STANLEY FLAHERTY (PLAINTIFF) .....APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) .. } RESPONDENT.

1952

*Mar. 4, 5
*Jun. 30

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Negligence—Jury trial—Conduct of trial—Submission of questions to jury piecemeal—Mistrial.

The appellant, a switchman employed in connection with a train movement in the respondent's yards at Saskatoon, suffered injury when attempting to enter the train after it had commenced to move. The appellant's claim was that the train had commenced to move without having received a signal from him and that this was a negligent act and was the proximate cause of his injury. A preliminary question as to whether the train had been started without such a signal having been given having been answered in the affirmative by the jury, the trial judge submitted a further question as to whether this was a negligent act and, if so, had it caused or contributed to the occurrence of the accident. The jury found for the appellant and awarded damages for which judgment was entered in his favour but the Court of Appeal directed a new trial on the ground that the conduct of the trial was unsatisfactory.

Held, Cartwright J. dissenting, that the appeal should be dismissed.

Per Rand, Kellock and Locke JJ.: The judge's charge when submitting the question as to whether the act complained of was negligent was made in terms which would tend to lead the jury to believe either that that question was the same as the preliminary question or that the trial judge had himself determined that it was a negligent act or that he was instructing them so to find. The conduct of the trial was in this respect unsatisfactory and the appeal should be dismissed.

Per Cartwright J. (dissenting): The course of putting one question to the jury and then permitting them to separate for the night before charging them as to the remaining questions is both unusual and undesirable, but the court was referred to no authority for the proposition that it is unlawful, and the decision in *Fanshaw* v. *Knowles* [1916] 2 K.B. 538 is to the contrary. As both parties had agreed to such course, the verdict should not be set aside on this ground since no miscarriage of justice had resulted. The charge to

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the jury was sufficient and contained no error of law. There was evidence on which it was open to the jury, acting reasonably, to answer the questions as they did and their answers should not be disturbed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) ordering a new trial.

W. G. Currie Q.C. for the appellant. Where the trial judge reasonably believes that the putting of the questions separately might lead to a saving of time and expense, he is justified in doing so. In England, by rule 431, that is expressly provided for. Such power in the court appears to be inherent and necessary. *Emma Silver Mine Co.* v. *Grant* (2). In the case of *Patterson* v. *Saskatchewan Creamery Co. Ltd.* (3), the Court of Appeal upheld the trial judge who had submitted further questions to the jury after he had found that the answers to the first questions submitted were not sufficiently explanatory. Rule 50 of the Rules of the Court of the Province of Saskatchewan purports to be based partly on rule 73 of the Ontario Rules, but appears to be wider. Under the Ontario Rule, it is held that the court may direct one or more issues of fact to be tried before the others: *Waller* v. *Independent Order of Foresters* (4).

While the trial judge could have directed the questions to be put separately without reference to counsel, he only took this course as a suggestion to counsel and with the full concurrence of counsel on both sides. A litigant is bound by the way he conducts his case at the trial: *C.P.R.* v. *Hanson* (5), *McDougall* v. *Knight* (6) and *Banbury* v. *Bank of Montreal* (7).

The submission of the one question did not have the effect of removing from the jury their right to consider the entire evidence and decide whether or not there were other findings of negligence which were warranted by the evidence such as contributory negligence.

The answers of the jury should be given the fullest possible effect: *Forbes* v. *Coca Cola Co.* (8).

(1) [1951] 4 W.W.R. (N.S.) 47.
(2) (1879) 11 Ch. D. 926.
(3) 14 S.L.R. 544.
(4) 5 O.W.R. 422.
(5) (1908) 40 Can. S.C.R. 196.
(6) (1889) 58 L.J.Q.B. 539.
(7) (1918) 87 L.J.K.B. 1168.
(8) [1942] S.C.R. 366.

The damages were not excessive and ought not to be disturbed: *Warren* v. *Grey Goose Stage Ltd.* (1).

