THE GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

F. J. EARL (PLAINTIFF) ..... RESPONDENT.

1923
*Feb. 7, 8.
*April 3.

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

Negligence—Railways—Accident—Level crossing—Switching operations—Breach of order of Railway Commissioners—Contributory negligence—Defence available.

In an action for damages brought by a person struck by a moving train when using a level crossing on a highway, the trial judge found that the railway company, in causing one of its switching trains to pass over the crossing, had acted in contravention of an order of the Board of Railway Commissioners; but he also found the injured person guilty of contributory negligence.

Held, Brodeur J. dissenting, that the railway company was not liable; its disregard of the board's order did not preclude its setting up as a defence the contributory negligence of the respondent, and it was not proved that the railway company's servants by the exercise of ordinary care and caution could have avoided the consequences of the respondent's negligence.

Judgment of the Appellate Division ([1922] 3 W.W.R. 406) reversed, Brodeur J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Harvey C. J. (2), 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 judgment now reported.

Maclean K.C. for the appellant. The train movement was not one impliedly prohibited by the order of the Board of Railway Commissioners. Even if the train had no right to cross the highway at the time, or if there should have been a watchman stationed on the crossing, the respondent, after knowing that the train did intend to cross, proceeded recklessly and carelessly into a dangerous place and should be held the author of his misfortune; and the judgment should have given effect to the respondent's negligence.

*PRESENT:—Sir Louis Davies C.J. and Duff, Anglin, Brodeur and Mignault JJ.

(1) [1922] 3 W.W.R. 406. (2) [1922] 3 W.W.R. 27.

1923

GRAND TRUNK PAC. RY. CO. v. EARL.

Duff J.

Ford K.C. for the respondent. The respondent was not guilty of contributory negligence, and the railway company acted illegally and in contravention of the order of the Board of Railway Commissioners.

THE CHIEF JUSTICE.—I would allow this appeal with costs throughout concurring in the reasons therefor stated by my brothers Anglin and Mignault.

DUFF J.—The appellate company was disobeying the enactments of the order of the Railway Commission as to the hours within which shunting might be carried on in the locality where the accident occurred, and in requiring the presence of a watchman. I do not think it follows, however, that the company's cars were such an unlawful (i.e. destitute of statutory authority) obstruction of the street traffic as to constitute what should be described as in point of law a nuisance, nor do I think the rule in *Rylands* v. *Fletcher* (1) comes into play; otherwise I should have thought it necessary to consider carefully the question whether the doctrine of contributory negligence applied. I think the charge against the company must be based upon the proposition that they were improperly and in violation of the order working their railway. Section 345 of the Railway Act has not been construed as enacting that a railway company should be responsible for all damages resulting in part through the negligence of the victim and in part through such disobedience. It is settled that in those provinces in which the doctrine of contributory negligence is part of the law, as a general rule it must be applied for the purpose of determining whether an injury arising wholly or in part from a contravention by a railway company of the provisions of The Railway Act or of an order made under the authority of the Act respecting the management of its trains is actionable. *The Grand Trunk Ry. Co.* v. *McAlpine* (2); *Canadian Pacific Ry. Co.* v. *Smith* (3). This is one of those cases that sometimes cause one to turn a rather wistful eye to jurisdictions in which where injury results from the combined negligence or misconduct of the plaintiff and the defendant, the burden of the

(1) [1868] L.R. 3 H.L. 330. (2) [1913] A.C. 838.
(3) [1921] 62 Can. S.C.R. 134.

loss can be equitably distributed. But where the English doctrine of contributory negligence reigns, a tribunal assessing damages in such circumstances must find the defendant responsible for the whole of the loss or for none.

The House of Lords unanimously affirmed the view expressed by the Lord Chancellor in *Admiralty Commissioners* v. *SS. Volute* (1), that the question of contributory negligence should be dealt with somewhat broadly and upon common-sense principles, as a jury would probably deal with it. The general rule has usually been put in accordance with this sentence from the judgment of Lindley L.J., in "*The Bernina*" (2):

> I take it to be settled that an action at common law by A against B for injury directly caused to A by the want of care of A and B will not lie.

(*Dowell* v. *General Steam Navigation Co.* (3); *Walton* v. *The London, Brighton and South Coast Ry. Co.* (4); *The Bernina* (2)). As Lord Sumner said, in his judgment in *Weld-Blundell* v. *Stephens* (5):

> Direct cause excludes what is indirect, conveys the essential distinction, which *causa causans* and *causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result.

