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*Feb. 29.
*April 22.

DAME LEONIE LAPORTE (PLAINTIFF) ... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY CO. (DEFENDANT) ..... RESPONDENT.

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

*Negligence—Railway—Injury—Jury trial—Evidence—Question for jury.*
Where there is conflicting evidence on a question of fact, whatever may be the opinion of the judges of an appellate court as to the value of that evidence, the verdict of the jury should not be disturbed.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec, reversing the judgment of the trial judge with a jury and dismissing the appellant's action.

The action was taken by the appellant against the respondent company for damages arising from the death of her husband, which occurred as the result of a collision between a motor truck which he was driving across the respondent company's track and one of the respondent company's locomotive engines. The jury found that the accident was the result of the combined negligence of the appellant's husband, in heedlessly crossing the line without taking proper precautions, and of the servants of the respondent company in failing to give the statutory signal. The jury having assessed the damages at $12,000 and reduced them to $8,000 in consequence of the fault of the victim, judgment was given for the last mentioned sum; but the appellate court reversed this judgment and dismissed the action, being of the opinion that the verdict was contrary to the evidence.

*Lafleur K.C.* and *Lamothe K.C.* for the appellant.

*Wells K.C.* and *Chassé K.C.* for the respondent.

IDINGTON J.—The jury before whom this case was tried answered a number of questions submitted to it by the learned trial judge in such a manner as to demonstrate that according to the view of the jury each of these parties was to blame for the accident.

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc*.

The learned trial judge entered judgment accordingly and, according to Quebec law, both parties being to blame the relative proportion of blame must be assessed by the jury as was done herein.

The answers of a jury to questions submitted to them by the learned trial judge must be read in light of the charge he has given the jury.

The jury in this case answered questions four and five as follows:—

4. Was the accident due only to the fault and negligence of the said late Oliva Paradis, and if so state in what consisted this fault and this negligence?

No. Nine for, three against.

5. Was the said accident due to the common fault of the said Oliva Paradis and the defendant or of persons under its control and for whom it is responsible, and if so state in what consisted, respectively, this common fault?

Y. The Canadian Pacific at fault by not whistling in time for the crossing. Paradis, for neglect for not looking before crossing the railroad track. Nine for, three against.

The turning point of this appeal is the answer to question number five from which it clearly appears, if we have regard to law and common sense, that the jury did not believe that part of the evidence of the respondent's servants that the required whistling took place at the exact point the law required, but took place after that had been passed and hence not legally in time for the crossing at which the accident herein in question took place.

There was evidence clear and convincing, that the whistling took place after the whistling post had been passed; especially if regard is had to the absolute oath of respondent's servants that only one whistling took place.

In such case the evidence of others (having no interest either way) indicates a whistling did take place quite close to the crossing if not actually upon it. Which is to be credited, in such a case of conflict, the interested or the disinterested set of witnesses?

A jury has not only a perfect right, but an absolute duty, to believe and accept one part of a witness's statement, and discard another part thereof which it does not believe. And that is evidently what this jury did in this case.

Counsel for respondent so persistently insisted upon arguing that the whole evidence of these servants of re-

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spondent should be accepted as final and conclusive that I am quite convinced they had no other case to rely upon.

The evidence on both sides in any case must all be considered and the true story contained therein as it is found in and by the minds of the jury or of the majority of nine, as Quebec law provides, is that upon which, when reported to the judge, he must act.

Unless the findings are clearly such as no nine reasonable men in Quebec can reach, they are final and conclusive and should not be interfered with by any court of appeal.

With great respect the appellate court below departed from this clear and absolute rule of law.

The opinions of the learned trial judge and Mr. Justice Guerin, dissenting, in the Court of King's Bench, were overruled.

I am therefore of the opinion that this appeal should be allowed with costs here and in the Court of King's Bench and the judgment of the learned trial judge restored.

