It may be objected that where a person insured under a liability policy negligently injures one of his own minor children, it is difficult to fulfil the conditions of the policy as to non-interference in a damage action and co-operation with the insurer. Even if that be so, the conditions of the contract must govern the contracting parties. Here the initiative of having a tutor named to the minor could have been taken by any relative (article 250 C.C.). And I entirely fail to see why collusion with the plaintiff should be allowed when the latter is a blood relative and forbidden when he is a stranger. In every case the contract, and not the relations between the insured and the injured party, must determine the right of recovery.

With all possible deference therefore I cannot concur in the reasoning which prevailed in the courts below on this crucial question. In my opinion, the respondent has not fulfilled the conditions of the policy and has therefore no right of recovery against the appellant.

I would allow the appeal and dismiss the respondent's action with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Elliott & David.*

Solicitors for the respondent: *Pélissier, Fortier & Thibaudeau.*

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THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANT).... } APPELLANT;

AND

DENNIS A. MURPHY (PLAINTIFF).....RESPONDENT.

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

Negligence—Railway—Injury to passenger—Announcement of stoppage—Stoppage short of station—Mistaken belief of passenger—Finding of jury.

M. was travelling to West Toronto on a G.T. train. When the last station on his journey had been passed an official went through the train calling out "next stop" or "next station" West Toronto. Before reaching that station the train had to stop for a few seconds in obedience

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

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to a stop signal and M. went to the platform of his car, on which there were no step doors, and alighted falling to the ground and sustaining severe injury. In action against the Ry. Co. he admitted that he had understood the announcement to mean that the next station would be West Toronto. The jury found negligence by the company and that such negligence was—"We believe that the defendants should * * * when compelled to stop trains use precaution to prevent passengers from alighting." A verdict for M. was maintained by the Appellate Division.

Held, Idington and Duff JJ. dissenting, that the action should be dismissed; that it was the duty of the officials of the company to stop the train as they did; that they were under no duty, either statutory or imposed by regulations of the Railway Board, to warn passengers that the train had not reached the station which was the only precaution suggested on M's behalf as available; and that there was no breach of the common law duty to carry safely as, owing to the brief period of the stoppage and the haste in which M. left the car, an effective warning was not possible.

Per Duff J.—By the announcement "next stop West Toronto" M. was placed in a situation which, without further warning, might be one of peril, and the trial judge refused to submit to the jury the suggestion of counsel that the announcement should have been accompanied by a warning that the train might stop at the semaphore, basing his refusal on the admission of M. that he understood the announcement to mean that the next station was West Toronto. This may have been regarded by the jury as a direction that on this crucial question such admission was conclusive against M. and there should be a new trial the finding of the jury as to negligence being too vague and uncertain to permit of a judgment against the company.

APPEAL from a decision of 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 respondent.

The facts are stated in the above head-note. The case has been tried twice. A judgment of nonsuit on the first trial was set aside by the Appellate Division and a new trial ordered.

D. L. McCarthy K.C. and *R. E. Laidlaw* for the appellant.

H. J. Scott K.C. for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario composed of four judges, the Chief Justice of the Common Pleas, and Middleton, Latchford and Logie JJ. The Chief Justice and Middleton J. were to allow the appeal from the judgment entered by the trial judge for

(1) 52 Ont. L.R. 642.

$4,000 on the findings of the jury and to dismiss the action, while Latchford and Logie JJ. were to dismiss the appeal. The court being equally divided the appeal was consequently dismissed, whereupon the company entered an appeal to this court.

The case had been twice tried first before Mr. Justice Hodgins who non-suited the plaintiff at the close of his evidence which non-suit was set aside on appeal and a new trial directed. The new trial was heard before Mr. Justice Riddell sitting with a jury who found for the plaintiff, now respondent, for $4,000 damages.

The questions and answers of the jury were as follows:

(1) Was the casualty in question a mere accident, or was it caused by negligence? Ans. It was caused by negligence.

(2) Was it caused by the negligence of the defendants? Ans. Yes.

(3) If so, what was the negligence? Answer fully. Ans. We believe that the defendants should on occasions when compelled to stop trains, use precautions to guard passengers from alighting from trains so stopped.

