**Supreme Court of Canada**
**Grand Trunk Rway Co. v. Mayne, (1917) 56 S.C.R. 95**

**Date: 1917-11-28**

The Grand Trunk Railway Company of Canada *(Defendants) Appellants;*

and

Lottie Mayne *(Plaintiff) Respondent.*

1917: November 12, 28.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

*Negligence—Railway company—Duty of conductor—Invitation to alight.*

The conductor of a railway train, whose duty it is to see that passengers are carried "with due care and diligence" is entitled to assume that they will act with ordinary prudence and discretion.

The act of the conductor in opening the door guarding the steps at the end of a car and allowing a passenger to go down these steps from which he stepped off while the car was still moving at a high rate of speed and was killed is not negligence on his part which makes the company liable in damages under the "Fatal Accidents Act."

*Per* Davies and Idington JJ. dissenting.—As the passenger was not accustomed to travel, and had been told by the conductor, after he had called out the name of the station, "this is where you get off," the passenger had reason to believe that he could safely alight and the company was liable.

Judgment of the Appellate Division (39 Ont. L.R. 1) reversed, Davies and Idington JJ. dissenting.

APPEAL from the Appellate Division of the Supreme Court of Ontario[1], affirming by an equal division of opinion the judgment at the trial in favour of the plaintiff.

The material facts are stated in the above head-note.

D.L. McCarthy for the appellants referred to Lewis v. London, Chatham and Dover Railway Co.[2]*;* *London*

[1] 39 Ont. L.R. 1.
[2] *L.R. 9 Q.B. 66.*

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and North Western Railway Co. v. Hellawell[3]*, and England v. Boston and Maine Railroad Co*[4]*.*

Phelan for the respondent cited Edgar v. Northern Railway Co[5]*. and Rose v. North Eastern Railway Co*[6]*.*

THE CHIEF JUSTICE.—This is the case of a passenger on appellants' railway who, when approaching his destination, left the seat he occupied in the car and proceeding to the end platform either stepped off or fell off the train and was killed. The train was at the time running at a speed of about twenty miles an hour. The respondent is the widow, who was present at the accident with her children, and by her action she claims damages for her husband's death which, she says, was caused by the negligence of appellants' servant, the conductor of the train. The particular acts of negligence set forth in the statement of claim are: (a) the conductor indicated to the deceased that he had reached his station and could safely alight and did in fact invite the deceased to alight when he could not do so, and (b) the conductor should have prevented the deceased from going upon the platform while the train was in motion and he should have warned the deceased and neglected to do so.

The obligation of the company was without delay and with due care and diligence to carry the passenger to his destination. Sec. 284 (c) "Railway Act," R.S.C. [1906] ch. 37. The fact of the casualty once established, it was the duty of the company to give an explanation of the accident consistent with performance on their part of their statutory obligation to safeguard their

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passengers with all practicable care and skill. The passenger, on his part, was obliged to use reasonable care.

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[3] *26 L.T. 557.*
[4] *153 Mass. 490.*
[5] *11 Ont. App. R. 452.*
[6] *2 Ex.D. 248.*

The negligence found by the jury consisted in

> the conductor not remaining at the door of the car until the train stopped

and they also negatived all negligence on the part of the deceased.

The theory of the respondent at the argument here was that the conductor so conducted himself as to lead to the deceased getting off the train at the time he did; and the reply on behalf of the appellant was that, accepting the story told by the respondent, the accident was attributable directly to the negligence of the deceased and that the conductor was fairly entitled to assume that primâ facie the deceased would conduct himself with ordinary prudence and discretion.

It is somewhat difficult to connect the negligence found by the jury with either of the two causes of the accident alleged in the statement of claim. But the verdict must be reasonably construed; and I think that, read in the light of the pleadings, the evidence and the judge's charge, it means that the jury were of the opinion that it was the duty of the conductor, having notified the deceased that he was approaching his destination, to be careful to prevent him from going on to the platform, which was a dangerous place when the trap covering the steps which the deceased would use to alight from the car had been removed.

