Privy Council Appeal No. 35 *of* 1914.

The British Columbia Electric Railway Company, Limited - - - - - - *Appellants,*

v.

T. K. Loach, Administrator of the Estate of Benjamin Sands, deceased - - - *Respondent,*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY 1915.

Present at the Hearing:

VISCOUNT HALDANE.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* LORD SUMNER.]

This is an appeal from a judgment of the Court of Appeal of British Columbia in favour of the administrator of the estate of Benjamin Sands, who was run down at a level crossing by a car of the appellant railway company and was killed. One Hall took Sands with him in a cart, and they drove together on to the level crossing and neither heard nor saw the approaching car till they were close to the rails and the car was nearly on them. There was plenty of light and there was no other traffic about. The verdict, though rather curiously expressed, clearly finds Sands guilty of negli-

gence in not looking out to see that the road was clear. It was not suggested in argument that he was not under a duty to exercise reasonable care, or that there was not evidence for the jury that he had disregarded it. Hall, who escaped, said that they went "right on " to the track," when he heard Sands, who was sitting on his left, say "Oh," and looking up saw the car about 50 yards off. He says he could then do nothing, and with a loaded waggon and horses going two to three miles an hour he probably could not. It does not seem to have been suggested that Sands could have done any good by trying to jump off the cart and clear the rails. The car knocked cart, horses, and men over, and ran some distance beyond the crossing before it could be stopped. It approached the crossing at from thirty-five to forty-five miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be ten or twelve feet from the nearest rail, and he at once applied his brake. He was then 400 feet from the crossing. If the brake had been in good order it should have stopped the car in 300 feet. Apart from the fact that the car did not stop in time, but overran the crossing, there was evidence for the jury that the brake was defective and inefficient and that the car had come out in the morning with the brake in that condition. The jury found that the car was approaching at an excessive speed and should have been brought under complete control, and although they gave as their reason for saying so the presence of possible passengers at the station by the crossing, and not the possibility of vehicles being on the road, there can be no mistake in the matter,

and their finding stands. It cannot be restricted, as the Trial Judge and the appellants sought to restrict it, to a finding that the speed was excessive for an ill-braked car, but not for a properly-braked car, or to a finding that there was no negligence except the "original" negligence of sending the car out ill-equipped in the morning.

Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car, and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered.

It was for the jury to decide which portions of the evidence were true, and, under proper direction, to draw their own inferences of fact from such evidence as they accepted. No complaint was made against the summing-up, and there has been no attempt to argue before their Lordships that there was not evidence for the jury on all points. If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and there was then nothing that he could do. There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective, he

could, as the jury found, have pulled up in time. Indeed, he would have had 100 feet to spare. If the car was 150 feet off when Sands looked up and said "Oh," then each had the other in view for 50 feet before the car reached the point at which it should have stopped. It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing.

Some of the judges in the courts below appear to have thought that because the equipment of the car with a defective brake was the original cause of the collision, and could not have been remedied after Sands got on the line, no account should be taken of it in considering the motorman's failure to avoid the collision after he knew that Sands was in danger. "You "cannot charge up the same negligence under "different heads," said Murphy, J., at the trial; "you cannot charge it up twice."

"On the question of ultimate negligence,"

he observes,

"that negligence must arise on the conditions as "existing at the time of the accident. It would, of course, "be absurd to say the company has any opportunity "between the time that this rig appeared upon the "track and the collision to remedy any defect in the "brake. If there was such a defect I think it was

" original negligence and not what may possibly be termed " 'ultimate negligence.' "

In the Court of Appeal Macdonald, C.J.A., delivering a dissentient judgment in favour of the present appellants, says :

" Where one party negligently approaches a point of " danger, and the other party, with like obligation to " take care, negligently approaches the same point of " danger, if there arises a situation which could be saved " by one and not by the other, and the former then " negligently fail to use the means in his power to save it, " and injury is caused to the latter, that failure is desig- " nated ultimate negligence, in the sense of being the " proximate cause of the injury. In this case it is sought " to carry forward, as it were, an anterior negligent " omission of the defendants, though continuing, it is true, " up to the time of the occurrence, and to assign to it " the whole blame for the occurrence, although by no " effort of the defendants or their servants could the " situation at that stage have been saved."

So, too, McPhillips, J.A., also dissenting, says :

" Upon the evidence, whether it was because of " defective brakes or any of the acts of negligence found " against the defendant, none of them were acts of negli- " gence arising after the act of contributory negligence of " the deceased, and cannot be held to be acts of negligence " which, notwithstanding the later negligence of the de- " ceased, warrant judgment going for the plaintiff. . . . " The motorman after he saw the vehicle could not have " stopped the car . . . therefore, as nothing could be " then done by the motorman to remedy the ineffective " brake, the want of care of the deceased was the direct " and effective contributory cause of the accident resulting " in his death."

These considerations were again urged at their Lordships' bar under somewhat different forms. It was said (i) that the negligence relied on as an answer to contributory negligence must be a new negligence, the initial negligence which founded the cause of action being spent and disposed of by the contributory negligence. Further, it was said

(ii) that if the defendants' negligence continued up to the moment of the collision, so did the deceased's contributory negligence, and that this series, so to speak, of replications and rebutters finally merged in the accident without the deceased ever having been freed from the legal consequence of his own negligence having contributed to it.

The last point fails because it does not correspond with the fact. The consequences of the deceased's contributory negligence continued, it is true, but, after he had looked, there was no more negligence, for there was nothing to be done, and, as it is put in the classic judgment in *Tuff* v. *Warman* (5 C.B. N.S., at p. 585), his contributory negligence will not disentitle him to recover "if the defendant " might by the exercise of care on his part " have avoided the consequences of the neglect " or carelessness of the plaintiff."

