MARY E. LEWIS, ADMINISTRATRIX OF EDWIN E. LEWIS (PLAINTIFF) .. } APPELLANT;

AND

THE GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANTS) ..... } RESPONDENTS.

1915

*Oct. 21, 22.
*Nov. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Operation of railway—Unsafe roadbed—Speed of trains—Disobedience to orders—Answers by jury—"Lord Campbell's Act"—Injury sustained outside province—Right of action in Manitoba.

At a curve in the permanent way there was a sink-hole, over which the roadbed had been recently constructed, where the weight of passing trains caused the tracks to be depressed, but trains running slowly had been safely operated across the unsafe spot for several months. Orders had been given that no trains were to be run over this place at greater speed than 5 miles per hour. The husband of plaintiff was engine-driver of a train which was run over the dangerous spot at a rate exceeding that indicated in the order and was derailed, causing injuries which resulted in his death. The accident happened in the Province of Ontario and the action to recover damages was instituted in Manitoba. In answer to the question, "In what did such negligence consist," the jury answered, "a defective roadbed, and not having provided a watchman for same."

Held, affirming the judgment appealed from (24 Man. R. 807), Idington and Brodeur JJ. dissenting, that the answer returned by the jury was insufficient and vague; that there was no reasonable evidence to support a finding that, assuming the order regulating speed of trains to be observed, the permanent way at the place in question was so dangerous as to make it negligence on the part of the railway company, *vis-à-vis* deceased, to operate trains thereupon or that the cause of the accident was the state

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Brodeur JJ.

1915

LEWIS
v.
GRAND TRUNK PACIFIC RWAY. CO.

of the roadbed rather than the running of the train at excessive speed.

Per Idington, Duff and Brodeur JJ.—A legal obligation *ex delicto*, arising in consequence of a fatal accident which happened beyond the territorial limits of the Province of Manitoba, may be enforced in the Manitoba courts where, according to the law in force in Manitoba, a similar right of action would have arisen if the accident had occurred within the province. *Phillips* v. *Eyre* (L.R. 6 Q.B. 1) referred to.

APPEAL from the judgment of the Court of Appeal for Manitoba(1) setting aside the judgment entered by Galt J., on the verdict of the jury, and entering nonsuit.

The material circumstances of the case are stated in the headnote.

C. R. Bethune and *W. M. Crichton* for the appellant.

H. J. Symington for the respondents.

THE CHIEF JUSTICE.—The jury found that the death of Edwin R. Lewis was caused by the negligence of the defendant company, and to the question:—

In what did such negligence consist ?

answered:—

A defective roadbed, and not having provided a watchman for same.

Now negligence is defined in many ways, but perhaps for general use the best definition is that—

Negligence is the absence of such care as it was the duty of the defendant to use.

It is clear that "a defective roadbed" is no real answer to the question: "In what did such negligence con-

(1) 24 Man. R. 807.

sist?" A railway company may be negligent either in constructing or maintaining its railway and perhaps the answer of the jury is to be interpreted as a finding of one or other of these causes of negligence, though it is at any rate exceedingly vague.

It does not appear from the evidence that there is anything to support a charge of negligent construction of the railway. What are known as "soft spots" or "sink-holes" are necessarily encountered more or less frequently on a long line of railway; they are simply places where owing to the loose or shifting nature of the subsoil it is impossible to get a firm foundation on which to rest the railway track. It may be possible to overcome the difficulty, as has often to be done for buildings, by sinking piles, putting in concrete foundations or by other costly expedients. As long, however, as a railway is made reasonably safe, it is impossible to say that there is negligence if it is not constructed in the most perfect manner; a railway is never perfect, it is always being improved, and a new line of enormous length like the one in question in this case must necessarily embrace a number of weak and more or less dangerous places which can only be eliminated gradually after long experience of working the line. Such dangers are found not only in the track itself, but in its surroundings, for instance, the liability to land slides in cuttings where it is impossible to remove sufficient earth to ensure perfect safety.

As to the maintenance of the roadbed, it is shewn that the arrangements made for the watching of this particular spot necessitated the sectionmen going over it at least twice every day, and a gang of men were constantly employed keeping up the level of the track

1915

LEWIS v. GRAND TRUNK PACIFIC RWAY. CO.

