Supreme Court Judgments re Contributory Negligence in Accident Case.

Canadian Railway and Marine World some little time ago gave particulars of a decision given by the Supreme Court in the case of Mrs. J. P. Hayes vs. Ottawa Electric Ry. Co. The judgments given by the various judges are of such importance to electric railway companies generally that they are given in full as follows:

DAVIES, J. I am to allow this appeal and dismiss the action on the ground that no negligence on the part of the motorman was proved or could be properly inferred from the evidence. The car was only 35 ft. away from the unfortunate man at the time the motorman could have appreciated or believed from the man's conduct and actions that he intended crossing the track. From that moment the motorman did everything in his power to prevent the accident and I fail to find from the evidence anything that he omitted to do that he should have done or that from the moment he did anything he should have refrained from doing. Even if it was possible to conclude that he then committed an error of judgment it was clearly in the "agony of collision," for which the company could not be held liable.

ANGLIN, J. If the question in this case were whether on the fiindings of the jury the judgment for the plaintiffs should be upheld, it may be that the cases of Long v. Toronto Ry., 50 S.C.R., p. 224, cited in the judgment a quo, would have some bearing upon it. But the grounds of appeal in this court are, as they appear to have been in the Appellate Division, that there is no evidence to sustain the findings of negligence against the defendant's motorman, and that the finding that the contributory negligence of the deceased did not continue up to the moment of the accident is contrary to the evidence. In so far as the result must depend upon a consideration of the evidence for the purpose of ascertaining how far it justifies these impeached findings, the Long case affords no assistance. So rarely are the circumstances of two cases identical in all material particulars that a decision upon a question of fact is scarcely ever of value as a precedent. The circumstances under which the motorman was found to have been negligent in the Long case differ widely from those with which we now have to deal. In the Long case, the unfortunate man who left the sidewalk was visible to the motorman at a much greater distance; a longer interval of time elapsed and the motorman had much greater opportunity for appreciating that Long was in a state of absentmindedness. Moreover, the victim himself became aware of his plight a moment or two before he was struck though too late to save himself, while the unfortunate Hayes appears never to have been conscious of the oncoming car.

I have reached the conclusion that in the case at bar there was no evidence to support the findings of negligence against the defendant. It is conceded that the finding of defective equipment cannot be sustained. The other finding of negligence is "that the motorman should have stopped when he realized the danger." The jury subsequently added to this latter finding the following explanatory rider: "According to evidence submitted, the motorman first realized the danger of an accident when at a distance of 45 or 50 ft. Instead of taking up the slack, as stated, had he applied the brakes immediately, we think the accident would have been avoided. The motorman in his evidence admitted that he realized the man was going to cross the street, that he had in his hands the power to stop the car either by brake or reverse. We find that had the motorman acted more promptly, the accident would have been avoided."

The first observation to be made on this part of the verdict is that the jury was manifestly under a misapprehension in regard to the taking up of the slack. The only evidence on that point, given by the motorman himself, is that he had taken up the slack and had his brakes partially tightened before he reached Bronson Ave., i.e., while the deceased was still on the sidewalk and before the motorman had seen him. Upon all the evidence, it is well established that when the deceased stepped off the kerb to cross Somerset St., the front of the car, travelling at about 10 miles an hour, or 14½ ft. a second, was about midway on Bronson Ave., and some 45 to 50 ft. from the point of contact. To reach that point, the deceased had to move slightly less than 10 ft. The motorman's statement is that he first saw the deceased as he stepped from the kerb; that because he than apprehended that an accident might happen he immediately rang the gong to warn him; that at 30 ft., or about one second later, he realized that the deceased was not going to stop, became seriously apprehensive and at once applied the brakes as vigorously as he could, still gonging, and also shouting to the deceased, who continued to walk on with his head down, apparently oblivious of danger. That the motorman did all in his power and exercised his best judgment from the moment when he was 30 or 35 ft. from the point of contact, is not, and, upon the evidence, could not be contested. If he was at fault at all, it must have been in not applying his brakes or reverses the moment he saw the deceased step from the kerb at a distance of 45 or 50 ft. from him. That would imply that he should instantly have anticipated, merely because he saw the man step on to the roadway, that he was in a brown study, or otherwise so abstracted that the gong might fail to arouse him and that he might walk into the car without having become aware of its approach. It must be remembered that realization of these possibilities—they cannot be deemed probabilities—and action upon them to be effective must have been instantaneous. In a single second the car had travelled to within 30 or 35 ft. of the point of contact. No doubt a motorman driving a street car must always be alert. But, having regard to the practical necessities of street car operation, I am not prepared to hold that it was open to a jury to find, under the circumstances of this case, that in failing to apply his brakes instantaneously upon the deceased stepping off the kerb and before he had seen, or had any reason to think, that the sharp clanging of the gong would be ineffective, the motorman was guilty of negligence.

Every case of this kind must depend upon its own facts. A very slight difference in the circumstances may render conduct, which is justifiable and not improper in one case, negligent and indefensible in another. It would be quite wrong, and probably entirely futile, to attempt to define any standard of general application. I can only say that I fail to discover in the facts before us anything to warrant a finding of fault or negligence on the part of the motorman. If he made any mistake at all it was at most an error of judgment in a sudden emergency (The Khedive, 5 A.C. 876, 891), but even that is not established.

Moreover, although there is no finding of excessive speed, and the company therefore cannot be held liable on that ground, the distance travelled by the car after the motorman had applied the brakes with all his strength—about 150 ft. according to the weight of evidence—would rather indicate that no effort on his part made at 45 or 50 ft. from the point of contact would have prevented the accident.

In the view I have taken, it is unnecessary to dwell upon the finding that the contributory negligence of the deceased did not continue up to the moment of the accident. If, as the jury found, the deceased was negligent "by not using proper precautions crossing the street," there is nothing in the evidence to indicate any change in that respect before the accident. On the contrary, it would seem that Hayes remained oblivious of any danger, and proceeded with his head down towards the point of contact, until he was actually struck by the car. The learned trial judge, having had his attention called to the Long case, explained to the jury that by the 9th question—"Was the negligence, if any, of the deceased a continuing act of negligence up to the very moment of the accident"—he meant, "did he become aware that the car was approaching and was he oblivious of the danger, that is the sense in which that question is put." The jury answered "No." There was no evidence that the car was approaching. The evidence was all to the contrary. If it was essential to his being negligent in the last moment before the accident that he should have been aware of the approach of the car, this answer of the jury may be intelligible. But it is, from any point of view, very difficult to reconcile it with their finding that there was contributory negligence, in view of the evidence that there had been no change from the moment he left the sidewalk either in regard to his knowledge of the oncoming car, or in his attitude in, or manner of, approaching the danger point. But it is not necessary further to consider this aspect of the case.

Notwithstanding my reluctance to set aside the verdict of a jury upon a question of negligence, and my sympathy for the plaintiffs in their misfortune, I am for the foregoing reasons constrained to allow this appeal. The defendants are entitled to their costs throughout, if they should see fit to exact them.

BRODEUR, J. This is another of those too numerous street railway accidents. The victim, J. P. Hayes, was crossing Somerset St., in Ottawa, at the corner of Bronson Ave., when he collided with a street car and was killed. The verdict of the jury at the trial is a very unsatisfactory one. At first, it is found that the victim, by not using proper precautions in crossing the street, was guilty of negligence. It is common ground that the deceased stepped off the kerb and reached the track without looking if there was any danger. His negli-