CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANT)... } APPELLANT;

1921
*Feb. 2, 3.
Feb. 24.

AND

L. O. HORNER (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Negligence—Railway—Jury trial—Res ipsa loquitur—Burden of proof—Master and servant—N.W.T. Ord. (1915), *c. 98.*

The respondent's husband, a brakesman in appellant's employ, was killed by the derailment of his train. The derailment was caused by an unlocked switch being partly open. At the trial, the respondent simply gave evidence of the accident and of the damages claimed by her, resting her case on the doctrine of *res ipsa loquitur*. The appellant then moved for a non-suit on the ground that this doctrine was not applicable in a case between master and servant. The motion was refused and the appellant proceeded to produce evidence to rebut the *prima facie* case of negligence. The jury rendered a verdict in favour of the respondent.

Held, Mignault J. dissenting, that, upon the evidence, the verdict of the jury that the condition of the switch was due to the negligence of the appellant must be upheld.

Per Anglin, Brodeur and Mignault JJ.—In the province of Alberta the doctrine of *res ipsa loquitur* can be invoked by a servant seeking to hold his master liable for injuries sustained in the course of his employment, since the defence of common employment has been taken away by statute; and it was incumbent upon the appellant to rebut the presumption of negligence resulting from the application of the doctrine.

Per Idington, Anglin and Brodeur JJ.—The sufficiency of the evidence adduced by the appellant to rebut such presumption was wholly within the province of the jury.

Per Mignault J. (dissenting).—The evidence adduced by the appellant having completely rebutted the *prima facie* case of negligence resulting from the rule *res ipsa loquitur*, and the respondent not having made any affirmative proof of negligence of the appellant, the jury was not justified in finding a verdict in favor of the respondent.

Judgment of the Appellate Division ([1920] 3 W.W.R. 909) affirmed, Mignault J. dissenting.

PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming, on equal division of the court, the judgment of Walsh J. with a jury, and maintaining the respondent's action. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

D. L. McCarthy K.C. and *N. D. McLean* for the appellant.

David Campbell for the respondent.

IDINGTON J.—The respondent sued as the widow of a brakeman killed in an accident on appellant's railway. That accident and the consequent death of respondent's late husband were caused by the train on which he was serving having been derailed in passing a switch which was found unlocked.

There can be no doubt of the derailment having been the result of the switch having been unlocked.

Prima facie that condition of things must be attributable to the open switch and that in turn to the negligence of appellant. The burden of proof that it was due to some other cause than such negligence thus rested upon the appellant. Until that was established by such clear evidence that the jury could not, as reasonable men, refuse to accept and act upon it the presumption arising from the circumstances, expressed in the maxim *res ipsa loquitur*, stands as the guide for the jurors.

The sole substantial question raised by this appeal is whether or not the jury has by acting upon the said presumption, and unreasonably, either impliedly

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refused to believe, or so far as believed to accept as a satisfactory rebuttal of such presumption the evidence adduced by the appellant, tending to shew that appellant's servants absolutely discharged their respective duties and that the discharge thereof would cover all that may be involved in the charge of negligence.

Now, it is the province of the jury to decide as to the credibility of each and every witness and the measure of credibility to be given to the evidence of each witness.

The jury may properly disregard the evidence of each witness from many points of view. It may find from his demeanour or otherwise that he is entirely unworthy of credit.

In this case there does not seem to be anything for applying such an extreme view as to any of the witnesses, especially in view of the expressions in the learned trial judge's charge. There is, however, very much in the ordinary experience of life which the jury could well apply in this case, and that is that he on whom the duty is cast and is daily many times discharging, with absolute care and accuracy, may from time to time through a great variety of causes omit to discharge.

Such a man in good faith is apt to persuade himself that he had actually discharged his duty when, as a matter of fact, he had entirely forgotten to do so, or failed from some cause to perform it.

Yet in such a case of failure his master may be legally liable for the negligence involved, if injury to another results therefrom.

The jury in such a case must use the best judgment it can and its verdict is only reviewable and reversible by an appellate court if such as no twelve men could reasonably arrive at on the evidence presented.

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In this case or any other where the jury may have been of a less number, I do not regard the exact number of twelve jurors as governing, though I present it as what has been so often presented by the highest courts in England where twelve is the number of a jury selected to try an issue of fact.

The jury was confronted with the problem of deciding whether the unlocked switch was the result of negligence on the part of some one of the servants of the appellant, or a criminal interference by some stranger.

The evidence tendered to rebut the former depended, in almost every instance bearing on that aspect of the case, upon the unsupported evidence of a single witness, who may have been mistaken. If any link in that chain of events thus failed the whole defence fails.

And we should not forget the very serious consequences presented to the mind of each of such witnesses tempting him to persuade himself that he must have discharged his duty, when in fact he may have failed to do so.

