[HIGH COURT OF AUSTRALIA.]

THE MUNICIPAL TRAMWAYS TRUST . APPELLANTS; DEFENDANTS,

AND

BUCKLEY . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Negligence—Contributory negligence—Evidence.

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ADELAIDE, *June* 6, 7.

Griffith C.J., Barton and Isaacs JJ.

The plaintiff's husband at about 10.30 p.m. on a dark, windy and rainy night was driving a heavy waggon drawn by four horses along a country road near Adelaide, on which was a tramway. The wheels on the off-side of the waggon were between the tram rails. An electric tramcar driven by a servant of the defendants at the rate of about 20 miles an hour coming up behind the waggon struck and overturned it and the plaintiff's husband was killed. The driver of the tramcar gave no warning of the approach of the car. In an action by the plaintiff against the defendants,

Held, that there was evidence of negligence on the part of the defendants' servants.

Held, also, that, assuming there was contributory negligence on the part of the plaintiff's husband which continued up to the time of the accident, there was evidence upon which a jury might find that the driver of the tramcar could, with ordinary care and diligence and notwithstanding that contributory negligence, have avoided the accident.

Decision of the Supreme Court of South Australia affirmed.

APPEAL from the Supreme Court of South Australia.

An action was brought in the Supreme Court by Isabella Amelia Buckley, administratrix of the estate of her husband George Alfred Buckley, deceased, against the Municipal Tram-

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ways Trust, to recover damages in respect of the death of intestate which she alleged was caused by the negligence of the defendants' servants. The defendants by their defence denied the negligence and alleged contributory negligence.

The action was heard before *Gordon* J. and a jury. At the conclusion of the plaintiff's case the learned Judge withdrew the case from the jury and directed judgment for the defendants with costs. On motion by the plaintiff to the Full Court a new trial was ordered.

From this decision the defendants now appealed to the High Court.

The facts are sufficiently stated in the judgments hereunder.

Sir Josiah Symon K.C. (with him *O'Halloran*), for the appellants. On the plaintiff's evidence the cause of the accident was the joint negligence of her husband and the driver of the tramcar and the case was properly withdrawn from the jury. The plaintiff's husband was not entitled to act without taking the due precautions which under the circumstances an ordinary person would take on the chance that the driver of a tramcar coming up behind him would be careful: *Fraser* v. *Victorian Railways Commissioners* (1); *Wakelin* v. *London and South Western Railway Co.* (2). The jury could not reasonably have found that the plaintiff's husband was absolved from taking those precautions which he might have taken. The duties of a person going on a tram track are the same as those of a person going on a level crossing, that is to say, he must be careful. Under the *Municipal Tramways Trust Act* 1906, although by sec. 84 the right of the public to use the roads on which the tram lines are laid is not abridged by anything in the Act, yet the tramcars have a superior right of user of the tram lines, and the public are bound to exercise greater precautions than would otherwise be the case. Under the circumstances it was negligence for the plaintiff's husband to drive on the tram track. Once contributory negligence is proved which continues until the moment of the accident, the plaintiff is disentitled to succeed.

(1) 8 C.L.R., 54, at p. 80. (2) 12 App. Cas., 41, at p. 56.

He also referred to *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1); *The Bernina* (2); *Reynolds* v. *Thomas Tilling Ltd.* (3); *Commissioner of Railways* v. *Leahy* (4); *Cliff* v. *Midland Railway Co.* (5); *The City of Brooklyn* (6); *The Anglo-Indian* (7); *Wood* v. *Detroit City Street Railway* (8); *Gilmore* v. *Federal Street Railway Co.* (9); *Drown* v. *Northern Ohio Traction Co.* (10); *Pollock on Torts*, 8th ed., p. 465; *Beven on Negligence*, 3rd ed., p. 547.

Poole, *Johnstone*, and *R. Homburg*, for the respondent, were not called upon.

GRIFFITH C.J. This was an action against the appellants for damages for the negligence of their servant in driving a tramcar, with the result that the respondent's husband, who was driving a waggon in front of the car, was killed. The place was a country road not far from the City of Adelaide, and the time was about a quarter past ten p.m. on a dark, windy and rainy night. The waggon, which weighed, with its load, between three and four tons, and was drawn by four horses, was being driven out from Adelaide, and the tramcar coming up behind it at a speed, according to the evidence, of twenty miles an hour, struck the waggon with such force as to drive it about 60 feet forward and overturn it, Buckley being killed. The speed at which the tramcar was travelling may, indeed, be inferred from the result. The gong was not sounded before the impact.

