

GEORGE E. BROWN, PLAINTIFF AND APPELLANT, VS. THE MANILA ELECTRIC RAILROAD AND LIGHT COMPANY, DEFENDANT AND APPELLEE.

G.R. No. 6666. October 24, 1911

Ponente: MORELAND, J.

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MORELAND, J.:

This is an appeal by the plaintiff from a judgment of the Court of First Instance of the city of Manila, the Hon. A. S. Crossfield presiding, dismissing the complaint upon the merits after trial, without costs.

The action is one to recover damages for an injury sustained by plaintiff's horse and calesa resulting from a collision between it and a street car belonging to the defendant. It seems that, at about 11 o'clock on the night in question, the horse and calesa, which are the subject of this suit, were being driven along on the left side of Calle Concepcion toward Bagumbayan in a direction substantially west. About the time the horse and calesa reached the Y. M. C. A. building a street car belonging to the defendant company, the one that had part in the accident, turned into Concepcion from Bagumbayan and proceeded east along Concepcion toward Marcelino. There are two street-car tracks on Concepcion, an east-bound track and a west-bound track. The street car referred to was passing along the east-bound track toward Marcelino, while the calesa was proceeding west toward Bagumbayan between the west-bound track and the curb of the street. There was, therefore, between the calesa and the east-bound track that part of the street between the curb and the west-bound track, which is reserved for vehicles, and that part occupied by the west-bound track itself. So that before a collision would be possible between the calesa and a car upon the east-bound track it would be necessary for the calesa to cross not only that part of the street between the west-bound track and the curb but also the west-bound track itself.

The proofs in the case are conflicting in the extreme. The cochero driving the calesa at the time of the accident, Mariano Alejo, testified (and I preserve as far as possible not only the form of expression but also the words of the witness) that at the time of the accident, which occurred at about 11 o'clock at night, he was driving the horse and calesa in question along the south side of Calle Concepcion west toward Bagumbayan; that on arriving opposite the Y. M. C. A. building he overtook two refuse carts, traveling in the same direction, the head one of which was covered with a white tarpaulin; that he turned out and passed one of the carts; that in attempting to pass the other the horse got scared at the tarpaulin which was flapping in the wind, and reared; that he reared and shied just as the car rounded from Bagumbayan into Concepcion. In response to the question, "How many times did your horse go backwards and forwards across the street before the street car struck you?" the witness answered, "He was a long time going backwards and forwards, he did not like to pass the cart at all." The witness further said that the street car was going fast; that while the horse was misbehaving the witness "was trying my best to get off the rig and get hold of the horse by the reins, but it was impossible to do anything because the horse was afraid and did not want to go ahead, but went backwards and forwards, and when I attempted to get off my seat the horse tried to turn around;" that as the street car got near to his calesa he shouted to the motorman to stop as his horse was frightened and would not go ahead and that he shouted several times to the motorman before the street car struck

him; that the motorman did not stop the car; that the street car struck the calesa on the right-hand side; that when he was struck the horse was facing the left-hand side of the street; that the calesa was struck first on the shaft; that "I was going straight along Calle Concepcion towards Calle Bagumbayan and that bull-cart was ahead of me and I wanted to pass it, and then the horse got scared, and I was trying to make him go to the left-hand side and he was trying to go to the right-hand side, and when he got to the left-hand side he got scared and started to rear;" that the horse was cut on the right-hind leg; that the horse had a bad habit, especially at night, when he would get vicious and scared; that the horse was full of life.

On cross-examination this witness testified that the American, Mr. Strawn, who was the occupant of the calesa, told him during the evening to go slow with the horse and to be careful with him as he was acting badly; that the street car was far away from him when he was trying to pass the bull-cart and that he thought he would have plenty of time to pass before the street car would reach him; that the first thing the horse did was to dash across the street car track to the right; that the first thing that struck him was the footboard on the right-hand side of the car; that the portion of the car which struck him was the footboard just at the head of the car in the center of the car; that it was the right-hand corner of the car which struck one of his shafts; that one of his shafts struck the footboard of the car and for that reason the calesa tumbled down; that at the moment the shaft struck the footboard the horse passed by. At this point appear the following questions and answers:

"Q. When the horse first got scared the street car was a considerable distance away, was it not? - A. When the horse first started to be mean the street car was far away, but you must take it into consideration that it does not take a very long time to approach, and it did not give me much time.

