

Tuesday, June 1.

SECOND DIVISION.

[Lord Guthrie, Ordinary.]

CASS v. EDINBURGH AND DISTRICT  
TRAMWAYS COMPANY, LIMITED.

(Reported *ante*, 1908 S.C. 841, 45 S.L.R. 675.)

*Reparation—Negligence—Tramway Car—  
Defective Construction—Obstruction of  
Driver's View by Stair—Board of Trade  
Regulations.*

The father of a child who was run over and injured by a tramway car raised an action of damages against the tramway company, and averred that the accident was due to the defective construction of the car in respect that the stair, which was of the reverse type, started from the left front of the platform and passed obliquely in front of the driver, so as to obscure the vision of the driver to the front and left front of the direction in which the car was travelling; that the driver in consequence failed to see the boy and avoid the accident; that the use by the defenders of this car was a breach of the Board of Trade regulation which required the car to be "so constructed as to enable the driver to command the fullest possible view of the road." The proof established that the car, originally passed by the Board of Trade seventeen years previously, and annually by the local authority, was of a type, as regarded the stair, no longer constructed; that the Board of Trade had stated, though the reason was doubtful, that such a stair should be avoided, but had not, even since the accident, objected to its use by the defenders; that the driver's view of a person on the foot pavement to his left front was obscured for a brief period, but only when such person was so nearly level with the car as to render it dangerous for him to attempt to cross; that in every type of car the stair obscured, more or less, the driver's view.

*Held* that the defenders were not in fault either as being in breach of the Board of Trade regulations or as having used a defectively constructed car.

*Reparation—Negligence—Contributory  
Negligence—Child of Four and a half  
Years Run over by Tramway Car—  
Failure of Child to Look out before Cross-  
ing Street.*

A child of four and a-half years of age was knocked down and run over by a tramway car and sustained serious injury. In an action of damage against the tramway company it was proved that the child suddenly left the foot-pavement and hurried across the street in front of the car, and that while he was doing so, instead of looking to see whether the street was clear, he was examining a bag of nuts which he had just bought and was carrying.

*Held* that the child was guilty of contributory negligence.

On 23rd December 1907 Henry Cass, insurance manager, 2 Bilton Street, Edinburgh, as tutor and administrator-in-law of his son William Henry Duncan Cass, who was run over and seriously injured by a cable car in Inverleith Row on 16th November 1907, raised an action of damages against the Edinburgh and District Tramways Company, Limited.

The pursuer averred that the accident to his son, who was four years and eight months old, was due to the defective construction of the car, which was one of eight in use in Edinburgh, fitted with stairs of the type known as reverse; that "said stair is built on a dangerous and obsolete system. It starts from the left front of the platform, and in gradually rising to the level of the top of the car it passes obliquely in front of the driver of the car in such a manner as to completely obscure his vision to the front and left front of the direction in which the car is travelling. Further, the said car, like all the other cars used by defenders, was provided with a guard in front, which is intended to prevent any obstruction which may be encountered by the car on the street from passing under the car or its wheels. The guard on the car, No. 127, was quite out of date and ineffective for that purpose, for it allowed the boy's legs to pass freely underneath it, and so allowed the wheels to pass over them. . . . Further, the regulations and bye-laws of the Board of Trade relating to defenders' tramways, provide that every car shall be so constructed as to enable the driver to command the fullest possible view of the road, and also that every car shall be fitted with a suitable lifeguard. . . . The said car was so constructed as to prevent the driver from commanding the fullest possible view of the road, and was not fitted with a suitable lifeguard; and defenders, in continuing to use said car as presently constructed, acted knowingly or negligently in violation of said regulation."

The defenders denied that the accident was due to fault on their part, and explained that the car was duly licensed by the city authorities.

The defenders further averred—"The said accident was due to, or was materially contributed to, by either (a) the fault of the pursuer's son in suddenly placing himself right in front of the car; or (b) to the fault of his parents in allowing a child of such tender age to wander unattended in a public street of the city."

