1969

*Jan. 30, 31
*Feb. 3
June 6

CANADIAN PACIFIC RAILWAY COMPANY (*Defendant*) ..... APPELLANT;

AND

ANGELO BABUDRO, Administrator of the Estate of FERRUCCIO BABUDRO, Deceased, and the said ANGELO BABUDRO (*Plaintiff*) ..... RESPONDENT.

CANADIAN PACIFIC RAILWAY COMPANY (*Defendant*) ..... APPELLANT;

AND

LIVIA SDRAULIG, Administratrix of the Estate of DANTE ANTHONY SDRAULIG, Deceased, (*Plaintiff*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Collision between car and train at level crossing—Driver and passenger killed—Several sets of tracks including siding tracks in addition to those for through traffic—Standing box cars limiting driver's view of approaching train—Whether railway liable—Whether doctrine of exceptional or special circumstances applicable.

Practice—Trial—Trial judge taking question of liability from jury—Court of Appeal in error in interfering with discretionary decision of trial judge.

Two actions arose as a result of a crossing accident in the City of Port Arthur when a northbound car was in collision with a westbound transcontinental train. Both driver and passenger were killed. The crossing traversed seven sets of tracks, the two most northerly of which were used for through traffic and the remainder were for siding and switching. The collision occurred on the track referred to as No. 1 (reference to the tracks being made by number from north to south), and at the time of the accident there was a string of box cars standing to the east of the crossing on track No. 4. These cars limited to a certain extent the easterly vision of the northbound motorist.

At the trial the judge took from the jury the question of liability and left to them only the assessment of the damages. On appeal from the subsequent dismissal of the actions, the Court decided that the judge had improperly dismissed the jury as to liability. They ordered a new trial since, in their opinion, there was some evidence on which the jury might have found negligence on the part of the railway which caused or contributed to the accident. On appeal to this Court, the

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*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

railway contended that there was error in interfering with the discretionary decision of the trial judge to dispense with the jury on the question of liability; that the railway was not negligent; and that the sole cause of the accident was the negligence of the driver of the car.

Held (Cartwright C.J. and Spence J. dissenting in part): The appeals should be allowed and the trial judgments restored.

Per Martland, Judson and Ritchie JJ.: There was good reason for the trial judge's decision to dispense with the jury on the question of liability. The assumption by the Court of Appeal of power to review this decision was in conflict with decisions in this Court which hold that the exercise of a trial judge's discretion to dispense with the jury is not a reviewable matter.

There was no evidence that the railway company had failed in any manner to comply with the provisions of the *Railway Act* or any order of the Board of Transport Commissioners, and there was no evidence of negligence on the part of the passenger train crew, either by breach of statute or running orders or at common law.

On the facts of the case, the trial judge was right in concluding that the box cars which were standing to the east of the crossing on track 4 could not be evidence of a dangerous situation created by the railway. The doctrine of exceptional or special circumstances was one to be applied with great care. It had no application here.

Per Cartwright C.J. and Spence J., *dissenting in part:* The Court of Appeal erred in holding that it could review and reverse the decision made by the trial judge in the exercise of his proper discretion to remove from the jury's consideration the question of liability.

As to the question of liability, the appellant railway was negligent in not providing some better warning under the special and exceptional circumstances present in this case. Those exceptional circumstances were that the crossing of the main line occurred after the unwary motorist had travelled north over five storage tracks some of which on both sides of the road bore standing box cars apparently merely stored at that place, and failing to provide an indication that the two tracks upon which the motorist should last come were not mere storage tracks but through lines upon which trains were entitled to proceed at 55 m.p.h.

On the evidence, the conclusion was reached that the driver contributed 25 per cent of the negligence which caused the accident while the railway company contributed 75 per cent. The passenger was a gratuitous passenger and therefore the provisions of s. 2(2) of *The Negligence Act,* R.S.O. 1960, c. 261, applied to the claim by his administrator who should be able to recover only 75 per cent of the damages as found by the jury.

Accordingly, the appeals should be allowed only to strike out the judgment of the Court of Appeal granting to the respondents a new trial but then the trial judgment should be varied to allow each of the plaintiffs to recover 75 per cent of the damages found by the jury in their actions.

[*Telford v. Secord,* [1947] S.C.R. 277; *Mizinski v. Robillard,* [1957] S.C.R. 351, applied; *Alexander v. T.H. & B. R. Co.,* [1954] S.C.R. 707; *Brown v. Wood* (1887), 12 P.R. 198; *Wise v. Canadian Bank of Commerce*

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(1922), 52 O.L.R. 342; *Currie v. Motor Union Insurance Co.* (1924), 27 O.W.N. 99; *Wilson & Kinnear* (1925), 57 O.L.R. 679; *Logan v. Wilson,* [1943] 4 D.L.R. 512; *Fillion v. O'Neill,* [1934] O.R. 716; *Anderson v. C.N.R. Co.,* [1944] O.R. 169; *Grand Trunk R. Co. v. McKay,* (1903), 34 S.C.R. 81; *C.P.R. Co. v. Rutherford,* [1945] S.C.R. 609; *C.P.R. Co. v. Smith* (1921), 62 S.C.R. 134; *Blair v. Grand Trunk R. Co.* (1923), 53 O.L.R. 405; *Reynolds v. C.P.R. Co.,* [1927] S.C.R. 505; *Flynn v. C.P.R. Co.* (1958), 25 W.W.R. 499, referred to.]