(4) Could the plaintiff, by the exercise of ordinary care, have avoided the casualty? Ans. No.

(5) What should he have done? Ans. Nothing.

(6) Was the train in motion when the plaintiff stepped off? Ans. No.

(7) Damages. Ans. $4,000.

After the jury had answered the questions as above set forth, the learned trial judge declined to hear argument on behalf of the appellant. He said,

I think it is a matter to be disposed of by the Divisional Court and it is so near the line it ought to go to the Divisional Court in any case.

I agree so fully with the judgments of the Chief Justice of the Common Pleas and Mr. Justice Middleton, for allowing the appeal and dismissing the action, that I feet it is not necessary for me to repeat in full their reasoning.

As Mr. Justice Middleton says there might be evidence to justify the holding that the plaintiff was not negligent, but he goes on to say:

When we turn to the question of the defendant's negligence the case is different. * * * If the jury intend to impute fault to the brakeman in not going again through the car to warn the passengers against alighting, then they impose upon him a duty in conflict with his statutory duty to go back upon the track and protect the rear of the train. They probably did not intend this because the trial judge warned them that they must specify all the negligence which they thought existed and that the negligence found would alone be regarded. The plaintiff in his evidence pointed out this as the thing that he complained of, and the jury refused to find for him.

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The Chief Justice.

The truth probably is that the jury desired to find for the plaintiff but could not put their hands on any particular fault, and so resorted to the device of a vague general statement. More is required than this. Negligence "in the air" is not enough. See, for example, *Newberry* v. *Bristol Tramways Co.* (1), where a similar finding was paraphrased: "We find there was negligence but we cannot tell what. We negative the various suggestions of negligence, to which the evidence has been directed, but we divine the existence of some other negligence too obscure to be named in words or to be proved by testimony." The principle is there stated by Hamilton L.J. (now Lord Sumner) "that the jury cannot fix a defendant with liability for want of care, without proof given or reason assigned, out of their own inner consciousness and on their own notion of the fitness of things." A verdict must rest on a foundation of actuality and not merely upon an ideal or vague view. If the jury meant that the train should have had a larger crew so that there might have been a man on guard at each door, then the jury went too far because the crew necessary on each train is subject to specific regulations by the Railway Board, and the decision of the board governs.

On the argument I asked the plaintiff's counsel if he could surmise exactly what the jury intended, and he could not. His answer was in effect: It is not for the plaintiff or for the jury to say what should be done, it is enough to say something should have been done. I do not agree with this. The plaintiff must shew something done which ought not to have been done, or something omitted which should have been done, before he can recover.

I would, therefore, allow the appeal and dismiss the action.

IDINGTON J. (dissenting).—This appeal arises out of a case in which the respondent by the evidence, as I read it, had presented a rather simple problem for solution yet there has been a very remarkable difference of judicial opinion in the course thereof.

He was a passenger on appellant's train from Chesley to West Toronto which passed through and had stopped at Weston.

The distance between Weston and West Toronto is between three and four miles and usually takes only about nine minutes to run.

The respondent was accompanied by his wife and they naturally were alert to any announcement to be made by the train officials as to when to get off the train at West Toronto, their point of destination.

The trainman in charge having, as West Toronto was approached, announced "Next stop West Toronto," they got ready to answer said call as the train slowed up and

(1) [1912] 107 L.T. 801.

duly proceeded to the nearest door of their car which was next to the last of a very long train consisting of ten cars of which six were passenger cars.

The train stopped and they got on to the open platform of their car and appellant, though it was pitch dark, went down the steps of the car and then, assuming he was quite safe, stepped off, but it turned out that the last step of the car was three or four feet from the ground. The result was a violent fall from which he suffered very serious injuries.

Hence he sued appellant for the damages thus suffered attributing same to the negligence of the appellant in inviting him thus to alight at the next stop which was not, as supposed, the next station.

The case has been tried twice on substantially the same evidence.

On the first trial Mr. Justice Hodgins, before whom it was tried, dismissed the action.

