OSCAR GREEN AND GAVIN BRECKENRIDGE (PLAINTIFFS) ..... } APPELLANTS;

AND

CANADIAN NATIONAL RAILWAYS (DEFENDANT) ..... } RESPONDENT.

1932
*May 4.
*Oct. 4.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Negligence—Railways—Motor vehicles—Collision between gas electric coach on railway and a motor car, at highway crossing—Responsibility for accident—Coach bell not rung—Nature of sound made by coach horn—Whether motor car driver guilty of contributory negligence—"Ultimate" negligence.

Appellant claimed for damages caused by his motor car being struck by respondent's gasoline electric coach on respondent's railway, at a highway level crossing near Colinton Station, Alberta, about noon on July 4, 1930. The coach was used for an inspection trip and was for the first time in that locality. Appellant knew the times of the regular trains, that they stopped at the station, and that none was due. He had reason to expect workmen coming on hand-cars or speeders. The coach bell was not rung. Its horn was sounded, but its noise did not resemble that made by a steam whistle, but rather that of a motor-bus horn. Appellant, in approaching the crossing, looked once in the direction from which the coach was coming, but did not see it, as the station (at which the coach did not stop) obstructed his view, and he did not look again. He had heard the horn once, and now heard it again, but thought it was from a car behind him (there was none in fact) whose driver wished to pass him, and he looked back. At no time did he see the coach. Just before the collision the coach operator, as appellant apparently was not going to stop, applied his brakes. Ford J. ([1913] 2 W.W.R. 886) held that respondent, in not ringing the bell, was guilty of negligence causing the accident, and that appellant, under the circumstances, was not guilty of contributory negligence. His judgment was reversed by the Appellate Division (26 Alta. L.R. 49), which held (by a majority) that appellant was guilty of contributory negligence which was the *causa causans* of the accident.

Held (Rinfret and Smith JJ. dissenting), that, under all the circumstances, appellant was not guilty of contributory negligence, and was entitled to recover.

Principles applicable discussed, and authorities referred to.

Canadian Pacific Ry. Co. v. *Smith*, 62 Can. S.C.R. 134, discussed and distinguished by Lamont J., but discussed and applied by Rinfret J. (Smith J. concurring) (dissenting).

The application against respondent of the doctrine of "ultimate negligence" under the circumstances, discussed and favoured by Cannon J. (Anglin C.J.C. concurring) but discussed and negatived by Rinfret J. (Smith J. concurring) (dissenting).

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

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APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which, by a majority, allowed the defendant's appeal from the judgment of Ford J. (2) in favour of the plaintiff Green, in an action for damages for personal injuries and for destruction of his motor car, caused by a collision between the defendant's gasoline electric coach on defendant's railway and the plaintiff Green's motor car at a highway level crossing. The Appellate Division (1) dismissed the action.

The plaintiff Breckenridge was the assignee of the interest of the plaintiff Green in the judgment obtained at trial, and was subsequently added as a party plaintiff.

The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The plaintiffs' appeal to this Court was allowed, with costs in this Court and in the Appellate Division, and the judgment of the trial judge restored. Rinfret and Smith JJ. dissented.

S. Bruce Smith for the appellants.

N. D. Maclean, K.C., for the respondent.

The judgment of Anglin C.J.C. and Cannon J. was delivered by

CANNON, J.—This is an appeal from the Appellate Division of the Supreme Court of Alberta, reversing (Clarke and Lunney, JJ.A., dissenting) Ford, J., and dismissing with costs the plaintiff Green's action for damages for personal injury; the proceeds of the judgment have been assigned to his father-in-law, Breckenridge, the co-plaintiff.

The action arises out of a collision of July 4, 1930, about noon, at Colinton, on the Edmonton to Athabasca line of the respondent, between a motor car driven by Green and a gasoline electric coach owned and operated by the railway company for an official inspection and then for the first time in that locality. Green was proceeding northerly on a street which parallels the railway line, at about 135 feet west of it, and turned east, towards the railway crossing. He was travelling at a speed of about fifteen miles an hour.

(1) 26 Alta. L.R. 49; [1931] 3 W.W.R. 448; [1932] 1 D.L.R. 253.
(2) 1931 2 W.W.R. 886.

Before he reached the turn to go easterly, he heard a horn signal which sounded like a "bus" horn or a "studebaker" horn; and as he was turning the corner, he gave a glance southerly towards the station, to see if any obstruction were on the track. He did not see, approaching from the south, the car which was then hidden by the station to the south of which he could not see from the point where he then was. As he got around the corner, he again heard the horn, but thought it was a bus or automobile on the road, behind him. He did not again look southerly to see if any train was coming along the track and slowly drove up on to the track, where he collided with the railway car. His companion was killed, his car damaged and himself seriously injured.

Green knew nothing of the approach of the gas electric car; the sound of the whistle, the exhaust from the gasoline motor, and the shouts of one Meyer standing about 22 yards northeast of the crossing, who, seeing that Green was looking in a northerly direction, rushed towards the crossing, waving his hand and shouting in a vain attempt to warn him, were insufficient to attract his attention, which seems to have been riveted on the discovery of the doings of the automobile which he mistakingly supposed was signalling in his rear.

It is common ground that the bell of the gas electric car was not at any time material to the issue now before us used by Dean, the engineer, and the trial judge found that had the bell been ringing the accident could and would have been avoided.

The Chief Justice of Alberta and two of his colleagues found that plaintiff's own negligence in crossing the line in broad daylight, without noticing the approaching car, was the main and proximate cause of his injuries.

