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*March 23.
*April 3.

THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM TOMS (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Damages—Negligence—Physical injuries—Mental shock—Severance of damages.

T. was riding in a street car when it collided with a train. He was thrown violently forward on the back of the seat in front of him, but was able to leave the car and walk a short distance towards his place of business when he collapsed and was taken home in a cab. He was laid up for several weeks and never recovered his former state of health. On the trial of an action against the Railway Co. one medical witness gave as his opinion that the physical shock received by T. was the exciting cause of his condition, while others ascribed it to a disturbed nervous system. Negligence on the part of the company was not denied, but the trial judge was asked to direct the jury to distinguish, in assessing damages, between the physical and nervous injuries, which he refused to do.

Held, affirming the judgment of the Court of Appeal (22 Ont. L.R. 204), that the trial judge properly refused to direct the jury as requested; that the injuries to T.'s nervous system were as much the direct result of the negligence of the company as those to his physical system, and he could recover compensation for both; and that in any case it was impossible for the jury to sever the damages. *Victorian Railway Commissioners* v. *Coultas* (13 App. Cas. 222) distinguished.

APPEAL from a decision of the Court of Appeal for Ontario(1), maintaining the verdict at the trial in favour of the plaintiff.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 22 Ont. L.R. 204.

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The facts of the case are stated in the above headnote.

Glyn Osler, for the appellants, referred to *Victorian Railway Commissioners* v. *Coultas*(1).

Masten K.C. for the respondent was not called upon.

THE CHIEF JUSTICE.—This case is distinguishable from *Victorian Railway Commissioners* v. *Coultas*(1). In that case the condition from which the complainant was suffering was due to fright alone. Here there was impact resulting in some physical injury, however slight, to the respondent. The question at issue between the parties at the trial, as I understand it, was whether the jury should be directed to apportion the compensation allowed so as to distinguish between that which was attributable to injuries resulting from nervous shock and that properly attributable to physical contact. I would have thought it too clear for argument that where a person suffers physical injury, however slight, damages might also be claimed for the fright occasioned thereby. It would appear somewhat difficult to distinguish between the injury caused to the human frame by the impact and that resulting to the nervous system in consequence of the shock, the shock and the physical injury being both the result of the same accident. The nature of the mysterious relation which exists between the nervous system and the passive tissues of the human body has been the subject of much learned speculation, but I am not aware that the extent to which the one acts and reacts upon the

(1) 13 App. Cas. 222.

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other has yet been definitely ascertained. Those who are interested will find a learned discussion of the whole subject by Paul Bert in his book where he discusses the role played in the human system by what he calls "la grande sensitive." I do not think that many of the jurors who usually try damage cases have had their attention directed to this abstract subject which, as Bert says, has baffled the scientists for ages. For my part it is difficult to understand how a person should not be allowed to recover for an injury to the nervous system resulting from fright which frequently alone produces physical injuries of the most serious character. But we are not concerned with that question now. Here the fact of physical injury is established beyond all doubt, and, that fact once admitted, I cannot find the line of demarcation between the damage resulting to the human being by reason of the fracture of a limb or the rupture of an artery and that which may flow from the disturbance of the nervous system caused by the same accident. The latter may well be the result of a derangement of the relation existing between the bones, the sinews, the arteries and the nerves. In any event the resultant effect is the same. The victim is incapacitated and in consequence suffers damages, whether the incapacity results from the physical injury alone or the physical injury with the nervous shock superadded.

I would dismiss with costs.

DAVIES J.—After hearing counsel for the appellant we did not deem it necessary to call upon respondent's counsel to sustain the judgment appealed from.

The respondent sued the railway company for damages arising out of injuries he claimed to have been

caused to him while being carried as a passenger on one of their street cars which, through the negligence of their servants, came into collision with a railway train.

The shock of the collision threw the respondent, as he stated in his evidence, from where he was sitting "right over to the back of the next seat," which would be the seat facing him.

No physical result of the collision upon the respondent was noticed by him until he had left the scene of the accident and was proceeding towards his employer's office. He then, however, "suddenly collapsed," was conveyed to his home in a cab and for many weeks was unable to resume with any continuity his usual employment.