On 6th March 1908 the Lord Ordinary (GUTHRIE) disallowed the issue proposed by the pursuer and allowed a proof.

The pursuer reclaimed, and on 23rd May 1908 the Court adhered and remitted to the Lord Ordinary [see *ante ut supra*].

Proof was thereafter led, the import of which sufficiently appears from their Lordships' opinions *infra*.

On 20th August 1908 the Lord Ordinary assoilzied the defenders.

*Opinion.*—"If damages were given in this distressing case they would obviously

be large. But I am not able to find that the damage suffered by the poor boy injured has been proved by the pursuer to have been caused by the fault of the defenders; and in any case I think the defenders have proved contributory negligence on the boy's part.

"Neither Mr Cass nor his witnesses, at the time of the accident or in the witness box, blamed William M'Donald, the driver of the car. If any driver could have been relied on to see the boy in time to save him, M'Donald would have seen him. He struck me as a man likely not only to be careful but hyper-conscientious in the discharge of his duty.

"The accident is attributed by the pursuer to the construction of the car staircase in its effect on the leftward vision of the driver; and it is said that the terrible injuries received, resulting in the amputation of both legs at or below the knee, would have been avoided had a 'Tidgewell guard' been used.

"I. STAIRCASE—The staircase known as the 'reverse,' used on this and other seven cars, all running regularly on the Golden-acre route and occasionally on other routes, was passed originally by the Board of Trade and annually by the local authority. During the seventeen years in which the cars have been running, on a route usually one of the quietest but very busy during sports, there has been no accident due to the defect now alleged; nor has any difficulty been experienced by the men working the traffic; nor any complaint made by anyone of the alleged defect.

"On the other hand, none of the cars built for Edinburgh, subsequent to the supply of these eight, have been fitted with similar staircases, all other cars having staircases (from their construction less convenient and less safe for outside passengers ascending and descending, but from their situation more convenient, through their increased platform area, for heavy traffic and in emergencies) which less interrupt the driver's leftward view, while shutting him off from the side view, which is important in passing other wheeled traffic. Further, where reverse staircases are used on other systems, in connection with electric traction, the driver has a better leftward view than in the eight Edinburgh cars, because he stands two feet nearer the front of the car. Lastly, the Board of Trade has said that the use of reverse staircases should be avoided. But it is not proved that the Board of Trade's objection to reverse staircases is due to their effect in narrowing the leftward vision of the driver. It seems as probably caused by their effect in congesting ingress and egress.

"The pursuer's and defenders' witnesses differ as to the amount of interference of the staircase in question with the driver's vision to his left side. I cannot accept the pursuer's witnesses' figures, because they are based on two wrong assumptions. They assume, *First*, that the driver occupies a position to the left of the centre line of the car, whereas he stands 6 inches to the right of that line; and *Second*, they assume that,

from every point where the driver's face would be invisible to an outsider, that person would be totally invisible to the driver, whereas it is proved that, although the driver may not see the face of the man in the street, he is yet able to see other parts of his person. The defenders' witnesses' figures, which I accept, are taken from observations made on the street and experiments with stationary and moving cars. The result is, that if a person is on the pavement, as this boy was, to the left of the car, at a distance of 9 feet from the nearest car rail, he is visible, in whole or in part, to the approaching car driver till the car is within 15 feet of the point on the car line opposite the person on the pavement. During the progress of the front of the car along the next 5 feet, the intervening staircase makes the boy, whether on the pavement or crossing towards the car rails, totally invisible to the car driver. When the car has traversed these 5 feet, the boy then becomes partially visible to the driver. The risk, therefore, only arises in the case of a person who when the car is 15 feet away starts to go across the intervening 9 feet and attempts to cross in front of the car, because when the car driver again catches sight of him 10 feet off, it may be impossible for the person to cross in time, and impossible for the driver to stop the car so as to prevent accident.