Section 308 of the *Railway Act* enacts that when any train (which includes, under subsections 25 and 34 of section 2, any description of car designed for movement on its wheels), is approaching a highway at rail level, the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung *continuously from the time of the sounding of the whistle until the engine has crossed such highway.*

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On the 30th May, 1930, previous to the accident, by 20-21 Geo. V, ch. 36, section 301 of the *Railway Act* was repealed and the following substituted therefor:

> 301. Every locomotive engine propelled on the railway by steam shall be equipped and maintained with a bell of at least thirty pounds weight and a whistle; and every locomotive engine, car or other mechanism, propelled on the railway otherwise than by steam, shall be equipped and maintained with such signalling appliance or appliances as may be approved by the Board.

There is no evidence that the Railway Board have approved of, or determined that any device should be used as a signal by cars propelled otherwise than by steam. The company had, however, equipped this particular car with a horn and a bell, no doubt to be used by their employees as signals to avoid possible danger to the public.

The respondents' car, which was travelling for the first time on this short and not extensively used branch line, was thus equipped with a horn and a bell as signalling devices. It appears from the evidence on discovery of James L. Cameron, the superintendent of the Edmonton Division of the respondents' railway, that the noise of the horn in no way resembled that made by a steam whistle. Its sound is somewhat similar to that of the horn heard on motor "busses". This official has no knowledge of any order of the Railway Board authorizing the use of such gas-electric coaches.

There was no horn, at the time of the accident, at the end of the car then used as the front, although we are told by Cameron that there should have been a horn at each end. The bell is operated by the engineer turning a valve which releases air and runs a little engine which works the clapper on the bell. The bell would ring continuously until stopped, while the sound from the horn would be intermittent.

It is admitted that the bell upon the railway coach was not rung at any time material to this accident. Green knew that there was no train due at that time. There is a regular schedule of only eight trains a week, all stopping at Colinton station. The plaintiff was justified in thinking that no train from the south was due at that hour. Nor is he to be blamed for thinking that all trains would stop at the nearby Colinton station, as was the invariable practice, and that the crossing was safe. These circumstances and the use as a special train by respondents of a new and unfamiliar coach, with a signalling horn never

before used in that locality on a railway train, and resembling an ordinary motor "bus" signal, afford a reasonable excuse for the plaintiff not knowing of the approach of the train.

Counsel for the respondent at trial put in as part of his evidence portions of the examination for discovery of Green which are as follows:

Q. What impression did the sound cause on your mind?—A. Well naturally that someone wanted to go by and I no more than got around the corner when it blew again and I went on a little west and it had not passed me and I looked back to see what was wrong.

Q. And as you approached the railway track you were more or less looking backward over your left shoulder to see whether anything was coming up behind you on the highway?—A. Yes. I looked back to see what had happened to it.

Q. And are you satisfied now that what you actually heard was the horn from this gas electric coach coming up the track?—A. Well I suppose it would be if that was the only horn blowing.

Q. Do you know of any other horn?—A. No I know of no other horn.

Q. And are you satisfied that was the only vehicle trying to pass you? —A. Well there was none passed me as far as I know.

Q. And you did not see any when you made attempts to see what was behind you?—A. No.

Q. Did you have a rear mirror?—A. Yes.

Q. Did you look in the mirror?—A. Yes, when I looked over my shoulder.

* * *

Q. And as nearly as you can recollect after taking the glance southerly along the track at the corner you did not again look southerly along the track until the accident happened?—A. No I did not. On account of this horn blowing I looked back to see what was coming behind.

Q. *Your attention was distracted by what you thought was coming behind you?*—A. Yes.

The engineer Dean states that, when he got opposite the station or at the north end of the station, he noticed the automobile just in the act of turning the corner.

The evidence is that the last time that Dean sounded the horn was when the coach was immediately north of the station. The station was approximately 480 feet from the crossing.

Dean apparently kept his eyes upon the car from the time he first saw it, for the following appears in Dean's cross-examination:

Q. Did you watch the automobile as it came along?—A. Yes.

Q. All the time?—A. Yes.

To quote Lord Hatherly in *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (1), if a special statutory duty

(1) (1878) 3 App. Cas. 1155, at 1172.

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were imposed on a company of whistling at a station, it might be said that this mode of warning strangers, and no other, is what a stranger is entitled to depend upon. The *Railway Act* imposed on the respondent the duty, when a train approached this highway crossing at rail level, of sounding the engine whistle at least eighty rods before reaching such crossing and of ringing the bell from the time of the sounding of the whistle until the engine has crossed such highway. Parliament thought that the *combined* sounds of the whistle and of the bell would be a sufficient warning to any stranger of the approach of a train. It is a fair inference that the sounding of the whistle, without the bell signal, would not be a sufficient warning. Indeed, in this case, even assuming that the opening clause of section 301 of the *Railway Act* as amended does not apply to this peculiar gas electric railway coach or engine, the substitution by the respondent of the horn for the steam whistle, according to all witnesses, justifies the remark of the trial judge, when refusing the motion for non-suit, that " the sounding of the horn was really a menace rather than a warning ".

Moreover, the placing of a bell by the respondent on this coach affords evidence, as against them, of a standard of reasonableness in regard to the precautions to be taken concerning the management of cars in matters affecting the safety of persons using the highways at railway crossings. See *Brenner et al.* v. *Toronto Ry. Co.* (1), and *Preston* v. *Toronto Ry. Co.* (2).

