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

AND

F. C. SIBBALD (PLAINTIFF) ..... RESPONDENT.

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*June 3.
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THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE MIDLAND RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

FRANK G. TREMAYNE AND ANOTHER, ADMINISTRATORS, &C., OF ANNE A. ANDERSON, DECEASED (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Co.—Negligence—Construction of road—Impairing usefulness of highway.

A railway company has no authority to build its road so that part of its road-bed shall be some distance below the level of the highway unless upon the express condition that the highway shall be restored so as not to impair its usefulness, and the company so constructing its road, and any other company operating it, is liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it.

A company which has not complied with the statutory condition of ringing a bell when approaching a crossing is liable for injuries resulting from a horse taking fright at the approach of a train and throwing the occupants of the carriage over the dangerous part of the highway on to the track though there was no contact between the engine and the carriage. *Grand Trunk Railway Co.* v. *Rosenberger* (9 Can. S.C.R. 311) followed :

The decisions of the Court of Appeal and the Divisional Court were affirmed.

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*PRESENT :—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the plaintiffs.

The actions in this case were brought for damages claimed in consequence of an accident caused, as was alleged, by the negligence of the servants of the defendant companies in not ringing the bell and sounding the whistle on approaching a crossing, and, also, for negligence in the construction of the railway at the place where the accident occurred. The one action was brought by the executors of a Mrs. Anderson who was killed, and the other by the plaintiff, Sibbald, who lost an arm, by such accident. The facts disclosed by the evidence of the plaintiffs' cause of action are as follows:—

The deceased Mrs. Anderson, on account of whose death the second above-mentioned action is brought, was on the morning of the 11th October, 1888, being driven with her younger son Allan by the plaintiff in the first mentioned action along the highway known as the Town Line, between the townships of Georgina and North Gwillimbury, in the county of York. The plaintiff, Dr. Sibbald, was driving two horses in a wagonette towards the south with his coachman, Lonergan, on his left, and Mrs. Anderson and her son Allan seated behind, with their backs to the driver. The defendants were propelling a locomotive engine with tender foremost along their line of railway towards the north.

The said line of railway in crossing the said highway for a distance of about 500 feet, entering upon it from the south at the distance of some 420 feet south of the point where the accident occurred, and continuing upon the highway for the distance of about 80 feet

(1) 18 Ont. App. R. 184. (2) 19 O. R. 164.

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north of the point where the accident occurred, the accident occurring at a point within the limits of the road allowance. The distance between the north and south cattle guard at this crossing is some 592 feet. The plank crossing where vehicles pass over the defendants' track is distant about 195 feet south of the point of the accident. It will thus be seen that the railway is carried along the highway in crossing it for the said distance of 500 feet, and that an engine being propelled along the said railway and a person driving along the said highway are proceeding on almost parallel lines.

At the plank crossing the highway and the railway are practically on a level. To the south of the plank crossing the railway is above the level of the highway, but a few feet north of the plank crossing the land commences to rise, and in order to have the railway on a level the road allowance was cut into, and at the point of the accident the railway company has excavated a considerable portion of the highway for the purposes of the railway, leaving the railway at this point below the level of the highway two feet six inches. Dr. Sibbald, Mrs. Anderson, the doctor's boy, and Mrs. Anderson's little boy Allan were driving towards the south down this hill when they discovered a train coming from the south towards them, and, as soon as it was discovered, Dr. Sibbald told his man to get out and go and hold the horses by the head; then the engine came on slowly; the man was unable to hold the horses; the horses turned round and down the slope to the left, which was close to the railway track; the carriage or wagonette was upset, and two at least of the occupants of the carriage were thrown on to the track close to, if not under, the wheels of the engine which was coming along. The doctor's man was left safe in the road; Mrs. Anderson's little boy had got down

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out of the carriage, and was also safe: the doctor was thrown with his arm across the rail, and got that arm crushed so it had to be amputated, and Mrs. Anderson received such injuries there on the track at that time as resulted in her death the next morning.

The following are the questions put to the jury at the trial and the answers given thereto by them :—

First. Did the Lake Simcoe Junction Railway Company, at the place where the accident happened, excavate a portion of the highway, and carry its line of railway across the highway through the excavation? A. Yes.

Second. If so, how much lower is the line of the railway, in consequence of the excavation, than the highway at the point where the accident happened? A. Two feet six inches.