If I could agree with Ferguson J.A. who said:

> the deceased may have been misled by the conductor's action into the belief that the train was at its destination,

I would have less difficulty in accepting the verdict, because I assume the learned judge means that the conductor gave deceased the impression that the train

had stopped and he could alight with safety. But I can find nothing in the evidence to justify that inference. To call out the name of a station, is merely an intimation that the train is approaching that station, and the speed at which the train was moving, which must have been apparent to any one exercising the slightest care, was in itself sufficient to destroy any impression that the train had reached the station and come to a standstill, and then only would the deceased be justified in attempting to leave the train. Further, the conductor was not under any obligation to assume that the passenger would be so void of common sense and prudence as to endanger his own safety as the deceased certainly did. According to the story of the respondent, the Conductor was standing on the platform when the deceased passed by him to go down the steps with two bundles, one in each hand. The car was then going at a speed of twenty miles an hour and swaying from side to side under the pressure of the brakes, and it is said that the conductor in allowing the deceased to pass on down the steps did not exercise that vigilance and care for the safe conveyance of the company's passenger which, in the circumstances, the statute imposed upon him and that he should have stopped him at the door. But the conductor, as I have already said, might fairly assume that the passenger would act with ordinary prudence and discretion, and it was almost impossible for any one to imagine that a sane man with any regard for his own safety would have gone down the car steps having both hands fully occupied with the bundles he was carrying.

Of course the evidence, as in all similar cases, is conflicting. But the jury, who were absolute masters of their own determination in that respect, chose to

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believe the story of the widow and her children, and I have accepted their conclusion although I would have felt disposed to believe the version of the facts given by the conductor as more consistent with all the other admitted circumstances. The respondent said that when the deceased came on board he asked the conductor to let him know when they reached Dunbarton, his station—which was only a flag station; but there is no evidence, as was assumed below, that he placed himself in the special care of the conductor. The latter gave the engine-driver the

proper signal to stop at that station and subsequently called out: “Dunbarton is the next stop.” Later on he came up to the deceased and touching him on the shoulder said: “Dunbarton is the next stop.”

This cannot, in my opinion, be construed as an invitation to alight; at most it was an intimation to the passenger that he should prepare to get off. In a very few moments after, the deceased followed by his family moved towards the door of the car and there, according to the story of the respondent, stood the conductor on the platform. He had previously removed the trap in the platform floor which covered the steps leading off the car. It is a fair inference that the deceased—as I have already said—accepted this as some evidence that he might alight in safety. But was he justified in either attempting to alight or placing himself in a position of danger when the car was moving at a speed of twenty miles an hour and swaying backward and forward, as I have already described? To hold that it was the duty of the conductor to foresee that the passenger would be so imprudent and reckless as to attempt to alight from the car in such conditions is to impose a burden on railway officials greater than the law requires, and that is

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what the verdict means when the jurors say that the conductor should have prevented the deceased from coming out of the car, i.e., should have treated him like an irrational being.

The appeal should be allowed with costs if the company deems it advisable, in the circumstances of this case, to collect them.

DAVIES J. (dissenting).—On the night of November 13, 1915, the deceased, William Mayne, respondent’s husband, a passenger travelling on a train of the appellants with his wife and seven children, one of which was a baby in arms, came to his death by stepping off the car while it was still in motion and before it had reached the station where he was to get off.

The contention on the part of the plaintiff respondent was that the conductor having been informed by the deceased of the station Dunbarton, at which he desired to get off, had opened up the vestibule, had informed the deceased that, “this is Dunbarton where you get off” and had generally by his conduct actively created in the mind of the deceased the belief that the train had reached Dunbarton and that he and his family could safely alight, when as a fact the train was still moving at a rapid speed and had not then reached Dunbarton station.

The appellant contended that upon the evidence and upon the jury’s findings there was not in law or in fact an invitation for the deceased to alight when he did, and that all that took place only amounted to an intimation by the conductor to the deceased that the next station was his station and an invitation to alight when the train stopped. They further contended that the deceased so regarded it as was clear from the

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evidence, because when the conductor told the deceased “this is Dunbarton, this is where you get off” the children immediately made a move in anticipation of getting off, and the deceased told them to resume their seats, which they did until they were told to come along.