"That being the risk caused by this staircase, the question is whether perseverance in its use constitutes fault on the part of the defenders leading to the accident? In my opinion it does not. I adopt the views of the defenders' witnesses M'Donald, the driver, Mr Shepherd, the defenders' manager, and Mr Bennett, civil engineer. M'Donald said—'The place that is obscured is so close to the car that no one would think of crossing. If they did, it would be a very dangerous thing to do. I never found any person attempting such a thing.' Mr Shepherd said—'There is no obstruction that would impede the driver's sight of any person taking ordinary care;' and Mr Bennett said—'The fact that there is this obscured portion, as the car is being driven along, is not in my view any danger to the public on the footway, because it is so near that no person in his senses would attempt to cross in front of the car.' A car going at 9 miles an hour goes about 13 feet in a second. That is to say, it will cover the 5 feet of obscurity in less than half a second, and the whole 15 feet above referred to in a second and a quarter. It could not be represented as a risk that should reasonably have been anticipated and provided against in the construction of the car that a person would act on the footing that a second and a quarter would enable him to cross not only the 9 feet between the pavement and the nearest car rail, but also the 5 feet between the rails.

"(2) *Guard*.—It is enough to say that the defenders have proved that, whatever the merits of the Tidgewell guard, it cannot be applied to cable cars on account of the gripper arrangements.

"II.—CONTRIBUTORY NEGLIGENCE.—Sup-

pose that the defenders were in fault in continuing to use the staircase in question (although originally passed by the Board of Trade, and found safe in actual working during a course of seventeen years) owing to the existence of a defect which had never been suggested by anyone, either on theoretical or practical grounds, and that they were bound to have adopted such a staircase as is shown on the photograph with all its risks to ascending and descending passengers, the defenders plead contributory negligence, and I am of opinion that the plea is well founded.

“Whether we accept the pursuer’s figures that the driver would lose sight of a person on the pavement 9 feet from the nearest rail when 16 yards away from him, or adopt the defenders’ view that he would only lose sight of him when he came within 5 yards, it appears clear that a person, seeing the car approaching at a steady speed, who left the pavement, without necessity and without invitation, and attempted to cross in front of the approaching car, was not acting with ordinary care and caution and took the risk of what might happen. In the one view it was impossible to cross in safety; in the other view, if it were done in safety, it would be the feat of an athlete. But if the person crossing did not look to see whether a car was approaching, his contributory negligence would be equally clear.

“But the person crossing in this case was a child of four years and eight months. Clearly it was not safe for so young a child to be alone crossing a tramway line where cars, travelling at a speed of nine miles an hour, pass every three minutes. I impute no blame to the parents. When his father gave him, at his request, a penny to buy nuts, he naturally assumed he would get them, as usual, at Mrs Barr’s shop, which is on the same side of Inverleith Row. Had the parents known that the boy intended to go alone to Lumsden’s, 240 yards away, near the corner of Inverleith Terrace, which involved crossing and re-crossing Inverleith Row, they would not have allowed him to go unattended. But it is not necessary to prove blame on the part of the guardian in order to escape liability. Children will disobey all orders, and break all rules, and neglect all warnings. But if they do so, in such circumstances as the present, the law does not consider it fair that others should suffer.

“Apart from the question of the parents, I think, young as the boy is, he himself was guilty of contributory negligence. We are told he is a distinctly intelligent child; he has been warned to keep out of the way of cars and to watch carefully to see when he crosses a street that there is no car coming; and he has been told of the danger of going across the car line when out by himself; and thus, young as he was, he was not incapable of the simple kind of contributory negligence alleged in this case. Notwithstanding, absorbed, poor chap, in the little purchase of nuts made on his own hook, without looking whether any car was approaching and too absorbed to hear

its noise (the three eye-witnesses, White, Milne, and Jamieson, agree in this) he walked rapidly straight, or almost straight, across the road right against, if not in front of, the approaching car; the front wheel went over his legs and he was thrown out 2 feet on to the roadway by the slipper drag which the carman instantly applied the moment he saw the nursemaid Milne’s signal. When they differ, I prefer Miss Milne’s evidence, which was given with intelligence and distinctness, to that of the boys, White aged twelve, and Jamieson aged ten. The case is in essentials the same as if a grown person, absorbed in a book, were to cross a thoroughfare without looking up or down for approaching traffic. My impression is that the boy came rapidly out from the pavement when the car was some 12 feet off the place where he left the pavement, and that the dashboard, which is 5 feet from the rail, was itself sufficient to hide him from the driver’s view.

