1942
*Nov. 19, 20.
1943
*Feb. 23.

CANADIAN NATIONAL RAILWAYS (DEFENDANT) ..... APPELLANT;

AND

ARTHUR GUÉRARD (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Railway—Bridge over highway—Height of—Injury to person—Standard of maintenance—Whether statutory height to be maintained as structure originally constructed, or maintained continually at such height—Bridge and land owned by railway company—Level of highway raised by works of third parties—Knowledge of railway company of possible danger and previous accident—Whether railway company had means to cope with situation—Government Railways Act, R.S.C., 1927, c. 173, s. 19.

The respondent brought an action for damages against the railway company appellant, arising out of the death of his son, whose head was struck by a beam of a railway bridge over a highway. The bridge at the point of contact was only 10 feet 4 inches above the highway, and it was contended that it should have been maintained at all times by the appellant company with a clearance of at least 12 feet. The railway company pleaded that the bridge had been constructed originally with a clearance in excess of the 12 feet required by statute, but that in subsequent years improvements made from time to time by the municipal corporation and by the provincial highway authorities resulted in raising the level of the travelled road to such an extent as to diminish the original clearance. The statutory provision under which the railway bridge had been built in 1912 was the same as the one now contained in section 19 of the *Government Railways Act*, R.S.C., 1927, c. 173, where it is provided that "the span of the arch of any bridge * * * shall be constructed and continually maintained at * * * a height * * * of not less than twelve feet * * *".

Held, Rinfret and Taschereau JJ. dissenting, that the section must be construed as compelling the railway company to maintain the structure as it was when originally constructed, provided it was constructed within the statutory requirements, and that the railway company was not required under the statutory provision to raise the bridges on their line, and with them necessarily the whole grade of the line in the neighbourhood, whenever a municipality or a provincial government should think proper to raise the surface of the highways passing under them. *Carson* v. *Village of Westen* ([1901] 1 Ont. L.R. 15) approved and applied.

Per Rinfret and Taschereau JJ. (dissenting).—Under section 19 of the *Government Railways Act*, R.S.C., 1927, c. 173, it was the duty of the appellant railway company to build the subway with a clearance of at least twelve feet; but, in this case, the railway company, being the owner of both the subway and the land over which it was built,

(1) [1901] 1 Ont. L.R. 15.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

where the public had access and to which it was invited, had the further duty to maintain this clearance continually, and, having failed to do so, must be held liable. Moreover, the argument of the appellant that the lowering of the clearance was not the result of its own acts, but of the acts of third parties, the provincial and municipal authorities, cannot be upheld: the acts of third parties may constitute an answer to a claim in damages only if it be shown that they cannot be imputed to the defendant and could not have been foreseen or prevented by him. Upon the evidence, the appellant railway not only contributed to the raising of the road, but knew it had been raised by the provincial and municipal authorities; it was aware of the danger and had been warned by the fact that another accident had happened previously at the same place and was also aware through representations made by public bodies and a petition before the Board of Transport. Moreover, the appellant railway company had at its disposal the appropriate means to cope with the situation, by applying to the courts for an injunction to prevent, on its own property, the performance of these works by third parties or by summoning the latter, if the work had been done without its knowledge and consent, to restore the premises to their original state.

Judgment of the Court of King's Bench (Q.R. [1942] K.B. 345) reversed, Rinfret and Taschereau JJ. dissenting.

APPEAL, by leave of this Court, from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), which affirmed the judgment of the Superior Court, Boulanger J., in so far as it maintained the respondent's action for damages against the appellant railway company.

C. V. Darveau K.C. and *I. C. Rand K.C.* for the appellant.

S. Germain and *G. Roberge* for the respondent.

The judgment of Rinfret and Taschereau JJ. (dissenting) was delivered by

TASCHEREAU J.—This is an appeal by the Canadian National Railways, which have been condemned to pay to the plaintiff-respondent the sum of $1,212.70.

