

THE NEW BRUNSWICK RAIL- WAY CO. AND ROBERT LAW } (DEFENDANTS).....	APPELLANTS; 1888 *Nov. 15.
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AND

ALICE M. VANWART, ADMINISTRA- TRIX OF JOSEPH M. VANWART, DE- CEASED (PLAINTIFF).....	} RESPONDENT. 1889 *Mar. 18.
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ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Railway Co — Negligence — Approaching siding — Notice of approach.*

At a place which was not a station nor a highway crossing the N. B. Ry. Co. had a siding for loading lumber delivered from a saw mill and piled upon a platform. The deceased was at the platform with a team for the purpose of taking away some lumber, when a train coming out of a cutting frightened the horses, which dragged the deceased to the main track where he was killed by the train.

*Held* that there was no duty upon the company to ring the bell or sound the whistle or to take special precautions in approaching or passing the siding.

**APPEAL** from a decision of the Supreme Court of New Brunswick (1) setting aside a non-suit granted at the trial and ordering a verdict to be entered for the plaintiff.

The action in this case was brought to recover damages from the defendant for the death of Joseph M. Vanwart, caused, as alleged by the plaintiff, by the negligence of the servants of the company.

The deceased was at a siding of the railway with a pair of spirited horses, his business there having no connection with the railway. While there he was told that a train was approaching, and he endeavored

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\*PRESENT.—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

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to unhitch the horses but before he could do so the train approached, the horses ran away and dragged deceased on the track and he was killed. No whistle was sounded or bell rung as the train approached the siding. The company was under no statutory obligation to give warning.

The defendants contended on the trial that there was no evidence of negligence to go to the jury, and if there was the plaintiff was guilty of such contributory negligence as to relieve the company.

At the trial the counsel agreed that a non-suit should be entered subject to the same being set aside by the court if it should be considered that there was evidence of negligence and not of contributory negligence, in which case a verdict might be entered for the plaintiff for the damages agreed upon or a new trial be granted, the court to draw inferences of fact. The court set aside the non-suit and ordered a verdict to be entered for the plaintiff. The company then appealed to the Supreme Court of Canada.

*Weldon, Q.C.* for the appellants, cited *Dublin, &c., Railway Company v. Slattery* (1); *Wright v. The Boston & Maine Railroad* (2); *Gaynor v. The Old Colony Railway Company* (3); *Wakelin v. The London & South Western Railway Company* (4); *Taylor on Private Corporations* (5); *Skelton v. The London & North Western Railway Company* (6); *Larmore v. The Crown Point Iron Co.* (7).

*J. A. Vanwart* for the respondent—The decision of the court below must be treated as the verdict of a jury, and will not be interfered with on questions of fact.

(1) 3 App. Cas. 1155.

(2) 129 Mass. 440.

(3) 100 Mass. 208.

(4) 12 App. Cas. 41.

(5) 2 Ed. sec. 376.

(6) L.R. 2 C.P. 631.

(7) 101 N.Y. 391.

(PATTERSON J, refers to the case of *Young v. Moeller* 1888  
 (1) as an authority, showing that where the court below has power to draw inferences from the evidence a court of appeal may also draw inferences) THE NEW  
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The learned counsel referred to the cases of *Rosenberger v. The Grand Trunk Railway Company* (2); *Davie v. The London & South Western Railway Co.* (3); v.  
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The judgment of the court was delivered by :—

PATTERSON J.—The plaintiff has judgment for \$1,500 for herself, as widow of the deceased, and for \$500 for his father. An objection was made to the father's right to recover damages for the death of his son, but the authorities are against the objection. He is properly held to have had reasonable expectations of future pecuniary benefit from the life of his son. I think all the English cases on the point, decided under Lord Campbell's Act, will be found collected in my judgment in *Lett v. St. Lawrence and Ottawa Ry. Co.* (4), and considered in chronological order. The cases of *Franklin v. South Eastern Ry. Co.* (5); *Dalton v. South Eastern Ry. Co.* (6); and *Hetherington v. North Eastern Ry. Co.*, (7), amongst others, will be found to be in point upon the present objection, if the defendants are held liable at all.