Third. Was the highway rendered less safe by reason of the difference in level, caused by the excavation between the highway and the railway, at the point where the accident happened? A. Yes, by reason of the fact that the legal allotment for the public highways in the said township is sixty-six feet, which has been reduced by said excavation.

Sixth. Was the whistle sounded or the bell rung at least eighty rods from the crossing? A. That the engineer did give the three sounds of the whistle somewhere about eighty rods south from the crossing.

Seventh. Was the bell rung, at short intervals, for a distance of about eighty rods from the crossing, until the engine reached the crossing? A. No; the bell did not ring; nor was it sounded by the fireman.

Eighth. Could the plaintiff, Dr. Sibbald, by the exercise of reasonable care, have avoided the accident, which happened to him? A. He could not have avoided the accident; he did exercise reasonable care in the course of it.

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Ninth. Could Mrs. Anderson, by the exercise of reasonable care, have avoided the accident which happened to her? A. She could not have avoided the accident by any special care of her own.

Twelfth. In your opinion, was the accident caused by negligence on the part of the defendants? A. Yes.

Thirteenth. If so, what was the negligence of the defendants which caused the accident? A. Their negligence consisted in not constructing any fence or other protection on the portion of the road or highway, and that the non-ringing of the bell was contributory to it.

On these findings a verdict was entered for the plaintiffs in each action, which was affirmed by the Divisional Court and the Court of Appeal. The defendants appealed.

The accident occurred on the line of the Midland Railway Company, which, by agreement, was being operated by the Grand Trunk Railway Company.

McCarthy Q.C. for the appellants.

The duty to protect the public by fencing the road was on the municipality and not the company. *Wilson* v. *City of Watertown* (1).

The company cannot be held responsible under the circumstances. *Cracknell* v. *The Mayor, &c., of Thetford* (2); commented upon in *Geddes* v. *The Proprietors of Beauce Reservoir* (3); *Whitmarsh* v. *The Grand Trunk Railway Company* (4); *Hill* v. *The New River Company* (5); *Simkin* v. *The London & North-western Railway Company* (6).

The learned counsel referred also to *The Railway Act* (7), sec. 6 subsection 4 and section 12, and 51 Vic.

(1) 3 Hun. (N.Y.) 508.
(2) L.R. 4. C. P. 629.
(3) 3 App. Cas. 430, 448.
(4) 7 U.C.C.P. 373.
(5) 9 B. & S. 303.
(6) 21 Q.B.D. 453.
(7) R.S.C. c. 109.

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ch. 20 section 90 sub-section 8 and sections 91 and 184.

Burns for the respondent. The company was under an obligation to make the highway safe. *Fairbanks* v. *The Great Western Railway Company* (1). The engine should have been stopped when the driver saw the plaintiff's horses. *Tyson* v. *The Grand Trunk Railway Company* (2). See also *Lister* v. *Lobley* (3).

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Sir W. J. RITCHIE C.J.—I think these appeals must be dismissed for the reasons given by the majority of the Court of Appeal, namely, the Chief Justice and Osler and McLellan JJ.

STRONG J.—At the opening of the argument by the respondents' counsel, I intimated the opinion that these appeals were entirely unfounded and ought to be dismissed, and I adhere to that opinion.

TASCHEREAU J. concurred in the appeals being dismissed.

GWYNNE J.—I think these appeals must be dismissed upon the short ground that the railway company had no authority to interfere with the highway as they did, unless upon the express condition that they should restore it so as not to impair its usefulness. This the jury found that they did not do, and they have attributed the injuries received by the plaintiff to this default.

PATTERSON J.—I am of opinion that we should affirm this judgment for the reasons given by the Chief Justice of Ontario—and I shall add only a few observations.

(1) 35 U.C.Q.B. 523. (2) 20 U.C.Q.B. 256.
(3) 7 A. & E. 124.

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Two features of the case are somewhat unusual. One is that the accident and injury occurred without any collision between the locomotive engine and the vehicle in which the injured persons had been driving, and the other is that the negligence in respect of the alteration, which made the highway dangerous and led to the accident, was in the first place the fault of the company that constructed the railway and not that of the defendant company. These features do not, however, involve questions which are new to this court. The former existed in the case of *Grand Trunk Railway Co.* v. *Rosenberger* (1), and the latter in *Bate* v. *Canadian Pacific Railway Co.* (2). In both cases the defendant companies were held to be liable.