During the night of November 10th, 1938, the respondent's son, who was driving in a truck, was accidentally killed while passing through a subway at Charny, his head striking a beam about 10·4 feet above the highway. The boy, who had helped to load the truck in Quebec city, the property of one Marius Miller, took a place on the top of the load, and it is while proceeding to Sherbrooke that

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this unfortunate accident happened. He suffered a fracture of the skull from the effects of which he died shortly afterwards.

The father of the victim took action against Miller, the owner and operator of the truck, against the municipality of Charny where the subway is located, against the Government of the province of Quebec, and also against the appellant, the tracks of which pass over the subway.

Mr. Justice Boulanger of the Superior Court in Quebec dismissed the action as to Miller, but condemned the municipality of Charny, the Government of the province of Quebec, and the present appellant to pay to the plaintiff jointly and severally the sum of $1,212.70. For a reason which does not appear in the record, the respondent desisted from his judgment against the Government of the province of Quebec; the Court of King's Bench allowed the appeal of the municipality of Charny and dismissed the action. There remains before this Court only the present appellant, the appeal of which was dismissed in the court below, Chief Justice Létourneau and Mr. Justice Bernier dissenting, and to which special leave to appeal to the Supreme Court of Canada was granted.

It is submitted on behalf of the respondent that the appellant has violated section 19 of the *Act Respecting Government Railways,* chapter 173, Revised Statutes of Canada, which reads as follows:

> 19. The span of the arch of any bridge erected for carrying the railway over or across any highway, shall be constructed and continually maintained at an open and clear breadth and space, under such arch, of not less than twenty feet, and of a height from the surface of such highway to the centre of such arch of not less than twelve feet.

The contention is that under the provisions of this section there must be a clearance of not less than 12 feet between the surface of the highway and the span of the arch, and that the law creates an obligation upon the appellant to maintain it continually.

The appellant submits that such an obligation does not exist, and that, at all events, if the insufficiency of the clearance is the cause of the accident, the parties responsible are the other defendants, namely, the municipality of Charny and the province of Quebec which elevated the surface of the highway and reduced to 10·4 feet the clearance which under the provisions of the Act should be of at least 12 feet.

This subway was constructed in 1912 by the Intercolonial Railway which was owned by the Dominion Government. At the time of its construction it had a clearance of 13 feet, and the road over which it was built, and which was the property of the Railway, was not a very important commercial artery. It was a dirt road, and used mostly by pedestrians and horse-drawn vehicles. Pierre Fontaine, the mayor of Charny at that time, testifies that it was " un chemin de campagne ", and another witness states that it was used also between Breakeyville and Charny " pour la malle ". But although it was in a primitive state, it was nevertheless, I think, a " highway " within the meaning of the Act, for it was a public way of communication. The word " highway " in the *Railways Act* is defined as follows:

> Subsection (11) section 2: " highway " includes any public road, street, lane or other public way or communication.

And under the Government *Railways Act*, section 2, subsection (*g*), the word " highway " has the same meaning.

It seems that the word " lane " found in the definitions above cited is the appropriate word to describe this road. The words " lane or other public way or communication " do not necessarily mean that the road must be owned by the municipality, but they mean that the road must be one where the public may circulate freely, as it did in the present case. (*Vide Canadian Pacific Railway Co.* v. *City of Toronto* and *Grand Trunk Railway Co.* (1).)

It follows that " the span of the arch of the bridge erected for carrying the railway " was over a highway, and therefore the provisions of the law find their application.

Since 1912, three defendants in the action, one of which was the appellant, have at different times repaired this lane, thus inviting the people to use it " as a public communication "; and approximately at the time of the construction of the subway, the Canadian National Railways placed cinders and ashes on its surface to facilitate circulation. In 1914, the municipality of Charny macadamized it, and at a later date the Government of the province of Quebec added a layer of gravel and asphalt, and also undertook in 1924 to keep the road in a good state of repairs.

(1) [1911] A.C. 461, at 477.

