WABASH RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

WILLIAM FOLLICK (PLAINTIFF) .. RESPONDENT.

1920
Mar. 25
May 4.

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

Negligence—Railway company—Evidence—Findings of Jury—Statutory precaution.

F. was in charge of a wrecking train working at a crossing where two railway lines intersect and on receiving a signal that a train was approaching from the east removed his cars from the crossing. He then went to a signal station a few feet away and on returning was struck by the oncoming train. He had a clear view of the track to the east before he started to cross and was nearly over when struck. He could not account for his failure to see the train coming. Seven hundred feet east of the crossing was a semaphore and the train stopped several hundred feet east of that and came on without stopping again. On the trial of an action against the railway company the jury negatived contributory negligence and found the company negligent in not stopping at a reasonable distance east of the distant signal (semaphore) and proceeding with sufficient caution approaching wreck zone which was observed.

Held, affirming the judgment of the Appellate Division (45 Ont. L.R. 528) that the jury were justified in finding that the failure to moderate the speed of the train when approaching the crossing was negligence and to infer from the evidence that had the train been brought to a stop as the Railway Act requires the plaintiff would have had a better opportunity to escape injury.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial by which the action was dismissed.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 528.

1920

WABASH RAILWAY CO. v. FOLLICK.

The Chief Justice.

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

H. S. Robertson for the appellant.

Tilley K.C. for the respondent.

THE CHIEF JUSTICE.—This action is one to recover damages for injuries received by respondent Follick when struck by an engine of the appellant railway company as he was crossing the track in front of the appellant's approaching train at a railway crossing called Niagara Junction.

The facts are fairly stated in the appellant's factum as follows:—

At the place in question the line of the Grank Trunk Railway running west from Niagara Falls intersects a branch line of the Michigan Central Railway running south to Fort Erie. The appellant's trains run on the Grand Trunk tracks and the train in question was a regular west bound passenger train.

The respondent was a section foreman of the Michigan Central Railway and at the time of the accident about 5.15 a.m. on the 21st of December, 1916, was engaged in helping to clear up a wreck that had occurred upon its branch line at a point a little south of the Grand Trunk line.

There are two signals or semaphores to protect the railway crossing against trains coming from the East. One is about seven hundred feet east of the crossing and is called the distant signal; the other is close to the crossing and is called the home signal. Both signals are under the control of a signal man stationed at the crossing in a small building called the "H" office.

A little while before the arrival of the train on the morning in question the signal man notified the conductor of the wrecking train that the appellant's

train would soon pass and the wrecking operations were suspended and the wrecking train taken off the crossing, its engine going to the north side and the cars standing on the south side of the track on which the appellant's train was travelling. The signal man on the approach of the appellant's train gave it both signals clear so that the train could come through.

The respondent had shortly before this sent his men home to breakfast and he himself was preparing to go and went into the "H" office for his lantern. Coming out of the door of that office he was facing directly towards the approaching train, but it is said that it was hidden from him at the moment by a car of the wrecking train which stood about seven feet south of the Grand Trunk tracks. The respondent walked from the door of the "H" office in a northerly direction towards the Grand Trunk tracks, having the above mentioned car on his right hand. He says that when he reached the north end of the car he looked easterly, and although the country is level and free of obstructions for at least one third of a mile to the east he says he did not notice the appellant's approaching train, although its headlight was burning and bell ringing and the engine was almost upon him.

The respondent continued on his course to and across the Grand Trunk tracks and had just passed the north rail of the track when the appellant's engine struck him and severely injured him.

The respondent is quite unable to explain why he did not notice the approaching train. Various explanations were suggested to him. He had been at work constantly for a period of twenty-two hours at the time of the accident and the appellants suggested

1920

WABASH RAILWAY CO. v. FOLLICK.

The Chief Justice.

that that fact may have been the effective cause of the accident. His counsel and some of his witnesses suggested that he may have been blinded by the headlight of the Michigan Central wrecking engine which stood at the north side of the Grand Trunk track. The respondent frankly confessed that he could not explain it.

On behalf of the respondent it was contended that the appellants were responsible for the accident because in the first place it is alleged their train did not come to a stop before proceeding over the railway crossing as it was required to do. The evidence as to the stopping of the train was conflicting. Some witnesses said the train did not stop at all after it had come in sight of the crossing. Other witnesses said that it did stop at a point about five hundred feet east of the distant signal, and then came on, the signals shewing a clear track. The jury contented themselves with finding on this point merely that the train did not stop at a reasonable distance east of the distant signal.

