THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS). } APPELLANTS;

AND

SARAH HINRICH (PLAINTIFF) ..... RESPONDENT.

1913
*Oct. 30.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Railways—Operation—Negligence — Excessive speed — Trespasser — "Railway Act," R.S.C., 1906, c. 37, ss. 275, 408—Cause of accident.

While a train was running at the speed of about thirty miles an hour, on the company's line along the harbour front in the City of Vancouver, B.C., H., who had unlawfully entered upon the right-of-way through a break in the company's fences, attempted to cross the tracks in front of the train. The engine driver saw H., at a distance of about 500 feet and whistled several times. H. paid no attention to the danger signals and continued walking in an oblique direction towards the track, and, observing his apparent intention to cross the track and his disregard of the signals, the engine driver then applied the emergency brakes which failed to stop the train in time to avoid the accident by which H. was killed. In an action for damages by his widow and child,

Held, that, notwithstanding the fact that deceased was a trespasser and committing a breach of section 408 of the "Railway Act," R.S.C., 1906, ch. 37, the company was liable because their engine driver neglected to apply the emergency brakes at the time he became aware of the danger of accident when he first noticed deceased attempting to cross the tracks.

APPEAL from the judgment of the Court of Appeal for British Columbia, which reversed the judgment of nonsuit entered by the trial judge and maintained the plaintiff's action with costs.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

1913

CANADIAN PACIFIC RWAY. CO. v. HINRICH.

The circumstances in which the accident, which caused the death of the plaintiff's husband are stated in the head-note. At the trial of the action the jury rendered a general verdict against the company and awarded $6,000 damages ($3,000 to the widow and $3,000 to her infant child. The trial judge then rendered judgment upon a motion for nonsuit which had been made before he allowed the case to go to the jury and dismissed the action on the ground that the only inference to be drawn from the evidence was that deceased had been killed in consequence of his own negligence and unlawful act in attempting to cross the tracks while the train was rapidly approaching and he was a trespasser upon the right-of-way. By the judgment now appealed from, this judgment was set aside and judgment was ordered to be entered in favour of the plaintiff in conformity with the verdict of the jury, on the ground that the company was chargeable with negligence which was the ultimate cause of the accident.

Hellmuth K.C. for the appellants admitted the original negligence of the company in running their train at excessive speed at the place where the accident occurred, but contended that the unlawful course of the deceased in attempting to cross the tracks in the face of the rapidly approaching train, while he was a trespasser there and committing a breach of section 406 of the "Railway Act" and also in disregarding the danger signals given by the engine driver, constituted the sole cause of the accident by which he was killed.

D. G. Macdonell for the respondent was not called

upon for any argument, and the appeal was dismissed with costs.

1913

CANADIAN PACIFIC RWAY. CO. v. HINRICH.

The Chief Justice.

THE CHIEF JUSTICE.—This appeal was dismissed with costs after hearing counsel for the appellants. I have no doubt that whatever may be the negligence which is fairly attributable to the husband of the respondent, it was open to the jury, on the whole evidence, to find as they did that the determining cause of the accident was the failure on the part of the engine-driver to subsequently take the necessary steps to avoid the consequences of that negligence.

DAVIES and IDINGTON JJ. concurred in the dismissal of the appeal.

DUFF J.—I think this appeal should be dismissed There was evidence from which the jury might conclude properly, that the driver of the engine ought to have been aware that the victim of the accident was crossing the track while oblivious of the danger of doing so in time to have averted the accident by applying the emergency brake. In these circumstances, the negligence of the victim is immaterial because it was quite open to the jury to find that that negligence was not a proximate cause of the victim's death as that phrase has been construed and applied in such cases.

ANGLIN J. concurred in the opinion of the Chief Justice.

BRODEUR J.—The jury having found that there was negligence on the part of the company appellant and there being in the case evidence that could justify

1913

CANADIAN PACIFIC RWAY. CO. v. HINRICH.

Brodeur J.

such a verdict, it would be inadvisable for this court to allow this appeal.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *J. E. McMullen.*

Solicitor for the respondent: *D. G. Macdonell.*