SOPHIE KUCZERYK (PLAINTIFF).....APPELLANT;

AND

TORONTO TRANSPORTATION COMMISSION (DEFENDANT)..... } RESPONDENT.

1937

* May 6.
* June 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Street railways—Passenger injured by a passing automobile after alighting from street-car which, to allow her to alight, had been stopped suddenly at a place other than a usual stopping place—Liability of street railway company—Evidence—Findings of jury.

Plaintiff was a passenger in defendant's street-car and, desiring to alight, signalled to stop, and went to the exit door at the side of the car. As the motorman did not slow down to stop at the usual car stop, she rang again. The motorman, noticing her at the exit door, quickly stopped the car at a point which was not a usual stopping place, and then caused the door to open. She alighted and was almost immediately struck and injured by an automobile driven by S. from the rear. She sued for damages. At the trial the jury found that defendant's motorman was negligent "in stopping the tram too suddenly at other than a customary car stop without taking proper precaution for the safety of passengers"; they negatived negligence in S. and the plaintiff. Judgment was given to plaintiff for damages, which was reversed by the Court of Appeal for Ontario ([1937] O.R. 256). Plaintiff appealed to this Court.

Held: The judgment for plaintiff at trial should be restored.

There is no absolute rule that the duty of a street railway company towards its passengers ends when they alight and that it is not responsible for any mishap that may overtake the passenger making his way to the sidewalk. Each case must depend on its own circumstances. There is a duty on the company not to place its passenger in danger at the moment of alighting or immediately thereafter. There were precautions that might have been taken by the motorman, which the jury, no doubt, took into account.

Per Duff C.J.: Defendant's duty was to exercise reasonable care for the safety of its passengers. What constitutes reasonable care (where no special rule of law comes into play) is a question of fact, to be determined according to the circumstances.

Sec. 37 (1) of the Ontario *Highway Traffic Act* (as to vehicles not passing a street-car which is stationary for taking on or discharging passengers) was intended to provide a specific safeguard for (*inter alia*) passengers leaving street cars. It imposes a duty upon drivers of motor cars directly, but has significance in relation to a street railway company's execution of its duty to exercise reasonable care in the carriage of passengers. The conduct of a company, which stops its car for the discharge of passengers at such a place and in such a manner as to render nugatory said statutory safeguard, is a circumstance not irrelevant in determining whether it has acquitted itself of its obligations to them. *Ex facie*, it is not a wholly unreasonable con-

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

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clusion that the company is not sufficiently attending to the safety of passengers if it acts in disregard of the contingency (when the emergence of that contingency ought to be foreseen as a practicable possibility) that a motor car may at the moment be in the act of passing and may, if the street-car is too suddenly stopped and the doors too suddenly thrown open, be carried through the place where passengers are alighting. In the absence of circumstances implying assumption of the risk by the passenger (which in itself in most cases would probably be an issue of fact for the jury; and which assumption of risk could not be affirmed in the present case) it is a question of fact for the jury whether, in managing its street-car in such a manner as to deprive descending passengers of the safeguard contemplated by the statute, the company is fulfilling its duty to take reasonable care for its passengers' safety.

Further, in the present case, it was, upon the evidence, open to the jury to take the view that the sudden stopping of the street-car might set up motions in the car itself, which, when the doors were opened almost simultaneously with the application of the brakes, might cause the plaintiff, in descending, to lose her balance and distract her attention from street traffic; and that such things did occur and had that effect upon the plaintiff; and in such view it would be a natural and proper conclusion that defendant was not reasonably entitled to assume that no precautions on its part were necessary

There was evidence from which the jury might not improperly find that the situation of danger from the passing automobile was one created by the unreasonable and imprudent stopping of the street-car in the manner in which and at the place where it was stopped; and that this situation of danger ought to have been anticipated as a reasonably possible contingency; and that defendant could not reasonably assume that, in the circumstances, plaintiff, without negligence on her part, would not be unaware of the risk involved in defendant's acts or of the actual danger from the approaching motor car.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment at trial in her favour on findings of a jury) dismissed her action. In the action the plaintiff claimed damages for personal injuries received by being struck by an automobile after alighting from defendant's street-car (a "one-man" operated street-car, south bound on Bathurst street, Toronto) which, to allow her to alight, had been stopped suddenly at a place which was not a usual stopping place.

At trial, on verdict of a jury, the plaintiff recovered judgment for $2,000. This was reversed by the Court of Appeal (Fisher J.A. dissenting) which dismissed the action (1). Special leave was granted by the Court of Appeal to the plaintiff to appeal to the Supreme Court of Canada.

(1) [1937] O.R. 256; [1937] 1 D.L.R. 756.