Though I do not attach very much importance to this latter contention, I think it only fair that the whole evidence on the point should be considered, in which case it would seem that a few moments after telling the children “not to move till the train stopped” he said to them “all right now come on” or “now come on” shewing that he believed that the train had then stopped.

The conductor did not immediately leave these passengers the moment he told the deceased “this is Dunbarton where you get off,” but remained standing for some moments in the passageway three or four seats down and “looking at some people or something on the south side of the car.” It was when the conductor, after so waiting in the aisle, started for the door that

the deceased gave the children the order “all right, now come on,” and the inference I draw from the evidence on this point is that the deceased inferred the conductor was waiting for the stoppage of the train, and when he started for the door the deceased assumed he did so because, as he thought, the train had either stopped or was about stopping. I do not think, however, this incident is a controlling one upon the real issue between the parties, but the jury were entitled to believe the plaintiff’s evidence on the point of the conductor having waited in the aisle or gangway for some time after giving notice to the deceased as before mentioned, in preference to that of the conductor, and it explains the other evidence

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as to the deceased and his family closely following the conductor along the aisle or passageway out into the vestibule.

There was no specific finding by the jury in words that there was an “invitation to alight” nor did the respondent contend that there was. The invitation to alight was a reasonable inference to be drawn from the conductor’s conduct and actions and is rather a question of law to be drawn from the question of fact found by the jury.

The jury found that the negligence of the conductor consisted

> in not remaining at the door of the car until the train stopped.

They further found that the deceased was not guilty of any contributory negligence.

The question then arises as to what is the fair and necessary inference to be drawn from these findings under the proved facts.

The learned Chief Justice, who tried the case, upon the findings of the jury directed judgment to be entered for the plaintiff respondent for the damages found. The appeal court was equally divided in opinion, two of the learned judges being to dismiss the action on the ground, as I understand the judgment of Mr. Justice Riddell with whose reasons Mr. Justice Rose concurred, that there was no invitation to alight on the conductor's part and no negligence found for which the company could be held liable, and two, Lennox and Ferguson JJ., for sustaining the judgment of the trial judge on the jury's findings.

Owing to this judicial difference of opinion, I have found it necessary to give the evidence most careful attention, and have reached the conclusion that the finding of the jury as to the negligence of the conductor under the peculiar facts and circumstances detailed

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in the evidence was justified and that on such finding the appellants are liable.

These findings of negligence on the conductor's part, and of no contributory negligence on the part of the deceased, must be read and construed in light of the facts.

I am inclined to think that one material fact proved, if the evidence of the widow and daughter is accepted, was overlooked by the learned judges who favoured the dismissal of the action, and that fact was that the conductor did not open the outer door of the vestibule until after he had notified the deceased the second time, touching him on the shoulder and saying, "this is Dunbarton. This is where you get off."

The importance I attach to this fact will be seen later on. I think the conclusion must be drawn from the jury's findings that they accepted the evidence of Mrs. Mayne and of her daughter in preference to that of the conductor on all points where such evidence differs or cannot be reconciled.

After reading the evidence carefully over and accepting that of Mrs. Mayne and her children when at variance with the conductor's, which the jury must have done to make the findings they did, I draw the following conclusions of fact: That after the conductor had first gone through the car and called out: "Dunbarton is the next stop," he went through the car door, lifted the trap door, in the vestibule, but left the outer vestibule door closed. That he then returned into the car, touched the deceased on the shoulder, saying to him, "Dunbarton station. This is where you get off" and remained standing for a few moments in the passageway of the car near to or alongside of deceased, looking at something or some passenger on the other side of the car. That he then started for

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the door, and that when he so started the deceased believing the car had stopped said to the children, whom he had previously warned not to move till the car stopped, "all right now, come on."

He himself at once got up and followed the conductor carrying the baby in his arms. The wife and children started to follow him, and she, finding the parcels she had to carry too heavy, called him to give her the baby and take the parcels instead, which he at once did. With the parcels in hand described as "a big parcel tied with a piece of rope or string round it" and a valise, he immediately followed the conductor who was some few feet only ahead and who passed out of the car door into the vestibule and then opened the outer vestibule door. The widow in her evidence stated explicitly that she followed close after her husband and when she had just reached the car door heard the conductor then open the outside vestibule door and saw him, after doing so, step back into the vestibule right to the edge of the platform and that he did not step over on to the platform of the next car. He stood there and the deceased, as she stated, then

> went out of the car door and I followed him and he went down and stepped right off.