Upon the main question of the defendants' liability we have the advantage of elaborate and able judgments delivered in the court below. The opinion of the majority of the court was in favor of the plaintiff's right to recover. The question was treated as one of some novelty, as well as of some difficulty. It is not a matter of surprise to find it regarded in different lights by the judges by whom it was discussed, but after the

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| (1) 5 E. & B. 755.                         | (4) 11 Ont. App. R. 1.  |
| (2) 8 Ont. App. R. 482; 9 Can. S.C.R. 311. | (5) 3 H. & N. 211.      |
| (3) 11 Q.B.D. 213.                         | (6) 4 C. B., N. S. 296. |
|  | (7) 9 Q. B. D. 160.     |

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further discussion it has received in the argument before us, I cannot say that I have any doubt of the right of the defendants to our judgment in their favor. The incidents connected with the unfortunate accident which occasioned the death of the intestate need not now be stated in detail. The essential facts on which the liability of the defendants must be tested are within a narrow compass.

The freight train was making its ordinary daily trip, in the ordinary manner, and at its regular time, when the horses of the deceased, which he had just brought to a place very near the track for the purpose of taking away a load of lumber, were frightened by the train, became unmanageable, and dragged him with or under the waggon on to the track, where he received fatal injuries from the train if he had not been already fatally injured by the horses and the waggon.

There was a cutting at a short distance each way from the place of the accident, and the approach of the train was not easily discovered until it was about to emerge from the cutting. The fright of the horses may have been in this case caused by the sudden appearance of the train, and reason is given for the belief that the accident might have been avoided if the deceased had had time, after he knew the train was coming, to turn the horses' heads towards it.

No whistle was sounded or bell rung to give notice of the approach of the train.

The place was not a highway crossing, and there was no statutory duty to whistle or to ring.

Under the facts so stated, if those were all the facts, there could be no suggestion of negligence on the part of the defendants.

The position would be that which recurs every hour in the day along all our railways.

It is precisely that of a farmer unloading his grain

at a warehouse beside the railway, or a team standing at a flag station while an express train rushes past, or being driven along a highway that runs alongside of a railway as many highways do, or crosses the railway by a bridge or culvert where the statutory duty to whistle or to ring does not apply.

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In cases like these the sight and noise of a train passing along the line may frighten horses unused to such objects. The business of the railway would be materially impeded if account had to be taken of every such possibility. The duty, if recognised, would, by an easy process of reasoning, be found to extend also to ordinary farm crossings. The danger to horses from the supposed cause may easily be exaggerated. It may be found, just as in the present instance, that while work with trains is plied all the year round in such situations, no trouble occurs in any but exceptional cases, where the horses may be excitable or the drivers imprudent.

It has long been the law with regard to nearly all our railways, under the provisions of our railway legislation, that notice of the approach of a train to a level crossing of a highway must be given by sounding the whistle or ringing the bell. We are told that that rule did not apply by statute to the defendant company until after the accident now in discussion. The existence of the legislative rule may, however, afford a criterion of what is reasonable, and as a warning not to impose on the company a burden more onerous than that indicated by the legislature as sufficient :—

It would be extremely difficult, Lord Halsbury remarked in *Wake-  
 lin's case* (1), to lay down as a matter of law that precautions which the legislature has not enjoined should be observed by a railway company in the ordinary conduct of their traffic.

Nothing turns on the circumstance that the unfortu-

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nate man was dragged on to the track and mangled by the engine. The legal position would have been the same if his injuries had been sustained without that distressing incident. This was fully recognised in the court below.

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 Patterson J.

There are, however, some other facts, and it is upon the effect attributed to them that I understand the judgment to have proceeded. I think the fallacy consists in regarding those other facts as essential facts.

A Mr. Tapley had a sawmill at or near the spot in question. For the convenience of shipping his lumber by the railway he had made a road from the mill to the railway grounds, and the company had constructed a siding. There was a structure which is called a wharf, and was, if I correctly apprehend the evidence, some kind of platform on which boards could be piled and from which they could be conveniently loaded upon cars on the siding. The deceased had been sent by a customer of Tapley's for boards, and Tapley, not having what was wanted at the mill, directed the deceased to take them from the wharf. He had just driven his horses into position to begin loading from the wharf when the train appeared and the horses took fright.