The rule thus broadly stated must be supplemented, of course, by the judgment of Lord Penzance in *Radley* v. *London & North Western Ry. Co.* (6) as interpreted in *British Columbia Electric Ry. Co.* v. *Loach* (7); but I cannot help thinking that there has been a tendency to over-refinement in the application of the law which has led to a good deal of confusion and uncertainty.

With the greatest respect for the courts below, my conclusion is that this case comes within the class of cases envisaged by Lord Cairns in *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (8). I repeat the sentence, which has many times been approved and applied, e.g., in *Grand*

(1) [1922] 1 A.C. 129, at p. 144.
(2) [1886] 12 P.D. 58, at p. 88.
(3) [1855] 5 E. & B. 195, at p. 205.
(4) [1866] H. & R. 424.
(5) [1920] A.C. 956, at p. 984.
(6) [1876] 1 App. Cas. 754.
(7) [1916] 1 A.C. 719.
(8) [1878] 3 App. Cas. 1155, at p. 1166.

1923

GRAND TRUNK PAC. RY. CO. v. EARL.

Duff J.

Trunk Ry. Co. v. *McAlpine* (1), and *Canadian Pacific Ry. Co.* v. *Fréchette* (2), by the Judicial Committee; and in *The Canadian Pacific Ry. Co.* v. *Smith* (3).

If a railway train, which ought to whistle when passing through a station, were to pass through without whistling and a man were, in broad daylight, without anything in the structure of the line or otherwise to obstruct his view, to cross in front of the advancing train and be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man and not the carelessness of the company which caused his death.

The violation of the restriction as to hours may be left out of account, obviously. As to the watchman, I doubt very much indeed if the facts would justify a finding that the presence of a watchman would probably have saved the respondent. At all events I am quite clear that the object of having a watchman is to warn people that they are in presence of a railway and that the tracks are in use, to call their attention to the risks in order to give them an opportunity of exercising that prudence which people usually display in such circumstances; and not at all to protect people by forcible means from the consequences of their own folly and recklessness in refusing to take warning and observe the usual precautions in the presence of such risks.

The respondent's miscalculation (I assume there was a miscalculation) is, I think, of no importance. His fault was in his heedless inattention to the risks of a situation which would have awakened the attention and the care of any ordinarily careful person. Miscalculation was inexcusable in the circumstances.

To distinguish this case from the hypothetical case put by Lord Cairns or from the case of *Canadian Pacific Ry. Co.* v. *Smith* (4), or, indeed, from a number of other authorities which could be named would, I think, with the greatest respect, be approaching perilously near to frittering away the substance of the doctrine which it is the duty of the court to apply; and unless the language of the rule that a plaintiff cannot recover when carelessness is in part the "direct" cause of the accident is to be interpreted with no regard whatever to the meaning of the words em-

(1) [1913] A.C. 838.

(2) [1915] A.C. 871, at pp. 879 and 888.

(3) 62 Can. S.C.R. 134.

ployed, I cannot understand an affirmation that the respondent is not within it. The case is not at all like *Slattery's Case* (1) in the view Lord Cairns took of it (as well as Lord Penzance), namely, that notwithstanding the plaintiff's want of due care and attention in the presence of a railway, the blowing of a whistle might (in the opinion of the jury) have awakened his attention to the fact that a train was approaching; nor like the *Ottawa Electric Ry. Co.* v. *Booth* (2), where the driver of one street car, meeting and passing another which was stopping to enable passengers to alight, proceeded without sounding his bell in order to give warning to passengers who most probably would be passing around the rear of the other car, oblivious of the peril arising from the fact that they were about to encounter a car moving on another track. Nor is it like *Long* v. *Toronto Ry. Co.* (3), where the driver of the car saw a pedestrian, evidently in a state of abstraction, about to pass in front of his car and negligently failed to take in due time proper measures to avoid him; nor has it any resemblance to *Loach's Case* (4).

The appeal should be allowed and the action dismissed with costs.

ANGLIN J.—The defendant railway company appeals from the judgment of the Appellate Division of the Supreme Court of Alberta affirming the judgment of Harvey C. J. awarding the plaintiff $3,850 as damages for personal injuries sustained at a level crossing in the City of Edmonton.