The Chief Justice.

by filling up with gravel the depression caused by the passage of trains. Though trains had been constantly passing there had been no previous trouble at this place and an inspection after the accident shewed no unusual conditions in the track.

It would seem to me that this disposes of any negligence which could properly be covered by the verdict "a defective roadbed." There is no finding of negligence in the operation of the road, but it may be pointed out that though no negligence is to be attributed to the respondent company in the construction and maintenance of the railway, the company was bound to exercise due diligence in endeavouring to protect the public and its own employees from known dangers which required to be guarded against at particular places.

It is not suggested the company was not alive to its duties in this respect or that it failed to take precautions. We find that the engineer and conductor were each furnished with a copy of an order directing that speed was to be reduced at this sink-hole to 5 miles per hour. It is in evidence that the rule is that such an order is to be understood as meaning that the speed is not to exceed 5 miles an hour. Further, there was a "slow sign," that is, a board about 3 feet wide, standing out 15 feet from the right-hand side of the track on the engineer's side and that sign said: "slow."

Lewis, the engine-driver, had passed over this place dozens of times and knew the conditions perfectly; so had other men and always with safety. How then did the accident happen? It seems to me, in the absence of better explanation, that it is impossible to disregard that offered by the respondent that it was

caused by the train proceeding at a rate of speed that in the circumstances was too high. I do not propose to examine the evidence to try and ascertain what that rate of speed was, because it seems indisputable that it was over 5 miles an hour. The excessive speed of the train at this dangerous spot is, I think, the only plausible explanation of the accident, and for that excessive speed the deceased himself was responsible.

The presence of a watchman could not have had the slightest effect in preventing the accident since at the time there was nothing unusual in the appearance of the road and no reason for holding up the train; the engine-driver knew all that a watchman could have known.

As I have said before I do not think that the answer "a defective roadbed" was any statement of an act of negligence on the part of the defendant; but any negligence there was could, I think, only have been that of the deceased engine-driver himself.

I agree with the reasons for judgment of Mr. Justice Perdue in the Court of Appeal for Manitoba, and I think that this appeal should be dismissed and judgment entered for the respondents (defendants), the whole with costs.

DAVIES J.—Many interesting points were discussed at bar in this appeal raising the question of the right of a party to bring an action in one province of the Dominion to recover damages for injuries received in another province for which damages, if sued for in the latter province, the defendants would be liable. The questions debated covered alike the common law lia-

1915

LEWIS v. GRAND TRUNK PACIFIC RWAY. CO.

Davies J.

bility and that created under the "Workmen's Compensation for Injuries Acts," and, if under the latter Acts, whether the language declaring that the action must be brought within a fixed time after the accident with a proviso

> that in case of death the want of notice should be no bar to the maintenance of such action if the judge should be of opinion that there was reasonable excuse for such want of notice,

extended to another province than the one legislating.

It seems to be conceded that such question must depend largely upon whether the question of notice required and the excuse for its not having been given is or is not of the essence of the right of action created by the statute.

In the view, however, which I take of the facts as proved and of the jury's findings upon them, I do not find it necessary to discuss or decide any of these questions.

Assuming the appellant's contentions to be sound —that she had the right to sue in the Manitoba courts —and that the judge of that court was competent to determine the question of there having been a "reasonable excuse" for the want of the statutory notice, the question to be determined is whether the defendant company had failed in its duty to provide a railway track or roadbed which could be safely used for the purpose of operating a locomotive thereon and in not having provided a watchman at the soft spot or sinkhole where the accident occurred.

The answer of the jury to the question:—

> In what did the negligence of the defendant consist ?

was:—

> A defective roadbed, and not having provided a watchman for the same.

1915

LEWIS v. GRAND TRUNK PACIFIC RWAY. CO.

Davies J.

The evidence shewed that at the time of the accident there was nothing unusual in the condition of the roadbed at that point which would have attracted a watchman's attention, if he had been there. A watchman in such circumstances could only have signalled to the deceased if there was anything unusual or symptomatic of danger in the conditions. The evidence is clear beyond question that there was nothing of the kind when the engine in question passed the spot, and, in view of the order to slow at the point in question to five miles an hour given to the deceased engineer, and the slow-board some distance back to indicate when and where he should begin to slow, the finding as to negligence in not having a watchman seems superfluous and without any grounds or evidence to support it.