I am unable to see that the knowledge by the company of the existence and use of this wharf, or the consent and concurrence of the company in its erection and in the use of the siding for the purpose of the shipment of Tapley's lumber, and of bark or other produce brought there by others for shipment, alters the position in any respect material to the present inquiry. Setting aside the fact that the deceased was not using the structures for their intended purpose, or acting under any permission from the company, but regarding him in the same way as if he had brought lumber from the mill to pile it on the wharf for ship-

ment, his position did not differ from that of a farmer delivering his grain at a warehouse beside the track, or a teamster waiting at a way station whose horses might be frightened by a passing train, without any breach of duty on the part of the company, and without any duty attaching to the company to give any kind of special notice that the train was approaching.

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Several cases have been relied on for the plaintiff either as showing that there may be circumstances in which special care is called for in operating the railway or that a liability may be incurred by neglecting to sound the whistle, and even by unnecessarily sounding it, and that the company may be liable even when the injury is sustained at a distance from the track. I do not propose to discuss those cases in detail. They will be found to be of two classes, viz.: cases where the railway crossed a highway, or where the complainant was injured while lawfully using or passing over the railway property. In *Rosenberger v. The Grand Trunk Railway Company* (1), which went as far as any case has gone, the railway crossed the highway, and the company neglected their statutory duty. The general remark of Spragge C.J., quoted by the learned Chief Justice in the court below, as to the duty of the company not being confined to that prescribed by the statute may perhaps be rather wide. It was merely obiter, because it was the neglect of a statutory duty that was there in question; but, at all events, it was made with reference to the crossing of a highway on the level, and cannot properly be taken to bear on a situation like that now under consideration.

In *Sneesby vs. Lancashire and Yorkshire Railway Company* (2) the negligence was in allowing some trucks to run down a siding over which the cattle were cross-

(1) 8 Ont. App. R. 482; 9 (2) L. R. 9 Q. B. 263; 1 Q. B. D. Can. S.C.R. 311.

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ing on their way from the railway carriage in which they had been conveyed. The cattle were killed on another railway to which they had found their way, and which happened to belong to the same company. The ownership of that railway did not affect the liability of the defendant company, which would have been the same if the cattle had met their deaths by rushing in their fright over a precipice.

Two very recent cases may be usefully noted. One is *The Victorian Railways Commissioners v. Coultas* (1) decided by the Judicial Committee of the Privy Council after the argument of the rule *nisi* in this case, where a person who was, by the negligence of the railway gatekeeper, allowed to drive across the track when a train was approaching, and who escaped actual impact but received a severe nervous shock from fright, was held not entitled to recover, the committee holding that the damages were too remote without deciding whether actual impact was necessary to the maintenance of the action. The other and later case, *Simkin v. London and North-Western Railway Company* (2) approaches more nearly to the present case in some of its facts than any other case which I have met with. The plaintiff's horse was frightened when leaving the station by an engine blowing off steam. The jury found that there was no negligence in the manner of the blowing off of the steam, but that the company ought to have erected a screen to shut out the view of the engines from the horses on the road. It was held that the evidence did not warrant the finding.

I cite these because they are the latest cases on our subject, and not as necessarily bearing more directly than some others on the case in hand. It will be found, however, that the decisions proceed on the principles on which I have formed the opinions I have expressed,

(1) 13 App. Cas. 222.

(2) 21 Q.B.D. 453.



and that in *Simkin's Case* (1) the judgment delivered by Lopes C.J. follows to a great extent the same line of argument and illustration by which I have reached my conclusion.

The question of contributory negligence does not arise here as a separate question. The whole of the facts appear from the evidence adduced by the plaintiff, and the question is whether upon those facts the accident can properly be held to have been caused by the negligent conduct of the defendants in the running of the train.

For the reasons I have given, I am of opinion that that question must be answered in favor of the defendants.

I have treated the case as if the company had been the only defendants. The engine-driver, who has been joined with them in the action, of course succeeds when the company succeeds. If the plaintiff had succeeded against the company the right of action asserted against the engine-driver might have required some consideration which is now unnecessary.

I am of opinion that appeal should be allowed with costs.

*Appeal allowed with costs.*

Solicitors for appellants: *Weldon & McLean*

Solicitors for respondent: *J. A. & W. Vanwart.*

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(1) 21 Q. B. D. 453.