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ALFRED C. REYNOLDS AND CLARK WALLACE REYNOLDS, EXECUTORS (PLAINTIFFS) ..... } APPELLANTS;

*May 31.
*June 1.
*June 17.

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

MARY CRAIG (PLAINTIFF) ..... APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

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

Negligence—Railways—Train striking automobile at highway crossing—Question whether statutory signal given by train—Interference on appeal with jury's findings—Maintaining of bank on side of railway—Contributory negligence—New trial.

R. and C., while in a motor car driven by R., were injured by defendant's train striking the car at a highway crossing, and sued for damages. The jury found that defendant was guilty of negligence causing the accident, its negligence being "whistle not blown at whistling post, maintaining banks that obstruct view of train coming from south"; that R. was guilty of contributory negligence, being "partially to blame in neglecting to ascertain the time that train was due at crossing," his degree of fault being 25 per cent.; and that C. was not guilty of contributory negligence. Judgment was rendered, on the findings, for damages, those of R. being 75 per cent. of his total damages assessed. The Appellate Division, Ont. (59 Ont. L.R. 396) reversed the judgment, holding that the evidence was overwhelming that the whistle was blown, and it was a proper case to interfere with the jury's finding; that the maintaining of the bank in its original or heightened condition was not negligence in law; and that the whole cause of the accident was the negligence of R. and C. and another occupant of the car. R. and C. appealed to this Court.

Held: The evidence was not so overwhelmingly in favour of the view that the whistle was blown at the whistling post that the judgment which set aside the jury's finding to the contrary should be sustained (*Laporte* v. *C.P.R.* [1924] S.C.R. 278). As to the bank, even if its existence along the railway, caused by the cutting made through a hill and any necessary cleaning out of the ditch, and, in normal cleaning, the throwing of materials on the side of the bank, increasing its height, could be regarded as negligence in law, there was no foundation in fact for the finding that it obstructed the view of a

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

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train coming from the south; what obstructed the view was the hill itself. As the wrongful finding of the latter ground of negligence against defendant (in addition to the other ground, sufficient to import liability, that the whistle was not blown at the whistling post) might have influenced the jury in their apportionment of the damages according to the degrees of fault as between R. and defendant, a new trial of R.'s action was directed. Owing to the unsatisfactory character of the jury's answer as to the nature of R.'s contributory negligence, the new trial should not be restricted to apportionment of damages, but should take place generally on all issues. There was nothing to justify a finding of contributory negligence against C., and the judgment at trial in her favour was restored.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which allowed the defendant's appeal, and dismissed the plaintiff Reynolds' cross-appeal, from the judgment entered at trial upon the findings of the jury, in actions brought, one by Reynolds and his wife, and the other by Mary Craig and Jeannette Craig, against the defendant for damages for injuries suffered by the plaintiffs by reason of the motor car in which they were riding, and which was driven by the plaintiff Reynolds, being struck by the defendant's train at a highway crossing. The actions were tried together before Grant J. and a jury. The jury found that the defendant was guilty of negligence causing the accident, its negligence being "whistle not blown at whistling post, maintaining banks that obstruct view of train coming from south"; that Reynolds was guilty of contributory negligence, being "partially to blame in neglecting to ascertain the time that train was due at crossing"; that the degrees of fault were: of Reynolds, 25 per cent., and of the defendant, 75 per cent.; that the other plaintiffs were not guilty of contributory negligence. Judgment was entered in favour of Reynolds for $8,175, being 75 per cent. of the total damages ($10,900) assessed to him by the jury, and in favour of Mary Craig and Jeannette Craig for $1,100 and $50 respectively, the total damages assessed to them. No damages were assessed to Mrs. Reynolds.

On appeal, the Appellate Division (1) held that on the whole the evidence was overwhelming that the proper signals were given by defendant, and that it was a proper case for it to interfere with the jury's findings in this re-

(1) (1926) 59 Ont. L.R. 396.

spect; that the maintaining of the bank in its original or heightened condition was not negligence in law; that the whole cause of the accident was the negligence of Reynolds and the Craigs; and the defendant's appeal was allowed and the actions dismissed. Reynolds' cross-appeal as to the finding of contributory negligence against him was dismissed.