"Q. The street car was on the opposite side of the street from you, on the right-hand side? - A. Yes, sir.

"Q. Then why could you not have turned around and gone in the opposite direction? - A. As I have stated, I was between the two carts and had no chance to move, except to go ahead in that direction.

"Q. And you were trying to force your horse to go ahead? - A. Yes, sir; to pass the second cart.

"Q. Why did you not stay in between the two carts instead of trying to pass the second cart, let the horse stay in between the two carts instead of trying to pass? - A. The street car was still far away from me, and the other cart was behind me, and the driver of that cart told me to go ahead.

"Q. And that is why you went ahead, because the man behind you told you to go ahead? - A. Yes, sir.

"Q. If you had stayed where you were, between the two carts, you would have been all right, would you not? - A. We were both going in the same direction, one cart ahead of me and the other cart behind me, and the street car was coming in front; how could I have stopped in that place, the street car would have come on top of me.

"Q. Why the carts were not on the street car track, were they? - . But my rig was on the track.

"Q. But the track the street car was coming on is the track on the opposite side of the street from the Y. M. C. A. building? - A. The street car was coming on the track on the left-hand side, and I was going on the same track.

"Q. Were the carts not on the Y. M. C. A. side near the curb? - A. They were on the left-hand side.

"Q. The side nearest the Y. M. C. A. building? - A. Yes, sir.

"Q. And the street car was on the opposite side of the street? - A. Yes, sir.

"Q. And you were in between the two carts, had passed one and were behind the other one? - A. I passed one cart and came between the two.

"Q. How far is it from there to the track on the other side of the street? - A. It was far yet when I sighted the street car.

"Q. Then if you had stayed in between the two carts, after having passed one of them, you would have been all right, would you not? - A. I had passed one of these carts and was trying to pass the other, and one was going ahead and the one behind was going also, and the fellow behind told me to go ahead, and for that reason I had to go, if not he would have spoiled my rig on the back, and as I was going ahead my horse reared.

"Q. And that is why you turned out, is it? - A. Yes, sir."

This witness denied having stated to Mr. Lurison in the presence of Mr. Bradley, after the accident, that his horse shied at a bull-cart and that in endeavoring to restrain him he pulled the wrong rein and thereby ran into the street car.

Cipriano Nocum, a witness for the plaintiff, testified that on the night in question he was the driver of the cart which the cochero sought to pass with his calesa at the time the accident occurred; that the two carts were about twenty varas apart; that the cart he was driving was in the lead; that when he first observed the horse and calesa the horse was rearing, and did not want to go ahead but wanted to go backwards; that the cochero was crying out to the motorman to stop the street car; that the street car was going very fast; that it was a dark and cloudy night; that the horse did not stand steady but went backwards and forwards; that in going backwards it crossed the street about three times; that the right-hand front corner of the car struck first; that the car ran about three brazas before it was stopped by the motorman. On cross-examination this witness testified that the first thing the horse did was to back somewhat and rear up; that as soon as he saw the white tarpaulin he went backwards from side to side; that he went first to the left side; that the cochero succeeded in pulling him to the left side of the street; that he was facing always the left-hand side of the street; that he did not cross the street. These questions were put to him:

"Q. Did you not say in direct examination that he went across the street three times? - A. Backwards and forwards, I mean to say that the cochero could not keep the horse in the same place, as he would not stay quiet.

"Q. How far did the horse move from one track to the other? - A. I should say that the horse would go backwards about four brazas and then rear up again.

"Q. He was not moving very much from one side to the other, just moving backwards and forwards? - A. The cochero was holding on to the reins, trying to bring the horse on the left-hand side so as to pass, and then the horse started to rear up, but always on the left-hand side.