She adds:

> We thought we were to the station and the train had stopped.

The widow herself was in the act of descending the steps following her husband when the conductor stopped her.

Now if the jury believed, as they had a perfect right to do, these statements of fact, confirmed as they substantially were by the elder daughter. Gertrude and in large measure by the boy Archie, they would amount to an invitation to the deceased to alight.

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The first calling out by him “Dunbarton is the next station” was certainly not such an invitation, and was not contended to be such but the subsequent personal intimation to the deceased when the conductor touched him on the shoulder and said, “this is Dunbarton station, this is where you get off” followed by his conduct and actions in going down the aisle or gangway of the car just a few feet ahead of the procession of the deceased, his wife, and the children, who were following him, his entry into the vestibule and opening of the outer vestibule and then standing lantern in hand on the edge of the vestibule platform leaving room for the deceased to pass out was, it seems to me, a distinct invitation for the deceased man and his family to alight. They were persons unaccustomed to railroad travelling, as the deceased had informed the conductor, and the latter’s action and conduct would reasonably be understood by these persons to be an invitation to alight.

In the light then of the facts as proved by the plaintiff and her witnesses, the jury’s finding that the conductor’s negligence was in not remaining by the door of the car until the train stopped is easily understood. It means: You should not have spoken and acted as you did, because you led

these passengers astray, but you should have stood at the door of the car until the train stopped and so prevented their alighting.

If the conductor believed, as he says he did, that the car had not stopped, but was going at a rapid rate of speed, then his conduct and actions as sworn to are inexplicable on any other theory than that of carelessness and negligence.

The facts and circumstances, as I understand and appreciate them from the evidence, and which the findings of the jury shew they believed, were such as

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distinctly called for such an act of prudence on the conductor's part as the jury suggest, namely, his standing by the door of the car till the train stopped, or some equivalent action which would have prevented the calamity which occurred.

The controlling question is whether there was evidence from which the jury might fairly find that the conductor was guilty of negligence in not having prevented the deceased from attempting to alight when he did. The action which the jury say he should have taken so as to prevent him would certainly have been effective. There was no evidence that any other passengers desired either to alight at this flag station or to get on the train there, nor was there any evidence that the conductor's duties required his presence elsewhere. If they did and he could not remain in the doorway, then he was bound after opening the outer vestibule door and knowing that the train had not stopped, to give the family who were about to alight from the train, and as to whose ignorance of railway travelling, in my opinion, he had full knowledge, clear warning not to alight when they attempted to do so. He neither interposed his physical body before the deceased so as to prevent the deceased alighting, nor gave him any warning not to alight, nor was his presence required elsewhere. He simply stood by on the vestibule platform and allowed the man carrying a valise and a large parcel, to go down the steps with the outer door open, without any warning

whatever. His suggestion, on cross-examination, as an explanation of his silence and inaction, that he thought the man might have been going into the first-class coach, was evidently not accepted seriously by the jury, and I must say that, looking at all the facts and circumstances, it was a most unreasonable if

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not absurd one. I think this case must be decided on its special facts, and not upon the law which, it is contended, applies to the duties which, under ordinary circumstances and with respect to ordinary passengers, conductors owe to them with regard to alighting from trains.

My judgment is that this appeal should be dismissed with costs.

IDINGTON J. (dissenting).—When the somewhat confusing facts presented by the evidence herein, as dealt with in the conflicting opinion of the learned judges in the Appellate Division have been sifted and tested by the process of fair argument before us, there is found in them, I think, a case for the jury to try and in the result found such a judgment as appealed against.

They found the deceased came to his death through the negligence of the appellant.

They found further that the deceased had not been guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened.

It seems quite clear from this latter finding that the jury must have accepted the version of the relevant facts as given by respondent and two of her children and rejected whatever the conductor said in evidence in conflict therewith.

