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*Feb. 16.
*Mar. 5.

WINNIPEG ELECTRIC COMPANY (DEFENDANT) ..... APPELLANT;

AND

ENGEBRET PAULSON ODEGAARD (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Street railway—Door of moving tramcar, wrongfully opened by passenger, striking and injuring person on station platform—Liability of railway company—Granting of "special leave" to appeal—Supreme Court Act, s. 41.

While defendant's tramcar, which had overshot a station platform, was backing to it, a passenger, without the knowledge of the motorman or conductor, and while the conductor was collecting fares in the front

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

part of the car, opened a rear door by working the handle which was within the conductor's box; the opened door of the moving car struck and injured the plaintiff who was standing on the platform.

Held: Defendant was not liable for the injury. The cause of the accident was the passenger's wrongful act in operating the handle, which he must have known was intended to be operated only by the conductor. There was no evidence to warrant the conclusion that the passenger's act should have been anticipated by the defendant. As to alleged disregard of a rule requiring the conductor to go to the rear of the car when being moved reversely, it was sufficient to say that, if the rule applied at that point, its breach was not the cause of the accident; moreover, the rule was for an entirely different purpose.

Judgment of the Court of Appeal for Manitoba (36 Man. R. 592) reversed.

Newcombe J. dissented, holding that it was the conductor's neglect of his duty to be at his post at the rear when the car was backing, that was the direct cause of the accident; it was a consequence of the lack of the control which he was required to exercise that the passenger opened the door for himself; the passenger's act was natural and should have been foreseen and precautions taken against it.

The court expressed the opinion that the case did not belong to the class of cases in which it was contemplated that "special leave" might be given under s. 41 of the *Supreme Court Act.*

APPEAL by the defendant, by special leave granted by the Court of Appeal for Manitoba, from the judgment of that Court (1), affirming, by a majority, the judgment of Stacpoole, Co. C.J., holding the defendant liable in damages for personal injuries suffered by the plaintiff through being struck, while standing on a station platform, by a door of the defendant's tramcar, the door having been opened by a passenger in the car, while the car, which had overshot the platform, was backing to its stopping place. The material facts of the case are sufficiently stated in the judgments now reported. The appeal was allowed, Newcombe J. dissenting.

E. H. Coleman for the appellant.

H. C. Morrison for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Rinfret, Lamont and Smith JJ.) was delivered by

(1) 36 Man. R. 592; [1927] 2 W.W.R. 589.

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ANGLIN C.J.C.—By special leave of the Court of Appeal for Manitoba, the defendant appeals from a judgment of that Court (1), affirming (Fullerton and Trueman, JJ.A., dissenting) the judgment of Stacpoole, Co.J., who awarded the plaintiff $800 damages for personal injuries which he found were sustained through negligence of the defendants. Fullerton, J.A., states the material facts as follows:

> On the day of the accident, the plaintiff was standing on the platform at Ridge Creek Road, on the Selkirk line of the defendant's railway, waiting for a car from Selkirk, upon which he intended to travel to Winnipeg. The car overshot the platform about a car length, when it stopped and backed until the front door of the car was opposite the south end of the platform. While it was backing up, a passenger named Fyffe, without the knowledge of either the motorman or conductor, opened one of the rear doors, which struck the plaintiff, knocking him down and seriously injuring him.
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> The evidence shows that the crews of defendant's cars change at McBeth Siding, which is north of the platform on which the accident happened. After leaving McBeth Siding, the conductor's duty is to collect the fares of the passengers going to Winnipeg, and it was while he was attending to this duty and away from the handles operating the rear doors that Fyffe opened the door. Until fares have been collected, passengers get on and off by the front door, and the rear doors are not used. The learned trial judge found in favour of the plaintiff, taking the view that it was the duty of the company to have the conductor stationed near the operating levers in order that he might be able to control the opening and shutting of the doors.
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> It is clear that had it not been for Fyffe's interference the accident would not have happened.

