Supreme Court of Canada
Staley v. British Columbia Electric Ry. Co. Ltd., [1938] S.C.R. 387
Date: 1938-05-17

Rose Ellen Staley (Plaintiff) Appellant;

and

British Columbia Electric Railway Company, Limited (Defendant) Respondent.

1938: February 17, 18; 1938: May 17.

Present: Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Electric railways—Motor car stalling between rails at crossing under repair—Findings of jury—Whether perverse—Whether tacit invitation to cross—New trial ordered by appellate court.

A railway repair gang had removed a couple of planks at a road crossing a few minutes before one of respondent's cars was expected, when the appellant's automobile arrived at the crossing. The workmen removed their tools to one side and stood to one side themselves. Appellant's son, who was driving the car, although he knew the time at which the respondent's car was expected, attempted to drive across the rails at spot where the planks were still in place. The car skidded and stalled and was hit by the incoming train. Appellant's husband, who was in the car, was killed and the automobile demolished. The jury in answer to questions found that the workmen were negligent in "removing planks * * * too close to train time" and in "failing to replace temporarily same on approach of auto." The jury also found that the driver of the car was not negligent. On appeal, a new trial was ordered.

Held, reversing the judgment of the Court of Appeal ([1937] 2 W.W.R. 282), that the judgment of the trial judge should be restored: the answers to the questions by the jury were justified by the evidence and the jury's finding that the driver of the automobile was not negligent, was not perverse.

APPEAL from the judgment of the Court of Appeal for British Columbia[1], reversing the judgment of Morrison, C.J.S.C., on the verdict of a jury and ordering a new trial.

H. J. Sullivan K.C. for appellant.

J. W. deB. Farris K.C. for respondent.

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The material facts of the case are stated in the above head-note and in the judgments now reported.

[1] [1937] 2 W.W.R. 282; [1937] 3 D.L.R. 578.

THE CHIEF JUSTICE.—In my view the respondent by removal of the planks created a situation which, the jury might reasonably find, had the effect of attaching a wholly unnecessary risk to the exercise by the deceased Charles Joseph Staley of his rights in the use of the highway; and that, accordingly, they were justly chargeable with negligence. At the same time, the jury might quite consistently take the view that the risk was not in all the circumstances, and particularly in view of the conduct and attitude of the track men present, so obvious to the driver of the automobile as to render his act in attempting to cross the railway a negligent one. They might not unreasonably think that, at the highest, he was chargeable with nothing graver than mistake of judgment, both natural and excusable.

I have read with care the judgments delivered in the Court of Appeal and, with the greatest respect, I feel constrained to say that, in the reasons given by Mr. Justice M. A. Macdonald, the case is put in a way that appears to me to be unanswerable.

As to the effect of the jury's answers, I concur with my brother Kerwin.

The judgment of Rinfret, Crocket, Kerwin and Hudson JJ. was delivered by

KERWIN J.—I agree with Mr. Justice M. A. Macdonald that the answers of the jury to the first two questions are sufficient to impose liability upon the respondent. These questions with their answers are:—

> (1) Q. Was there any negligence on the part of the defendants' servants which caused the accident?
>
> A. Yes.
>
> Q. If so, in what did such negligence consist?
>
> A. Removing planks at crossing too close to train time and failing to replace temporarily same on approach of auto.

These answers are justified by the evidence. It was shown that the foreman of the work crew knew the time at which the car of the respondents would reach the station to the east of the railway crossing in question and that, although the men arrived at the crossing but a few minutes before the car was expected, they proceeded with their work and removed two planks. It was also open to the

jury to consider that the actions of the workmen amounted to an invitation to the driver of the automobile to proceed over the crossing. While the latter also knew the time at which the respondent's car was expected, he stated that he did not have that information in mind at the relevant time, and although, when he stopped twenty-five or thirty feet from the crossing, he saw that the two planks had been removed, the jury must have determined that it was not negligence on his part in thinking that he could safely cross at the spot where the planks were still in place. It is impossible to say that it was not open to the jury to find that the acts of the respondent's employees were the cause of the accident.

It was argued that the jury's finding, that the driver of the automobile was not negligent, was perverse. It is not necessary to repeat the considerations that apply in determining this question as they have been discussed in several recent cases in this Court, the latest of which is *Warren* v. *Gray Goose*[2]. I agree with Mr. Justice Martin (now Chief Justice of British Columbia) that there is nothing in this case to indicate that the jury failed to perform their duty.

Having negatived any negligence on the part of the driver of the automobile, the jury answered question 9 as follows:—

> (9) In what degree of fault was either party liable?
>
> Q. (*a*) The defendants' servants?
>
> A. We consider that the speed of the tram car was excessive, especially in view of the fact that two crossings had to be negotiated and we refer as well to our answer to question no. 2.
>
> Q. (*b*) The driver of the auto?
>
> A. None.

The answer to 9 (a) is really not responsive but there is nothing to show that the jury were in any way departing from their answer to the crucial question, no. 1, as to negligence *which caused the accident.* In fact, the words "and we refer as well to our answer of question no. 2" really reiterates and emphasizes the earlier answer. Even without applying the admonition in *Pronek* v. *Winnipeg, Selkirk and Lake Winnipeg Railway Co.*[3], that "the language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly," it is plain,

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[2] [1938] S.C.R. 52.
[3] [1933] A.C. 61, at 66.

I think, that the appellant is entitled to judgment on the answers to questions 1 and 2, and that nothing in the answer to question 9 (a) can derogate from that right.

The effect of the original negligence of the respondent's employees continued down to the time of the impact. The jury being justified if finding no negligence on the part of the driver of the motor car either in the first instance of alter he found his automobile had straddled the north rail of the respondent's tracks, it is unnecessary to consider the other questions discussed at bar. I would allow the appeal and restore the judgment of the trial judge with costs throughout

Appeal allowed with cost.

Solicitor for the appellant: Harr J. Sullican.

Solicitor for the respondent: V. Laursen.