JESSIE ALEXANDER *(Plaintiff)* .....APPELLANT;

AND

TORONTO, HAMILTON & BUFFALO RAILWAY CO. AND WALTER RICKER *(Defendants)* ..... } RESPONDENTS.

WILBERT O'HANLEY *(Plaintiff)* .....APPELLANT;

AND

WALTER RICKER AND TORONTO, HAMILTON & BUFFALO RAILWAY CO. *(Defendants)* ..... } RESPONDENTS.

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*Mar. 25, 26, 29, 30

*Oct. 5

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Railways—Level crossing—Statutory requirements and Board of Transport regulations complied with—Whether special circumstances existed imposing Common Law duty to take additional precautions.

In actions in damages arising out of the collision of a motor car and a locomotive at a railway level crossing on the outskirts of the limits of the City of Hamilton, it was established that the rate of speed at which the appellant railway's train approached the crossing was within the limit approved by the Board of Transport Commissioners and that the Board had refused a petition for the installation of a wigwag signal on the ground that the existing signals were adequate under existing traffic conditions. The jury however found the negligence of the appellants the sole cause of the accident in that with knowledge of the special circumstances existing and knowing the crossing was a dangerous one, the railway allowed its trains to operate at a high rate of speed at that point and the engineer failed to exercise due care; the railway was further negligent in permitting vegetation to grow on its right-of-way to a height that impeded the view and both, in their admission as to the blowing of the train whistle, contrary to a city by-law.

Held: that there was no evidence to support the jury's finding of special circumstances that called for special safety measures to be taken by the appellants, or of the appellants' negligence, and the findings should be set aside.

Per: Kerwin C.J. and Taschereau JJ.: In the absence of special circumstances, the rule in *G.T.R.* v. *McKay* 34 Can. S.C.R. 81, applied and it was not open to the jury to question the Board's ruling as to the rate of speed or the adequacy of the crossing signals. The general rule is subject to qualification but the qualification must be stated and applied with care to see if there is any evidence upon which a jury could find exceptional circumstances to take the matter out

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

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of the rule. Here there was no such evidence. *Columbia Bithulitic Ltd.* v. *B.C. Electric Ry. Co.* 55 Can. S.C.R. 1; distinguished. *C.P.R.* v. *Fleming* 22 Can. S.C.R. 33; *Lake Erie & Detroit River Ry.* v. *Barclay* 30 Can. S.C.R. 220; *Napierville Jct. Ry.* v. *Dubois* [1924] S.C.R. 375 at 380; *Rex.* v. *Broad* [1915] A.C. 1110 and *C.P.R.* v. *Rutherford* [1945] S.C.R. 609, referred to.

Per: Rand J.: The by-law was approved by the Board before the crossing had been brought within the city limits and the approval, given in the light of existing conditions could not apply to it in the circumstances, but that did not affect the issue in this appeal because the whistle was sounded as required by the Railway Act, and if the deceased did not hear it, the fault must be charged against him.

Per: Locke J.: To give effect to the answer made by the jury to Question 2 would be to allow that body to usurp the functions of the Board of Transport Commissioners. There was no evidence of any actionable negligence. *Wakelin* v. *London & Southwestern Ry. Co.* 12 Ap. Cas. 41; *G.T.R.* v. *McKay* 34 Can. S.C.R. 81; *G.T.R.* v. *Hainer* 36 Can. S.C.R. 180 followed: *Columbia Bithulitic Ltd.* v. *B.C. Electric Ry. Co.* 55 Can. S.C.R. 1 referred to.

Decision of the Court of Appeal for Ontario [1953] O.R. 168, affirmed.

APPEALS by the plaintiff in each of two actions tried together by consent from a judgment of the Court of Appeal for Ontario (1) which set aside the judgments of Kelly J. entered on the finding of a jury.

C. L. Dubin, Q.C. and *Sidney Paikin* for the appellants.

C. F. H. Carson, Q.C., Halliwell Soule and *J. B. S. Southey* for the respondents.

The judgment of the Chief Justice and of Taschereau J. was delivered by:

THE CHIEF JUSTICE:—Counsel for the appellants did not deny the general rule set forth in *Grand Trunk Ry. Co.* v. *McKay* (2) that the exercise of the powers of the Board of Transport Commissioners and their predecessors is not subject to review either as to their adequacy or otherwise by a jury but submitted that the rule is subject to a qualification. This is true but the qualification must be stated and applied with care.