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The appellant built a sidewalk for the use of pedestrians, installed electric lights and saw to the removal of snow during the winter months. All these repairs and additions to the surface of the road brought about the result that in 1938, date of the accident, the clearance between the surface of the road and the arch of the subway, was reduced from 13 to 10·4 feet which is nearly 3 feet, and it is undoubted, as found by the trial judge, that this reduction in height is one of the determining causes of the accident.

As already pointed out, the subway was built in 1912 by the Dominion Government which at that time owned and operated the Intercolonial Railway. In virtue of section 19 of chapter 172, Revised Statutes of Canada, 1927, *Canadian National Railways Act,* the Governor-in-Council passed an order entrusting to the Canadian National Railways the management and operation of the Intercolonial Railway. There is no doubt that section 19 of the *Act Respecting Government Railways* and providing for a clearance of 12 feet applied, because the *Railway Act* found its application to Government-owned railways only respecting operations. It was, therefore, the duty of the Railway to build the subway with a clearance of at lease 12 feet. This duty was fulfilled, but, the Railway being the owner of the subway and of the land beneath, where the public had access, had the duty to maintain this clearance continually.

Since 1928, 18-19 Geo. V, ch. 13, the provisions of the *Railway Act* apply not only for the operation of the railway, but also for its construction and maintenance, and it is the submission of the appellant that the matter of highway clearance is covered by section 263 and 264 of the *Railway Act,* which are as follows:

> 263. Unless otherwise directed or permitted by the Board, the highway at any overhead railway crossing shall not at any time be narrowed by means of any abutment or structure to a width less than twenty feet, nor shall the clear headway above the surface of the highway at the central part of any overhead structure, constructed after the first day of February, one thousand nine hundred and four, be less than fourteen feet.
>
> 264. Every structure by which any railway is carried over or under any highway or by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under or through such structure.

The effect of these sections would be to place within the sole jurisdiction of the Board of Transport all questions arising in respect of the protection, safety and convenience of the public. In its factum, the appellant points out that the matter has been brought before the Board of Transport, and that an order was made and complied with.

It is true that some time previous to the accident, an application was made to the Board, but, an examination of the proceedings before the Commissioners reveals that the decision arrived at does not have the bearing upon this case, that the appellant has invited us to give it. It was as the result of a resolution passed by the Chamber of Commerce of the district of Lévis, which asked that the subway be totally *reconstructed,* that the matter came before the Board; the conclusion of the resolution is as follows:

> That the Dominion Railway Board and the Canadian National Railways be requested to take immediate action to correct the error made in 1911, and *reconstruct the said subway* in order to give the proper width of road and sidewalk, which is standard throughout the province, thereby removing an existing hazard which may be responsible at any moment of causing death and injury to the citizens of Canada, and, at the same time, eliminating a serious bottle-neck to traffic.

As it will be seen, it was the reconstruction of the subway which was asked for by the Chamber of Commerce of Lévis, and obviously during the hearing the attention of the Commissioners was drawn to the fact that some oil was leaking from the subway, for we have been told at the hearing that the only order made by the Commission was that that part of the subway through which oil was leaking should be repaired; but, the question of reconstruction was kept in abeyance as it appears in the order itself:

> Que d'ici à ce que l'on dispose finalement de la requête pour la reconstruction de ladite structure, les Chemins de Fer Nationaux du Canada soient et ils sont par la présente requis de faire dans les trente jours de la date de la présente ordonnance, toutes les réparations nécessaires au toit du tunnel sur la route No. 1 entre Charny et Breakeyville, province de Québec, au mille 6·9 de la subdivision de Drummondville.

The question of reconstruction was never considered again, and the appellant complied with the order of the Commission and made the repairs which were ordered. The Canadian National Railways were not authorized to lower the clearance of the subway under section 263 of the *Railway Act,* and they never obtained such a permission,

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for the reason that they never asked for it. It might have been a good defence for the appellant, if it could have shewn that an order of the Board had been made authorizing a reduction in the statutory height of the arch, but I do not think that it is a valid defence to invoke an order of the same board, which does not deal with the question. As the matter stands, now, it is true that the reconstruction has not been ordered, but no authorization has been given to lower the clearance.

