1940

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... APPELLANT; * Oct. 1, 3. * Oct. 3.

AND

PETER CHESWORTH (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Railways — Automobiles — Level crossing accident — Evidence — Whether crossing sign properly maintained as required by Railway Act— Whether kept "painted white"—Effect of subsequent finding by Board of Transport Commissioners under section 309 that the crossing was sufficiently protected. Railway Act, R.S.C., 1927, c. 170, sections 267 and 309.

In an action tried without a jury, resulting from a level-crossing accident, the main issue was as to whether there was sufficient evidence to connect such accident with an alleged default of the appellant railway company in respect of its obligation to properly maintain a crossing sign as required by the *Railway Act* and the regulations thereunder. At the trial, the appellant company produced as evidence a finding by the (then) Board of Railway Commissioners, made under section 309 after the accident, affirming a report of its inspector made when the crossing was in the same condition as it was at the time of the accident,—that the crossing in that condition was sufficiently protected. The trial judge, although rejecting such evidence, nevertheless dismissed the respondent's action. On appeal, the judgment was reversed and the action maintained; but the appellate court also held that the finding of the Board of Railway Commissioners was not binding upon the parties to the action or upon the courts, and that it was not admissible evidence upon the issue whether the regulation requiring the placing of the sign at the crossing had been observed.

Held, reversing the judgment appealed from, ([1940] I W.W.R. 643) that the evidence did not justify the finding of the appellate court that the default in the condition of the crossing sign materially contributed to the accident, and, such being the case, the respondent's action ought to be dismissed.

Held, also, affirming the judgment appealed from as to that ground, that the finding of the Board of Railway Commissioners was not admissable evidence. Such finding was not evidence which did go to the crucial issue on the appeal, i.e., whether the default of the appellant company materially contributed to the accident.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Manson J., and maintaining the respondent's action.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Hudson JJ.

(1) [1940] 1 W.W.R. 643.

1940

CANADIAN NORTHERN PACIFIC RY. CO. v. CHESWORTH.

The action was for damages resulting from a collision at a level crossing between a train of the appellant company and an automobile driven by one Valentine, the respondent and his wife being passengers. The accident took place on a dark rainy night and the visibility was very poor. The driver stopped his car on the track, and six seconds later it was struck by the engine of a train. The respondent's wife died from injuries received.

A. Alexander for the appellant.

R. O. D. Harvey for the respondent.

After the conclusion of the arguments by counsel for the appellant and for the respondent, and without calling on the former to reply, the Chief Justice, speaking for the Court, delivered the following oral judgment.

THE CHIEF JUSTICE—It will not be necessary to call upon you, Mr. Alexander.

We have very fully considered the able argument that has been presented on behalf of the respondent and the evidence, as well as the judgments in the courts below, and we have come to the conclusion this appeal ought to be allowed.

The crucial issue—the one issue—is whether, or not, there is evidence which connects the alleged default of the railway company in respect of its obligation to maintain a sign in accordance with the regulation which has been produced and has been relied upon, and the most unfortunate accident in which the wife of the respondent lost her life. We have the greatest sympathy with the respondent, but in our judicial capacity we cannot allow considerations of that kind to weigh with us.

Now, on that issue the learned trial judge found against the respondent; the Court of Appeal reversed his judgment and held either that this default connected itself with the accident, or that there was evidence connecting it with the accident. In other words, that the respondent had acquitted himself of the onus resting upon him.

The first thing to be noticed is that there is no finding of a jury. There is a finding in the judgment at the trial and that judgment was reversed by the Court of Appeal and this Court in these circumstances is in this position: it must examine the evidence and form its conclusion as

to the issue upon which it has to base its judgment, but the Court will not reverse the judgment of the Court appealed from unless it comes to a conclusion which is different from that at which that Court arrived. In that sense it must be satisfied that the judgment below is wrong, that the evidence leads to a conclusion which is not the conclusion at which the Court below arrived.

Now, we are all satisfied that the evidence does not justify the finding that this default materially contributed to the accident, and such being the case the respondent must fail.

It is necessary to advert to the evidence that was before the trial judge which was rejected by the Court of Appeal. There was a finding by the Board of Railway Commissioners after this accident, when the crossing was in the same condition as it was at the time of the accident, that the crossing in that condition was sufficiently protected. The Court of Appeal held that that finding was not binding upon the parties to this action, or upon the Court, and that it was not admissible evidence upon the issue whether the regulation requiring the placing of the sign at the crossing had been observed. We are satisfied that the Court of Appeal was right in its conclusion that the evidence was not admissible. Counsel for the respondent dwelt upon the fact that the trial judge rejected that evidence, but it must be noticed, and it is very important to notice, that that evidence did not go to the issue which we regard as the crucial issue on this appeal; it did not go to the issue whether the default of the Railway Company materially contributed to the accident; it went only to the issue whether there was default in a failure to comply with the order of the Board of Railway Commissioners.

In any case, the real substantial question for this Court is the question whether, on its own view of the evidence, the judgment of the Court of Appeal ought to be sustained, and our view as to the effect of the evidence leads to a conclusion contrary to that of the Court of Appeal, whose judgment is therefore reversed with costs.

Appeal allowed with costs, if asked for.

Solicitor for the appellant. *A. R. MacLeod.*

Solicitors for the respondent: *Harvey & Twining.*