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*Nov. 23.
Dec. 1.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

ALBERTINA BIRKETT (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Railway company—Proximate cause—Imprudence of person injured.

A railway train was approaching a station in London and the conductor jumped off before it reached it intending to cross a track between his train and the station contrary to the rule prohibiting employees to get off a train in motion. A light engine was at the time coming towards him on the track he wished to cross which struck and killed him. The light engine was moving slowly and showed a red light at the end nearest the conductor which would indicate that it was either stationary or going away from him. In an action by the conductor's widow she was nonsuited at the trial and a new trial was granted by the Court of Appeal.

Held, reversing the judgment of the Court of Appeal, Davies and Killam JJ. dissenting, that as the light engine had been allowed to pass a semaphore beyond the station on the assumption, which was justified, that it would pass before the train came to a stop at the station, and as, if the deceased had not, contrary to rule, left the train while in motion, he could not have come into contact with said engine, the plaintiff was not entitled to recover.

Held, per Davies and Killam JJ. dissenting, that the act of the deceased in getting off the train when he did was not the proximate cause of the accident and plaintiff was entitled to have the opinion of the jury as to whether or not deceased was misled by the red light.

APPEAL from a judgment of the Court of Appeal for Ontario setting aside a non-suit and ordering a new trial.

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

The facts of the case are sufficiently stated in the above head-note.

Walter Cassels K.C. for the appellants. The deceased did not take ordinary precautions to avoid injury and was the author of his own wrong. *Jean* v. *Boston and Maine Railroad Co.* (1)

Moreover his disobedience of the rules of the company would bar recovery. *Sloan* v. *Georgia Pacific Railroad Co.* (2).

J. S. Robertson for the respondent, referred to *Balfour* v. *Toronto Railway Co.* (3); *Randall* v. *Ahearn & Soper* (4)

SEDGEWICK and GIROUARD JJ. concurred in the reasons given by Mr. Justice Nesbitt for allowing the appeal.

DAVIES J (dissenting)—After reading the evidence on which the trial judge non-suited the plaintiff together with the company's rules which were invoked by both parties, I am of opinion that this appeal should be dismissed for the reasons, given by Mr. Justice Garrow speaking for the Court of Appeal.

I purposely refrain from a critical analysis of the evidence because it might prejudice the parties in case of a new trial.

Assuming that the deceased conductor had, contrary to the rules, stepped on to the platform from his train before it had actually stopped, it is quite clear that such action on his part was not the *causa causans* of his death. He reached the space between his train and the reversing engine and tender safely, and it was what took place subsequently and was not necessarily

(1) 26 Am. & Eng. Rd. Cas. (N.S.) 234.
(2) 44 Am. & Eng. Rd. Cas. 513.
(3) 5 Ont. L. R. 735; 32 Can. S. C. B. 239.
(4) 34 Can. S. C. R. 698.

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Davies J.

the consequence of the too speedy stepping from the train which caused the death. In other words there was no necessary relation or casual connection between the breach of the rule in stepping off the train, if breach there was, and the accident which brought about deceased's death. Mr. Robertson's argument on this phase of the case was, to my mind, conclusive.

It was conceded without qualification by Mr. Cassells that the reversing engine and tender, which was running along an inside track between the deceased and the station house, displayed a red light instead of a white one, as required by the rules. This, to an experienced railway man, such as deceased was, would, under ordinary circumstances, indicate that the engine and tender were either stationary or were going away from him. It is, in my opinion, sufficient to entitle the plaintiff to have the question submitted to a jury whether or not, under the circumstances at the time, the deceased was misled and thrown off his guard and so excused from taking those precautions which under different conditions he would have been obliged to take to ascertain definitely whether the reversing engine and tender were running towards him or not. It was open to the jury to find, under the special circumstances of this case, that the crossing of the track by the deceased at the time he did might lose its character of negligence by reason of its being induced by the false signal, the red light, which might easily convey to him the impression in effect that the train was either stationary or receding from him. See *Coyle* v. *Great Northern Ry. Co.* (1), at page 425.

NESBITT J.—The negligence which must be charged against the defendants in this action must consist in the running of an engine reversely with a red light

(1) 20 L. R. Ir. 409.

instead of a white one at the particular spot and at the particular moment that the accident occurred.

The man in charge of the semaphore proved that he allowed the light engine to proceed past the semaphore as, in his judgment, it would be in a position of safety before the incoming passenger train would stop and allow its passengers to alight. It is not disputed that his judgment in this matter was correct, and that, in fact, had the rules of the plaintiff company been observed there would have been no negligence so far as this plaintiff is concerned, the negligence charged, as I have said, being the running of the engine with a red light at the particular spot and at the particular moment, causing the injury to the plaintiff. This seems to me to be the point entirely overlooked by the Court of Appeal. Had not the unfortunate deceased disobeyed the express rules of the company and stepped off the moving train there would have been no negligence in the engine being where it was. Both courts below have found that the train was in motion and did not come to a stop until the light engine had moved to a point beyond where the train stopped, and, therefore, the act of the conductor in stepping off the moving train produced the negligent situation charged. The semaphore man in allowing the light engine to proceed as he did had a right to assume the conductor would not get off the moving train, and, as I have pointed out, there was no negligence in any servant of the company in the engine being at the point it was at the moment of the accident. It was argued that when the conductor got off the train he was in a place of safety and was misled by the red light being displayed instead of the white one. This seems to me not to be the point in the case. The negligence, as I have pointed out, causing the accident, was the act of the conductor in disobedience

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of the rules stepping off a moving train, and bringing himself, therefore, into a situation where he had no right to be and the company had no right to expect him to be. It was not negligence, so far as he was concerned under the particular circumstances, to have the engine at the point that it was.

In my view the appeal should be allowed and the judgment of the trial judge dismissing the action restored.

KILLAM J. (dissenting.)—I agree with the view taken by the Court of Appeal.

The act of the deceased in alighting from the train while in motion cannot, in my opinion, be taken as the proximate cause of the accident. If the deceased had remained where he alighted until the train stopped he would have been in the same position as if he had remained upon it; it was subsequent acts that brought him into danger. The most that can be said is that possibly he alighted so hurriedly and in such a manner as momentarily to disturb his mental equilibrium or render his faculties less acute than usual; and it may be that his attempt to cross the track was made too soon or that it was made without due care.

These questions, however, appear to me as proper for the consideration of a jury in connection with the fact of the use of the red light.

Appeal allowed with costs.

Solicitor for the appellant: *John Bell.*

Solicitors for the respondent: *Idington & Robertson.*