That ruling was set aside by the unanimous judgment of the Appellate Division of the Supreme Court of Ontario and a new trial granted, which took place before Mr. Justice Riddell who submitted to the jury seven questions, which appear with the answers thereto, as follows:—

(1) Was the casualty in question a mere accident, or was it caused by negligence? Ans. It was caused by negligence.

(2) Was it caused by negligence of the defendants? Ans. Yes.

(3) If so, what was the negligence? Answer fully. Ans. We believe that the defendants should, on occasions when compelled to stop trains, use precaution to guard passengers from alighting from trains so stopped.

(4) Could the plaintiff, by the exercise of ordinary care, have avoided the casualty? Ans. No.

(5) What should he have done? Ans. Nothing.

(6) Was the train in motion when the plaintiff stepped off? Ans. No.

Was the plaintiff aware that it was in motion? Ans. No.

(7) Damages. Ans. $4,000.

It is quite clear therefore that mere accident was not the cause of respondent's injuries but appellant's negligence, and respondent was exonerated from any negligence on his part.

The learned trial judge who ought to know the due import and significance of these answers at once entered judgment for the respondent with costs.

Upon appeal to the Appellate Division of the Supreme Court of Ontario by the appellant here, the court hearing

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said appeal was equally divided, and hence the appeal failed and was dismissed accordingly.

The appellant then brought this appeal here. Its main contention, indeed only one in law, is that the answer to the third question is not sufficiently explicit and comprehensive.

I read it, as I think such questions and answers must always be read, in light of the evidence and the learned trial judge's charge, and so reading same I can find no difficulty in the case and agree with the learned judges Latchford and Logie in the court below maintaining, for the respective reasons each has assigned, the judgment of the learned trial judge upon said verdict.

If the stop at the point where the respondent got off was quite likely to be rendered necessary by reason of the immense traffic converging at the West Toronto station yard, then it clearly was the duty of the appellant to have taken precautions to guard passengers from alighting from trains so stopped. I do not think it was necessary for the jury to have written a treatise on the subject to enable any one to comprehend the true import of their answer.

Nor do I intend to elaborate upon the manifold methods by which one of many precautions might have been taken. I prefer, with all due respect for those who differ from me in so concluding, to apply common sense to the usual method of reading such question and answer verdicts in light of the evidence and the learned trial judge's charge.

I may be permitted to add that I fail to see any resemblance between what is presented herein and what transpired in the case of *Newberry* v. *Bristol Tramways Co.* (1), relied upon by Mr. Justice Middleton in the court below, or the case of *Hood and Wife* v. *Walthamstow District Council* (2), cited by counsel for appellant.

The decisions in the cases of *Glasscock* v. *London, Tilbury & Southend Railway* (3); *Readhead* v. *Midland Railway Co.* (4); *Scott* v. *London Dock Co.* (5); *Bridges* v. *North London Railway Co.* (6), cited by respondent's counsel, are much more in point.

(1) 107 L.T. 801.
(2) [1915] 79 J.P. 161.
(3) 18 Times L.R. 295; 19 Times L.R. 305.
(4) [1869] L.R. 4 Q.B. 379.
(5) [1865] 3 H. & C. 596.
(6) [1874] L.R. 7 H.L. 213.

And as to the case of *Newberry* v. *Bristol Tramways Co.* (1) cited by counsel for appellant herein I may say that if he had cited it to the learned trial judge and got through him a similar answer to that given by the foreman of the jury in that case, it might have had some application.

I cannot in absence thereof attach any importance to such a remote contingency.

I must therefore come to the conclusion that this appeal should be dismissed with costs.

DUFF J. (dissenting).—The respondent was a passenger on the appellant's railway from Chesley to West Toronto. The train was due to arrive at the plaintiff's destination at 9.15 p.m., but on the day when the accident occurred, the 5th November, 1921, it did not arrive until ten o'clock. The train comprised ten cars, and the car in which the plaintiff was riding was not vestibuled, and had no step-doors to prevent passengers from descending the car steps for the purpose of alighting. There were three other cars of the same design in the train. The evidence is to the effect that two train officers separately called out to the passengers, "Next stop West Toronto," and the last one punched the railway tickets. Shortly afterwards the train stopped, no further announcement having been made or warning given. The night was dark and, according to the plaintiff's evidence, he was unable to see where he was. The train had, in fact, stopped before reaching the station, and the plaintiff, assuming that he was at the West Toronto station, got up with his wife, walked on to the platform of the car, went down three steps and in stepping off the last of these fell, injuring himself seriously. The jury negatived contributory negligence, and found that the injuries suffered by the plaintiff were due to the negligence of the appellant company.