There were some slight apparent bruises on respondent's body, but none apparently serious.

The opinion of Dr. McPhedran, who was called on respondent's behalf, reached from listening to the evidence and accepting the history of the case as given to him by the respondent, was "that the physical shock that he suffered excited the condition that he was suffering from," that he did not think he was suffering "purely from a mental effect created on his mind," but thought "the physical effect was the exciting cause," and he described the respondent's condition as traumatic neurasthenia.

Some medical evidence was given by the defendants which did not agree with that of Dr. McPhedran, and the trial judge was requested when leaving the case to the jury, to ask them to separate the plaintiff's injuries "as between the physical injuries and the nervous ones."

The learned Chief Justice who tried the case, in my

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opinion very properly refused to impose upon the jury what under the evidence was an almost, if not altogether, impossible task. He said:

> I was requested to put a question to you to separate the injuries as between the physical and the nervous injury. I declined to do that for one reason — a very sufficient one — amongst others that that question of physical injury is one of very doubtful meaning. There was not any great physical injury in the sense that there were any bones broken, or any great bruising or abrasion of the surface; but there may be a physical injury of a serious nature which is not indicated by any external mark. So, therefore, I leave the whole question to you to say what damages he ought to recover for the injury, if you think he has sustained any.

An attempt to divide the damages in the manner suggested would, it seems to me, have involved the merest speculation.

The demand at the trial to have the damages so assessed and divided was pressed at the trial and afterwards in the Court of Appeal and in this court on the assumed application to this case of the principle supposed to have been determined by the Judicial Committee of the Privy Council in the case of *Victorian Railway Commissioners* v. *Coultas*(1). The headnote of the case as reported seems correctly to state what was really decided:

> Damages in a case of negligent collision must be the natural and reasonable result of the defendants' act; damages for a nervous shock or mental injury caused by fright at an impending collision are too remote.

In delivering the judgment, their Lordships say:

> Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending

(1) 13 App. Cas. 222.

the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.

The rule laid down by their Lordships as to the proper measure of damages to be allowed has not been called in question so far as I have seen, but the legal proposition stated that

damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock,

cannot under such circumstances as their Lordships were considering

be considered a consequence which in the ordinary course of things would flow from the negligence of the gate-keeper,

complained of in that case, has been the subject of much comment and adverse criticism alike in subsequent judicial decisions of the English and Irish courts, as also of those of Australia and of many text writers of recognized authority.

In the case of *Dulieu* v. *White & Sons*(1), at page 676, Mr. Justice Kennedy thus refers to this decision of the Privy Council:

In that case the principal circumstances were that the appellants' gate-keeper negligently invited the male plaintiff and his wife, who were driving in a buggy, to enter the gate at a crossing when a train was approaching, and, though there was no actual collision with the train, the escape was so narrow and the danger so alarming that the lady fainted and suffered a severe nervous shock, which produced illness and a miscarriage. The Colonial Court had entered judgment for the plaintiff for the amount found by the jury at the trial of the action brought against the appellants for negligence. The Privy Council reversed this decision. The principal ground of their judgment is formulated in the following sentence: "Damages arising from

(1) [1901] 2 K.B. 669.

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mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper." A judgment of the Privy Council ought, of course, to be treated by this court as entitled to very great weight indeed; but it is not binding upon us, and, in venturing most respectfully not to follow it in the present case, I am fortified by the fact that its correctness was treated by Lord Esher M.R. in his judgment in *Pugh* v. *London, Brighton and South Coast Railway Co.*(1) as open to question; that it was disapproved by the Exchequer Division in Ireland in *Bell* v. *Great Northern Railway Co. of Ireland*(2), where, in the course of his judgment, Palles C.B. gives a reasoned criticism of the Privy Council judgment, which, with all respect, I entirely adopt; and, lastly, by the fact that I find that the judgment has been unfavourably reviewed by legal authors of recognized weight, such as Mr. Sedgwick (on Damages (8th ed.), p. 861), Sir Frederick Pollock (The Law of Torts (6th ed.), pp. 50-52), and Mr. Beven (Negligence in Law (2nd ed.), pp. 76-83).