As to the possibilities of the switch being left unlocked, Farrell, a witness for the appellant who had been a brakeman on its trains, testified that he had found switches unlocked "but not very often."

I should have preferred to have seen this point pressed upon others. For what it is worth it shews that appellant's servants are not quite as infallible as it pretends herein.

The alternative question presented to the jury, of whether or not the unlocking in question herein was the result of strangers to the service having improperly meddled with the lock, seems unsupportable by any evidence worth considering.

The fact of someone having taken, on the Sunday in question, a hand car used by the section foreman, and apparently ridden on it for some miles away to a point where it was found later, is relied upon as if important.

One can easily understand how and why some idle men or boys, on a Sunday or holiday, might be tempted to do such a thing. It seems, however, an incident quite incapable of explaining why they, or such like idlers, should engage in the far more serious criminal conduct of unlocking the switch and deliberately planning the wreck of the train in question or any other passing over the point in question.

Moreover the switch was at a part of the country five or six miles away from any habitation but one, other than that of its foreman, and there was not the slightest effort made to attach blame to that party, or indeed to any party.

If there had been any reason to believe that it was the work of any persons designing to wreck the train, some trace would probably have been found of such persons.

The death of three men, and the ruin of property in cars and otherwise, which must have resulted, would have so aroused public attention and the public authorities as to have disclosed if any foundation in fact for such a theory, something more than a commonplace incident of someone taking a ride on a hand-car—left as it was to tempt the idlers to so use it.

There was never, I suspect, much search made for the alleged criminal unlocking of the switch. Probably nobody believed that theory and it was only looked on as fit to ask judges and juries to accept it.

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To my mind the whole of the hints thus thrown out as to the cause of the accident are not deserving of serious consideration as an alternative to the possibilities indeed probabilities of the unlocked switch being the result of neglect.

Before parting with the hand-car incident I cannot forbear remarking that its exposure to such use was apparently the result of carelessness on the part of the foreman on whose inspection of the switch so much reliance is placed. Alternatively he seems to have felt he was in such a deserted district, so remote from possible marauders, that he was quite safe in doing so.

Yet we are asked to presume on such a slender thread of evidence as adduced that the jury coming to a like conclusion were, in doing so, acting as no set of reasonable men could do and hence set aside their verdict.

The point was made in argument here that other trains had passed over unhurt.

It is admitted in evidence that such going in one direction would not be affected by the condition of the switch but contended that one had preceded the one in question and passed in safety going in same direction.

Hence it is argued that assuming we have an account of all trains run on the part of the road in question there was nothing happened for at least twenty-four hours out of which could have arisen the neglect of duty in question.

That would be a cogent, though by no means conclusive, argument had the appellant proven, as it should have done, if possible, that there was no other train passing which needed to use the switch, and left it unlocked.

It is said by counsel for appellant that no such point was made in argument below.

Whether that be correct or not does not matter. It is the evidence we have to be guided by and not the argument of counsel.

I doubt much, however, if it was not present to the minds of the learned judges in the court below, for I find Mr. Justice Ives in writing his judgment, had properly looked for such evidence and found it in the answer of Mr. Irwin, a superintendent of appellant on his examination for discovery, as follows:—

224. Q. When, prior to the accident, was the switch in question last operated? A. 17.20 K., July 5th, that would be 5.20 P.M.

225. Q. And that train proceeded out of the "Y" upon the main track, going west? A. Yes, Sir, I presume it did; I don't know whether it went in and backed through or went into the other switch first and came out of this. My opinion is they would head into this switch and back through the other one, but I am not prepared to say.

Mr. Justice Ives held that this answer to 224 having been put in by respondent's counsel is sufficient. It seems to me quite clear that the party so testifying could not swear to that needed to make effective proof meeting the point raised, and is only assuming it.

I am unable, with great respect, to agree with that view of Mr. Justice Ives as to the weight to be attached to this, but pleased to find that he felt as I do the need of some such evidence to make any possible defence for appellant out of the movement of trains.

I may remark in passing that the learned Chief Justice relied on other grounds entirely, in which, with respect, I cannot agree.

I am quite unable to understand why or by what process of reasoning a fellow servant who had nothing to do with the switch in question, could be debarred or his representatives be debarred from reliance on the maxim of *res ipsa loquitur* which is nothing but a concise expression of common sense applied to circumstantial evidence.

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It is equally applicable to every phase of common sense use of circumstantial evidence.

It could hardly be applied to the case of a man in charge of a switch injured by his own neglect or his representatives founding an action on such injury.

There are many other things incidental to the inquiry which I should have liked, before giving a favourable ear to appellant, to have heard a good deal more relative to.