The executors of the estate of the plaintiff Reynolds, who died since the trial (the executors having procured an order of revivor), and the plaintiff Mary Craig, appealed to this Court.

The material facts of the case are sufficiently stated in the judgment now reported.

A. B. Cunningham K.C. for the appellants.

W. N. Tilley K.C., A. MacMurchy K.C. and *J. D. Spence* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—In this case two actions by the appellants against the Canadian Pacific Railway Company were tried together before Mr. Justice Grant and a jury. The verdict was in favour of the appellants, but was set aside by the Second Appellate Divisional Court and the actions were dismissed.

The plaintiff Reynolds (now represented by his executors, for he died since the trial) was driving a Ford motor car along Craig road in the county of Frontenac, on November 13, 1925, his wife occupying with him the front seat and Mrs. Mary Craig and her daughter the rear one. They all resided in the vicinity, and knew that a train of the defendant company travelling to the north would cross Craig road, at a point called Doucet's Crossing, at about half-past twelve in the afternoon, and they had left their homes shortly before that hour. The railway line (the old Kingston and Pembroke single-track railway, acquired by the defendant in 1913), immediately to the south of the crossing, passes through a cutting made in the side of a hill, the east bank of which, at the time of the accident, was said to have intercepted the view of a train coming from the south, and all the plaintiffs must have known that the crossing was dangerous. Reynolds approached the crossing without reducing

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his speed, which he stated was about twelve miles an hour. When he was twenty or twenty-five feet from the rails, Mrs. Craig called out "There's the train." Reynolds applied the brakes, but the car had almost touched the rails when it stopped, and in Reynolds' endeavour to back it before releasing the brakes, his engine stalled, so that the front part of the car was struck by the pilot of the locomotive and the plaintiffs were injured. They all claimed damages, Reynolds and his wife in one action, and Mrs. Craig and her daughter in another.

Three grounds of negligence were particularized: 1. that the locomotive had not whistled at the whistling post a quarter of a mile from the crossing; 2, that the bell had not rung; 3. that the persons in charge of the railway threw up or maintained an embankment on the east side of the track in a manner to obscure the view of a train coming from the south.

The learned trial judge instructed the jury that if they found both the plaintiffs and the defendant guilty of negligence contributing to the accident they should, under *The Contributory Negligence Act*, Statutes of Ontario, 1924, c. 32, apportion the total amount of the damages according to the degree in which each party was in fault.

The jury answered the following questions put to them by the learned trial judge:—

1. Question: Was the defendant railway guilty of negligence causing the accident?

Answer: Yes.

2. Question: If so, what was that negligence; answer fully, giving every negligence?

Answer: Whistle not blown at whistling post, maintaining banks that obstruct view of train coming from south.

3. Question: Could the plaintiff, Thaddeus L. Reynolds, by the exercise of reasonable care, have avoided the accident?

Answer: Yes.

4. Question: If so, in what respect did he fail to exercise such reasonable care? Answer fully.

Answer: Partially to blame in neglecting to ascertain the time that train was due at crossing.

5. Question: Could the plaintiffs, other than T. L. Reynolds, by the exercise of reasonable care, have avoided the accident?

Answer: No.

The seventh question asked the jury to assess the total damages of each of the plaintiffs. The answer was:—

T. L. Reynolds, $10,900.

Sarah F. Reynolds. No damages given at all.

Mary Craig, $1,100.

Jeannette Craig, $50.

8. Question: If you find that the plaintiffs, or any of them, failed to exercise reasonable care contributing to the accident, what do you find were the degrees of fault?

Answer: (*a*) of the plaintiff T. L. Reynolds—25 per cent.
(*b*) of the other plaintiffs. Nothing.
(*c*) of the defendant railway—75 per cent.

The learned trial judge called the attention of counsel to the unsatisfactory character of the answer to question 4, but neither of them asked the judge to direct the jury to reconsider their answer in order to have the matter made clear.