It was put in general terms by King J. in *Fleming* v. *Canadian Pacific Ry. Co.* (3) at 343:—

> Obviously the railway is under the common law obligation to use or exercise its rights as not unnecessarily to injure another except so far as they may be relieved of this obligation by the clear intention of the statute.

(1) [1953] O.R. 168; 2 D.L.R. 3.

(2) (1903) 34 Can. S.C.R. 81; 3 C.R.C. 52.

(3) (1892) 31 N.B.R. 318.

The majority of this Court (*Canadian Pacific Ry. Co.* v. *Fleming* (1)) quashed an appeal from the decision of the Supreme Court of New Brunswick for lack of jurisdiction but stated that if they had considered the merits to be open they would have dismissed the appeal for the reasons given by Mr. Justice King. In *Lake Erie & Detroit River Ry. Co.* v. *Barclay* (2) Sedgewick J. in delivering the judgment of the majority of the Court dismissing the company's appeal, at pp. 363-4, amplifies the statement of the qualification and stated that it was properly left to the jury to determine whether or not

> In this particular case . . . it was not necessary . . . at that particular time and under those particular circumstances, to take greater precautions than they (the railway company) really did take, and to be much more careful than in ordinary cases where these conditions did not exist.

In *Canadian Pacific Ry* v. *Roy* (3), Lord Halsbury speaking for the Judicial Committee in an appeal from the Province of Quebec pointed out at p. 230 that the statutory right to work a railway did not by the law of England or the law of Quebec "authorize the thing to be done negligently or even unnecessarily to cause damage to others".

In *Columbia Bithulitic Ltd.* v. *British Columbia Electric Ry. Co.* (4), in which it was found that the respondent's electric tramcar had been equipped with a defective and inefficient brake, this Court reversed the judgment of the British Columbia Court of Appeal and restored that of the trial Judge. Chief Justice Fitzpatrick agreed with Anglin J. but added that it was not suggested that railway trains could never pass over a public crossing except at such speed that in case of necessity they could be stopped before reaching it. As Brodeur J. agreed with Anglin J., the judgment of the latter became that of the Court. At p. 31 he does state that he does not understand that the *McKay* case or any other decision

> Is authority for the proposition that statutory powers may be exercised with reckless disregard for the common law rights of others.

and at p. 32:

> Circumstances may exist at particular level crossings which involve peril from running at high speed obviously exceptionally great.

(1) (1893) 22 Can. S.C.R. 33.
(2) (1900) 30 Can. S.C.R. 360.
(3) [1902] A.C. 220.
(4) (1917) 55 Can. S.C.R. 1; 21 C.R.C. 243; 37 D.L.R. 64.

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but a perusal of his reasons as a whole makes it clear that different considerations apply to a tramcar than to a steam train.

In the judgment of Duff J., which varies in many respects from that of the majority, it is stated that it does not follow that in no circumstances does a legal obligation rest upon a railway in relation to the speed of its trains in approaching or crossing a highway. Later in the same paragraph, it is pointed out that the circumstances of a particular emergency may obviously cast a duty upon the servants in charge of the train to moderate its speed or bring it to a stop; "so also the permanent conditions of a particular crossing or the practice of the railway in relation to it . . . may give rise to a duty to take extraordinary measures there for the protection of the public." What is here meant is explained at p. 19:—

> As regards the crossing and the car in question there are, however, two reasons which put the question of the duty of the appellant company in relation to speed beyond question. First, as to the crossing—there was a stopping-place there and in the ordinary course of operation the car would be brought under control to enable the motorman to stop for passengers; and there could consequently be no general overriding necessity or convenience to prevent the taking of proper measures for the safety of the public on the highway; as to the car, the fact alone that it was not equipped with proper brakes was sufficient to limit in the special circumstances any otherwise uncontrolled discretion as to speed, assuming such discretion as a general rule to exist.

In *Napierville Junction Ry. Co.* v. *Dubois* (1), Duff J. (with whom Malouin J. agreed) at p. 380 referred to Lord Halsbury's statement in the *Roy* case quoted above. He also referred to the judgment of Lord Sumner in *Rex* v. *Broad* (2).

> As authority (if authority, indeed, could be needed for such a proposition) that nothing short of a legislative enactment, expressed in language unambiguous and precise, could affect the right of persons on the highway to have reasonable care exercised by the appellant company in the use of its line, with a view to the safety of such persons.

