53, 1932

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

BETWEEN

WINNIPEG ELECTRIC COMPANY,
(Defendant) APPELLANT,

and

JACOB GEEL,
(Plaintiff) RESPONDENT.

APPELLANT'S FACTUM

MESSRS. GUY, CHAPPELL & TURNER,
Appellant's Solicitors.

MESSRS. LARMONTH, BAKER & GIBSON,
Ottawa Agents for Appellant's Solicitors.

MESSRS. CHAPMAN, THORNTON & CHAPMAN,
Respondent's Solicitors.

GEORGE F. MACDONNELL,
Ottawa Agent for Respondent's Solicitors.

APPELLANT'S FACTUM

In the Supreme Court of Canada

BETWEEN:

WINNIPEG ELECTRIC COMPANY,

(Defendant) Appellant,

and

JACOB GEEL,

(Plaintiff) Respondent.

STATEMENT OF FACTS

The Plaintiff, Jacob Geel, brought this action against the Defen-
10 dant Winnipeg Electric Company to recover damages for personal injuries which he alleged were sustained by him on or about the 22nd day of April, 1928, at about 9 p.m. by reason of a collision between a bus operated by the Defendant and an automobile in which the Plaintiff was riding.

The Plaintiff was in the rear seat of an automobile driven by a friend and had proceeded ahead of the bus in a westerly direction along Portage Avenue in the City of Winnipeg. As they approached the intersection of Donald Street and Portage Avenue, the automatic traffic light signal at that point turned against Portage Avenue traffic
20 and the bus driver, who was proceeding at a moderate rate of speed, endeavoured to stop by applying his foot or service brake, and as is stated at case page 129, line 30 *et seq.*:

> "In applying my brakes to stop in accordance with the light signal, the brake at first seemed to grip, that is to take hold, and then snapped, allowing my brake pedal to go right down to the floor board. Realizing that something was wrong with my brake, the only opening I could see was to swerve in toward the curb to try to bring the car toward a stop. At the moment that my right front wheel hit the curb, my left front fender
> 30 struck the back end, that is the right fender, of this car that was standing there, bending the fender down towards the wheel and also bending the front portion of my left front fender in towards the tire."

This version of the accident was adopted by the Plaintiff as part of his case at case pages 35 *et seq.* At 37, line 18, the following

appears from the Examination for Discovery put in evidence by the Plaintiff:

> "Well then, the cause of the accident was the trouble with the brake? A. The little bolt, it is in the brake evener on the brake rods, I call it the brake mechanism; I don't know whether it was in the brake evener or the rod itself; it broke as I applied the brakes, letting my brake pedal go right through the floor board with no pressure on the brake.
>
> "This is the mechanism that is connected with the pedal?
> 10 A. Yes.
>
> "Didn't you have an emergency brake on? A. The emergency and the pedal brake of that car are on the one brake evener.
>
> "Did you try to use the emergency? A. I did put it on; as soon as I hit for the curb I put the emergency on.
>
> "And that didn't hold up? A. It held it up but not enough to stop me in time."

And at case page 131, line 11:

> "Q. Will you describe what the speed of your bus was from the time you attempted to put on the brake? A. At the
> 20 moment I hit the curb I would say I wasn't going any more than three, maybe three and a half miles an hour."

The automobile in which the Plaintiff was riding was rolled ahead a very short distance by the impact (variously estimated at from three to six feet). (Case pages 45, l. 40; 83, l. 22; 111, l. 41.) Upon alighting from the car, he was conveyed unwillingly to the Winnipeg General Hospital, where he was examined by Dr. Coppinger (case page 109, l. 43), who could find no marks of injury; whereupon, at his own request, he was allowed to proceed to his home. He did not return to work after the collision and some months later medical
30 diagnosis found him to be suffering from the disease paralysis agitans. An examination of the bus at the scene of the accident showed a brake rod to be hanging down under the chassis (case page 132, l. 34, and page 149, l. 32 to l. 40 *et. seq.*), and as the brakes were ineffective, the bus was towed to the garage, where it was found that a small bolt in the brake evener was missing and this was replaced.

