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crossing and the jury is not the tribunal to which Parliament has entrusted the duty of determining what permanent protection should be installed: *Grand Trunk Ry. Co.* v. *McKay* (1). It is unnecessary to consider any of the other cases referred to by the Court below or relied upon by the respondent, *Lake Erie and Detroit River Railway Company* v. *Barclay* (2); *Imerson* v. *Nipissing Central Railway Company* (3); *Montreal Trust Company* v. *Canadian Pacific Railway Co.* (4); *Anderson* v. *Canadian National Railway Co.* (5). In none of them were the circumstances similar to those in the present case.

The appeal should be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *J. Q. Maunsell.*

Solicitor for the respondent: *H. A. O'Donnell.*

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*June 5
*June 20

GRAY COACH LINES LIMITED AND LESLIE WHITE (DEFENDANTS) } APPELLANTS;

AND

LEONA PAYNE (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Collision—Action for damages—Jury's findings—Principles applicable on question as to setting them aside.

In a case tried by a jury, the question whether there is any evidence on any particular issue is distinct from that whether the jury's verdict may stand as being one to which reasonable men might have come. In the latter enquiry the principles to be followed are as set forth in *McCannell* v. *McLean,* [1937] S.C.R. 341, where it is said at p. 343: "The verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it." If, however, there is no evidence, then an appellate court has the right and the duty to set aside the verdict.

*PRESENT: Kerwin, Hudson, Taschereau, Rand and Estey JJ.

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The present action was for damages for death of a passenger in a motor car which collided with defendant's coach. The jury found negligence against defendant and against the driver of the car in which the deceased was a passenger, and apportioned the fault. This Court held that, as to one finding against defendant by the jury, reading it in connection with all the answers of the jury, it was fairly arguable that it fell within negligence alleged, and, in accordance with the principles above mentioned, the action should not be dismissed; but, as to the other finding against defendant by the jury, there was no evidence to support it, and as this wrongful finding might have influenced the jury in their apportionment of fault, there should be a new trial.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario dismissing their appeal from the judgment of Hope J. at trial upon the findings of the jury.

The plaintiff, suing under *The Fatal Accidents Act*, R.S.O. 1937, c. 210, claimed damages for the death of her husband, a passenger in a motor car driven by one Rimmer, caused when the said motor car, proceeding easterly on Ontario Highway No. 2, came into collision with the defendant company's motor coach, driven by the defendant White, proceeding westerly. The accident occurred at about 10 p.m. in the evening of December 24, 1942.

The questions to and answers by the jury are set out in the reasons for judgment in this Court *infra*. They found negligence (causing or contributing to the accident) in the defendants and in Rimmer; their findings being: a certain finding against the defendant company as to the brakes; a finding against the defendant driver (White): "poor judgment used. Instead of turning left, he should have turned to the right"; and a finding as to Rimmer that "he had been driving more to the north side of the road previous to the accident and in our opinion he failed to pull over to the south side of the road as soon as he might have". They apportioned the fault: against the defendants 80 per cent. and against Rimmer 20 per cent.

An appeal by the defendants to the Court of Appeal for Ontario was dismissed (*per* Gillanders and Laidlaw JJ.A.; Henderson J.A. dissenting). Laidlaw J.A., with whom Gillanders J.A. agreed, stated that he had concluded that the Court could not interfere with the jury's findings or with the judgment entered thereon; he was unable to say that the jury's findings were unsupported or that they did

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not constitute good findings in law; while he did not agree with all their findings, he could not substitute his conclusions as to the facts for those of the jury; it was not open to him to determine that the findings of a jury were perverse or unfair so long as there was some evidence in support of them; it was not for the Court of Appeal to test or re-test the weight of the evidence. Henderson J.A., dissenting, held that there was no evidence whatever to support the jury's finding as to the brakes; and that their finding against the defendant White, "poor judgment used. Instead of turning left, he should have turned to the right," could not be supported; that White "was at the time and at the last moment in the agony of the emergency attempting to avoid the motor car which was travelling on his side of the road and in that effort he turned his motor coach to the left. Unfortunately the motor car which was approaching the motor coach on its wrong side of the highway, at the last moment was also turned to its driver's right, but the finding of the jury in answer to the fourth question makes it clear that it was the motor car which was travelling on the wrong side of the highway up until the instant preceding the collision"; and that it could not be negligence for White to act as he did in the circumstances.

The defendants appealed to this Court.

I. S. Fairty K.C. and *A. H. Young K.C.* for the appellants.

J. W. Pickup K.C. and *I. Levinter K.C.* for the respondent.

The judgment of the Court was delivered by

KERWIN J.—The widow of George Francis Payne brought this action under *The Fatal Accidents Act* of Ontario for damages for the death of her husband, caused by the alleged negligence of the appellants, Gray Coach Lines Limited and Leslie White. On December 24th, 1942, Payne was a passenger in a motor vehicle owned and operated by Ernest Rimmer. The motor vehicle was proceeding easterly on Provincial Highway No. 2, in the Township of Toronto, when it was struck by a coach or autobus owned by the appellant Gray Coach Lines Limited, and being driven by the appellant White in a west-

erly direction. The action was tried with a jury which, after a charge that is not now objected to, answered the questions put to them as follows:—