There was a conflict of evidence at the trial upon several questions, principally upon the question as to whether or not the train had in fact stopped. This question the jury answered in favour of the plaintiff.

The stopping of the train before reaching the station of West Toronto was explained by witnesses called on behalf

(1) 107 L.T. 801.

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of the appellants. As the railway line approaches St. Clair Avenue in West Toronto it takes the form of a curve just before it reaches the railway yard, about a quarter of a mile west of that street. At or near the entrance to the yard there is the usual semaphore or distance signal. At St. Clair Avenue there is also a signal which, the trainmen said, was set at Stop as they passed the distance signal. Thereupon the train was slowed down and, according to their evidence, the stop signal having been raised before they reached St. Clair Avenue, they increased the speed and proceeded. On this last point the jury declined to accept their evidence.

There was evidence (as the Divisional Court held in ordering the second trial) from which the jury might draw the conclusion that the announcements and the stop together amounted in the circumstances to a representation that the train had reached the place where the passengers for West Toronto were to leave it. Moreover, it would be within the province of the tribunal of fact to decide whether (in view of the possibility, knowledge of which by the company could not be denied, of the train being brought to a standstill by the St. Clair Avenue signal) the announcements so made without qualification and without warning given then or afterwards *prima facie* constituted negligence in themselves, as conduct calculated in a contingency which the company ought to have anticipated, to lead passengers without warning into a situation which without warning was a dangerous one.

Passengers are entitled to rely upon the servants of a railway company performing their duty to exercise reasonable care to avoid putting them into a position of peril. They are entitled to act on such announcements as are made without analyzing them critically, and without suspicion, and to proceed with confidence on the plain obvious meaning of them.

It is arguable no doubt that the verdict expresses with sufficient certainty a finding to this effect; but I am forced to the conclusion that the verdict is too vague, too uncertain in its meaning and effect, to be treated as a proper basis for a judgment against the appellants. But I confess that I am quite unable to discover any adequate

ground for awarding judgment against the respondent, dismissing the action.

As I have said there was evidence to support a finding of negligence in the sense above mentioned. With great respect, I think the manner in which the case was left to the jury was calculated to divert their minds from the real question before them. In answer to the request of the plaintiff's counsel to submit to the jury his suggestion that the announcements should have been accompanied by a warning of the possibility of a stop at the semaphore, the learned trial judge in effect declined to do so, giving as his reason, in the presence of the jury, the admission of the plaintiff that he knew that when the conductor announced the next "stop" he meant the next station. This was to ignore the contention that the effect of the announcement was that the next stop would be the station at which the plaintiff was to alight, and might easily be regarded by the jury as a direction that upon the question—the crucial question in the case—whether the appellants negligently misled the plaintiff by the announcements, the plaintiff's admission referred to by the learned trial judge was conclusive against him. I am inclined to think that to this observation of the learned judge is to be attributed the form of the answer to the third question.

The learned trial judge had, it should be noted, asked the jury to consider two suggestions made by the plaintiff himself in his evidence. One, that the announcement of the station should be delayed until the signal for proceeding was received at St. Clair Avenue; and an alternative one, that if, on approaching the yard, the signal at St. Clair was set at "stop" the passengers should then be warned to keep their seats.