The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal to this Court was allowed and the judgment at trial restored, with costs throughout.

R. Roy McMurtry and *B. J. Spencer Pitt* for the appellant.

Irving S. Fairty K.C. and *A. H. Young* for the respondent.

DUFF C.J.—I am in complete agreement with the reasons and the conclusion of my brother Hudson; but there are some additional observations which may, I think, be not without value.

The duty of the respondents is to exercise reasonable care for the safety of their passengers. What constitutes reasonable care (where no special rule of law comes into play) is a question of fact, to be determined according to the circumstances.

Before proceeding to discuss the facts it will be necessary to state briefly a consideration which would appear to be of some importance. By section 37 (1) of the Ontario *Highway Traffic Act:*

> 37. (1) Where a person travelling or being upon a highway in charge of a vehicle, or on a bicycle or tricycle, or on horseback or leading a horse, overtakes a street-car or a car of an electric railway, operated in or near the centre of the travelled portion of the highway which is stationary for the purpose of taking on or discharging passengers, he shall not pass the car or approach nearer than six feet measured back from the rear or front entrance or exit, as the case may be, of the car on the side on which passengers are getting on or off until such passengers have got on or got safely to the side of the street, as the case may be. Provided, however, that this subsection shall not apply where a safety zone has been set aside and designated by a by-law passed under the provisions of paragraph 48 of section 399 of *The Municipal Act,* but no vehicle or horse shall pass such safety zone at a speed greater than is reasonable and proper and in no event greater than ten miles an hour and with due caution for the safety of pedestrians.

The terms of this enactment sufficiently evince its purpose. It was intended to provide a specific safeguard for (*inter alia*) passengers leaving street cars, in respect of the peril (well recognized by everybody concerned with such matters) to which such persons were not uncommonly subjected from the incompetence or inattention of drivers of automobiles passing a street car on the side from which passengers are in the habit of leaving it.

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The statute is not designed principally for the protection of the careful, the alert, the circumspect. It is within the experience of everyone that for diverse reasons people emerging from a vehicle do not infrequently, by reason of inattention due to commonly operating causes, fail to take into account risks which would be obvious to a person on the alert for the dangers of the street.

The framers of the statute, no doubt, had in mind the ordering of traffic for the general convenience, but that one of its main objects is to secure the safety of persons intent on getting on or leaving street cars is indisputable.

The statute imposes a duty upon the drivers of motor cars directly; but it does not necessarily follow that the enactments of the statute are without significance in relation to the execution by the owner of the street car of his duty to exercise reasonable care in the carriage of his passengers. The statute having provided a specific safeguard for the protection (*inter alia*) of passengers alighting from street cars, the question whether the conduct of the street car owner, who stops his vehicle for the discharge of passengers at such a place and in such a manner as to render nugatory this statutory safeguard, is a circumstance not irrelevant in determining whether he has acquitted himself of his obligations to them as carrier of passengers, is a question which ought not to be lightly dismissed.

The legislation has, in effect, declared that passengers on street cars ought to enjoy the protection of the safeguard prescribed. *Ex facie,* it is not, I think, a wholly unreasonable conclusion that the street car owner is not sufficiently attending to the safety of his passengers if he acts in disregard of the contingency (when the emergence of that contingency ought to be foreseen as a practicable possibility) that a motor car may at the moment be in the act of passing him, and may, if the street car is too suddenly stopped and the doors too suddenly thrown open for the exit of passengers, be carried, in spite of the driver's efforts, through the place where passengers are alighting, with consequent molestation of, and injury to, such passengers.

It is conceivable, of course, that the passenger may, by his words or conduct, assume the risk; but that, as we shall presently see, cannot be affirmed in this case. In the absence of circumstances implying assumption of the risk

by the passenger (which in itself in most cases would probably be an issue of fact for the jury), it would appear to be a question of fact for the jury whether, in managing his street car in such a manner as to deprive descending passengers of the safeguard contemplated by the statute, the owner is fulfilling his duty to take reasonable care for the safety of his passengers.

But the conclusion I have reached may be put also upon a narrower ground.

There is evidence from which the jury might conclude that the sudden stopping of the car in the manner in which it was effected in this case might not improbably set up motions in the car itself which, when the doors are opened, as here, almost simultaneously with the application of the brakes, may deprive a descending passenger of full control of his movements, completely distracting his attention from the possible proximity of approaching motor cars. I find myself unable to accept the view that the appellant must be held upon her own evidence to have been in a position immediately before leaving the steps to observe the approaching car. Her English is very imperfect and whatever doubt there may be upon other points, she is attempting to say, it seems to be quite clear, that she was thrown off her balance and lost, in consequence, control of her movements. She says the car was *still moving* when the door was opened and "I like fly from the car." In cross-examination she says:

Q. Now, you did not fall off the street car?
A. I didn't fall; just like somebody threw me out, and I fell on my feet.

* * *

Q. He stopped the car?
A. Yes, and the door was open, and I held it in my hand and he started the car sudden and it like threw me out * * *
Q. You lost your balance?
A. Yes.