Idington J. gave reasons for dismissing the appeal and mentioned the *Broad* case. Mignault J. dissented and Maclean J. *ad hoc* concurred in dismissing the appeal.

(1) [1924] S.C.R. 375; 29 C.R.C. 419; 4 D.L.R. 188.

(2) [1915] A.C. 1110.

Finally in *Canadian Pacific Ry. Co.* v. *Rutherford* (1) it was assumed in the judgment in this Court that one of the answers of the jury meant that a fog was "so dense in front of you that you could not see" but held that even on that assumption there was no common law duty upon the company under the circumstances to take special measures of warning to persons on the highway while the train was stopped on the crossing and the jury was not the tribunal to which Parliament had entrusted the duty of determining what permanent protection should be installed.

All these decisions indicate that in each case the facts must be closely examined to see if there was any evidence upon which the Jury could find exceptional circumstances to take the matter out of the rule in *Grand Trunk Railway* v. *McKay*. Counsel for the appellants seized upon the statement of Duff J. in the *Bithulitic* case that "the permanent conditions of a particular crossing or the practice of the railway in relation to it . . . may give rise to a duty to take extraordinary measures there for the protection of the public", and argued that in the present case the respondent, to use the wording of the jury's finding, had "allowed vegetation to grow to a height which restricts the view from Cochrane Road to the east on the north side of the rails".

The facts in this case are set out in the judgment of Mr. Justice Locke, but to that statement I desire to add the following circumstances and comments. At the trial (p. 110), upon motion on behalf of the appellant Jessie Alexander for a view by the jury of the scene of the accident, it was stated by her counsel that the conditions were the same then as at the date of the accident although it was a different time of the year. Counsel for the respondent agreed and counsel for the appellant Wilbert O'Hanley did not demur. The evidence shows that the curve in the line was one of the reasons for the application to the Board on June 13, 1951, and that the latter found no warrant for an order reducing the speed of trains at the crossing. There was no evidence to support the jury's finding quoted above as to vegetation, as it would have to be construed as meaning that there was vegetation growing along the right of way to such a height that the view of a person sitting in a car pointing south and immediately north of the rails at the

(1) [1945] S.C.R. 609; 3 D.L.R. 609; 58 C.R.T.C. 241.

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Cochrane Road crossing was restricted with respect to seeing a locomotive approaching from the east. There is no such evidence.

I agree with the Court of Appeal that it was not proper to permit the appellants to make either amendment desired by them. As to the first, even if it were made, for the reasons given above, there was no evidence upon which the jury could make the finding they did; as to the second, there is no evidence of any of these circumstances urged before us by counsel for the appellants. Whatever may be the legal position as to By-law No. 3553 of the City of Hamilton (approved by the Board of Railway Commissioners) prohibiting the blowing of a locomotive whistle when such locomotive was approaching a highway crossing in the city, in view of the fact that at the time of its enactment and approval (1927) the area in question had not been annexed to the city, the evidence at the trial shows that engineers were expected to blow for any unprotected crossing. Evidence was also given that this was done and the fact that the jury did not find that the bell had not been rung or the whistle not blown indicates that they negatived any suggestions to the contrary.

The appeals should be dismissed and with costs if demanded.

RAND J.:—I agree with the view taken by Laidlaw J.A. that at this crossing there were no special circumstances that called for special safety measures to be taken by the railway company, and that apart from that, there was no evidence of negligence involving the company in responsibility for the accident.

But it appears to have been assumed at the trial and before the Court of Appeal that the statutory duty to whistle had been suspended by a by-law of the City of Hamilton. The by-law had been approved by the Board of Railway Commissioners before Cochrane Street had been brought within the territorial limits of the city, and the question arises whether, so approved, it would apply to crossings in areas subsequently brought within the city limits. I have no doubt that it would not. The approval was given in the light of existing conditions and in a matter of such vital concern to the public was obviously passed

upon only after public safety had been carefully considered. I should have no difficulty in holding, then, that the by-law did not affect the duty to whistle when approaching the crossing.

But in the circumstances that fact does not appear to affect the issue of this appeal. The evidence is overwhelming that the whistle was sounded as required by the *Railway Act,* and if the deceased did not hear it, the fault must be charged against him. If this had not been so, I should have had to consider whether a new trial ought to be directed.

