1920
*Feb. 2
Apr. 6.

REGINALD V. DUNN ADMINISTRATOR OF THE ESTATE OF STANLEY L. DUNN (PLAINTIFF).....APPELLANT;

AND

THE DOMINION ATLANTIC RAILWAY COMPANY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Railway—Drunken passenger—Ejectment from train—Suitable place—Findings of Jury.

The right of a conductor on a railway train to eject a passenger for disorderly conduct is not absolute but must be exercised with proper precaution to avoid putting the passenger in danger.

A drunken traveller was put off a train at a closed and unlighted station at one o'clock in the morning and some hours later his body was found on the track near the station in a condition indicating that he had been killed by a passing train. In an action by the administrator of his estate against the railway company:

Held, Davies C. J. dissenting, that the evidence justified the jury in finding that deceased when ejected was not in a state to take care of himself and that putting him off in that condition at such a place and at such an hour was negligence on the part of the company which led to his death.

Judgment appealed from (53 N.S. Rep. 88) reversed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming, by an equal division, the

---

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

(1) 53 N.S. Rep. 88.

judgment at the trial in favour of the defendant company.

The facts are sufficiently stated in the above headnote.

J. J. Power K.C. for the appellant.

Henry K.C. for the respondents.

THE CHIEF JUSTICE (dissenting).—At the close of the argument at bar in this appeal I was of the opinion that the judgment appealed from was right and that this appeal should be dismissed.

Finding, however, in conference with my colleagues that this view was not shared in by them, I deemed it my duty to read all the evidence most carefully and to read and weigh the reasons of the different judges of the Supreme Court of Nova Scotia and the trial judge, who differed in their conclusions.

The result is that I find myself more strongly confirmed in the impression I had formed on the oral argument that the appellant had not proved any case of negligence against the company causing the death of the deceased.

The facts are not complicated and it seems to me that the evidence on all the material and vital facts is one way and that the findings of the jury on these facts as regards the conduct of the deceased on the train before he was put off by the conductor, and as to the place he was put off being an "unfit place" to put him off, were directly contrary to the evidence.

The learned trial judge's decision is short and to the point and I transcribe it in full:—

To recover in an action of this kind it is settled law that the negligence alleged and proved must be the proximate cause of the accident or injury. Here, according to the proof and findings, Dunn

1920

DUNN v. DOMINION ATLANTIC RLY. CO.

The Chief Justice.

was ejected or put off an up-train or train going west, and was run down hours later by a down train, or train going east, with no evidence as to the cause of the accident, except marks on the track, indicating that a train going east had run over the man. The jury has found the defendant company's negligence to be in putting Dunn off the up-train at Hantsport.

This is not connected with the accident, and may have had no connection with it. I am obliged to hold that the negligence found does not establish a case upon which plaintiff can recover. For all that appears such negligence may not have in any manner contributed to the accident, and I direct judgment for the defendant company. The *Wakelin Case* (1) is, I think, a conclusive authority against plaintiff.

The broad simple facts are that the deceased was a passenger on an excursion train leaving Halifax for Kentville between 10 and 11 o'clock at night, the train consisting of an engine and fifteen passenger cars, all cars being filled with passengers. The deceased had been visiting his brother who lived in Woodside on the Dartmouth side of Halifax Harbour, and left about 7 p.m. to take a car to Dartmouth ferry across to Halifax and then some conveyance to the railway station in Halifax. He came aboard the train the worse for liquor but by no means helpless, became very disorderly, made himself generally a nuisance to the other passengers and, in fact, assaulted an old couple sitting quietly in their seats. The conductor remonstrated with him and seems to have treated him with great patience and forbearance, the result being that he was violently attacked by deceased who broke one of the car windows and tried to choke him. Only after much effort was the conductor successful in getting the man comparatively quieted down. After this disorderly conduct had culminated in the violent attack upon the conductor, the latter decided to land the passenger when the train arrived at Hantsport, the next stopping place.

(1) 12 App. Cas. 41.