Can the appellant be excused for not having seen the approaching coach? He appears to have been in an anxious and perhaps flurried state of mind on account of the peculiar sound of the horn, which made him believe that a car was coming behind him trying to pass him. He omitted looking again to the left when approaching nearer the railway crossing. I believe that if the driver of the coach had started the continuous ringing of the bell, the confusion caused by the horn would have disappeared from the appellant's mind; his attention would have been called to his

(1) (1907) 13 Ont. L.R. 423, at 428.

(2) (1905) 11 Ont. L.R. 56; (1906) 13 Ont. L.R. 369.

immediate danger and his movement across the line might have been arrested. But even if Green was not entirely excused for the failure to see the train, there is much to be said in favour of the trial judge's finding that when Dean realized the danger and told to his assistant Gardner: "I don't think them fellows is going to stop", he had been guilty of ultimate negligence by not attempting to turn on the bell or again use the horn.

The trial judge has decided that the use of the horn and the omission to ring the bell on the part of the train, and not the want of reasonable care on the part of the deceased was the *causa causans* of the accident. This, in my opinion, is a reasonable inference from the facts, and not a mere guess. In cases like this one, such elements of knowledge and ignorance must be taken into account and the victim's conduct must be viewed in relation to the conduct of the defendant in determining the *causa proxima* (See *Long* v. *Toronto Railway Company* (1), from which leave to appeal to the Judicial Committee was refused). I believe that the cause of the accident was the persistent failure on the part of the engineer in his duty of giving a complete warning, and that Green's want of care is rather to be considered one of the conditions or circumstances on which Dean's continuous failure of duty took effect.

In *H. & C. Grayson Ltd.* v. *Ellerman Line Ltd.* (2), Lord Birkenhead, in the House of Lords, speaks of the "different standards" of care that circumstances may impose on persons in relation to one another. I also believe that different standards were imposed on the parties herein. The respondent owed a direct and definable duty to the appellant. The appellant owed no comparable duty to the respondent, who was bound to warn him that the crossing, which Green had good reason to believe safe at that particular time, had become dangerous by the unexpected presence of this special coach. In some jurisdictions, the driver of a motor car is under statutory obligation to stop at railway crossings; but it is not so in Alberta; there, attenuating circumstances may even be considered to excuse the driver who does not "look

(1) (1914) 50 Can. S.C.R. 224, at 247 and 248.

(2) [1920] A.C. 466, at 473.

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and listen". See: *Grand Trunk Railway Co.* v. *Griffith* (1); *Ottawa Electric Railway Co.* v. *Booth* (2), and *Canadian Northern Ry. Co.* v. *Prescesky* (3).

In my opinion, the appeal should be allowed with costs and the judgment of the trial judge restored.

LAMONT J.—This is an action for damages for injuries sustained by the appellant Green by reason of a collision between his automobile, driven by himself, and a gasoline electric coach (hereinafter called "the coach") belonging to the respondent railway. The collision took place at Colinton, seven miles south of Athabasca, on the respondents' Edmonton-Athabasca line, at a point where the highway crosses the line at level rail. The question for determination is whether, having regard to the circumstances, there was a reasonable excuse for Green's failure to perceive the approach of the coach by which he was injured.

Green lived in Colinton and was familiar with the crossing, which was 480 feet north of Colinton station. He knew on what days of the week the respondents' trains passed. There were two regular passenger trains per week north from Edmonton to Athabasca, passing through Colinton on Tuesdays and Fridays respectively, at 9.11 p.m. There were also two regular passenger trains per week south from Athabasca to Edmonton, on the same days, due at Colinton at 7.19 a.m. There were also two regular mixed trains per week each way: those from the north were due in Colinton in the morning and those from the south in the evening. Green knew the time when these trains were due to arrive, and also knew that no train was due around noon. He further knew that all these trains were due to stop at Colinton.

At twelve o'clock (noon) on July 4, 1930, Green drove his automobile north along Railway street, which is parallel to the railway track and 134 feet distant from it, until he came to the road running east over the respondents' line. As he turned to go east on this road he looked south along the railway and saw there was no train in sight nor was there anything on the track between the crossing and the

(1) (1911) 45 Can. S.C.R. 380, at 398.
(2) (1920) 63 Can. S.C.R. 444, at 458.
(3) [1924] Can. S.C.R. 2.

station. Of this part of the line he had a clear and unobstructed view. He could not see the track farther to the south as his view was obstructed by the station. Just before Green turned east he heard a horn which sounded like the horn of a motor bus or automobile, but he paid no attention to it. After he had gone about 20 or 30 feet easterly towards the crossing, he again heard the horn and thought it was a motor car behind him whose driver wished to go by. He drove on, he says at about 15 miles per hour, expecting this car to pass, and, as none went by, he said to his companion: "What the devil is wrong with the fellow?" Still going on he turned his head and looked back, and this was about the last thing he remembered. He neither saw nor heard the coach and did not know what happened to him. The evidence shews that he was struck by the coach, which came from the south and passed through the station without stopping or slacking speed. The collision smashed the automobile to pieces, grievously injured Green and killed his companion. According to Dean, who was operating the coach, Green had just turned east when the coach was passing the station. The coach, therefore, ran 480 feet to the crossing, while Green ran 134 feet. The coach was fitted with a bell but it was not rung; it was also fitted with a horn or whistle, but it is common ground that the sound it produced did not at all resemble the steam whistle ordinarily used on the respondents' trains on that line. It was the horn of the coach that Green heard. This was the first time that any gasoline electric coach had ever run on this line, and Green had never seen one. The coach was run as a special or extra train, and there is no evidence that any but the regular scheduled trains had ever run on this line after the respondents began to operate it.

