Privy Council Appeal No. 26 of 1950

Ena Pearl Nance - - - - - - - - - - *Appellant*

v.

British Columbia Electric Railway Company, Limited - - *Respondent*

British Columbia Electric Railway Company, Limited - - *Appellant*

v.

Ena Pearl Nance - - - - - - - - - - *Respondent*

(Consolidated Appeals)

FROM

THE COURT OF APPEAL FOR BRITISH COLUMBIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JUNE, 1951

Present at the Hearing:

VISCOUNT SIMON
LORD PORTER
LORD MORTON OF HENRYTON
LORD REID
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* VISCOUNT SIMON]

This is an appeal and cross-appeal from a judgment of the Court of Appeal of British Columbia (Sloan C.J., O'Halloran and Sydney Smith, JJ.A.) dated 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 claimed damages in respect of the death of her husband, which occurred on 18th January, 1949, through being knocked down and instantly killed by a streetcar, driven by a motorman employed by the Respondent Company. The appellant brought the action under the Families Compensation Act (R.S. of B.C. 1948 c. 116) on her own behalf and on behalf of the children and step-children of the deceased, and alleged that her husband's death was caused by the negligence of the motorman, for which the Respondent Company was responsible. The jury so found, awarding damages of $35,000, and in the subsequent proceedings the Respondent Company's liability for negligence has been admitted.

The Respondent Company, however, pleaded in its defence that the negligence of the deceased was a contributory cause of his death. The Contributory Negligence Act of British Columbia (R.S. 1936 c. 52) provides that 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 if it is not possible to establish different degrees of fault, the liability shall be apportioned equally. Consequently, if the Respondent Company made good its allegation of the deceased's contributory negligence, it would be liable for only a portion of the damages awarded.

The jury answered in the negative the question whether the deceased was guilty of negligence which contributed to the accident. Judgment was therefore entered for the appellant for the full amount of $35,000. The Respondent Company appealed to the Court of Appeal on the ground that the finding of the jury that the deceased was not guilty of contributory negligence was unreasonable and perverse and against the evidence, and further contended that a passage in the summing up of Whittaker, J. dealing with this issue was wrong in law and that the jury would not have found as they did if, in this matter, they had been properly directed.

The accident occurred between 11 p.m. and midnight near the intersection of Kingsway, a main thoroughfare of Vancouver running approximately east and west, and Gladstone Street, which runs approximately north and south. Along Kingsway a double pair of rails is laid to carry the Respondent Company's streetcars. Kingsway is 55 ft. wide between the kerbs, and the roadway of Gladstone Street is about 30 ft. across. There was deep snow on the ground, but snow-ploughs had cleared the snow along the middle of Kingsway up to 8 ft. of the kerb on either side, thus leaving a central band of swept surface occupied by the rails and the "devil strip" between them (in all 15 ft.), and also a selvage of a further 12 ft. on either side of the rails. The whole of the swept surface was slippery from ice and the piled snow between this surface and the kerbs, though at a higher level, was somewhat trampled down where foot-passengers had previously crossed. The whole area was well lighted. There were no traffic lights to regulate the crossing of foot-passengers or vehicles at the intersection.

The plaintiff and her husband began to cross Kingsway from the north-east corner of the intersection, the lady being on his left and holding his left arm. He was a very tall and heavy man, and somewhat lame. The pair could only proceed across the road at a "slow shuffle", with some slipping on the snowy and icy surface. It was in dispute whether they were crossing at right-angles or were inclining their course slightly to their left.

The streetcar pulled up on reaching the intersection to take on four passengers, who could be seen to be waiting near the south-west corner to board it. The plaintiff and her husband had already gone some way in crossing the road and were continuing to do so, when the motorman without warning restarted the streetcar and it advanced rapidly towards them, knocking the deceased down, just before he got clear of the southern-most rail, with such violence that his body projected his wife forward clear of the track: she also was injured. The distance travelled by the streetcar after restarting, before it collided with the deceased, appears to have been no more than some 75 ft. and the car, which is 44 ft. long, then pulled up within two lengths. The car is of a new type, which can very quickly pick up a high speed amounting to 30 miles an hour. The motorman is the only employee on this type of car and consequently has to take fares and supply tickets, as well as to drive the car. There was evidence that, at the time of restarting, he was giving a ticket to one of the passengers and he admitted that he never saw the injured couple at all, although they would have been clearly within his vision if he had looked.

