60 MAY.T.1926

New Jersey Court of Errors and Appeals

LOUIS BURKE, Plaintiff-Appellee, *against* PUBLIC SERVICE RAILWAY COMPANY, Defendant-Appellant.	In Tort. On Appeal from New Jersey Supreme Court

BRIEF FOR PLAINTIFF-APPELLEE

This case was tried in the First District Court of Jersey City, before Hon. Myron C. Ernst, without a jury. The Judge found a judgment in favor of the plaintiff and against the defendant, for the sum of $250.00.

The defendant seeks to set aside the judgment, upon the ground that the evidence adduced at the trial necessitates a judgment in favor of the defendant, as a matter of law.

The facts, as they appear from the testimony, are as follows (p. 13, line 10). The defendant says:

"A. I was going up at the lower—out on Main Street, between Summit—I was going up on the hill there, and the trolley car comes around behind me and smashes me, and I fell right between the shafts, and the horse fell.

"Q. What? A. That trolley car — I fell around here on the shafts, between the shafts, and right away I was up. I got up from the wagon, and right away I picked him up; the horse fell

behind me. The fellow did not stop his car, maybe; I don't know. Maybe he couldn't stop his trolley car. I don't know what was the matter."

And, on cross examination (pages 23 and 24) these questions were asked of the plaintiff:

"Q. Now, did this trolley car that hit you sound any gong at the time you were hit or a moment prior to your being hit? A. I don't understand.

"Q. Did you hear any bell sounded from this trolley car that hit you? A. No, no. He did not give me any bell at all, I guess."

When plaintiff was asked what he had on the wagon, he stated on his cross examination (page 24) as follows:

"Q. You pile them up to make a pyramid, don't you? A. Was not piled up — only about a foot and a half high, that is all."

And, on page 25, he was again asked this question, on cross examination (line 28).

"Q. You did not hear any bell, did you? A. No.

"Q. Did you see the trolley car? A. No.

"Q. You never saw it until it hit you? A. No."

And further, he testified (line 30, page 25) on cross examination, as follows:

"Q. Did you keep on moving until the trolley car stopped? A. Did I what? I could not move.

"Q. Did your horse keep on walking until the trolley car hit you? A. Oh, as soon as it smashed, of course, the horse came right down and fell; he could not walk. He knocked him into the car.

"Q. It knocked the horse into the car that was alongside of the street, didn't it? A. Yes."

And on (p. 26) cross examination, these questions were asked:

"Q. You had stopped in back of that horse, hadn't you? A. What is that?

"Q. You had stopped in back of that automobile, had you not? A. Stopped?

"Q. Yes. A. Yes.

"Q. In back of the automobile? A. No.

"Q. Before you reached the automobile? A. No; I stopped when he hit me. Then I could not walk no more. The horse stopped, I mean.

"Q. You did not pull up on one side and wait for this trolley car to go past you, did you? A. No. As soon as the trolley car hit me I was put to one side. Of course, it smashed me on one side to go ahead.

"Q. What part of your wagon was hit by the trolley car? A. In the back

"Q. On the left rear wheel were you hit? A. She hit me on the—yes, you see, I was right on the right side and she was coming when she hit me.

"Q. Your wheel on the right side of your wagon? A. No. I was on the right side, but the trolley car, as she hit me—I don't know. If she hit me in the back wheel or about the behind, I don't know. All I know I was in front of the trolley car and the trolley car was behind me."

And on page 29, line 27, the following questions were asked:

"Q. Were you turning in that way? A. No, I was going right ahead.

"Q. And had one trolley car been ahead of you? A. *No, Sir; no trolley car was ahead of me.*"

The defendant contends that there were two trolley cars, and that the rear trolley car struck the wagon of the plaintiff. Even if that is so, the trolley car might have struck the wagon of the plaintiff, because it extended out further than the first car, or it might have struck the wagon of the plaintiff, because the motorman did not wait until he had a reasonable time in which to pass the wagon of the palintiff, and thus cause the accident; but in any event, the issue was one purely of fact, and if there had been a jury, it would have been necessary to submit the case to the jury, as one of fact, and since the Court sat as a Judge and

jury, he had the right, from all the evidence presented to him, to find a judgment against the defendant.

The defendant's counsel seems to credit only the witnesses for the defendant, and his argument is that the plaintiff backed his truck into the second car; that is not the testimony of the plaintiff, and was not so found by the Judge to be the fact.

On page 67 of the testimony, the Court said in his findings (line 31) as follows:

> "The Court: Why, I find that the testimony shows he was hit by the second car, as evidenced by the motorman's testimony that his first car had passed, and as indicated by the testimony of the conductor that he was on the rear of the first car and that his car had passed, and, as I said before, I find from all of the facts as I have indicated. There is no question of law connected with this case."

The defendant's servants knew that the wagon was driving along in front of the trolley car, partly, in the track and partly on the street, and that the wagon had turned to the right to drive out of the track. It was the duty of the motorman to wait a reasonable time until the wagon was free from the tracks, before he started up his trolley car, and if he started the trolley car before the plaintiff, with his horse and wagon, had gotten a sufficient distance out of the track, to avoid the accident, and then moved the trolley car forward so that his car safely passed the wagon, but the second car did not, then the defendant would be guilty of negligence, and the Court below rightly found upon the evidence, apparently, that such was the case; but in any event, there is no evidence, as a matter of law, which would justify this Court in disturbing the judgment.

There is no evidence that the plaintiff turned his wagon toward the track, but there is his testimony, as given above, which shows that he continued to drive on and was struck in the back by the trolley car. The conductor, himself (page 56) in answer to a question, said:

"And then he kept going. It was unnecessary then to sound his gong.

"Q. After he had sounded his bell, the man switched over to the side of the street with his truck abreast of you and then it was not necessary to sound it? A. Yes, your Honor, he had gone over (p. 57).

"Q. Because he was switched over? A. Switched over.

"Q. But he did not sound his bell while both cars were passing, did he? A. The motorman was passing it, sir.

"Q. His first car was past? A. Yes."

The case *sub judice* is entirely different from the case of *Solatinow* v. *Jersey City, etc.*, in 41 Vroom page 154, and is not analagous to the Hackney case, in both of which cases, the driver seeing the trolley car, drove in front of it.

In the case now before the Court, the plaintiff was admittedly driving in front of the trolley car and under the law he should have been given a reasonable time to get his horse and wagon, and contents, sufficiently far away from the car, so as not to be struck in the rear by it.

The plaintiff was driving away from the trolley tracks and not upon them, and there is no dispute that his wagon was struck in the rear and that he was knocked off the wagon and injured; and counsel for the defendant admitted that the amount of damages awarded was very small, for (p. 68) the Court said:

"The Court: Yes, you have a very, very low judgment.

"Mr. Acton: Yes. I agree with your Honor. That is one of the difficulties."

The evidence in the case at bar shows that the plaintiff was driving his horse and wagon in a southerly direction on Grand Street, in Jersey City, near Summit Avenue, when the trolley cars came up in back of

him; that he heard no warning of their approach, but turned his horse toward the west, which is toward the right, to get out of the trolley tracks; that he was continuing on; that he had not stopped, nor had he any knowledge of more than one trolley car. He had not fully gotten out of the tracks, when he was struck from the rear.

The issue in this case was one purely of facts, and the Judge found on the evidence, that the plaintiff was entitled to a judgment; the Supreme Court sustained that Judgment.

The judgment should be sustained in this Court.

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