The rear door of the car was admittedly designed to be operated only by the conductor, and its construction and the placing of the handle by which it was operated in the box or enclosure within which the conductor ordinarily stood made this so obvious that any sensible person could not fail to be aware of it. The view which prevailed in the Court of Appeal was that the failure of the conductor to lock the rear door when he went forward to collect fares amounted to actionable negligence. That Court, as well as the trial judge, took the view that the act of Fyffe in opening the door as he did was something that the defendants should have anticipated might occur and to prevent which they should have taken precautions, the omission of the latter in the circumstances amounting to actionable negligence.

(1) 36 Man. R. 592; [1927] 2 W.W.R. 589.

With the utmost respect, we cannot accept that view. The cause of the accident was undoubtedly the act of Fyffe in opening the door. By placing the handles used to operate the doors within the conductor's box the company had given intimation that passengers were not intended to meddle with the opening of the doors quite as effectively as if it had posted a notice forbidding such meddling. At all events, in the absence of any evidence that such interference by a passenger had occurred before and was, therefore, something that might have been expected, such an inference was, in our opinion, unwarranted. Negligence implies a breach of duty. Finding nothing on which to base an inference that the wanton and mischievous act of the passenger in operating the handle, which he must have known it was intended should be operated only by the conductor, was something that the company ought to have anticipated might occur, there is no basis for the implication of a duty to prevent it.

There was, in our opinion, no evidence on which a court could come to the conclusion that such action by a passenger ought to have been anticipated.

Of other negligence suggested, such as the disregard by the motorman and conductor of a rule requiring the latter to go to the rear of the car when it is being moved reversely, it is sufficient to say that, if the rule applied at the point in question, its breach was not the cause of the accident. Moreover, the rule was made for an entirely different purpose. Nor is it material that when the door was opened the car was moving backwards.

For these reasons the appeal must be allowed and the action dismissed. Counsel for the appellants having informed the Court that he was instructed not to ask costs, there will be no order as to costs.

Before parting with this appeal we feel that we should add that this case does not, in our opinion, belong to the class of cases in which it was contemplated that "special leave" might be given under s. 41 of the *Supreme Court Act*. It deals with a very ordinary claim based upon negligence, the disposition of which depends upon the inferences to be drawn from a particular set of facts. There is no matter of public interest involved in it.

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NEWCOMBE J. (dissenting).—I am so unfortunate as to differ from the other members of the Court, and, as I have formed a very definite opinion, I think it better to state it. The view which prevails, if I may presume to express it according to my understanding, is that, while there may have been negligence on the defendant's part in backing the car with no lookout, and in thus coming to the station without exercising any competent control of the doors at the rear of the car, the company did no more than to create a dangerous condition, in which the act of the passenger who opened the door was the cause productive of the accident.

To the contrary, in my opinion, which I express with the utmost respect, not only would the accident not have occurred if the conductor of the car had discharged his duties, but neglect of these was the direct cause. Intervening, it is true, was the act of the passenger who opened the door, but, seeing that the conductor was not at his post, that act followed in natural course; it was a consequence of lack of the control which the conductor was required to exercise that the passenger opened the door for himself; and the defendant is liable for consequences which should have been foreseen—such as were so likely to ensue that the defendant's failure to anticipate them and make effective reasonable means of prevention was negligence.

The facts are very plain. On 13th November, 1926, at about half-past six in the evening, the plaintiff and two boys were waiting at Ridgecrest Station on the defendant's railway to take passage into Winnipeg on the incoming car. The accommodation provided for the taking up and discharge of passengers was extremely limited, the platform being only 5 feet long and 2 feet 6 inches wide; it was reached by the sidewalk of Ridgecrest Avenue, from which there were steps leading up. There had been rain and frost during the afternoon, and the platform was icy. When the car came along it passed the platform by a car length or less, then stopped, and, after some hesitation, moved slowly backward, as the motorman says, under "one notch of power, one and a half or two miles an hour probably." Then, as the car came opposite to the platform, the rear door, which swings outward, was opened from within,

projecting over the platform about 1 foot 3 inches, or half the width of the platform, and, in its progress, sweeping off the plaintiff and one of the boys. The plaintiff fell into a ditch or excavation and suffered damages, for the recovery of which the action is brought. The defence is that the defendant company is not responsible for the opening of the door and the consequent overthrow of the plaintiff, because it was one of the passengers in the car, and not a servant of the company, who opened the door. It appears that the defendant, in defining the duties of its employees, had taken care to provide that the doors were not left to the operation of the passengers. On this particular car two men were employed, a motorman and a conductor. The motorman's place was at the head of the car, and he attended to the driving and to the working of the door in front. There was a place provided for the conductor in the rear compartment of the car, in which were also seats for passengers. There was, between the conductor's seat and the space occupied by the passengers, a metal rail or bar to which were affixed handles for opening the doors at the rear.