At the trial before Dysart, J., and a jury, judgment was entered in favour of the Plaintiff for $11,158.00 and costs on the answers by the jury to the following questions:

> "1. Was there any negligence on the part of the Defendant
> 40 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? A. Paragraph F—in not keeping brakes and braking equipment in proper repair and insufficient inspection of said brakes."

The jury also found that the driver of the bus did everything possible under the circumstances to avoid the accident and exonerated him from any blame. (Case page 169, l. 29).

The Defendant appealed from the said judgment and verdict to the Court of Appeal for Manitoba, and the said Court dismissed the said appeal without costs, Prendergast, C.J.M., and Robson, J.A., being in favour of dismissing the appeal, Fullerton and Dennistoun, JJ.A., being in favour of allowing the appeal and Trueman, J.A., holding that the verdict and judgment could not be upheld, but in the 10 circumstances ordering a new trial.

The Defendant now appeals to the Supreme Court of Canada.

PART II

POINTS IN RESPECT OF WHICH THE APPELLANT ALLEGES ERROR

1. There was no negligence on the part of the Defendant, and the verdict and judgment are not supported by the evidence.

2. The learned trial judge failed to properly or sufficiently direct the jury as to the duty of the Defendant to keep brakes and braking equipment in repair and proper condition, and as to inspection there- 20 of, and should have told the jury the Defendant was under no higher duty to the Plaintiff than the ordinary careful motor car owner or driver.

3. The learned trial judge should have instructed the jury that, inasmuch as the evidence submitted established the cause of the accident, the question of onus as a determining factor of the liability did not arise.

4. The Court of Appeal having differed in opinion, the majority in favour of the Appellant should have allowed the appeal and set aside the verdict and judgment, failing which a new trial of the action 30 should have been ordered.

5. The damages awarded by the jury were excessive.

PART III

ARGUMENT

I. There was no negligence on the part of the Defendant.

The ordinary rule in negligence cases is that the onus of proving negligence lies on the party who alleges it, and as a rule also the mere proof that an accident has happened, the cause of which is unknown, is not evidence of negligence. See judgment of Bovill, C.J., in Simpson vs. London General Omnibus, L.R. 8 C.P. 390 at 392.

10. The learned Judges gave the following among other reasons for the judgment :— Record.

Chief Justice Prendergast expressed some doubt and did not find it necessary to say whether there was justification for the verdict of "Insufficient inspection of brakes." Although that might be a proper inference from the other part of the verdict he considered that the finding of negligence "in not keeping brakes and braking equipment in proper order," which meant that the Appellants did not rebut the statutory presumption against them in this respect, was justified by the evidence and sufficient to support 10 the judgment. He would accordingly have dismissed the appeal with costs. pp. 173-176.

Mr. Justice Fullerton, dissenting, held that section 15 of the Motor Vehicle Act does not create an absolute duty on the part of the owner of the motor vehicle, although the failure of the brakes to control the motor vehicle might afford *prima facie* evidence of negligence. At the very outside it would be the duty of the Defendants towards strangers to take reasonable care to see that the brakes of their omnibus were in working condition. Reasonable care is the care that a reasonably prudent man would take. No one suggests that the defect which caused the accident was a usual one or one that should have been anticipated and guarded against. The Plaintiff 20 was a stranger to the Defendants and towards him they owed no greater duty to take care than does the private owner of a motor car. The Plaintiff made his *prima facie* case by proving that his injuries were caused by the Defendants' omnibus and the case was, he thought, met by the Defendants showing that the accident was due to a defect in the brakes that could not reasonably have been discovered by the Defendants. The witnesses called by the Defendants were not cross-examined on the question of inspection and the Plaintiff called no evidence on the point. The jury found "Insufficient inspection of said brakes." The jury cannot set up an arbitrary standard of their own as to what constitutes sufficient inspection. They 30 must decide according to the evidence in the light of the duty that the Defendants owed to the Plaintiff. He considered that the finding of the jury was not supported by the evidence and would have allowed the appeal with costs. pp. 176-181. p. 177, l. 37. p. 180, l. 27. p. 181, l. 3. p. 181, l. 34.