The appeal must then be dismissed with costs if demanded.

LOCKE J.:—These are appeals taken from a judgment of the Court of Appeal of Ontario which set aside judgments entered in these actions (which had been tried together by consent) after a trial before Kelly J. and a jury at Hamilton.

The actions arose out of an accident which occurred at a level crossing on the outskirts of the City of Hamilton on February 13, 1952, at about 5 p.m., in which Frederick Alexander, the husband of the plaintiff Jessie Alexander, was killed and the appellant O'Hanley suffered serious injuries.

The facts disclosed by the evidence, in so far as it is necessary to consider them, are as follows: The respondent railway company, incorporated by a private Act of the Legislature of Ontario, has been declared a work for the general advantage of Canada and the provisions of the *Railway Act,* c. 234, R.S.C. 1952, accordingly apply to its operations. In the year 1913, upon the application of the Township of Saltfleet, the Board of Railway Commissioners authorized the Township, at its own expense, to construct a highway known as the Cochrane Road across the railway company's line on Lot 34, Concession 4, the crossing to be constructed in accordance with "the standard regulations of the Board affecting highway crossings as amended May 4th, 1910." The Cochrane Road runs north and south and the crossing constructed in pursuance of the Board's authority was at rail level. The area within which it is situate has since that time been incorporated in the City of Hamilton.

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It appears that between the year in which the crossing was constructed and the year 1949, two accidents occurred at the crossing and in respect of neither of these was any blame attached to the railway company or its servants. When the area was incorporated within the limits of the city, the lands lying both to the north and south of the crossing were built up to an extent which is not described in the evidence. In December of 1949, the city solicitor wrote to the Board of Transport Commissioners saying that a petition for the installation of a wigwag signal had been presented to the Board of Control by some 200 residents of the area. As a result of this letter the Board caused the crossing to be inspected by one of its engineers, accompanied by representatives of the city and the railway company, following which the secretary advised the city that the engineer had reported that the traffic over the street was very light, that there were reasonably good sight lines in all angles of the crossing for drivers of vehicles travelling at a low rate of speed and accordingly, that the installation of automatic protection at the crossing was not warranted, in the opinion of the Board.

In October 1950, the city solicitor again applied to the Board to consider the matter, pointing out that numbers of school children crossed the crossing every day and that on account of the curves in the line and the high speed at which trains were operated there was grave danger of accidents occurring. A further inspection was then made by the Board's Chief Engineer and a traffic count directed as a result, and on June 13, 1951, the Board informed the parties that as the sight lines were considered to be reasonable for slow traffic, it did not consider that the expense of installing automatic signals was warranted at that time. Following this, the city solicitor took the matter up, apparently directly with the railway company, and the latter informed the Board of Transport Commissioners that it did not oppose an application for additional protection, providing that the expense of the installation and maintenance was borne by the city since the latter was "junior" at the crossing.

On October 3, 1951, the city solicitor made a further application to the Board to limit the rate of speed at which railway trains might be operated through the area. This

application was opposed in writing by the railway company. On February 20, 1952, a week after the accident, the Board wrote to the solicitor saying that a speed restriction to be of any benefit as a protection would require to be so restrictive as to seriously affect railway operations, but that the installation of automatic warning equipment should be further considered. Thereafter, on the joint application of the city and the railway, the installation of flashing light signals and a bell was directed by the Board.

On the afternoon of the day in question, Alexander was driving his Anglia motor car from his place of employment towards his home, where he had lived for some fourteen years and which was to the south of the crossing in question. There are double tracks on this section of the railway line. When some distance north of the crossing he stopped and picked up the appellant O'Hanley, who was his neighbour, and the car proceeded south. When it was about 100 yards to the north of the track, Alexander stopped to enable Michael Evanoff, another friend to whom he was giving a lift, to alight and then proceeded toward the crossing.

According to O'Hanley, Alexander drove the car going very slowly in what he described as "first gear" (presumably meaning low gear) and when it was about five feet from the most northerly rail he said it was practically at a standstill. This witness said that when at this point, he saw Alexander look both to the west and to the east before he proceeded on to the track and that he himself had also looked to the east and had seen nothing, though the visibility was good and there was a clear view, according to him, of at least 400 feet from that point. He said that Alexander then proceeded and that:—

> Apparently he just got on to the rail of the track and he seemed to hesitate a moment there. He had his hand up as though he was working at the controls of the car, and I do not know whether he was trying to put it in gear, or what had happened to it. I sort of saw him raise his hand, and just in seconds the train was on us.