The first question raised is whether under those circumstances there was any evidence of negligence on the part of the driver of the tramcar fit for the consideration of the jury. The mere statement of the facts seems to me to answer the question. This being an application for a new trial it is very undesirable that the Court should say more than is absolutely necessary as to the facts. It is sufficient to say that a reasonable man might on the evidence come to the conclusion that the motorman who was driving the

(1) 3 App. Cas., 1155, at p. 1168.
(2) 12 P.D., 58, at pp. 61, 89.
(3) 19 T.L.R., 539.
(4) 2 C.L.R., 54.
(5) 22 L.T.N.S., 382, at p. 384.
(6) 1 P.D., 276, at p. 279.
(7) 33 L.T.N.S., 233.
(8) 50 Am. R., 259.
(9) 34 Am. St. R., 682.
(10) 118 Am. St. R., 844.

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tramcar was guilty of negligence in driving at that speed on such a night without giving warning of his coming. We all have sufficient experience as to the running of tramcars to know that, when a tramcar is approaching a vehicle which is proceeding in front of it, the motorman usually sounds a gong, which is, indeed, specially provided for the purpose of giving such warning. Under those circumstances to contend that there is no evidence fit to be submitted to a jury that the motorman was guilty of negligence is hopeless.

Then the appellants set up contributory negligence on the part of Buckley. It is put, first, in this way, that to drive a heavy waggon along that particular road on a dark, windy and rainy night with the wheels on one side of his waggon between the tram lines was, of itself, negligence. But the Statute expressly allows ordinary users of the highway to use that part of the road upon which the tramway is laid. The tramcars are, I think, entitled to precedence in the use of that part of the road, and we all know that when a vehicle is being driven along a tram track, and the driver knows that a tramcar is coming up behind him he usually gets out of the way. If he knows that a tramcar is coming up behind and does not get out of the way, and an accident happens, he is certainly guilty of negligence.

In my opinion a jury might reasonably think that Buckley was not guilty of negligence in being on the tram line. Possibly they might come to the opposite conclusion. That is the only point in the case on which I entertain any doubt. It was said that, being in that position, he was bound to keep a look-out behind him. We all know that many vehicles in ordinary use on streets are so constructed that the driver cannot look behind him. The most that can be urged on this point for the appellants is that the jury might think that Buckley ought to have looked behind him. On the other hand they might think that, considering the state of the weather, he was not bound to do so at the moment. There is, however, another alternative view. A jury might think that a man driving under those circumstances might reasonably expect to be warned by the gong, and expect that a tramcar would not arrive close behind him without giving such a warning that he would have time to get out of the way

before his waggon was struck. The most that can be said, then, is that it was a question for the jury. I myself have some doubt whether under the circumstances there was any evidence of contributory negligence fit to go to a jury.

But even if Buckley was guilty of contributory negligence, that is not sufficient to relieve the appellants. The general rule as to contributory negligence is well known. "The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident." Those are the words of Lord *Penzance* in *Radley* v. *London and North Western Railway Co.* (1). He went on to say:—"But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

Now it is contended that that doctrine only applies in a case where the plaintiff, having become aware of the defendants' negligence, has an opportunity of avoiding its consequences, and that, therefore, if the plaintiff's negligence continues as long as the defendant's negligence, the doctrine has no application. That is substantially the argument addressed to us, and some writers of text books seem to support it. But it is negatived by *Radley's Case* (2) itself. In that case the injury complained of was damage done to a bridge by two loaded trucks which had been left by the plaintiffs on a siding in such a position that the defendants' engine forced them against the bridge and broke it. That was negligence on the part of the plaintiffs, just as leaving an unattended waggon in the American case of *Gilmore* v. *Federal Street Railway Co.* (3). But Lord *Penzance*, after pointing out that the Judge in his summing up had said that there was evidence for the jury as to the defendants' negligence, said (4):—"But he failed to add that, if they thought the engine driver

(1) 1 App. Cas., 754, at p. 759.
(2) 1 App. Cas., 754,
(3) 34 Am. St. R., 682.
(4) 1 App. Cas., 754, at p. 760.