APPEALS from judgments of the Court of Appeal for Ontario[1], allowing the plaintiffs' appeals in actions brought under *The Fatal Accidents Act,* R.S.O. 1960, c. 138. Appeals allowed and judgments at trial restored, Cartwright C.J. and Spence J. dissenting in part.

John J. Robinette, Q.C., for the defendant, appellant.

Arthur Maloney, Q.C., and *J. Douglas Crane,* for the plaintiffs, respondents.

The judgment of Cartwright C.J. and Spence J. was delivered by

SPENCE J. (*dissenting in part*):—These reasons apply to two appeals from judgments of the Court of Appeal for Ontario[1]. By those judgments, the Court allowed the appeal of the plaintiffs Babudro and Sdraulig and directed a new trial of the two actions.

The two said plaintiffs had taken action against the Canadian Pacific Railway Company for damages due to the deaths of the late Angelo Babudro and Livia Sdraulig in a collision with a train owned and operated by the defendant Canadian Pacific Railway Company. The action had proceeded to trial with a jury before Moorhouse J. After all of the evidence had been completed, for reasons to which I shall hereafter refer, Moorhouse J. removed the question of liability from consideration by the jury but left with them the fixing of the quantum of damages. His Lordship then charged the jury upon the damages and, during the time the jury was considering its verdict, he heard argument upon the question of liability. The jury having announced its verdict as to the quantum of damages, from which there is no appeal, His Lordship reserved judgment and later, by written reasons, dismissed the action.

[1] [1968] 1 O.R. 377; 66 D.L.R. (2d) 475.

In the Court of Appeal, the two appeals were argued in full but the Court of Appeal first considered the question as to whether the removal of the issue of liability from the consideration of the jury was proper, and determined that the trial judge erred in adopting such a course. The Court of Appeal then proceeded to determine that evidence had been adduced upon which a jury, properly charged, could have found the defendant railway company negligent and directed a new trial before a jury as to liability only.

The first problem for this Court is whether the Court of Appeal erred in reversing the decision of the learned trial judge that the question of liability should be removed from the jury's consideration. The learned trial judge, when he announced his decision, gave his reasons in the following paragraph:

> Now, this case has been a most distressing case, and in view of counsel's question put to the witness Campbell when he was called in reply—in view of that being put in the presence of the jury, and in view of the general conduct of the trial, and certainly in view of the statements of counsel in respect of the law applicable, I feel that true justice cannot be done by leaving this case on the question of liability to the jury. I am taking from them the question of liability.

The learned trial judge extended the grounds upon which he had acted but, as Schroeder J.A. noted in his reasons for judgment, in the Court of Appeal for Ontario, counsel for the respondent railway company (here the appellant) placed no reliance upon such further grounds. Schroeder J.A. then continued:

> Viewing the evidence as a whole I am constrained to look upon this as one of those extreme cases in which the Court ought to intervene since, quite aside from his failure to give counsel an opportunity to argue the point and to put the plaintiffs to their election as previously mentioned, the learned judge's discretion was exercised upon such tenous grounds that it cannot be regarded as the exercise of a judicial discretion at all.

and therefore directed a new trial with a jury. Schroeder J.A. recognized the "well-settled rule that the exercise of discretion by a trial judge should not be interfered with except in extreme cases", but also noted that the Courts had not hesitated to interfere if the learned trial judge's discretion was exercised "under a mistake in law, in disregard of principle, under misapprehension as to facts, that he failed to exercise his discretion or that his order would result in an injustice". It would appear that the learned justice

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in appeal found some of these circumstances existed in the present case. In my respectful opinion, the proposition that a court of appeal may interfere with the discretion of a trial judge was stated much too broadly in applying it to the decision of such trial judge during the course of a trial to dispense with the assistance of a jury and dispose of the issues himself.

In Ontario as long ago as *Brown v. Wood*[2], at p. 200, Chancellor Boyd said:

> The difficulty is to get over sec. 255 of the C.L.P. Act. If this were an appeal from the order of a Judge in Chambers striking out a jury notice, before the trial, the cases cited by Mr. Read would be overwhelming in his favour, but the discretion of a Judge at the trial is much larger... As no affidavit of merits has been filed, and the defendant has not brought and does not seek to bring the amount of the verdict into Court, and as the motion is against a discretion that the trial Judge undoubtedly has to determine the method of trial, it should be dismissed, with costs.

That statement of principal has been cited and adopted since then in a long series of cases both in the Courts of Ontario and in this Court. In *Wise v. Canadian Bank of Commerce*[3], Middleton J. said at p. 345:

> It has been held that the discretion conferred upon the Judge presiding at the trial is an absolute discretion, not subject to review: *Brown v. Wood, supra.*

In *Currie v. Motor Union Insurance Co.*[4], Latchford C.J., for the Court, said:

> Even before the enactment of sec. 56(3) the discretion of a trial Judge in dispensing with a jury was not interfered with by an appellate Court: *Brown v. Wood supra.* It was within the power of the trial Judge to determine the method of trial, and his determination was not open to review.

See also *Wilson v. Kinnear*[5], *per* Middleton J.A. at p. 680; *Telford v. Secord; Telford v. Nasmith*[6], where Kellock J. said at p. 282:

> There rests with the trial judge sufficient power and authority to conduct the trial as it should be conducted, and, should he see reason to try the action without a jury or to dispense with the jury at any stage, his discretion is not subject to review; *Currie v. Motor Union Insurance Co.* (1924) 27 O.W.N. 99; *Wilson v. Kinnear* (1925) 57 O.L.R. 679.

