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*Nov. 19, 20.
*Dec. 4.

CANADIAN NORTHERN RAILWAY CO. (DEFENDANT) ..... APPELLANT;

AND

LEON PRESCESKY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Railway—Level crossing—Absence of statutory signals—Proper lookout—Contributory negligence—Questions for the jury.

In an action against a railway company for injuries sustained through a collision of appellant's train with respondent's automobile at a railway crossing, it was established that appellant failed to give the statutory signals; and the respondent declared in his evidence that

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

if the whistle had been sounded and the bell rung, he would have heard and thus avoided the accident. He also detailed circumstances which led to his not giving greater attention to the possibility of a train coming. The trial judge found negligence on the part of appellant but withdrew the case from the jury and dismissed the action on the ground that the plaintiff was guilty of contributory negligence in not keeping a proper lookout for approaching trains. On appeal, a new trial was ordered.

Held, Davies C.J. dissenting, that, it was a question for the jury to determine, having regard to all the circumstances, whether there was a reasonable excuse for the respondent's failure to perceive the approach of the train by which he was injured.

Canadian Pacific Railway Co. v. *Smith* (62 Can. S.C.R. 134) and *Canadian National Railways* v. *Clark* ([1923] S.C.R. 730) discussed.

Judgment of the Court of Appeal ([1923] 2 W.W.R. 1141) affirmed, Davies C.J. dissenting.

APPEAL from a decision of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge which had dismissed the respondent's action and ordering a new trial.

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

D. L. McCarthy K.C. and *D. O. Owens* for the appellant. A person crossing a level railway crossing must act as a reasonable person should act and not attempt to cross without looking for an approaching train; and where the evidence is conclusive that he did not look, the trial judge is justified in withdrawing the case from the jury, on the ground of contributory negligence.

P. Makaroff for the respondent. It is within the province of the jury to determine whether the negligence of the plaintiff or the defendant was the direct and effective cause of the accident.

THE CHIEF JUSTICE (dissenting).—As a majority of this court has dismissed this appeal and determined that a new trial must be had, I will refrain from discussing at any length the facts as proved at the trial already had.

The learned trial judge nonsuited the plaintiff at the close of his case on his own evidence to the effect that he had driven on to the railway crossing for eighty yards before reaching it without looking along the track to see if any train was approaching from the eastward, that is in the direction the plaintiff was travelling, toward the

(1) [1923] 2 W.W.R. 1141.

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crossing. Plaintiff stated that at about this distance of eighty yards from the crossing he had looked eastwardly along the tracks and did not see any train and that he had not looked afterwards. The evidence was that the nearer he approached the crossing the further along the track he could see and that if he had looked he could and would have seen the train from many places in the road between the eighty yards where he says he did look and the crossing itself.

The substantial question to be determined at the close of the plaintiff's case was whether the plaintiff was guilty of contributory negligence in not having so looked before attempting to pass over the level crossing.

I have gone very carefully into the evidence and have reached the conclusion that in so neglecting to look for an approaching train along these eighty yards he was clearly guilty of such negligence as contributed to the accident on the crossing from the train crashing into his auto; and that there was nothing in the evidence which would excuse the neglect of this plain duty of looking and no evidence from which the jury could find such excuse.

I would, therefore, allow this appeal concurring with the nonsuit granted by the learned trial judge and his reasons for granting it.

IDINGTON J.—This action was brought by the respondent against the appellant for damages to himself and his automobile, which he was driving, and in which he was alone, when struck by a special train of the appellant at the intersection of the appellant's railway and the public highway on which respondent was travelling.

The action was rested upon the failure of the appellant to either ring the bell or blow the whistle, as required by statute to do when approaching a public highway.

The respondent swore that neither was done and that when he was approaching the said crossing he looked towards the east along the railway, saw no train and, owing to the angle of his approach he was facing westerly rather more than if approaching the railway at right angles, and that the regular train from the west was due about that time and, owing to the growth of trees and shrubs, and the shape of the land alongside the railway

track to the west (and the train likely to come therefrom) it required close attention watching for the said train.

There was, according to the evidence, only one train a day each way and the one from the west passed the point in question about nine o'clock in the forenoon, and the other, going westerly, about five o'clock in the afternoon.

Counsel for respondent, if I understood him correctly, said that indeed there was only one of these trains each day.

This part of appellant's road seems to be a branch line far north and over which there is not much traffic.

The respondent had lived near the point in question for five or six years and knew the condition of things I have just adverted to, and hence paid more attention to the probabilities of a train coming from the west than the possibilities of a special train coming from the east at that time of day.

I cannot see how he was blameworthy for so doing.

Unfortunately there was a special train from the east coming at a higher rate of speed than usual on that road, carrying only the engine with its tender, and a single coach; and respondent, depending upon such a possibility giving due warning, according to statute, was thus taken unawares.