Another ground on which the appellant rests its case is that the lowering of the clearance between the surface of the highway and the arch of the subway was not the result of its own act, but of acts of third parties, namely, of the municipality of Charny, and of the Quebec Government. The subway was built by the Dominion Government, which owned the Intercolonial Railway, and by the operation of the law, the Canadian National Railways are entrusted with its care.

The appellant, with relation to the Intercolonial Railway, is answerable only for the liabilities to which the Crown would have been subject, if the railway's management and operation had not been transferred. *Canadian National Railways Company* v. *St. John Motor Line Limited* (1).

It is quite true, indeed, that, in many cases, the acts of third parties may constitute an answer to a claim in damages; but it must be shown that they cannot be imputed to the defendant, and could not have been foreseen or prevented by him.

Here we have to deal with very different conditions. The appellant not only contributed to the raising of the road, but knew that it had been raised by the municipality of Charny and by the Department of Highways of the province of Quebec many years before the accident. It was aware of the danger and of the possibility of the happening of an accident such as the one which caused the death of the defendant's son. It had been warned by the fact that another accident had happened previously at the same place, and also by the representations made by public bodies and by the petition of the Chamber of Commerce of Lévis before the Board of Transport. The answer of the appellant was that the costs to repair or

(1) [1930] S.C.R. 482.

rebuild would have been too high. We are not, I think, confronted with a case where the appellant may invoke this theory " de l'acte d'un tiers " to escape liability quoad the victim.

The appellant had at its disposal the appropriate means to cope with the situation, and it could have applied to the courts to obtain an injunction in order to prevent, on its own property, the performance of this work which offered a danger for the security of the public, and which the law forbade in unequivocal terms. It could also after the raising of the level of the road, have summoned these third parties, if the work (for instance) had been done without its knowledge and consent, to restore the premises to their original state. And in the event of a refusal, the appellant would have been entitled to have the work done at the expense of the municipality or of the highways department. It was its duty to see that the clearance was " continually maintained " at the height provided by statute, and having failed to do so, it must, as the trial judge and the Court of King's Bench have so found, be held liable.

As already pointed out, the appellant at the time of the accident was the owner of both the subway and the land over which it was built. It is on account of these special circumstances that I am of the opinion that the appellant is liable. In view of the conclusion which I have reached, it is unnecessary to determine whether the appellant would still be liable if the municipality or the provincial Government had been owner of the land under the subway, and on this point I reserve my decision.

In the appellant's petition praying for special leave to appeal before this court, it was stated that the provincial or municipal authorities had jurisdiction over the highway and it is under that assumption that leave was granted. But the evidence is that such are not the facts, and that the road is the appellant's property. It would, therefore, be useless to discuss a hypothetical case which would be of no help in determining this appeal.

I would dismiss the appeal with costs.

DAVIS J.—This action arose out of the death of the respondent's son, a boy of sixteen years of age, whose head was struck by a beam of a railway bridge over a highway.

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The boy was sitting on the top of some furniture that was being transported on a motor truck along the highway. The railway bridge at the point of contact was only about 10 feet 4 inches above the highway. From the effect of the injuries the boy died shortly afterwards. It is contended that the clearance should have been at least 12 feet.

The highway taken by the truck led through the subway at the village of Charny, a short distance west of Lévis, Que., under the tracks of the Canadian Government Railways. Action was brought against the owner and operator of the truck, the village of Charny within which the subway lies, the province of Quebec represented by the Attorney-General, and against the appellant railway. We are only concerned in this appeal with the judgment which has been awarded the father against the railway. What is said against the railway is that the bridge should have been maintained at all times by the railway company with a clearance of at least 12 feet, and the fact that the actual clearance at the time of the accident was only 10 feet 4 inches was the cause of the accident. The railway company's answer is, the bridge had been constructed originally with a clearance in excess of the 12 feet required by statute but that in subsequent years, owing to the increased highway traffic needs, what had been originally a dirt road had become an improved highway by improvements made from time to time by the village and by the province which had resulted in raising the level of the travelled road to such an extent as to diminish the original clearance.

