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CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT; *June 4 *June 20

AND

ROBERT RUTHERFORD (PLAINTIFF). RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Railways—Negligence—Truck at night running into railway train standing across highway—Action for damages against railway company—Alleged condition of fog—Extent of duty of railway company—Sufficiency of its precautions by way of signs and warning signals.

Appeal—Judgment at trial against defendant—New trial ordered by Court of Appeal—Defendant, in formal notice of appeal to Court of Appeal, asking in alternative for new trial—Whether this affected adversely defendant's further appeal to Supreme Court of Canada, in view of stands taken by defendant on the hearings of the appeals.

Plaintiff, while driving his truck through Carleton Place, Ontario, at night on November 30, 1942, ran into defendant's freight train which was standing across the highway, and sustained injuries for which he sued defendant for damages. The usual railway-crossing signs were there as required by the Dominion *Railway Act*, and also defendant had erected a standard which carried a bell, which was ringing, and above the bell was a light, which was burning. The windows of the truck were closed. Plaintiff did not hear the bell nor see the light. There was conflicting evidence as to existence of fog. At the trial the jury found plaintiff and defendant equally in fault, finding that defendant's negligence was "improper protection of the crossing under existing weather conditions. We feel that if this crossing had been protected by visible sign such as a wig-wag with light or flashing light, that the accident could have been avoided". The trial Judge gave judgment for plaintiff in accordance with findings of the jury. Defendant appealed to the Court of Appeal for Ontario, which ordered a new trial ([1945] O.R. 44). Defendant appealed to this Court. While defendant's formal notice of appeal to the Court of Appeal asked in the alternative for a new trial, its counsel before that Court argued only for dismissal of the action and its counsel before this Court stated that defendant's appeal was from the refusal by the Court of Appeal to dismiss the action and, if he failed in that, he was satisfied to have the judgment at trial restored.

Held (1) Defendant's appeal should be entertained. Under the circumstances, the rule set forth in *Ainslie Mining & Ry. Co.* v. *McDougall* (40 Can. S.C.R. 270), *Mutual Reserve* v. *Dillon* (34 Can. S.C.R. 141) and *Delta* v. *Wilson* (Cameron's S.C. Prac., 3rd ed., p. 110) did not apply.

(2) Defendant's appeal should be allowed and the action dismissed. Assuming that the jury's finding above quoted was a finding that the fog was "so dense in front of you that you could not see", as testified to by plaintiff, there was no basis on which defendant could be held

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

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liable. Defendant was entitled to have its train standing where it was at the particular time; nothing was being done by defendant or its employees to create a dangerous situation; and even if the fog existed to the extent suggested, defendant was not required to take further precautions than it had done in the way of signs and warning signals. There was no common law duty upon defendant under the circumstances to take special measures of warning to persons on the highway while the train was stopped on the crossing, and the jury was not the tribunal to which Parliament had entrusted the duty of determining what permanent protection should be installed (*Grand Trunk Ry. Co.* v. *McKay*, 34 Can. S.C.R. 81, at 97).

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1), which set aside the judgment of Urquhart J. (2) (from which the defendant had appealed) and ordered a new trial.

The action was for damages for personal injuries suffered by the plaintiff by reason that the truck which he was driving on a provincial highway on the night of November 30, 1942, struck a freight train of the defendant which was standing across the highway at a level crossing in the town of Carleton Place, Ontario. The plaintiff claimed that the accident was caused by negligence of the defendant.

The action was tried before Urquhart J. and a jury. The findings of the jury are set out in the reasons for judgment in this Court now reported. At the close of the trial (after the jury had made their findings and been discharged), counsel for the defendant (who had moved for a non-suit at the close of the evidence for the plaintiff, and renewed the motion at the close of the evidence for the defendant) moved for dismissal of the action on the ground that there was no negligence found against the defendant which was negligence in law or within the purview of the jury. The trial Judge reserved judgment and subsequently gave judgment (cited *supra*) for damages in accordance with findings of the jury. On appeal by the defendant, the Court of Appeal for Ontario (as stated and cited *supra*) set aside the judgment at trial and ordered a new trial; Laidlaw J.A., dissenting, would have dismissed the action. The defendant appealed to this Court, claiming that the action should have been dismissed.

(1) [1945] O.R. 44; [1945] 1 D.L.R. 333; 57 C.R.T.C. 385.
(2) [1944] O.W.N. 331; 57 C.R.T.C. 137.

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C. F. H. Carson K.C. and *J. Q. Maunsell K.C.* for the appellant.

H. A. O'Donnell K.C. and *G. R. Dulmage* for the respondent.

The judgment of the Court was delivered by

KERWIN J.—This is an appeal by the defendant, the Canadian Pacific Railway Company, from an order of the Court of Appeal for Ontario ordering a new trial in an action brought by Robert Rutherford for damages for injuries sustained by him shortly after midnight on November 30th, 1942. The plaintiff was driving his truck from Ottawa to Perth and, while passing through Carleton Place, ran into one of the railway cars of a standing freight train of the defendant at a point where the highway is crossed by the railway line. There is no evidence that the railway car had been standing on the highway for a longer period of time than is allowed by statute, or, in fact, that it had been there for any particular time. The usual railway-crossing signs required by the *Railway Act* were in their proper place and, in addition thereto, the Company had erected a standard which carried a bell, and above the bell there was a light. It does not appear whether the bell and light had been installed as a result of an order of the Dominion Transport Commissioners or not.