By an order of the Board of Railway Commissioners the defendant company was required to carry out its switching movements over the crossing in question between the hours of 1 o'clock and 2.30 o'clock p.m., and the hours of 9 o'clock p.m. and 6 o'clock a.m., and to keep a watchman on duty to protect the crossing during the periods when switching operations should be carried on. The plaintiff was injured by an engine engaged in switching operations at 6.30 o'clock p.m. on the 5th July, 1921. No watchman was on duty at the time. I am satisfied that the defend-

(1) 3 App. Cas. 1155.
(2) [1920] 63 Can. S.C.R. 444.
(3) [1914] 50 San. S.C.R. 224.
(4) [1916] 1 A.C. 719.

1923
GRAND TRUNK PAC. RY. CO. v. EARL.
Anglin J.

ant's train which injured the plaintiff was unlawfully passing over the crossing and that liability for the injury done him would therefore be clear if contributory negligence, of which he has been found guilty, had not deprived him of the right to recover.

I cannot, however, accede to the suggestion that section 310 (1) of the Railway Act (1919, c. 68) required that a person should be stationed on the tender of the engine to warn persons crossing or about to cross the railway. That provision applies only to "any train not headed by an engine." The train in question was so headed, although the engine was moving reversely.

For the plaintiff it is urged that he was not guilty of contributory negligence; that, if he was, the defendant could nevertheless by the exercise of reasonable care have avoided the consequences of his negligence and that contributory negligence is not available as a defence to a claim for injury caused by a defendant when acting in violation of a statutory prohibition.

The learned judge found the plaintiff guilty of contributory negligence in not taking reasonable care to avoid placing himself in the way of the train which he admitted he knew was about to pass over the crossing. After a careful study of the evidence I am satisfied that this finding must stand. The learned Chief Justice, however, held that the defendant was nevertheless liable on the ground that

> a watchman standing to guard the track and warn approaching passengers, if properly performing his duties, would almost certainly have observed and warned the plaintiff in time to prevent the accident.

With very great respect I cannot accept that finding, notwithstanding the approval of it by the Appellate Division. It is, I fear, purely a conjecture that a watchman could have effected what the fireman shouting from the approaching engine failed to accomplish. The plaintiff was either so intent on guiding his bicycle or so absent-minded that he failed to heed the fireman's warning. It seems to me to be more than probable that a watchman's flagging or shouting would have been likewise unheeded.

The plaintiff's negligence continued up to the moment of the impact; so much so that at the trial he could not himself say whether the train hit him or he hit the train.

It is a fair conclusion from the evidence that, after the likelihood of his putting himself in danger was or should have been apparent to employees of the defendant, they could not have avoided the consequence of his rashness and that they had not incapacitated themselves from doing so by anything they had done or omitted to do, except engaging in the illegal switching operation. This case in my opinion does not fall within the principle of the decision in *British Columbia Electric Ry. Co.* v. *Loach* (1).

The negligent running into danger of the unfortunate plaintiff, if not the sole proximate cause of his being injured, was at least a contributing cause quite as proximate and immediate as the breach of the order of the board by the defendants. Indeed I might, if necessary, require to consider carefully whether the unlawful conduct of the defendant was not merely a condition of the accident rather than a cause of it in the legal sense. The injury to the plaintiff can scarcely be attributed to the unlawful quality of the defendant's act in carrying on switching operations during prohibited hours. But see *Admiralty Commissioners* v. *SS. Volute* (2). If the unlawful switching should be regarded as a contributing cause, the accident was the result of the joint fault of the defendant and the plaintiff; without the negligence of the latter operating as a *causa causans* it could not have happened. There is therefore no cause of action. *Wakelin v. London & South Western Ry. Co.* (3) per Brett M.R.

Nor does the fact that the plaintiffs were using the highway crossing in violation of a statutory prohibition exclude the defence of contributory negligence. That question has been before the English and the Ontario courts several times and, with the possible exception of a dissenting judgment by Meredith C.J. C.P., in *Godfrey* v. *Cooper* (4), cited by Mr. Ford, judicial opinion has been uniform in this sense.

In the case referred to, Riddell J. and Middleton J., with whom Latchford J. concurred, cite with approval *Walton* v. *Vanguard Motor Bus Co.* (5), where Lord Alver-

(1) [1916] 1 A.C. 719.
(2) [1922] 1 A.C. 129, at p. 144.
(3) [1896] 1 Q.B. 189 N.
(4) [1920] 46 Ont. L.R. 565.
(5) [1908] 25 Times L.R. 14.

