll. 3–15. conclusion of the Jury, however, is manifest in its verdict, and speculation as to the deceased's conduct and care for his own safety, unsupported by positive evidence, entails affirmative rejection of their verdict.

p. 74, l. 32 to p. 75, l. 45. p. 194. p. 30, ll. 3–5. 18. The Appellant herself first saw the street-car when she was at a point between the northern-most of the four tracks and the southerly edge of the pile of snow which protruded some 8 feet into Kingsway from the north curbline of Kingsway. At that time the street-car was about p. 110, ll. 4–22. 250 feet west of Gladstone Street. The progress of the Appellant and the p. 77, ll. 13–34. deceased was slow, mainly because of the icy surface. The Appellant p. 110, ll. 4–22. p. 75, l. 31. demonstrated to the Special Jury the pace and speed. The Appellant p. 194. again saw the street-car the instant before the impact, which was at a p. 15, ll. 25–38. point where Kingsway is 56 feet wide from curb to curb : the front of the 46 feet long street-car when it came to rest after the accident was 110 feet east of the east curbline of Gladstone Street.

p. 62, l. 36 to p. 63, l. 11. p. 68, ll. 14–18. 19. The only eye-witness stated that the Appellant and the deceased were within the two tracks which constituted the course of the street-car at the moment when it started up from the south-west corner of the pp. 144 and 145. intersection. A witness for the Respondent estimated the speed of the street-car at about 20 to 30 miles per hour, which gave the deceased p. 203, ll. 18–29. approximately 2 seconds in which to escape. On the whole of the evidence it is submitted that there was an overwhelming case for the motorman being solely responsible for the accident.

p. 71, ll. 22–42. 20. The deceased left him surviving the Appellant (his widow) and two children of his first marriage, a son of 28 and a married daughter of 26. p. 202. The deceased was almost 54 at the time of his death and the Appellant p. 79, l. 13. was 46. The deceased also left two step-children, the sons of the Appellant by a former marriage, aged 20 and 18.

21. The deceased's normal expectancy of life was 19·4 years. He may have died from natural or unnatural causes at any time within the next thirty years. The Jury seems to have allowed him a reasonable expectancy, and to have found that he would not retire from gainful occupation for a reasonably long time. p. 203.

22. The only abnormal conditions of the deceased affecting expectancy were of the heart and legs. As to the heart, it was not unduly enlarged and did not have much to do with his health. The effect of its condition upon the life expectancy would depend upon the care he took of himself, and the evidence of his intimate friends and his wife is that he did take good care of himself and was moderate in his habits. There is evidence from which the Jury could and did reasonably find that his life would not be cut short from this cause. p. 38, ll. 41–44. p. 38, ll. 25–31. p. 117; p. 118; p. 83, ll. 12–31.

23. As to the effect upon life expectancy of the state of deceased's legs, the evidence is that there would be some bearing in minimising his physical activity, assumably with concurrent benefits in respect to his heart condition. There was adequate evidence from which the Jury could reasonably have arrived at the conclusion that he would have some years of economic productivity, especially as his work did not involve physical strain. p. 38, ll. 3 to p. 39, l. 5.

24. In all respects the deceased's health and general condition lent themselves to diligent work and fairly long hours of moderate business activity.

25. Complete and eminently impartial evidence was presented to the Jury as to deceased's health. The result of the Jury's opinion as to his expectancy of life is a reflection of their interpretation of that evidence.

26. He was the owner of a garage business at Irricana, near Calgary, Alberta, and Dealer for that district of the International Harvester Company, trading in farm machinery and trucks. This was a valuable franchise, based upon his personal worth, and came to an end on his death. pp. 184–188. p. 49, ll. 3–5.

27. His average annual income during the four years preceding his death had been $5,876.00. Just before the commencement of the third full year before his death, i.e., in December, 1945, he acquired the dealership above referred to, and his average annual income from then till his death was $7,345.00. He earned over $9,600.00 in the year before his death. His earnings accordingly show an annual increment which would justify a resultant in excess of the Jury's conclusion. p. 43, ll. 30–45. pp. 184–188. p. 84, ll. 4–31; p. 85, l. 26 to p. 86, l. 41.

28. He would have earned in the following years between $6,500.00 and $7,000.00 as an annual average. His son, however, is not operating the business successfully, and the temporary licence he now holds may be revoked at any time. p. 44, ll. 32–38. p. 57, l. 41 to p. 58, l. 12. p. 87, ll. 10–43.

29. In the first year of his dealership, 1946, he increased his assets by $6,640.00 (before income tax). In the second year, 1947, the increase p. 189–193.

was $1,025.00. In his last year of life, 1948, the increase was $4,870.00. The total increase for the three year period was $12,500.00, or an average annual increment of over $4,000.00.

p. 193 and p. 197.

30. It is submitted that there are a number of ways in which the figure arrived at by the Special Jury, of $35,000.00 can be justified and that the sum so arrived at was a matter peculiarly within the discretion and competence of the Special Jury and was not too high.

31. The Appellant accordingly humbly submits that the judgment of the Court of Appeal of British Columbia should be set aside reversed or varied and the verdict of the Special Jury restored for the following amongst other

REASONS.

(1) No majority judgment of the Court appealed from as to the quantum of damages has been substituted for the quantum found by the Jury, and the judgment of the Court appealed from is the arithmetical result of opinions mutually inconsistent.

(2) The judgment of the Court of Appeal gives effect to a minority opinion, viz. that of the Chief Justice on the issue of liability.

(3) It is not competent to the British Columbia Court of Appeal to reduce damages pursuant to Court of Appeal Rules 5 and 7, inasmuch as Court of Appeal Rules 5 and 7 are not within the competence of the enacting body so far as they purport to authorise the reduction of damages awarded by a Jury.

(4) There were reasonable grounds for the Jury to award damages of $35,000.00, in view of the deceased's earnings, recent increment in his estate, the loss of subsequent increase in the estate to be expected, and the life-expectancy of the deceased.

(5) The Jury, having been properly instructed, reached a reasonable verdict as to both liability and the quantum of damages.

(6) There is no evidence of contributory negligence on the part of the deceased, that he did not see the vehicle and take due precautions with regard to it, nor any evidence that he did not exercise due care for his own safety.

(7) The case for contributory negligence on the part of the deceased went to the Jury as pleaded in the Statement of Defence, and was rejected on the evidence.

(8) The deceased was not at fault or negligent.

(9) The Defendant's servant was grossly and overwhelmingly negligent.

DAVID A. STURDY.

In the Privy Council. No.26 of 1950

ON APPEAL

from the Court of Appeal for British Columbia.

BETWEEN

ENA PEARL NANCE - *Appellant*

AND

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED *Respondent*

AND BETWEEN

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED *Appellant*

AND

ENA PEARL NANCE - *Respondent.*

(CONSOLIDATED)

Case for the Appellant and CROSS RESPONDENT ENA PEARL NANCE.

GARD, LYELL & CO.,
47 Gresham Street,
London, E.C.2,
Solicitors for ENA PEARL NANCE.

The Solicitors' Law Stationery Society, Ltd., Law and Parliamentary Printers,
5 Dove Court, Old Jewry, E.C.2. CL2654-24605