I agree so fully and completely with the conclusions of the trial judge and of chief Justice Harris of the Supreme Court on appeal from the judgment of the trial judge, that I do not feel it necessary to re-state the facts and the conclusions to be drawn from them at any length.

The first question to be determined is whether the conduct of the deceased while on the express train was so disorderly and unruly as justified the conductor in putting him off the train and, if so, whether the place where he put him off, Hantsport station, was a fit and proper place to do so. As regards the latter point, I may say that the evidence showed Hantsport station is situated in an incorporated town and is not distant from the main thoroughfare of the town more than about one hundred yards.

The excursion train was a very lengthly one and the steps of the car from which the deceased was ejected when the train stopped at Hanstport opened on an extension of the train platform built up of ashes packed and hardened and protected by side planks. There was no more danger or difficulty in the deceased alighting on this ash extension of the station platform than upon the platform of which it was an extension.

I am of the opinion that this station was a fit and proper place to put off the disorderly passenger, and the only remaining question is whether the deceased's conduct had been so disorderly as to have made him a nuisance and offensive to other passengers in the train. It was proved beyond doubt that he was under the influence of liquor, was using profane language, actually assaulted several persons in the train without the slightest provocation and eventually assaulted the conductor violently, breaking at the time one of

1920

DUNN v. DOMINION ATLANTIC RLY. CO.

The Chief Justice.

the windows of the car. The conductor appears to me to have treated the deceased, unruly and provocative as his conduct was, with a good deal of forbearance and restraint and in a manner deserving commendation and not censure.

The result of my reading of the whole evidence, the vital and material parts being uncontradicted, is that I think the conductor was not only warranted and justified, after the deceased's disorderly conduct and the violent personal assault made upon him by the deceased passenger and his inability to keep him quiet, in deciding to put him off the train on reaching Hantsport, but that if he had failed so to put him off he would have assumed a greater responsibility that he was justified on doing. It was not only the conductor's right to land him where he did but, in my opinion under the circumstances, his duty. The manner of his being put off was, of course, criticised, but I cannot find there was more force used than was reasonably necessary to carry out his ejection. It is true it was after midnight, and the station offices were closed, but the hotel of the town was not many yards away and when last seen by the witnesses who spoke of the man's ejection as the train moved away from the station he was walking away from the track towards the town.

If I am right in my conclusion with uncontradicted evidence that the conductor was justified in putting the deceased off at the Hantsport station, the appeal must fail.

If, however, I am wrong in so holding, I am of the opinion that the fact of the deceased's body having been found with life extinct on the following morning on the car track, where he had eventually been killed by a passing train, would not of itself have been suffi-

cient to uphold the verdict. There is not a scintilla of evidence as to what became of the man after having been put off at the station. Whether he had liquor on his person and took more of it or got it otherwise, there is no hint. He evidently, we may surmise, wandered on the track while in a state of inebriety, sat down or lay down on the track, probably fell into a drunken sleep and was struck by one of the company's trains coming from the opposite direction to that of the train from which he had been ejected. No negligence is charged against the train which must have struck him. The expulsion, if wrongful, was not the cause of the man's death, nor is there any necessary connection between that expulsion and his death. If, in his half drunken condition, he wandered on to the track and sat or lay down there, and went asleep and was killed, the company is not surely liable, evidence to connect the alleged wrongful landing of the passenger at the station with the accident being entirely wanting.

I think the principle decided in the well-known case of *Wakelin* v. *The London and South Western Ry. Co.* by the House of Lords in 1886 and reported in (1), applicable in this case. To hold the company liable it must be established by proof that the accident to which the death of the deceased is attributable was caused by its negligence. If, in the absence of direct proof, the circumstances which are established are equally consistent with the allegations of the plaintiff as with the denial of the defendants, the plaintiff must fail. The plaintiff was very far from being helplessly drunk when he was put off at the station. He was drunk enough to make himself offensive and a nuisance,

(1) 12 App. Cas. 41.

1920.