O'Hanley said that he did not hear any whistle (which the jury found to have been blown) or bell sounded nor any sound of the approach of the train. After having said that the car was practically at a standstill when some five feet from the most northerly rail, he said, in cross-examination,

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that Alexander had apparently slowed down to make certain the track was clear. When asked if he thought the car had stopped, he said that he would say that it was stopped when it was four or five feet from the crossing. Later in his cross-examination, O'Hanley said that when he had looked to the east the car was not moving and that:—

> When he started on, we just moved up there a few feet, and the car kind of hesitated, and I looked at him and he has his hand up in the air, at the controls.

Then, in answer to a question:—

> And his wheels went over the north rail, and then for some reason the car came to a standstill?

he answered:—

> It seemed so.

No evidence was given as to the mode of shifting gears on the Anglia car and O'Hanley's statement that Alexander had his hand up in the air at the controls is unexplained.

There was other evidence as to the progress of the car immediately before the collision. Robert Crump, a witness for the appellants who lived in the vicinity north of the track, was driving along the Cochrane Road from the south approaching the crossing at the same time and seeing the train coming, stopped south of the crossing. Describing what had happened, he said that just about the time he stopped he had seen the front wheels of Alexander's car go over the first track and that:—

> The car just gave a jolt and the train took it away.

He was then asked the following questions by counsel for Alexander:—

> And where would it (i.e. the train) be when Mr. Alexander's car—have you any idea where it would be when his car *pulled up and stopped?*

to which he answered:—

> It was very close, may be about a block, or may be a couple of hundred feet, or somewhere in there.

A portion of the cross-examination of this witness reads:—

> Q. Did you look at Mr. Alexander's car after it had stopped on that north rail?
>
> A. Yes.
>
> Q. Did you continue to look at it?
>
> A. Yes, I looked both ways—at the train and the car.
>
> Q. The car is stopped on the north rail, and you see it stop?
>
> A. Yes.

Q. Did you watch what the driver did?

A. The only thing I seen Mr. Alexander do, he sort of looked down, and the car gave a jolt.

James Kirkpatrick, a boy of eighteen called by the respondents, who was walking along Cochrane Road close to the crossing, said that he had seen Crump's car stop to the south of the crossing and that he saw Alexander's car when the front wheels were on the most northerly rail when the train was just a little way around the bend, and that when he saw the car it was not moving, saying:—

Well, it seems to me it was stalled there, and it gave a little jolt, and that was all—the car itself.

Kirkpatrick had heard the whistle of the train as it approached.

Albert Draper, called for the defence, had been driving south on the Cochrane Road behind Alexander and saw the latter stop to let Evanoff alight and said that thereafter the car had stopped on the track. As to this, he said:—

Well, he proceeded very slow right up to the track, and then something seemed to go wrong with the car, and it was as far as he went.

The respondent Ricker, a railway engineer with twenty-three years' experience, said that as the train approached Cochrane Road, he had given the whistle signal at the whistling post (which was shown to be more than 1300 feet east of the crossing), that the bell had been ringing continuously since the train had left Welland and that as the engine came around the curve he had seen the car approaching the crossing from the north slowly as though it intended to stop north of the crossing, but that it had stopped on the track at a time when he estimated the engine to have been about 140 feet distant. The witness had, however, when examined for discovery at an earlier time, said that he had seen the car approaching when he was about 400 feet from the crossing, at which time he had also said that he thought it was going to stop but that it had stopped on the track in front of the train. The curve referred to was to the north and commenced 500 feet to the east of the crossing. The speed of the train was 55 miles an hour as it rounded the curve.

There was no other evidence as to the manner in which Alexander's car was driven up to the time of the collision and it thus appears from the evidence called for both of the

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parties that the car had stopped on the track immediately in front of the oncoming train. I think the only reasonable inference to draw from all of the evidence is that the engine had stalled.