Mr. Justice Dennistoun concurred with Mr. Justice Fullerton. p. 181, l. 43.

Mr. Justice Trueman held that looking at the course of the trial it could be gathered that the jury's finding of negligence was based on the breaking of the bolt and default in inspection, that a verdict so found could not be upheld and that the evidence was uncontradicted that it was not to be apprehended that the bolt would prove insecure, and that a better 40 inspection than that made was not required. pp. 182-185. p. 184, l. 29.

The trial, in his opinion, was abortive. Reading the verdict in the light of the charge, there was no finding on an essential branch of the case put forward by the Defendants. The Defendants needed a finding upon it in their favour, if they were to be exonerated from negligence, and were equally concerned with the Plaintiff in having it dealt with by the jury. He would have ordered a new trial. p. 185, l. 5.

Mr. Justice Robson did not consider that the jury went against the evidence in finding, in effect, that the Defendants had not satisfied them, as the tribunal of fact, that all proper precautions had been taken in order pp. 185-195. p. 194, l. 9.

Record.

to provide against risks which might reasonably have been anticipated. Although insufficient inspection was not charged in express language in the Statement of Claim, it was naturally involved in clause (f) of paragraph 5, to which the jury alluded in their finding. The matter of inspection was introduced by Defendants in seeking to meet the onus on them. He was in favour of dismissing the appeal with costs.

p. 203.

11. The Appellants appealed to the Supreme Court of Canada (Duff, Rinfret, Lamont, Cannon and Maclean JJ.) and on the 12th June, 1931, judgment was given dismissing the appeal.

pp. 204-207.

12. Mr. Justice Duff, with whom Mr. Justice Lamont concurred, stated :— 10

p. 204, l. 41 to p. 205, l. 3.

" The defence of the Appellants in substance was, that the equip-" ment of the motor bus was adequate, and that the collapse of the " brake mechanism, by reason of which the driver lost control of the " vehicle, was due to the fracture of a brake pin, owing to a latent " defect in the pin, not discoverable by careful inspection, and that " the bus and its equipment had been subjected to a proper inspection, " which had revealed nothing pointing to any deficiency in the " machinery."

p. 205, l. 43 to p. 206, l. 10.

He considered that the trial judge rightly directed the jury and that 20 section 62 of the Motor Vehicle Act created, as against the owners and drivers of motor vehicles, in the conditions therein laid down, a rebuttable presumption of negligence ; that the onus of disproving negligence remains throughout the proceedings ; and that if, at the conclusion of the evidence, it is too meagre or too evenly balanced to enable the tribunal to determine this issue as a question of fact, then by force of the Statute the Plaintiff is entitled to succeed.

p. 206, ll. 27-31.

The learned Judge did not discuss the facts. He considered that sufficient had been said in the judgment of Mr. Justice Robson in the Court of Appeal for Manitoba to show that on the evidence a finding by the jury 30 that the Appellants had not acquitted themselves of the onus cast upon them could not, as the law governing such matters stands, be set aside by an Appellate Court as a perverse or unreasonable verdict.

p. 206, ll. 32-35.

As to the form of the verdict the learned Judge considered the finding of the jury in answer to the first question conclusive and the answer to the second question could only be regarded as material if it tended to show that, in answering the first question, the jury had been misled into error.

pp. 207-210.

13. Mr. Justice Cannon, with whom Mr. Justice Rinfret and Mr. Justice Maclean concurred, quoted with approval the following statement as to the effect of the statutory onus imposed on the Appellants :— 40

p. 210, ll. 2-4.

