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*May 10.
*May 23.

THE CENTRAL VERMONT RAILWAY COMPANY (DEFENDANTS).... } APPELLANTS;

AND

JACQUES FRANCHÈRE (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW AT THE CITY OF MONTREAL.

Railways—Negligence—Free pass—Consideration for transportation—Misdirection — Findings of jury—New trial — Excessive damages — Art. 503 C. P. Q.

Where there was misdirection as to the assessment of damages merely and it appeared to the court that the damages assessed by the jury were grossly excessive, the Supreme Court of Canada made a special order, applying the principle of article 503 of the Code of Civil Procedure, directing that the appeal should be allowed and a new trial had to assess damages, unless the plaintiff consented that the damages should be reduced to an amount mentioned.

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Killam JJ.

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APPEAL fron the judgment of the Superior Court, sitting in review at Montreal, affirming the judgment in favour of the plaintiff entered by Curran J. on the verdict of the jury at the trial.

The circumstances under which the action was brought and the questions in issue on this appeal are stated in the judgments reported.

Lafleur K. C, for the appellants, cited *Brasell* v. *Grand Trunk Railway Co.* (1); *Grand Trunk Railway Co.* v. *Miller* (2); *Cowans* v. *Marshall* (3); and *The Glengoil Steamship Co.* v. *Pilkington* (4).

R. C. Smith K. C. and *R. A. E. Greenshields K. C.* for the respondent referred to *Beaudry* v. *Starnes* (5); *McRae* v. *The Canadian Pacific Railway Co.* (6) at page 144; *Crepeau* v. *Julien* (7); *Thibault* v. *Poitras* (8); *Kane* v. *Mitchell Transp. Co.* (9) at page 69; 20 Laurent No. 524; Sirey, Code Civ. Ann., arts. 1382, 1383, nn. 686, 702, 703; *Goodhue* v. *The Grand Trunk Railway Co.* (10); *Canada Shipping Co.* v. *The Mail Printing & Publishing Co.* (11); *Baillie* v. *Provincial Insurance Co. of Canada* (12); and *Laflamme* v. *The Mail Printing Co.* (13).

THE CHIEF JUSTICE concurred in the judgment ordering a new trial for the purpose merely of assessing damages, unless the plaintiff consented to accept a judgment for $2,500.

SEDGEWICK J.—I agree in the result of the judgment for the reasons stated by my brother Killam.

(1) Q. R. 11 S. C. 150.
(2) 34 Can. S. C. R. 45.
(3) 28 Can. S. C. R. 161.
(4) 28 Can. S. C. R. 146.
(5) Q. R. 2 S. C. 396.
(6) M. L. R. 4 Q. B. 140.
(7) Q. R. 12 S. C. 308.
(8) Q. R. 13 S. C. 481.
(9) 90 Hun. 65.
(10) M. L. R. 3 S. C. 114.
(11) M. L. R. 3 S. C. 23; M. L. R. 4 Q. B. 225.
(12) 21 L. C. Jur. 274.
(13) M. L. R. 4 Q. B. 84.

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GIROUARD J.—I concur in the opinion of Mr. Justice Killam.

NESBITT J.—The plaintiff sues, under article 1056 of the Civil Code, to recover damages for the death of his son, which occurred on the 28th January, 1903.

The plaintiff's declaration contained two paragraphs, as follows:

3. That the accident in question was due to the *gross fault and culpable negligence of the company defendant and its employees and servants:*

4. That owing to *improper couplings, the car in which the deceased* was riding became *detached and uncoupled from the rest of* the train while the train was going at a high rate of speed, and the officials and employees of the company-defendant in charge of said train, *took no precaution to avoid said car from running into the forepart of the train* on which collision occurred, and owing to the shock resulting therefrom the deceased was thrown down and killed.

On the 12th May, 1903, counsel for both parties agreed on the following facts to be submitted to the jury and by them answered in the cause, subject to the right to object:

1. Was J. Arthur Franchère on the 28th day of January a passenger on a train owned and operated by the defendant and running between the City of Montreal and the Village of Marieville?—Yes.