The importance of this way of presenting the plaintiff's case to the jury, excluding the suggestion made by the plaintiff's counsel that the announcements should have been accompanied by a warning, while submitting the suggestions just mentioned, received illustration in Mr. McCarthy's argument. Naturally he emphasized the phraseology of the answer to the third question as confining the scope of the answer to precautions coming into effect either after the train had stopped, or after the certainty, or the

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immediate probability, of a stop had become apparent. Whether or not this is the necessary meaning of this answer, at least I am convinced that it is the better reading of it; and the conclusion was urged upon us, as involved in certain decisions of this court, that the jury, having thus defined the negligence they were finding, necessarily negatived any charge of negligence based upon the absence of precautions coming into play at an earlier stage, such as the warning suggested by Mr. Ferguson. If that be the correct way of looking at the verdict and, as I have already intimated, I am by no means satisfied that it is not, then it is impossible to affirm, I think, that the learned judge's observations, above referred to, did not very gravely affect the form of the findings.

Then I think the learned judge gave the jury the impression that in answer to the third question they should seek to indicate the precautions negligently omitted by the appellants. As I have said, given a stop long enough to lead the plaintiff to think the station had been reached, and the absence of warning and the absence of contributory negligence, the *ensemble* of the facts, beginning with the announcements themselves, might have been stated, if that was their view, as constituting the negligence for which they held the appellants responsible; and it is barely possible that, as Mr. Scott argued, this is precisely what the jury, without assistance, was attempting to do; although, if such was their object, I agree that they signally failed in it.

It was not for the plaintiff to specify the appropriate precautions. The fact that without warning he had been invited into a situation which without warning was a situation of peril, by the appellants, was *prima facie* a breach of their duty to him as a passenger. If the appellants' answer was to be that this was unavoidable it was for the appellants to shew that; the burden of explanation was upon them. A finding against the appellants on that issue could not be set aside as unreasonable.

There should be a new trial. In view of the opinion of the majority of the court there is no object in discussing the question of costs.

ANGLIN J.—The respective functions of the court and the jury in cases such as this were definitely stated by the House of Lords in *Bridges* v. *North London Railway Co.* (1). It is for the court to determine whether there was any evidence of facts upon, or by legitimate inference from, which a jury might find that negligence of the defendants *dans locum injuriæ* was established. If there is such evidence, it is for the jury to decide whether it warrants such a finding. *Robson* v. *North Eastern Ry. Co.* (2). If they determine that it does it is not within the province of an Appellate Court to hold that it does not and on that ground to set aside the verdict.

Some facts in this case are perfectly clear. There were two calls—either " West Toronto next stop " or " West Toronto next station "—made by the train crew and heard by the plaintiff at a time when the train was still at a considerable distance north of that station. The signal for the diamond crossing at St. Clair Avenue, which is about one-quarter of a mile north of the West Toronto station, was set against the train and the engineer could not lawfully cross that thoroughfare until that signal had been reversed. The train slowed down when approaching the diamond crossing and, on conflicting evidence, the jury found that it actually stopped north of St. Clair Avenue and that fact cannot now be questioned. Their further finding negativing contributory negligence on the part of the plaintiff involved acceptance of his story that, when he attempted to alight, he believed the train had stopped at the station and that he used reasonable care in making that attempt. Those facts, I agree, must also now be assumed.

That nothing was done after the train stopped to prevent passengers alighting and that the plaintiff was injured while in the act of alighting from the train are undisputed facts. It must be assumed that when he attempted to alight the train was stopped north of St. Clair Avenue. The precise duration of that stop is not proven. The train crew all denying that any stop was made, and agreeing in the statement that the train had only slowed down and that the signal having been reversed it proceeded to the

(1) L.R. 7 H.L. 218. (2) [1876] 2 Q.B.D. 85, 87.

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station without actually stopping, of course no evidence of the duration of the stop could be had from them. The plaintiff and his wife say the train had stopped before he opened the door of the car to reach the platform preparatory to alighting. Thompson, a witness called for the plaintiff, says that the train did not stop until the plaintiff was on the platform. At most, only a few seconds elapsed between the stopping of the train and the plaintiff's stepping off. His wife says the train started again immediately after he had stepped off—that she had not time to follow him. It, therefore, seems to be certain that the stop, if made (as we must assume it was), was but momentary.

The train comprised ten cars, the six in the rear being passenger coaches. The train crew consisted of a conductor and two trainmen, each of the latter being in charge of three of the passenger coaches. The plaintiff travelled in the coach next to the last. It was the duty of the trainman in charge of the three rear coaches, in the event of a stop being made between stations, to go back on the track to protect his train against the danger of any following train running into it while stationary. There was no attempt to shew that the train crew was not adequate or that it did not meet the requirements of the regulations of the Board of Railway Commissioners.

