

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

Taylor McVeity, for the appellant company.

A. E. Fripp, K.C., for the plaintiff company, respondent.

HODGINS, J.A., reading the judgment of the Court, said that the plaintiff company's chauffeur convicted himself of negligence by his own testimony. He arrived on the scene, operating the car, and when coming into Dalhousie street, which runs north and south, he found his view to the south obstructed by a building. He blew his horn and slowed up, moved ahead to go across the street, and when he got out so that he could see up the street, he sighted the street-car. He was then "going so slow" that he "could not get up speed to go across the street to get to the other side in time."

The trial Judge, in charging the jury, put it as if the chauffeur was in a position of danger at the moment and had to act suddenly, and that the very best judgment was not to be expected of him in such circumstances; but in the evidence there was no trace of such a crisis. The chauffeur thought he could run northward while the street-car slowed down, he crossing ahead of it—he had it in full view when he made this decision. Before he got across, he was struck by the car—he called the speed of the car terrific. If his evidence as to speed was correct, he was extremely foolish to try to cross. He was, on his own shewing, perfectly safe, and his car was under control, and he chose to take a step either utterly foolish or quite unwise and unjustifiable, having regard to the approaching street-car, whether it was going at high speed or not. The finding of the jury acquitting him of negligence could not be supported. It was a case in which the powers given by sec. 27 of the Judicature Act should be exercised and the finding set aside.

There remained the question whether the principle underlying the decision in *Loach v. British Columbia Electric R.W. Co.*, [1916] 1 A.C. 719, was applicable—the principle that ultimate negligence may be established either by an act occurring after the effects of the contributing negligence has been spent and the crisis has supervened, or by a condition created negligently prior to the emergency, but still operating so as to prevent any immediate act from being effective. The jury in this case found that the defendant company's negligence consisted in excessive speed and neglect in not perceiving the motor-car sooner and then not exercising precaution to avert a possible accident. Consideration of the respective negligent acts and apportionment of the proper