“I must, therefore, as in the question of legal liability for fault on the one hand, and contributory negligence on the other, grant absolutor with expenses.”

The pursuers reclaimed, and argued—  
(1) Where the driver of a vehicle ran down a pedestrian in broad daylight there was a strong presumption that the driver was in fault—*Clerk v. Petrie*, June 19, 1879, 6 R. 1076, 16 S.L.R. 626; *Grant v. Glasgow Dairy Company*, December 1, 1881, 9 R. 182, 19 S.L.R. 155. A driver who was keeping a proper lookout must have seen the boy but for the obstruction caused by the stair. The regulations passed by the Board of Trade in pursuance of the Tramways Act 1870 (33 and 34 Vict. cap. 78), section 64, required that the car be so constructed as to enable the driver to have the fullest possible view of the road. The evidence established that the use of the car in question was in violation of that regulation. The driver never saw the boy. In these circumstances the maxim *res ipsa loquitur* applied, and the accident must be held to be due to the fault of the defenders. The certificate by the local authority did not help the defenders. The local authority only considered the comfort and safety of passengers. The common law liability of the defenders was preserved by section 55 of the Tramways Act 1870. (2) Contributory negligence had not been established. A child so young was probably incapable of contributory negligence—*M’Gregor v. Ross & Marshall*, March 2, 1883, 10 R. 725, 20 S.L.R. 462; *Gibson v. Glasgow Police Commissioners*, March 3, 1893, 20 R. 466, 30 S.L.R. 469. In any event the same standard of care was not to be expected from a child as from a grown-up person—*Campbell v. Ord & Maddison*, November 5, 1873, 1 R. 149, 11 S.L.R. 54—and a driver was bound to take that fact into account—*Auld v. M’Bey*, February 17, 1881, 8 R. 495, 18 S.L.R. 312. There was certainly no negligence in the child’s being on the street, and it was the driver’s duty to avoid him—*Martin v. Wards*, June 15, 1887, 14 R. 814, 24 S.L.R. 586. The mere failure to look whether a car was approaching was not contributory

negligence in a person of advanced age—*per* Lord Gifford in *Clerk v. Petrie, cit.*—and a higher standard of care would not be demanded from a young child. The case of *Frasers v. Edinburgh Street Tramways Company*, December 2, 1882, 10 R. 264, 20 S.L.R. 192, was distinguishable. The boy who was injured in that case was older and attempted to rush across the street in front of a car which he saw. In any event contributory negligence was no answer if the defenders could have avoided the accident by the exercise of ordinary care and diligence—*per* Lord Penzance in *Radley v. London and North-Western Railway Company*, (1876) L.R., 1 A.C. 754, at p. 759.

Argued for the defenders (respondents)—  
(1) The pursuer had completely failed to prove fault on the part of the defenders. The question was not whether another type of stair would be better than the “reverse,” but whether the use of the latter made an accident a thing reasonably to be contemplated, and that certainly had not been established. Any stair involved a “blind angle,” and the car in question was designed under competent superintendence, licensed after yearly inspection by the magistrates, and had run for twenty years without accident. The car was proved to afford the driver the fullest possible view of the road consistent with the presence of a stair. The “blind angle” prevented a view only of a pedestrian who was so near the car that it would be utterly unreasonable for him to attempt to cross in front of it. (2) In any event the child was guilty of contributory negligence. There was no defined age at which a child became guilty of contributory negligence. The question was always one of fact—*Campbell v. Ord & Maddison, cit.* It was proved here that the child was of more than average intelligence, and that he well knew the danger involved in crossing the tramway lines. He was therefore capable of negligence, and in attempting to cross the street without looking to see whether it was clear he was undoubtedly guilty of negligence—*Frasers v. Edinburgh Street Tramways Company, cit.* The dictum of Lord Penzance in *Radley v. London and North-Western Railway Company, cit.*, had no application to the present circumstances.