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might at this stage of the matter by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.

"In point of fact the evidence was strong to show that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine-driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. This substantial defect of the learned Judge's charge is that that question was never put to the jury."

For this part of the case I do not rely merely on the failure of the motorman to sound the gong, which was very relevant to the question of the plaintiff's negligence. For, besides that, another question arises, namely, whether the motorman ought not to have seen the waggon before him in sufficient time to have pulled up the tramcar before he struck it. That involves the questions of the speed at which the tramcar was travelling, the condition of the weather, and the other lights which were said to be burning in the vicinity. On the evidence a jury might reasonably have thought that with ordinary care and diligence on the part of the motorman, notwithstanding the previous negligence of Buckley, if there was any, in being on the tram line, the accident would not have occurred. If they had thought so the plaintiff would have succeeded. It was entirely a matter for the jury. I have abstained from expressing any opinion on the effect of the evidence, but in my judgment all the questions raised, except perhaps as to the plaintiff's contributory negligence, were questions of fact proper to be submitted to the jury. I think, therefore, that the appeal should be dismissed.

BARTON J. I am of the same opinion. What the Chief Justice has said so fully expresses what I desired to say that I have nothing to add, except that it seems to me the judgment of the learned Chief Justice of the Supreme Court was absolutely conclusive.

ISAACS J. I agree that this appeal should be dismissed. The conclusion arrived at by the learned Chief Justice of the Supreme

Court in his very able judgment was undoubtedly a correct one. The first question is whether there was evidence of negligence on the part of the defendants. In four particulars negligence is charged against them, first as to the look out, second, as to the speed of the tramcar, thirdly, as to the brakes not being applied, and, fourthly, as to the gong or bell not being sounded. Having regard to the circumstances as they existed on that night, I will only say at this stage, for the reason adverted to by the Chief Justice, that there was, in my opinion, ample evidence for the jury to form a conclusion as to whether there was any absence of reasonable care on the part of the said motorman in travelling at that speed, even if speed be taken alone, and much more when considering that speed in connection with the absence of any warning bell or any proper look out. I say the absence of a look out because, if the motorman had seen Buckley, it would have made the position very much worse for the defendants.

The next question is as to contributory negligence. I observe that *Gordon* J. said that it is important, in the event of a new trial being ordered, there should be something said as to whether the conduct of the plaintiff did, or did not, "amount to contributory negligence as a matter of law, or whether the issue should go to the jury as a question of fact." I think there can be no doubt that it must go to the jury as an issue of fact. In *Tobin* v. *Murison* (1), Lord *Brougham* said:—"Negligence is a question of fact, not of law, and should have been disposed of by the jury." In one sense whether or not there has been negligence or contributory negligence—for they stand on the same footing in this regard—may be looked at as a question of law, but only in this way. I quote the words of *Stephen* J. in *Watkins* v. *Rymill* (2), where, after speaking of the duty of the Court to set aside a verdict for being in opposition to the evidence, he said:—"It is, in one sense a question of fact, but it is a question of fact to which, by law, one answer only can be given, and this is the same thing as a question of law." Lord *Halsbury* put it in the same way in *Bist* v. *London and South Western Railway Co.* (3).

(1) 5 Moo. P.C., 110, at p. 126. (2) 10 Q.B.D., 178, at p. 190.
(3) (1907) A.C., 209, at p. 212.

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He said :—" We have no right to interfere with the finding of the County Court Judge upon a matter of fact. We can say, because then it becomes a matter of law, where there is no evidence upon which a reasonable man could find such facts as would give him jurisdiction—we can say as a matter of law, that it was a thing that he had no right to find, because he had not the materials upon which to find it." So it may in that particular sense be a question of law, but in any other sense the issue whether there has been negligence or not is a question of fact.

