

Privy Council Appeal No. 38 of 1918.

The Montreal Tramways Company - - - - - *Appellants*

v.

Peter McAllister - - - - - *Respondent*

FROM

**THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC
(APPEAL SIDE).**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 3RD MARCH, 1920.**

Present at the Hearing :

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD DUNEDIN.

[*Delivered by* LORD DUNEDIN.]

The respondent in this case, Peter McAllister, is the guardian and father of Francis McAllister, and sues the appellants, the Montreal Tramways Company, for damage for personal injury to Francis McAllister. The facts are simple enough. Francis McAllister is a schoolboy, and with other school companions he was, on the 7th November, 1913, going to the grounds of the Montreal Amateur Athletic Association, which are situated on the south side of the appellants' tramway lines. He was riding in a west-bound car, and there is a point at which it is indicated by a signpost that cars may be asked to stop opposite the entrance of the said grounds. The tramways have a double track and the west-going track is to the north of the east-going. The car in which McAllister was riding was signalled to stop and did stop at the above-mentioned stopping-place. Just as the car stopped, the boys left the car at the rear, on the north side, and going round

the back of the car proceeded to go across the other track. As McAllister crossed the track he was struck by an east-going car and seriously injured.

The case was tried by a special jury, to whom the learned Judge put certain specific questions which had been fixed by the Court after argument. As it was a mixed jury, the questions were put both in French and English, but it is sufficient to give the English version.

1. On or about the 7th May, 1913, was Francis McAllister a passenger on board of a car owned and operated by the company defendant ?
2. On that day was Francis McAllister struck by a car owned and operated by the company defendant ?
3. Was such accident caused by the sole fault and negligence of the company defendant and if so, in what did such fault and negligence consist ?
4. Was such accident caused by the sole fault and negligence of the said Francis McAllister and if so, in what did such fault and negligence consist ?
5. Was said accident caused by the combined fault and negligence of the said Francis McAllister and of the company defendant and if so, in what did the fault and negligence of each consist ?
6. Did said Francis McAllister suffer damages as a result of such accident and if so, at what amount do you fix such damages ?
7. If you have replied in the affirmative to question No. 5, to what sum do you reduce the amount to which the said Francis McAllister is entitled on account of his having contributed to the accident in question ?

To these questions the jury replied as follows :—

(1) Yes. (2) Yes. (3) No. (4) No. (5) Both parties were in fault, but the greater fault was on the part of the boy ; and having asked the question the jury added the motorman did not have his car under control and the boy was negligent. (6) \$6,000. (7) \$2,400.

All findings were stated to be unanimous.

Judgment was accordingly entered for \$2,400.

The appellants appealed to the Court of King's Bench to recall the judgment on the ground of misdirection, and on the ground that the verdict was contrary to evidence. The Court of King's Bench consisting of five learned Judges unanimously dismissed the appeal and affirmed the judgment. Reasons were given by Cross, J.

Appeal has been taken to this Board, but the only ground argued was that the verdict was contrary to evidence.

The case was argued by the appellants' counsel with great candour and ability. He at once admitted, as he was bound to do, that unless he could show that the sole cause of the accident was the boy's own rashness in crossing the other track without looking to see whether another car was coming, he could not succeed ; if he could so show then he was entitled to succeed.

Their Lordships do not think there is any controversy as to the law of the matter.

It has been clearly laid down in many cases, and quite recently by this Board in the case of the *Canadian Pacific Railway Company v. Fréchette* (1915 A.C. 871) that if the negligence of the plaintiff

is the sole cause of the accident it cannot be in the proper sense contributory, and the negligence of the defendant in such a case is in the words of Lord Cairns "an *incuria*," but not an "*incuria dans locum injuriæ*." When, however, it is sought to apply the law to the facts, the question is one for the jury, and if the jury has been properly directed and there is any evidence on which their findings can be based, these findings must stand.