The allegations of negligence made in the pleadings of both of the appellants were the same. As against the company, it was alleged that, well knowing the intersection to be dangerous, it had not posted proper warning of such danger and, further, that it permitted a "trap like condition" to exist at the intersection. As against the engineer Ricker, the negligence alleged was in driving a locomotive over a highway crossing in a thickly peopled portion of the city at an excessive rate of speed, in not keeping a proper lookout, in failing to give any sufficient warning of the approach of the train, in driving over the intersection at an excessive rate of speed, well knowing the intersection to be dangerous, and in failing to apply the brakes. It was further alleged that Ricker had the last chance of avoiding the accident but had failed to do so. To these allegations there was added a claim in nuisance against the railway company by permitting the intersection to fall into a condition of disrepair.

In addition to the oral evidence as to how Alexander's car came to be upon the crossing at the time of the accident, photographs were put in showing the view to the east from the crossing. Those put in by the appellants had been taken on February 16th, four days following the accident and one of these indicated some growth of what appeared to be weeds or grass growing between the gravel portion of the right-of-way and the fence which contained it to the north. The photographs put in by the railway company had been taken on the following October and did not, therefore, indicate the condition of that portion of the right-of-way at the time of the accident. They were, however, very clear. For at least 500 feet there was a clear and unobstructed view from the crossing. According to Constable Lawrence, the weeds or grass were quite high and there were a number of telegraph poles and he said that they interfered with the view to the east if you were north of the track. It is, however, perfectly clear that there was nothing growing on the

gravelled portion of the right-of-way which carried the double track of the railway company and the photographs filed by the appellants show that this growth could not conceivably have affected the view of Alexander and O'Hanley to the east for some 500 feet when they were at the point described by the latter as some five or six feet to the north of the most northerly rail, where Alexander either stopped or slowed down almost completely, and at the place where the car stopped on the track.

At the conclusion of the evidence, counsel for the respondents moved for the dismissal of the action on the ground that there was no evidence of negligence, but this application was refused by the learned trial judge. The questions submitted to the jury and their answers follows:—

1. Were the damages suffered by the Plaintiffs caused or contributed to by any negligence or want of care on the part of the Defendants T. H. & B. Railway Company or of their Engineer, Walter Ricker? Answer "Yes" or "No"—Answer: Yes.

2. If your answer to the first question is "yes" then in what did such negligence consist? Answer fully. Answer: The T. H. & B. Railway Company was negligent in that they having full knowledge of the special circumstances that existed at the Cochrane Road Crossing, did permit and allow their trains to operate at a high rate of speed at that point, and that Walter Ricker was negligent in that he did not exercise due care and caution in the operation of the locomotive at the Cochrane Road Crossing having full knowledge that this was a dangerous crossing as attested to by the previous accident in which Walter Ricker was involved and the fact that both the T. H. & B. Railway Company admit to blowing train whistle at this point contrary to City of Hamilton By-law No. 3553, and the T. H. & B. Railway Company did not maintain their right-of-way in a manner compatible with the restricted vision in that they allowed vegetation to grow to a height which restricts the view from Cochrane Road to the east on the north side of the rails.

3. Have the Plaintiffs satisfied you that the loss or damage suffered by the Plaintiffs did not arise through the negligence or improper conduct of the late Frederick Alexander, the owner and driver of the motor car which was in collision with the train operated by the Defendants? Answer "Yes" or "No"—Answer: Yes.

4. If you find that the damages suffered by the Plaintiffs were caused or contributed to by the negligence of the Defendants and of the late Frederick Alexander, then in what proportion do you determine the respective degrees of negligence of each—

Answer: The late Frederick Alexander ..... %
The Defendants 100%

100%

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5. Regardless of who you find is responsible for the damages suffered by the Plaintiffs or in what proportion you determine the respective degrees of negligence of those responsible, in what amount do you assess the total damages of the Plaintiffs:

Answer: Jessie Alexander $35,250.00
Wilbert O'Hanley .....$1,464.13 special
3,500.00 general
$4,964.13 Total.

The appellants had alleged as one of the negligent acts of the respondent Ricker that he had failed to give any sufficient warning of the approach of the train. What was meant by this was apparently the alleged failure to sound the engine whistle at least eighty rods before reaching the crossing and ringing the bell continuously, as required by s. 308 of the *Railway Act* (R.S.C. 1927, c. 170), as evidence was given by O'Hanley and others in an attempt to prove that these warning signals were not given. The jury, however, as shown by their answer to question 2, accepted Rickers' statement that the train whistle was blown and as they did not find that the bell had not been rung, it must be taken that they negatived this allegation of negligence (*Andreas* v. *C.P.R.* (1)).

