LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY (DEFENDANT) ........ APPELLANTS;

1904
*Oct. 21.
*Oct. 24.

AND

HENRIETTA MARSH (PLAINTIFF)........RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Appeal—Special leave—60 & 61 V. c. 34, sec. 1 (D.)*

Special leave to appeal from a judgment of the Court of Appeal for Ontario (60 & 61 Vict. c. 34, sec. 1 (D)) may be granted in cases involving matters of public interest, important questions of law, construction of imperial or Dominion statutes, a conflict between Dominion and provincial authority, or questions of law applicable to the whole Dominion.

If a case is of great public interest and raises important questions of law leave will not be granted if the judgment complained of is plainly right.

MOTION for leave to appeal from a decision of the Court of Appeal for Ontario sustaining a verdict for the plaintiff at the trial awarding her $1000 damages.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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The plaintiff's husband was killed by a train of the defendant company at a highway crossing in the City of London. At the trial of her action for compensation for his death the jury found no contributory negligence on the part of deceased, and found negligence in defendant causing the accident which negligence consisted in non-ringing of the bell and want of a watchman at the crossing and an automatic bell. The plaintiff obtained a verdict for $1000 which was not sufficient to give an appeal *de plano*.

*Riddell K.C.* for motion. This case is of great importance to railway companies and to the whole public. The jury has usurped the functions of the Board of Railway Commissioners in holding the lack of an automatic bell or a watchman at the crossing, which are not required by statute, to be negligence.

*Faules* contra. This case is of no more public importance than was *Fisher* v. *Fisher* (1).

SEDGEWICK and GIROUARD JJ. were of opinion that the motion should be refused for the reasons stated by Nesbitt J.

DAVIES J.—While concurring generally in the judgment prepared by Mr. Justice Nesbitt dismissing this application for special leave to appeal, I do not wish to express any opinion whatever as to the conclusion this court would reach on an application for leave where the question was raised "Whether an engine and tender running reversely had other duties to perform than those imposed by the Railway Act." I have seen no reason to qualify the observations I made in the case of *The Grand Trunk Railway Co.* v. *McKay* (2) with respect to the decision of this court

(1) 28 Can. S. C. R. 494. (2) 34 Can. S. C. R. 81.

in *The Lake Erie and Detroit River Railway Co.* v. *Barclay* (1).

NESBITT J.—This is a motion for special leave to appeal. We are of opinion that special leave should not be granted in this case.

The action was one for negligence, tried by a jury, and the plaintiff recovered a verdict for $1,000. A perusal of the case shows that there was evidence of statutory negligence in failing to ring the bell of the engine, which the jury found to have caused the accident. They also found against the defence of contributory negligence. There were added, too, findings of the necessity of further precautions which we think were surplusage and cannot on a fair reading be treated as part of the negligence but for which the accident would not have happened; and, therefore, no questions such as were raised in *The Grand Trunk Railway Co.* v. *McKay* (2) were in our opinion involved.

Nor does the case raise the important question of the duty of a traveller to observe the precautions of looking and listening, on approaching a crossing, since the trial judge expressly charged that such was the duty of the plaintiff and the plaintiff swore to the observance of the duty.

Whether this court would have come to the same conclusion as the jury is not the question. In applications to this court for special leave, it is bound to apply judicial discretion to the particular facts and circumstances of each case as presented. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not

(1) 30 Can. S. C. R. 360. (2) 34 Can. S. C. R. 81.

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necessarily be subject to future qualification, and any attempt to formulate any such rule might, therefore, prove misleading. The court may indicate certain particulars the absence of which will have a strong influence in inducing it to refuse leave, but it by no means follows that leave will be given in all cases where these features occur. If a case is of great public interest and raises important questions of law and, yet, the judgment is plainly right, no leave should be granted. See "*Daily Telegraph*" *Newspaper Co.* v. *McLaughlin* (1).

Where, however, the case involves matter of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted. Such cases, as we understand, came peculiarly within the purview of this court which was established, as far as possible, to be a guide to provincial courts in questions likely to arise throughout the Dominion. We think it was the intention of the framers of the Act creating this court that a tribunal should be established to speak with authority for the Dominion as a whole and, as far as possible, to establish a uniform jurisprudence, especially within matters falling within section 91 of the B. N. A. Act, where the legislation is for the Dominion as a whole, or, as I have said, where purely provincial legislation may be of general interest throughout the Dominion.

Had this case involved a discussion of any special section of the Railway Act and the powers of the railway committee, as suggested, we think it would have been a case for leave; had there been any such general question in dispute, as the undoubted duty of a traveller to observe care in approaching a railway cross-

(1) 20 Times L. R. 674.

ing, or the question of whether or not an engine and tender running reversely were bound to observe other duties and obligations than those imposed by the Railway Act, a case for leave might have been made out. But we think that no such questions were really involved, as the case was wholly disposed of by answers finding statutory negligence and against contributory negligence, with evidence which must have gone to the jury on each branch, findings that we cannot think should be disturbed.

The motion is therefore dismissed with costs.

KILLAM J. also concurred with Nesbitt J.

*Motion dismissed with costs.*

Solicitor for the appellants: *J. H. Coburn.*

Solicitor for the respondent: *John F. Faulds.*