Now, in the present case, not only do the above-recited questions very clearly put the point to which the attention of the jury was to be directed, but the Judge in his charge put the matter very clearly, and no objection is now taken to what he said. That being so, the sole question now comes to be, was there evidence on which the jury could find that there was negligence on the part of the appellants' servant which was partly the cause of the accident? Contributory negligence on the part of the boy they have found, and reduced the damages accordingly. As to this the matter is admirably put by Cross, J., in the judgment under appeal. He first of all calls attention to what was said on this point by the Judge in his charge, which was as follows:—

"Mais quand on voit un char qui est prêt de s'arrêter, s'il n'était pas arrêté tout-à-fait, s'il était presque arrêté, alors le garde-moteur doit immédiatement aller à une allure telle qu'il puisse arrêter presque immédiatement son char, l'avoir sous contrôle, pour pas qu'il arrive d'accident à quelqu'un qui descendrait de l'autre char. Cela doit être, n'est-ce pas, ce à quoi l'oblige la prudence."

And then continues:—

"It is made clear to the jurors that they could take their own view of the facts. The case of cars meeting one another at ordinary speed at places other than stopping-places was distinguished, and it was pointed out by the learned Judge that the motorman in such a case, having reason to believe that nobody would be trying to cross in front of him, would not need to slacken speed. The jury were asked to consider whether in the circumstances the motorman had slowed down promptly enough or not, and they were properly enough invited to consider the distance traversed by the car after the collision before it came to a stop, in its bearing upon the matter of speed.

"The jury, in such circumstances, could adopt either view. Having found that the motorman did not have his car sufficiently under control, they would appear to have taken the view that the west-bound car had come so near the crossing that passengers who had hurriedly alighted from it—or other pedestrians for that matter—might happen to cross from behind it and so come upon the track of the east-bound car.

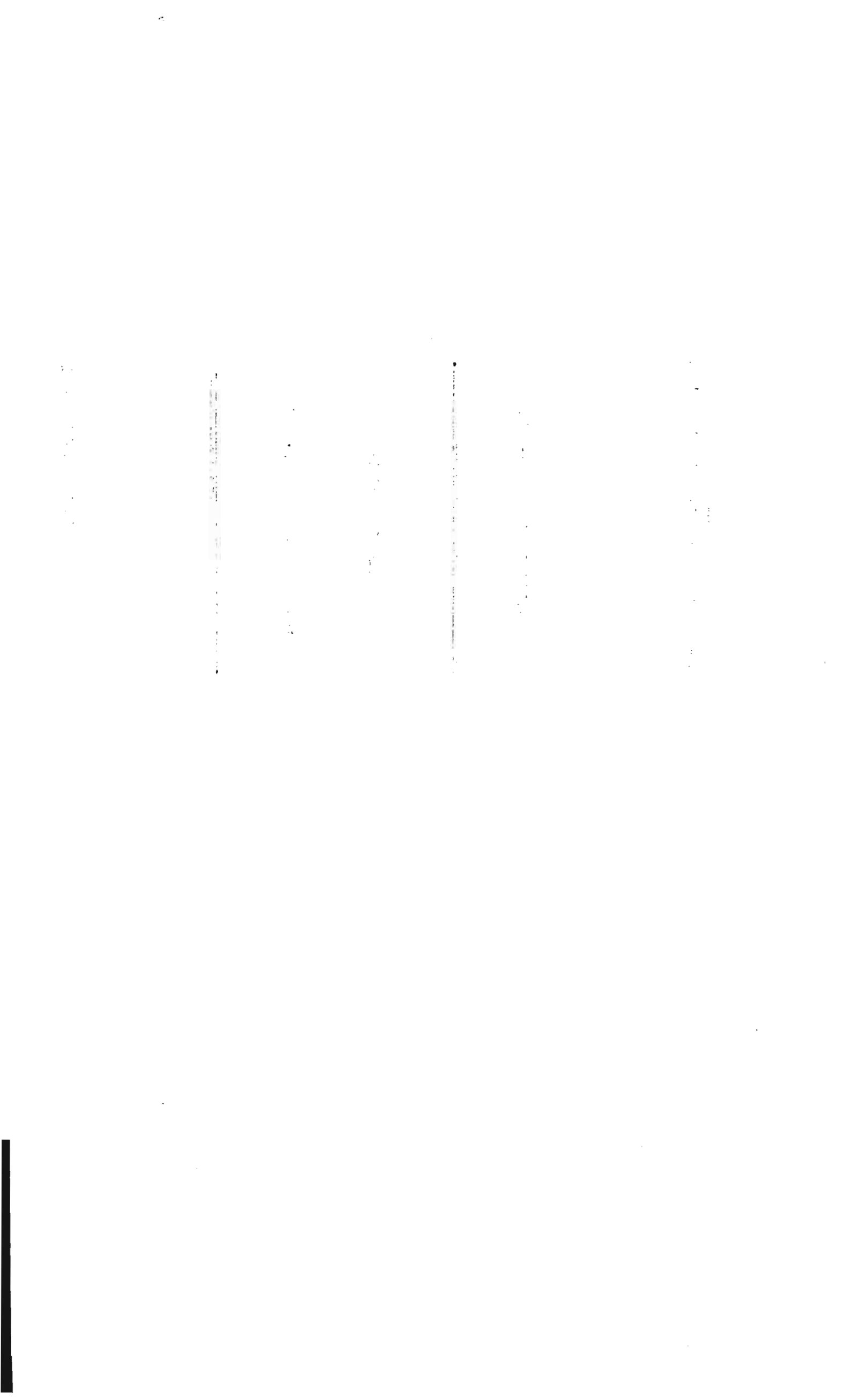
"If it was the view of the jury that that was the way the accident happened, there was clear ground to treat it as a case of contributing faults: fault on the part of McAllister in having ventured upon the track without having looked and listened, and fault on the part of the motorman in not having control of his car sufficient to stop it before it would strike the pedestrian. It might indeed be taken as a typical case of contributing faults, for the defendant cannot say that McAllister's fault was a sufficient cause of the whole damage, seeing that the motorman by stopping the car quickly enough would have avoided the damage."