The learned trial judge upon motion for a nonsuit granted same and refused to submit the case to the jury. It was eminently a case for the jury to have passed upon.

Hence the Court of Appeal for Saskatchewan unanimously reversed that ruling and directed a new trial, costs of the first to abide the event.

From that decision the appellant has appealed to this court.

I agree in all essential features with the reasoning of Mr. Justice Martin writing the judgment for said court, and therefore am of the opinion that this appeal should be dismissed with costs here and in said Court of Appeal.

The respondent submits, by way of cross-appeal, that the costs of the last trial should be allowed also instead of being made to abide the event.

In a case of this kind, I respectfully submit, that the proper course is to try it out (subject to the motion for non-suit) and thus avoid the costs of a new trial and, as

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is often done by the learned trial judge who can, if clearly holding that the plaintiff must, by reason of contributory negligence, fail, at the close enter judgment for the defendant and trust to the appellate courts finally determining all involved therein.

I would therefore, seeing counsel for appellant pressed for the contrary course, allow said cross-appeal.

Repeated trials are undesirable, and can be avoided by the method I have suggested in such cases as this; and especially when as I respectfully submit they often come so close to the line as apparent in the recent cases of *The Canadian Pacific Railway Company* v. *Smith* (1), and *Canadian National Railways* v. *Clark* (2), recently decided by this court.

DUFF J.—It is necessary, in my judgment, that there should be a new trial in this case. It is, of course, important to avoid unnecessary comment upon the facts. It will be sufficient to say, I think, that in my opinion the point for decision on the appeal put concretely cannot be better stated than in the argument of Mr. McCarthy. The question is this: Was there in the facts which the jury was entitled to find on the evidence anything which the jury, acting judicially, might consider to be a reasonable excuse for the failure of the respondent to see the approaching train? The infrequency of traffic on the line, the fact that the respondent's attention was fastened on the possibility of the approach of a train which was expected in the usual course from the west and the respondent's statement that he actually listened for the statutory signals were circumstances which I think should not have been withheld from the jury.

There is some misapprehension, I think, a misapprehension which to me, I must admit, is unaccountable, of the purport of the decision in *Smith's Case* (1). In that case the evidence adduced by the plaintiff himself established conclusively that if the plaintiff had given his attention to the matter at all he must have seen the train by which he was struck, a train which he knew would by the usual rule be passing at that time. As to excuse for failing to look, there was no suggestion of an excuse in the respondent's own evidence. It was suggested by his coun-

(1) [1921] 62 Can. S.C.R. 134. (2) [1923] S.C.R. 730.

sel that his attention was distracted by the horn of a motor following him, which indeed, was blown for the purpose of awakening his attention to his surroundings and the danger he was running into. This suggestion had no support in the respondent's own testimony and was not one to which, in the opinion of the majority of the court, the jury, acting judicially, could, in view of the undisputed facts and the respondent's silence upon the point, have given effect by holding the circumstances to constitute a reasonable excuse for the respondent's conduct.

In *Clark's Case* (1), on the other hand, the respondent stated that as he approached the railway track, which was hidden by a bluff, knowing a train was due to pass about that time, he listened for the bell and the whistle and looked for the smoke, and that hearing nothing and seeing nothing, he surmounted the bluff with the conviction that the train was not approaching. These circumstances, in the opinion of the court, were circumstances which might properly be considered by the jury in the inquiry whether or not there was a reasonable excuse for the failure of the respondent to see the train by which he was injured.

The elaborate discussion of facts in such cases as this does, no doubt, involve some risk of evidence being shaped to fit into the frame of some headnote or dictum; but questions of credibility are peculiarly for the jury, and such evidence as that given in *Clark's Case* (1) and in this case cannot properly be withheld from them by the trial judge.

ANGLIN J.—For the reasons assigned by Mr. Justice Martin when delivering the judgment of the Court of Appeal, I would dismiss this appeal with costs, merely adding a reference to the language of Lord Sumner in *The King* v. *Broad* (2), and to the recent judgment of this court in *Canadian National Railways* v. *Clark* (1).

The costs here were not materially increased by the plaintiff's cross-appeal in regard to the disposition made by the Court of Appeal of the costs of the abortive trial.

(1) [1923] S.C.R. 730.

(2) [1915] A.C. 1110, at pp. 1118 and 1119.

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While the cross-appeal must be dismissed, I think it may properly be without costs.

MIGNAULT J.—I am of the opinion that the appeal should be dismissed with costs and the cross-appeal without costs for the reasons stated by my brother Duff.

Appeal dismissed with costs.

Solicitors for the appellant: *Borland & McIntyre.*

Solicitors for the respondent: *Makaroff & Bates.*