53, 1932

No. 13 of 1932.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN—WINNIPEG ELECTRIC COMPANY (Defendant) APPELLANT

AND

JACOB GEEL (Plaintiff) ... ... RESPONDENT.

RESPONDENT'S CASE.

CASE FOR THE RESPONDENT.

RECORD

1.—This is an appeal by special leave from the judgment of the Supreme Court of Canada (Duff, Rinfret, Lamont and Cannon JJ. and Maclean J. ad hoc) affirming the judgment of the Court of Appeal for Manitoba (Prendergast, C.J.M. and Fullerton, Dennistoun, Trueman and Robson JJ.A.) dismissing the Appellant's appeal from the judgment of Dysart J. and a jury in the Court of King's Bench for Manitoba, awarding the Respondent damages in the amount of Eleven thousand one hundred and fifty-eight dollars and twenty-five cents ($11,158.25) for injuries sustained by him when the standing motor car in which he was seated was struck by Appellant's motor omnibus.

10 2.—It is not disputed that the accident was caused entirely by the failure of the brakes upon the Appellant's bus nor is it disputed that the measure of damages suffered by the Respondent is properly assessed at Eleven thousand, one hundred and fifty-eight dollars and twenty-five cents ($11,158.25) if Appellant's liability is affirmed.

3.—The accident occurred about 9 o'clock in the evening of the 22nd April, 1928, on Portage Avenue in the City of Winnipeg, while the respondent was returning home after attending a religious service held in a hall on that street.

4.—He was seated in the rear seat of an open touring automobile which p. 40, l. 17
20 had stopped at the intersection of Portgage Avenue with a cross street, known as Donald Street, to await the turning of a traffic signal light from "STOP" to "GO".

5.—While the car was so waiting, the Appellant's bus travelling, in the same direction, approached the intersection and the driver, intending to stop behind the car and await the turning of the traffic light, moved his right foot p. 130, l. 38

RECORD — to the foot brake pedal and pressed it hard down, but the brakes did not respond. Then he turned towards the curb and at the same instant pulled on his emergency brakes but they hardly reacted and the bus then struck the rear of the car in which the Respondent was seated and knocked it forward.

6.—The Respondent was seated in such a way that the force of the collision jerked his head violently back and caused a cerebral injury from which paralysis agitans developed in so severe a form as to render him totally incapable of following his trade as a house painter or, for that matter, of doing any work at all.

7.—Until the moment of the accident the evidence established that he had been at all times free from illness and had enjoyed the most robust good health, whereas, he was altogether incapacitated thereafter and the medical evidence shewed that his condition would become steadily worse with every prospect of death intervening within five years of when the accident occured.

p. 32
p. 65, l. 28
p. 74, l. 30
p. 65, l. 43

8.—The Respondent, having sued for damages, proved his injuries and that they were caused by the bus owned by the Appellant and driven by its servant and he relied upon the Manitoba Motor Vehicle Act then in force (Chapter 131, 1924, Consolidated Amendments) of which sections 15, 22 and 62 read thus—

Section 15.

" Every motor vehicle shall be equipped with adequate brakes " sufficient to control such motor vehicle at all times, and with a " windshield wiper, and also with suitable bell, gong, horn or other " device which shall be sounded whenever it shall be reasonably necessary " to notify pedestrians or others of the approach of any such vehicle."

Section 22.

" No person shall operate a motor vehicle upon a public highway " unless such person shall have complied in all respects with the " requirements of this Act."

Section 62.

" When any loss, damage or injury is caused to any person by a " motor vehicle the onus of proof that such loss, damage or injury did not " arise through the negligence or improper conduct of the owner or driver " of the motor vehicle, and that the same had not been operated at a rate " of speed greater than was reasonable and proper having regard to the " traffic and use of the highway or place where the accident happened, " or so as to endanger or be likely to endanger the life or limb of any " person or the safety of any property, shall be upon the owner or driver " of the motor vehicle."