In these circumstances, the jury had to consider whether the deceased was guilty of contributory negligence. As he was instantly killed, he could not personally testify, but the plaintiff said that she had seen the street-car some 250 ft. away and realised that the car would stop on reaching the intersection, as it did. It appears to Their Lordships that a properly instructed jury might without perversity come to the conclusion, on the evidence available, that the defendants had not discharged the burden of proving contributory negligence on the part of the deceased. If the

deceased, after starting to cross, looked to see the position of the streetcar and noted that it had come to a stop for taking on passengers, he might reasonably have continued to cross the road, assuming that the car would not start up again and advance towards him at a high rate of speed until he and his wife were safely beyond the rails. Even though there was some justification for taking the contrary view, it was for the jury to decide whether they were satisfied that the defendants had proved their plea. Their Lordships consider that there would be no ground for reversing the jury's finding on this point or for ordering a new trial unless the summing-up misled the jury.

As to this, the passage in the learned Judge's charge which is complained of was as follows:—

> "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. The onus of proving contributory negligence is upon the defendant, and that must be proved by a preponderance of evidence, which you are prepared to accept."

The three Judges of the Court of Appeal were unanimously of the view that the judgment below could not stand, but for widely different reasons. Chief Justice Sloan held that the passage just quoted from the summing-up was a misleading and inaccurate exposition of the obligations of the deceased. In his view, the deceased owed no "duty" to the Respondent Company, but was subject to an imperative obligation to exercise reasonable care for his own safety. As the jury was not so instructed, the Chief Justice held that there was misdirection, which had occasioned a miscarriage of justice, and that the verdict of the jury and the judgment entered thereon must be set aside. The learned Chief Justice then substituted the judgment which he considered ought to have been given, viz., that the deceased was at fault in not keeping a proper lookout for the approaching streetcar; he said "Had he taken the precaution of a momentary glance, he would not have walked into a position of imminent peril". (On this, Their Lordships would respectfully observe that in their opinion there was no evidence that the deceased did not look, and that if he looked, it may be that he saw that the streetcar was stationary. A person crossing the road in such circumstances cannot reasonably be expected to "keep his eye" continuously on the streetcar, for he has to look after his own steps on the slippery surface, and the Chief Justice only postulates a "momentary glance".) As for damages, the Chief Justice's view was that the damages awarded by the jury were excessive and $20,000 would fairly represent the pecuniary loss suffered by Mrs. Nance and those she represents. He fixed the degree of fault of the motorman at 60 per cent. and that of the deceased at 40 per cent., with the result that judgment should be entered for $12,000.

O'Halloran J.A., on the contrary, took the view that "the jury would have failed to act judicially if they had not reached the decision that the motorman was solely responsible for the collision". The learned Judge met the criticism directed to Whittaker J.'s summing-up by examining the pleadings, which he considered set up the breach of duty owed by the deceased to the Respondent Company as the only contributory negligence alleged and did not include an allegation of his carelessness apart from duty. In his view Whittaker J.'s charge was entirely correct. He added "the argument that in crossing the street the deceased owed no duty to the streetcar to be careful is one which I have struggled unsuccessfully to appreciate". In the result, O'Halloran J., while holding the Respondent Company solely to blame, was of opinion that the $35,000 awarded as damages appeared to be "purely arbitrary and without foundation in the evidence" and was in favour of directing a new trial to decide the proper quantum.

Sidney Smith J.A. also took the view that there was no contributory negligence by the deceased; "the assumption that the deceased did not see the car at all is against the evidence . . . but he was then so far

advanced in the intersection that he was entitled to assume the car would give way to him ". This learned Judge was not prepared to accept the view that a pedestrian crossing a street owes to approaching traffic the duty to be careful, for he said " a pedestrian carries no menace ; and since a pedestrian is practically incapable of causing damage to a vehicle by a collision, only damage to him need be considered ". Their Lordships, as will appear hereafter, must not be understood to agree with this proposition. The learned Judge consequently held that there was clear misdirection, but at the same time held that the Respondent Company had disabled itself from taking the point, since at the end of the summing-up Whittaker J. had inquired of Counsel whether there was any objection to his charge and counsel then appearing for the defendants had replied that it was " entirely fair ". Their Lordships find themselves relieved from pronouncing upon this view of the matter, which was apparently not shared by the other two judges of the Court of Appeal. Mr. Justice Sidney Smith, however, considered that the award of damages was excessive and thought that a figure of more than $12,000 could not be justified.

With this conflict of judicial opinion before them Their Lordships must now deal with the objection to the summing-up and consider whether the conclusion reached by the jury was affected by any mistake in it.

The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owned by the defendants to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call upon the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in *Davies* v. *Swan Motor Co.* [1949] 1 A.E.R. 624, to which the Chief Justice referred.

This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to Their Lordships that in running-down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet such instances may easily occur, e.g. if the individual's rashness causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care, and if a sentence of Lord Justice Denning's judgment at page 631 of the *Davies* case, where he says, " when a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe to a motorist that is going at an excessive speed any duty to avoid being run down ", is to be interpreted in a contrary sense, Their Lordships cannot agree with it.