"Q. And he moved very little in that direction? - A. The cochero could not stop the horse in the condition he was in, frightened and going backwards and forwards, but he kept on the same line; of course, there was some change but the tendency was to the left-hand side.

"Q. Always? - A. Yes, sir.

"Q. If he went to the left and went backwards and forwards, he was clear of the track was he not? - A. Just on the track.

"Q. That was the track nearest the Y. M. C. A. building? - A. Yes, sir.

"Q. And when the street car came along the horse turned from there to the left? - A. He went backwards.

"Q. Back into the street car, so as to throw the calesa into the street car? - A. No, sir; it was at the same time, the going backwards of the calesa and the coming of the street car.

"Q. What part of the calesa struck the street car first? - A. The right-hand side.

"Q. But what part; the wheel or the shaft? - A. The footboard of the street car struck the wheel of the calesa.

"Q. What part of the wheel; back or front? = A. The front part of the wheel.

"Q. Then if the calesa had not backed into the street car, it must have been going ahead? - A. Yes, sir.

"Q. The calesa approached the street car from the left-hand side of the car, did it? - A. The horse was rearing and backing, and backed into the front of the street car, and the calesa struck the right-hand corner of the street car, and the car struck the calesa on the right-hand side.

"Q. Did you hear the driver of the cart which was behind shout to the driver of the calesa to go ahead? - A. No, sir: I did not hear that."

The witness further testified on cross-examination that the horse started to rear about five minutes before the calesa collided with the street car; that the horse reared and went backwards and forwards for five minutes before the collision occurred; that the car was going very fast down the street; that it was not going so fast but that the motorman could stop it in a distance of three brazas after the collision occurred.

Francisco David, a witness for the plaintiff, testified that he was the driver of a cart which was proceeding along the street on the night of the accident in the rear of the calesa in question which was following the cart driven by the previous witness; that the cart in front of him was about nine brazas distant; that the street car was going very fast and that the cochero of the calesa was shouting to the motorman to stop; that the motorman did not stop the car; that at the time he shouted he was on the street car track on which the street car was coming. On cross-examination this witness testified that the horse was very much frightened and ran upon the track on which the street car was coming and stood there and collided with the street car; that he told the cochero to go ahead because he was backing into his cart.

These are the only witnesses for the plaintiff who testified concerning the accident. Their statements are so confused and jumbled that it is impossible to discover just how the accident really occurred. The testimony of the witness David is entirely different from that of Nocum and the testimony of Nocum is in many essential particulars different from that of the cochero Alejo. It is only by referring to the testimony of the witnesses for the defense that we are able to get anything like a clear idea of how the accident actually happened.

Leander W. Strawn, an American, was, aside from the cochero, the sole occupant of the calesa at the time the accident occurred. Although subpoenaed as a witness for the plaintiff, he was not called by him but was presented by the defense as one of its witnesses. He testified that he was chief of the property division of the Bureau of Internal Revenue; that he was in the calesa at the time the accident occurred; that on coming down the left-hand side of Calle Concepcion the horse evidently shied, causing him to awake from a doze into which he had fallen, and then "the first thing I knew the horse commenced to rear, and when he reared he hit the street car, hitting it probably about two seats down, and then there was a rebound and he came back again, and then the calesa and the horse were thrown over. The calesa also hit the street car, but I don't know what part of it hit the car;" that the street was wide enough so that the cart could go right up against the curb. "We were passing between the cart and the street car, or trying to, when the horse begun to rear."

Then follow these questions and answers:

"Q. What happened then? - A. Then the horse struck the street car.

"Q. How long a time was it from the time the horse commenced to rear until it struck the street car? - A. I could not say.

"Q. Approximately; was there any perceptible time, or was it instantly, or what? - A. It might have been ten or

twenty seconds, I could not say, I did not pay any attention to the street car at that time, I was watching the horse to see whether we would hit the car, and it looked to me as if we would miss it, consequently I did not jump; if I had thought we were going to hit the street car I would have jumped."