2. Did the said J. Arthur Franchère meet with an accident on the said date?—Yes.

3. Did the said J. Arthur Franchère receive injuries by the said accident, which resulted in his death?—Yes.

4. Was the accident due to the fault and negligence of the company defendant, its servants or employees?—Yes.

5. Were the couplings between the cars of the said train improper and defective?—Yes.

6. Were the brakes on said train in working order?—No.

7. Was the bell cord on said train in proper working order?—No.

8. Was the said J. Arthur Franchère the son of the plaintiff?—Yes.

9. Was the said J. Arthur Franchère the main support of the said plaintiff and his wife, the mother of the said J. Arthur Franchère?—Yes.

10. Was the said J. Arthur Franchère travelling at the time of the said accident on a free pass containing the following condition?—Yes.

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"The person accepting this free pass, in consideration thereof, assumes all risk of accident and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise for any injury to the person or for any loss or injury to the property of the passenger using it. If presented by any one other than the person named hereon, or if an alteration, addition or erasure is made upon this pass, it is void, and conductors will take it up and collect fare.

"The right to cancel this pass at any time is reserved by the company."

11. Was said condition accepted by the said Franchère?—No.

12. Was said pass issued for value received by the defendant or its *auteurs*?—Yes.

13. Was the said J. Arthur Franchère at the time of the accident riding in the baggage car of the said train?—Yes.

14. Was it against the rules of the said company to ride in a baggage car?—No.

15. Did the said plaintiff suffer damage by reason of the death of the said J. Arthur Franchère, and if so, to what amount?—Yes ($5,000), five thousand dollars. Unanimous on all questions.

At the trial, which took place on the 11th June, 1903, the jury answered the questions as above indicated, and the trial judge thereupon entered judgment for the plaintiff for the sum found by the jury.

The defendant appealed to the Court of Review which affirmed, without stating any reasons, the judgment of the trial judge.

The defendant now appeals here taking exception to questions 6 and 7 on the ground that the plaintiff's declaration contained no suggestion of any negligence as to the questions inquired into by questions 6 and 7, and claiming that the whole case of the plaintiff was that the accident had been caused through the fault of the company and its employees * * * * *

1. Owing to improper couplings; and,

2. Because the officials in charge of the train took no precaution to prevent the car which had been detached from running into the forepart of the train.

The defendant claims that the assignment of facts was fixed before the case came on for trial subject to

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the right of the parties to move before the judge to strike out, add to, or amend any of the facts so assigned as provided by article 427 of the Code of Civil Procedure. The defendant admitted negligence under question 5, and the importance of eliminating questions 6 and 7 and the answers thereto is that the negligence found would bring it under section 243 of the Railway Act of 1888 and within the provision entitling a party to recover notwithstanding any agreement to the contrary. I am inclined to think that the appellant should have required particulars under clause 3 of the declaration and that not having appealed from the assignment of facts is not entitled to invoke article 427 to claim the right to object to evidence being offered of the negligence found in answers to the questions 6 and 7. In any event on a new trial the plaintiff could and would no doubt amend his declaration to which the defendant would be entitled to plead, and on such new trial evidence could be gone into of the negligence so found.

The appellant also objects to the misdirection of the learned trial judge on the question of the measure of damages and in directing the jury as to the acceptance of the condition on the back of the pass by the deceased. The learned judge read the document which is in the following terms:

Cette vente est faite en consideration du droit, par les présentes accordé au dit Jacques Franchère et à son épouse, leur vie durant ou la vie durant de l'un d'eux, de voyager, gratis (sans payer) sur tout le parcours du dit chemin, tant et aussi souvent et longuement qu'il leur sera loisible, sans charge extra pour leurs paquets et bagages ordinaires, et dans les chars que les dits Jacques Franchère et son épouse choisiront ou choisira, pour leur plaisir ou utilité. Tel privilège et droit de passage gratis étant transférable par les privilégiés à deux des enfants des dits J. Franchère et son épouse, la vie durant de ces derniers ou de l'un d'eux.

A l'effet du privilège présentement accordé, la dite compagnie devra livrer aux dits Jacques Franchère et son épouse tous papiers, billets de passage ou tickets nécessaires.

Which I translate textually as follows :—

"This sale is made in consideration of the right by these presents granted to the said Jacques Franchère and to his wife during their life or the life of either of them, to travel free (without payment) on the whole length of the said road, as much and so often and at such length as will be possible to them, without any extra charge for their bundles and ordinary baggage and in the cars that the said Jacques Franchère and his said wife will choose, for their pleasure or use. Such privilege and the right of free passage being transferable by the persons to whom the privilege is given to two of the children of the said J. Franchère and his wife, during the life of the latter or of either of them.