They had " to produce evidence reasonably satisfying the tribunal " of fact that all proper precautions had been taken in order to provide " against risks which might reasonably be anticipated."

Record.

He considered that a Company using omnibuses of a capacity of twenty-five persons for the conveyance of the public was bound to inspect minutely the braking apparatus, and he said :— p. 210, ll. 10-12.

"The Courts' discretion was restricted by the Legislature when it "imposed the duty on the driver of having brakes sufficient 'at all "times' to control these dangerous machines. It was the duty of the "Defendant to equip all its motor vehicles with adequate brake service "to control such vehicles *at all times*. In order to be sure that the "brakes were efficient and sufficient at all times, it may be necessary 10 "to inspect them daily or even several times a day." p. 210, ll. 19-26.

14. The Appellants submit that the judgment of the Supreme Court should be reversed and the action dismissed for the following, among other

REASONS.

1. Because section 62 of the Manitoba Motor Vehicle Act does not increase the actual degree of care required apart from the Statute from owners and drivers of motor omnibuses or any other motor vehicles.

2. Because section 15 of the same Act as amended in 1927 dealing with brake equipment does not create an absolute or "insurers'" liability to individual citizens in respect of any failure of brakes. 20

3. Because there was no negligence on the part of the Appellants.

4. Because the Appellants disproved negligence.

5. Because there was no evidence on which the jury could find that the Appellants were negligent.

6. Because the uncontradicted and unchallenged evidence was "all one way" on the questions of keeping braking equipment in proper repair and of inspection of brakes.

7. Because the answer of the jury to the second question shows that the jury had been misled into error. 30

8. Because legislation as to the onus of proof should not be so construed or applied as to lead to decisions inconsistent with the common law as to negligence where no question of onus remains.

9. For the reasons appearing in the judgment of Dennistoun J.A. concurred in by Fullerton J.A. in the Court of Appeal.

D. N. PRITT.
E. H. COLEMAN.

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In the Privy Council.

No. 13 of 1932.

On Appeal from the Supreme Court of Canada.

BETWEEN

WINNIPEG ELECTRIC COMPANY
(*Defendants*) *Appellants*,

AND

JACOB GEEL - (*Plaintiff*) *Respondent*.

CASE OF THE APPELLANTS.

BLAKE & REDDEN,
17, Victoria Street,
S.W.1.

The jury found that the negligence consisted in not keeping brakes and braking equipment in proper repair and insufficient inspection.

There is no allegation in the Statement of Claim of insufficient inspection of said brakes. At most the duty which the Defendant was under in regard to its brakes, insofar as the Plaintiff was concerned, was a duty to take reasonable care, and it is submitted on the evidence that the only conclusion that can be reached is that reasonable care was taken. It is common knowledge that the ordinary careful automobile owner or driver does not make a minute examin-
10 ation of his brakes and other equipment on the car before driving same to ascertain if any pin or bolt has broken or dropped out, nor does reasonable care require it to be done; but if in driving the vehicle it is noticed that the brakes are not working or something is wrong with the car, it is of course the duty of the driver to see that that defect is remedied. It is not disputed and could not on the evidence be contradicted that the bus in question on the day in question made four or five trips to Transcona, a suburb of the City of Winnipeg, and return, and that the brakes brought the bus properly to a stop within a few blocks of the place where the accident occurred.

20 Moreover, insufficient inspection never caused an accident in itself. In order to uphold a verdict based on insufficient inspection of anything, there first must be a duty to inspect owed to the particular plaintiff and the defect must have been one which would have been disclosed on a reasonable system of inspection. The only duty, as already submitted, is that the Appellant owed to the Plaintiff the duty to take reasonable care according to the circumstances, and as the Plaintiff was not a passenger, the degree of duty was only ordinary care. In Phelan vs. Grand Trunk, 51 S.C.R., 113, the jury found that the Company had been negligent through lack of proper in-
30 spection. Reading from the headnote:

> "The obligation resting upon the Company both under the statute and at common law was discharged by the customary inspection of the car, which had been made according to what was shown to be good railway practice, and there was no further duty imposed in regard to unusual conditions not perceivable by ordinary methods of inspection."