1. Was the accident caused or contributed to by any fault or negligence of the defendants or either of them?
   Answer: ("yes" or "no")—"Yes."
2. If the answer to No. 1 is "yes" then state fully in what did the fault or negligence of the defendants or either of them consist?
   (*a*) (the defendant company)—"Faulty brakes. Reason:—Taking into consideration the condition of the highway the brakes did not act according to the test of the Gray Coach Lines."
   (*b*) (the defendant driver)—"Poor judgment used. Instead of turning left, he should have turned to the right."
3. Was the accident caused or contributed to by any fault or negligence of Rimmer, the driver of the automobile in which the deceased was a passenger?
   Answer: ("Yes" or "no")—"Yes."
4. If the answer to No. 3 is "yes", then state fully in what did the fault or negligence of Rimmer consist. "He had been driving more to the north side of the road previous to the accident."
5. If the answer to No. 1 is "yes" and to No. 3 is "yes", then state if in your opinion it is practicable to apportion the degree of fault or negligence as between the parties?
   Answer ("yes" or "no")—"Yes."
6. If the answer to No. 5 is "yes", then state the proportion of fault or negligence attributable to each:—
   (*a*) the defendants 80%
   (*b*) the driver Rimmer 20%
   100%
7. Regardless of the degree of fault attributable to either party, state the amount at which you assess the *total* damages of the plaintiff.
   $8,500 Plus Costs.

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The jury were sent back to clarify their answer to question 4 to which they thereupon added the words "and in our opinion he failed to pull over to the south side of the road as soon as he might have." While apparently considering that the findings were not justified, the trial judge entered judgment for the plaintiff for the sum of $6,800 and costs. On an appeal by the defendants to the Court of Appeal for Ontario, Mr. Justice Laidlaw, with whom Mr. Justice Gillanders agreed, considered that he was precluded by the law and the evidence from interfering with the jury's findings. Mr. Justice Henderson was of the opinion that there was no evidence to warrant the jury's findings against the defendants.

In a case tried by a jury the question whether there is any evidence on any particular issue is distinct from that whether the jury's verdict may stand as being one which reasonable men might have come to. *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austin et al.* (1). The principles which must be followed in the latter inquiry are set forth in *McCannell* v. *McLean* (2), where Chief Justice Sir Lyman Duff states, at page 343:—

> The verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

As was there pointed out, the same rule had been set forth in numerous cases in this Court, the then most recent one being *C.N.R.* v. *Muller* (3), and was the same guide by which the judges in England had governed themselves as exemplified in the judgment of Lord Wright, delivered in the *Mechanical* case (1), which judgment was adopted by Lord Atkin and Lord McMillan. The same rule has been consistently followed ever since.

If, however, there is no evidence, then a Court of Appeal has the right and the duty to set aside a verdict. It was admitted on the argument before us that the amendment allowed by the Court of Appeal to the particulars of negligence alleged in paragraph 7 of the statement of claim so as to add thereto clause (*j*), "the defendant's bus was being driven with faulty brakes", had really been permitted by the trial judge although the record had not been amended.

(1) [1935] A.C. 346.
(2) [1937] S.C.R. 341.
(3) [1934] 1 D.L.R. 768.

There is no evidence upon which the jury could say in the answer to question 2 (*a*) that the fault or negligence of the defendant company consisted of "Faulty brakes. Reason,—taking into consideration the condition of the highway, the brakes did not act according to the test of the Gray Coach Lines." The only testimony upon this point is that of the witness Wood, a service mechanic in the employment of the appellant company. On December 21st he tested the brakes on the coach concerned in the accident and merely testified that the coach could be stopped in a certain number of feet, depending upon whether the foot-brake or hand-brake was used. He was not cross-examined. White, the operater of the coach with a full coach load of passengers did not attempt to apply any brake so as to bring the coach to an immediate stop.

If this were the only fault or negligence found against the Coach Company or the driver, the action should be dismissed. However, the answer to question 2 (*b*) as to the fault or negligence of the driver is given as "poor judgment used. Instead of turning left he should have turned to the right." There is considerable force in Mr. Fairty's argument that the latter part of this answer applies to what the coach driver should have done in an emergency but, upon consideration, I am unable to say that that is the only way in which it may be construed. In any event, the first part, "poor judgment used", must be taken in connection with all the answers and, so reading it, it is fairly arguable that it falls within the negligence alleged in the statement of claim. Of course, any difficulty on the score of pleading felt by the Court of Appeal was removed by its order permitting an amendment. Under all the circumstances, I am not disposed to quarrel with that order since the Court of Appeal must have concluded that such an amendment did not deprive the defendants of their right not to be called upon to meet a case not open on the pleadings.

On the whole case I find it impossible, in accordance with the principles already adverted to, to dismiss the action, but, as in *Reynolds* v. *C.P.R.* (1), the wrongful finding of the ground of negligence against the Company in the answer to question 2 (*a*) may have influenced the

(1) [1927] S.C.R. 505.

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jury in their apportionment of the fault or negligence attributable to the defendants and Rimmer. There should, therefore, be a new trial upon the record as amended. The appellants are entitled to their costs in the Court of Appeal and in this Court and the costs of the abortive trial will abide the event of the new trial.

Appeal allowed with costs; new trial directed.

Solicitor for the appellants: *I. S. Fairty.*

Solicitor for the respondent: *A. M. Garrison.*