M. A. McIntyre Q.C. and W. G. Boyd for the respondent. The cases referred by the appellant, on the question of putting the questions to the jury piecemeal, are not cases dealt by a jury but cases tried by a judge alone, and have therefore no relevancy. The dividing of questions is fatal as a matter of law. No case can be found to show that the court has not the competence to do so, but this seems to be a case where the trial judge should not have done it.

There is no evidence to support any finding of negligence against the respondent and in any event the evidence of contributory negligence on the part of the appellant is so strong that the jury must have failed to act in a judicial manner in answering the questions as it did and its verdict is contrary to law, evidence and the weight of evidence.

The trial judge failed to explain to the jury the proper meaning of contributory negligence and apportionment of damages.

The damages are in no way supported by the evidence.

The judgment of Rand, Kellock and Locke JJ. was delivered by

LOCKE J.:—The appellant is a switchman employed by the respondent company and claims damages for personal injuries sustained by him on the early morning of November 18, 1949, while working in the railway yards in Saskatoon. The action was tried before the Chief Justice of the Court of King's Bench and a jury and, in view of the manner in which the issues were presented to the jury, it is necessary to consider in some detail the issues which were raised by the pleadings and the evidence given at the hearing.

The appellant had gone on duty at midnight and as a member of a switching crew had come from the railway yards at Nutana upon a light switch engine with which it was intended to move some 15 or 16 cars from their position in the yards of the respondent adjoining the station to a "Y" some 2½ miles to the north to be turned. The equipment to be moved consisted of some 13 or 14 passenger cars, an express refrigeration car and a dining car, the latter

(1) [1938] S.C.R. 56.

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two being the last two cars at the southern end of the train, the diner with its vestibule at the northerly end being the last of the cars. The appellant had descended from the switch engine when it was at a point at the southerly end of the train and proceeded to a position in the vicinity of the last two cars: the engine proceeded northward and coupled on to the cars preparatory to proceeding north. According to the evidence of the appellant, he had gone to the east side of the dining car at which time two express men employed by the respondent were loading bread from a truck standing on the station platform on to the express car. While he was standing on the platform to the south of the truck, intending to signal with his lantern when the loading of the express car was completed, the train started to move whereupon he went to the rear of the dining car and turned the angle-cock which set the brakes and stopped the train.

While the evidence is not entirely clear, apparently the train had moved about half a car length to the north when it was thus brought to a stop, whereupon the express men moved their truck into position and continued to load the car. After they had completed the loading and had moved the truck away from the car, the train started again. According to the appellant, he had not given any signal to start. McMurchy, another switchman who was a member of the crew, said that he did not see any signal from the rear of the train and the engineer, Brown, also said that he had not seen such a signal but had started to move the train either on the order of, or on a signal from, the switch foreman who was standing on the east side of the train to the south of the engine. As opposed to this evidence, both the express men who were within a few feet of the place where Flaherty was standing said that he had given a signal with his lantern before the train moved the second time, and evidence to the same effect was given by the switch foreman who said that he had received a go ahead signal from the rear of the train and then instructed the engineer to start. There is also conflict between the evidence of the appellant and the two express men as to his position when the train commenced to move. According to the appellant, he was near the rear of the dining car. According to James Read, one of the express men who was

working inside the express car, Flaherty was just south of the door of the express car when he gave the signal with his lantern and was thus to the north of the north entrance to the dining car and waited for the dining car to come up to where he was standing before proceeding to enter. Edgar Lake, the other express man who was on the truck loading the bread on to the car, said that Flaherty was standing between the express truck and the north end of the diner and, after waving his lantern up and down, moved towards the diner and started to enter. In addition to the evidence given for the appellant as to the train having started the second time without any signal from him, a conductor employed by the respondent company, though not in connection with the movement in which the switching crew were engaged, said that in all train movements there is generally communication between members of the crew with the engineer by hand signals or lamps and expressed the opinion that the train should not have been started without such a signal from the appellant. It was in attempting to enter the north entrance to the diner that the appellant suffered the injuries complained of: across the entrance there was a cast iron bar some four feet above the level of the floor of the vestibule and which was shown to be standard equipment on such cars. Flaherty was aware that this was the case but, while there was sufficient light from the flood lights in the station to enable the express man Lake to read the labels on the goods they were loading, he, for some reason, failed to detect the presence of the bar and struck his face against it, breaking his glasses and causing injury to one of his eyes which necessitated its removal.