At advising—

LORD JUSTICE-CLERK—The impression which I formed on this case at the conclusion of the debate was in exact accord with your Lordships' opinion, which I have had opportunity to peruse. It is the only thing satisfactory in regard to this deplorable accident which has been the subject of inquiry, that there is plainly no personal blame attaching upon either side. The pursuer does not blame the driver of the car, and no blame attaches to the boy's mother, who had no reason to suppose that he had gone where he did, or would go where he did, unattended.

The pursuer's case is that the construction of the tramway car was so faulty that it was

an act of negligence to use it. I am unable so to hold. I entirely concur with what has fallen from your Lordships upon that matter. And I will add that I very much doubt whether, if there had been a stair on the car such as the pursuer maintains, it would have given a better view or would have made any difference on the occasion in question. I think it is most probable that the stair had nothing to do with the accident. The driver of a car cannot be always keeping a lookout to a particular side of his car. He may have to look straight ahead if anyone is crossing, or he may have to look to the other side if any high vehicle coming in the opposite direction obscures his view of the road on that side, so that there may be danger if anyone should step out from behind it. This seems to have been the very case on the occasion in question. The accident which occurred here might well have happened when his attention was for the moment directed to the other side. For it was all a matter of a second or two. The little fellow, much interested in his bag of nuts, trots off the pavement and is in front of the car almost before the driver could do anything effective even if he did see him. I cannot therefore hold that it is proved that the form of the stair was in fact a contributory cause to the accident. I may add on this part of the case that I do not see any ground for holding that the defenders were to blame for using this car. It was one of a number that had been passed on official inspection, and had been used without accident and without any complaint against the construction for 17 years. It is obvious that if a stair must at a certain moment obscure the view of the side of the road, any danger so caused must be a danger which may occur according to the difference in the direction in which the person on foot approaches the vehicle. If there must be some obstruction momentarily, any danger caused by the obscuration may not at all depend on the exact position of the obscuring object, the stair.

The view I thus take is sufficient for the disposal of the case, but I am bound to add that, in accordance with the opinions of your Lordships, I hold that the little boy by his own carelessness contributed to the accident, and is therefore barred from obtaining compensation, even if fault were proved against the defenders. A boy of four and a-half years, living in a town, knows quite well that he must be careful in crossing a street on which he knows that cars are constantly passing. He must look when he is going to cross that he does not get in front of a car. Here the evidence satisfies me that the little fellow—quite naturally—failed to look out, because his thought was on his bag of nuts, to which he was seen to be looking and putting his hand towards at the very moment when he was crossing on to the tramway rails. If he had looked as he stepped on the roadway he would not have gone in front of the car. The accident thus was a direct result of his not being careful when in the act of crossing, and this would of itself be suffi-

cient to exclude the claim. I quite assent to the idea that the same amount of caution is not to be expected of a child as is expected of an older person, nor the same knowledge of the danger of doing certain things. But on the question of crossing a street, a child of that age understands quite well that he has to be careful of his own safety, and puts himself in danger if he walks straight in front of a vehicle when he cannot possibly cross in front of it without being knocked down.

On these grounds I concur in holding that the Lord Ordinary's judgment must be affirmed.

**LORD LOW**—The first question in this case is whether the deplorable accident which happened to the pursuer's son was caused by the fault of the defenders?

In the condescendence the pursuer avers that the defenders were in fault in several respects, but the only alleged fault now founded upon relates to the construction of the tramway car by which the injuries to the pursuer's son were inflicted. The stairs at each end of the car leading up to the roof are of the type known as "reverse" stairs, and in regard to that type of stair, the pursuer avers—"Said stair is built on an obsolete and dangerous system. It starts from the left front of the platform, and in gradually rising to the level of the top of the car it passes obliquely in front of the driver of the car in such a manner as to completely obscure his vision to the front and left front of the direction in which the car is travelling."