One of these was the question of the light on this switch and the angle at which the target was set when the train was approaching the point in question; and another as to the results found after the accident in the situation of the switch and light in something more tangible and satisfactory than what appears in evidence.

The frame in which the switch was set is sworn to have been undisturbed after the accident. If so, why was the light so found, as it was, not giving light, and the target turned as it was?

And if not the result of the accident why was it passed instead of stopping?

And again the neglect of someone to lock the switch after using it may have been productive of much in its many possible movements as the result of trains passing over the point in question either way.

On these points the evidence is left in a rather unsatisfactory condition.

The following evidence is worth considering:—

Q. A Juryman. You state this train was the first one that went over the switch before the accident. If you went over that and that switch was apparently open would it have any effect on your train?—A. None whatever.

Q. Your train would not close the switch or throw it wider open? A. Well, it might; it would, but it would spring back to about half way.

Q. It would not affect your train at all?—A. No.

It suggests in the first place that the jury was possibly quite as alive to the several questions thus raised as we can be, and that the passage of the trains upon which so much reliance is placed by appellant, may have had much to do with the changes in the switch's position if left unlocked. Such shaking and disturbance of the switches unchained may have had much more serious results upon an unlocked switch in relation to the accident in question than the evidence discloses.

In conclusion I should say that for a great many years this Court has refused in any way to interfere with the measure of damages as left by the courts below, even when we have felt them excessive. If the courts below cannot find therein a ground for granting a new trial then we should not interfere.

There must be an end, if possible, to litigation being prolonged.

I agree so fully with what has been well said by the learned judges below, taking the view I do of this case, that I rely thereon as well as on the foregoing reasons in reaching the conclusion that this appeal should be dismissed with costs here and below.

DUFF J.—This appeal was argued by Mr. McCarthy with his usual force and ingenuity, but it is unnecessary, in my judgment, to enter upon any of the interesting general questions discussed. I agree with the majority of the Appellate Division that from the circumstances in evidence the jury might properly infer that the condition of the switch was due to the negligence of somebody for whom the appellants are responsible; and I think the jury, by their finding, expressed this conclusion with sufficient clearness.

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ANGLIN J.—Read together, as I think they should be, the answers of the jury to the first and second questions submitted to them cover findings

(a) that the cause of the derailment which resulted in the death of Horner was the switch in question "not being properly set and locked,"

(b) that the existence of this state of affairs was attributable to the defendants, and

(c) that it amounted to actionable negligence.

These findings, unless they are not sustainable, sufficed in my opinion, to warrant the entry of judgment for the plaintiff for such damages as she was entitled to recover.

That the derailment was caused by an unlocked switch being partly open is common ground. The plaintiff offered no evidence to shew how the switch came to be in that condition, invoking the doctrine *res ipsa loquitur* to establish *prima facie* responsibility of the defendants for its being so. That, if attributable to an act or default of them or their servants, the position of the switch amounted to actionable negligence is neither questioned nor questionable.

Nor does it seem open to doubt that, if the plaintiff's husband had been a passenger—if the relation of master and servant had not subsisted between him and the defendant company—upon the fact that the derailment was caused by a partly open switch being established or admitted, the applicability of the doctrine *res ipsa loquitur* would have been incontestible.

The switch belonged to and was under the management of the defendants; in the ordinary course of things it could not have been half open as it was unless the defendants' servants in charge of it had

failed in some respect to use proper care; in the absence of explanation by the defendants it would be reasonable for a jury to infer that the switch was not properly closed and locked because of some want of care on the part of those servants. *Scott* v. *The London and St. Katherine Docks Co.* (1); *Flannery* v. *Waterford and Limerick Rly. Co.* (2).

Mr. McCarthy strongly contended, however, that the fact that Horner was an employee of the defendants excludes the applicability of *res ipsa loquitur*. That and the sufficiency of the evidence adduced by the defendants to establish that they and their servants had fully discharged their duty in regard to the switch and thus to lead to the inference that its admittedly improper position was ascribable to the intervention of some foreign agency for which they were not accountable, or at least to render unwarrantable the inference that it was attributable to them, were the main grounds of the appeal.

That *res ipsa loquitur* cannot ordinarily be invoked by a servant seeking to hold his master liable for injuries sustained in the course of his employment is due to the fact that the injury may have been caused by the fault of a fellow servant for which at common law the master would not be liable or, it may be, to the fault of the servant himself. Where it is equally probable that the master may or may not be liable no presumption of liability can arise. But when, as in Alberta, the defence of common employment has been taken away by statute and the master is liable to a servant for injuries due to the neglect of a fellow employee if the servant injured was himself neither responsible for nor in a position to know the existence of the danger which caused the injury complained of,

(1) [1865] 3 H. & C. 596. (2) [1878] Ir. R. 11 C.L. 30.

