19, 1951

No. 26 of 1950.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

14502

BETWEEN

ENA PEARL NANCE (Plaintiff) - - - - *Appellant*

AND

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED (Defendant) - - - *Respondent*

AND BETWEEN

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED (Respondent) - - - *Appellant*

AND

ENA PEARL NANCE (Appellant) - - - - *Respondent.*

CONSOLIDATED APPEALS.

Case

FOR THE RESPONDENT IN THE APPEAL AND FOR THE APPELLANT IN THE CROSS-APPEAL.

RECORD.

1. This is an appeal and cross-appeal from the Judgment of the Court of Appeal of British Columbia (Sloan, C.J.B.C., and O'Halloran and Smith, JJ.A.) delivered 23rd February, 1950, and entered 23rd March, 1950, allowing in part only the appeal of the Respondent from the Judgment of Whittaker, J., and a special jury in the Supreme Court of British Columbia 24th June, 1949.

2. The action was brought by the Appellant as Plaintiff on 12th April, 1949, in the Supreme Court of British Columbia claiming damages for herself and other dependents under the Families' Compensation Act, R.S.B.C. 1948, Chapter 116, for the death of her husband caused by being struck by a street car of the Respondent at or near the intersection of Gladstone and Kingsway, an arterial highway in the City of Vancouver, British Columbia. p. 1, l. 23.

3. The accident occurred at the intersection of Kingsway and Gladstone Street in the City of Vancouver between 11 o'clock and midnight 17th January, 1949. Kingsway runs East and West and Gladstone North and South. The Appellant and her deceased husband having come out of a restaurant on the North side of Kingsway proceeded Easterly to the East side of Gladstone, intending to cross to the South side of Kingsway.

The Plaintiff's evidence was that the street car was proceeding East on the Southerly half of Kingsway. Seeing no traffic they proceeded arm in arm to cross and at some stage of the crossing they looked again and saw the street car approaching some 250 feet away. They did not look again and were unaware of the position of the street car until they were struck by it. The deceased suffered a fracture of the skull from which he subsequently died. The street car was fully lighted and clearly visible and the street itself was well lighted. It was a cold night with some snow and ice on the street. Nance being lame and a large obese man the walking for him was precarious.

p. 182, ll. 3–4.
p. 205, ll. 19–21.

4. The jury found the Respondent's employee entirely to blame, absolving the Appellant's husband of any negligence. They awarded her $35,000 and judgment was given for this amount and costs.

p. 206, ll. 1–40.

5. The Respondent appealed to the Court of Appeal of British Columbia on the grounds, amongst others, that the finding that the Appellant's husband was not guilty of contributory negligence was unreasonable and perverse, and that the damages awarded were excessive. The Respondent did not contend and does not now contend that its employee was not guilty of negligence.

p. 208, l. 34.

6. The Chief Justice of British Columbia held that there had been manifest misdirection and non-direction amounting to misdirection by the Trial Judge on the issue of contributory negligence, occasioning a miscarriage of justice, in that he directed the jury that " before you can find Nance was guilty of contributory negligence you must find that he owed a duty to the Defendant and that he committed a breach of that duty and was therefore negligent." He proceeded, in accordance with the rules to give the judgment which he thought should have been given below, and assessed the degree of fault of the Respondent's motorman at 60 per cent. and that of the Appellant's husband at 40 per cent. The Chief Justice further reduced the damages from $35,000 to $20,000 and held that the Appellant should recover 60 per cent. of that sum, or $12,000 with the costs of the trial and 65 per cent. of the costs of the appeal.

p. 209, l. 15.
p. 209, l. 34.
p. 209, l. 38.

7. O'Halloran, J.A., held that there was no misdirection and that the jury's finding that the Respondent's motorman was alone to blame must be upheld. He thought, however, that there was no foundation in the evidence for an award of $35,000 as damages, and that therefore there should be a new trial, limited to the assessment of damages.

p. 218, l. 46.