It is not disputed that the bell was ringing and that the light was burning. The windows of Rutherford's truck were closed and he did not hear the bell until he hit the railway car and, although he was familiar with the road and the crossing and was looking for the light, he did not see it; but, even he did not say that it was not burning. He said he saw the railway car when about fifty or sixty feet away from it, that his brakes were applied when he was between thirty to forty feet away and that, owing to the slippery surface of the highway, he was unable to bring his truck to a stop before the collision. A police constable who was at the scene of the accident shortly after its occurrence identified the marks of the tires on the plaintiff's truck as extending on the highway for a distance of 150 feet behind the truck, which still stood in the same position in which it was found after the accident. The surface of the road

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was icy. Rutherford and a passenger with him put the speed of his truck at twelve or fifteen miles an hour although the evidence of an automotive engineer, called by the defendant, was to the effect that, in his opinion, the truck must have been travelling at a speed greatly in excess of that. Rutherford and his passenger said that there was a heavy fog "so dense in front of you that you could not see", while the witnesses for the defendant said that the night was clear and cold and that visibility was good.

The action was tried before Mr. Justice Urquhart and a jury who answered the first three questions put to them as follows:—

1. Has the plaintiff Rutherford satisfied you that there was no negligence or improper conduct on his part which caused or contributed to the collision in question?

Answer "Yes" or "No". A. No.

2. Were the damages sustained by the plaintiffs caused by or contributed to by the negligence of the defendant, its servants or agents?

Answer "Yes" or "No". A. Yes.

3. If your answer to question No. 2 is "Yes", of what did that negligence consist?

Answer fully.

"Improper protection of the crossing under existing weather conditions. We feel that if this crossing had been protected by visible sign such as a wig-wag with light or flashing light, that the accident could have been avoided."

In answer to subsequent questions, they found the plaintiff and the defendant equally in fault and fixed the total damages at $4,500.

Mr. O'Donnell first contended that the appeal should not be entertained because the appellant had, before the Court of Appeal, asked, in the alternative to its claim to have the action dismissed, for a new trial. Reliance was placed upon the decision in this Court in *Ainslie Mining and Railway Co.* v. *McDougall* (1), where Mr. Justice Girouard, speaking on behalf of the Court, followed two earlier judgments,—*Mutual Reserve Fund Life Assn.* v. *Dillon* (2), and *Corporation of Delta* v. *Wilson*, decided in March, 1905, and referred to in the third edition of Cameron's Supreme Court Practice at page 110. In those cases the appellants in this Court sought to hold the order for a new trial that they had obtained and, as stated at page 143 of the *Mutual Reserve* case, "they cannot and do

(1) (1908) 40 Can. S.C.R. 270. (2) 1903) 34 Can. S.C.R. 141.

not appeal from the judgment ordering a new trial." In the present instance, while the Company's formal notice of appeal to the Court of Appeal did ask in the alternative for a new trial, the report of the decision of that Court in [1945] O.R. 44, and the Company's memo. of points of law and fact, required to be filed by an appellant before the Court of Appeal, indicate that the only question argued was whether the judgment at the trial should be reversed and judgment entered in favour of the Company dismissing the action. Furthermore, counsel for the appellant stated at bar that he does not wish to hold the order for a new trial but desires to appeal from the order of the Court of Appeal which in fact refused his application to have the action dismissed, which is the judgment that he seeks in this Court. If he fails in that, he is satisfied to have the judgment at the trial restored Under these circumstances, it would appear that the rule set forth in the cases referred to does not apply.

The Chief Justice of Ontario stated that he expressed no opinion whether or not a finding by the jury of exceptional conditions of fog such as the respondent says existed would support a judgment for him based on negligence of the Company in regard to the protection of the crossing when a freight train was standing across it. He considered that this question should be left to be decided when a jury has determined whether or not there were in fact such exceptional circumstances as the respondent has alleged. I am willing to assume that the jury's answer to question 3 is a finding that the fog was "so dense in front of you that you could not see", as testified to by the respondent. Under those circumstances I can find no basis upon which the appellant may be held liable. The train was not in motion and nothing was being done by the Company, or its employees, to create a dangerous situation. The railway car was entitled to be on the highway at the particular time and even if the fog existed to the extent suggested, the appellant was not required to take further precautions than it had done in the way of signs and warning signals. There was no common law duty upon the Company under the circumstances to take special measures of warning to persons on the highway while the train was stopped on the

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crossing and the jury is not the tribunal to which Parliament has entrusted the duty of determining what permanent protection should be installed: *Grand Trunk Ru. Co.* v. *McKay* (1). It is unnecessary to consider any of the other cases referred to by the Court below or relied upon by the respondent, *Lake Erie and Detroit River Railway Company* v. *Barclay* (2); *Imerson* v. *Nipissing Central Railway Company* (3); *Montreal Trust Company* v. *Canadian Pacific Railway Co.* (4); *Anderson* v. *Canadian National Railway Co.* (5). In none of them were the circumstances similar to those in the present case.

The appeal should be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *J. Q. Maunsell.*

Solicitor for the respondent: *H. A. O'Donnell.*