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there seems to be no reason why he should not be entitled to invoke the doctrine *res ipsa loquitur* as if he were a stranger. In my opinion upon the admitted facts of this case the plaintiff was clearly justified in invoking that doctrine. In all probability the switch would not have been unlocked and partly open as it was found immediately after the derailment unless there had been neglect of duty by some servant of the defendants. At least that was an inference which a tribunal of fact could properly draw.

The sufficiency of the evidence adduced by the defendants to rebut that inference by shewing that their servants had fully discharged their duty in regard to the position of the switch was eminently a matter for the jury. The credibility of the witnesses who deposed to the discharge of their several duties in regard to the closing of the switch or seeing that it was closed was for the jury to determine. Counsel for the respondent very properly pointed out that while there was the positive evidence of Neil Macdonald, a brakeman on a train which had used the switch twenty-four hours before the derailment, that he had closed and locked it, the conductor of that train upon whom the company's rules cast the duty of seeing that every switch used by this train is left in proper position was not called as a witness, and there was no satisfactory evidence that other trains had not used the switch in the interval. Mr. McCarthy answers that the train despatcher's sheet was produced and shewed every train operating in the division during the period in question. He also stated that the failure to call either the conductor or the train despatcher is urged here for the first time. It is impossible to know whether the jury discredited the evidence of Neil Macdonald, and that of Jordan, the section

foreman, who testified that he saw the switch locked on the morning of the day of the accident, or whether they inferred *proprio motu* from the failure to call the train despatcher that some other train or engine had used the switch during the day of the accident.

Mr. McCarthy also relied very much on evidence that another train travelling in the same direction as that on which the unfortunate Horner was engaged had safely passed over the switch about eleven hours before the derailment. This is no doubt cogent evidence, but its conclusiveness depends wholly on the sufficiency of the proof that there had been no legitimate use of the switch during the intervening eleven hours.

It is common ground that the opening of the switch by accident, if it were locked, was an impossibility. Interference with it by mischevious boys, as was suggested, would be, to say the least, highly improbable. The opening of it by design by any unauthorized adult would be a criminal act such as should not be presumed. While, if trying the case on the evidence in the record and without seeing the witnesses, I might have been disposed to consider that the presumption of actionable fault arising under the doctrine *res ipsa loquitur* was sufficiently met, I am unable to say that a jury properly instructed, as the jury in this case admittedly was, could not reasonably have reached the contrary conclusion.

While the verdict was undoubtedly large, having regard to the facts that the man who was killed was only twenty-six years of age, that he was in good health and in good standing as a railroad man, that he had been already promoted to the rank of conductor and apparently had excellent prospects for future advancement, that he was earning at the time of his death about $175 a month, and that the plaint-

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iff, aged twenty-three years, and two children of tender age survive him, I am not prepared to say that the amount of the judgment is so excessive that we would be justified in setting it aside on that ground.

The appeal in my opinion fails.

BRODEUR J.—This is a railway accident. The plaintiff's husband was employed as brakeman on one of the appellant's trains, which derailed at a switch west of Peace River Station. Three men were killed, amongst whom was this brakesman. In inspecting the wreck it was found that the switch was half open and that the derailment was due to that.

The plaintiff proved her case in establishing the accident and the condition of the switch and of the railway line at this place. She rested her case on the maxim, or, as I prefer to call it, on the rule of evidence *res ipsa loquitur*.

The defendant company then moved for a non-suit on the ground that this rule of evidence does not apply as between master and servant. The trial judge dismissed the defendant's application and the company called evidence.

This evidence is to the effect the switch had been opened the night before for the passage of a train, that it had been properly locked after closing it, that on the day of the accident, some trains passed in both directions and nothing strange was seen in connection with this switch which appeared in good order, that about an hour before the accident happened a train going west passed at that place and the switch looked all right and that when the eastbound train on which the brakesman Horner was working, passed the switch was half open.

Now how this change in the switch came to happen no evidence is adduced to shew. It was left to the jury as a question of inference. If the verdict had been a general verdict it would without doubt, have to be sustained, because there is enough of evidence to leave to the jury the inference that the accident was due to the negligence of the company. But the verdict was not a general one. It is stated that the defendant was guilty of negligence; and they assign as a cause of the negligence that the switch was not properly set and locked and that it caused the derailment and wreck of the train. In other words, the answer appears to be a finding of the cause of the accident rather than a fixing of the responsibility for it.

But as they have in answer to the first question found expressly that there was negligence on the part of the railway company, their finding may be due to the fact that they may not have believed some of the witnesses for the defence or they may have drawn the inference that the accident was due to the fault of the employees of the company.

As to the rule of evidence *res ipsa loquitur*, it should be observed that the exclusion of the rule in the case of master and servant is based upon the doctrine of common employment. In Alberta, a legislation was passed by which this doctrine of common employment has been discarded; and I am of the view that the rule of evidence should be fully observed in a system of legislation where the doctrine of common employment is no more in force.