When the motorman desires to reverse his car he gives a signal of four bells to the conductor, whose duty it is then to see that the way is free of obstruction, and so to inform the motorman by repeating the signal. While the reverse operation is in progress the conductor communicates with the motorman by signals to warn of any danger. On this occasion, although backing into a station, the conductor was not at his post in the vestibule at the rear. He had gone forward to collect fares from passengers who were extending their journey beyond that for which they had paid when entering the car, and he was, in fact, so close to the motorman that signals were useless, and the latter, instead of giving the reverse signal, told the conductor orally that he was going to reverse. The conductor paid no attention; he says he did not hear what the motorman said. The motorman looked at his side vision mirror, which gave him a limited view of the situation outside at the rear of the car, and started, as he says, slowly in the reverse direction, intending to stop at the platform. The conductor ignored these movements, but remained in the front of the car, col-

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lecting his fares. It was then that a passenger who was riding in the rear vestibule opened the door, and in consequence the man and boy were upset. There were means of locking these doors, and, as to a car which is in the sole charge of a motorman, or, as the saying is, "operated as a one-man car," the doors at the rear are locked while the car is in motion, and open automatically, or by the passenger's foot upon a treadle, when the car stops. When there is a conductor, and he is in his place, he controls the handles by which the doors at the rear are opened and closed; but when he is not in his place, no means are substituted or employed to prevent a passenger from opening them, and the handles are conveniently placed for the use of passengers riding in or passing through the vestibule to make their exits. As to what should have been anticipated, such cases are said to be rather of first impression, but, so far as I can perceive, it is just as natural, and just as much to be foreseen, that an outgoing passenger who knows the use of the handles would open the door for himself as if the handles had been knobs or latches affixed to the doors themselves. The company's standing orders were apt enough, if followed, to prevent such accidents; the trouble was that the conductor in this case failed to comply with them, the instructions which the company gave to its servants were thus set at nought, and the accident followed as a natural result. It is common course for a passenger to open a door when he has only to turn the handle and there is no employee exercising any control. Then, if it be natural and probable that a passenger would let himself out, it is surely not unnatural or improbable that he may on occasion open the door somewhat prematurely, or without due regard to the circumstances of the people who are waiting on the platform. All kinds of passengers ride in tramway cars, and, if the doors of these cars open outwards, and there be nothing to prevent the opening of them by any passenger who is so minded, the use of a lock or some device to prevent the doors becoming sources of danger to persons outside would seem to be a matter which should not escape the attention of those responsible for the operation of the tramway.

The defendant relies upon a passage from Lord Dunedin's judgment in *Dominion Natural Gas Co.* v. *Collins, et al* (1), where the law is stated in these words:

> The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell* (2); *Thomas* v. *Winchester* (3); and *Parry* v. *Smith* (4), are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail.

And it is argued that here the accident was due to the conscious act of another volition, and that the defendant is not liable. But I am satisfied, and indeed the cases cited in the context show, that the passage does not assist a defendant in cases where there is a duty to take prudent precautions, such as, upon the findings, existed in this case, and where the cause of the accident is to be found in the neglect to take those precautions. It is a question of fact whether the negligent act of a third person is such a natural and probable consequence of the defendant's own neglect in prescribing and enforcing reasonable preventive measures that the defendant is himself guilty of negligence if he fail to anticipate and provide against the negligent *actus interveniens*, and my finding upholds that of the trial judge, and of the majority of the Court of Appeal.

Appeal allowed.

Solicitors for the appellant: *Anderson, Guy, Chappell & Duval.*

Solicitors for the respondent: *Morrison & Booth.*

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(1) [1909] A.C. 640, at p. 646.
(2) (1816) 5 M. & S. 198.
(3) (1852) 6 N.Y.R. 397.
(4) (1879) 4 C.P.D. 325.