DUFF J.—The appellant recovered judgment for $8,000 in an action against the respondent company under Art. 1056 of the Civil Code for damages arising from the death of her husband, which occurred as the result of a collision between a motor truck which he was driving across the respondent company's track and one of the respondent company's locomotive engines. The negligence alleged by the appellant was the failure to give the statutory crossing signal by whistling. The jury found that the accident was the result of the combined negligence of the appellant's husband, in heedlessly crossing the line without taking proper precautions, and of the servants of the company in failing to give the statutory signal. The jury having assessed the damages at $12,000 and reduced them to $8,000 in consequence of the fault of the victim, judgment was given for the last mentioned sum. From this judgment the respondent company appealed, and the Court of King's Bench reversed the judgment of the trial judge and dismissed the action. The grounds upon which the Court of King's Bench proceeded are set out in the formal judgment in these words:—

Attendu que la seule faute reprochée à la compagnie appelante est que ses employés n'auraient pas fait crier le sifflet de la locomotive à temps;

Considérant qu'il appartenait à la poursuite de prouver cette faute et qu'il est au contraire établi que les employés de la compagnie ont fait entendre plusieurs fois, et à temps, le sifflet de la locomotive, spécialement qu'ils ont donné des coups de sifflet réglementaires avant le passage à niveau où la collision s'est produite, et à la distance requise de cet endroit;

Considérant que la preuve ne justifie pas le verdict du jury;

Considérant qu'aucune faute imputable à l'appelant n'a été prouvée, que le verdict rendu est contraire à la preuve et qu'il appert d'une manière évidente que nul jury ne serait fondé à rendre un verdict autre qu'en faveur de l'appelante.

The sole question on this appeal is whether there was evidence from which the jury could reasonably find that the negligence charged against them was properly imputable to the respondent company's servants. The crossing signal is a well-understood signal, and consists of two long and two short blasts. Another signal is spoken of in the evidence, called the "alarm," or the "danger" signal, and the difference between the two signals is very clearly explained by Parmelee, the locomotive engineer. The alarm, or danger signal, consists in a series of rapidly repeated short whistles.

There is little conflict between the witnesses called on behalf of the appellant and those of the respondent company upon the point that only one signal was given. The point in dispute is whether that signal was the alarm signal given at the moment of the impact, just as the engine was about to strike the truck, or whether it was the usual crossing signal given some seconds before, at the whistling post. Parmelee, the engineer, is perfectly explicit upon the point that the usual crossing signal was given some seven or eight seconds before he actually reached the crossing, and that it was the last signal before the collision occurred. According to his statement, the signal was the usual one, two long and two short blasts. Other witnesses called on behalf of the respondent company are equally explicit, and their evidence is quite unshaken in cross-examination. But as against that there is evidence, which is quite as positive, quite as unequivocal, given by witnesses who, if they are to be believed, were in a position to speak, that the only signal given was a signal consisting of three sharp blasts in rapid succession, just at the moment of impact. One of these witnesses was Rev. Father Lavigne, who was travelling in the train. Another

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was Leduc, an employee of the Post Office, who was standing on the platform at the Rang-Double de St. Grégoire, a distance of twenty arpents from the Kemp crossing, watching the train, which he says he could see distinctly, and in a position in which, as he says, he could have heard the crossing signal, had it been given. His evidence may usefully be quoted:—

Q. Lorsque vous regardiez le train qui s'en venait, avez-vous entendu quelque chose de la locomotive?
R. J'ai entendu crier trois cris de sifflet.
Q. A quel endroit?
R. A l'endroit où ils ont frappé.
Q. A l'endroit où ils ont frappé quoi, ou qui?
R. Le camion.
Q. Quel camion?
R. Le camion de M. Paradis.
Q. Quelle sorte de coups de sifflets avez-vous entendus?
R. J'ai entendu trois cris, trois cris d'alarme, comme on dirait.
Q. Est-ce que ces cris-là étaient longs ou courts?
R. Courts.
Q. Quel était l'intervalle entre les cris? La longueur de temps entre deux cris?
R. Toute de suite.
Q. Avez-vous entendu d'autres cris de sifflet avant ceux-là
R. Non, monsieur.
Q. Aviez-vous entendu la cloche sonner avant cela?
R. Non.
Q. Pouviez-vous entendre de l'endroit où vous étiez, à la station? —Entendre la cloche?
—De l'endroit où vous étiez, à la station, pouviez-vous entendre les cris de sifflet et la cloche?
R. Je pouvais entendre le sifflet.
Q. Combien de temps après les coups de sifflet la collision s'est-elle produite?
R. En même temps j'ai vu monter la poussière.
Q. Et cette proussière d'où venait-elle?
R. Ç'était de la marchandise qu'il avait dans le truck.
Q. Ca venait du camion?
R. Oui.