On the evidence, Mr. Justice Ford, the trial judge, found that the respondents were guilty of negligence in not ringing the bell as required by statute when approaching a highway crossing, and that this negligence was the efficient cause of the accident. He also found that Green had not been guilty of contributory negligence. His finding that the respondents were guilty of negligence in not ringing the bell is not now questioned. It is, however, contended that Green was guilty of contributory negligence in not again

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looking south before going on the track, and that it was this negligence on his part, and not that of the respondents, which was the *causa causans* of the accident. This contention was upheld by the Appellate Division of the Supreme Court of Alberta (Clarke and Lunney, JJ.A., dissenting), and the judgment of the trial judge was set aside. From the decision of the Appellate Division this appeal is brought.

In *Grand Trunk Ry. Co.* v. *Griffith* (1), Anglin J. (now Chief Justice) stated the law in the following language:—

> We have, however, the fact that Parliament has deemed it wise to enact that railway trains approaching highway crossings shall give certain signals not for the purpose of attracting the attention of those who are already on the alert and need no warning, but for the purpose of arousing those who are distracted or whose attention is absorbed owing to whatever cause and who, therefore, need warning. Parliament has specified the particular signals which in its judgment are best fitted to serve this purpose. Where it is clearly proved that those signals have been omitted and that an accident, which the giving of them *might* have prevented, has occurred, it must, I think, always be within the province of a jury to say whether or not, having regard to all these circumstances, the breach of statutory duty should be taken to be the determining cause of the accident.

It was, however, pointed out by counsel for the respondents that in the *Griffith* case (2), as in *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (3), and the great majority of cases cited to us, the question which the court was called upon to determine was whether there was sufficient evidence of negligence on the part of the defendant to justify leaving the case to the jury; while in the present case, the action being tried without a jury, the question before the trial judge was not whether there was evidence to go to the jury and on which the jury might find one way or the other, but whether the evidence established negligence on the part of the respondents, which was the proximate cause of Green's injuries. As negligence on the part of the respondents is no longer disputed, we have only to decide whether the conduct of Green has not so clearly proved him the author of his own wrong that it would be unreasonable to attribute the collision to the negligence of the respondents.

(1) (1911) 45 Can. S.C.R. 380, at 399.
(2) (1911) 45 Can. S.C.R. 380.
(3) (1878) 3 App. Cas. 1155.

Our attention was also directed to the fact that there is a difference between the duty of an appellate court where the action is tried with a jury, and where it is tried by a judge alone. In the former case, if there is evidence of negligence which the jury can connect with the accident in the sense of being the cause of it, and the jury does so connect it, an appellate court will not set aside the jury's finding, for it is the function of the jury to find the facts; whereas in an action tried without a jury an appellate court may review the findings of fact of the trial judge. If it is satisfied, after giving due consideration to his findings, that they are not justified upon the evidence, it may set aside the findings and give the judgment which, in the opinion of the court, the trial judge should have given. This rule is, however, subject to a limitation, namely: that where a finding of fact made by a trial judge is based upon the credibility of the witnesses, the weight which an appellate court should accord to his finding is scarcely distinguishable from the weight which would be given to it had it been found by a jury. In the case before us but little depends upon the credibility of the witnesses. Green's testimony as to his knowledge of the practice of the respondents in the operation of their trains at Colinton, the hours at which they were due to arrive, their stopping at the station and the distraction of his mind by the horn of the coach, is not contradicted and was accepted by the trial judge. The chief controversy between the parties on the argument before us was as to the duty devolving upon each of them under the circumstances, and the inferences to be drawn from the facts established in evidence.

The duty of the respondents when their train was approaching the crossing was to make known its approach to Green, who was lawfully about to cross. Green's duty was to take reasonable care for his own safety—by this is meant the care which a reasonable and prudent man would take under the circumstances. There is no difficulty about the principle to be applied; the difficulty is in determining just what a prudent man would do in Green's situation. What amounts to reasonable care depends entirely on the circumstances of the particular case as known to the person whose conduct is the subject of the inquiry. Whether, in those circumstances, as so known to him, he used due

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care—that is, whether he acted as a reasonable and prudent man—is a mere question of fact as to which no legal rules can be laid down. (Salmond's Law of Torts, 7th ed., at p. 28). Being a question of fact, we cannot hope for much assistance from cases decided on facts different from those before us. There are, however, some cases in which the circumstances in certain material respects were similar to those in the case at bar, and the judgments in which contain expressions which indicate what, in the opinion of the courts pronouncing them, would be reasonable conduct under the given circumstances.

In the *Slattery* case (1), a train ran through a station without whistling when it ought to have whistled. The deceased, without looking to see if a train was approaching, attempted to cross the railway company's line at a point where the company permitted persons to cross, and was struck by the train and killed. The accident occurred at night. In an action for damages the jury found for the plaintiff. On appeal to the House of Lords, Lord Cairns, at page 1166, expressed the following opinion:—

> If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death.

Although Lord Cairns was of this opinion, he upheld the verdict of the jury in favour of the plaintiff because, on all the facts, His Lordship thought the conduct of the deceased might be open to two different views, in which case it was for the jury to decide, and they having decided in favour of the plaintiff, their verdict should not be disturbed. The members of the court made it quite plain however, that, had they been deciding the case as a jury, they would have exonerated the company from liability, because, in their opinion, the real cause of the accident was the recklessness and folly of the deceased in not looking to see if a train was coming, and not the negligence of the company.