The statement of claim gave particulars of the alleged negligence which formed the basis of the action as follows:

9. The said accident and injuries sustained were due to the negligence of the defendant and its servants (other than the plaintiff) and particulars of the said negligence are as follows:—

(*a*) In putting the said train in motion without a signal from the plaintiff so to do.

(*b*) In putting the said train in motion without prior warning to the plaintiff.

(*c*) In having the said cross-bar in the doorway of the said dining car at the time and place aforesaid.

(*d*) In failing to warn the plaintiff of the presence of the said cross-bar.

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(e) In failing to signify the presence of the said cross-bar by lantern, light, luminous paint or other form of warning, in view of the dark conditions under which the said work was being carried out.

(f) In failing to provide the plaintiff with a safe place in which to carry out his work.

(g) In failing to furnish the plaintiff with safe conditions under which to carry out his work.

(h) In failing to furnish the plaintiff with a safe system with which to carry on his work.

At the conclusion of the evidence the learned trial judge stated that he had decided to put a preliminary question of fact to the jury which he said that he considered to be fundamental to the whole case, this being:

Did the defendant put the train in motion just prior to the accident without a signal from the plaintiff so to do?

Counsel for both parties agreed to this course and addressed the jury on the question. While the question propounded was merely whether the train had been started without a signal from the plaintiff and not as to whether to have done so would be a negligent act, the learned trial judge in addressing the jury, in advance of their consideration of the question, defined negligence and said that the respondent was liable for the negligence of its servants if injury resulted and that the burden of establishing negligence lay upon those that asserted it. This explanation would not appear to have been necessary at this stage of the matter in view of the form in which the question was to be put. While there may be some doubt as to whether the instructions given to the jury on the question of negligence led them to understand that they were to consider whether in the circumstances, assuming no signal had been given by the plaintiff, the defendant had been negligent, I think the concluding part of the instructions given would convey to them that their consideration was to be restricted to the exact question put since, after dealing with the matter of negligence, the learned trial judge said:

Now on this question that you have to decide, it is for you to decide as to what witnesses to believe. You have seen these witnesses, you have heard them give their story. And it is for you from that story to decide where the weight of the evidence is and to give your verdict accordingly, on this question, the particular question of *whether or not this train started without a signal from the plaintiff.*

which was followed by a review of the evidence pro and con.

When the jury returned, in answer to a question by the clerk of the Court as to whether at least ten of them had agreed on the answer to the question, the foreman said that the answer

is a pretty unanimous "Yes", that the train was put in motion without a signal.

Following this, the learned trial judge announced that he had prepared a number of further questions which he proposed to submit to them. The first two of these were:

1. Having found that the train was put in motion without a signal from the plaintiff, was that an act of negligence on the part of the defendants and did it cause or contribute to the accident?

2. If the answer aforesaid is "Yes", then in what way did it cause or contribute to the accident?

Counsel for the appellant thereupon urged that further questions should be submitted dealing with the other counts of negligence pleaded but this application was refused, the learned trial judge saying that he would not have submitted the preliminary question to the jury, had he not been of opinion that all other questions were eliminated. Counsel for the respective parties thereupon addressed the jury. The judge's charge which followed contained the following passage:—

Now then, as the plaintiff did not give the signal to start, then it seems to me it was unquestionably an act of negligence on the part of the foreman to give the signal and therefore negligence on the part of the company, because the company is responsible for the acts of any member of the crew; even if that particular member is working in co-operation with the plaintiff, the negligence of the servant is brought home to the company and the company is responsible in law.