On the evidence of the latter it would be difficult to acquit deceased of negligence.

On the evidence of and on behalf of the respondent it was easy to come to the honest conclusion that deceased had been misled by the words and acts of the conductor into the belief that the train was stopping, and the way clear to get out.

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Dunbarton was a mere flag station. The present tense used by the conductor speaking in relation to it must have meant, if anything, the station. It was not the case of a conductor coming into a large city or town, when the same expression used to a passenger could not reasonably be interpreted as an invitation to alight or do so in a few seconds. But spoken of, or relative to, a mere flag station or platform, they could only mean that the spot was at hand and the train stopping, and hence the only thing to do was to get ready and get off.

The every-day traveller might use his own sense of motion and use his own judgment of the fact, but the untravelled and, quite inexperienced man would trust the words and acts of the conductor.

There can be little doubt that deceased as result thereof trusted himself thereto and stepped off relying thereon.

The respondent swears she thought the train had stopped and the jury quite evidently implicitly believed her. She was mistaken, but evidently that was the impression she had got from what the conductor had said and done till she realized that her husband was off.

I cannot understand why the conductor seeing such a man as deceased stepping out laden with packages and his hands thus tied, on a train going at the rate of twenty to twenty-five miles an hour, remained dumb so long.

Moreover there is no evidence of any one else than deceased and his wife and seven children wanting to get off at that station, or any one likely to get on the train there.

The night was very dark and feelings of common

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humanity alone demanded a little attention on his part to such a party.

His sole duty to them and his employers demanded it. And if he had given the slightest heed thereto the accident never would have happened.

He should, if heeding that duty, have seen by a glance at the movement of the whole family that they must have misunderstood him or were pursuing a most dangerous course.

He says he crossed over to open the trap and vestibule door in the next car. There is not a vestige of evidence of any need therefor.

I much doubt him in that regard till he saw deceased had stepped off and the jury may have disbelieved him in that as they evidently did in regard to other things.

All these and other considerations of what the evidence discloses which it is needless to dwell upon in detail, must be borne in mind when we come to consider the only difficulty in the case.

What I refer to is the peculiar form of the answer defining the negligence the jury find the appellant answerable for.

I should be sorry to lay down as a rule of law that the conductor must always stand at the door of the car until the train is stopped.

I should be equally sorry to say that the finding was and is incomprehensible.

I think it stands for nothing more or less than that under all the attendant circumstances, including especially the misleading nature of his invitation to be ready instantly to alight and inducing a procession in obedience thereto, it was his duty to have guarded the door of the car from being used as it was used.

Many other forms of expression might have been

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used indicating, as this doubtless was intended to indicate, the neglect of that duty I have signified above as devolving upon him, under said circumtances.

I think the language used is quite capable of being understood as expressing that neglect of duty imposed on him to have due care of those in his charge, and that his neglect in that regard was in law the neglect of the appellant.

I am of course aware that the train was twelve minutes behind time, and had little time to waste on a flag station, and of the pressing anxiety to make haste, but that rendered it all the more incumbent on him in charge to see that no chance of harm should come to the helpless and inexperienced ones who were being hastened, possibly beyond their usual pace.

I agree with the opinion of the learned and long experienced trial judge and the learned judges of the Appellate Division supporting his judgment.

I think the appeal should be dismissed with costs.

DUFF J.—The appeal should be allowed and the action dismissed with costs.

ANGLIN J.—The plaintiff's husband, Wm. J. Mayne, was fatally injured, as a result of stepping off a car of a vestibuled railway train at night, while it was moving at a speed of from twenty to twenty-five miles an hour, a quarter of a mile before it reached his stopping place. A jury negatived contributory negligence and held the railway company liable on the ground that the conductor should have prevented what had occurred by

> remaining at the door of the car until the train stopped.

Upon an even division of opinion the Appellate

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Division upheld the judgment entered by the learned trial judge for the plaintiff[7].