For these reasons I would dismiss the appeal with costs.

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MIGNAULT J. (dissenting).—The respondent's husband was killed in an accident on the appellant's railway, and in a suit against the appellant she obtained from the jury a verdict for $25,000 which, subsequently to the appeal by the appellant to the Appellate Division of Alberta, she reduced to $20,000.

The facts fortunately give rise to no dispute between the parties. Late at night on Sunday, July 6th, 1919, a freight train known as Extra East No. 2047 of the appellant was derailed at Peace River Junction, a place where there is practically no settlement, and the respondent's husband, who as head end brakeman was riding in the cab of the engine, was killed, as were also the engineer and fireman. At the place where the locomotive was derailed a loop line known as the "Y," used to permit trains to change their direction, leaves the main line and extends to a branch of the railway to the north, which branch also leaves the main line a short distance further east. The cause of the derailment was discovered immediately by the conductor, the rear end brakeman and an employee who was riding as a passenger, all three of whom were in the "caboose" and were uninjured, the rear part of the train not having left the rails. This cause was that the switch connecting with the "Y" was about half open, so that the wheels of the engine, the tender and the first fifteen cars left the rails, and the engine in which Horner was riding was thrown over onto its right side. The switch, or rather the lever handle by which it was operated, was usually held in place by a locked padlock, but after the accident this padlock was found unlocked. The lamp of the switch was not burning after the accident and, as a matter of fact, it then received a blow which would have sufficed to put out the light had it been

burning. The switch lever handle was raised and was pointing across the main line, while the target was very nearly parallel with the main line. At that place there is a curve and the evidence seems to shew that from the engine of train No. 2047 approaching the switch the lamp would have shewn green if it was then lighted, as it must have been, for otherwise it would have been the duty of the engineer, who had full view of the switch for a mile and a half before he reached it, to stop his train. It is therefore not unreasonable to assume that the light was then burning and showed green. This, however, is, and can only be, a surmise, for none of the ill-fated occupants of the locomotive cab survived to tell the story.

In her action claiming on her behalf and on behalf of her children $30,000 damages for her husband's death, the respondent alleged three grounds of negligence against the appellant:—

(a) In running the said train at the time and place of the said occurrence at an excessive and dangerous speed.

(b) In permitting or causing the said "Y" switch to be set or placed improperly to allow the said train to pass along and upon the main track safely.

(c) In having a defective switch and railway tracks at the time and place of said occurrence, whereby the said locomotive was caused or allowed to leave the railway tracks as aforesaid.

Of these three grounds the first and third may be disregarded because none of them were found by the jury.

At the trial the respondent made formal evidence of the accident, by calling a physician to prove the cause of death and by putting in parts of the examination on discovery of Mr. Irwin, superintendent of the first division western district of the appellant's railway, and also of the damages claimed by her, and

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then declared that she rested her case and relied on the doctrine of *res ipsa loquitur*. The appellant having moved for a non-suit, the question of this doctrine and its applicability between master and servant was argued and the trial was adjourned to give the learned trial judge time to examine the authorities. The following day the learned trial judge refused the motion, but the respondent nevertheless decided to put in additional parts of the examination of Mr. Irwin with the object apparently of further establishing negligence on the part of the appellant. The motion for non-suit was renewed at what was termed the second close of the respondent's case and was again denied.

The appellant then proceeded to call witnesses, to wit its servants and officials, in order to rebut any *prima facie* case resulting from the rule *res ipsa loquitur*, assuming its applicability in a case like this. I will have to discuss this evidence in detail, so I will immediately quote the answers made by the jury to the questions submitted by the learned trial judge.

1. Was the death of Horner caused by the negligence of the defendant? A. Yes.

2. If so, in what did such negligence consist? A. Of switch known as west main track switch leading to the "Y" at Peace River Junction not being properly set and locked causing the derailment and wreck of train known as Extra East No. 2047.

3. If the plaintiff is entitled to recover, what amount of damages is she entitled to recover? A. $25,000 (twenty-five thousand dollars.)

Before discussing the rule of evidence *res ipsa loquitur*, the first point to be considered is whether it applies in a master and servant case like this one, having regard to the state of the law in the province of Alberta.

It is broadly stated in text books such as Beven on Negligence, 3rd edition, p. 130, and Halsbury, Laws of England, vol. 21, p. 439, note m, that this rule does

not apply between master and servant. But on referring to the cases cited by them: *Patterson* v. *Wallace* (1); *Lovegrove* v. *London, Brighton and South Coast Rly. Co.* (2), where a dictum of Willes J. at p. 692 is quoted, it is seen that the fellow servant rule was there applied, and, in cases governed by that rule, it is clear, as stated by Willes J., that

> it is not enough for the plaintiff to shew that he has sustained an injury under circumstances that may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation.