In that case a car coupler failed to function owing to presence of snow and ice in its working mechanism.

Mr. Justice Davies, at page 116, states:

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> "On the common law liability of the Company invoked by the plaintiff, the only findings of the jury were that the defendant company was guilty of negligence, and that this negligence was therefore lack of proper inspection. This expressed finding negatives any other negligence on the defendant's part. I am unable to find any evidence warranting the jury's finding."

See also Mr. Justice Davies at page 118, where he states:

> "No witness gave evidence of anything omitted by these inspectors which ought to have been done by them, and if the jury in the absence of evidence drew inferences as to what should have been done in addition to what was done they should have stated what these inferences were and not put their finding in the vague and unsatisfactory language they used. There was much discussion as to the meaning and effect of their finding "through lack of proper inspection." There is an air of delightful
10 vagueness and uncertainty about it amply justified by the absence of any evidence."

And Anglin, C.J.C., then Anglin, J., at page 131, quotes with approval Osler, J.A., in Schwoob vs. Michigan Central, 13 O.L.R. 548 at 553, stating:

> "Want of inspection, unless there was some existing defect which inspection would have disclosed, is not defect or by itself negligence."

And at 133:

> "It is not within the province of jurymen to constitute them-
20 selves experts on such a technical question of proper railway practice and without any evidence to warrant such a course and against all the evidence before them to find that the method of inspection prescribed is improper. Jackson vs. Grand Trunk, 32 S.C.R. 245: If the verdict means that the system of inspection was improper, viewed as a finding upon an ordinary question of fact, it should be set aside not as being against the weight of evidence but as being against the evidence. Jones vs, Spencer, 77 L.T. 536: As Lord Herschell puts it at page 538, 'I cannot myself say . . . that the jury have found their
30 verdict upon the evidence.' Viewed as a finding upon a matter of technical knowledge, it is still less defensible."

Moreover, any person using a highway takes a certain risk in so doing or, as it is stated by Baron Bramwell in Holmes vs. Mather, L.R. 10 Ex. 261 at 267:

> "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect or put up with such mischief as reasonable care on the part of others cannot avoid."

The evidence discloses that the Defendant employed a reasonable system of inspection (case page 142, l. 30, *et seq.*, and case page 174).
40 This system of inspection was employed by the Defendant in order to meet the very high obligations cast upon it as a carrier of passengers. The finding of the jury specifically negatives any negligence on the Defendant in the operation of its bus on the occasion in

question. Consequently, it is submitted that the Defendant was not guilty of any negligence causing the accident.

II. The learned trial judge failed to properly and sufficiently direct the jury as to the duty of the Defendant to the Plaintiff to keep brakes and braking equipment in repair and proper condition, and should have told the jury the Defendant was under no higher duty to the Plaintiff than the ordinary careful motor car owner or driver. He was asked to so direct the jury by counsel for the Appellant (case page 166, line 1). Without such specific direction, the jury
10 were without proper instruction or guidance and unable to properly weigh the evidence, and the trial judge's charge (case page 158, line 22, *et seq.*), it is submitted, does not go sufficiently far without the addition of the instruction that the Defendant, notwithstanding that it was a transportation company, owed no higher duty to the Plaintiff than any other automobile driver on the street.

III. The learned trial judge should have instructed the jury that, inasmuch as the evidence submitted established the cause of the accident, the question of onus as a determining factor of the liability did not arise.

20 In Schonberner vs. Barron, 1927, 3 D.L.R. 708, Mr. Justice Ford, in the Alberta Supreme Court on legislation almost identical with the Manitoba section, reviews the cases and holds that "where a court is able on all the evidence to come to a determinate conclusion that an accident did not occur through the negligence of the driver of a motor car, the onus section in the appropriate motor vehicles statute cannot be applied to determine the action in favour of the other party to the action.

