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*Oct. 15.
*Nov. 9.

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

AND

ISABEL MURRAY (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Defective brake on railway car—Whether cause of death of operator of brake—Accident not seen—Jury's finding—Reasonable inference.

An employee of defendant was killed while engaged in switching operations in defendant's yard. The accident was not seen, but he was found dead on the ground after "riding" down a "hump" a car which, as later found, had a defective brake. Plaintiff, mother of deceased, recovered, on verdict of a jury, judgment for damages, which was affirmed by the Appellate Division, Alta.

Held: Defendant's appeal to this Court should be dismissed. The jury were justified in concluding, as the reasonable inference from the facts and circumstances in evidence (nature and tendency of the defect in the brake, deceased's duty at the time, his operation and position when

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

last seen before the accident, direction of car, position of body when found, etc.), that it was defendant's negligence in having in use the defective brake which caused deceased to fall and be killed. (*Jones* v. *Great Western Ry. Co.*, 47 T.L.R. 39, at 45; *Cottingham* v. *Longman*, 48 Can. S.C.R. 542, and other cases cited.)

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta, dismissing its appeal from the judgment of Walsh J., entered upon the verdict of a jury, in favour of the plaintiff for the sum of $6,000 damages for the death of the plaintiff's son who was killed while in defendant's employ and, according to plaintiff's allegations, by reason of defendant's negligence. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

W. N. Tilley K.C. and *C. F. H. Carson* for the appellant.

S. J. Helman K.C. for the respondent.

The judgment of the court was delivered by

CANNON J.—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta unanimously dismissing an appeal from a judgment in the sum of $6,000 entered in favour of plaintiff after a trial with a jury.

At the time of his death, Murray, the respondent's son and sole support, was a young man of twenty-two years of age and had been in the employment of the appellant as switch tender, although, at the time of his death, with the consent and approval of the company, he was actually performing the duties of a yardman. Murray was killed on the 27th September, 1927, at nine o'clock in the evening, and was then engaged in switching operations over a "hump" in the appellant's yard at Calgary. When a car reaches the level or upper portion of the "hump," a "rider" gets on the car and takes his place at the brake and the car is then pushed down the incline sufficiently to permit it to run by gravity and also to enable a test to be made of the holding power of the brake. After the holding power of the brake has been ascertained, the car is cut loose from the remainder of the train and proceeds by gravity down the "hump," along the lead track into one of the tracks in the classify-

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ing yard. The "rider" controls the speed of the car by operating the brake as the car goes down and brings it to a stop at its ultimate destination.

On the night of the accident, Murray asked yardman Mosgrove to change places with him in order that he (Murray) might get some experience as a yardman. Mosgrove agreed and, with the knowledge and consent of the foreman, Murray proceeded to ride cars off the "hump." Murray mounted a flat car on which was loaded a combine thresher. The hand brake is at the front of the car and the person operating it stands on its floor. The top of the brake reaches up to about the rider's waist.

Murray proceeded to attempt to set the brake, which was found difficult to use. Finally, however, the brake was set, the pin was drawn and the car was released and started on its way down the gradient at about six miles per hour. At a dividing switch, at 122 feet from the place of the accident, the car with Murray on it passed one Jack, a switch tender, who was standing at that point and was the last person to see him alive. Murray was then standing at the front of the car with his right hand on the brake wheel and his left hand on the "club" which had been put through the wheel on the mast. Jack saw Murray a short distance west of him making an effort to put his brake on with the brake club by shoving with his club in his left hand and pulling with his right hand on the wheel. A noise was next heard like a car going off the track and was investigated by several witnesses. It was found that the car had not run off the track but that it had passed over Murray, who was found dead by Buckwell on the fork between the ninth and tenth switches in the receiving yard, at a distance of 122 feet from where Jack had last seen him.

The brake on the car is designed with a series of pinions, one gear fitting into the other and the large gear having a chain which wraps around the brake mast; the gear and the chain are below the platform of the car and are not visible to the person operating the brake.

It is common ground that the brake was not in good working order. The car was inspected after the accident by the car foreman and the master mechanic, and they found a defect in the construction of the large gear which

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was not a true circle and did not lie flat when laid on a flat surface; it had evidently been warped in the casting in its manufacture.

It is also common ground that this defective gear would bind at certain points, with the effect that when the brake wheel was turned it became stiff once in every turn. It is proven by the evidence of Steele, A. E. Whitlock, F. E. Whitlock and Meechan, that it was very difficult to turn the brake past the binding point and that when it went past that point, the brake unloosed so quickly that it would cause, or was likely to cause, a person to lose his balance and pitch forward. Indeed, Steele, who tested the brake immediately after the accident, swears that when the brake went past the binding point he swung right off the end of the car, but, as he was " hanging on," he did not fall off but swung right around.