As to the first point, the case of *Victorian Railway Commissioners* v. *Coultas* (3) does not appear to me to aid the defendants. The Judicial Committee did not decide in that case that "impact" was necessary, holding merely that a nervous shock sustained by a lady whose carriage was safely driven across a railway in front of an approaching train, but who was frightened by the proximity of the train, was a cause of damage that was too remote to sustain an action The case of *The Notting Hill* (4) is referred to as containing a correct statement by the Master of the Rolls (Lord Esher) of the rule of English law as to the damages which are recoverable for negligence, viz., that the damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary state of things would flow from it.

The jury found in this case that the proper signals required by the railway law had not been given when the engine was approaching the crossing, and the

(1) 9 Can. S.C.R. 311.
(2) 18 Can. S.C.R. 697.
(3) 13 App. Cas. 222.
(4) 9 P.D. 105.

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judgment of the Divisional Court (1) appears to have been rested to a great extent upon that finding and on the authority of Rosenberger's case. I do not find fault with that judgment, but I think that the defendants are liable to these plaintiffs, even if the statutory signals were regularly given.

The signal would have enabled the driver to stop in good time. Grant that in this case the driver did stop his horses far enough from the crossing to have been, in ordinary circumstances, free from danger. Grant further that the railway engine was lawfully moving, after passing the planked crossing, along the road allowance almost parallel with the travelled track on which the horses were, very much as we sometimes find a railway running alongside a travelled road, or even along the road itself. The tendency in every such case is to frighten horses that are not trained to the phenomenon.

The railway company being in the exercise of a right conferred by law will, in the absence of negligence, be free from responsibility for any such casualty. But if a horse in such circumstances takes fright at a passing engine and, by reason of the defective state of the highway, damage is sustained, there must be a remedy against the party by whose act or neglect the highway was insecure. Such was the case of *Toms* v. *The Township of Whitby* (2), in which the law on this subject was much discussed in two of the Ontario courts, the Queen's Bench and the Court of Appeal. The horse of the plaintiff in that case was accidentally startled and backed the carriage over a declivity which the township ought to have protected by a fence. See also the later case of *Steinhoff* v. *Corporation of Kent* (3).

(1) 19 O.R. 164.

(2) 35 U.C.Q.B. 195; 37 U.C.Q.B. 100.

(3) 14 Ont. App. R. 12.

The accident in the case before us would not have happened if the railway had not encroached upon the highway or if the declivity formed by the railway cutting had been guarded by a fence or other protection. The jury so found, and the force of their finding is not weakened by the proof, to which our attention is called by the defendants in their factum, that a man coming to the place to make the experiment found that a carriage could be turned on the narrow road that was left, even if the forewheels did not turn under the carriage as they did in Dr. Sibbald's wagonette. Experiments of that kind seldom reproduce the situation. Important data are apt to be absent, as, in this case, the suddenness of the emergency and the fright of the animals. It is not surprising that the jury paid little attention to the experiments.

The unsafe condition of the road was caused by the railway company which is therefore liable for the individual injury even though it may have been caused by what is a public nuisance. The law was so laid down nearly four hundred years ago (1):

> If one make a ditch across the high road, and I come riding along the road at night, and I and my horse are thrown into the ditch so that I have thereby great damage and annoyance, I shall have my action against him who made the ditch, because I am more damaged than any other man.

The liability under this rule of law would probably not be confined to cases where the working of the railway was concerned in causing an accident, but would embrace other casualties incident to travel upon any road but which do no harm when the road itself is sufficient. In such cases there would be more room than in the present case for arguing that the liability was upon the company that made the cutting and not upon the defendant company. The damage here is

(1) Year Book 27 Hen. VIII. 27 pl. 10.

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caused by the passage of the engine along the road allowance while that portion left for the public remained in the unsafe condition produced by the construction of the railway, or conversely, by leaving the highway in that unsafe condition while the engine moved along the rails beside it.

The damages were—to adopt the definition already quoted—

> The natural and reasonable result of the defendants' act; such a consequence as in the ordinary state of things would flow from it.

In my opinion we should dismiss the appeals.

Appeals dismissed with costs.

Solicitor for appellants: *John Bell.*

Solicitors for respondents: *McCullough & Burns.*

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