If it had been proved to be the case that the stair completely obscured the driver's vision to the front and left front, I do not doubt that that would have implied fault on the defenders' part, because a car with such a stair could not be driven with safety to the public. But the proof falls far short of establishing such a case. The stair is on the left side of the driver, and only shuts out from his view a small part of the road upon that side a very short distance in front of the car, and for an almost inappreciable space of time.

Where the accident occurred the foot-pavement on the left side is a little over 9 feet from the nearest rail, and the evidence is to the effect that a boy 3 ft. 9 in. in height standing upon the foot-pavement would not be wholly obscured until he was not more than 15 or 16 feet in front of the car, and would again come into sight when at a distance of from 8 to 10 feet in front of the car. As a car going at the usual speed on the line in question, namely, 9 miles an hour, travels 13 feet in a second, the driver standing in the ordinary position would only lose sight entirely of a boy of the height supposed standing upon the pavement for about half a second. A person of a greater height would be lost sight of at the same time as the boy would be, but would again come into sight on the other side of the stair sooner than the boy would do. Of course if a person on the pavement was moving in the same direction as the car, he might be shut out from the driver's

view for a somewhat longer period, but on the other hand if the driver thought it prudent to keep the person in view, he could do so without practically ever losing sight of him, because if he kept him in view as long as he could upon the right hand side of the stair, he could immediately catch sight of him again upon the left hand side of the stair by slightly altering his position. The time therefore during which the driver altogether loses sight of a person is very short, and a person is only wholly shut out from view when he is towards the side of the car and but a short distance in front of it, a position from which he would not attempt to pass in front of the car unless he was very rash or negligent. Therefore although the "reverse" type of stair seems to me to be open to objection in the case of cable cars where the driver stands a considerable distance behind the dashboard, I am not prepared to say that the use of such stairs indicates such a want of reasonable regard for the safety of the public as to constitute fault on the part of the defenders.

Further, the cars with reverse stairs which have been run by the defenders have stood the test of experience, because in a period of seventeen years there has never been an accident except that which happened to the pursuer's son, and during that long period nothing seems to have occurred to suggest that the position of the stair was a source of danger. Macdonald, who was driving at the time of the accident, and whom the Lord Ordinary regards as a careful and reliable witness, and who speaks with an experience of thirteen years, put the matter very distinctly. He said—"If the boy started to cross in front of the car at a reasonable distance so as to enable him to cross, there is nothing in the stair or otherwise to obstruct my view of him; it is a matter of a flash, that is all. I have never in practice found the stair an obstruction to my view so as to endanger the public."

It was, however, said that the fact that the accident to the pursuer's son occurred showed that the position of the stair did constitute a danger. That would be a formidable argument if it were proved that the accident was due to the boy having been shut out from the driver's view by the stair. That may possibly have been the case, but on the other hand the accident might quite well have happened although there had been no stair at all. The evidence shows that the boy left the foot-pavement suddenly and proceeded to cross the road at a quick pace. He was not actually running, but the witnesses describe him as "trotting" or "hurrying." Now the boy, although small, would, if trotting or hurrying, take an inappreciable time to cross the nine feet between the pavement and the tramway line, even although he did not go straight across but somewhat diagonally, and of course the driver cannot keep his eye upon all points at the same time. Therefore as the period which elapsed between the boy's leaving the pavement and the accident must have been

a matter of seconds, it cannot be assumed that the reason why the driver did not notice him was that the stair obstructed the view. It is just as likely that the driver happened to be looking in another direction at the time, and the evidence shows that as matter of fact he had immediately before the accident been looking to the right-hand side of his car, to guard against anyone stepping out from behind another car which passed him.

Therefore if there was nothing else in the case, I should have little difficulty in holding that fault on the defenders' part had not been proved. But it is further maintained that the position of the stair was a direct contravention of a rule of the Board of Trade which has the force of statute. That rule is—"Every carriage used . . . shall be so constructed as to enable the driver to command the fullest possible view of the road."