The running or visual inspection by the appellant company of the hand brakes on freight cars at every terminal failed to disclose the defect in the construction of this gear. Mr. Jamieson, the divisional superintendent, admits that this defect could not be discovered unless the car was dismantled, so that an inspection made while the brake was on the car would only disclose that there was difficulty in turning it; but the exact nature of the defect could not accurately be judged by a " rider," who could not realize the extent and nature of the risk he was running when using this brake.

In presence of this evidence, the only remaining ground of appeal, and the only one to which, at the hearing, the respondent was called upon to address himself, is whether or not the negligence of the company or its employees in allowing Murray to use this defective brake really caused his death. In other words, did the learned trial judge err in refusing the appellant's motion for non-suit made on the ground that, assuming negligence to be established, such negligence was not shown to be the cause of the death of the deceased?

To use the words of Viscount Hailsham, in the comparatively recent case of *Jones* v. *Great Western Railway Co.* (1), does the plaintiff's evidence in the present case " take

(1) (1930) 47 T.L.R. 39.

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us beyond the region of conjecture into that of legal inference?" Upon the evidence, could the jury reasonably reach the conclusion that the real cause of the accident was inferentially established by the presence of facts too strong to be ignored?

Amongst other facts, we have:

1. The test made after the accident of the tendency of the brake to throw a man off his balance;

2. The brake required to be turned to tighten it and would become stiff once in every revolution;

3. The duty of Murray was to use this brake to control the speed of the car and this was the sole operation which he had to perform on that car at the time of his death;

4. The witness Jack saw Murray at 122 feet before he was killed with his hands on the brake, travelling at six miles an hour, which would reasonably lead to the conclusion that he had continued to use, and was actually using, the brake at the time he reached the fatal spot;

5. The position of the body on the track and the marks on the car also help to render not unreasonable the conclusion that the defective brake caused Murray to fall in front of the car;

6. The car was travelling in an easterly direction. Murray, when last seen, had his right hand on the front wheel and his left hand on the club inserted in the wheel. If he was pushing with his left hand, the tendency would be to throw him east and south, if the brake were suddenly unloosed.

The jury could reasonably infer from these facts, considering the position of the body after the accident, that the fall had been caused by the negligence of the company in allowing this defective brake to be placed in commission and used on this occasion by its employee. I believe that the evidence establishes not only that the accident was *possibly* due to the negligence to which the plaintiff seeks to ascribe it; but the evidence, to use the words of Lord MacMillan, in the above quoted case (1), is such that the attribution of the accident to that cause may reasonably be inferred. I think that we may safely apply to plaintiff's evidence the test propounded by the noble Lord as follows: (1)

(1) 47 T.L.R. 39, at 45.

The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved. Indeed, as Lord Shaw said in *Marshall* v. *Owners of SS. Wild Rose* (1): "The facts in every case may leave here and there a hiatus which only inference can fill." The true doctrine in the matter is clearly stated by Lord Penzance in *Parfitt* v. *Lawless* (2): "It is not intended to be said that he upon whom the burthen of proving an issue lies is bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved legitimate and reasonable inferences may, of course, be drawn, and all that is fairly deducible from the evidence is as much proved for the purpose of a *prima facie* case as if it had been proved directly." I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.

In this case, we have facts proven which establish relation between the defective brake and the accident, as the victim was seen with his hands ready to use the same brake a few moments before it happened. Moreover, the defect was of a nature and created a danger which was likely to cause the operator to lose his balance and be thrown off the car. Here, we certainly have more evidence to satisfy the jury, than there was in *McArthur* v. *Dominion Cartridge Company* (3).

See also *Grand Trunk Railway Company* v. *Griffith* (4). In *Cottingham* v. *Longman* (5), this Court held: "A series of facts may be proved in evidence from which the jury may reach a conclusion, as to the cause of the mishap, in some respects more satisfactory than if they were obliged to depend upon the deposition of an eye-witness." As Chief Justice Fitzpatrick said in the last mentioned case (pp. 543-544), "the function of an appellate court is to consider in each case whether there was evidence before the

(1) 26 T.L.R. 608; [1910] A.C. 486, at 494.
(2) (1872) L.R., 2 P. & D., 462, at 472.
(3) [1905] A.C. 72.
(4) (1911) 45 Can. S.C.R. 380.
(5) (1913) 48 S.C.R. 542.

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jury from which they could reasonably draw the conclusion at which they arrived."

Here, too, the finding of the jury has the approval of the provincial Court of Appeal as well as of the trial judge, and it should not be disturbed.

In our opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *George A. Walker.*

Solicitors for the respondent: *McGillivray, Helman, Mahaffy & Smith.*