Then as to the defective roadbed the finding is general and in no sense specific as to negligence on defendant's part.

The deceased engineer had been running over this spot every day for several months. The soft spot had been in existence ever since the construction of the road. Its length was about 50 feet and the depression of the rails as the trains passed over it at times was from two to four inches. There was a section gang looking after the spot and they had crossed it once or twice on that day. An examination of the track after the accident shewed that it was in proper alignment and some eight hours afterwards, on the train being hauled away, there was no depression of the track over the sink-hole or soft spot. This soft spot was protected by a slow-order of five miles an hour and by a slow-board sign some 2,000 feet from it. There was no evidence to shew that the depression in question was dangerous when the speed of the passing

1915

LEWIS v. GRAND TRUNK PACIFIC RWAY. CO.

Davies J.

trains was confined to five miles an hour. A railway roadbed may be quite safe for a speed of five miles an hour, but be dangerous for a speed of eight or twelve miles or more.

The evidence, however, was conclusive that the commencement of the accident, where the front pony-wheels of the engine first left the tracks, took place before the engine reached the depression and that it completely passed over the depression, some 200 or 300 feet, before it left the roadbed and fell down the embankment. Some cause for the derailment there must have been, happening at the place it did, other than the depression or any defect in the roadbed at the depression. The only reasonable suggestion offered is the deceased engineer's disobedience of his express orders as to speed and his continuance of a speed beyond the prohibited rate up to the time the pony-wheels of his engine left the track. As to the actual rate of speed he was running, there is the usual discrepancy between the evidence of the different witnesses. Most of them put it from 6 to 8 miles; one of them 12 miles. But not a single witness puts it as low as five miles an hour, the limit of speed he was ordered to run at.

After listening to the able arguments of counsel and the careful analysis of the evidence made by them and reading all the evidence called to our attention on the crucial point of the defendants' alleged negligence, I have reached the conclusion that there was no evidence to justify the jury's finding of negligence on the defendants' part "in a defective roadbed and want of a watchman for same" and that the real cause of the accident arose from the excessive and prohibited speed at which the deceased was running his train.

It was argued that the finding of the jury that the deceased by the exercise of ordinary care could not have avoided the accident amounted to a finding that the speed of the train was not beyond the five miles an hour his orders prescribed. But I think that is asking too much of the court. No witness ventured the statement that the speed was as low as five miles, while the facts proved did not admit of any reasonable inference being drawn to that effect. I do not think the jury intended in this indirect way to find that the rate of speed was in accordance with the orders.

I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—This is an action for damages by the widow and administratrix of a locomotive engine-driver, for damages suffered by reason of his having been killed in an accident on the respondent's road on the 19th July, 1911, claimed by her to have been caused by the negligence of respondent.

The action was tried at Winnipeg by Mr. Justice Galt, with a jury, who rendered a verdict of $5,000 for the plaintiff, now appellant.

Upon that verdict judgment was entered for appellant. The Court of Appeal for Manitoba reversed it. Chief Justice Howell and Mr. Justice Cameron dissented from the judgment of reversal, holding that there was evidence of negligence as charged which must be submitted to the jury.

The negligence charged was that there was a sinkhole over which the track had been laid, by reason of which the track, or at least one of the rails, was liable to sink from two to four inches as the trains passed over it. It was in that condition in October, 1910,

1915

LEWIS v. GRAND TRUNK PACIFIC RWAY. CO.

Idington J.

and had continued so up to the time of the accident. Meantime the respondent's men from time to time had been putting in material to try and solidify the track. It never seems to have occurred to the respondent that such a continued series of failures from October to July demonstrated the necessity for more vigorous methods of rendering that part of the track safe for travel; unless indeed the existence of a heap of gravel deposited recently before the accident at the spot indicated an intention to do so.

It is proven other methods such as bridging the hole or avoiding it might have been adopted.