This court would possibly feel itself bound, notwithstanding all this adverse criticism, in a case where the facts were strictly analogous to those under consideration in *Victorian Railway Commissioners* v. *Coultas*(3), to follow that decision. But I do not think they would be disposed to in any sense enlarge the principle underlying that decision or apply it to facts so essentially differing from those there considered as the facts do in the case now before us. Here there was a violent collision brought about by the negligence of the defendant railway company and occasioning injuries to a passenger being carried by that company.

There was sufficient medical and other evidence to justify the jury, properly directed as in my judgment they were, in holding that the plaintiff had sustained injuries arising from the shock or collision. Unless

(1) [1896] 2 Q.B. 248. (2) 26 L.R. Ir. 428.
(3) 13 App. Cas. 222.

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the trial judge should have directed the jury to "divide the physical damages from the mental shock," there was no misdirection and could be no complaint as to the damages assessed.

I do not think any such direction would, under the circumstances, have been proper, nor am I able to see how any such division could have been made by the jury without entering into the domain of absolute conjecture.

If the railway company by the negligence of its servants causes a collision between two trains or cars which results in injuries to one of its passengers, they are admittedly liable for all such damages as are the reasonable and natural result of their negligent acts. I am quite unable to understand why injuries to the nervous system should be excluded from consideration in assessing such damages. Such injuries are as much the reasonable and natural results of the negligence which causes or is responsible for a railway collision or accident as physical injuries, such as broken bones, crushed or bruised or lost limbs, or loss of sight or hearing or other physical sense. The nervous system is just as much a part of man's physical being as the muscular or other parts and equally, if not more, important. In all cases the question of material injury having been caused the passenger or injured one must be a question of fact. Bodily injuries are not necessarily observable and cannot always be diagnosed or defined with legal accuracy or precision. But the results or effects may be perfectly well known and describable. Many of what are called physical injuries are altogether internal and not even to modern medical science observable. Indeed, the worst injuries are too often such. Injuries may consist of broken bones,

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crushed or torn muscles or sinews, injured or ruined eye-sight, hearing or memory. These can, with some approach to certainty, be observed and described. But injuries may, as we all know, be not physically observable, and may result in a complete or partial collapse of the nervous system. In the latter cases, the results are frequently more deplorable and injurious to the unfortunate man than are the injuries physically observable or ascertainable with medical certainty. Medical men may call the results by what scientific term they please. But if they are such as incapacitate the injured one from earning his living or enjoying life as he was accustomed to, or subject him to constant or intermittent attacks of pain or incapacity, is the negligent carrier to be excused from liability because it may be successfully contended that the injurious results are wholly or partially to the nervous system and are not observable on the physical system? True, it is, there is danger of simulation, and in some cases of possible self-deception, resulting in imaginary ailments and claims. But in any and all cases they must in the last analysis be reduced to questions of fact for the court and jury to determine. The danger from simulation or imaginary claims may call for the closest and most exhaustive examination, but would not justify the court, in cases where the liability of the company for damages was established, in exonerating the negligent company from liability.

All I am contending for is that actionable negligence on a carrier's part resulting in injuries arising out of a collision or impact extends as well to those injuries which may be classed under the head of, or as the result of, nervous collapse or prostration, as to those of a strictly physical character. It is, of course,

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essential that the injuries, whether nervous or physical, should be the natural and reasonable result of the carrier's negligence, but the mere fact of these injuries being physical or nervous cannot affect the liability. The ease with which in the one case the damages are capable of being ascertained, and the difficulty which in the other case may frequently arise, cannot be made the test of liability. That test must be based upon the negligence causing the collision or accident, and the proof of the alleged injuries being a natural and reasonable result from such negligence.

We are not obliged in such a case as the one before us to apply the rule as to remoteness of damages adopted in the *Coultas Case*(1) to the facts the Judicial Committee had before them. I do not think we would be justified in doing so, as the cases can be so easily and satisfactorily distinguished. In yielding to the defendant's contention we would be giving a dangerous and improper extension to the rule there laid down, which, as I understand the decision, was confined to "damages arising from mere sudden terror unaccompanied by any actual physical injury." I have no hesitation in holding that the trial judge and the Court of Appeal were right, and that this appeal should be dismissed.