In the above quoted illustration it will be observed that Lord Cairns' opinion is predicated upon the facts as stated by him, and is, therefore, applicable only in cases where the

(1) (1878) 3 App. Cas. 1155.

facts are similar, as in *Canadian Pacific Railway Co.* v. *Smith* (1). His Lordship was not there dealing with the rule which would be applicable where the injured person was misled into believing it was safe to cross by the failure of the railway company to observe a customary practice of stopping all trains at the station. Lord Selborne, who agreed with the conclusions reached by Lord Cairns, dealt with this point at page 1193, in the following language:—

> The cases of *Wanless* (2) and *Bridges* (3) in this House (with which that of *Jackson* (4) is consistent), determined, as I understand them, that a man is not necessarily to be regarded as having caused or contributed to his own death by * * * crossing a line of railway, in a manner *prima facie* dangerous and imprudent (from which his death actually followed), if there is evidence of acts or omissions on the part of the company by which he might have been put off his guard and led to suppose that he might safely act as he did.

See also *Pressley* v. *Burnett* (5); *Rex* v. *Broad* (6); *Sharpe* v. *Southern Ry.* (7).

Even though a plaintiff has been thrown off his guard, yet, notwithstanding that, if the probability of injury was so obvious that it would have been present to the mind of a prudent and reasonable man in the same circumstances, the plaintiff would not be entitled to recover. *Mercer* v. *S.E. & C. Rly. Co.* (8).

In Clerk and Lindsell on Torts, 8th ed., there is a passage which bears closely on the facts in the case at bar. At page 461 the learned authors state the law as follows:

> Although there may be no universal duty upon those in charge of a train to whistle on approaching a level crossing, still if the company have made a practice of so doing, and that practice is known to the plaintiff, the latter will, if he hears no whistle when he is about to cross the line, be justified in assuming that it is unnecessary for him to look about to see whether a train is coming.

See also *Smith* v. *South Eastern Ry. Co.* (9), 21 Halsbury, page 449, par. 762.

In view of these authorities I am of opinion that, where a collision occurs at a level crossing to which the public have access, anyone lawfully using the crossing is entitled

(1) (1921) 62 Can. S.C.R. 134.
(2) *North Eastern Ry. Co.* v. *Wanless*, (1874) L.R. 7 H.L. 12.
(3) *Bridges* v. *North London Ry. Co.*, (1874) L.R. 7 H.L. 213.
(4) Metropolitan Ry. Co. v. Jackson, (1877) 3 App. Cas. 193.
(5) [1914] S.C. 874.
(6) [1915] A.C. 1110.
(7) [1925] 2 K.B. 311.
(8) [1922] 2 K.B. 549, at 553.
(9) [1896] 1 Q.B. 178, at 183 and 184.

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to assume the existence of such protection as the public have, through custom, become justified in expecting.

Green was lawfully using the crossing. Having looked along the track and having found it clear to the station, he says it did not occur to him to look again. He knew that, according to the respondents' practice, no train would arrive for hours, and that when it did arrive it would stop at the station. If a train had been standing in the station he knew he could be over the crossing before it could start and reach him. As he did not hear the bell or any whistle which would give him notice of danger approaching on the track, he assumed it safe to cross. That he was justified in making that assumption the trial judge has held.

In reversing the judgment of the trial judge the majority of the Appellate Division of the Supreme Court of Alberta were, as I read the judgment of the Chief Justice, influenced by two considerations, (1) by the argument that although there was no evidence that any train other than those scheduled to stop at Colinton had ever run over this branch of the respondents' line, yet it was Green's duty to assume that there might be a special or extra train running north and not stopping at Colinton. In his judgment the learned Chief Justice says:—

> The evidence shews that the regular trains were few and that they stopped at the station but what other traffic there was on the line does not appear and certainly there is no warrant for anyone assuming that there will be nothing on a railway line except regular trains.

If this language means that a level crossing is in itself a warning of probable danger to which a person lawfully entitled to cross must pay attention at his peril, I am, with deference, unable to agree. That view, in my opinion, is inconsistent with the view of Lord Selborne in the *Slattery* case (1), quoted above, as well as that expressed in the above passage from Clark and Lindsell on Torts.

As I have already said, what amounts to reasonable care on Green's part depends entirely upon the circumstances as they were known to him. If he reasonably believed that any train coming from the south would stop at the station, why should he apprehend danger from that direction? I quite agree that if, to Green's knowledge, it had been customary for special trains to run to

(1) (1878) 3 App. Cas. 1155, at 1193.

and fro at irregular hours, and to pass the station without stopping, the degree of care which would reasonably be required from him would be very different from the degree of care required from a person who is not going to encounter a known risk, but is entitled to assume that there is no risk whatever. But here there is no evidence that any but regular trains had gone over this line and I am not disposed to assume, in favour of the respondents, a fact which they could easily have proved if it had been true.

The second consideration which appears to have influenced the majority of the court below arose from what I consider a misapprehension of the facts in *Canadian Pacific Railway Co.* v. *Smith* (1), and a misconception of the purport of that decision. In his judgment the learned Chief Justice of Alberta says:—

> Though in the *Smith* case (1) above mentioned there was also the distraction of the driver by a motor horn which was even more distracting because there was in fact a motor following and the driver's attention continued to be distracted in the endeavour to reach a suitable place for the following motor to pass him.