I am unable to concur in the conclusion of the Court of King's Bench that the verdict of the jury, who had such evidence before it, can be set aside as an unreasonable verdict. There was the sharpest contradiction between the two sets of witnesses, and it may be that there were powerful reasons which ought to have influenced the jury to accept the evidence produced by the respondent company in preference to that produced on behalf of the appellant; but the question of credibility in all its phases was entirely

a question for the jury. It was for them to judge whether Allard and Leduc were worthy of credit when they stated that if the crossing signal had been given they would have heard it. It was for them to say whether the Rev. Father Lavigne was to be credited when he stated that the alarm signal—a signal, that is to say, which he recognized as the usual alarm signal—was given just at the moment of the impact. It was for them to accept or reject the evidence of Leduc that the alarm signal was given just at that moment. If this evidence was believed by the jury, it involved the rejection of the testimony given by the witnesses called on behalf of the respondent company, who were quite positive that only one signal was given, the usual crossing signal, consisting, as above mentioned, of two long and two short blasts.

I have already mentioned that there was little or no conflict upon the point that only one signal was given. On this there was such a degree of unanimity that the jury could not consistently with the evidence have taken the view that there was more than one. Starting from that point, if they believed the evidence of Allard, Leduc and Lavigne, for example, the case for the respondent was conclusively established. Whatever the jury might have thought of the likelihood that the attention of the witnesses called for the appellant would be directed to the subject of the crossing signal (so that if given they would probably have heard it) it was entirely for the jury to say how much of the evidence given by witnesses called for the respondent company they should accept and how much they should reject. It was within their province to decide whether, having accepted their evidence upon the point that only one signal was given, they should reject it in so far as it bore upon the issue whether that signal was the usual crossing signal or an alarm signal given just at the moment of impact. *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (1).

The appeal should be allowed with costs here and in the court below, and the judgment of the trial judge restored.

MIGNAULT J.—The photographs which were put in evidence at the trial graphically depict a railway crossing which

(1) [1878] 3 App. Cas. 1155, at p. 1201.

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no one would imagine a dangerous one. The highway, called the Kempt road, crosses the railway line at an angle in an open country, while the railway itself runs along an embankment making it a conspicuous object for a considerable distance. At the time of the accident the sun was about setting, but there was still light enough to dim the glare of the locomotive's head lights which were burning. The appellant's husband, who was killed, was driving an automobile truck along the highway with two companions, one of whom lost his life and the other saved himself by jumping. The respondent's train was running at a speed of forty-five miles an hour and struck the automobile on the further track of a double tracked line. The only evidence we have of the speed of the motor truck is that when it mounted the incline leading to the railway crossing it was going at about ten miles an hour, a speed which is said to have been reduced as it crossed the nearer track.

The jury found that the railway company and the driver of the car were both in fault, the former by not whistling in time for the crossing, the latter for not looking before crossing the railroad track. They reduced the assessed damages, $12,000, to $8,000 by reason of the negligence of the appellant's husband. Judgment having been rendered in accordance with the verdict, the appellate court reversed this judgment and dismissed the action being of the opinion that the verdict was contrary to the evidence.

The question now is whether the verdict should have been disturbed. In other words, was the Court of King's Bench justified in disregarding the verdict of the jury on the facts in evidence?

It seems unnecessary to say at this late date that it is wholly within the province of the jury, properly directed as to the law, to find the facts. The Court of King's Bench set the verdict aside on the ground that it was not justified by the evidence. It is true that a verdict clearly contrary to the weight of evidence cannot stand, but the Quebec code of civil procedure (art. 501) states that a verdict is not considered against the weight of evidence unless it is one which the jury, viewing the whole of the evidence, could not reasonably find, and article 508 adds that a judgment different from that rendered by the trial judge may be

rendered when it is absolutely clear from all the evidence that no jury would be justified in finding any verdict other than one in favour of the party moving or inscribing.

The weight of the evidence adduced and the credibility of the witnesses are also matters for the jury alone. As long ago as 1878, Lord Blackburn in an often quoted passage, *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (1), said:—

> The jurors are not bound to believe the evidence of any witness; and they are not bound to believe the whole of the evidence of any witness. They may believe that part of a witness's evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him, unless there is an express or tacit admission that the whole of his account is to be taken as accurate.

I do not apprehend that there is any difference between the Quebec law under the articles of the code which I have cited and the opinion expressed by Lord Blackburn. It may be epitomized by saying that the jurors are the sole judges of the facts.