IDINGTON J.—I think this appeal should be dismissed with costs.

DUFF J.—The respondent was a passenger on a car on the appellant company's railway when it came into collision at a level crossing with a locomotive en-

(1) 13 App. Cas. 222.

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gine of the Grand Trunk Railway Co. The only point in controversy at the trial related to the question of damages. The respondent's evidence, which in this respect was not contradicted or seriously attacked, was to the effect that when the collision occurred he was seated and in the seat nearest the motorman, but facing the rear end of the car; that having noticed people hurriedly leaving the car he was turning to look forward to see the cause of the disturbance when the collision occurred as the result of which he was thrown violently forward and across the back of the seat opposite to that in which he was sitting. He further said that, without assistance, he got off the car and after walking some distance, to use his own words, "he simply collapsed" and could go no further. He took another car to the office, where he was engaged as bookkeeper, but feeling he was unfit to work went home and called in a physician. He was unable to return to his duties for five weeks and between the time of the accident (October, 1908) and the trial (March, 1910), there were 37 weeks during which he was unable to work. He said that immediately after the accident he suffered "pains all over his body," and that he then — at the trial — "was a wreck." He had pains all over his limbs.

> My shoulders, my legs, my feet and up to the knees as a rule are like in cold water. I have no energy or will-power to do anything scarcely.

Prior to the accident the respondent, who was 68 years of age, had, according to his own statement, enjoyed the normal health of a man of his years.

The medical testimony was given by two witnesses, one called by the respondent and one by the appellants. The effect of the evidence of Dr. McPhedran,

called by the respondent, was that he was suffering from neurasthenia, the result of a nervous shock which might have been due, and in his opinion was due, to the physical jar described by the respondent as received in the collision. There was no express testimony that the respondent had experienced any fright. When asked at the trial what his sensations were, he said: "I thought I was going to be smashed up." Then in answer to a question from the learned trial judge, "I suppose you had not much time for sensations?" he said: "There was no time to think." On his examination for discovery the respondent stated that his illness was due to "nervous shock"; and at the trial he admitted that "so far as he knew" his answers given on that examination were "practically true."

Dr. Johnson, the medical witness called by the appellant, did not dispute the opinion of Dr. McPhedran that the same neurasthenic condition might arise from the physical shock to the system caused by such a jar as that experienced by the respondent, but stated that when examined by him some time before the examination made by Dr. McPhedran, the respondent was not suffering from neurasthenia and there were no signs of any injury to his nervous system.

The learned trial judge was asked to direct the jury in estimating the damages to distinguish between the injury suffered by the respondent in consequence of the shock to his nervous system in so far as it arose from fright and the injury due to the physical jar; and the appeal is based on the refusal of the learned Chief Justice to give such a direction.

I think that the learned Chief Justice was right in this refusal. The only evidence on the point, the uncontradicted evidence of Dr. McPhedran, was quite

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positive to the effect that it would be quite impossible to distinguish a neurasthenic condition caused by fright from such a condition caused by physical jar. The same condition might be produced by either cause. That being the case — assuming there was evidence of fright sufficient to entitle the jury to say that the respondent's condition might in some degree be due to mental disturbance — it is quite clear that the jury would have no means whatever of apportioning the consequences as between the two concurring causes and to direct them to do so would simply be directing them to go through a process which as a tribunal, acting judicially and therefore reasonably, they would be incapable of doing. There was, however, in my judgment no evidence which would justify the jury in attributing the respondent's condition to the direct effect of mental disturbance. The respondent himself is unable to give (and quite naturally) any very accurate account of his mental experiences during the critical moment. His statement that his illness was due to "nervous shock" is quite consistent with the notion that its exciting cause was purely physical; and his statement that he "expected to be smashed up" does not seem necessarily to imply any such mental disturbance as would affect his physical condition.