In *Canadian Northern Ry. Co. v. Prescesky* (2), my brother Duff, in referring to the *Smith* case (1), pointed out that, although it had been suggested by Smith's counsel that his attention had been distracted by the horn of a motor car following him, the suggestion had no support in Smith's own testimony. In that case Smith had a clear and unobstructed view of the C.P.R. tracks for half a mile before he reached the crossing, and a view along the tracks for a very considerable distance. Yet, in broad daylight, he drove on to the crossing without looking to see if a train was approaching although he knew that one was due about that time. In his testimony Smith did not even suggest, much less affirm, that his mind was distracted by the horn behind him. In my opinion, the Smith case is applicable only where the facts are similar; where there is nothing in the structure of the line or otherwise to obstruct the plaintiff's view and nothing to distract his mind nor any act or omission on the defendant's part to mislead him into thinking it safe to cross. It cannot have any application here. There was in that case no act or practice on the part of the railway company which could possibly have led Smith to

(1) (1921) 62 Can. S.C.R. 134. (2) [1924] Can. S.C.R. 2, at 6-7.

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believe he could cross in safety. Here, Green's mind was distracted and he was thrown off his guard by the acts and omissions of the respondents in not following their ordinary practice of having all trains stop at Colinton.

For these reasons I am of opinion that Green was justified in proceeding upon the assumption that the respondents would follow the theretofore universal practice, or give him due warning if they changed it. In holding that he was justified in the circumstances I am not overlooking the fact that it is open to a railway company, at any time, to alter the schedule on which its trains shall run or add a special train or trains to those already in operation. But, if it does so, it must observe the duty of giving reasonable warning that a train is approaching to anyone legally using the crossing. The statute (*Railway Act*, ss. 301-308) has prescribed what form the warning shall take. In this case, in my opinion, there was no sufficient warning given to Green: the bell was not rung and I do not think that signalling by means of a horn, whose sound resembles that of a motor bus or automobile which may be heard every day on the highways, is sufficient to call the attention of anyone approaching the crossing to the fact that he should apprehend danger on the track.

I therefore agree with the trial judge that, in the circumstances, there was a reasonable excuse for Green's failure to see the approach of the coach by which he was injured.

The appeal should be allowed; the judgment below set aside and that of the trial judge restored.

The appellants are entitled to costs throughout.

The judgment of Rinfret and Smith JJ. (dissenting) was delivered by

RINFRET, J.—This was a collision, at a highway crossing, between a motor car driven by Green and an electric coach operated by the railway company.

It came about in this way:

The highway ran parallel to the railway for a certain distance, then turned at right angles and continued for 134 feet up to the railway track, which it crossed on the level.

The electric coach was equipped with a bell and a whistle sounding like a bus horn.

Thirty or forty feet before he reached the turn, Green heard the whistle but mistook it for the horn of an automobile intending to pass him. Green knew there was a railway crossing. In the words of the trial judge, he "was familiar with the railway and the time for the regular trains". He also knew there were employees working at a bridge in the vicinity and, as it was noon-time, that they were to be expected to come back on speeders or hand-cars for their midday meal.

When he turned into the stretch of the highway leading straight to the railway track, he took "just a glance over his right shoulder" to see if a train was coming. He saw none. He had then 134 feet to travel before he reached the track. He did not look again.

He had "no more than got around the corner" when the locomotive horn blew a second time. He again mistook it for an auto horn, wondered why the auto did not pass him, and "looked back to see what was wrong". We will now transcribe the next question and answer:

Q. And as you approached the railway track you were more or less looking backward over your left shoulder to see whether anything was coming up behind you on the highway?—A. Yes. I looked back to see what had happened to it.

The country surrounding the highway crossing was flat and, all along the straight stretch to the railway track, there was absolutely nothing to obstruct the view from the track for a distance of at least 500 feet. Green was asked the question:

Q. And if at any time after you had made the turn you had looked south you could doubtless have seen anything that was coming on the track?

and he answered:

A. Yes, sir.

David Dean, the engineer driving the electric coach, had noticed Green's car on the portion of the highway parallel to the railway and then on the other portion leading towards the crossing. He fully expected that it would stop. He says it is "an every day occurrence that automobiles come up to the crossing and stop just short of the tracks". But, when Dean got 30 or 35 feet from the crossing, he said to his companion: "I don't think them fellows is going to stop", and he applied the brakes in emergency and "then (they) came together".

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When Dean made this remark and applied the brakes, Green's car was 10 to 15 feet away from the crossing.

The bell on the electric coach was not ringing.

The trial judge said the problem was as follows:

> * * * negligence on the part of the Defendant being clearly proved, and it being admitted by the Plaintiff that he did not see the train approaching, when by looking he could have seen it in time to avoid the accident, are the circumstances such as to afford a reasonable excuse for his failure to see the train?

To that problem the trial judge gave the following solution:

> Apart from the one glance over his right shoulder made before he completed the turn into the road leading to the crossing, and the one glance he made to the north, Green did not look north or south on the railway track. It did not occur to him to look again to the south. He did not ask his companion to look. There is no doubt the horn Green heard was the horn on the Defendant's electric coach which collided with his car. There is no doubt that the sounding of this horn, which he had no difficulty in hearing over the sound of the engine of his own car, when it sounded the last time before the accident, distracted his attention from the railway track to the investigation of what he thought was behind him wanting to pass or wanting him to stop. Green had never seen one of these electric coaches before. He had never heard the sound of the horn of one of them before. He had never known a train to go through the station at Colinton before without stopping at the station. He did not see the coach at all. He did not know what happened until told some time after the collision. If he had seen the coach when he was ten feet west of the track he could have stopped his car. I have no doubt that if the bell had been rung continuously even from the time the coach cleared the station to the time it reached the crossing the accident would not have happened. I am also of the opinion that if Green's attention had not been distracted by the sounding of the horn of the coach he would have seen the approaching train in time to avoid the accident.
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> * * *
>
> Apart from any other consideration, I think it was negligence having a causal relation to the accident and the injury to the Plaintiff that the bell was not rung. I think the circumstances attending the occurrence of the accident were such as to afford a reasonable excuse for the Plaintiff not seeing the approaching train. Under the circumstances I find that his failure to see the approaching train was not contributory negligence on his part and there is no other ground for holding that he was guilty of contributory negligence debarring him from recovering damages.