You are taking the law from me, and the first question that arises is the one that I first submitted to you: If you find this act of negligence on the part of the defendant company by virtue of the failure of the foreman to get a signal from the plaintiff, then did that act of negligence contribute in any way to the accident?

If by saying that "the first question that arises is the one that I first submitted to you" the learned trial judge intended to convey to the jury that the first of the questions then being submitted was the same as the preliminary question, this was clearly error. The questions as to whether the plaintiff had given a signal to start the train and whether to start without such a signal was a negligent act were entirely distinct matters, the second of which had not been submitted to the jury. If by this instruction the jury were led to believe that the questions were the same,

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having answered the preliminary question in the affirmative, to answer the first question then being submitted in the same manner would be merely perfunctory. If, on the other hand, they understood that the question as to whether such conduct would amount to negligence was still open, to instruct them that such conduct "was unquestionably an act of negligence" would unfailingly lead them to believe either that this question had been decided by the trial judge or that he was instructing them so to find.

In delivering the unanimous judgment of the Court of Appeal (1), directing a new trial, the learned Chief Justice of Saskatchewan has said that in the opinion of the Court the conduct of the trial was unsatisfactory, a conclusion with which I respectfully agree.

I would dismiss this appeal with costs.

Being of the opinion that in all the circumstances of this case there should be a new trial, I would dismiss the cross-appeal with costs.

ESTEY J.:—I agree that there should be a new trial and the appeal dismissed with costs.

CARTWRIGHT J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for Saskatchewan (1) setting aside the judgment of Brown C.J., whereby it was adjudged that the plaintiff should recover $24,289 damages, and directing a new trial. The respondent cross-appeals asking that the action be dismissed.

The facts, so far as they are relevant to the decision of this appeal, may be stated briefly. On the 18 November, 1949, the appellant was employed by the respondent as a switchman. At about one o'clock in the morning he was engaged in certain duties at the rear end of a stationary train in the Saskatoon yards of the respondent. The last car was a dining-car. There were no steps or other equipment at the rear end of this car by which the appellant could board it. At the front end of the car there was an iron ladder of two rungs by which access could be had to the vestibule. Across the doorway to this vestibule was an iron bar, its height from the ground being 8 feet 7 inches. The car immediately ahead of the dining-car was a refrigerator car and once it was closed there was no way of boarding

(1) [1951] 4 W.W.R. (N.S.) 47.

it. It was intended that when the loading of the refrigerator car was finished the appellant would signal with a lantern to the foreman, who was near the engine some six hundred feet to the north, and that the foreman would then instruct the engine-driver to start. The train was to be pulled about two miles for the purpose of being turned at a "Y". The appellant had duties to perform at the "Y". He intended to ride for this two miles in the coach immediately ahead of the refrigerator car, and did not intend to give the signal to start until he was ready to board the coach. The appellant asserted that the train started without his giving any signal and that although it was moving very slowly he boarded it hurriedly, getting on the front end of the dining-car instead of the coach. He got his feet safely on the rungs of the ladder but in pulling himself up to the platform or vestibule he struck his face on the iron-bar mentioned above. He was wearing glasses and unfortunately in the result he lost one of his eyes.

The main dispute of fact at the trial was as to whether or not the appellant had given the signal to start prior to the train starting. The foreman and other witnesses testified that he had. This fact was found by the jury in favour of the appellant, and there was evidence to support this finding.

The questions to the jury and their answers were as follows:—

1. Did defendant put the train in motion just prior to the accident without a signal from the plaintiff so to do?

Answer: Yes.

2. Having found that the train was put in motion without a signal from the plaintiff was that an act of negligence on the part of the defendants and did it cause or contribute to the accident?

Answer: Yes.