DUNN v. DOMINION ATLANTIC RLY. CO.

The Chief Justice.

but not by any means helplessly drunk. Whether he obtained more liquor after being put off the train or not, there is not a particle of evidence. His condition was his own fault and the company is not liable after his expulsion for his imprudence or his fool-hardiness in running into danger on the track and being killed.

I would dismiss the appeal with costs.

IDINGTON J.—The only question raised herein deserving consideration is whether or not the conductor of a passenger train exercised due care in putting off the said train (about 1 a.m. on a dark night, at a station, and leaving unattended) a passenger who was so drunk that he staggered in the car, and when put off staggered and fell in sight of both the said conductor and a brakeman of the train who had been deputed by the former to see that such passenger did not get on again.

The passenger so put off was found on the respondent's railway track, five or six hours later, eleven or twelve hundred feet distant from the said station, evidently mangled to death as the result of being run over by another engine or train.

There was no light or accommodation in the station and none shewn to exist in a near by hotel, or elsewhere in the vicinity.

Assuming the respondent's by-law enabling its conductor to put off a passenger, possessed of a ticket entitling him to proceed further, when misconducting himself, is the doing so justifiable under such circumstances, so obviously likely to lead to such results, as in question herein, without taking the slightest precaution to guard against same?

The jury answered that in the negative by finding respondent, by reason of such want of care, to have caused the death of said passenger, as well as in answering many other questions submitted to them affirming the conditions I have outlined.

The subsequent finding of the dead body where it was, not only justifies that finding as the cause of death, but illuminates the whole story and demonstrates, if circumstances ever can demonstrate anything, the hopelessly drunken condition of the man and the need there was for due care in regard to him in such a condition and in such a dangerous situation.

In broad daylight when there would perhaps be in such a situation many there, engaged in their daily avocations, likely to supply the needed care, such an incident might be justifiable.

The question of law raised herein upon the findings of the jury is of an entirely different character.

I am of the opinion that in this peculiar case herein presented there was ample evidence to submit to the jury relative to the question of the duty of due care, under the circumstances, and that their finding of fact, which was wholly within their province to decide, should not be set aside.

And I am the more inclined to such holding by this evident loss of temper on the part of the conductor leading to and resulting from the scuffle between him and the drunken passenger.

I can see no further excuse for the entire abandonment of a human being in such a condition, to such obvious possible consequences as ensued.

And that excuse for the entire want of care on the part of the respondent's conductor, under such circum-

1920

DUNN v. DOMINION ATLANTIC RLY. CO.

Idington J.

stances does not, in my opinion, justify the course pursued.

I agree with Mr. Justice Russell and Mr. Justice Mellish in the result they reached in the court below, and so much am I in accord with the elaborate review of the facts presented by the latter, that I do not feel it necessary to repeat same here.

Nor do I deem it necessary to demonstrate that the *Wakelin Case* (1) is quite irrelevant unless we are prepared to hold that a drunken man has in law so lost his rights that he may lawfully be pitched overboard regardless of the consequences.

I think the appeal should be allowed and judgment be entered for the amount of damages found by the jury with costs throughout.

DUFF J.—This appeal should be allowed.

ANGLIN J.—After some hesitation due chiefly to the difficulty and delicacy of the position of a railway conductor called upon to deal with a disorderly drunken passenger and the danger of unduly curtailing or circumscribing his powers and restricting his discretion, I have reached the conclusion that there was evidence on which a jury might, without laying itself open to a charge of perversity, find that, having regard to the state of inebriety of the late Stanley Dunn and to the conditions at Hantsport station at the time, it was not a proper place at which to remove him from the defendant's train. The right of removal of a disorderly passenger which is conferred on the conductor is not absolute. It must be exercised reasonably. He cannot under it justify putting a passenger off the

(1) 12 App. Cas. 41.

train under such circumstances that, as a direct consequence, he is exposed to danger of losing his life or of serious personal injury.