The majority of the Appellate Division of the Supreme Court of Alberta reversed that decision.

The learned Chief Justice of Alberta delivered the judgment of the majority; and we agree with his conclusions and, in the main, with his reasons.

The trial judge found that the railway company was negligent because the bell of the electric coach was not

rung. On the other hand, he found Green negligent because he did not look, "when by looking he could have seen (the train) in time to avoid the accident".

On these findings, Green's contributory negligence disentitled him from recovering unless, as Harvey, C.J., expressed it: "the established facts, for there is no conflict of testimony of importance, furnish sufficient excuse for the failure of the plaintiff to take more care than he did before going upon the track".

We adopt as our own the following passages of the judgment of the majority in the Appellate Division:

> The evidence shows that the regular trains were few and that they stopped at the station but what other traffic there was on the line does not appear and certainly there is no warrant for anyone assuming that there will be nothing on a railway line except regular trains. * * * * Indeed the Plaintiff had reason to expect hand cars and speeders at this place at this time and therefore knew that he should have kept a watch. Just north of the crossing on a siding were some box cars housing a bridge building crew the members of which would at noon come in for their lunch. Those working south of the crossing would require to cross the highway, but those working to the north would not.

That a person about to pass over a railway crossing upon a level should look to see whether or not a train is approaching is not only the result of all the decided cases, but is a matter of plain common sense. In fact, the trial judge did not dispute that proposition and he exculpated Green only because, in his opinion, the circumstances afforded him a reasonable excuse for not looking. That excuse he found in the fact that "Green's attention had been distracted by the sounding of the horn of the coach". He did not find any other excuse.

While it is obvious that, in litigation such as this, the special facts of each case must be considered, and a previous decision in one accident case can rarely be relied on as complete authority for a subsequent accident case, one can hardly escape pointing out the striking similarity between the circumstances of the present case and those in *Canadian Pacific Ry. Co.* v. *Smith* (1), where it was also suggested that the driver's attention had been distracted by the tooting of an automobile behind him which he thought wished to pass him. The holding was that, notwithstanding the assumed negligence of the railway company owing to the absence of statutory warnings, the driver of the car

(1) (1921) 62 Can. S.C.R. 134.

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must be held negligent in attempting to cross the tracks without looking for the approaching train, as no evidence was given of circumstances which would warrant a jury in finding he was excused from doing so. And this court dismissed the action of the driver.

In that case, there was in fact an automobile behind the plaintiff's car and the sound of the horn heard by the driver came from that automobile. In this case, the presence of another car was only imaginary; the sound came from the horn of the electric coach of the railway company; but we do not think the difference is of the slightest importance. We do not consider that a circumstance of such a character: just because a driver thinks an automobile behind him intends to pass him, could excuse him for looking backwards while he approaches a railway track which he knows to be there. But, moreover, the horn from the electric coach was heard by Green when, in his own words, he had "no more than got around the corner". He was then still about 120 feet from the crossing. In a moment, the distraction was removed or ought to have been removed. It should not take 120 feet for a man to find out whether a car is behind him or not. The road was wide enough and all he had to do was to go a little more to one side, signal with his hand (if he wanted to) and let it pass. It was an absurd thing to do to look backwards; and, like the Appellate Division, we are unable to accede to the proposition that the circumstances afforded a reasonable excuse for the appellant's failure to perceive the approach of the train by which he was injured.

If Green's failure to look was inexcusable in the circumstances, then he was negligent and his negligence debars him from recovering from the railway company. If, notwithstanding the fact that his momentary distraction might be justifiable, yet after the distraction ought to have been removed, he had sufficient time "in which to use his senses as a careful man about to cross a railway track", still he was negligent and again his action fails.

But it was argued—and the trial judge so held—that "when Dean, knowing the kind of train he was operating,

should have seen the plaintiff's car and realized the danger, he could have avoided the result of (Green's) contributory negligence by using the means provided", that is: by ringing the bell. That holding is based on the theory of ultimate negligence, which is that, notwithstanding the negligence of one or the other or both of the parties to the accident, "there is a period of time, of some perceptible duration, during which both or either may endeavour to avert the impending catastrophe" (*per* Lord Sumner in *British Columbia Electric Ry. Co.* v. *Loach* (1)).

In the present case, there is no occasion for the application of the doctrine. The breach of the statutory duty to ring the bell continued up to the time of the collision; but so also did the plaintiff's failure to look continue up to the moment of the impact. It is said that if the bell had been rung even 35 feet before the coach reached the crossing, the accident might have been avoided. With great respect, for reasons about to be stated, we cannot accept that finding, which was set aside by the Appellate Division and which is, in our view, purely a conjecture (See *Grand Trunk Pacific Railway Co.* v. *Earl* (2)). However, assuming that to be the fact, it was equally found as a fact that "if Green had seen the coach when he was ten feet west of the track he could have stopped his car". If he did not see it, it was because he did not look. That means that if he had looked, even when he was at ten feet from the track, the accident might have been avoided. Surely by that time any effect from the so-called distraction must have vanished. No excuse was left for not looking at least at that spot. And we fail to understand why the ruling which fastens negligence on the railway company should not equally apply to fasten negligence on the plaintiff.