The only finding of negligence made by the jury was the following:

> We believe that the defendants should on occasions when compelled to stop trains use precaution to guard passengers from alighting from trains so stopped.

This finding must be read in the light of the evidence and the charge of the learned trial judge. So read, notwithstanding its generality, it is not open to the objection that prevailed in *Newberry* v. *Bristol Tramways Co.* (1), and in *Hood et ux.* v. *Walthamstow Urban District Council* (2). I am disposed to regard it, as did Latchford and Middleton JJ., as sufficiently expressing the jury's view that some precaution was practicable. Since the only precaution suggested by the plaintiff, or on his behalf, was that the train crew should, after the train had stopped, have warned passengers not to debark because the train was not yet at

(1) 107 L.T. 801. (2) 79 J.P. 161.

the station, the jury's finding should be taken to imply that the failure to give such a warning was negligence *dans locum injuriæ*. The question presented, therefore, is whether, upon the evidence in the record and such inferences as they could legitimately draw from it, the jury could reasonably make such a finding.

The calling out of the name of each station a short time before the train reaches it is customary and is such a convenience to the passengers whose destination it is and to the conductor who is obliged to collect their tickets or hat checks that its discontinuance would evoke a storm of protest. The stopping of the train at the diamond north of St. Clair Avenue, while not altogether unexpected, is not usual; it is said to occur in the case of the train with which we are dealing about once a week. This stop was made in the discharge of an imperative duty. Neither singly, nor taken together, did the announcement of the station and the stop following it involve any fault or negligence. But, having regard to the darkness (10.10 p.m.), a situation was thus created in which it might not unreasonably be anticipated that some passenger, in the belief that he had been invited to alight, would make the very mistake which the plaintiff made and might sustain injury, as he did, without being himself in any way negligent or at fault. That the possibility, if not probability, of such an occurrence was, or should have been, realized by the defendant's officials and employees also seems clear. It follows that if its happening could have been prevented by any reasonably practicable precaution, omission to take it would be negligence.

It is upon the practicability of giving an effective warning under the circumstances that, after most anxious consideration of the whole record, it seems to me evidence to support the plaintiff's case is lacking. A finding that there was sufficient time after the train had stopped for the train crew to have taken steps that would probably have prevented the plaintiff making the mistake he did in my opinion cannot be supported on the evidence before us. On the contrary, it seems to be reasonably certain that there was no opportunity for their giving the warning, the omission of which is the fault relied on by the plaintiff. It may be that the moment the train stopped the members of the

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train crew available for that duty should have started going through the train to give some warning. But, having regard to the evidence indicating that the stop was momentary and to the fact that the plaintiff stepped off the car immediately upon its being made, no jury, in my opinion, could reasonably find that any attempt to give such warning would have been effective to prevent the plaintiff's alighting or to bring to his attention the danger of attempting to do so. Not only is this a fair inference from the facts in evidence; it is, I think, the only legitimate inference. Negligence of the defendants *dans locum injuriae,* essential to the plaintiff's success, is not merely not established by direct proof or reasonable inference; its existence is excluded by the facts that are proven.

For these reasons I concur in the judgment allowing this appeal.

MIGNAULT J.—This is an appeal from the judgment of the Appellate Divisional Court of Ontario, whereby the judgment of the trial judge giving effect to the verdict of the jury was sustained on an equal division. The case has been tried twice, a divisional court having ordered a new trial after the trial judge at the first trial had dismissed the action at the close of the plaintiff's case.

The material facts are as follows:

The respondent, on the evening of the 5th of November, 1921, was travelling with his wife on a Grand Trunk train from Chesley, Ont., to West Toronto. The last station before West Toronto is Weston, and after leaving the latter place, the brakeman passed through the car where the respondent and his wife were seated, calling out: "Next station West Toronto," or "Next stop West Toronto." Whichever it was, however, is not material, because the respondent says he understood that the call meant that West Toronto would be the next station. Before reaching the latter station the train had to cross St. Clair Avenue, where there is a tramway line and considerable traffic, and where also there are gates erected for the protection of the public. When these gates are closed to traffic the semaphore signals that the line is clear and trains cross the highway without stopping and

proceed to West Toronto station, a quarter of a mile distant. When, however, the gates are open to traffic on the avenue the signal from the semaphore stops the train before it reaches the crossing.