1923

GRAND TRUNK PAC. RY. CO. v. EARL.

Anglin J.

stone C.J., dealing with a case in which a lamp standard unlawfully placed on a footpath had been negligently run against and damaged by the defendants, said:

The defendants were not entitled to raise the point that the lamp-post was an object they were entitled to knock down without being held liable for negligence.

In *Deyo* v. *Kingston & Pembroke Ry. Co.* (1), this question was squarely presented for decision. The defendants, in violation of a prohibitive section of the Railway Act, were using freight cars of a height which did not allow an open and clear headway of 7 feet between the top of the cars and the bottom of the lower beams of a bridge over the railway. A brakesman, who was on the top of a moving freight car contrary to a rule of the defendant company, was killed by coming in contact with this overhead bridge. An action brought by his representative failed. Osler J.A., delivering the judgment of the Court of Appeal, said:

There remains the question whether the violation of the statutory duty of the defendants under the other section was the proximate cause of the death of the deceased; or whether this must not be said to have been wholly owing to his own unfortunate neglect of the rules of the company. I feel compelled to say, that on this ground the defence has been made out and that the action must fail. Even to an action founded on the breach of a statutory duty contributory negligence may be a defence, as we constantly see in actions arising under the Workmen's Compensation Act or the Factory Act. *Groves* v. *Wimborne* (2). *A fortiori,* it must be an answer to such an action that the injury was caused by the deceased's own act or omission; that it was caused by or could not have happened but for the servant's direct disobedience of some order or rule of his employers, intended though that may have been to prevent accidents arising from the continued failure of the latter to perform their statutory duty.

In *Groves* v. *Wimborne* (2) it was held that the defence of common employment is not available to a master where breach of an absolute duty imposed on him by statute has caused injury to his servant. Vaughan-Williams L.J., in his judgment in the Court of Appeal said, at p. 419:

No one would contend, if there were contributory negligence, that such negligence on the part of the plaintiff would not be an answer to a claim by him for damages in respect of an injury occasioned through the neglect of his master to perform the absolute statutory duty. It would be an answer for the reason that in fact the damage to the plaintiff would not be caused by the failure of the master to perform the absolute statutory duty, because it would not have happened but for that and something else, namely, the contributory negligence of the plaintiff.

(1) [1904] 8 Ont. L.R. 588.

(2) [1898] 2 Q.B. 402.

In *Blenkinsop* v. *Ogden* (1), Kennedy J., sitting in a Divisional Court, said that

> In an action by an injured person for damages his own contributory negligence would be an answer upon the ground that the immediate and direct cause of the mischief would be his own conduct and not the occupier's neglect to fence.

Iles v. *Abercarn Welsh Flannel Co.* (2) was also a case of injury through a breach of statutory duty to fence off machinery. A Divisional Court (Mathew and A. L. Smith JJ.) dismissed an appeal by the defendants holding that there was no evidence of contributory negligence, but

> intimated that the holding of the county court judge, that the defendants, having been guilty of a breach of a statutory duty, could not set up a defence of contributory negligence by the plaintiff, was wrong.

In *Britton* v. *Great Western Cotton Co.* (3), another case of unfenced machinery, the unsuccessful defence was based on "*volenti non fit injuria.*" Channel B., in the course of his judgment, expressed his agreement with the distinction drawn between a statutory and common law liability,

> not by any means questioning the proposition, however, that in either case contributory negligence on the part of the person injured would afford a defence;

and Piggott B. said:

> It seems that even although there may be a statutory duty, imposed on the employer, the workman must still be careful of his own safety. In this case there is nothing to shew that the deceased knowingly incurred the danger, or was guilty of any want of care, and the defendants, therefore, ought to bear the consequences of their own clear neglect of duty.

In *Kelly* v. *Glebe Sugar Refining Co.* (4) Lord Adam, in delivering the unanimous judgment of the First Division of the Court of Sessions, treated contributory negligence as a defence that would have been available if established.

In *Caswell* v. *Worth* (5), a plea admitting that a shaft, in which the plaintiff was injured, was not fenced as required by the Factory Act, but alleging as contributory negligence that the plaintiff had himself set the machinery in motion contrary to an express order, was sustained on demurrer by a court consisting of Lord Campbell C.J., Coleridge, Wightman and Crompton JJ.