8. Sidney Smith, J.A., thought that at the trial there had been misdirection in that the Trial Judge " charged the jury that they could only find the deceased guilty of contributory negligence if he had failed

in some duty that he owed to the defendant." His Lordship held however that the Respondent was precluded from relying on the misdirection because of acquiescence at the trial, and that the verdict of the jury on liability should be affirmed. The damages, however, were excessive and he did not think that an award of more than $12,000 could be justified. p. 219, ll. 9 and 28.

9. As two of the Judges in the Court of Appeal thought, although for inconsistent reasons, that the Appellant should recover only $12,000, the appeal was allowed and the judgment was varied by reducing the damages to $12,000. The Appellant was given the costs of the trial and 65 per cent. of her costs of the appeal.

10. The judgment of the Court of Appeal was delivered on the 23rd of February, 1950.

11. The only questions now in dispute are the contributory negligence of the deceased and the amount of damages.

12. Obviously there is no direct evidence that the deceased ever looked for, saw, or heard the street car, but as the Appellant and the deceased were walking side by side it could be assumed that the deceased would have the same opportunity for observation that the Appellant had. p. 74, ll. 29-31.

13. The Appellant stated that they looked before they left the curb on the north side and saw no traffic. Her evidence as to where she was when she saw the street car half a block away is conflicting but in any event they did not look again until they were hit although there was nothing to obstruct their view. The deceased was watching his feet as they crossed the street and into the path of the street car. p. 74, l. 23 to p. 75, l. 37. p. 91, ll. 41-45. p. 92, ll. 23-36. p. 94, l. 1 to p. 105, l. 20. p. 103, ll. 25-34. p. 104, ll. 3-4.

14. The street car was moving when seen by the Appellant. It must have been when it was leaving the corner where it stopped to pick up passengers and not 250 feet from the corner as stated by the Appellant, otherwise the deceased could not possibly have been struck. p. 99, ll. 35-39. p. 102, ll. 7-9. p. 103, ll. 37-43. p. 105, ll. 11-20.

15. The deceased and Appellant were not crossing Kingsway in the regular cross-walk as the point of impact was 30 to 50 feet east of such cross-walk. p. 15, l. 41 to p. 16, l. 7. p. 129, ll. 18-26. p. 130, ll. 23-26. p. 143, ll. 28-29. p. 150, ll. 33-38. p. 151, ll. 5-10. p. 154, ll. 15-25. p. 155, ll. 26-31. p. 168, ll. 31-37.

16. On these facts the jury should have found that the deceased was guilty of contributory negligence to the same degree as the motorman.

It is as much the duty of foot passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot passengers :—

Cotton v. *Wood* (1860), 8 C.B. (N.S.) 568 ; 141 E.R. 1288, Erle, C.J., at foot of page 1289.

There is a greater duty upon pedestrians to look out for vehicles which are upon tracks and cannot stop as quickly or turn in their course :—

Jones v. *Toronto and York Radial Railway* (1911), 25 O.L.R. 158 (Ont. C.A.), Meredith, J.A., at pages 164 to 165 ;

Vance v. *Drew* (1925), 36 B.C.R. 241, Hunter, C.J.B.C., at page 244.

There is a duty to use special care cast upon a person who is not in the regular crossing :—

Gibson v. *The King* (1947), 4 D.L.R. 39, Cameron, Exchequer Court Judge, at page 44 ;

Dixon v. *Sinclair* (1936), 3 W.W.R. 527, Robertson, J., foot of page 529.

When there is nothing to obstruct the vision there is a duty to look ; it is negligence not to see what is clearly visible :—

Swartz Brothers, Limited v. *Wills* (1935), S.C.R. 628, Cannon, J., at 634.

When a pedestrian observes the approaching traffic at the time when he ventures to cross and it is not clear that he has ample time to cross in front of it, he is bound to exercise care by keeping that traffic in sight :—

Dixon v. *Sinclair* (1936), 3 W.W.R. 527, Robertson, J., at p. 529.

It is submitted that the learned judge misdirected the jury in his charge when he said :—

p. 171, l. 10. " Before you can find that Nance was guilty of contributory negligence, you must find that he owed a duty to the Defendant, and that he committed a breach of that duty, and was therefore negligent."