Their Lordships do not feel able to accept the view of Mr. Justice O'Halloran that the pleadings in this case debar the Respondent Company from objecting that the passage complained of in Mr. Justice

Whittaker's charge is wrong in law. The plea that the deceased was guilty of contributory negligence is wide enough to cover the contention that he was careless of his own safety, even though he did not owe a duty to the Respondent Company to be careful. It is perhaps unfortunate that the phrase "contributory negligence" uses the word "negligence" in a sense somewhat different from that which the latter word would bear when negligence is the cause of action. It may be pointed out that in the Law Reform (Contributory Negligence) Act 1945 of the United Kingdom Parliament (8 and 9 George VI c. 28) the contrast between the two meanings is recognised, for that Act, which provides for a sharing of responsibility for damage where a person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, defines "fault" as "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence". The Contributory Negligence Act of British Columbia, which was passed before the United Kingdom Act, does not contain a definition of "fault", but there is no doubt that in British Columbia the conception of contributory negligence, which is part of the Common Law, is the same as in this country. Such a plea should be treated as setting up want of care by the plaintiff for his own safety, whether in the circumstances of the accident the plaintiff owed a duty to the defendant or not.

With the above considerations in mind, both as to the facts and as to the law, Their Lordships have carefully considered whether the impugned passage in the summing-up of the trial judge should be regarded as vitiating the conclusion of the jury. To decide this question, it is necessary to have regard to the summing-up as a whole. The misdirection occurs early in the judge's charge and it is followed by a full and careful survey of the evidence, to which no objection can be taken and which placed the essential issues before the jury very clearly. Moreover, the question put at the end of the summing-up to the jury on contributory negligence is correctly framed and contains no suggestion that the defence would be incomplete unless "duty" is proved to the jury's satisfaction. Their Lordships have come to the conclusion, after weighing these various elements, that the error complained of did not mislead the jury and the verdict that the Respondent Company was solely to blame should stand.

Their Lordships now turn to the question of quantum of damages.

As already stated, the jury awarded the plaintiff $35,000. The three members of the British Columbian Court of Appeal were unanimous, for different reasons, in holding that this figure could not stand. The Chief Justice was for reducing it to $20,000 (subject to a further reduction to $12,000 in respect of contributory negligence which he found proved); Sidney Smith, J.A., who did not find contributory negligence proved would have awarded $12,000; and O'Halloran, J.A., would have left the figure to be determined at a new trial on materials more adequate than those available at the actual trial.

In those circumstances two distinct questions arise:—

(1) What principles should be observed by an Appellate Court in deciding whether it is justified in disturbing the finding of the Court of first instance as to the quantum of damages; more particularly when that finding is that of a jury, as in the present case.

(2) What principles should govern the assessment of the quantum of damages by the tribunal of first instance itself.

(1) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the Appellate Court can properly

intervene, it must be satisfied either that the judge, in assessing the damages. applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint* v. *Lovell* [1935] 1 K.B. 354 approved by the House of Lords in *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a Court of Appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of proportion" (per Lord Wright, *Davies* v. *Powell Duffryn Associated Collieries, Ltd.* at page 616).

(2) The second question is, what principles the Court of first instance should itself apply in determining the quantum of damages under the relevant British Columbian legislation, which reproduces with inconspicuous differences the Fatal Accidents Acts in force in the United Kingdom.

(Among these differences Their Lordships note that while in the United Kingdom any sums for which the deceased has insured his life are not to be taken into account, in British Columbia a different rule prevails in this regard.)

The claim to damages in the present case falls under two separate heads. *First,* if the deceased had not been killed, but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward, what sums during that period would he probably have applied out of his income to the maintenance of his wife and family? (Under this head in the present case the wife or widow need alone be considered, since his children and step-children were all adults and self supporting, and at the time of his death he contributed nothing material to their maintenance.)

Secondly, in addition to any sum arrived at under the first head, the case has been argued on the assumption common to both parties that according to the law of British Columbia it would be proper to award a sum representing such portion of any additional savings which he would or might have accumulated during the period for which, but for his accident, he would have lived, as on his death at the end of this period would probably have accrued to his wife and family by devolution either on his intestacy or under his will, if he made a will.

A proper approach to these questions is in their Lordships' view one which takes into account and gives due weight to the following factors; the evaluation of some, indeed most, of them can, at best, be but roughly calculated.

