

THE CANADIAN PACIFIC RAIL- } APPELLANT;
 WAY COMPANY (DEFENDANT). . . . }

1901
 *May 17.

AND

JESSIE E. SMITH (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA,

Negligence—Railway company—Injury to passengers in sleeping berth.

S. an elderly lady, was travelling on a train of the Canadian Pacific Railway Company from Montreal to Toronto. While in a sleeping berth at night, believing that she was riding with her back to the engine she tried to turn around in the berth, and the car going around a curve at the time she was thrown out on to the floor and injured her back. On the trial of an action against the company for damages it was not shown that the speed of the train was excessive or that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the verdict at the trial in favour of the defendant company.

The material facts are sufficiently stated in the above head-note. The trial judge withdrew the case from the jury and ordered judgment to be entered for the defendant. The court *en banc* set aside this judgment and granted the plaintiff a new trial.

Nesbitt K.C. and *Harris K.C.* for the appellant.

Drysdale K.C. for the respondent.

The judgment of the court was delivered by :

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and Girouard JJ.

1901
 THE
 CANADIAN
 PACIFIC
 RAILWAY
 COMPANY
 v.
 SMITH.
 The Chief
 Justice.

THE CHIEF JUSTICE (oral).—It is clear beyond a doubt, though I say it with all respect, that there was no proof of negligence which would have warranted the Chief Justice, who presided, in submitting the case to the jury. It would have been exceedingly wrong if he had done so, and his power of dealing with a case in the way he did when there is no such proof depends on rules which are now quite elementary.

I find in the old reports that in cases of coach accidents in England it was customary to leave the case to the jury as a whole, but that stage of the law has long since passed away. The principle laid down by the House of Lords, in some quite recent cases, as that upon which the courts ought to act, is that it is the duty of the judge to inquire for himself as to whether or not there is any evidence of negligence for the jury. If there is none, he should dismiss the action; if there is any evidence he is to call upon the defendant to disprove it, and if he fails to do so the plaintiff must have judgment.

In the present case the question of negligence must depend either upon negligent construction of the permanent way or negligent running of the train. There has been no proof made of either. In order to prove that the railway was badly constructed the plaintiff would have required a great mass of expert evidence, in order to admit which it would have been necessary to lay the foundation by an inquiry, of vast scope and involving very heavy expense, as to the construction of the whole of the line from Montreal to Toronto, including the necessity of curves and so forth. At the time of the accident it appears to have been probable that the train might have been going round a curve. It is in the very nature of things that all railways must have some curves, and we must presume that the curve in this case was necessary and proper for

the construction of the road and also that it had been properly constructed.

Then again, as my brother Taschereau remarked during the argument a high rate of speed is not necessarily evidence of negligence, and, moreover, there is no proof that there was an irregular or excessive rate of speed. Beyond this allegation or inference there has been no attempt made to show that there was any negligence. This elderly maiden lady, journeying upon a most laudable mission, appears to have had no previous experience of travelling by railway and using berths in sleeping cars, and she met with the accident. Her berth appears to have been constructed in the usual manner, with all customary appliances for the comfort and safety of passengers, and an electric button to ring a bell for the porter in case of any assistance being required, of which, however, she did not avail herself. She appears to have been in an extraordinary posture at the time the accident occurred, trying to change her position in the berth, when the train probably went round a curve at a rate of speed not shown to have been improper. The accident must be attributed to her own act and inexperience.

To some extent it would appear that the accident was on account of a change made in the location of the plaintiff's berth from a lower to an upper one, through the train of the Intercolonial Railway failing to make the proper connection at Montreal, but this is not to be attributed to the Canadian Pacific Railway Company.

We must allow the appeal and dismiss the action with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Harris, Henry & Cahan.*

Solicitors for the respondent: *Drysdale & McInnis.*

1901
 THE
 CANADIAN
 PACIFIC
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 v.
 SMITH.
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 Justice.