3. If the answer aforesaid is yes then in what way did it cause or contribute to the accident?

Answer: The defendant was negligent in putting the train in motion before the plaintiff gave a signal in that the action caused the plaintiff to move more quickly to board the train than would have been necessary for him (the plaintiff) to do so, had he (the plaintiff) given the signal for the train to move.

4. What damages if any do you allow?

Answer:

1. Special Damages	$ 289.00
2. General Damages	24,000.00

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5. Was the plaintiff guilty of any negligence that contributed to the accident?

Answer: No.

6. If so in what way did such negligence consist?

Answer:

7. What is the degree of negligence in which the plaintiff and defendants are respectively at fault?

Answer: Defendants 100 per cent.

Several grounds of negligence were alleged in the Statement of Claim but the learned Chief Justice ruled as a matter of law that there was no evidence to support any of them except the one found in favour of the appellant in the answers to questions 1 and 2. In regard to this allegation of negligence the position of the defendant was: (i) that the plaintiff did in fact give the signal to start; and (ii) that even if he did not do so the starting of the train was not a cause of his injuries as he had succeeded in getting safely on to the ladder leading up to the vestibule of the dining-car and his injury occurred when he was pulling himself up from the ladder at a time when any necessity for hurry had passed.

At the conclusion of the evidence the learned Chief Justice decided to put a preliminary question of fact to the jury as to whether or not the plaintiff had in fact given a signal and question 1, quoted above, was put accordingly. As the learned Chief Justice had already ruled out all other allegations of negligence it is obvious that if the jury answered this question in favour of the defendant it would have been the end of the case. This course was followed without objection from either counsel.

In charging the jury on this question the learned Chief Justice gave them some instruction as to the law of negligence and pointed out to them that, as it was alleged to be negligence on the part of the foreman that he started the train without a signal, the onus lay on the appellant to satisfy the jury that he had not in fact given a signal prior to the starting of the train. No objection to the charge on this first question was taken by counsel for the defendant.

The jury, after deliberating, answered this question in favour of the appellant. The learned Chief Justice then permitted them to separate for the night and in the morning charged them as to the remaining questions.

The Court of Appeal were of opinion that the conduct of the trial was unsatisfactory and that "the submission of the questions to the jury piecemeal cannot be supported." After quoting the first question put to the jury by the learned Chief Justice the reasons of the Court of Appeal proceed as follows:—

> In doing so he stated that the question should be answered in the first place as, "it is fundamental to the whole case." He also stated that the lack of a signal from the plaintiff was the first charge of negligence which had been alleged. The statement that the question of the signal was fundamental to the whole case indicated to the jury that this was the only matter of negligence which appeared in the case and the effect of the submission of the one question was to remove from the jury their right to consider the entire evidence and decide whether or not there were other findings of negligence which were warranted by the evidence. Moreover, the selection of the one question would create in the minds of the jury the impression that in the opinion of the trial judge, if the plaintiff had not given the signal, there was negligence on the part of the defendant which caused or contributed to the accident. It is pointed out that counsel for both parties agreed to the question being submitted—even so statements made by the trial judge in the presence of the jury and in his final address to the jury amounted to instructions that the starting of the train without a signal from the plaintiff was negligence. The jury was not given an opportunity after proper instruction to answer the question:
>
> "Q. Was there any negligence on the part of the defendant or its servants which caused or contributed to the accident?"
>
> The appeal should be allowed and a new trial ordered, the costs of the first trial to abide the event of the second. There will be no costs of the appeal.

The course of putting one question to the jury and then permitting them to separate for the night before charging them as to the remaining questions is, I think, with great respect, both unusual and undesirable, but we were referred to no authority for the proposition that it is unlawful, and the decision of the Court of Appeal in *Fanshaw* v. *Knowles* (1) is to the contrary. Before adopting this course the learned Chief Justice suggested it to counsel and, far from objecting, both counsel expressly agreed that it should be followed. Under these circumstances the verdict should not be set aside on this ground unless it were clear that a miscarriage of justice had resulted.