As to whether there was evidence of contributory negligence, we must not forget that the public right to go upon the tramway, subject to the necessary right of the defendants to run their tramcars unobstructed, is carefully preserved to the general public, and I cannot agree that it can be looked upon as negligence—even *primâ facie*—for any member of the public to pass along the highway or any part of it. No doubt when the tram track is used by a member of the general public he has no right to obstruct the passage of a tramcar, and he must remember in regulating his conduct that the tramcars cannot give way to him, that is to say, they cannot in the case of a possible collision leave the track and step aside. That is a circumstance to be borne in mind and one of the features to be remembered in arriving at a conclusion as to how a reasonable man would act in the circumstances.

The fact, therefore, that Buckley was on the tramline at the time is not in itself to be looked upon as negligence. The jury may or may not think that he did not look back sufficiently. They may or may not think that, if he had looked back more frequently, or if he had looked back at all, he might or might not have seen the tramcar approaching. They may think that he was to some extent negligent, but, even if they do, that does not conclude the question. I am unable to assent to the proposition put by *Sir Josiah Symon* that once negligence on the part of the plaintiff is found, even if that negligence is continuing down to the moment of the accident, the plaintiff is necessarily to be looked upon as disentitled to succeed on the ground of contributory negligence. The cases are overwhelmingly against that view. I will only refer to two fundamental decisions. One is

the celebrated donkey case, *Davies* v. *Mann* (1). There the negligence of the plaintiff was continuing down to the moment of the accident. He had fettered the four feet of the donkey, turned it into a public highway and left it there, and that negligence continued right down to the time when the donkey was injured. The Court held that, notwithstanding that that was so, and even if the donkey was to be considered as illegally, not merely negligently on the highway, that did not necessarily disentitle the plaintiff to succeed. The case was tried before *Erskine* J. and he put it to the jury that the action was maintainable, notwithstanding the negligence of the plaintiff, if the proximate cause of the injury was attributable to want of proper conduct on the part of the driver. A new trial was moved for and the Court of Exchequer, consisting of Lord *Abinger*, *Parke* B. and two other Barons refused the rule. Lord *Abinger* said (2):—"As the defendant might by proper care have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." *Parke* B. once more affirmed the rule that "although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them he is the author of his own wrong." Then he says as to the case in hand, the mere fact of negligence in leaving the donkey on the highway was no answer to the action unless the donkey's being there was the immediate cause of the injury, but if the cause of the injury was that of the defendant in driving too fast, the plaintiff's negligence in putting the donkey on the road would not bar the plaintiff. The defendant, he said—and this is extremely important here—"was bound to go along the road at such a pace as was likely to prevent mischief."

The other case is remarkable for its similarity to the present case except in one respect, the exception, however, not being one of principle, the vehicles meeting instead of going in the same direction. It is *Tuff* v. *Warman* (3). The plaintiff's barge kept

(1) 10 M. & W., 546.

(2) 10 M. & W., 546, at p. 548.

(3) 2 C.B.N.S., 740.

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no lookout, though the steersman saw the defendant's steamer some considerable distance off, and did not look again till within two or three yards, too late to prevent a collision. *Willes* J., who tried the case, said that, if the plaintiff's negligence was in any degree the proximate cause of the damage, he should fail, but not if it was only remotely connected with the accident if the defendant could by ordinary care have avoided it. And he put two questions to the jury. (1) Was the absence of a lookout negligence on the part of the plaintiff; and (2) If so, did it directly contribute to the accident. The direction was upheld by the Court of Common Pleas, and, on appeal, by the Exchequer Chamber (5). These decisions seem to me to be a complete answer to the argument here, and, if so, then the jury would have to consider whether, having regard to the well-known practice of the Tramway Company and their conduct in driving tram locomotives, as well as what was in any case reasonable in the circumstances, Buckley was justified in expecting some warning, and whether he by his conduct was negligent, and, if he was negligent, whether his negligence was such as proximately to be in any degree the cause of the accident. Of course, if he did so conduct himself as to be a proximate cause of the accident, his widow would not have any right to recover because he was the author or an author of his own injury. But, unless the defendants can show—and the onus is upon them—that Buckley's conduct was a proximate cause, then, notwithstanding he may have been guilty of some negligence, it seems to me upon the authorities that bind us, that the defendant's negligence, being itself a proximate cause, is not displaced as a cause of action, and that the plaintiff would still have a right to recover. For these reasons I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *T. S. O'Halloran.*

Solicitors, for the respondent, *Poole & Johnstone.*

B. L.

(1) 5 C.B.N.S., 573.

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