On re-examination she says:

A. No. when the car try to stop, and move, I try to make the step, and it threw me off.

The witness Wojonski in cross-examination says:

A. I see her when the door is open from the street-car, and the lady is gone.

* * *

Q. Did she fall?
A. She fall.

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Q. Did she fall out of the street-car?
A. Yes.
Q. She fell out of the street-car?
A. She fell down on the road.

* * *

Mr. JUSTICE MCFARLAND: * * * Would she have fallen down on the road if there had not been any automobile there at all?
A. Yes, she fall.

The witness Saracini in examination in chief says:

When you put the brakes on a car *so quick* there will be a certain amount of sway.

The evidence of the appellant and Wojonski that, in leaving the street car, she lost her balance, is supported by Saracini's evidence that the street car was still swaying when his car and the appellant came into contact; and continued to sway until the door was closed. Saracini says the sudden stopping of the car would set up a swaying motion and that such was its effect on the occasion in question. Moreover, Saracini says that, after reaching the ground, the appellant was "staggering." The motorman says he stopped the car as quickly as he could. Saracini says that when a car is brought to a stop as abruptly as on this occasion a swaying motion will be set up. He was for some years a conductor in the employ of the respondents; and there is no apparent reason why the jury might not, on this point, properly accept his evidence.

There was, therefore, evidence for the jury that such a sudden stopping of the car would be calculated to embarrass the passenger in the attempt to descend and to distract her attention from the traffic in the street; and that it, in fact, had such affect upon the appellant. It is impossible to affirm as a proposition of law that, in the circumstances, the respondents were entitled to act upon the assumption that she was in a situation to take care of herself. She had rung once without response; she rang a second time before the usual stopping place was reached and, although she, no doubt, observed, before alighting, that the car had passed the usual stopping place, it was not necessarily inconsistent with reasonable conduct on her part that she should not have anticipated the suddenness of the motorman's action or its effects, either on the motions of the street car itself, or in rendering it impracticable for the driver of a motor car in the situation of Saracini to stop in time to enable her to pass on to the sidewalk unmolested.

These were all matters within the special cognizance of the respondents. The argument that a jury might not properly think that such matters, in the circumstances, would not probably present themselves in all their practical significance to the mind of a passenger (especially one disturbed in mind as they may very well have supposed the appellant to have been in view of the possibility of being carried on to the next stopping place) is not, to me, a very convincing one. Nor can I endorse the proposition of law, that, the facts being such as I have stated, the passenger must be taken, by ringing the bell a second time, to have assumed the risk of what happened in consequence of the ill-advised sudden stop and immediate opening of the doors.

The views of Mr. Justice Middleton are, I think, summed up in this passage:

> From this evidence it is clear that what happened was that the plaintiff succeeded in reaching the pavement. She was then entirely free from the street-car. She took one step upon the pavement and looked and saw the automobile approaching. She attempted to step back towards the street-car and did take one step backwards, but, this not being sufficient, she was struck by the approaching automobile and so injured.
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> It will be noticed that, at the trial, notwithstanding the endeavour of the plaintiff's counsel to get her to say that she fell from the street-car, she adhered to her former statement that she did not fall until struck, that she was safely on the pavement and off the street-car, took one step towards the sidewalk and, thinking of cars, she turned around to see if any automobile was approaching, tried to step back to a position of safety and was hit by the automobile.
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> At the trial she endeavoured to show that, at the time she alighted from the car, the car was yet moving and did not come to rest. On the examination for discovery, she had taken the position that the car had been stopped and that she was thrown out of the car by reason of the motorman "started the car sudden," thus causing her to lose her balance.
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> The jury found the driver of the automobile was not negligent, but they found the motorman was negligent "In stopping the tram too suddenly at other than a customary car stop without taking proper precaution for the safety of passengers." No explanation was had of this somewhat ambiguous and enigmatical answer. In the light of the proceedings at the trial I think its meaning becomes clear. It was not unlawful for the motorman to stop his car for the convenience of passengers at other than a regular stopping place. It was suggested that here a stop was made too quickly, made so quickly that it did not afford Saracini in his motor-car an opportunity of getting it under control. When the car had passed the usual stopping place Saracini was justified in assuming that it would not again stop until Queen street was reached and so was off his guard, and the car stopping suddenly at other than a customary car stop, he was excused and not subject to any adverse comment. The jury apparently thought that when stopping at other than a usual stopping place there was an obligation on the part of the railway company to take some pre-

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caution for the safety of passengers from the risk of passing automobiles. What precautions precisely should have been taken the jury have not intimated.