The medical witness for the company did not say, and it is clear that on such vague evidence he could not say, that mental shock experienced by the plaintiff arising from an expectation of being injured would account in any degree for the injury his nervous system sustained. It is obvious that having another circumstance, the physical jar, which would definitely account for that condition it was impossible to say

that a state of mind so indefinitely described had anything whatever to do with it.

In these circumstances it is quite clear that the learned trial judge would have erred if he had suggested to the jury that they should attempt to ascertain and designate some definite proportion of the damages suffered as attributable to the plaintiff's state of mind.

In this view of the case it is quite unnecessary to analyze closely the decision of the Privy Council in the *Coultas Case*(1).

I do not think there is anything in that case remotely countenancing the contention that where there is a physical blow sufficient to account for nervous conditions which might also have been produced by fright, if there was fright, accompanying the blow — that in such a case the jury must attempt the absolutely impossible task of separating the results arising on the one hand from the physical impact from those arising from mental disturbance on the other.

ANGLIN J.—In view of the manner in which the *Coultas Case*(1), and the doctrine for which it is supposed to stand have been dealt with in recent English and Irish decisions, it should, I think, be followed only in cases in which the facts are indistinguishable from those there considered by the Judicial Committee. We are not bound by the views expressed by the Ontario Court of Appeal in *Henderson* v. *Canada Atlantic Railway Co.*(2), and if they imply any extended application of the principle of the *Coultas Case*(1), I must, with deference, decline to adopt them. The

(1) 13 App. Cas. 222. (2) 25 Ont. App. R. 437.

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decision of this court in the *Henderson Case*(1), does not at all affect the question now before us. I respectfully concur in the statement of Palles C.B. in *Bell* v. *Great Northern Railway Co.*(2), at p. 442:

> I am of the opinion that as the relation between fright and injury to the nerve and brain structure of the body is a matter which depends entirely upon scientific and medical testimony it is impossible for any court to lay down as a matter of law that if negligence causes fright and such fright in its turn so affects such structures as to cause injury to health, such injury cannot be a consequence which in the ordinary course of things would flow from the negligence unless such injury accompany such negligence in point of time.

I agree with Garrow J.A. that

> no one can object to the general principle enunciated at p. 225 (of the judgment of the Judicial Committee in the *Coultas Case* (3)) that the "damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary course of things would flow from the act;"

but I am unable to understand the argument for the appellants that the damages sought to be recovered in the present case are not a natural and reasonable result of the negligence charged against the defendants. The *Coultas Case*(3) should not, in my opinion, be held to preclude recovery where there has been actual impact to which a jury might not unreasonably ascribe the injuries complained of, or where, without actual impact, a passenger being carried by a common carrier has, through the negligence of such carrier, sustained a serious mental or nervous shock due to fear of immediate personal injury to himself from such negligence (*Dulieu* v. *White*(4)), the injurious physical consequences of which have been established and have been sufficiently shewn to be the result of that negligence.

(1) 29 Can. S.C.R. 632.
(2) 26 L.R. Ir. 428.
(3) 13 App. Cas. 222.
(4) [1901] 2 K.B. 669, at p. 675.

There was in the present case no evidence upon which the jury could be asked to distinguish between damages sustained by the plaintiff because of purely mental injury, and damages which he sustained from physical injury due to mental or nervous shock. The right to recover for injury of this latter class is established by many English and American authorities, and, in the circumstances of the present case, it is not precluded by the decision of the Privy Council in the *Coultas Case*(1).

There certainly was evidence that the plaintiff had suffered and was suffering actual physical injury, whether its cause was mental or physical shock, and there was also evidence, as pointed out by Garrow J.A., that his condition was due in part at least to actual physical shock. In either aspect he was entitled to recover, and the learned Chief Justice of the King's Bench was, in my opinion, fully justified in declining to ask the jury to refine between mere mental injury and physical injury due to mental shock, or between the latter and physical injury due to physical shock. Indeed, since physical injury, whether due to mental or to physical shock, would entitle the plaintiff to damages, there could be no object in drawing the latter distinction.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Masten, Starr, Spence & Cameron.*

(1) 13 App. Cas. 222.