This really disposes of the whole case. Their Lordships will only add a few words on a case which was much relied on in the

argument before them, viz., *McLeod v. Edinburgh Tramways Company* (Sess. Cas. 1913-14), where the facts bore in some respects a great resemblance to the facts in this case. A young woman in Edinburgh left a tramcar which had stopped, and crossed behind the car on to the other track, and as she did so was hit by a car going in the opposite direction. The jury found in favour of the pursuer, but the First Division of the Court of Session set aside the verdict, holding that there was clear contributory negligence on the part of the plaintiff, who had failed to look to see if there was anything coming before she stepped on to the track. They accordingly gave judgment in favour of the defendants. Now the actual judgment in the case cannot avail the appellants here, for the simple reason that all the judgment did was to affirm contributory negligence, which by the law of Scotland, like that of England, affords a complete defence, whereas here contributory negligence has been found, but by the law of Quebec does not afford a complete defence.

The case was relied on for the sake of certain remarks of the Lord President on the conduct of the woman, which would go to show that in that case he thought (and the other Judges agreed with him) that the imprudence of the woman was the sole cause of the accident; but here there arises a distinction in the facts which, as regards this topic, makes all the difference. The accident there did not occur at any stopping-place, the stopping car was stopped by desire to let the woman down. Accordingly the approaching motorman had no warning until he actually saw the other car stop, and that he only did when he was close to the car. The whole point in the present case is that the motorman knew that he was approaching a place where the other car might stop, and in view of that he was bound to have his own car under control. The jury held he did not. That was a disputed question of fact, and it cannot be said that the jury were not entitled so to hold.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.



In the Privy Council.

THE MONTREAL TRAMWAYS COMPANY

v.

PETER McALLISTER.

DELIVERED BY LORD DUNEDIN.

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