(1) [1898] 1 Q.B. 783.
(2) [1886] 2 Times L.R. 547.
(3) [1872] L.R. 7 Ex. 130.
(4) [1893] 30 Sc. L. Rep. 758.
(5) [1856] 5 E. & B. 849.

1923
GRAND TRUNK PAC. RY. CO. v. EARL.
Anglin J.

The weight of American authority is to the same effect. The cases will be found noted in 29 Cyc., p. 508, under the text:

> Contributory negligence will defeat recovery, even though the negligent act consisted in the violation of a statute or ordinance, and though such violation is held to be negligence *per se*.

A very recent American decision to that effect is, *Ebling* v. *Nielsen et al* (1).

Although none of the cases I have cited is binding on this court, the weight of judicial opinion which they present cannot be disregarded. So long as we are governed by the English doctrine of contributory negligence no sound reason can in my opinion be advanced for holding that defence inadmissible where the defendant's fault consists in the violation of a statutory duty. On the other hand, the present case illustrates the harshness of the rule by which, where there is common fault contributing to cause injury to a plaintiff, he is deprived of all redress and the defendant entirely relieved, although the culpability of the former may be comparatively slight and that of the latter distinctly gross. The doctrine of the civil law that in such circumstances the damages should be divided in proportion to the degree of culpability commends itself to my judgment as much more equitable.

The appeal must in my opinion be allowed and the action dismissed. The appellant is entitled to its costs throughout, should it see fit to exact them.

BRODEUR J. (dissenting).—This is a railway accident at a level crossing at Edmonton. There are no less than six tracks crossing the street; some are main tracks and some are used for switching operations. The latter should be used according to the order of the Railway Board during the night only and during one hour of day-time. However the appellant company disregarded this order of the Railway Board and during the prohibited time was having a reversed engine with a few cars passing on the switching tracks and had no flagman and nobody on the tender to give warning. Earl, who was on a bicycle, saw the train; but having the impression that it would continue across the street in the direction in which it was proceeding when he

(1) [1920] 186 Pac. Rep. 887.

saw it, he tried to reach a track on which he did not expect that the car would pass; but he came into collision with it and was hurt.

His action is to recover damages resulting from his disability, which was estimated at 35 per cent.

The courts below maintained his action for $3,850. The railway company is appealing; and Earl asks by a cross-appeal that the damages be increased to $5,993.61.

It is pretty evident that this level crossing is a very dangerous one. It is at a place where there is a very heavy traffic and it is no wonder that the company, when it applied for a level crossing, was ordered by the Railway Board not to carry out any switching operations during the day, except for one hour and a half, and that a signal man be provided to watch the crossing.

However the company completely disregarded this order and was carrying out shunting operations at a prohibited hour without having a flagman to give warning to the public. Besides, in the evidence given by the engineer of the train, it is admitted that a man on the front of the tender would have had a better chance of warning a victim than a man in the cab.

The finding on the facts was on the whole in favour of the plaintiff and is to the effect that he did not go on the track deliberately.

But, besides that, the defendant company had no right to be on this street at this hour of the day when the accident occurred. It deliberately violated the law as laid down by the Railway Board and it should not be entitled to avail itself of the error of judgment which might have been committed by a person who had a right to be there.

For these reasons, the appeal should be dismissed with costs.

As to the cross-appeal, we do not interfere in this court with the amount of damages granted by the courts below except in very exceptional circumstances which I do not see in the present case.

The cross-appeal should be also dismissed with costs.

MIGNAULT J.—Questions involving the application of the rule of contributory negligence are of much nicety and con-

1923

GRAND TRUNK PAC. RY. CO. v. EARL.

Mignault J.

siderable difficulty and it is not easy to frame a satisfactory formula which can be applied in the almost infinite variety of circumstances where the rule is invoked. (See the article of Lord Justice O'Connor in The Quarterly Review, vol. 38, p. 17.) If I may say so, the doctrine of the civil law, in force in the province of Quebec and also adopted in admiralty matters, is much more equitable, for where there is common fault the liability of each party is measured by his degree of culpability. This prevents the negligent defendant from entirely escaping punishment because the plaintiff, in a greater or less degree, has contributed by his negligence to the accident. However this is a matter for the consideration of the law-maker, for the courts are obliged to apply the law however harsh it may seem.