Now it does strike one at first sight that the "reverse" stair constitutes a contravention of that rule, because if part of the road is shut out from the driver's view he cannot be said to have the fullest possible view of the road. I think, however, that the true meaning of the rule is, not that the driver must have an absolutely unobstructed view of the road, but a view as unobstructed as is reasonably possible considering the kind of carriage to which the rule applies. Now all tramway cars have stairs leading to the seats upon the roof, and these stairs, I imagine, invariably spring from the platform at either end of the car, and at all events in cable cars a stair springing from the platform must to some extent obstruct the driver's view. The car shown in the photograph No. 31 is fitted with the type of stair now generally in use in Edinburgh, and the pursuer points to it as a car which meets the requirements of the Board of Trade rule. Even in that case, however, part of the road on the left-hand side of the car is shut out from the driver's view, although the part shut out from view is not so far in front of the car as it is when a reverse stair is used—a difference which is no doubt important. It appears, however, that the stair shown in No 31 was adopted, not because the reverse stair was recognised as being dangerous, but because it only allowed of one person at a time entering or leaving the car. It also appears that the Board of Trade do not favour the use of the reverse stair, but they have never prohibited it unless they have done so indirectly by the rule which I am now considering.

Now if the rule had been intended to strike at reverse stairs, I think that the defenders would have been stopped from using that type of stair. The rule was made in November 1905, and the accident to the pursuer's son occurred in November 1907. That accident must have drawn attention to the fact that the defenders were using reverse stairs, but when the proof was taken in June 1908 no proceedings had been taken against them to enforce compliance with the rule, nor, so far as

appears, had they received any official communication on the subject. In these circumstances I am not prepared to affirm that in using reverse stairs the defenders were in breach of the rule.

I confess, however, that I have felt that question to be attended with considerable difficulty, but even if I had come to the conclusion that fault upon the defenders' part had been proved, it would not have altered the result, because in my judgment contributory negligence is clearly established.

The pursuer's son was four years and eight months old at the time of the accident. It is quite settled that there may be contributory negligence on the part of a child of that tender age. Whether there has or has not been such negligence is a question of circumstances. I do not think that the law on the subject has ever been better stated than by Lord Justice-Clerk Moncreiff in the case of *Campbell v. Ord & Maddison*, 1 R. 149. That was a case in which a child, four years of age, had had his fingers crushed in the teeth of an oil-cake crushing machine which had been left unguarded in the public street. His Lordship said—"It would be as unsound to say as a proposition in law that this child was not capable of negligence as to say that he was. Negligence implies a capacity to apprehend intelligently the duty, obligation, or precaution neglected, and that depends to a large degree on the nature of that which is neglected, as well as on the intelligence and maturity of the person said to have neglected it. The capacity to neglect is a question of fact in the individual case, as much so as negligence itself, which is always a question of fact."

Now, there can be no doubt that the pursuer's son had what Lord Moncreiff calls "capacity to neglect." His mother's very frank evidence alone establishes that that was so. He was a very intelligent boy, and he had lived all his life in close proximity to the tramway line, and he quite appreciated the danger which tramway cars caused, and the necessity of exercising caution in crossing the lines. It is equally clear, in my opinion, that he was guilty of negligence, without which the accident could not have happened. I have already explained how he suddenly left the foot-pavement and hurried across the street right in front of the approaching car, and the evidence is that while he was doing so, instead of looking where he was going, he was busy with a bag of nuts which he had bought. That was very grave negligence upon his part, which is sufficient to bar the claim of damages made on his behalf, even although the defenders had also been at fault. It is right that I should add that I agree with the Lord Ordinary that no blame attaches to the parents.

For these reasons I am of opinion that your Lordships should adhere to the interlocutor reclaimed against.

LORD ARDWALL—As the Lord Ordinary

has observed, this is a distressing case, but I agree with him that it has not been proved that the injuries to the pursuer's son were caused by the fault of the defenders, and even if that had been proved I think the defenders have proved contributory negligence on the part of the boy.