And the same eminent judge, at p. 691 of the same report, said that

> there can be no doubt that the person injured and the person whose negligence caused the injury were fellow servants.

I am therefore disposed to think that because of the fellow servant rule, which applies (except in matters governed by Workmen's Compensation Acts) in almost every jurisdiction subject to the common law, the maxim *res ipsa loquitur*—which is no more than a presumption of negligence that the defendant must rebut—has been considered inapplicable in master and servant cases. But the fellow servant rule has been excluded in Alberta by chapter 98 of the Ordinances of the North West Territories, whereby is was enacted that:

> 2. It shall not be a good defence in law to any action against an employer or the successor or legal representative of an employer for damages for the injury or death of an employee of such employer that such injury or death resulted from the negligence of an employee engaged in a common employment with the injured employee any contract or agreement to the contrary notwithstanding.

(1) [1854] 1 Macq. (H.L.Sc.) 748. (2) [1864] 16 C.B.N.S. 669.

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Therefore inasmuch as the liability of the master for injuries suffered by his servant is in Alberta the same as his liability for injuries inflicted on a stranger, I would not be disposed to qualify the application of the maxim *res ipsa loquitur* by distinguishing one case from another. And there is no authority that I know of which excludes this maxim between master and servant in a jurisdiction where the rule as to common employment has been repealed by statute. This point now stands to be determined by this court for the first time, and I think it must be determined against the contention of the appellant.

Now as to the rule *res ipsa loquitur*, a rule of evidence I have said, and a very reasonable one, it is now firmly established, and its scope is well shewn by the following quotations from the opinions of eminent judges.

In *Christie* v. *Griggs* (1), Sir James Mansfield C.J., observed that

> when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it is unfounded; and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a mere accident.

The defendant in that case having made evidence concerning the cause of the accident, the Chief Justice said:—

> There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them, went no further than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff has no remedy for the misfortune he has encountered.

(1) [1809] 2 Camp. 79.

In *Carpue* v. *London and Brighton Rly. Co.* (1), Lord Denman said:—

It having been shewn that the exclusive management, both of the machinery and of the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give.

In *Byrne* v. *Boadle* (2), the case of a barrel falling from a building on the plaintiff, Pollock C.B. expressed himself as follows:—

The fact of its falling is *prima facie* evidence of negligence and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

In *Scott* v. *London and St. Katherine Docks Co.* (3), Erle C.J. said at p. 601:—

There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

In *Kearney* v. *London, Brighton and South Coast Ry. Co.* (4), a case of a brick falling from a bridge and injuring a person passing under it, Cockburn C.J. stated:—

Where it is the duty of persons to keep premises, or a structure of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to shew that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed by the fact that there was the defect from which the accident had arisen. Therefore there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts.

(1) [1844] 5 Q.B. 747, at p. 751.
(2) [1862] 2 H. & C. 722.
(3) [1865] 3 H. & C. 596.
(4) [1870] L.R. 5 Q.B. 411.

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In *Flannery* v. *The Waterford and Limerick Ry. Co.* (1), the plaintiff had been injured by the derailment of a train in which he was travelling. Palles C.B. followed *Scott* v. *London & St. Katherine Docks Co.* (2), and, at p. 39 said:—

> I am of opinion that as the railway, the engine and the waggon were under the defendants' management, and as the circumstance of the wagon leaving the rails does not happen in the ordinary course of things if due care is used, the fact of the accident was sufficient evidence to call upon the defendants to shew that there was no negligence on their part.

I think therefore that the circumstances of this case and the fact of the open and unlocked switch which undoubtedly caused the derailment, suffice to establish a *prima facie* case of negligence making it incumbent on the defendant to rebut the presumption of fault resulting therefrom.

If the appellant has sufficiently rebutted this presumption there is no doubt that it cannot be held liable for Horner's death. *Christie* v. *Griggs* (3); *Readhead* v. *Midland Ry. Co.* (4). This is therefore the question that must be determined by carefully examining the evidence adduced by the appellant.

In so far as the switch is concerned—and in view of the jury's finding I need not consider the other grounds of negligence set up in the respondent's statement of claim, but I may say that the appellant established that the equipment of the train, its air brakes as well as the railway itself were in perfect condition—it was proved to be one of the best switches on the line. It was last used in connection with the "Y" the evening before the accident. Six miles west of the switch is a summer resort, Alberta Beach, and an excursion train had run from Edmonton to

(1) I.R. 11 C.L. 30.
(2) 3 H. & C. 596.
(3) 2 Camp. 79.
(4) [1867] L.R. 2 Q.B. 412.

this resort on Saturday, July 5th, without stopping at Peace River Junction. On the return trip this train left Alberta Beach about 8.45 P.M. and stopped at this switch to go into the "Y" in order to turn the train. Neil Macdonald, the head end brakeman, on this train, opened the switch to let the train go on to the "Y" track. He swore that after the train had passed on this track, he set the switch in normal position, parallel with the main line, placed the lever handle down and locked it. This witness was not cross-examined by the respondent.