Save some statements by two or three witnesses to which apparently the learned trial judge gave no weight, there is no dispute as to the material facts. The respondent is a stenographer and book-keeper, and at half-past six of the evening of July 5, 1921, in bright daylight, was riding a bicycle north on 96th Street in the city of Edmonton, approaching the crossing of 105th Avenue, which runs east and west, while the direction of 96th Street is north and south. The centre portion only of 96th Street is paved. The tracks of the appellant's railway cross 96th Street on the level almost at its intersection with 105th Avenue and thence proceed in a northeasterly direction. To the west of 96th Street and at a distance of about one hundred yards are the freight sheds of the appellant. As the respondent approached the crossing, he saw a train of ten loaded freight cars headed by an engine placed reversely, that is to say tender in front, moving in an easterly direction from the freight sheds towards the crossing of 96th Street, and he says he assumed that it would cross the latter street and intended to wait until it had passed. He had all the more reason for waiting because he saw another train approaching the crossing from the east. He had been riding along the paved strip, but as he came near the crossing a motor car in front of him stopped at the tracks, and then backed a few feet, and the respondent left the paved strip and crossed diagonally and in a northeasterly direction over a somewhat muddy portion of the street, for it had been

raining, no doubt intending to go on to the sidewalk and wait there. This brought him to the right and to the east of the motor car, which had its top up and may have obstructed his view of the freight train approaching from the west, the more so as the diagonal direction he was following towards the sidewalk possibly caused him to turn his back to the train. The muddy condition of the roadway he was thus crossing diagonally must have absorbed all his attention, for when he reached the sidewalk he was on the railway track and was struck while still on his bicycle by the tender of the engine and very seriously injured. The train that struck him was shunting and moving at about five miles an hour, the engine's bell constantly ringing. It was stopped within about forty feet.

An important point to be considered is that under an order of the Board of Railway Commissioners of June, 1914, the appellant was authorized to construct, maintain and operate ladder tracks across Kinistine Avenue (now 96th Street), but switching movements were authorized only between the hours of 1 and 2.30 p.m. and between 9 p.m. and 6 a.m. and a watchman was ordered to be provided, at the expense of the appellant, to protect the crossing during the periods that switching operations were being carried on. There was no watchman at the crossing when the accident happened and the shunting itself was at an unauthorized and impliedly prohibited time.

The learned trial judge, speaking of the respondent's conduct, said:—

> I can see no explanation of his conduct consistent with reasonable care and I think he was guilty of negligence in riding on to the track blindly in this way knowing as he did that a train was approaching the crossing.

Notwithstanding this finding of contributory negligence on the part of the respondent, the learned trial judge nevertheless condemned the appellant on the ground that it should have had a watchman at the crossing, who, had he been there, might have warned the respondent of his danger. This reason, with deference, appears to me unsatisfactory, for the watchman, to be of any use, would have had to be stationed between the tracks to stop traffic on both

1923

GRAND TRUNK PAC. RY. CO. v. EARL.

Mignault J.

sides of the crossing, and therefore at some distance from the point where the respondent was struck. It further seems entirely a matter of conjecture whether a warning from a watchman so placed would have prevented the respondent from going on to the track, for the fireman of the approaching engine, when not further away than the watchman would have been, loudly shouted to him to stop and the warning was unheard or unheeded by the respondent.

In the appellate court, Mr. Justice Stuart was of opinion that while the reasons of the learned trial judge were quite sufficient, they were not nearly as strong as they might have been. In his opinion, the appellant's train was crossing the highway illegally, and in so crossing struck the respondent who had the right to be there, and he felt great reluctance under these circumstances in going very far with any doctrine of contributory negligence. Mr. Justice Beck and Mr. Justice Clark adopted the reasons of the trial judge.

A point urged by the respondent is that the appellant should have placed a man on the foremost part of the tender to warn persons on the highway. This turns on the proper construction of section 310 of The Railway Act of 1919, and inasmuch as the train was headed by an engine, although the engine was moving tender first, I do not think the section applies. Any possible warning that could have been given by a man so placed was in fact shouted to the respondent by the fireman of the engine, but to no effect.

As the failure to have a watchman at the crossing or a man on the foremost part of the tender does not afford a satisfactory basis for the judgment rendered against the appellant, there only remains the question whether, assuming the appellant violated a statutory prohibition in carrying on shunting operations at an unauthorized hour, it can escape liability by reason of the contributory negligence of the respondent. In other words, is the contributory negligence of the plaintiff a valid defence where the injury was caused by the defendant in the course of the performance of an illegal act?