On the evening in question, at about 10 o'clock, this train arrived near the crossing and found that the signal was set against it. There was a conflict of evidence on the question whether the train actually stopped, or merely slowed down to a speed of about four miles an hour, but the jury, as they were entitled, found that it did stop, and that fact must be assumed to be conclusively established. We must therefore take it that the train stopped, certainly for a very short time, waiting for the signal to proceed. As it stopped, the respondent and his wife, who were in the car next to the rear car, rose from their seats, opened the car door and went out on the platform. The respondent looked from the steps leading from the platform of the car and saw lights ahead on the right side. His first intention was to alight on that side, but his wife having remarked that the station was on the left side, he got off on the left side, although it was dark there, and fell to the ground, suffering the injuries for which he now seeks compensation.

The jury were cautioned by the trial judge that, if they found that the defendant was guilty of negligence causing the accident, they should state in what the negligence consisted, and that any act of negligence not specified by them would be held to have been negatived.

Under these circumstances, the jury having found that the accident was caused by the negligence of the defendant, they had to answer the further question what was this negligence. The answer written down by them was:

> We believe that the defendant should, on occasions when compelled to stop trains, use precaution to guard passengers from alighting from trains so stopped.

They also found that the plaintiff could not have avoided the accident by the exercise of ordinary care, thus negativing any contributory negligence on his part.

We have now, on this very vital question, an extremely vague answer. When trains are compelled to stop before reaching a station—and they are compelled to stop whenever the signal is given them that the line is not clear—the

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railway company must, in the opinion of the jury, use precaution to guard passengers from alighting from trains so stopped. What this precaution should be, the jury do not say. Had they been further questioned, as they should have been, the matter would have been clinched, and it is possible either that they would have specified a precaution which the appellant was not bound to take, or that they would have made some such answer as was considered insufficient in *Newberry* v. *Bristol Tramways Co.* (1). The vagueness of the jury's answer is now the difficulty with which the respondent must contend.

I will assume that the jury did not intend to go outside of what was properly their province, and lay down, perhaps as a counsel of perfection, a general rule for the guidance of railway companies when they are compelled to stop their trains between stations. Taking the answer of the jury in connection with the facts in evidence, they probably meant that the next station having been announced and the train being compelled to stop before reaching it, the railway company should have taken precautions to prevent passengers who had heard the announcement from assuming that the train had reached the station and alighting as this respondent did. This is the construction placed on the answer of the jury by Mr. Justice Middleton in the Appellate Division and I am willing to accept it although, with deference, I cannot but regret that the jury were not further questioned.

On the other hand, it is obvious that unless there is a breach of duty on the part of the railway company there is no negligence in law and there can be no liability. The duty of railway companies is to carry their passengers with due care to their destination. To insure the performance of this duty the Railway Act has formulated certain rules and there are also certain regulations of the Railway Commission which have statutory force. If these rules and regulations are not observed there is a breach of duty and consequent liability. And, there is also liability if the common law duty to carry the passengers with due care is not fulfilled.

(1) 107 L.T. 801.

In his factum, Mr. Scott says:—

> The defendants brought about a dangerous situation to the plaintiff by telling him that the next station or the next stopping place was the place where the plaintiff desired to alight and then stopped the train without warning him that his destination had not been reached.

This statement is made in the attempt to bring the case within the rule *res ipsa loquitur,* but it seems to me an impossible contention to say that the announcement of the next station, or of the next stopping place, created a dangerous situation to the passengers of the train. And then if the train did stop before the next station was reached in obedience to an order to stop which the company was compelled to obey, there was in so stopping no possible breach of the duty the company owed to its passengers, nor can it be fairly said that the company brought about a dangerous situation to them, assuming that they acted as reasonable beings should act.