Under the first head—indeed for the purposes of both heads—it is necessary first to estimate what was the deceased man's expectation of life if he had not been killed when he was; (let this be "x" years) and next what sums during these x years he would probably have applied to the support of his wife. In fixing x, regard must be had not only to his age and bodily health, but to the possibility of a premature determination of his life by a later accident. In estimating future provision for his wife, the amounts he usually applied in this way before his death are obviously relevant, and often the best evidence available; though not conclusive, since if he had survived, his means might have expanded or shrunk, and his liberality might have grown or wilted. In the present case it is known that in the years 1945-48, which immediately preceded his death, his "drawings" from his business averaged $2,600 per annum. His wife's maintenance was derived from, and could not have exceeded, these drawings. What proportion of such amount he in fact contributed to her support is a matter

of guess-work, but both his widow and her sister give him a good character for generosity. He was a "good provider". Supposing, by this method, an estimated annual sum of $y is arrived at as the sum which would have been applied for the benefit of the plaintiff for x more years, the sum to be awarded is not simply $y multiplied by x because that sum is a sum spread over a period of years and must be discounted so as to arrive at its equivalent in the form of a lump sum payable at his death as damages. Then a deduction must further be made for the benefit accruing to the widow from the acceleration of her interest in his estate on his death intestate in 1949 (she came into $6,500, one-third of his estate, x years sooner than she would otherwise have done) and of her interest in sums payable on a policy of $1,000 on his life; and a further allowance must be made for a possibility which might have been realised if he had not been killed but had embarked on his allotted span of x years, viz. the possibility that the wife might have died before he did.

And there is a further possibility to be allowed for—though in most cases it is incapable of evaluation—viz. the possibility that, in the events which have actually happened, the widow might remarry, in circumstances which would improve her financial position.

A figure having been arrived at under this first head, there should be added to it a figure arrived at under the second head. The question there is what additional amount he would probably have saved during the x years if he had so long endured, and what part if any of these additional savings his family would have been likely to inherit.

Here it is to be noted that under the law of Alberta (which is the relevant law) he would have been free to leave his whole estate away from his family. There is in that Province apparently no "*legitima portio*" or "*querela inofficiosi testamenti*". However, he had made no will when he died at the age of nearly 54 and it seems reasonable to assume that if he had lived on he would either have died intestate, in which case his widow and his own two children would have taken his whole estate in equal thirds; or that if he had made a will, these three persons would in some proportions (it matters not for the present purpose what proportions) have been the sole objects of his testamentary bounty.

The main question here is:—if he had continued to live for x years what annual sum during this period would he probably have accumulated in the form of savings? The appellant's counsel invited their Lordships to say that he would have saved an average sum of $3,000 a year. This figure, subject to a number of discounts, was based on the evidence that between 1945-48 his earnings had risen in a sharp curve as follows:

	$
1945	1,469.57
1946	4,707.30
1947	7,689.40
1948	9,638.30

and that they would have been likely, if not to increase, to remain somewhere near this peak level. His accountant estimated that his *gross* earnings might have continued at a rate of about $6,000-$7,000 a year. Their Lordships consider this estimate very questionable. The period 1945-48 was abnormal. Before it started the deceased had in all his working life saved only about $4,000. He had enjoyed and then lost an agency in a limited area for the sale of agricultural implements supplied by International Harvester Inc. He recovered this agency in December, 1945, and it was the main staple of his income till 1949: but he might have lost it again. The garage business which he also ran was a subsidiary and quite minor source of revenue. The period of steeply mounting profits was one in which there was a banked-up unsatisfied demand for agricultural implements, carrying with it as a corollary a strong sellers' market and boom conditions. This state of affairs could not have been expected to continue indefinitely. His so-called savings in the pre-war

years were mostly sums ploughed back into the business. The business itself depended on the world supply and demand for wheat, which is subject to considerable fluctuation. It cannot be assumed that he would in no part of the *x* years have made a loss or have been affected by fluctuations in the world price of wheat, or that a third world war might not have diverted production from ploughshares to swords and dried up his main source of profit.

Whatever sum he would have saved over *x* years must again be reduced to its lump sum equivalent here and now, and further discounted to allow for the contingency that his wife might have died before him; though these reducing factors would have been to some extent offset by any interest carried by the savings annually set aside.

Taking all these considerations into account, and basing on them the best estimate they can form, Their Lordships are satisfied that a jury could not reasonably have computed the total recoverable damage at a figure exceeding $22,500. This figure in their view falls short of the $35,000 award by a margin wide enough to justify the British Columbian Court of Appeal in rejecting the jury's figure. In that case a new trial on damages could be ordered but the parties through their counsel have expressed their preference for the determination of the figure for damages on the advice of this Board. Their Lordships accordingly will humbly advise His Majesty that the appeal should be allowed, and the sum of $12,000 awarded as damages by the Court of Appeal should be increased to $22,500. The cross-appeal should be dismissed.

The respondents must pay the appellant's costs throughout.

(12247) Wt. 8137—69 100 7/51 D.L./P.1/3

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