9.—This fixed the Appellant with liability unless it could establish that Respondent's injuries " did not arise through the negligence or improper conduct " of itself or its driver and, to rebut the presumption of negligence, the Appellant attempted to shew that the accident was caused by the fracture

of a brake pin due to some defect which could not have been discovered by careful inspection and that the bus and its equipment had been subjected to such inspection which had revealed nothing defective in its machinery or parts before the accident occurred. RECORD —

10.—A number of witnesses were called by the Appellant in support of its explanation but in the result there was between them considerable conflict on the important points of their evidence.

Erhardt, the driver of the bus, testified that the failure of his brakes had been the sole cause of the accident and that afterwards he had looked under the rear end of the bus and had seen "a portion of a rod or something hanging down from the brakes." p. 37, l. 18 p. 136 p. 132, l. 35

Holmes, the Appellant's superintendent of bus and brake equipment, produced two diagrams shewing "the correct diagram of the braking equipment on that particular bus" and explained in his evidence that the failure of the brakes was due to the loss or breaking of a small pin in one end of a brake "evener" or equalizer. By his evidence he shows the "evener" to be a part joining the rod from the brake pedal or hand brake lever to a round steel bar which runs across the bottom of the bus and which in turn is linked to the brake rods which actuate the brakes on the rear wheels. p. 138, l. 19 p. 140, l. 12 p. 141

Reference to Holmes diagram (Exhibit 10) shows that the "evener" Holmes described would be a different part situated in a quite different place from the rod which Erhardt, the driver, described "as hanging down from the brakes" and from the location of the pin which Johnson, the mechanic who repaired the bus after the accident, later testified that he replaced in a brake-rod at the rear of the bus and not in the "evener" at all. p. 150, l. 13 p. 132, l. 35 p. 151, l. 14

Holmes further explained that the bus in question had only one evener which operated both sets of brakes but the diagrams which he filed shewed two distinct and separate eveners each operating its own system of brakes. Erhardt also testified that the two brakes were on the one brake evener. p. 140, l. 24 p. 37, l. 27

Holmes also explained the company's practice was to inspect its buses every seven hundred and fifty (750) miles but that this bus had been permitted to run (1000) miles since its last inspection and in this last statement he was corroborated by the mechanic Colyer who made the last inspection on March 5th before the accident, which occurred on April 22nd. p. 142, l. 30 p. 143 l. 30 et seq. p. 147 l. 30 et seq.

11.—The Respondent failed to show that this White bus (Exhibit 9) was equipped with proper brakes adequate to control it, and in fact the evidence of Holmes shows that the Respondent had no other car in its service with a similar type of evener and brake machinery. p. 145 l. 32 et seq.

12.—The trial judge directed the jury thus:

"We have in this province for our guidance a Motor Vehicle Act, "section 63 of which states: p. 157, l. 12

"When any loss, damage or injury is caused to any person by a "motor vehicle, the onus of proof that such loss, damage or injury did "not arise through the negligence or improper conduct of the owner or "driver of the motor vehicle . . . . . shall be upon the owner or "driver of the motor vehicle." "In other words, by reason of that

RECORD

" enactment the onus is now upon the defendant to show that it was " not negligent, whereas normally in other cases it would be upon the " plaintiff to show that the defendant was negligent. The result of that " is that if the evidence is evenly balanced both ways the defendant has " not shewn that there was no negligence, and having failed in that, it " could be held liable for negligence or a breach of duty, because the " duty on the defendant is to free itself from the imputation of negligence. " In doing that the defendant has not to carry it to any unreasonable " extremes: it is just a mere preponderance in the balancing of the " evidence. If the weight is with the defendant, it should have the " benefit."

13.—The following questions were put to the jury and were answered thus:—

p. 169, l. 13 " (1) Was there any negligence on the part of the defendant which " caused the injury to the plaintiff?—A. Yes.

" (2) If you find there was such negligence, in what particulars as " alleged in the statement of claim did that negligence consist?—Answer: " Paragraph (f). In not keeping brakes and braking equipment in proper " repair, and insufficient inspection of said brakes.