"For the effect of the privilege now granted, the said company should deliver to the said Jacques Franchère and his wife all papers, passenger notes or necessary tickets."

It was argued that the deceased could have presented this deed and demanded his free passage on the train, and that he in no sense came within the cases establishing that a person travelling on a free pass issued with such a condition as is contained on the back of the pass in this case was not entitled to recover from the railway company for the negligence of its servants. In the case of transportation issued strictly under the document in the case of either Jacques Franchère or his wife that would be so, but as I read the document it is an agreement to give free passage to Jacques Franchère and his wife or to any two of their children whom they substitute in their place. If that is the proper construction, then,

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if the railway company issue the pass to five persons, that is three of the family of Jacques and Mrs. Franchère, then, surely they can say that as they are giving something not called for by the deed, something that is merely gratuitous, that as to the three persons to whom they are extending the gratuity the considerations relative to an ordinary free pass would apply. I would think it clear, too, that even the parties entitled under the deed could agree with the railway company that, if the railway company would do something over and beyond that which was required by the deed, they, on their part, would, in consideration of such "extra" upon the part of the railway company, agree to limit or release the liability of the railway company to themselves. I should think that that must be clearly the case and that therefore a very serious question arose, and that as to at least three of the parties this was a free pass, and that as to the other two, namely, the persons mentioned in the deed, they had a perfect right to agree with the railway company that if the railway company would carry three other members of the family also free, that all five would agree to make no claim against the railway company for negligence resulting in their injury. I need only refer to the cases collected in *Provident Life Society of New York* v. *Mowat* (1) to shew that any person receiving a pass, such as was issued in this case, with the conditions indorsed on the back of it, and having same in possession from year to year, would be presumed to have consented to the conditions. See also *Robertson* v. *Grand Trunk Railway Co.* (2). I therefore think that upon this branch of the case the learned trial judge clearly misdirected the jury, and that any finding of non-acceptance would be against the weight of evidence and the proper con-

(1) 32 Can. S. C. R. 147. (2) 24 Can. S. C. R. 611.

clusions to be drawn that the verdict must be set aside.

On the question of the assessment of damages the effect of the charge of the learned trial judge is best shewn by the following language :

You have had before you here an expert who comes and tells you that the cost of an annuity is $683 for $100 a year to a man of the age of the old gentleman who is now the plaintiff before you. He is supposed according to the tables of mortality, to live for seven and a half years. It will be for you to say what annuity he is entitled to from all the evidence you have heard. That is to say, as regards his own support and that of his wife ; I want to eliminate from this the support of Mr. Bouthillier and of any other person who may be in that house.

By restricting yourselves to the strict line of your duty taking into consideration what this old gentleman and his wife were entitled to under the circumstances I have mentioned to you, *you will reach the conclusion that—if they should get anything—they should get an annuity of four hundred or five hundred or six hundred dollars a year, whatever amount you think in your consciences that this young man could have paid.* That is what you have to do, and it is upon the basis of that amount that your verdict must be reached.

This direction is, I think, clearly erroneous. I think that it should have been pointed out to the jury that they must consider the circumstance also that the son was running behind in his payments to creditors ; that he might be cut off by disease or accident at any moment, when the payments to the father would cease. I cannot do better than cite from the language of Mr. Justice Brett.

To the best of my belief, the invariable direction to juries, from the time of the cases I have cited until now, has been " that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider *under all the circumstances a fair compensation.*" I have a clear conviction that any verdict founded on the idea of giving damages to the utmost amount, which would be an equivalent for the pecuniary injury, would be injust. Founding my opinion on that conviction, on the declaration of it by Parke J., and on the ordinary direction of judges, which directions have not been

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for years challenged, I conclude that the direction that I have enunciated is the legal, and only legal, direction. A direction which *leaves it open* to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued if there had been no accident is a direction, as it seems to me, leaving it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such a direction is a misdirection according to law. And such, in my opinion, was the direction in the present case of the Lord Chief Baron. *Rowley* v. *London & N. W. Ry Co.* (1).

This case has been adopted by the Court of Appeal in England on the 30th of last month in *Johnston* v. *Great Western Railway Company* (2).