See also Harvey, C.J.A., in Turpie vs. Oliver, 1925, 4 D.L.R. 1023, at 1024, where he states:

30 "However, beyond shifting the burden of proof, the Act does not declare anything so far as applicable to this case to be negligence that would not otherwise be negligence. The evidence in this case being quite sufficient to show just how the accident was caused, the Defendant should not be held liable unless the facts established constitute negligence."

In Bradshaw vs. Conlin, 40 O.L.R. 494, Mr. Justice Riddell's judgment is to the same effect. The judgment of Mr. Justice Duff in Canadian Westinghouse vs. C.P.R. 1925, S.C.R. 579 at 584, is likewise to the same effect and similar in essence to the words of Viscount
40 Dunedin in Robins vs. National Trust 1927, A.C. 515, where it is stated:

"But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con. so evenly balanced that it can come to no sure conclusion—then the onus

will determine the matter; but if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it and need not be further considered.

See also Stanley vs. National Fruit Company, a decision of the Court of Appeal for Saskatchewan, 1929, 3 W.W.R. page 522, reading from the headnote:

> "The statutory onus does not increase the degree of diligence required of the owner or driver of a motor vehicle—his duties to others remain the same notwithstanding the shifting of the burden of proof."

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The Saskatchewan Court of Appeal reached the same conclusion as to the effect of the statutory onus, and adopted the principle enunciated by Lord Dunedin in Robins vs. the National Trust, 1927, A.C. 515, and by Mr. Justice Duff in Canadian Westinghouse vs. C.P.R. *supra*.

It is quite obvious from a consideration of the evidence, and indeed it is common ground, that the accident was due to the failure of the brakes to work on the occasion in question, and that being the case, it then became necessary to ascertain whether that fact in itself is evidence of negligence. As already submitted, the mere happening of the accident was not evidence of negligence.

20

The learned judges in the Court of Appeal for Manitoba who were adverse to the Appellant treated the finding of the jury, as to insufficiency of inspection of the brakes, as tantamount to a finding that the statutory onus had not been satisfied. It is submitted that it was not open to them to do so.

Prendergast, C.J.M., at page 183, line 5, states:

> "The appellants were bound to satisfactorily explain to the jury the primary cause of the accident, which could only mean that something was amiss in the braking machinery . . . possibly owing to some latent effect for which they were not responsible."

30

This, it is submitted, would place upon the Defendant the burden of demonstrating freedom from negligence, which the law does not require.

Duff, J., in Canadian Westinghouse vs. C.P.R. 1925, S.C.R. 579 at 584, in a case where the onus was on the defendants to prove freedom from negligence, states:

> "It is perhaps needless to say that the respondents, in order to bring themselves within this exception, are not required to show how the accident was brought about. They are not obliged to demonstrate 'freedom from negligence.' Evans vs. Astley, 1911, A.C. 678: It is sufficient if they produce evidence reasonably satisfying the tribunal of fact that all proper pre-

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cautions have been taken in order to provide against risks which might reasonably be anticipated."

At case page 183, line 10, *et seq.*, the learned Chief Justice submits the evidence to too microscopic an examination. The statement of the witness is to the effect (case page 149, l. 41, *et seq.*) that he repaired the bus by putting in a new pin, but the learned judge states:

"We did not even have the broad statement that everything but for the absence of the pin was in condition after the collision nor even that the brakes functioned properly after a new
10 pin was put in." Such a minute critical examination of the evidence should not be applied.

And he bases his judgment on the finding of negligence in not keeping brakes and braking equipment in proper order, which he says (case page 184, line 7):

"Only means that the appellants did not rebut the statutory presumption against them."

Robson, J.A., at case page 202, l. 23:

"The Plaintiff had a right to be on the street and it was simply a question for the jury whether the Defendants discharged the
20 onus that was on them."