The next day, Sunday, the 6th of July, the day of the accident, Jordan, the appellant's section foreman, as was his duty, inspected the switch between 10 and 11 o'clock in the forenoon. He testified that it was in good condition then, that the lever handle and lock were in proper place, properly locked, and that the switch was set for the main line. He said that on Sundays people are often on the track—it is to be remembered that Alberta Beach is six miles away—and that his hand car, which was some distance east, was stolen that afternoon and taken to near St. Albert, also to the east of the switch. The switch lamp was then burning. He had often inspected the switch and never found it unlocked.

Another freight train of the appellant, known as extra 2147 west, had twice passed the switch along the main line that Sunday. First coming from Edson, which is west of Peace River Junction, it passed the switch about noon, going east, without stopping. The engineer of this train, Fallon, swore that the switch then was all right, and that had it been wrong the train would have been derailed, for it was going in the same direction as Horner's train went that same night. Returning towards Alberta

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Beach that evening, his train passed the switch between 8 and 9 o'clock, and went on to Alberta Beach, where it was crossed by Horner's train No. 2047, which did not stop at Alberta Beach and continued on to the east and was derailed at the switch as already stated. Fallon, the engineer of train 2147, being on the north side of the locomotive (the switch was on the south side of the line), could not see the switch when he went on that evening to Alberta Beach, but the fireman, Wellington, and the head end brakeman, Farrel, of train 2147 were in position to see the switch as they passed, and both swore that the switch was then all right, the target shewing all right for the main line, and Farrel said that had the switch handle been in a horizontal position facing north he would have noticed it, and that he saw nothing like that. It was however stated by Wellington that if the switch was open an inch or two as his train went west, it would not affect the train at all, and that the flanges of the wheels would bring it over into its proper place. As to this, another witness of the appellant, Jordan, confirmed this last statement, saying that a train going west would close the switch, but that it would spring to a certain extent afterwards. None of the men on the train 2147 could say whether the switch light was burning when this train passed the switch going west that evening, for it was not then dark enough to notice the light.

As I have said, train 2047 on which Horner was riding passed train 2147 at Alberta Beach, going east. It was derailed at the switch about half an hour afterwards, and I have described the condition in which the switch was then found, unlocked, the lever handle raised and pointing to the north across the main line.

Of the witnesses called by the appellant, the learned trial judge said in his charge to the jury:

> Now I think I may say with perfect propriety that in my opinion the railway company has acted with great candour and with great fairness in the number and class of the witnesses whom it has placed before you. It seems to me that they practically exhausted the witnesses who were able to cast any light upon this tragedy, and it is to be commended for that. Those men who were called were without exception all employees of the railway company. There has not been a suggestion made against their perfect honesty, and I am very glad that that is so. These men struck me as being fair-minded, honest, intelligent men, who gave evidence they did give with perfect candour and straightforwardness. That is my opinion of them. You may have a different opinion. I am simply expressing my own opinion, but there is no suggestion that simply because they are employees of the railway company they twisted their evidence to suit the purpose of their employer. We all know, in these days at any rate, that the sympathies of railway men are just as apt to be with each other as they are with their employer. However, Mr. Campbell was exceedingly fair in his conduct of this case and has not made the slightest imputation against the perfect honesty of the various witnesses called by the defence. So that you have had these men before you, you have heard from them their story, and it is for you to say now upon a review of all the evidence whether in your opinion this unfortunate accident occurred through the negligence of the railway company.

Elsewhere the learned trial judge said:—

> I feel quite justified in saying that in my opinion all the evidence that could be given has been given in this case, except, perhaps, the evidence of the man by whom this switch was opened and who apparently is not known to any person, and you are entitled to draw such inference from all the evidence as that evidence will justify.

It was contended on behalf of the respondent that the jury may not have believed the testimony of these witnesses, whose credibility however was in no way impeached by her counsel, and the straightforwardness of whose evidence was testified to by the trial judge; that they may not have believed Macdonald who said that he set and locked the switch for the main line on the Saturday evening, and he was not cross-examined by the respondent's counsel,—nor Jordan who on Sunday forenoon found the switch

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locked and set for the main line—nor the train crew of train 2147. If the jury did not believe this evidence there is nothing in the verdict to shew it, for the negligence which they found was that the switch was not properly set and locked, which obviously refers to its condition at the time of the derailment and involves no necessary disbelief in the testimony of Macdonald and Jordan that it had been properly set and locked the evening previous and was so set and locked on the forenoon of Sunday. And this testimony was conclusively corroborated by the fact that train 2147 passed the switch safely at noon on Sunday going east, for had the switch been in the condition in which it was that evening at the time of the derailment, this train would unquestionably have been derailed.