The previous accident at the crossing in which Ricker was involved had occurred on January 12, 1952, when a horse-drawn bakery wagon, driven at a walk across the tracks at this place in the face of an oncoming train, was struck and damaged though no personal injury resulted. Apparently the driver of this wagon, who knew that the train was coming, was unable to induce the horse to move faster and the rear part of the wagon was struck before it cleared the most northerly track. The evidence as to this occurrence given by the driver of the wagon had been ruled to be inadmissible by the learned trial judge, rightly in my opinion. The occurrence, in any event, was quite irrelevant to any of the issues which the jury were required to consider.

In the answer to question 2, mention is made of a by-law of the city which had been passed in the year 1927 and which prohibited the blowing of engine whistles when approaching any highway crossing except when absolutely necessary as a signal of danger. This by-law, which would otherwise have been ineffective, had been approved by an order of

(1) (1905) 37 Can. S.C.R. 1; 5 C.R.C. 450.

the Board of Railway Commissioners in that year. The engineer had said that he had caused the whistle to be blown commencing at the whistling post. The only meaning which I am able to attribute to the reference to the blowing of the whistle at that point is that the jury considered that the fact that it was blown indicated that the engineer was aware that a dangerous condition existed at the crossing at the time in question due to the approach of Alexander's car from the north. This would appear to overlook the fact that at the whistling post, the crossing could not be seen by the engineer due to the curve in the line. If this is not what was intended by the answer, it must presumably have been intended to mean that the fact that the whistle was blown was an acknowledgment that the particular crossing was a dangerous one. As all level crossings are dangerous to traffic proceeding across them in the face of oncoming trains, this portion of the answer appears to me to be equally irrelevant.

The finding that the railway company allowed vegetation to grow on their right-of-way was not a matter which had been alleged as one of the particulars of negligence, and no application had been made to the learned trial judge for leave to amend. Such an application was made in the Court of Appeal and leave refused by that court. The matter was not, therefore, one for the consideration of the jury. However, even if it had been, it could not have affected the matter for the reasons which I have stated.

There remains that portion of the answer to question 2 which finds the respondent railway company to have been negligent in that with knowledge of the special circumstances that existed, they allowed their trains to operate at a high rate of speed at that point. The expression "special circumstances" appears to have been taken from a phrase used by Riddel J. in *Walker* v. *Grand Trunk Ry.* (1), where that learned judge referred to any "special circumstances of danger" which might affect the obligation of a railway company to a traveller on the highway. By this, I take it, is meant a failure on the part of a railway company of its duty to exercise its statutory powers without negligence. So long ago as 1886, Lord Halsbury L.C., pointed out

(1) (1920) 47 O.L.R. 439 at 450; 55 D.L.R. 495.

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in *Wakelin* v. *London and Southwestern Ry. Co.*, (1), that railway companies are permitted to establish their undertakings for the express purpose of running trains at high speed along their lines. For reasons which are discussed at length in the judgment of Sedgewick J. in *Grand Trunk Ry.* v. *McKay* (2), Parliament, in enacting the *Railway Act*, did not consider that it was practical in a country where distances are so vast as they are in Canada to require that gates be installed at level crossings as was required by the *Railway Clauses Consolidation Act* in England. In place of such a statutory requirement, authority was vested at first in the Railway Committee of the Privy Council and thereafter in the Board of Railway Commissioners and their successors, the Board of Transport Commissioners, to regulate and limit the rate of speed at which trains may be run in any city, town or village, and to determine the precautions to be taken for the protection of the public at railway crossings. In the judgment of Davies J. (as he then was) in that case, with which the Chief Justice and Killam J. concurred, the following passage appears at p. 97:—