That this is not the law see—

Davies v. *Swan Motor Co., Ltd.* [1949] 1 All E.R. 620 ;

particularly p. 624 where Bucknill, L.J., adopts the language of Charlesworth's text on the law of negligence :—

" Negligence ordinarily means breach of a legal duty to take care, but as used in the expression ' contributory negligence ' it does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property . . . "

In the case at Bar the negligence of the Nances in not keeping any lookout for traffic must be a " cause operating to produce the damage " (Bucknill, L.J., in *Davies* v. *Swan Motor Co., Ltd., supra*, at p. 624), and that negligence, and the negligence of the motorman in not seeing the Nances must be so mixed up with each other that " in the ordinary, plain commonsense of this business " it must be held that both parties were to blame for the accident :—

Admiralty Commissioners v. *S.S. Volute* [1922] 1 A.C. 129, Lord Birkenhead, at p. 145.

The words of Scott, L.J., in *The Eurymedon* [1938] P. 41, at p. 58, are apt :—

" (There is) a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense. I respectfully agree with a phrase of Lord Wright in *McLean* v. *Bell*, 147 L.T. 262, 264 : ' the decision however of the case must turn not simply on causation, but on responsibility '."

17. The Court of Appeal having found that the gross amount of damages should be $12,000 it is submitted that this amount should not be increased.

18. The deceased was in a poor state of health, consequently damages could not be predicated on the average, or any other life prospect. pp. 35–39.

19. The deceased had only drawn out of his business an average of $2,633.33 per year for the four years preceding his death, out of which he provided for the home. Of the four who might be called dependents, other than the Appellant, all were self-supporting and there is no evidence that he contributed or was likely to contribute in a pecuniary way to any of them. So that it may be assumed that the total award by the jury was for the Appellant. In addition the Appellant received $7,450.65 out of the estate. Ex. 4. p. 190, l. 12. p. 191, l. 18. p. 192, l. 26. p. 193, l. 33. p. 71, ll. 21–42. p. 80, l. 10 to p. 81, l. 13. p. 198, ll. 28, 29.

20. The jury were instructed to consider his expectancy of life. There is no evidence of the Appellant's expectancy and it is on the joint expectancy that damages should be considered. p. 177, ll. 7–9.

21. The jury was further instructed to state "what you think the family as a whole *should receive* by way of compensation." This is clearly wrong, as the evidence shows that the only real dependent was the Appellant. p. 178, ll. 14–15. p. 71, ll. 21–42. p. 80, l. 10 to p. 81, l. 13.

22. The Respondent submits that the Appeal should be dismissed and that the Cross-Appeal be allowed by a finding of the Court :—

(*a*) that the deceased was negligent in an equal degree with the motorman ;

(*b*) that the gross amount of damages be adjudged to be $12,000 ;

(*c*) that the costs in the Courts below be apportioned in the same degree as the liability.

REASONS FOR DISALLOWING THE APPEAL

BECAUSE the Court of Appeal, notwithstanding the differences of opinion of the learned Judges, were right in not awarding an amount in excess of that in the judgment as entered.

REASONS FOR ALLOWING THE CROSS-APPEAL

(1) BECAUSE the deceased was guilty of negligence in walking in front of an approaching street car that was immediately upon him.

(2) THE deceased's negligence was of the same kind and degree as that of the motorman.

(3) EACH owed the same duty to take care.

(4) THE damages awarded by the Jury were on a wrong principle and on wrong directions from the Court.

J. W. DE B. FARRIS.

No. 26 of 1950.

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BETWEEN

ENA PEARL NANCE (Plaintiff) - *Appellant*

AND

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED (Defendant) - - - - - *Respondent*

AND BETWEEN

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CONSOLIDATED APPEALS.

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LINKLATERS & PAINES,
Austin Friars House,
6 Austin Friars,
London, E.C.2,
Solicitors for the (Respondent) Appellant.

The Solicitors' Law Stationery Society Limited, Law and Company Printers
5 Dove Court, Old Jewry, E.C.2. CL2631-23478