I do not think the defence of contributory negligence is excluded in a case like this one. It is true that proof of the

breach of a statutory prohibition or of a statutory duty relieves the plaintiff from the necessity of alleging or proving negligence. But it is not enough to find that the defendant was negligent, for, if the plaintiff was himself guilty of negligence which caused the accident or which contributed thereto, he cannot recover damages from the defendant, unless, in the language of Lord Atkinson in *Grand Trunk Railway Co.* v. *McAlpine* (1),

it be shewn that the defendant could by the exercise of ordinary care and caution on his part have avoided the consequences of the plaintiff's negligence.

There only remains the question whether the appellant's servants by the exercise of ordinary care and caution could have avoided the consequences of the respondent's negligence?

The fireman of the engine was riding on the south side or on that side which gave him a view of anything approaching the track from the south. He says he was looking to the east, that is to say in the direction the train was moving.

As I have stated, the respondent passed to the right of the motor car which had stopped on the paved portion of the street and which was between him and the train, his attention apparently being entirely directed towards the muddy road he was crossing in his effort to reach the sidewalk. I will quote from the fireman's testimony with whose evidence, as well as with that of the engineer, the learned trial judge stated he was particularly impressed:—

Q. If you can tell me, as near as possible, whereabouts was your cab when you first saw the plaintiff?—A. Pretty nearly the west side of the crossing.

Q. And where was the plaintiff when you first saw him?—A. He came from around that first automobile. There were two automobiles; one was on the paved road a little way back from the track, and the other one was on the side, that is the west side of the street, but he came from this first one and tried to make across the tracks.

Q. He was going north?—A. He was going north.

Q. And east of the far auto?—A. Yes.

Q. And you first saw him when?—A. He was pretty close to the track.

Q. About how far from the track?—A. About ten feet.

Q. What did you do?—A. Well, my impression was he seemed to hesitate. I thought he was going to wait until the train went by and when I saw that he wasn't, he was going on the track, and then headed straight

(1) [1913] A.C. 838, at pp. 845, 846.

1923

GRAND TRUNK PAC. RY. CO. v. EARL.

Mignault J.

down the track between the rails, his bicycle was wobbling around, he seemed to me like he was nervous, and as soon as I saw that I hollered.

Q. How far was he from the track when you hollered?—A. He must have been about five feet. I knew he was going to head right on to the track, and I hollered and tried to attract his attention.

Q. How loudly did you holler?—A. Just about as loud as I could leaning out of the window and hollering.

Q. And did you do anything about notifying the engineer?—A. Yes, sir, I turned to the engineer and told him to hold her.

Q. And did he hold her? Yes, and applied the emergency brake and reversed the engine.

Q. And where did the engine stop?—A. The engine moved to just over the east side of the crossing, the tender just over the east side of the crossing.

I think the fireman was entitled to assume, when he first saw the respondent, that the latter would not attempt to cross the track which would have been an act of madness with the train so close. But when he realized that the respondent was not going to wait, he shouted out to him, and the engineer says the shout could be heard a block. Did this shout come too late to permit the respondent to stop his bicycle, or should the fireman have shouted a second or two sooner, for it was a matter of seconds? The respondent's act, in riding blindly on to the track, knowing that a train was approaching the crossing, had created a situation of great danger, and when the fireman realized the danger he shouted to respondent. The latter may have been then so close to the track that he could not stop, or he may have been unnerved by the sudden realization of the danger, at all events he became the victim of the situation his negligence had created. Even if the fireman did not do everything that could have been done in this emergency—and it is easier to criticise after the event than to take the proper course during an emergency—still the respondent's own act was the cause of his misfortune. I think the language of Lord Birkenhead in the recent case of *Admiralty Commissioners* v. *SS. Volute* (1), a marine collision case and therefore one for contribution, may very properly be cited here as descriptive of the situation created by the respondent's negligence:

I think that the question of contributory negligence must be dealt with somewhat broadly and upon common sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be

(1) [1922] 1 A.C. 129, at p. 144.

drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

Unfortunately for the respondent, this is not a case of contribution, and his negligence disentitled him to succeed in his action against the appellant. It is with regret that I come to this conclusion, but after the most serious and anxious consideration I can see no help for it.

With great respect therefore I differ from the judgments below and would allow the appeal and dismiss the respondent's action with costs throughout.

Appeal allowed with costs.

Cross-appeal dismissed with costs.

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

Solicitors for the respondent: *Howatt & Howatt.*