The facts are deposed to by the plaintiff and her two children and the railway conductor. Without imputing deliberate perjury to the conductor, the inaccuracy of several of his answers, and the flippancy of one of them may well have led the jury to reject his version of what occurred where it differed materially from that of the plaintiff, and I think we must, for the purposes of this appeal, assume that the story of the plaintiff and her children is correct. It should, however, be noted that, although the unfortunate Mayne was not accustomed to travelling, there is no evidence that the conductor had been apprised of that fact. The contrary view taken by one of the learned judges of the Appellate Division[8], probably to some extent influenced his judgment in favour of the plaintiff.

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[7] 39 Ont. L.R. 1.
[8] 39 Ont. L.R. 12.

Mr. Justice Ferguson, who reached the same conclusion, very succinctly, and, upon the assumption that the plaintiff's story is correct, I think accurately, states the material facts as follows:—

> The deceased, his wife and seven children, entered the train at Whitby destined for a flag station called Dunbarton. The deceased requested the conductor to let him know when they were at that station; accordingly, as the train approached Dunbarton the conductor came through the car and called out: "Dunbarton is the next stop." Shortly afterwards the conductor returned and touching the deceased on the shoulder said, "this is Dunbarton, this is where you get off." The deceased was entitled to conclude from these words that he had arrived, but he appears to have construed them only as a notice to get ready at once to get off, because, on the children rising to go, the father told them to "sit still till the train is stopped" but almost immediately afterwards he said, "now, come on," and all started for the door. As the wife and husband reached the car door the conductor stepped out and in the hearing of the husband and wife and perhaps in the sight of the husband, who was ahead, opened the trap door in the vestibule and the outside door, and there in sight of both stepped back, whereupon the deceased walked down the steps.

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Two difficulties in the plaintiff's way are that it is almost incredible that a man in possession of his faculties, however inexperienced in travelling, could, when on the platform of a car running twenty to twenty five miles an hour, have been under the impression that it was stationary; and that the finding of the jury, if taken literally, would impose upon the conductor a duty which certainly did not exist.

A suggestion that Mayne did not intentionally step off the car, but that, laden with a valise in one hand and a bulky bundle in the other, he lost his balance and fell off, is excluded by the evidence of the plaintiff and of the conductor, who both aver that they saw him step off.

The improbability that a man in possession of his faculties when on the platform of a car in a train running twenty or twenty-five miles an hour, with the accompanying noise and motion, would not have realized that it had not stopped is perhaps little, if any, greater than that of such a man, if

aware that the train was moving, stepping off it on a dark night into space. Yet one or other of these improbable theories must be accepted. The jury, in negativing contributory negligence, evidently preferred the former. The plaintiff and her two children who followed the deceased—the wife according to her story having actually begun to descend the steps after him—say that they were under the belief that the train had stopped. It is possible that the father's preparations for alighting and his concern for his wife and children and the parcels under his charge so absorbed his attention that he actually failed to realize that the train was still in rapid motion. It may be, as put by Mr. Justice Ferguson, that by the conductor's action in raising the vestibule trap, opening the outer door, placing the

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hand-bar in position, and then stepping back to the edge of the platform, Mayne was misled, notwithstanding the evidence of his senses, into a belief that the train was at its destination and stopped. Difficult as it is to conceive of this having been his state of mind, having regard to the testimony of the wife and children as to their own belief and to the unlikelihood of his having knowingly stepped off a rapidly moving train, it seems to me impossible to say that the jury was clearly wrong in assuming that in fact it was. If so, it was for them to determine whether Mayne's failure to appreciate the actual conditions amounted to negligence. They have found that it did not and I am not prepared to set that finding aside.

But the finding of negligence on the part of the conductor involves greater difficulties. In the first place, it is perfectly clear upon all the evidence that it was his duty before reaching the station to prepare for his passengers alighting by raising the trap, opening the vestibule door and putting the hand-bar in place. To do this work after the train had stopped is quite impracticable. It should, however, be done as late as possible before the actual stop in order that the safeguard of the closed trap and vestibule door may not be taken away earlier than is necessary. The conductor, therefore, could not, consistently with his duty, after notifying Mayne that the station then being approached was his stopping place, have "remained at the car door until the train stopped." If that be the necessary meaning of the jury's finding it cannot be supported.