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[2] (1887), 12 P.R. 198.
[3] (1922), 52 O.L.R. 342.
[4] (1924), 27 O.W.N. 99.
[5] (1925), 57 O.L.R. 679.
[6] [1947] S.C.R. 277.

And in *Mizinski v. Robillard and McLaughlin*[7], Cartwright J. (as he then was) said at p. 356:

> I have quoted from the above judgments, and there are many others containing expressions to the same effect, for the purpose of indicating that the order of a trial judge dispensing with a jury during the course of the trial is consistently treated as the exercise of a discretion vested in him by the statute. There may be cases in which the order could be shown to have been made otherwise, as for example if the judge in his reasons made it clear that he had discharged the jury only because he had erroneously decided that he was bound as a matter of law to do so. *Logan et al. v. Wilson et al.*, [1943] 4 D.L.R. 512, was a case of this sort.

Logan et al. v. Wilson et al.[8], to which Cartwright J. referred, was a case in which the trial judge acceded to an application by the counsel for the defence to discharge the jury mistakenly believing that if some of the evidence might tend to show medical malpractice in an attempt to reduce damages he was bound to remove the matter from the jury.

Another example of such unusual circumstances is the case where the existence of insurance is revealed in some answer of a witness. A whole series of cases in Ontario would appear to have resulted in a special jurisprudence and should not be extended beyond that type of case. *Fillion v. O'Neill*[9], cited by Schroeder J.A. in his reasons, was one of these cases in which a witness for the plaintiff in answer to a question put by the trial judge accidentally revealed that the defendant was insured. The portions of the judgment at pp. 727 and 728 referred to by Schroeder J.A. were concerned with the failure of the trial judge to permit the plaintiff to elect whether he might proceed without a jury or take an adjournment to the next sittings. No such situation existed here. Here, the learned trial judge dispensed with the jury for the reasons which he stated carefully and which he, in the exercise of his discretion, regarded as providing adequate basis for such a course in order to ensure that justice should be done. Although it would appear that the learned trial judge did not request counsel to submit argument on the topic before making the statement which I have quoted above, he certainly permitted counsel for the plaintiff to make submissions at length immediately thereafter and before the jury was

[7] [1957] S.C.R. 351.
[8] [1943] 4 D.L.R. 512.
[9] [1934] O.R. 716.

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recalled and instructed. Since it was only this latter event which foreclosed the matter, I am not ready to conclude that the learned trial judge did not permit argument.

For these reasons, I am of the respectful opinion that the Court of Appeal for Ontario erred in holding that it could review and reverse the decision made by the trial judge in the exercise of his proper discretion to remove from the jury's consideration the question of liability. Having determined that it could so review the learned trial judge's decision, the Court of Appeal were only called upon to determine that there was evidence which, when submitted to a jury upon a new trial, would have permitted that jury to find negligence on the part of the railway company. After a review of the facts and the many authorities dealing with level crossing accidents, the Court of Appeal determined that there was such evidence and therefore directed a new trial.

Having come to the conclusion that the learned trial judge's removal of the question of liability from the jury was not open to review, I therefore am required to proceed to consider the correctness of his judgment on the question of liability. This entails a rather detailed consideration of the facts and application thereto of the authorities to which I have referred.

The Canadian Pacific Railway had, for many years, a double-track line running into Port Arthur. When the city grew larger, the city authorities desired to cross the line with a municipal road known as Clavet Street. Upon the city's application, the Board of Railway Commissioners, by its Order No. 12083 of October 24, 1910, permitted the city to construct such crossing. Provisions in such order as to maintenance are not relevant here. The appellant railway owned the lands to each side of Clavet Street to the south of its main line and by orders of the Board of Railway Commissioners made on various dates thereafter, it was permitted to construct five more crossings over Clavet Street. The railway right of way over these five crossings was some 10 to 12 feet higher than Clavet Street to the north and south, so there was an upgrade of that street at both sides of the railway property. Therefore, in 1964 when the accident occurred Clavet Street running northerly from the bay area went up a grade and then crossed at level these five tracks of the appellant's storage yards which were

at each side of the street and finally the double-track main line. The southerly of the latter two tracks was for eastbound traffic and the northerly for westbound.

It was found convenient at trial and thereafter to refer to these tracks by numbers from one to seven, numbers 1 and 2 being the main line through-traffic tracks and numbers 3 to 7 inclusive being the freight car storage tracks. The distance from the north rail of track No. 1 to the south rail of track No. 7 was 89 feet and the distance from the southerly rail of track No. 1 to the northerly rail of track No. 4 was 36 feet. At the time of the accident, box cars stood on tracks Nos. 4 and 7, both to the east and west of Clavet Street. The box cars west of Clavet Street were 36 feet west of the street on track No. 7 and 92 feet west of the street on track No. 4, while those cars to the east of Clavet Street were 50 feet east of the street on track No. 7 and 47 feet or 47 feet 9 inches (the variation in the evidence is inconsequential) on track No. 4.