It is true that it was not strictly necessary that the learned Chief Justice should instruct the jury as to the law of negligence when they were dealing with the first

(1) [1916] 2 K.B. 538.

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question which was solely one of fact and I am in agreement with the Court of Appeal and with counsel for the respondent that the jury would understand from the charge that if the train was started without any signal from the appellant this was negligence; but I do not regard this as important, for the whole conduct of the trial indicates that the respondent did not seriously contend that if the foreman started the train without a signal his conduct in so doing was not negligent. The defence in this regard was that the appellant in fact gave the signal, but that if this fact was found against the defendant the foreman's act did not cause the plaintiff's injury. On the evidence the jury could not reasonably have found that to start the train without a signal was not negligent. The foreman himself in answering questions put to him by the learned Chief Justice expressly stated that he should always wait for a signal from the rear end before instructing the engineer to start, and that to do otherwise would be a mistake. This, I think, accounts for the fact that counsel for the defendant made no objection to the charge.

It appears to me that in his final charge the learned Chief Justice dealt correctly and adequately with every point upon which the defence relied and particularly that he made it perfectly clear to the jury that their finding that the foreman started the train without a signal did not fix the defendant with any liability unless they were satisfied that such conduct was a cause of the plaintiff's injury. The form of question 2 also indicates this. Without attempting to quote all that the learned Chief Justice said on this point, I refer to the following passage:—

. . . . It is not sufficient to find there was an act of negligence; you must find that act of negligence either caused or in some way contributed to the accident. The mere fact a signal has not been given does not necessarily mean the defendant company is liable here. The plaintiff says it did contribute to the accident; he says, "If I had given the signal I would have put myself in a position where I was sure of my footing, where I would not have been rushed and could get secure footing on the train and would not have to act under any emergency." The defendants say: "Well you didn't have to act under any emergency; this train started very slowly, you were in just as good a position to secure proper footing on the train and safeguard yourself as if you had given the signal." That is what the defendants contend. It is for you to say in the light of the evidence whether or not that is so. And if you say that the failure to give that signal was the cause or contributed to the accident, then you are asked to go on and say, in what did that consist; in what way did that contribute.

The instructions as to contributory negligence and the assessment of damages are sufficient and satisfactory. Indeed, if I may be allowed to say so, the final charge appears to me to put every aspect of the problem before the jury with admirable clarity and I am not surprised that neither counsel asked the learned Chief Justice to amend or add to it in any way.

It is next necessary to consider the submission of the respondent that on all the evidence the answers of the jury to questions 2 and 5 were perverse and should be set aside. After perusing the whole record I think there was evidence on which it was open to the jury, acting reasonably, to answer these questions as they did and that their answers should not be disturbed. It is unnecessary to repeat that the question for an appellate court is not whether it agrees with the conclusions reached but rather whether the jury, the constitutional tribunal of fact, acting reasonably and judicially, might have come to such conclusions.

There remains the submission that the damages awarded are excessive. At the date of the accident the appellant was twenty-two or twenty-three years of age. An operation was performed on the day of the accident in an attempt to save the eye but this proved unsuccessful and the eye had to be removed four weeks and two days later. During this period the appellant endured severe pain. The doctor who performed the operation stated that the loss of one eye usually results in extra strain on the remaining eye. The $24,000 awarded for general damages included $1,918.19 for lost wages. The amount awarded may appear large but the loss of an eye is a serious matter for a man in his early twenties, and I am quite unable to say that the amount is so large as to indicate that the jury failed to act reasonably and judicially in making the assessment.

For the above reasons I would allow the appeal and restore the judgment at the trial with costs throughout and I would dismiss the cross-appeal with costs.

Appeal and cross-appeal dismissed with costs; new trial ordered.

Solicitor for the appellant: *W. G. Currie.*

Solicitors for the respondent: *Borland & McIntyre.*