> In my judgment Parliament has by the 187th section of the Railway Act vested in the Railway Committee of the Privy Council the exclusive power and duty of determining the character and extent of the protection which should be given to the public at places where the railway track crosses a highway at rail level. The exercise of such important powers and duties requires the careful consideration of many possible conflicting interests and the fullest powers to enable this committee to bring all such interests before them and determine all necessary facts, are given by the Act in question. Similar powers to enable this tribunal effectively to enforce any order it may make in the premises are vested in the committee. It is quite open to any municipality through which a railway runs at any time it thinks proper, or to any interested person or corporation, or, indeed, to any one of the travelling public to invoke the exercise of this jurisdiction. The composition of the tribunal, the simplicity and ease with which its powers can be invoked, and the completeness with which it can carry out the intentions of Parliament and the scope and extent of its powers, all combine to convince me that Parliament designed to establish and has established a tribunal which while fairly guarding the interests of the railway corporations would at the same time provide the fullest necessary protection to the travelling public. I cannot think that these powers, so full, so complete, and so capable of being made effective, can if exercised be subject to review either as to their adequacy or otherwise by a jury, nor do I think that failure to invoke the exercise of the powers is of itself sufficient to take the matter away from the jurisdiction to which Parliament has committed it and vest it in a jury.

(1) (1886) 12 App. Cas. 41. (2) (1903) 34 Can. S.C.R. 81.

It was under the provisions of the statute that continue the powers referred to in the Board of Transport Commissioners that the applications were made by the City of Hamilton in December, 1949, October, 1950 and October, 1951, and the very matter referred to in the answer made by the jury was considered by the Board. While the first two applications were for the installation of further warning signals at the crossing, the last was to direct a limitation of the speed of trains operated on the line. However, all of the applications raised before the Board the question as to what measures, if any, were requisite for the protection of persons passing along the highway across this level crossing and this would require consideration both of the necessity of warning signals, the limitation of speed or whatever other matters were relevant to the question of affording reasonable protection.

The existence of the curve in the line and the fact that it was utilized for passenger traffic was the very reason for each of applications made and, as shown by the answer made by the Board on June 13, 1951, it did not consider that the installation of automatic signals was warranted, and, as shown by the letter of February 20, 1952, did not consider that there should be any order restricting the speed of the trains.

In my opinion, to give effect to this finding of the jury based on the speed at which the train was operated would be to allow that body to usurp the functions of the Board of Transport Commissioners and is therefore wholly ineffective.

The railway company is authorized by its statute to operate passenger trains and these must be operated at high rates of speed for, amongst others, the reasons pointed out by Sedgewick J. in *McKay's* case. The finding of the jury, even if the matter had been one with which, in the circumstances of this case, it was proper for them to deal, would simply mean that a train such as this must, at a place such as that in question, proceed at such a limited rate of speed as to enable the engineer to bring the train to a halt if a motor car or other vehicle stops or is stalled upon the level crossing, and that the failure to do so is actionable negligence. No support for any such contention is to be found in the judgments of this court in *Columbia Bithulitic*

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v. *B.C. Electric Ry* (1), in my opinion. For the reasons explained in the judgment of Duff J., as he then was, the cars of the interurban railway, the operation of which was in question, were merely large street cars, as pointed out in that judgment, to which different considerations apply to those which affect the operation of passenger trains of the nature referred to in *Grand Trunk Ry.* v. *McKay.*

The proximate cause of this accident is made clear by evidence which, as I have pointed out, is undisputed, disclosing that the motor car was stopped on the track in the face of the oncoming train in circumstances that gave the engineer no opportunity of avoiding the collision. As Alexander had lived for many years in the vicinity and must have known that the train passed at about that time at high speed, it is apparent that it was some accidental occurrence, such as the stalling of the engine, which brought the car to a halt. If it be the case that the train had not appeared around the curve when he undertook to make the crossing, and if the train had not yet reached the point where the whistle was blown, the occurrence would appear to be a pure accident. If, on the other hand, Alexander embarked upon the crossing after the whistle warning him had been blown and after the train was plainly visible at a distance of 500 feet, it was this negligent act alone which caused the accident. As Nesbitt J. pointed out in *Grand Trunk Ry.* v. *Hainer* (2):

> . . . the cases clearly establish that if a man actually looks and sees a coming train and crosses with full knowledge of its approach he does so at his own risk.

I respectfully agree with the finding of the Court of Appeal that there was no evidence of any actionable negligence on the part of either of the respondents and I would dismiss these appeals with costs if they are demanded.

CARTWRIGHT J.:—I agree that these appeals should be dismissed with costs if demanded.

Appeals dismissed with costs, if demanded.

Solicitors for the appellants: *White, Paikin & Robinson.*

Solicitors for the respondents: *Soule & Soule.*

(1) (1917) 55 Can. S.C.R. 1.

(2) (1905) 36 Can. S.C.R. 180 at 199; 5 C.R.C. 59 at 74.