Here the crucial point is as to the fault found by the jury against the respondent, for there has been no attack on the finding of negligence against the driver of the truck. This fault is that the train did not whistle in time for the crossing.

The Railway Act (9-10 Geo. V, ch. 68), section 308, when a train is approaching a highway crossing at rail level, requires that the engine whistle be sounded at least eighty rods before reaching such crossing and that the bell be rung continuously from the time of the sounding of the whistle until the engine has crossed the highway. There was a post eighty rods from this crossing known as the whistling post, and it was there that the whistle should have been sounded and from that point to the crossing the bell should have been rung.

The jury's finding was as to the whistling, there was no mention of the bell not having been rung. At the speed the train was travelling, it would take twenty seconds to cover the distance from the whistling post to the crossing, a quarter of a mile.

As might have been expected, the testimony was contradictory as to this whistling, but the jury found, not that the

(1) 3 App. Cas. 1155 at p. 1201.

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whistle was not sounded, but that it was not done in time. It might have been desirable to put a further question to the jury in order to determine whether the train whistled at the statutory distance from the highway, for if it did there would have been ample time for the car to stop, and the respondent could not be said to have been in fault.

There was however evidence that the train whistled immediately before the collision and therefore not at the whistling post. Probably the testimony which the jury considered the most impressive was that of a mail carrier, Ernest Leduc, who from the station of St. Grégoire, three quarters of a mile from the crossing, watched the train as it approached the station. He swore that he heard three short blasts of the whistle at the place where the collision occurred and immediately he saw a cloud of dust, for the truck was laden with bags of flour. He heard no other whistle before the three short blasts.

The engineer and the fireman testified that the engine whistled but once and then at the whistling post. But the jury could disbelieve their evidence in so far as they stated that the whistle was sounded at the whistling post, and believe that of Leduc who said that the whistling, as he heard it, was at the moment of the collision. If that story was true, and its truth or falsity was entirely a matter for the jury, then the whistle was not sounded in time for the crossing and therefore not at the whistling post.

The construction of the jury's answer that the train did not whistle in time for the crossing at first gave me some difficulty, but I think that, taken in connection with Leduc's statement, what the jury meant was that the whistle was sounded immediately before the accident, or practically at the same time as it would appear to an observer placed at a distance of three-quarters of a mile who heard the whistling at the same time as he saw the cloud of dust, sound travelling much slower than light.

If therefore the finding means that the train did not whistle at the whistling post, there is a finding that the respondent committed a breach of its statutory duty, and therefore that it was in fault. The jury could infer that if the regulation signal had been given it would have been heard by the appellant's husband and the accident might have

been averted. It was for them to say whether the failure to give the statutory signal was a contributing cause of the accident.

There is just a further remark which I venture to make. Several cases, closely resembling the present one, have been referred to where, under the doctrine governing contributory negligence, damage actions have been dismissed by reason of the negligence of the injured party. But in the province of Quebec negligence of the plaintiff contributing to, but not being the sole cause of, the accident is not a bar to the right of recovery, but only a reason for reducing the damages that the negligent plaintiff has suffered by reason of his injury. It is for the jury to say whether the plaintiff's negligence was the sole cause of the accident or merely a cause contributing thereto with the negligence of the defendant, and the verdict will stand if there be evidence in support of it. This will serve to distinguish the case under consideration from the decision of this court in *Canadian Pacific Ry. Co.* v. *Smith* (1) strongly relied on by the respondent. The decision of the Privy Council in *Canadian Pacific Ry. Co.* v. *Fréchette* (2), also cited by the respondent, is an instance of a case where an appellate court may come to the conclusion that there was no evidence to justify the verdict of the jury, but the facts in that case show that the plaintiff had done something he was forbidden to do and had thereby assumed the risk of injury. Also in *Grand Trunk Ry. Co.* v. *Labrèche* (3) referred to, the verdict was set aside because the alleged fault found against the railway company was no fault in law. In no subject perhaps in the whole realm of jurisprudence is reference to cases which turn on particular facts more apt to prove delusive. It is the rule which has been applied to the facts which should be followed, and not the conclusion which consideration of the facts themselves led the court to adopt. Were it otherwise, there would be no guiding principle in a matter where facts vary *ad infinitum*.

With great deference therefore it appears to me that the Court of King's Bench had not sufficient ground for disregarding the verdict of the jury. The question for the

(1) 62 Can. S.C.R. 134. (2) [1915] A.C. 871.
(3) 64 Can. S.C.R. 15.