The findings of the jury must, no doubt, be read in the light of the plaintiff's allegations, the evidence and the judge's charge, and should be given any interpretation of which they are reasonably susceptible

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and will enable the court to support them. The relevant allegation of negligence is that

> the conductor should have prevented the deceased going upon the platform while the train was in motion

and

> should, under the circumstances, have warned him

of his danger. The learned trial judge, paraphrasing this allegation, said:—

> The plaintiff claims that there was on the part of the conductor a failure * * * to warn the man when it must have been manifest to the conductor that he was in a position of danger, that the conductor should have realized and recognized that danger, and done all he could to avert it by shouting, by springing and stopping the man.

I think the jury's finding may—and, if necessary to sustain it, probably should—be taken to mean that after raising the trap and opening the vestibule door the conductor should have placed himself in the car door to prevent passengers coming out on the platform before the train had stopped.

It may be that, if strictly discharging his duty, a conductor should, if it be practicable to do so, prevent passengers coming on the platform of a car until the train has actually stopped. Had Mayne been thrown from the platform, or had he fallen from it as a result of his losing his balance

while standing there, allowing him to come upon the platform might possibly be said to have been negligence dans locum injuriœ. But that is not at all this case. Allowing Mayne to come upon the platform was not the proximate cause of his injury; it was at most a remote cause or cause sine qua non. But for his proceeding to alight his coming on the platform would have been harmless, and, having regard to the custom of travellers on this continent (disclosed by the evidence and a matter of common knowledge, as was pointed out by the learned trial judge) when a train is approaching a station, to move

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to the car door and to pass out to the vestibule platform with their hand luggage before the train has stopped, even had the unfortunate passenger fallen or been thrown from the platform, I am not at present prepared to say that failure to prevent his coming out upon it would have amounted to actionable negligence. But this remote cause need not now be further considered.

If the jury intended to find that the conductor's fault consisted in having failed to prevent Mayne proceeding to alight from the vestibule platform, they certainly have not said so, and I think their finding is not reasonably open to that interpretation. But, if it is, it involves the idea that the conductor realized or should have realized that it was Mayne's intention to attempt to alight, notwithstanding that the train was in rapid motion, in time to have interfered to prevent his doing so. The conductor had properly notified him, as requested, that he was nearing his station. That is all his notification amounted to and the evidence makes it clear that it was so understood. He, no doubt, had reason to expect that Mayne and his family would thereupon prepare to alight and, having regard to the custom to which I have alluded, that they would probably move to the door of the car and come out upon the vestibule platform with their luggage before the train had stopped. The opening of the trap and vestibule door were not meant as an intimation that the train had stopped, and that it was safe to alight immediately, and, while Mayne may have so regarded them, it by no means follows that the conductor knew or should have known that such an erroneous and extremely improbable impression would be thus created. I am unable to follow counsel for the plaintiff in his contention that the

mere fact that Mayne came out on the platform and turned to the car steps should have made it apparent to the conductor that it was his intention to proceed forthwith to alight. The moment that intention became apparent to him it would, I think, have been the conductor's duty, having regard to the statutory obligation of the company to "carry and deliver all traffic with due care and diligence," to have endeavoured to prevent its being carried out. It is to me unthinkable, that if he had even a suspicion of the intention of the deceased to alight, this conductor of thirty years' experience would have stood idly by and allowed him to step off to almost certain death. It is, I think, clear that the conductor failed to realize the deceased's intention until too late to prevent him stepping off, though he succeeded in stopping the wife who was following him. The question therefore is, should the conductor have realized sooner than he did and in time, by a shout of warning or by physical intervention, to have prevented its execution, that it was Mayne's intention, under the impression that the train had stopped, to attempt to alight from it while actually moving at a rate of twenty or twenty-five miles an hour—or rather, is there any evidence upon which a reasonable jury could so find? After giving to this, for me, vital question a great deal of anxious consideration, I find myself unable to say that there is. Why should the conductor have anticipated anything so utterly improbable?

On the ground, therefore, that there is no evidence to warrant a finding of negligence on the part of the conductor, I would allow this appeal.

Appeal allowed with costs.

*Solicitor for the appellants: W.H. Biggar.*

*Solicitors for the respondent: Robinette, Godfrey & Phelan.*