" (3) If you find such negligence, at what do you assess the damages " of the plaintiff?—Answer: Ten thousand dollars ($10,000:00) plus " expenses as agreed to by counsel."

14.—The Court of Appeal for Manitoba divided on the Appellant's
p. 176, l. 6 appeal. Prendergast, C.J.M. and Robson, J.A., held that there was evidence upon which the jury could properly find as it did in favour of Respondent and
p. 194, l. 9 dismissed the appeal. Fullerton and Dennistoun, JJ.A., would have allowed
p. 181, l. 20, *et seq.* appellant's appeal upon the ground that its failure to make its regular inspections was only evidence of negligence where the Plaintiff was a passenger on the bus and not in the case where a third party not a passenger on the bus was concerned.

p. 184, l. 29, *et seq.* Trueman, J.A, would have granted a new trial because the trial judge and counsel had failed to note that Holmes, Appellant's superintendent of brakes and equipment, had testified that the service and emergency brakes on this particular bus were tied together by a single evener in such a way that any failure of this evener would put both brakes out of commission, whereas the diagrams which he produced in support of his evidence demonstrated the existence of two independent braking systems.

While it is unfortunate that the judge appears not to have mentioned this fact to the jury the Respondent submits that the only consequence likely to follow from this oversight would be one favourable to the Appellant's chances at the trial and cannot be invoked by it in aid of its appeal.

15.—Upon Appellant's appeal to the Supreme Court of Canada, the Court was unanimous in holding that the appeal must be dismissed and that the jury could reasonably find as it did.

Duff J. (with whom Lamont J. concurred) held that Section 62 of the Motor Vehicle Act quoted above created a presumption of negligence which

Appellant must meet by reasonable evidence in rebuttal sufficient "to satisfy "the judicial conscience of the tribunal of fact" and that the sufficiency of the explanations advanced will be considered by the tribunal in the light of the opportunities of knowledge possessed by the parties respectively, and that sufficient was said in the judgment of Robson J. in the Manitoba Court of Appeal to shew that the findings by the jury in this case could not be set aside by a Court of Appeal as being perverse or unreasonable.

He further held that the jury's answer to the first question (finding negligence) was really conclusive as it was not necessary for Respondent to give particulars of negligence and establish it as particularized when the law presumes negligence in his favour.

16.—Rinfret J. and Maclean J. ad hoc concurred in the judgment of the Cannon J. that the appeal must fail also upon the further ground that section 15 of the Manitoba Motor Vehicle Act, quoted above, imposed an absolute liability upon the Appellant to equip its buses with brakes adequate to control them *at all times* and that the mere failure of the brakes to control the bus just before the accident occurred was in itself sufficient to establish its liability for the injuries which the Respondent sustained.

17.—On behalf of the Respondent it will be contended that the judgment awarding him damages is right and should be upheld for the following and other

REASONS.

(1) Because he was entitled to recover reparation from the Appellant unless it is established that his injuries "did not "arise through the negligence or improper conduct" of the Appellant or its driver.

(2) Because the duty so cast upon the Appellant was not duly discharged.

(3) Because there was ample evidence to justify the jury in finding as it did and its verdict could not be set aside as being unreasonable or perverse.

(4) Because the finding of negligence by the jury in answer to the first question is conclusive.

(5) Because it was not the duty of the Respondent to furnish particulars of negligence and to establish negligence as particularized.

(6) Because negligence as particularized in paragraph (f) of the Statement of Claim was established to the satisfaction of the jury.

(7) And upon the grounds stated in the reasons for judgment of Mr. Justice Duff and Mr. Justice Cannon in the Supreme Court of Canada and in the factum filed by Respondent in that Court as well as in the reasons for judgment of the Chief Justice of Manitoba and of Mr. Justice Robson, of the Manitoba Court of Appeal.

EDMUND F. NEWCOMBE.
E. R. CHAPMAN.

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CASE FOR THE RESPONDENT.

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