As to the former point, there seems to be some ambiguity in the statement. It may be convenient to use a phraseology which has been current for some time in the Canadian courts, especially in Ontario, though it is not precise. The negligence which the plaintiff proves to launch his case is called "primary" or "original" negligence. The defendant may answer that by proving against the plaintiff "contributory negligence." If the defendant fails to avoid the consequences of that contributory negligence, and so brings about the injury, which he could and ought to have avoided, this is called "ultimate" or "resultant" negligence. The opinion has been several times expressed, in various forms, that "original" negligence and "ultimate" negligence are mutually exclusive, and that conduct which has once been relied on to prove the first,

cannot in any shape constitute proof of the second.

Here lies the ambiguity. If the "primary" negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the "ultimate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence, is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

This matter was much discussed in *Brenner* v. *The Toronto Railway Company* (13 Ont. L.R., 423), when Anglin, J., delivered a very valuable judgment in the Divisional Court. The decision of the Divisional Court was reversed on appeal (15 Ont. L.R., 195, and 40 S.C.R., 540), but on other grounds, and in their comments on the decision of the Divisional Court, Duff, J., in the Supreme Court, and also Chancellor Boyd, in *Rice* v. *Toronto Railway* (22 Ont. L.R., at p. 450), and Hunter, C.J., in *Snow* v. *Crow's Nest Company* (13 B.C. Rep., at p. 155), seem to have missed the point to which Anglin, J., had specially addressed himself.

The facts of that case were closely similar to those in the present appeal, and it was much relied on in argument in the court below. Anglin, J., following the decision in *Scott* v. *Dublin and Wicklow Railway Company* (11 Irish Common Law Reports, p. 394), observes as follows:

"Again the duty of the defendants to the plaintiff, "breach of which would constitute ultimate negligence,

" only arose when her danger was or should have been " apparent. Prior to that moment there was an abstract " obligation incumbent upon them to have their car " equipped with sufficient emergency appliances ready and " in condition to meet the requirements of such an occa- " sion. Had an occasion for the use of emergency " appliances not arisen, failure to fulfil that obligation " would have given rise to no cause of action. Upon the " emergency arising, that abstract obligation became a " concrete duty owing to the plaintiff, to avoid the con- " sequences of her negligence by the exercise of ordinary " care. Up to that moment there was no such breach of " duty to the plaintiff. In that sense the failure of the " defendants to avoid the mischief, though the result of an " antecedent want of care, was negligence which occurred " in the sense of becoming operative immediately after " the duty in the breach of which it consisted arose. It " effectively intervened between the negligence of the " plaintiff and the happening of the casualty."

" But there is a class of cases, when a situation of " imminent peril has been created either by the joint " negligence of both the plaintiff and the defendant, or it " may be that of the plaintiff alone, in which, after the " danger is, or should be, apparent, there is a period of " time of some perceptible duration during which both, or " either, may endeavour to avert the impending cata- " strophe. . . . If, notwithstanding the difficulties of " the situation, efforts to avoid injury duly made would " have been successful but for some self-created incapacity, " which rendered such efforts inefficacious, the negligence " that produced such a state of disability is not merely " part of the inducing causes—a remote cause or a *causa* " *sine qua non*—it is in very truth the efficient, the " proximate, the decisive cause of the incapacity, and, " therefore, of the mischief. Negligence of a defendant " incapacitating him from taking due care to avoid the " consequences of the plaintiff's negligence may in some " cases, though anterior in point of time to the plaintiff's " negligence, constitute ultimate negligence rendering the " defendant liable, notwithstanding a finding of contributory " negligence of the plaintiff. . . ."

Their Lordships are of opinion that, on the facts of the present case, the above observations apply and are correct. Were it otherwise the defendant company would be in a better

position, when they had supplied a bad brake but a good motorman, than when the motorman was careless but the brake efficient. If the superintendent engineer sent out the car in the morning with a defective brake, which, on seeing Sands, the motorman strove to apply, they would not be liable, but if the motorman failed to apply the brake, which, if applied, would have averted the accident, they would be liable.

The whole law of negligence in accident cases is now very well settled, and, beyond the difficulty of explaining it to a jury in terms of the decided cases, its application is plain enough. Many persons are apt to think that, in a case of contributory negligence like the present, the injured man deserved to be hurt, but the question is not one of desert or the lack of it, but of the cause legally responsible for the injury. However, when once the steps are followed the jury can see what they have to do, for the good sense of the rules is apparent. The inquiry is a judicial inquiry. It does not always follow the historical method, and begin at the beginning. Very often it is more convenient to begin at the end, that is at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a causal agency but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote. Till that has been done there may be a considerable sequence of physical events, and even of acts of responsible human beings, between the damage done and the conduct, which is tortious and is its cause. It is

surprising how many epithets eminent judges have applied to the cause, which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents, which for this purpose are not the cause at all. "Efficient or effective "cause," "real cause," "proximate cause," "direct cause," "decisive cause," "immediate "cause," "*causa causans*," on the one hand, as against, on the other, "*causa sine qua* "*non*," "occasional cause," "remote cause," "contributory cause," "inducing cause," "condition," and so on. No doubt in the particular cases in which they occur they were thought to be useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification.

In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility, and that upon the answers which they returned, reasonably construed, the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required

a perfectly efficient brake to arrest it. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed, with costs.

In the Privy Council.

THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED

v.

T. K. LOACH, ADMINISTRATOR OF THE ESTATE OF BENJAMIN SANDS, DECEASED.

DELIVERED BY LORD SUMNER.

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