The only possible difficulty to my mind is that it might perhaps be said that the open and unlocked condition of the switch at the time of the accident justified the inference that Macdonald, when he said that he had closed it the night before, and Jordan, when he testified that it was closed and locked between 10 and 11 of the forenoon of Sunday, were mistaken and should be discredited. That inference might have had some weight had train 2147 not passed the switch safely going east at noon on Sunday, but with this fact standing out I would not think that any jury would be justified in disregarding the positive evidence made by the appellant that the switch had been properly set and locked. Indeed the evidence as to the prior condition of the switch is all one way and is so strongly corroborated that it would seem almost a mockery if a verdict finding that the switch had not been properly set and locked when last used could be supported by suggesting that perhaps the jury had not believed this evidence. And, as I have already

said, I construe the jury's answer as referring merely to the condition of the switch at the time of the accident and not to its previous condition that day and the evening before.

I think that taken with what the learned trial judge said to the jury when they were recalled after discussion of objections to the charge, the jury's answer to question 2 must bear this construction. The learned trial judge said:

> I told you at the start of my charge that the plaintiff by a simple proof of the fact that this accident had occurred had imposed upon the company the onus of proving that it did not occur through its negligence. I think I made myself quite plain as to that. And it follows from that, of course, that if the company has not satisfied you that the accident did not occur through its negligence then it did not discharge that onus, and the plaintiff is entitled to a verdict.

The appellant's counsel did not object to this direction, which, in my judgment, may I say so with deference, goes beyond what is incumbent on the defendant in such cases. See *Christie* v. *Griggs* (1) and *Readhead* v. *Midland Ry. Co.* (2). But the jury being told that the simple proof of the accident imposed on the company the onus of proving that the accident did not occur through its negligence, and that if the company did not prove this the plaintiff was entitled to a verdict, naturally considered the open and unlocked switch which caused the accident as being itself the negligence they found against the defendant in answer to the first question, and that is the verdict they rendered.

So we have this result, if the respondent's contention is sound, that because the jury finds that the switch was unlocked and unset at the time of the accident, evidence of regular inspection of the switch, positive

(1) 2 Camb. 79 (2) L. R. 2 Q.B. 412

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proof that when inspected that day it was locked and set for the main line, in fact evidence that the appellant used reasonable care and diligence and did all that human care and foresight could suggest to ensure the safety of its line, is all of no avail to rebut what obviously is a mere presumption under the rule *res ipsa loquitur*.

I cannot concur in this result which would impose on the railway company the obligation of an insurer towards those who travel on its lines. For it is obvious that the best organized and most carefully guarded human systems may and do occasionally fail. But when the railway company has done all that human care and foresight can suggest to render its lines safe to the public and to its own employees, an occurrence like the one under consideration is as much a pure accident as is the breaking of an axle-tree through a hidden flaw in its welding. And where there has been, as here, regular and careful inspection of the switches of the railway, unless it be held that the appellant is obliged to have an employee in constant attendance at each of its switches, I must find that the appellant's evidence completely rebuts and destroys the *prima facie* case—for it is only a *prima facie* case—which results from the rule *res ipsa loquitur*. The respondent was thus without evidence of the negligence which she alleged and which was the very basis of her right of action, and the appellant was entitled to a verdict in its favour. Under these circumstances, the verdict for the respondent appears to me entirely perverse.

I may add that at the argument I asked counsel for the appellant what criticism he had to make of the evidence adduced by the appellant. He said first that the conductor of Macdonald's train, whose

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duty it was, as well as of Macdonald himself, to see that the switch opened for that train had been properly closed and locked, should have been called to corroborate Macdonald. In view of the fact that possibly the conductor did not verify this, for otherwise he would no doubt have been called, his testimony would have been useless, and the learned counsel who had not even cross-examined Macdonald, should not therefore criticise the non calling of this conductor. A second criticism was that the appellant had not proved that no train since Macdonald's train had used this switch. The learned counsel probably forgot that he had himself proved this fact by putting in question and answer No. 224 of Irwin's testimony on discovery which read as follows:—

Q. When prior to the accident was the switch in question last operated? A. 17.20 K. July 5th, that would be 5.20 P.M.

I would therefore allow the appeal and dismiss the respondent's action.

Appeal dismissed with costs.

Solicitors for the appellant: *Short, Cross, Maclean & McBride.*

Solicitors for the respondent: *Friedman & Lieberman.*