No precaution was taken to avoid any accident except the issuance of a general order in October to engineers to reduce speed of travel to five miles an hour in passing over this sink-sole and a notice merely to slow down posted at some distance from the spot. Copies of this order were issued to each engineer making the trip over this part of the road. No watchman was appointed to warn approaching trains in case of any danger. No sectionmen were called to shew any one had seen it that day, or when any one had seen it, though sectionmen had, about fifteen hundred feet distant therefrom, a station for operating from. It is said sectionmen had general instructions to look after the repairing. From two to six trains a day passed over it.

If that condition of things does not constitute such a case of negligence on the part of the defendant as should be submitted to a jury, I am at a loss to know what would. If some passengers had got killed as the result thereof and those responsible for the continuance of such a condition of things, from October to 19th July, had been put on trial for manslaughter,

I think the jury trying them would have been justified in finding a verdict of guilty.

It never occurred to able counsel at the close of the trial to move for a nonsuit on the ground of want of proof of negligence. There was a motion of nonsuit on other grounds and a hope that respondent could prove to the satisfaction of the jury that the deceased had disobeyed the order to reduce his speed to five miles an hour.

In that the respondent failed; and I think, considering the evidence as presented in the analysis thereof in the appellant's admirable factum, which I have found most helpful, that the jury properly refused to find that deceased had neglected his duty.

It was quite competent for the jury to have disbelieved the evidence, and some of it certainly was not entitled to much credit. As to those speaking of the rate of speed being six to eight miles an hour, between the slow-down post and the place of the accident, they were at best making a guess about something in respect of which they had no duty to observe anything, whilst the deceased had his mind solely directed to the matter in discharging his duty. And it is to be observed that the order was

> to reduce speed to five miles an hour over sink-hole half a mile east of Farlane.

The man who issued this order asserted on the witness stand the sink-hole proper was *only twenty feet* in length.

To apply the like illustration I have given relative to the negligence of respondent, had the deceased been put on trial for manslaughter caused by neglect of this peculiarly worded order, could he have been

1915

LEWIS v. GRAND TRUNK PACIFIC RWAY. CO.

Idington J.

convicted thereof on evidence resting upon such a guess ?

I repeat this defence had to be established to the satisfaction of the jury and their verdict is conclusive, but by reason of the theories put forward (to demonstrate rate of speed and not the respondent's negligence as the cause) resting upon the appearance of things as found after the accident being coupled with this evidence, I think it well to point out how little that can be depended upon. So far as the theories themselves, quite independent of such support, are concerned they are equally matters which the jury could reject, especially as not supported by any positive expert evidence and are not based upon accurate representation of the facts.

The question thus comes back to the primary one of whether or not the respondent can in law be permitted to maintain in such condition for such a length of time such a dangerous condition of things without more drastic means to remedy them and without more protection to those whose duty or business might call them to venture across so treacherous a spot.

I concur in the main in the reasoning adopted by the judges dissenting in the court below from the judgment of the court. I need not repeat same here.

I think the action lies at common law. The negligence was that of the respondent.

As to the point, taken by Mr. Symington, that the action would not lie in Manitoba, I think as the law of England, including the "Fatal Accidents Act" was introduced into Manitoba in 1870, and a like law in force in Ontario, that the action would lie in Manitoba where the appellant lived, and respondent had property.

See Dicey on Conflict of Laws, pages 645 to 647 —Rule 178.

In my view of the case it is neither necessary nor desirable that I should express any opinion upon the many questions raised relative to the possibility of the claim being rested upon the "Workmen's Compensation Act."

I think the appeal should be allowed with costs here and below and the trial judgment be restored.

DUFF J. — This appeal should be dismissed. There is not in my opinion any reasonable evidence to support a finding either:—

(1) That the track and roadbed at the place in question were, assuming the order as to speed to be observed, so dangerous as to make it negligence on the part of the company, *vis-à-vis* the appellant, to operate for traffic; or

(2) That it was the state of the roadbed rather than excessive speed which was the real cause of the most unfortunate and distressing accident in which the husband of the plaintiff met his death.