The respondent also complained that the train was run at an excessive speed. The evidence as to the speed of the train was also conflicting. The estimates of speed given by different witnesses varied from ten to twenty-five miles an hour. The jury did not make a finding as to the speed of the train. They found the appellants chargeable with negligence in not

proceeding with sufficient caution approaching wreck zone which was observed.

I frankly confess that at the close of the argument at bar, Mr. Robertson had by his able argument and clear presentation of the case for the railway company almost, if not quite, convinced me that the appeal

should be allowed and the action dismissed. After however, reading the evidence and judgments, and most carefully considering them in connection with the findings of the jury, I entertained great doubts that my first impressions of the case after the argument were correct.

In the result, I find myself in the position of being unable to decide that the judgment appealed from is so clearly wrong that I would be justified in reversing it.

Under these circumstances I will not, though still doubting, dissent from the judgment proposed dismissing the appeal.

IDINGTON J.—The question raised by this appeal must turn upon the question of whether or not there was sufficient evidence to warrant the jury in finding that the injuries which respondent suffered on the occasion in question were caused by the failure of appellant

in not stopping its train at a reasonable distance east of the distant signal and proceeding with sufficient caution approaching wreck zone which was observed.

The appellant, in my opinion, absolutely discarded the statutory provisions contained in sections 277 and 278 of the Railway Act, which are as follows:—

277. No train or engine or electric car shall pass over any crossing where two lines of railway, or the main tracks of any branch lines, cross each other at rail level whether they are owned by different companies or the same company, until a proper signal has been received by the conductor or engineer in charge of such train or engine from a competent person or watchman in charge of such crossing that the way is clear.

278. Every engine, train or electric car shall, before it passes over any such crossing as in the last preceding section mentioned, be brought to a full stop; provided that whenever there is in use, at any such crossing, an interlocking switch and signal system, or other device which, in the opinion of the board, renders it safe to permit engines and

1920

WABASH RAILWAY CO. v. FOLLICK.

Idington J.

trains or electric cars to pass over such crossing without being brought to a stop, the board may, by order, permit such engines and trains and cars to pass over such crossing without stopping under such regulations as to speed and other matters as the board deems proper.

The statute does not in express terms define the exact distance from the crossing at which the "full stop" is to be made, but uses very imperative terms when it says

the engine, train or electric car shall, before it passes over any such crossing, * * be brought to a full stop.

I should say that the stopping seventeen hundred feet away, alleged in this case, by the appellant was a mere mocking of the Act.

Some electric cars do stop several times in that distance. If one happened to have stopped that far back from a crossing, would it be justified in rushing ahead when it came to the railway crossing, even if, as urged herein, the signal to pass was up?

I submit decidedly not and hold that such a car must, before crossing, come "to a full stop" immediately next the crossing place.

I say this to illustrate how variable the conditions may be for the respective moving things specified in the statute.

Obviously what would be the exact stopping place for an electric car might, for many reasons, be impossible for a train, or even an engine alone, upon a steam railway.

Hence Parliament, finding it impossible by the ordinary use of language accurately to define a common distance serviceable for each and all of these different kinds of traffic appliances, left that to the reasonable allowance necessary to be made in each respective case by those concerned, impliedly requiring, however, the exercise of a reasonable judgment.

The verdict in terms finds this was not exercised and the evidence supports that finding.

In the case presented herein reasonable judgment seems to have been entirely absent. I can find no excuse for such a disregard of its use. I am quite sure that the signal being up permitting the crossing was no excuse for disregarding this statutory obligation, otherwise there would have been no occasion or need for enacting section 278.

The latter was an added, independent and imperative safeguard which experience, no doubt, had dictated was necessary; and it is to the observance, or non-observance, of that alone, and the possible relation of that non-observance to the accident in question, that we should direct our attention in this case.

The primary object of this statutory safeguard probably was to avert the possible collision of crossing trains, whilst at the same time protecting those employed in the complicated situation often found co-existent with such crossings.

But its existence and observance was something which all those working at the point of crossing, or immediately thereabout, had a right to rely upon for their protection.

And all the more so when working under the peculiar conditions in question of removing a wrecked train, as respondent had been doing for twenty-two hours on a stretch up to the very moment of the crossing, and (after putting away his tools) he had picked up his lantern and was necessarily crossing the track on his way home.

Had the statute been duly observed on that occasion, it seems quite clear he would not have been touched by the appellant's train.

1920

WABASH RAILWAY CO. v. FOLLICK.

Idington J.

Had he been a mere casual trespasser he might have had no ground in law to complain.