On February 17, 1964, a fine, sunny, mild day, the deceased Dante Sdraulig, to conduct some business in the office of the Great West Timber Limited on the Lakeshore Road, which ran from east to west south of this railway property, drove to that firm's office. He was accompanied in his motor car by his brother-in-law, the deceased Ferruccio Babudro. After a few moments, the two drove northerly on Clavet Street arriving at the crossing of the main line at almost exactly 1:40 p.m. and there the motor car collided with a locomotive of the appellant railway's transcontinental train, the Canadian, which was westbound on track No. 1. Both men were killed instantly and the vehicle, totally destroyed, tossed down the embankment to the north of track No. 1 about 76 feet west of the west limit of Clavet Street. The train which consisted of two diesel locomotives, a baggage car and fourteen passenger cars, stopped with the leading locomotive 1,425 feet west of Clavet Street. Only three persons other than the deceased occupants of the motor car were eye-witnesses of the impact; the engineer and fireman of the train, and Mr. Robert Campbell, who was repairing his automobile outside a residence on the north side of the right-of-way about 300 feet or more east of Clavet Street. The engineer Guina and Campbell gave evidence. The fireman was not called nor his absence from the trial explained. At the trial, all the

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witnesses agreed that the view of a northbound motorist approaching the main line would be blocked by these standing box cars and much evidence was tendered as to "view lines". This evidence dealt with the view to the east from which direction the Canadian had approached Clavet Street. It may be summarized as follows: Constable MacDonnell swore that the upgrade on Clavet Street levelled out as it crossed track No. 6 and that point 72 feet south of the north rail of track No. 1 he chose as the first point at which a northbound motor car would level out and permit a good view to east and west. The constable then sighted past the north-west corner of the box car standing on track No. 4 at a distance which he found to be 47 feet east of Clavet Street, and determined that his view line crossed the north rail of track No. 1 at a point 117 feet east of the east side of Clavet Street. William E. Mercer, a professional engineer, called for the defendant railway, agreed with this evidence although he chose a point 70 feet 4 inches south of the centre of the two rails of track No. 1 and he found that his view line past the corner of the box car sitting on track No. 4 struck the north rail of the main line westbound at a point 118 feet 8 inches east of Clavet Street. I see no practical difference between the evidence of the two witnesses. Mr. Mercer also produced an exhibit which was intended to illustrate the lengthening of the view to the east along the tracks which a motorist would experience as he drove northerly from that point 70 feet 4 inches south of the centre line of track No. 1. This exhibit was not the result of observation and measurement at the site but was a calculation based on the original observation at the 70 feet 4 inches point. By that table, he illustrated that the view to the east lengthened as the car proceeded northerly at first by quite small distances but thereafter by rapidly increasing distances so that when the motorist reached a point 42 feet south of the centre line of track No. 1 his view to the east extended for a distance of 398 feet and thereafter his view to the east was unlimited.

The liability of the railway company must be considered under three different headings: firstly, the operation of the defendant railway's train, secondly, whether or not it was in breach of any statute or regulation, and, thirdly, even if it were not so in breach was it guilty of negligence in common law?

As to the operation of the train, the learned trial judge found that the train was proceeding between 35 and 40 miles per hour and that that speed was reasonable in the circumstances and was not of any significance. The speed limit in the yard, and this was within the Port Arthur yard, was 55 miles per hour. The learned trial judge further found that the statutory warning signs were erected and the bell on the locomotive was ringing. A by-law of the municipality which had been approved by the Board of Railway Commissioners barred the operation of the whistle except in actual emergency. So soon as the fireman who rode on the left side of the locomotive saw the automobile driven by the deceased Sdraulig, which had just emerged into view on the crossing, and which would appear to have been at that time crossing track No. 4, he warned the engineer and the engineer, in view of the emergency, immediately sounded the whistle. Of course, that was much too late to be of any effect. It was the learned trial judge's conclusion that "there was no evidence from which I can attribute negligence to the train crew either from breach of statute, running orders or at common law". That is a finding of fact amply justified by the evidence.

I turn next to the respondents' submission that the appellant was in breach of the provisions of the Uniform Code of Operating Rules. There was produced at trial a copy of this Code which was effective on October 28, 1962, and thereafter which therefore governed the conduct of the appellant railway at the time of the accident. The respondent points out a provision of rule 103 which reads:

> When necessary to cut trains at public crossings at grade, except where a member of the crew is to protect the crossing, or where other protection is provided, cars or engines must not be left standing within 100 feet of the travelled portion of the public road.

That paragraph is only one of many paragraphs in rule 103 and must be considered with all other parts of the same rule. I quote the complete rule:

> 103. When cars are pushed by an engine, except when switching or making up trains in yards, and even then when conditions require, a member of the crew must be on the leading car and in a position from which signals necessary to the movement can be properly given.
>
> When cars not headed by an engine are passing along a public road or over a public crossing at grade which is not adequately protected by gates or otherwise, a member of the crew must be on the leading car to warn persons standing on, or crossing, or about to cross the track.

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No part of a car or engine may be allowed to occupy any part of a public crossing at grade for a longer period than five minutes, and a public crossing at grade must not be obstructed by switching operations for more than five minutes at a time.

When necessary to cut trains at public crossings at grade, except where a member of the crew is to protect the crossing, or where other protection is provided, cars or engines must not be left standing within 100 feet of the travelled portion of the public road.

Where special instructions require that switching movements over certain public crossings at grade be protected by a member of the crew, such protection must be provided by a member of the crew from a point on the ground at the crossing until the crossing is fully occupied.