The statutory provision under which the railway bridge had been built in 1912 by the Dominion Government in the course of its administration of the Government Railway then known as the Intercolonial is that now contained in section 19 of the *Government Railways Act*, R.S.C. 1927, ch. 173. The provision is as follows:

> 19. The span of the arch of any bridge erected for carrying the railway over or across any highway, shall be constructed and continually maintained at an open and clear breadth and space, under such arch, of not less than twenty feet, and of a height from the surface of such highway to the centre of such arch of not less than twelve feet; and the descent under any such bridge shall not exceed one foot in twenty feet.

Counsel for the respondent seeking to maintain the judgment against the railway naturally stresses the words

in the provision "shall be constructed and continually maintained," asserting that on a proper construction the obligation of the railway company is to maintain at all times a clearance of 12 feet.

I should have found much more difficulty in coming to a conclusion in the appeal had I not come across, since the argument, the case in the House of Lords of *Attorney-General* v. *Great Northern Railway Company* (1). That appeal had reference to the maintenance and repair of a bridge by means of which a highway was carried over a railway, and the appeal raised the question whether the railway company was liable merely to maintain the bridge in the same condition as to strength in relation to traffic as it was in when completed, or whether it was liable to improve or strengthen the bridge so as to render it sufficient to bear the ordinary traffic which might reasonably be expected to pass over the bridge according to the standard at the time of the litigation. The bridge had been constructed between 1862 and 1867 and it was admitted that the bridge as originally constructed complied with the statutory requirements in relation thereto. The bridge in question had been constructed by means of cast-iron girders which were designed to carry a road thickness of one foot. At later dates the road thickness had been considerably increased, and the weight upon the girders had been increased by the provision of larger water mains, a thick bed of concrete, and heavy cast-iron plates. In 1912 Pickfords, Limited, who were desirous of using the bridge for heavy motor traffic, having obtained the fiat of the Attorney-General, instituted proceedings asking for a mandatory injunction to compel the railway company to put the bridge into a proper state of repair and into a condition of safety for the passage of the traffic upon or to be expected upon the highway carried by the bridge.

The measure of the railway company's liability turned upon the construction of section 46 of the *Railways Clauses Consolidation Act,* 1845, which section provided as follows:

> 46. If the line of railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary

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works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: Provided always, that, with the consent of two or more justices in petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level.

The emphasis in the argument was put, as in the appeal now before us, upon the words of the statute—" shall be executed and at all times thereafter maintained "—which are, it seems to me, substantially the same as in the statutory provision with which we have to deal. The House of Lords held by Lord Buckmaster L.C., Earl Loreburn, Lord Shaw of Dunfermline and Lord Sumner, Viscount Haldane dissenting, that the railway company was liable to maintain the bridge in the condition as to strength in relation to traffic in which it was at the date of completion but was not liable to improve and strengthen the bridge to make it sufficient to bear the ordinary traffic of the district which might reasonably be expected to pass over it according to the standard existing at the time of the litigation. A careful reading of the speeches of the Lords as to the proper construction of the statutory obligation " shall be executed and at all times thereafter maintained," and the principles of interpretation laid down by them has been very helpful to me in reaching a conclusion as to the proper construction of the words of the statutory obligation in this appeal now before us—" shall be constructed and continually maintained." As Lord Shaw said in the concluding words of his judgment (p. 377) (1):

> The adjustment of the responsibilities of all parties in regard to those alterations and developments which the needs of the country demand is a legislative task, but does not fall within the sphere of judicial remedy.

The judgment of Street J., in *Carson* v. *Village of Weston* (2), on a section similar to that in our present statute was to the same effect. That was section 185 of the Dominion *Railway Act,* 51 Vict., ch. 29. The words were,

> shall, at all times, be and be continued * * * of a height, from the surface of such highway to the centre of such arch, of not less than 12 feet.