But as a man lawfully engaged in his employment at the place in question, he was entitled to that measure of protection which a due observance of the statute would have produced.

The circumstances in which he was placed, by reason of the appellant's non-observance of the statute, rendered the conditions for his discharge of duty far more hazardous than need have been.

There is thus to my mind evidence of the natural sequence connecting the illegal act of appellant with the injuries suffered by respondent, which, of necessity, had to be submitted to the jury.

I find no difficulty in understanding the verdict of the jury in light of the evidence and the learned judge's charge.

I fail to understand the relevancy of the case of the *Grand Trunk Ry. Co.* v. *McKay* (1) relied upon by counsel for appellant.

According to the construction put therein, by the majority of this court, upon the statute there in question, the railway company had duly observed the terms thereof.

I think the appeal should be dismissed with costs.

ANGLIN J.—I was much impressed during the argument by Mr. Robertson's ingenious and forceful contention that the failure of the employees of the defendant company to stop its train at a reasonable distance east of the distant signal could not have been the proximate cause—*causa causans*—of the injury to the plaintiff, but was as most a remote cause or

(1) 34 Can. S. C. R. 81.

cause *sine quâ non*. If all that the jury were entitled to infer from this omission of duty was that if it had been fulfilled the train would not have reached the crossing until the plaintiff had passed over it, I incline to think Mr. Robertson would be right. But it seems to me that the jury was entitled to infer more, and to find that, had the stop been made as required by the statute, the plaintiff would have had a much better opportunity by reason of a reduced speed of the train to escape being run down. Of course nobody can positively affirm that he would have escaped; but as, in the familiar cases of failure to sound the whistle or ring the bell as prescribed by the statute, the jury is allowed to infer that the omission to do so is the cause of injuries sustained at a highway crossing, although nobody can assert that had the bell been rung or the whistle blown the injured person's attention would have been thereby attracted to the approaching train and the accident averted, and the company cannot successfully appeal in such cases from a finding that its negligence was the cause of the plaintiff's injury, so here it seems to be impossible to hold that the jury was not warranted in inferring that the failure to discharge the statutory duty of stopping within a reasonable distance of the diamond crossing was truly a *causa causans* of the plaintiff being run down.

While the additional finding—that the defendants were negligent

> in not * * proceeding with sufficient caution approaching a wreck zone, which was observed—

seems a little vague and indefinite, on turning to the statement of claim I find that, in addition to failing to stop as prescribed by the statute, the only other

1920

WABASH RAILWAY CO. v. FOLLICK.

Anglin J.

negligence charged against the defendants is "running at an excessive speed" and "not giving the proper statutory warning on approaching the level crossing." There is no evidence of the latter omission and it is not mentioned in the charge of the learned trial judge. But he does direct the jury's attention specifically to the allegation of excessive speed—"that the train was going at too great a speed" and he tells them that they should

> eliminate from (their) consideration anything except such negligence as caused injuries to the plaintiff.

Although it is not so clear as in the recent case of *British Columbia Electric Ry. Co.* v. *Dunphy*, (1), that the jury's finding of lack of precautions was directed to the specific neglect charged, I incline to think we should not ascribe to them an intention to travel outside the record or to find negligence of which there was no evidence and that we should assume that failure to moderate the speed of the train in approaching the wreck zone was the lack of due caution for which they meant to find the company to blame.

No objection to the findings seems to have been made when they were brought in. If counsel were not satisfied that they were sufficient and responsive to the questions submitted they might have called the attention of the trial judge to the matter and he might have directed the jury to bring in a more specific finding.

On the whole, while the case is undoubtedly close to the line, interference with the judgment appealed from seems to me not to be warranted.

(1) 59 Can . S.C.R.263.

1920

WABASH RAILWAY CO. v. FOLLICK.

Brodeur J.

BRODEUR J.—This is a railway accident. The action instituted by the respondent claims that as a result of the appellants' negligence he suffered damages. The negligence that is complained of is want of conformity to the statutory provisions of the Railway Act in reference to level railway crossings.

Section 278 of the Railway Act enacts that a train, before it passes over a level railway crossing, must be brought to a full stop.

The question of fact is whether the appellants' railway train did or did not come to a full stop at the place where the law requires them so to do. The evidence is conflicting on that point. The jury was fully charged as to that and they found that the company was at fault. It was also for the jury to determine in those circumstances if there was contributory negligence and their findings are not such that we could consider them as perverse.

The appeal should be dismissed with costs.

MIGNAULT J.—I concur with my brother Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: *Fasken, Robertson, Chadwick & Sedgewick.*

Solicitor for the respondent: *G. H. Pettit.*