When a train or engine passes over any public crossing at grade protected by automatic signals or automatic gates, it will be necessary before making a reverse movement over the crossing for a member of the crew to protect the same.

Before making switching movements over unprotected public crossings at grade where the engineman's view of the crossing is obscured, arrangements must be made for a member of the crew to be in position to observe the crossing and give signals to the engineman as necessary.

At public crossings at grade at which there are automatic warning devices to indicate the approach of trains or engines on the main track, movements over such crossings on other than main tracks, must not, unless otherwise provided, exceed ten miles per hour from 100 feet distant until the engine or leading car has passed over the crossing.

At public crossings at grade referred to in time table instructions, where protection devices are required to be operated by use of push buttons or other appliances, movements must not obstruct the crossing until the protection devices have been operating for at least twenty seconds.

In the rules, "train" is defined as follows:

An engine or more than one engine coupled, with or without cars, displaying markers.

It will be seen that in order to have these standing box cars be part of a train for the purpose of the rule, they must be coupled with an engine. There was no evidence of any engine coupled to any of the standing box cars.

It is also significant that the whole rule deals with the operation of switching cars, that is, moving them from one place to the other, and is not a rule which is applicable to the situation existing in the present case where the car had stood stored for some indefinite time upon these tracks, numbered 3 to 7. The paragraph of rule 103 relied upon by the respondents, by its terms, applies only when it is necessary to cut trains at public crossings at grade. No such cutting of a train nor the necessity for such cutting of a train was proved in this particular case. It was quite possible that these box cars had been moved into their position

from points east of or west of Clavet Street without ever having crossed Clavet Street and, therefore, it was quite possible that they never had been cut at Clavet Street. The paragraph of the rule being evidently for the protection of the public at level crossings against the movement of a "live train" simply had no application in the present circumstances, and the respondents fail in their reliance upon this rule to prove a breach of the statutory regulations in leaving the box cars standing where they stood particularly on track No. 4.

Counsel for the appellant railway, however, submits that since rule 103 does not apply to the present circumstances, and since the Board of Railway Commissioners, as it then was, have not made any regulation requiring the stationary box cars not attached to the train be left any specific distance away from a roadway that there can be no negligence found against his client based on the position of the box cars. I am unable to accede to such a submission. In my view, counsel having contended, and rightly contended, that the paragraph of rule 103 cited by the respondent had no application, it necessarily follows that the Board simply has not dealt with this question and that negligence may exist when there has been no breach of the regulation of the Board.

In *Anderson v. Canadian National Railway Co.*[10], Robertson C.J.O. considered such a contention. At pp. 175 and 176, the learned Chief Justice said:

> It will not be doubted, I think, that a railway company, such as appellant, has no more liberty than anyone else to be negligent. In *Imerson v. Nipissing Central Railway Co.*, 57 O.L.R. 588 at p. 593, [1925] 4 D.L.R. 504, Masten J.A., in speaking of the matter of the speed at which the car of the railway company was travelling, said, "But the absence of any statutory limitation of speed does not absolve the defendant from its common law liability if it is negligent, and it still remains liable for negligence if, 'having regard to all the circumstances of the case, its employees omit that reasonable degree of care which the law justly requires of those who, in the exercise of their rights, are using an instrument of danger'." The latter part of this statement is quoted from the judgment of King J. in *Fleming v. Canadian Pacific Railway Company* (1892), in 31 N.B.R. 318 at p. 345, which was adopted by the Supreme Court of Canada on appeal in (1893), 22 S.C.R. 33.
>
> This principle has been applied in cases of accidents at highway crossings, two of which may be referred to as illustrations. First is *The*

[10] [1944] O.R. 169.

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Lake Erie and Detroit River Railway Company v. Barclay (1900), 30 S.C.R. 360. In that case shunting operations were carried on near a highway crossing, and a train of cars was sent across a much frequented highway by what was called a "flying switch", the engine being detached and the cars proceeding by their own momentum. It was held that it was properly left to the jury whether it was not necessary, at that particular time and under the particular circumstances, to take greater precautions than were taken, and to be much more careful than in ordinary cases where these conditions did not exist. In *Montreal Trust Co. v. Canadian Pacific Railway Co.*, 61 O.L.R. 137, [1927] 4 D.L.R. 373, 33 C.R.C. 407, there was evidence that some box-cars of a freight train, placed on a passing-track to allow a passenger train to proceed on the main line, obstructed the view which the driver of a motor car would otherwise have had of the approaching passenger train. It was held that it was proper to submit to the jury the question whether, in the circumstances of the case, a duty was cast upon the railway company to take some precaution additional to the precautions prescribed by The Railway Act, and that it was open to the jury to find that the omission to take extra precaution was negligence.

There is nothing in the decisions in such cases as these I have referred to, in any way inconsistent with the principle laid down in *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, 3 C.R.C. 52. In that case Davies J. (in whose judgment the Chief Justice and Killam J. concurred), said at p. 97, referring to the powers conferred by The Railway Act upon the Railway Committee of the Privy Council, of determining the character and extent of the protection which should be given to the public at level highway crossings: "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."