On cross-examination the following appears:

"Q. Do you know when the horse first shied at the white tarpaulin on the bull cart? - A. When? I could not say exactly as to when the horse first shied, and I would not say that it shied at the white tarpaulin for I was not watching, I was half asleep when the horse shied and went across the street car track, that was what woke me up.

"Q. And almost instantly the street car struck the calesa? - A. The calesa went back far enough to miss the street car apparently, and had room to pass between the street car and the bull cart; that is, it went back far enough so that it did not appear to me that the street car was going to hit us."

Further, on redirect examination, appears:

"Q. Then there would have been the whole space from the right-hand side of the street car track and the curb in which to pass? - A. Yes, sir; and the horse was far enough past the street car so that when he reared he hit his feet about the second or third seat down the street car.

"Q. In other words he had cleared street car when he reared? - A. Yes, sir; but what had been the action of the horse before that I would not say.

"Q. What first attracted your attention? - A. The fact of the horse rearing, and when he reared the street car was right onto us, but had the horse not reared we could have gotten through probably.

"Q. Did you hear the cochero say anything before the collision? - A. No, sir.

"Q. Did you not hear him shout to the motorman to stop? - A. No, sir.

"Q. You were not asleep? =A. I was half asleep, and did not pay any attention to what was happening until by the jolting of the rig I became sufficiently awake to notice what was going on, because I was thinking of something entirely different, and I did not pay any attention to what the cochero was doing.

"Q. Then you did not hear the cochero shout to the motorman to stop ? - A. No, sir; I did not hear that."

H. E. Schiffbauer, called as a witness for the defense, testified:

"That he was the house surgeon at St. Paul's Hospital; that at the time of the collision in question he was on the north side of Concepcion about opposite the Y. M. C. A. building; that he noticed the street car just as it was rounding into Concepcion from Bagumbayan."

In answer to the question, "State to the court what you saw," the witness said:

"I was walking on Calle Concepcion towards Calle Bagumbayan, and I noticed the car coming just as it rounded the corner of Calle Bagumbayan, and at the time the car was coming I was watching to get a car going the other way so that I could ride into the Walled City. I was walking along watching the car when I noticed a calesa coming in the opposite direction to the car, and I noticed that the front end of the calesa passed the front end of the street car, and a few seconds afterwards I heard a crash, and the next thing was that the street car was stopped and the calesa upturned, and the horse was injured I think on the right hind leg, and the occupant of the calesa was standing by looking at the smash-up of the calesa. This happened just opposite the Y. M. C. A. building, I think a little towards the Calle San Marcelino side. When I first noticed the horse and the calesa they were ahead of the car going in the opposite direction. When I first noticed the calesa it was about two street car lengths ahead of the car. At that time the horse was going along peaceably and seemingly the cochero had the horse under perfect control. I should say the car was going at the rate of the five points, say eight to ten

miles an hour. Apparently the motorman had the street car under perfect control, and it seems the front end of the calesa went by the street car and then crashed in, and the next thing I could hear the wheels grinding, and the street car went a length or a length and a half and then stopped. The calesa had passed the front end of the street car before the collision occurred, I did not notice how far the calesa was from the curb on the Y. M. C. A. side of the street, but it seemed to me that there was plenty of room in which to get around, everything was going along nicely, there was plenty of room for everybody, but I did not notice the exact distance of the space between the calesa and the curb."

Modesto Medina, the motorman, testified that he was motorman on the car at the time the collision occurred; that he had been working for the company about one year prior to the accident; that the car was coming from the Rotonda and going to Santa Ana. He said:

"As I have stated I was coming from the Rotonda and going in the direction of Santa Ana, and upon turning into Calle Concepcion from Calle Bagumbayan, near the City Hall, I saw a carretela coming, and rang the bell, and continued ringing it until I had a speed of five points, and when I was near the Y. M. C. A. building I saw a calesa coming. The calesa was following a bull cart. The bull cart was on Calle Concepcion in front of the Division Hospital and the Y. M. C. A. building. The bull cart was on my right, near the side walk. The calesa was following the bull cart and was also near the sidewalk immediately behind the bull cart. My car was I believe about 2 brazas from the bull cart when I first observed the calesa behind it. The calesa was about 30 feet away when I first saw it. I rang the bell when I first saw it. When the calesa was about to come into the same line as the bull cart the horse turned to the right and of course collided with my car. What I mean by coming into line with the bull cart is when the car and the bull cart were opposite each other, at that moment the horse turned to the right and collided with the street car; it was something over two seconds from the moment the horse turned out until it struck the street car. Up to the time the horse turned out towards the street car he had not been rearing at all. He was running, just following the bull cart. The calesa had already cleared the front of my car when he struck me. The calesa struck the car at the second hand grab. The wheel of the calesa went between the footboard of the street car and the body of the car. And the brass work was broken there. Three hand grabs were broken off. When the calesa struck me I stopped and reversed. After I reversed I ran about half the length of the car before stopping."

A photograph having been shown the witness, he testified: "That shows that the calesa went over to the right-hand side, and for that reason the collision took place."

On cross-examination the witness said:

"He [meaning the driver of the calesa] is the one who collided with me; that is the truth, he is the one who collided with me. * * * I was going five points. Very fast is nine points but that night I was going five points. The reason why I remember that we were going only five points when the street car struck the calesa is because that was the instruction given by the superintendent that after 8.30 o'clock at night the speed should be only five points. If I ran more than five points after half past 8 o'clock it would be in violation of the rules."

The cochero driving the calesa in question testified that after the collision he went to the hospital and did not return to the scene of the accident again that night. In this he is contradicted by the witnesses Bradley and Lurison. Both of these witnesses testified that after they had taken the cochero to the hospital and returned to the scene of the accident for the purpose of clearing up the wreck, the cochero returned there and that they had a conversation with him at that time. The witness Lurison testified as follows:

"Then about that time I saw the cochero who had been hurt coming up the street, and I asked him what he was doing back there, and why he was not at the hospital, and he said that he felt pretty good and came back to get things together. Then I asked him for a statement regarding the accident, and he said that he was driving along behind a bull cart, and that his horse shied, and when the horse shied he did not know exactly what happened, but that one rein got caught under the shaft and when he wanted to pull he pulled the wrong rein, and pulled

the horse into the car."

The witnesses Bradley and Lurison also testified that the front of the calesa had struck the street car on the side; that three of the grab handles were knocked off; that the first grab handle on the side of the car was not touched, but, beginning with the second one, two or three were broken loose from the car; that the second grab handle is about four feet from the front of the car.

As is seen from the testimony presented by these witnesses there is almost perfect agreement between the declarations of the motorman of the car, of Mr. Strawn and of Doctor Schiffbauer. From their evidence it is clear to us that everything relating to the accident, from the beginning to the end, happened almost instantly. These witnesses make it clear that the collision occurred thus: The cochero sought to pass the garbage cart just about the time the street car reached a point opposite the cart; that there was plenty of room, there being between the garbage cart and the street car that portion of the street between the garbage cart and the west-bound track and the west-bound track itself; that as the cochero urged the horse around the end of the garbage cart it became frightened at the white tarpaulin, and rearing leaped sideways away from the cart and toward the street car; that before anything could be done to restrain him he had dashed across the west-bound track and leaped head foremost into the side of the car. The allegation of the plaintiff that the car struck the calesa head-on or nearly so is entirely unsupported except by the jumbled testimony of the cochero and the drivers of the garbage carts. Their evidence is completely nullified by the clear and forceful testimony of disinterested witnesses and by the condition of the street car after the accident. Mr. Strawn and Doctor Schiffbauer, reputable men and entirely disinterested so far as appears, are in perfect accord in saying that nothing occurred to attract attention prior to the attempt of the cochero to turn out and pass the garbage cart, at which time the street car was nearly opposite the cart; that up to that moment the horse was going along quietly, under perfect control, exhibiting no symptoms of fright or unsteadiness; that it was only when passing the cart that he became unmanageable, and that was at the very moment that the street car was about to reach a point alongside the garbage cart. It may have been, and it is quite possible, that in coming alongside the cart the horse not only reared but hesitated about going forward, or even backed slightly; but it is certain that the unusual activities of the horse were very limited prior to the collision. All the subsequent events sprang from the attempt of the driver to force the horse past the garbage cart. The animal, becoming greatly frightened at the tarpaulin, dashed head foremost into the side of the car, preferring that alternative to the greater danger which, to him, lay in the bull cart and white tarpaulin. Mr. Strawn says:

"What first attracted my attention was the fact of the horse rearing, and when he reared the street car was right onto us, and had the horse not reared we could have gotten through probably. And the horse was far enough past the street car so that when he reared he hit his feet about the second or third seat down the street car."

That the horse ran backwards and forwards across the street in front of the street car for five minutes as testified one of the witnesses for the plaintiff, or several times as testified two others, is incredible under all of the evidence in this case. It is unbelievable that Mr. Strawn, the occupant of the calesa, who said that he was awakened from his doze or reverie by the rearing of the horse the instant before the collision, would have remained dozing up to that moment if the horse had been rearing and plunging backwards and forwards across the street and the cochero had been shouting to the motorman to stop the car. It is very improbable that this could have occurred and not been seen and heard by Doctor Schiffbauer, who at the time was at the very point where the accident occurred and who saw every act and perceived every condition up to the very time of the collision. The condition of the car after the event is also a complete refutation of the testimony of the plaintiff's witnesses who assert that the car ran into the calesa rather than that the calesa ran into the car. The testimony of Doctor Schiffbauer, of Mr. Strawn and of the motorman is to the effect that the front end of the car had passed the horse and calesa before the collision occurred. The condition of the car after the accident completely and in every detail corroborates this testimony. An examination of the car disclosed that the horse or calesa had struck the side of the car at least four feet from

the front righthand corner; that from that point on toward the rear of the car several grab handles, that is, the handles which are seized by passengers in entering and leaving the car, were broken off by the force of the collision. No damage was done to the end of the car or to the corner. The first grab handle was intact. The only marks upon the car and the only injuries observable were those upon the side, several feet from the front and corner. From the testimony of Mr. Strawn it is clear that the horse rather than the calesa struck the car first. He asserts that the horse reared and when he reared he leaped against the car, striking it with his feet about two or three seats down; that then there was a rebound, the horse having probably been thrown away from the car by the force of the impact, thus turning the rear end of the calesa toward the car and bringing it into contact with it.

That the cochero called to the motorman to stop the car we believe is equally incredible. Two witnesses for the plaintiff testified that the cochero called to the motorman to stop. One of them is the cochero himself and the other the driver of one of the bull carts. The driver of the other bull cart testified that he did not hear the cochero call to the motorman. Mr. Strawn, who was within two feet of the cochero at the time, testified that he did not hear any such outcry, and Doctor Schiffbauer, who stood upon the sidewalk at the place where the accident occurred, stated that no such thing happened. This is also the testimony of the motorman, who asserted that he saw and heard nothing out of the ordinary until the very moment when he came opposite the garbage cart, when the horse which was just turning out from behind the same reared and leaped into the side of his car. On cross-examination he insisted on the proposition that it was the calesa that struck the car and not the car that struck the calesa.

The theory of negligence presented by the arguments of plaintiff's counsel is that the motorman having for a distance of 25 rods or more seen an unmanageable horse running backwards and forwards across the track upon which the street car was running ought to have stopped his car before reaching the danger point, and that not having done so but having continued on his course at full speed regardless of the probability of a collision, he was guilty of negligence and the company was responsible for the results thereof. As we have already said, this theory is untenable as the facts presented to support it are disproved by the clear weight of the evidence.

We are of the opinion that the judgment of the court below is supported by the clear weight of the evidence and should be and is hereby affirmed, without special finding as to costs.

So ordered.

Arellano, C, J., Torres, Carson, and Trent, JJ., concur.

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