In spite of the absence of warning, if the plaintiff had kept his eyes about him, he would have perceived the approach of the train and would have kept out of mischief. If that be so, his action must fail, for he was certainly guilty of contributory negligence. He owed his injury to his own fault, and whether his negligence was the sole

(1) [1916] 1 A.C. 719, at 726.

(2) [1923] Can. S.C.R. 397, at 402.

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cause or the cause jointly with the railway company's negligence does not matter (*British Columbia Electric Railway Company Limited* v. *Loach* (1)).

Be that as it may, the doctrine of ultimate negligence is predicated on the assumption that the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff (*Tuff* v. *Warman* (2)); and the duty to exercise that special care, breach of which constitutes ultimate negligence, only arises when the plaintiff's danger was or should have been apparent. (*Loach* case (3).)

In *Long* v. *Toronto Railway Co.* (4), the motorman admitted he realized the danger almost immediately when he first saw the deceased. Here, even if we accept the version that Green was in a distracted state of mind because he thought an automobile was about to pass him, that state of mind could neither be discovered nor foretold by the engineer, who was not endowed with the art of divination. According to the trial judge's finding, the likelihood of Green putting himself in danger became apparent when the coach was at most 35 feet from the crossing. On the evidence and at the rate of speed the coach was going, 35 feet would be covered in not quite one second. In that extremely short time, the engineer had to make up his mind, and do one of three things: ring the bell, blow the whistle or apply the brakes. It must be a matter of extreme doubt whether, at that time, either of these things could still be effective. The engineer could not do the three things, nor even two of them. He applied the brakes; and, the moment after, the coach and the motor car were together. Like the Appellate Division, we do not think ringing the bell would have brought a different result. At all events, applying the brakes was a reasonable thing to do, it was the most natural and instinctive thing to do, and even assuming it would have been wiser to ring the bell, the engineer can hardly be blamed, in the emergency, to have adopted the course he did.

(1) [1916] 1 A.C. 719 at 722.
(2) (1858) 5 C.B.n.s. 573, at 585.
(3) [1916] 1 A.C. 719, at 726.
(4) (1914) 50 Can. S.C.R. 224, at 226.

In the *Loach* case (1), when the motorman saw the cart and realized the danger, he was 400 feet from the crossing and the evidence was that, with a brake in good order, the car should have been stopped in 300 feet. In our view, it is clear from the facts of the present case that when Dean became aware of the dangerous position of Green there could have been no time for Dean to do anything to avoid the impact. (*Swadling* v. *Cooper* (2).)

At most, this is one of the cases spoken of by Viscount Birkenhead, L.C., as being " at the other end of the chain " (The *Volute* case (3)), and of which he gives the following illustration:

> A's negligence makes collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be guilty of any negligence and A. wholly fails: *The Bywell Castle* (4); *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (5).

It is our view that Dean's and Green's negligence was contemporaneous or " synchronous," as put by the House of Lords in the *Volute* case (6), and that it is impossible to find a period at which Green's negligence had ceased and after which Dean's ultimate negligence had begun. At all events, we do not find it possible to say that " a clear line can be drawn," after which the supposed subsequent negligence of Dean alone could be regarded. Here, both acts of negligence were so mixed up with the state of things as to make it a cause of contribution (The *Volute* case (7)). Green's negligence, if not the sole cause of his being injured, was at least a contributing cause quite as proximate and immediate as the breach of the statutory duty by the railway company's employee (*Grand Trunk Pacific Ry. Co.* v. *Earl* (8)), and we would like to conclude with the remarks of Duff J. in the *Earl* case (9):

(1) [1916] 1 A.C. 719.
(2) [1931] A.C. 1.
(3) *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, at 136.
(4) *London Steamboat Co.* v. *Bywell Castle,* (1879) 4 P.D. 219.
(5) (1880) 5 App. Cas. 876.
(6) [1922] 1 A.C. 129.
(7) [1922] 1 A.C. 129.
(8) [1923] Can. S.C.R. 397 at 403.
(9) [1923] Can. S.C.R. 397, at 400.

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To distinguish this case from the hypothetical case put by Lord Cairns or from the case of *Canadian Pacific Ry. Co.* v. *Smith* (1), or, indeed, from a number of other authorities which could be named would, I think, with the greatest respect, be approaching perilously near to frittering away the substance of the doctrine (of contributory negligence) which it is the duty of the court to apply.

Of the cases relied on by the learned trial judge, or to which we were referred by counsel for the appellant, the following should be said: Most of those cases were jury trials; and, as pointed out by Lord Penzance in *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (2),

> in all these cases the question which the Court was deciding was not whether the plaintiff was negligent, but whether there was evidence to go to the jury of negligence by the defendants such as caused the injury.

In many of those cases, the courts clearly indicated that their own opinion was different from that expressed in the verdict; but they would not reverse it because it appeared to them that to reverse, in the words of Lord Cairns (*Dublin, etc., Ry. Co.* v. *Slattery* (3)), "would seriously encroach upon the legitimate province of a jury." Other cases cited concerned street railway accidents; and, in our view, street railway accidents should not be decided according to the same standards as other railway cases; for railway companies, like the respondents herein, are on their own private right of way, while street railways are run on public streets where the people have equal access and the conditions are different.

The appeal should be dismissed, with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Parlee, Freeman, Smith & Massie.*

Solicitors for the respondent: *Maclean, Short & Kane.*

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(1) (1921) 62 Can. S.C.R. 134.

(2) (1878) 3 App. Cas. 1155, at 1177.

(3) (1878) 3 App. Cas. 1155, at 1167.