I refer to the argument on the question of jurisdiction for the reason only that silence might be construed as implying some doubt as to the jurisdiction of the Manitoba courts to entertain the action. The effect of the provincial and Dominion legislation [chapter 12 of the Statutes of Manitoba, passed in the year 1874 (38 Vict.) and section 6 of chapter 99, R.S.C. (51 Vict., ch. 33)] is that *primâ facie* the law of England as it existed in the year 1870 is, for the purposes of this appeal, to be regarded as the law of Manitoba. By the law of England, speaking generally, a legal

1915

LEWIS v. GRAND TRUNK PACIFIC RWAY. CO.

Duff J.

obligation *ex delicto* (where the *res gestæ* giving rise to the obligation have occurred outside the territorial jurisdiction of the English courts) may be enforced in those courts if, according to the law of England, a like obligation would have arisen had the scene of the *res gestæ* been within that jurisdiction; *Phillips* v. *Eyre*(1), at pages 28 and 29. Nothing has been suggested to create a doubt that this is the law of Manitoba to-day. The argument founded upon the limited legislative jurisdiction of the province misses the mark. If there could be anything in it in the absence of the Dominion legislation above mentioned the argument would be disposed of by reference to that legislation. It follows, therefore, that if a right of action by common law (the law of England) became vested in the plaintiff in Ontario the obligation to which that right of action was attached would be enforceable in Manitoba. The fact that the plaintiff's right to sue in Ontario rests upon "Lord Campbell's Act" is really no objection because "Lord Campbell's Act" is in force in Manitoba: and it is literally true to say that if the scene of the *res gestæ* had been in Manitoba the right to redress independently of the "Workmen's Compensation Act" would not have been any less there than in Ontario. As to the enforceability of any obligation imposed upon the respondents by the "Workmen's Compensation Act" I have formed no opinion upon the point whether the provisions of that Act relating to notice and to dispensing with notice are of the essence of the employees' rights to such a degree as to make that right enforceable in Ontario only.

(1) L.R. 6 Q.B. 1.

I think it is proper to add that acknowledgments are due to counsel on both sides for the very admirable way in which the appeal was argued.

BRODEUR J. (dissenting).—This is the case of a railway accident which occurred on that part of the Grand Trunk Pacific Railway which runs through the Province of Ontario.

The action was instituted in Winnipeg, the place of destination of the train on which the accident occurred. Winnipeg is also the centre of operations of the Grand Trunk Pacific Railway Company and was in that respect the place where, for the convenience of the respondent, the suit could be best tried.

The accident having occurred in the Province of Ontario was necessarily to be decided according to the laws of that province. *"Lex loci actus"* must furnish the rule to dispose of the case, as Cockburn C.J. decided in *Phillips* v. *Eyre*(1).

The company respondent has property in the Province of Manitoba and it could have been sued in the latter province although the cause of action had not arisen there.

The jury found that the accident was due to the negligence of the company.

That judgment, however, was reversed by a majority of the judges of the Court of Appeal.

The deceased, in consequence of whose death the present action was instituted, was operating as a locomotive engineer. On the line of the defendant company, there was a soft spot or sink-hole over which the trains of the defendant company ran.

(1) L.R. 4 Q.B. 225.

1915

LEWIS v. GRAND TRUNK PACIFIC RWAY. CO.

Brodeur J.

On the 19th of July, 1911, as the deceased was driving a freight train over this soft spot the engine was turned over and he was killed.

An order had been given that the trains should not run, at that place, at a speed exceeding five miles. It was claimed by the company that this order had not been carried out and that the accident was due to an excessive rate of speed.

The evidence is very conflicting with respect to that, and a jury could reasonably infer that the order had not been violated. With that verdict of the jury it is not within our province to interfere.

The jury has also found that the accident was due to a depression of the track caused by the weight of the engine and by a defect of construction in the road. That was also a matter for the jury to decide and the evidence is also on that point somewhat conflicting. But the jury having come to the conclusion that there was negligence on the part of the company, we should not interfere with that verdict.

In those circumstances, I think that the verdict of the jury should stand and that the judgment of the Court of Appeal, which has rejected that finding, should be reversed with costs of this court and of the Court of Appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Crichton, McClure & Cohen.*

Solicitor for the respondents: *Joseph Yates.*