The result of the decisions seems to be that, under ordinary circumstances, the railway is permitted to carry on its usual operations in the normal way, at a highway level crossing, without other precautions and warnings than are prescribed by The Railway Act or by the Board, but if the operations are carried on in such a way, or are of such a character, that the public using the crossing is exposed to exceptional danger, as in the *Barclay* case, or if there are exceptional circumstances, as in the *Montreal Trust Co.* case, that render ineffective or insufficient the precautions and warnings generally prescribed, then, in such cases, it may be left to a jury to say whether or not the railway has been negligent in failing to adopt other measures for the protection of those who may use the crossing.

With respect, I adopt the view of the Chief Justice as to the decisions in the *Grand Trunk Railway Company of Canada v. McKay* case, and I am also of the view that *Canadian Pacific Railway Co. v. Rutherford*[11], at p. 613, does not carry the appellant railway any farther.

[11] [1945] S.C.R. 609.

The problem which remains, therefore, is to find whether, in the words of Chief Justice Robertson, there existed in this case such exceptional circumstances as would require the taking of other precautions.

Let us consider the position of a motorist, any motorist, not particularly the deceased Mr. Sdraulig, who approached the scene driving northerly on Clavet Street. About 200 feet south of track No. 7, he would start to climb a grade which in the next 200 feet rose 10 or 12 feet. He would then find himself crossing a series of seven railroad tracks; on either side of Clavet Street, box cars stood on some of the tracks, particularly on track No. 7, which he reached first, and on track No. 4. It was therefore apparent to him from the many railroad tracks and from the box cars which stood on some of them, that he was driving through a railway yard. In a railway yard, he could expect shunting to take place but he also would know, as it is mere common sense to know, that such shunting would be accompanied by some sort of notice to him, from either the whistle or bell of a slow moving locomotive, or a warning by a trainman. Indeed, the various paragraphs of regulation 103 which I have cited above require this. The evidence reveals no variation of any kind in the appearance of the crossings to warn a northbound motorist that the last two tracks he is approaching, Nos. 2 and 1, are two express tracks. These two would appear simply the last two of seven shunting or storage tracks in the railway yard. When the motorist had proceeded to a point only 70 feet south of the centre of that track No. 1, he still feeling himself in the midst of a railroad yard, would, if he had taken a view only have had one to his right, that is, the east, of 118 feet 7 inches in length. A train travelling only at 35 miles an hour would cover that 118 feet 7 inches in a little less than 2.3 seconds. If the motorist were driving at 20 miles an hour, it would take exactly the same 2.3 seconds for him to travel the intervening 70 feet between his first lookout point and the track upon which the Canadian was running.

Mr. Mercer, in the exhibit which he prepared and filed, showed that if that box car standing on track No. 4 had stood 100 feet east of Clavet Street, the distance suggested in rule 103, rather than merely 47 feet 9 inches, the motorist at this point would have had a view to the east of 228 feet. A train travelling at 35 miles an hour would

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require 4.3 seconds plus to cover those 228 feet. Therefore, I am of the opinion that the appellant railway company was negligent in not providing some better warning under special and exceptional circumstances present in this case. Those exceptional circumstances are that the crossing of the main line occurred after the unwary motorist had travelled north over five storage tracks some of which on both sides of the road bore standing box cars apparently merely stored at that place, and failing to provide an indication that the two tracks upon which the motorist should last come were not mere storage tracks but through lines upon which trains were entitled to proceed at 55 miles an hour.

The appellant railway has pleaded the provisions of *The Negligence Act*, R.S.O. 1960, c. 261. It is, therefore, necessary to consider the position of the late Mr. Sdraulig as he drove north over these seven tracks. Although the late Mr. Sdraulig was born in Europe, he had lived in Canada for about ten years prior to the accident, and he had evidently possessed an automobile driver's licence for about that length of time. He was married in Port Arthur in 1960 and it would seem that the trial judge was quite justified in concluding that he was familiar with the area. On at least two occasions, the late Mr. Sdraulig had called at the office of the North West Timber Company, south of the scene of the accident, but there is no evidence as to whether he had approached that timber company on Clavet Street or on one of the streets to the east or west of it. No matter which route he chose, the late Mr. Sdraulig would have had to have crossed this double track main line of the C.P.R. It must be noted that a southbound motorist on either Clavet Street, or the other streets to either side of it, would have an unobstructed view of the main line because they were the two northerly tracks and they were of course unoccupied by any standing box cars. Therefore, the late Mr. Sdraulig when he drove north across the five storage or shunting tracks must be taken to have known that ahead of him were the two main line tracks of the appellant company. Under those circumstances, therefore, he must be required to have exercised his ability to see what traffic was on the main line at the earliest possible moment. That earliest possible moment seems to be the time when his car was some 70 feet south of track No. 1

and at that moment, as I have said, his vision to the eastward was only 118 feet 7 inches easterly along track No. 1.