The appellants also objected to the learned trial judge telling the jury that they were entitled to consider the needs of the plaintiff's wife during the lifetime of the plaintiff. The action was taken only for the plaintiff and not in a representative capacity, and I think, under the Code, damages recoverable are the same as under Lord Campbell's Act, and I entirely agree with the rules laid down by my brother Killam when Chief Justice of Manitoba in a case of *Davidson* v. *Stuart* (3). The cases are there fully considered and referred to and I adopt the conclusions he arrives at in that case and I think all that the jury were entitled to consider in this case were the reasonable pecuniary benefits to be derived by the father himself.

The verdict itself is evidence that the jury utterly failed to appreciate the proper measure of damages. They have given a present cash sum for a larger amount than could be suggested was likely to be contributed from year to year during the balance of the life time of the father. If the jury were to give a sum which at present expended would produce as a certainty at the present time the sum mentioned as usually contributed by the son it would, in my judgment,

(1) L. R. 8 Ex. 221. (2) [1904] W. N. 92.
(3) 14 Man. L. R. 74 ; 34 Can. S. C. R. 215.

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under the doctrine of *Rowley's Case* (1) be too large. not being under all the circumstances a fair compensation taking into consideration the chances of the support being out off by accident or death or other causes at any time ; but to give at least double such a fixed amount, as they have done in this case, stamps the verdict as one which must have been given under a misapprehension of the proper measure of damages to be adopted. It is very difficult under Lord Campbell's Act to get a jury to understand that they cannot give solatium for wounded feelings, etc., but that their verdict must only be for such a sum as there is reasonable proof of a reasonable expectation of a pecuniary benefit.

I think the appeal should be allowed with costs and a new trial directed.

KILLAM J.—At the trial counsel for the company moved to have certain questions which had been assigned to be submitted to the jury struck out, and the refusal of the trial judge to strike out the 6th and 7th questions has been urged as one ground for granting a new trial. Art. 498 of the Code of Civil Procedure makes the insufficiency or defectiveness of the assignment of facts a ground for granting a new trial; but by art. 499,

the defects in the assignment of facts must be such as to prevent a trial of the material issues.

As the declaration did contain a general allegation of negligence and as the defendants pleaded to the declaration, assented to the assignment of facts, subject to revision by the trial judge, and went down to trial without previously raising any objection, it does not appear to me that the trial judge was absolutely bound to strike out those questions or the Court of

(1) L. R. 8 Ex. 221.

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Review to disturb the judgment on the ground of his refusal to do so, or of the reference to the jury of the questions objected to.

In view however, of the findings of negligence in the answer to the 6th and 7th questions, the direction respecting the acceptance of the pass appears unimportant. These findings are not challenged otherwise than by the objection just mentioned, and it is not disputed that the defects came within the provisions of section 243 of the Railway Act of Canada, 51 Vict. ch 29, noncompliance with which renders the company liable, notwithstanding any agreement to the contrary. The evidence seems to me to have amply warranted the finding of the jury that the pass was issued for value, and we need not consider the application of the section to the case of a person riding by mere license of the company, without consideration.

It does not appear to me to have been erroneous to receive evidence of the mother's chance of life. The jury would have the right to take into account the probable effect of the mother's life and the father's liability to maintain her upon the action of the deceased in making contributions to his father if he had not been killed.

I entirely agree, however, that the direction to the jury upon the question of damages was erroneous upon the other ground pointed out by my brother Nesbitt. But, as the only question upon which there was any error was a question of damages, I think that justice would be done by refusing to allow the appeal if the plaintiff will consent to a reasonable reduction of damages.

By article 500 of the Code of Civil Procedure;

A new trial is not granted on the ground of misdirection * * * unless some substantial prejudice has been thereby occasioned; and if

it appears that such prejudice affects a part only of the matter in controversy, the court may direct a new trial as to such issues only.

And by article 503;

If the amount awarded by the verdict is grossly excessive, the court may refuse a new trial, provided that the plaintiff agrees that it be reduced to an amount which the court considers not excessive

in this case, say $2,500.

While the latter article was probably intended to apply only to cases in which the jury has been properly directed, yet I think that its spirit may be applied in dealing with an application for a new trial on the ground of a misdirection as to damages, and the new trial refused, if in that way the "prejudice" can be removed.

Appeal allowed with costs.

Solicitors for the appellants: *Lafleur, MacDougall & Macfarlane.*

Solicitors for the respondents: *Greenshields, Greenshields, Heneker & Mitchell.*