Not only was Street J. a very able judge but the decision, so far as I am aware, has never been challenged since it was delivered over forty years ago. The bridge had originally been built at a height greater than that required by the

(1) [1916] 2 A.C. 356. (2) [1901] 1 Ont. L.R. 15.

statute but subsequent improvements to the highway under the bridge had resulted in a reduction in the clearance between the then travelled road and the railway bridge. Street J. held that the statutory obligation on the railway was an obligation to maintain the structure as it was when originally constructed, provided, of course, that it was constructed within the statutory requirements, and that the railway company was not required under the statutory provision to raise and lower the bridges on their line, and with them necessarily the whole grade of their line in the neighbourhood, whenever a municipality should think proper to raise the surface of the highways passing under them.

There was some evidence that the railway company in the present case had put some cinders and ashes at one time upon the road and had built sidewalks and lighted the road, but it is plain that no substantial change in the clearance was caused by anything the railway did. The highway improvements that did effect the change were made both by the village of Charny and the provincial highway authorities.

I should allow the appeal and set aside the judgment against the appellant. It is not a case for costs.

KERWIN J.—If this were the case of an ordinary highway vested in a municipal or provincial authority, I am of opinion that section 19 of the Government *Railways Act,* R.S.C. 1927, chapter 173, would not impose any liability upon the appellant where the statutory clearance between the surface of such highway and the centre of the arch of the bridge had been lessened by the action of the authority having control over the highway. I read that section as referring to the construction and maintenance of the span of the arch of a bridge and not as imposing on the railway a duty to see that such an authority does not raise the level of the surface of the highway so as to lessen the required clearance. In that respect I agree with the construction placed by Mr. Justice Street in *Carson* v. *Weston* (1), on an enactment which, for the purposes of this appeal, is the same as section 19.

In the present case the Intercolonial Railway constructed its line of railway in 1912 at the point in question. A

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bridge was erected for carrying the railway over a gully, the paper title to which gully was, and so far as appears, still is, either in the Intercolonial Railway or in the Crown in the right of the Dominion. This gully was a "highway" within the definition of that word in subsection 11 of section 2 of the Act. *Canadian Pacific Railway Co.* v. Toronto (1). The span of the arch of the bridge as originally constructed was "of a height from the surface of such highway to the centre of such arch" of more than twelve feet. Subsequently the appellant placed not more than three inches of cinders on the highway but this did not lessen the clearance below the statutory limit. The other work done by the appellant, such as building a sidewalk for pedestrians, installing electric lights and occasionally removing snow, had no effect at all upon the clearance. For the purposes of this action, I think it must be found on the evidence, that the municipality of Charny or the province of Quebec exercises control over the highway and that the appellant was correct in so stating in its application for leave to appeal to this Court. None of the work done by the appellant should be treated as indicating that the appellant did anything more than assist one or other of those authorities. The effective control over the highway still remained in the municipality or province and there is nothing, therefore, in my view, to take the case out of the general rule.

I would allow the appeal and set aside the judgment against the appellant. In accordance with the terms of the order granting leave to appeal, there should be no costs.

HUDSON J.—I agree with my brothers Davis and Kerwin in their interpretation of section 19 of the Government *Railways Act*. The reasons for such an interpretation are stated by Mr. Justice Street in construing a similar provision in the case of *Carson* v. *Weston* (1), and so stated seem to me most convincing.

It appears from the record that the ownership of the soil is either in the railway company or in the Crown in the right of the Dominion of Canada. Accepting this as a fact, I cannot see that taken by itself it imposes any obligation on the railway company. In my opinion the

(1) [1911] A.C. 461, at 477.

railway company is not liable for the acts of others who have jurisdiction over the highway crossing beneath its lines.

Appeal allowed, no costs.

Solicitor for the appellant: *C. V. Darveau.*

Solicitors for the respondent: *Marquis, Lessard, Germain & Lapointe.*