The learned trial judge put the late Mr. Sdraulig's speed at 15 to 20 miles an hour. That was the estimate which had been set out in the written statement of one Campbell, to whom I have referred and who was one of the three eye witnesses of the accident. In Campbell's evidence at trial, he gave the speed at 15 and described the vehicle as moving very slowly. Guina, the engineer on the Canadian, described the speed of the late Mr. Sdraulig's car in these words: "but I would estimate it would be 12 to 15 miles per hour, a very normal rate of speed going across a crossing. It was rough and so forth". It must be understood that both Campbell and Guina could have only a very fleeting moment to judge the speed of the late Mr. Sdraulig's car. In fact, I cannot see how Campbell would have ever had any opportunity to observe the automobile. He swore that he was attracted by the sound of the whistle; the engineer swore that he sounded the whistle when his locomotive was within about 100 feet of the crossing or perhaps a little longer distance. If the locomotive were in that position, the train would be between Campbell whose position was at least 300 feet east of Clavet Street and the late Mr. Sdraulig's car cutting off his vision completely. The best summary would seem to be that the late Mr. Sdraulig's automobile was proceeding at about 15 miles an hour at the time it emerged into view of those who were looking at it from the east, particularly the engineer on the Canadian. If that vehicle were more than 70 feet from the crossing and if the late Mr. Sdraulig had immediately so soon as he was able observed the approaching Canadian on track No. 1 he could have brought his vehicle to a stop in something around 42 to 45 feet, *i.e.*, 25 feet before he arrived at track No. 1. If, on the other hand, the late Mr. Sdraulig did not observe the approaching Canadian until he was level with the north side of the box cars standing on track No. 4, he was only at that time 36 feet away from track No. 1. At 15 miles an hour he would have covered that distance in 1.6 seconds and it was not said that his car decreased in speed before the impact nor were there any skid marks. It would, of course, have been impossible for the late Mr. Sdraulig to have stopped his car in that distance.

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It is, of course, perfectly plain and established by the authorities beyond any question that a motorist attempting to cross railway crossings must do so with caution and must take care to observe oncoming trains. The matter was put by Sir Louis Davies C.J., in this Court in *Canadian Pacific Railway Co. v. Smith*[12], at p. 135 in these words:

> The reasonable and salutary rule frequently laid down by the court with respect to persons crossing level railway crossings is that they must act as reasonable persons should act and not attempt to cross without looking for an approaching train to see whether they can safely cross. If they should choose recklessly and foolishly to run into danger, they must take the consequences.
>
> The rule so requiring persons crossing railway tracks to look for a possible approaching train may not be an absolutely arbitrary one. Circumstances may exist which might excuse their not looking, but those circumstances must be such as would reasonably warrant a jury in finding they were excused from their duty in that regard.

Middleton J. in *Blair v. Grand Trunk Railway Co.*[13], said at p. 407:

> I should deplore the adoption of any fixed standard of care, such as "stop, look, listen," but it is just as deplorable if an action will lie at the instance of a "man who rushed, with his eyes open, to his own destruction."

Two factors, however, must be kept in mind in considering those and many other decisions; firstly, every case depends on the facts in the particular case and, secondly, those two decisions, and many others, were rendered before the enactment of what is now the Ontario *Negligence Act*. The application of that statute will permit a plaintiff to recover a proportion of his damages despite the fact that he himself, as well as the defendant railway, had been negligent: *Reynolds v. Canadian Pacific Railway Co.; Craig v. Canadian Pacific Railway Co.*[14]*; Flynn et al. v. C.P.R.; Kwapisz Estate v. C.P.R.*[15]

It should also be noted that in *Canadian Pacific Railway Co. v. Smith, supra,* and *Blair v. Grand Trunk Railway Co., supra,* the drivers of the vehicles were alive and able to give evidence as to their lookout or lack of lookout. In the present case, both Sdraulig and Babudro were killed instantly and we are only able to determine whether or not the driver looked for the train by making inferences from the course of the vehicle and from the presence of these obstructing empty standing box cars.

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[12] (1921), 62 S.C.R. 134.
[13] (1923), 53 O.L.R. 405.
[14] [1927] S.C.R. 505.
[15] (1958), 25 W.W.R. 499.

After a careful review of all of the evidence, I have come to the conclusion that Sdraulig must be found to share a portion of the negligence which resulted in the accident, and I would find that the late Dante Sdraulig contributed 25 per cent of the negligence which caused the accident while the railway company contributed 75 per cent. I arrive at these percentages from a consideration of the salient fact that the view of the driver northbound on Clavet Street was so confined, particularly by the presence of the standing box car to the east of Clavet Street on track No. 4, that even at his earliest point of view he had a startling situation to face and that his failure to get his vehicle stopped had he observed the onrushing Canadian at this first possible moment was not such a fault as would justify a greater amount of negligence being assessed against him.

The late Ferruccio Babudro was a gratuitous passenger and therefore the provisions of s. 2(2) of *The Negligence Act,* R.S.O. 1960, c. 261, applied to the claim by his administrator who should be able to recover only 75 per cent of the damages as found by the jury.

Therefore, in the result, the appeals of the Canadian Pacific Railway Company should be allowed only to strike out the judgment of the Court of Appeal granting to the respondents a new trial but then the judgment of the learned trial judge should be varied to allow each of the plaintiffs Livia Sdraulig and Angelo Babudro to recover 75 per cent of the damages found by the jury in their actions. I would allow these respondents their costs of the trial and of the appeals to the Court of Appeal for Ontario; success being divided in this Court, I would make no order as to costs here.

The judgment of Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—These two actions under *The Fatal Accidents Act,* R.S.O. 1960, c. 138, result from a crossing accident in the City of Port Arthur when a northbound car was in collision with a westbound transcontinental train. Both driver and passenger were killed. At the trial the judge took from the jury the question of liability and left to them only the assessment of the damages. On appeal[16], the Court decided that the judge had improperly dismissed the jury

[16] [1968] 1 O.R. 377, 66 D.L.R. (2d) 475.