Several grounds of fault were alleged on record, but at the discussion on the reclaiming note the only fault founded on was that the car which ran over the pursuer's son was a badly constructed car, and that the improper construction consisted of its having what is known as a "reverse" stair, which the pursuer alleged obscured the view of the driver of the car on the occasion in question, and prevented him from seeing the pursuer's son as he might otherwise have done, and so avoided the accident.

The pursuer maintains that the kind of stair which ought to be substituted for that on the car in question is one which has been adopted in the other cars on the defenders' system, and which, while more convenient for heavy traffic and in emergencies, is not so safe or convenient for passengers ascending or descending. It is further to be noticed that the difference in the amount of obstruction to the vision of the driver presented by these two styles is not great.

The pursuer's case with regard to this matter is founded upon expert evidence regarding what has been called in the evidence the "blank angle," throughout which a person leaving the kerb would be invisible to the driver of the car. I do not think this expert evidence is satisfactory, because, as pointed out by the Lord Ordinary, it proceeds upon two wrong assumptions. But apart from this I am of opinion that mere theoretical evidence as to the goodness or badness of the construction of a car is not of nearly the same weight as the evidence to be drawn from experience in determining whether the construction of a car is consistent with public safety or not. Now the eight cars fitted with reverse stairs have been in use on the Goldenacre route for some seventeen years, and no accident has ever occurred in connection with them owing to the drivers' view of persons on the street being obstructed, nor has any difficulty been experienced by men working the traffic nor any complaint made by anyone. The man who was driving the car when the accident happened had been fourteen years in the employment of the Tramways Company as a driver, and he states that he never in practice found the stair an obstruction of his view so as to endanger the public, and he prefers the older construction of car to the newer one. Further, these cars were originally approved of by the Board of Trade Inspector, and they have been regularly licensed every year by the Local Authority, who are the Corporation of Edinburgh.

In this state of matters I think it impossible to say that the construction of the car in question was not reasonably safe so far as the public were concerned, but it

was urged for the pursuer that under the regulations and bye-laws made by the Board of Trade for the use of cable traction on the Edinburgh Corporation Tramways, and dated 28th November 1905, it was provided that "every carriage used on the tramways shall comply with the following requirements, that is to say—(e) It shall be so constructed as to enable the driver to command the fullest possible view of the road." Now in my opinion this provision cannot be read literally. If it were so, stairs would require to be abolished altogether as a means of access to and egress from the roofs of cars, and something of the nature of a fixed iron ladder or some such contrivance substituted therefor, for there is no doubt that stairs of any kind do obstruct the driver's view more or less. Accordingly this provision requires construction, and in my opinion does not impose upon the Tramways Company any greater duty than that imposed at common law, on the footing that the stairs are to be used, and that is that they are to be so constructed as not materially to obstruct the view of the driver. I think this requirement was satisfied by the construction of the car in the present case. I am therefore of opinion that no liability rests on the defenders in respect of fault in the construction of the car in question.

With regard to the matter of contributory negligence, I agree with the opinion expressed by Lord Low.

LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Wilson, K.C.—Kemp. Agent—Francis S. Cownie, S.S.C.

Counsel for the Defenders (Respondents)—Watt, K.C.—Munro. Agents—Macpherson & Mackay, S.S.C.

Wednesday, May 26.

## SECOND DIVISION.

[Lord Skerrington, Ordinary.]

ARMOUR AND OTHERS v. GLASGOW ROYAL INFIRMARY AND OTHERS.

*Repetition—Title to Sue—Trust—Discharge—Approbate and Reprobate—Residuary Legatee having Granted Discharge Seeking Repetition from Payee of a Bequest Paid though Void from Uncertainty.*

By a codicil to his will a testator directed his trustees to dispose of the residue of his estate "for such purposes of a religious, charitable, or educational character, or partly among my own relatives as may be specified in any writing under the hand of my . . . wife." He was survived by his