It is submitted that Prendergast, C.J.M., and Robson, J.A., in so holding that the statutory onus of proof has not been satisfied in effect impose an absolute liability on the Defendant. Sections 15 and 62 of the Manitoba Motor Vehicle Act already quoted do not impose any absolute liability, nor is the statute similar to that under consideration by the Supreme Court of Canada in Hall vs. Toronto Guelph Express, 1929, S.C.R. 92. The Ontario section there under consideration provided "The owner of a motor vehicle shall be responsible for any violation of this Act. . ." That liability under
30 the Manitoba Act is based on negligence is seen from section 62 already quoted.

The case of Scottish Metropolitan vs. Canada Steamship Lines, 1930 S.C.R. 262, is referred to by Prendergast, C.J.M., as being specially applicable to the case at bar. This was a wholly different case to the one under consideration here. In that case the bolt, according to the evidence, had been bent at least for several months before it broke during the sixth trip of the season. There is no evidence that the bolt, which breaking caused the accident in the case at bar, was defective in any way. Moreover it appears, from
40 the judgment of Mr. Justice Smith at page 280, that the Defendant's engineer knew of the existence of the bend in the bolt and "that ought to have brought to his mind that some condition existed that ought not to exist and which indicated danger." In the case at bar

there was no possible suggestion of knowledge of any defect on the part of the Defendant.

For the foregoing reasons, it is submitted that it was not open either for the jury on the evidence or Prendergast, C.J.M., and Robson, J.A., to hold that the Defendant had not discharged the statutory onus.

IV. The Court of Appeal, having differed in opinion, the majority in favour of the Appellant, should have allowed the appeal and set aside the verdict and judgment, failing which a new trial of the action
10 should have been ordered:

The Court of Appeal divided as follows:

Prendergast, C.J.M., and Robson, J.A., would dismiss the appeal;

Fullerton and Dennistoun, JJ.A., would allow the appeal and dismiss the action; while

Trueman, J.A., held, at case page 192, l. 31, that the verdict could not be upheld but would order a new trial.

On this division of the Court, it is submitted that judgment should have been entered, not dismissing the appeal without costs, but allowing the appeal, and setting aside the verdict, or ordering a
20 new trial. The judges of the Court of Appeal were dealing with the appeal of the Defendant Company, and three members of the Court were against the verdict and judgment.

The Court of Appeal Act of the Province of Manitoba, 1913, chapter 43, section 14, provides:

> "Any three of the judges of the Court shall constitute a quorum of the court at any sitting thereof, and every order, decree, decision or judgment of such three judges at any such sitting, or a majority of them, shall be deemed to be the order, decree, judgment or decision of the Court."

30 The Supreme Court of Canada, in Confederation Life Association vs. Edmund O'Donnell, 13 S.C.R. 218, on such a division ordered a new trial, even sending the case back for a third jury trial.

V. The damages awarded by the jury were excessive. The medical experts called on behalf of the Defendant (case pages 88 and 115) show that the disease from which the Plaintiff was in fact suffering was not due to any injury which he could possibly have received on the occasion in question, and they gave as their reason therefor that this disease is within a part of the brain that it could not be affected by such an accident as the Plaintiff was in, but that at most it might
40 have advanced latent symptoms in the Plaintiff by perhaps about six months or a year at the outside. The medical witnesses called on behalf of the Plaintiff gave evidence to the effect that such an injury might be caused by the accident but were unable to give any substantial reason therefor.

The Appellant adopts and relies upon the reasoning of Fullerton, J.A., in the Court of Appeal, case page 184, with whom Dennistoun, J.A., concurs, and also upon the judgment of Trueman, J.A., (case page 190), but submits that Trueman, J.A., should have allowed the appeal and dismissed the action instead of ordering a new trial.

In conclusion, the Appellant asks that the appeal be allowed and the action dismissed, failing which a new trial of the action be ordered.

All of which is respectfully submitted.

R. D. GUY, K.C.,
10 *Of Counsel for the Appellant.*