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as to liability. They ordered a new trial since, in their opinion, there was some evidence on which the jury might have found negligence on the part of the railway which caused or contributed to the accident.

In this Court, the railway, as appellant, contends that there was error in interfering with the discretionary decision of the trial judge to dispense with the jury on the question of liability; that the railway was not negligent; and that the sole cause of the accident was the negligence of the driver of the car.

As to the decision of the trial judge to dispense with the jury on the question of liability, in my opinion there was good reason why he did so. This was not a capricious exercise of the discretion, nor one founded on an erroneous decision on a matter of law. The assumption by the Court of Appeal of power to review this decision is in conflict with two decisions in this Court. *Telford v. Secord; Telford v. Nasmith*[17] and *Mizinski v. Robillard and McLaughlin*[18], are clear that the exercise of a trial judge's discretion to dispense with the jury is not a reviewable matter.

The accident happened on Clavet Street in the City of Port Arthur. Clavet Street runs north and south and seven tracks of the Canadian Pacific Railway run east and west. The tracks have been numbered from north to south and I will adhere to these numbers. The westbound transcontinental line is No. 1. The motorist was travelling north. He was struck on track No. 1 by the westbound passenger train.

There were no box cars standing on either tracks 1, 2 or 3. There was a string of box cars standing to the east of the crossing on track 4. The nearest of these cars was 47 feet east of the easterly limit of the crossing. These cars limited the easterly vision of the northbound motorist. From the southerly line of track 4, the visibility to the east was 231 feet. From the centre of track 4, the visibility was 398 feet to the east. On the north line of track 4, the visibility to the east was unlimited.

The crossing in its present form was duly authorized by orders of the Board of Railway Commissioners. The two northerly tracks were used for through traffic. The other tracks were for siding and switching.

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[17] [1947] S.C.R. 277.

[18] [1957] S.C.R. 351.

The trial judge found that the train was travelling at a normal speed between 35 and 40 miles per hour. It was within the Port Arthur yards and was approaching the Port Arthur station. Its bell was ringing and had been ringing for some distance east of the crossing. There was a by-law of the City of Port Arthur passed under the authority of the *Railway Act*, R.S.C. 1952, c. 234, prohibiting the sounding of the whistle at this crossing. The railway had erected and maintained at the crossing signboards bearing the words "Railway Crossing—7 Tracks", as required by s. 270 of the *Railway Act*. These signs were plainly visible to motorists crossing in either direction.

There was no evidence that the railway company had failed in any manner to comply with the provisions of the *Railway Act* or any order of the Board of Transport Commissioners, and there was no evidence of negligence on the part of the passenger train crew, either by breach of statute or running orders or at common law.

The Court of Appeal recognized that the railway had complied with all applicable regulations and orders. Nevertheless, it held that the stationing of the box cars east of the crossing on track No. 4 could afford some evidence fit for submission to a jury that the accident was, at least in part, the result of a dangerous situation created by the defendants. With this conclusion I disagree.

The trial judge was of the opinion that the presence of the freight cars on track No. 4 could not be considered an exceptional danger or exceptional circumstances. The circumstances were ordinary and the operations usual. It must be remembered that this crossing was within the Port Arthur freight yards. This was a normal and every day use of these freight yards.

The only conclusion is that the motorist, in crossing, should have seen the oncoming train when he was on the north rail of track 4 and he should have been driving in such a way as to be able to stop.

We heard full argument on s. 103 of the Uniform Code of Operating Rules effective October 28, 1962, and in force at the time of the accident, which were fully approved and prescribed by the Board of Transport Commissioners. Section 103 reads:

> 103 . . .
>
> When necessary to cut trains at public crossings at grade, except where a member of the crew is to protect the crossing, or where other protec-

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tion is provided, cars or engines must not be left standing within 100 feet of the travelled portion of the public road.

* * *

Both the trial judge and the Court of Appeal were in agreement that this section had no application. The apparent purpose of the section is to protect the public against movements of a live train which has been temporarily cut. The box cars on track No. 4 at the time of the accident did not constitute any part of a train as defined by the operating rules and there was no evidence at all that they had been placed in this position as a result of or during the cutting of a train at the Clavet Street crossing. Section 103 does not create a general rule that cars or engines must not be left standing within 100 feet of the travelled portion of the public road. This is only required when it is shown that it was the result of a cutting of a train at the particular crossing.

The standing box cars were, therefore, not on the tracks in breach of the Uniform Code of Operating Rules. Section 103 deals only with standing cars coming into position as a result of a certain operation. They must be 100 feet back. There is no general provision from the Board of Transport Commissioners dealing with other standing cars near level crossings. On the facts of this case, I think that the trial judge was right in concluding that box cars in this position on this track could not be evidence of a dangerous situation created by the railway. This Court in *Alexander v. Toronto, Hamilton & Buffalo Ry. Co.*[19], dealt with the doctrine of exceptional or special circumstances and it is one to be applied with great care. It has no application here.

I would allow the appeals and restore the judgments at trial. The appellant is entitled to its costs both here and in the Court of Appeal.

Appeals allowed and judgments at trial restored, with costs, CARTWRIGHT C.J. *and* SPENCE J. *dissenting in part.*

Solicitors for the defendent, appellant: Weiler, Weiler & Maloney, Fort William.

Solicitor for the plaintiffs, respondents: Alfred A. Petrone, Fort William.

[19] [1954] S.C.R. 707.