If then a passenger, in the erroneous impression that the train has stopped at the station which had previously been announced, alights from the train and is injured in so alighting, is the railway company liable as for a breach of its duty to carry him with due care to his destination? No enactment of the Railway Act or regulation of the Railway Commission has been cited as imposing a duty on the company under such circumstances.

This is not the case of a servant of the company seeing the passenger in the act of alighting under this erroneous impression and not warning him that the train has not yet reached his station. Even in such a case, where the train was still running, when the passenger alighted, at a speed of from twenty to twenty-five miles an hour in approaching the station where it was to stop, this court held that the railway company was not liable. *Grand Trunk Ry. Co.* v. *Mayne* (1). See also *Canadian Pacific Ry. Co.* v. *Hay* (2).

There is no suggestion that this train was not properly equipped and manned. There were four baggage and six passenger cars, of which the two first were what are known as vestibule cars and the four last platform cars. There was a conductor and two brakesmen, one of the brakesmen

(1) 56 Can. S.C.R. 95.

(2) 58 Can. S.C.R. 283.

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being in charge of the three first cars, the other of the three last.

In case the train stopped between stations it was the duty of the company to have an employee go to the rear of the train to flag any approaching train and thus prevent a rear end collision. This is referred to by some of the learned judges as being a statutory duty, and it would be a statutory duty if it were required by the Railway Act or by an order of the Railway Commission. I have been unable to find in the Railway Act any mention of this duty and no orders of the Railway Commission have been put in evidence. I will however assume that it was the duty of the railway company to send a man to the rear of the train when it stopped to flag any approaching train, such action being imperative to insure the safety of the passengers. The rear end brakesman was in the third car from the rear when this train slowed down on approaching St. Clair Avenue, and says that he prepared to go to the rear to discharge this duty. He did not go because he says the train did not stop.

No law or regulation has been cited as requiring the train employees, when the train stops as this train did before reaching a station, to warn the passengers that the train is not yet at the station and that they should not attempt to get off. It would in most cases be impracticable to do so. This was a long train crowded with people going to Toronto for Thanksgiving day. Assuming as we must that the train really stopped for a moment, the rear end brakesman who was looking after the part of the train where the respondent was travelling, was obliged to go to the rear end of the train, as I have explained. The front end brakesman had three cars under his charge, and the conductor could not be everywhere. Moreover such a stop would ordinarily be a very short one and to go through six crowded cars to give a warning not to alight would require several minutes. If the answer of the jury be taken to mean that the company should have used vestibule cars, the exit door of which is opened only when the station is reached, it suffices to say that there was no such obligation incumbent on the appellant.

So far I can find no duty of the train employees to tell the respondent that the train had not yet reached the station, assuming they did not see him in the act of alighting, and they did not.

But it is said that there was here an invitation to leave the train. This, however, was merely an invitation to alight when the train reached West Toronto station, and not if perchance a semaphore signal stopped the train before it got there.

We are referred to several decisions where, the train having run beyond a station or stopped short of it, the passengers were held to have been invited to get off in a dangerous place and it was decided that the company was liable. There is nothing similar here, for the train was still a quarter of a mile from the station when it was held up at St. Clair Avenue.

It is also said that the platform at West Toronto station was a short one and that the passengers in the rear cars would have had to alight on the cinders before reaching the platform. While this circumstance may have excused the respondent in stepping off in the place he did, it is not material to fix any duty on the appellant when the train stopped before reaching the station, nor would it reasonably lead the appellant to expect that the respondent would have thus alighted a quarter of a mile from the station.

On the whole, and placing the most favourable construction on the answer of the jury, I do not think it discloses any breach of duty of this appellant rendering it liable towards the respondent. The case is a very important one and I have given it all possible consideration. My conclusion is that the accident which befell the respondent was a pure misfortune for which in law the appellant is not responsible.

I would therefore allow the appeal and dismiss the action. The appellant is entitled to its costs throughout if it sees fit to exact them from the respondent.

Appeal allowed with costs.

Solicitor for the appellant: *W. C. Chisholm.*

Solicitors for the respondent: *Millar, Ferguson & Hunter.*