On the findings judgment was rendered in favour of Reynolds for $8,175, being 75 per cent. of his damages, and in favour of Mary Craig and Jeannette Craig for $1,100 and $50 respectively.

The defendant having appealed to a divisional court, the plaintiff, T. L. Reynolds, cross-appealed seeking to have the finding of contributory negligence against him set aside. The main appeal was allowed and the two actions were dismissed. The cross-appeal of T. L. Reynolds was rejected.

Reynolds' executors and Mary Craig alone have appealed from this judgment. There is no appeal by Jeannette Craig.

With great respect, we think that the judgment of the appellate court setting aside the finding of the jury that the locomotive had not whistled at the whistling post as required by the statute cannot be sustained. Not only was there evidence, usual in such cases, that the whistle had not been blown at the statutory distance from the crossing, given by persons who deposed that they were paying attention and were in a position to hear and would

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have heard had it been sounded, but there was not a little confusion on the part of some of the witnesses—notably Walworth, Margaret Doucet, Clow and wife, and Kenyon —as to whether there had been more than one whistle signal given before the train passed over the crossing and as to whether the signal, if only one, was given at the whistling post or immediately before the accident when the train was only a few yards from the crossing. The questions whether more than one signal had in fact been given and whether a whistle signal had been sounded at the whistling post, as prescribed by the statute, could not properly have been withdrawn from the jury, and the evidence, in our opinion, is not so overwhelmingly in favour of the view that the statutory signal was given that we should sustain the judgment setting aside the jury's finding to the contrary (*Laporte* v. *Canadian Pacific Ry. Co.* (1).) Scores of verdicts based on similar evidence have been sustained on appeal.

As to the other ground of negligence found by the jury, that the defendant had maintained an embankment on the east side of the railway in a manner to obscure the view of a train coming from the south,—after a full hearing and consideration of the evidence relied on by the parties, we incline to the view that even if the existence of the bank along the railway, caused by the cutting made through the hill and any necessary cleaning out of the ditch, could be regarded as negligence in law, there was no foundation in fact for the finding that the bank maintained by the railway obstructed the view of a train coming from the south. The construction of the railway at this point no doubt required that the hill should be cut through. It is true that some witnesses asserted that the east bank of this cutting was increased in height by throwing on it materials taken from the ditch when from time to time it was cleaned out. But we are not in position to say that the defendant company in any way acted negligently with respect to the sides of the cutting, even granting that some material may have been thrown on either bank in the normal cleaning out of the ditches. Moreover the photographs filed at the trial graphically shew that what obstructed the view of the railway from the approach by Craig road, was not the east-

(1) [1924] S.C.R. 278.

ern bank of the cutting, but the hill itself which extends beyond the right of way of the defendant, and is higher on the adjacent property than it is on the railway right of way.

We think that the wrongful finding of this ground of negligence against the defendant (in addition to the other fault found by the jury, sufficient to import liability, that the locomotive had not whistled at the whistling post), may have influenced the jury in their apportionment of the damages according to the degrees of fault as between T. L. Reynolds and the defendant. We have therefore come to the conclusion that a new trial of Reynolds' action must be directed, which shall proceed as if this action had been brought by his executors, under the Revised Statutes of Ontario, 1914, c. 151. The unsatisfactory character of the answer of the jury to question 4 renders it advisable that the new trial be not restricted to the apportionment of damages, but should take place generally on all issues. This does not mean that we think that Reynolds should be absolved from contributory negligence in approaching the crossing as he did. We express no opinion on that point which will be a matter for the jury's consideration.

We see nothing that could justify a finding of contributory negligence against Mary Craig, who has obtained leave to appeal, her recovery being under the appealable amount. Her appeal, therefore, will be allowed with costs here and in the appellate court, and the judgment of the trial court in her favour restored.

Reynolds' executors should have their costs in this court but should pay the defendant's costs in the Appellate Divisional Court, with set off. Costs of the abortive trial in Reynolds' case will abide the event of the new trial.

Appeals allowed with costs. New trial ordered of Reynolds' action.

Solicitors for the appellants: *Cunningham & Smith.*

Solicitors for the respondent: *MacMurchy & Spence.*