We think that the duty of the street railway company towards its passengers ends when they alight from the car, and that the railway is not responsible for any mishap that may overtake the passenger making his way to the sidewalk. The operation of these one-man cars is authorized by the law, and it is obvious that a motorman who is located at the front of the car discharges his entire duty to the passenger when he brings the car to a standstill and opens the door, thus permitting the passenger to alight. The passenger when alighting must take all precautions necessary to ensure his own safety and must observe whether there is any danger from a passing automobile. The motorman would not be justified in starting up the car until he had seen that the passenger had safely reached the ground. His duty was to observe this through the mirror provided for that purpose. The jury having by the answers given in effect negatived all other charges of negligence, the action must, as a result, be dismissed.

As will appear from what I have said, I am, with the greatest possible respect, unable to agree that the view stated in this passage as to the effect of the evidence is one which the jury was bound to accept and act upon. There is some confusion, no doubt, in the evidence of the appellant, but, as I have said, she adheres firmly to the statement that she lost her balance and was involuntarily ejected from the car. This evidence is supported by Wojonski and corroborated by the statement of Saracini repeated more than once that, after reaching the ground, she "staggered" towards his car. Wojonski says, "One moment decided everything." If the jury took the view (which was open to them on the evidence) that the sudden stopping of the car would cause it to sway and that the motions of the car after the opening of the door did in fact cause the appellant to lose her balance, then the conclusion that the respondents were not reasonably entitled to assume that no precautions were necessary would be a natural and proper one.

There was evidence from which the jury might not improperly find that the situation of danger from the passing automobile was a situation created by the unreasonable and imprudent stopping of the car in the manner and at the place where it was brought to a stop. The jury were also entitled to hold that this situation of danger ought to have been anticipated as a reasonably possible contingency; and that the respondents could not reasonably assume that, in the circumstances, the appellant would not, without negligence on her part, be unaware of the risk involved in the

respondents' acts or of the actual danger itself from the approaching motor car.

HUDSON J. (all the other members of the Court concurring)—This is an appeal from a judgment of the Court of Appeal of Ontario allowing, by a majority of 2 to 1, an appeal from the judgment pronounced by the Honourable Mr. Justice McFarland, after trial with a jury, awarding the plaintiff $2,000 damages against the defendant, the Toronto Transportation Commission. The action was brought against the Commission and one Saracini for personal injuries arising under the following circumstances:

The plaintiff was a passenger in one of the defendant's street cars. Desiring to alight, she signalled the motorman and arose and went to the exit door at the side of the car. The motorman not slowing down to stop at the usual car stop, she rang again. The motorman, then noticing her at the exit door, quickly stopped his car at a point which was not a usual stopping place. He then did what was necessary to open the door, in order to enable her to alight. She did alight and was almost immediately thereafter struck and injured by an automobile driven by Saracini and approaching from the rear. The following questions were put to and answered thus by the jury:

1. Was the motorman negligent?

Answer: Yes.

2. If so, in what did such negligence consist?

Answer: In stopping the tram too suddenly at other than a customary car stop without taking proper precaution for the safety of passengers.

3. Was Saracini negligent?

Answer: No.

5. Was the plaintiff negligent?

Answer: No.

10. At what amount do you assess the plaintiff's damages? If any?

Answer: $2,000.

The majority of the Court of Appeal took the view that the duty of the street railway towards its passengers ends when they alight from the car and that the railway is not responsible for any mishap that may overtake the passenger making his way to the sidewalk, and that, therefore, as a matter of law, according to the answer of the jury to question 2 there was no negligence on the part of the motor-

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man. With this view I cannot agree and, in my opinion, there is no such absolute rule. Each case must depend on its own circumstances. There is a duty on the street railway not to place a passenger in danger at the moment of alighting or immediately thereafter. The question has been asked: What precautions might have been taken by the motorman? It is not difficult to suggest a number. In the first place, he might have brought his car to a stop more slowly and in this way given warning to the driver of the approaching motor car. In the second place, he might have kept the door closed after stopping for a few seconds, which would have enabled any motor car approaching from the rear to pass before the passenger was permitted to alight.

The jury, having expressly negatived negligence on the part of Saracini and contributory negligence on the part of the plaintiff, no doubt took into account precautions which might have been taken such as above suggested.

I would allow the appeal and restore the judgment of the trial court with costs here and below.

Appeal allowed with costs.

Solicitor for the appellant: *B. J. Spencer Pitt.*

Solicitor for the respondent: *Irving S. Fairty.*