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appellate court was whether there was any evidence upon which the jury, if they believed it, could come to the conclusion that the regulation signals were not given or, as they put it, not given in time. It was not whether the appellate court itself found the evidence sufficient to establish fault on the part of the respondent. That again was a question for the jury and the jury alone, and as there was some evidence, as I have shewn, that the whistle was sounded practically at the time of the accident, the verdict must stand.

This does not mean that I believe that the jury should have come to the conclusion it did. The circumstances I have mentioned at the beginning of my opinion show to my mind that the driver of the car was guilty of almost incredible carelessness and brought on his own misfortune. But an appellate court is not entitled to substitute its opinion on the facts for that of the jury. Its duty is to accept the verdict if there be evidence to support it, however much it may disagree with the conclusion arrived at by the jury.

My opinion is therefore to allow the appeal with costs here and in the Court of King's Bench and to restore the judgment on the verdict.

MALOUIN J.—L'appelante réclame de la compagnie défenderesse, tant en son nom personnel qu'en sa qualité de tutrice à ses deux enfants mineurs, la somme de $26,200 à titre de dommages résultant de la mort de son mari, Oliva Paradis, tué accidentellement le 27 septembre 1922 dans une collision survenue à un passage à niveau entre le camion automobile qu'il conduisait et un train de la compagnie intimée.

Le procès a eu lieu devant un juge assisté d'un jury. Le jury étant arrivé à la conclusion que l'accident était dû à la faute commune des employés de la défenderesse et de Paradis rapporta un verdict en faveur de la demanderesse. Le jury reproche à Paradis de n'avoir pas regardé avant de traverser le passage à niveau et aux employés de la défenderesse de n'avoir pas fait crier à temps le sifflet de la locomotive.

Le jury a évalué les dommages à $12,000, mais les a réduits à $8,000, vu la faute commune des parties, accordant $4,000 à la demanderesse personnellement et $4,000 en sa

qualité de tutrice à ses deux enfants mineurs. Le juge qui a présidé au procès a accordé jugement conformément au verdict. Sur appel devant la cour du Banc du Roi, juridiction d'appel, le jugement a été infirmé et l'action renvoyée avec dépens, M. le Juge Guerin étant dissident.

Le motif donné pour infirmer le jugement est que le verdict est contraire à la preuve.

L'article 508 du code de procédure civile édicte qu'un jugement différent de celui rendu par le juge présidant au procès ou au verdict dans une cause réservée peut être rendu lorsqu'il appert d'une manière évidente de toute la preuve que nul jury ne serait fondé à rendre un verdict autre qu'en faveur de la partie qui fait la motion ou qui inscrit. En d'autres termes, cet article de la loi n'autorise le tribunal ou la cour d'appel à casser un verdict ou à infirmer un jugement basé sur un verdict que dans le cas où il n'y a aucune preuve quelconque au dossier pour le justifier.

Je soumets respectueusement que lorsqu'il y a au dossier une preuve suffisante pour créer un doute, cette preuve doit être soumise à l'appréciation du jury et son verdict doit être respecté.

Après le verdict, la demanderesse a fait motion pour jugement suivant le verdict; et la défenderesse a fait motion pour jugement nonobstant le verdict. Le président du tribunal a accordé la motion de la demanderesse et a rejeté celle de la défenderesse. Il est à présumer que si le juge présidant au procès avait été d'opinion qu'il n'y avait aucune preuve pour justifier le verdict, il aurait accordé cette dernière motion au lieu de la rejeter.

Je suis d'opinion qu'il y a suffisamment de preuve au dossier à l'appui du verdict pour empêcher le tribunal de substituer son appréciation à celle du jury sur les faits.

M. le juge Duff, dans ses notes préparées dans la présente cause, cite des extraits de la preuve qui justifient cette opinion. Il est inutile pour moi de les reproduire ici. J'y réfère.

J'infirmerais le jugement dont est appel et je rétablirais le jugement de première instance avec dépens dans les trois cours.

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MACLEAN J.— For the reasons given by Mr. Justice Duff, and Mr. Justice Mignault, I am of the opinion that the appeal should be allowed with costs here and in the court below, and the judgment of the trial court restored.

*Appeal allowed with costs.*

Solicitors for the appellant: *Lamothe, Gadbois & Charbonneau.*

Solicitor for the respondent: *P. C. Chassé.*