If, upon evidence warranting that belief, the jury was of the opinion that leaving Dunn alone on the platform of the closed and unlighted Hantsport station at 1.30 a.m. seriously imperilled his life, they were quite right in concluding that the conductor was negligent in doing so. It was eminently for them to determine whether Dunn was or was not in such an advanced state of intoxication that leaving him where he was placed involved endangering his life because he was unable to take care of himself. If so the conductor should have found some other means of discharging his duty to prevent Dunn being a source of danger or annoyance to his fellow passengers as well as a menace to himself until he could be removed from the train without jeopardizing his life. For instance, as Russell J. suggests, he might have been taken to the baggage car and detained there until a suitable place for removing him from the train should be reached.

The absence of direct proof of causal connection between the leaving of a man on the station platform and his death, in my opinion, does not present any serious difficulty. It was quite open for the jury to infer that he wandered from the platform to and along the tracks and eventually lay down on the latter in a state of drunken stupor and was killed there about 3 o'clock in the morning by the second engine of the train when returning from Kentville to Halifax. Indeed that seems to be the most probable inference from all the facts in evidence. That he should have wandered on to the tracks was, I think, a

1920

DUNN v. DOMINION ATLANTIC RLY. CO.

Anglin J.

natural and probable result of his being left unattended on the dark station platform in the condition in which he was—such a result as the conductor should have anticipated might ensue.

This case is readily distinguishable from *Delahanty* v. *Michigan Central Rly. Co.* (1), where a passenger was put off at an open, lighted station and was not incapable of taking care of himself though slightly intoxicated and also from the *Wakelin Case* (2), where it was a matter of pure conjecture how the man who was killed got on the line, and there was nothing to justify an inference that he got there by any fault of the company. On this aspect of the case the decision of this court in *Grand Trunk Ry. Co.* v. *Griffith* (3), seems to afford authority for rejecting the attack on the verdict.

There was evidence in my opinion which makes it impossible to say that the jury's answers to the sixth, eighth and ninth questions were not such as could reasonably be found. They therefore cannot be set aside. Upon them the plaintiff was entitled to judgment.

I would therefore allow the appeal and direct that judgment be entered for the plaintiff for the sum of $2,000, found by the jury to have been the damages sustained, with costs of the action and of the appeals to the court en banc and to this court.

MIGNAULT J.—By the by-laws of the company respondent, admitted to be validly passed by-laws of the respondent, it was provided as follows:—

(1) 10 Ont. L.R. 388. (2) 12 App. Cas. 41.
(3) 45 Can. S.C.R. 380.

12. Persons intoxicated, or otherwise unable to take care of themselves, will not be furnished with tickets or allowed to enter the cars or premises of the company, and if found in the cars or upon the premises of the company, they may be removed.

15. Any person in or upon a carriage, station, platform of the Company, or elsewhere upon the Company's premises, in a state of intoxication, or fighting or guilty of other disorderly conduct, or using foul, obscene or abusive language, or otherwise wilfully interfering with the comfort of other passengers, is guilty of an offence under this By-law. In addition to liability to fine under this section, any such person may be summarily ejected from such station or premises of the Company, or in the case of a moving train, such person may be removed or ejected from the train with his baggage at any usual stopping place, or near a dwelling house, and the conductor and train servants may use force, doing no unnecessary violence, to restrain passengers and others upon the train from fighting, using foul, obscene, or abusive language, or other disorderly conduct.

The jury found that the deceased was killed by an engine or train of the respondent moving towards the east (questions 1 and 2); that his conduct on the excursion train between Halifax and Hantsport had not been such as to interfere with the comfort or endanger the safety of other passengers on the said train sufficiently to eject him from the train (question 3); that he had not used vulgar, offensive, obscene or blasphemous language in the hearing of his fellow passengers (question 4); that he had conducted himself in a disorderly manner during his journey from Halifax to Hantsport (question 5); that there was negligence on the part of the respondent company in connection with the death of the deceased and that caused such death, and that such negligence consisted in putting a drunken man off the train at a late hour at night in an unfit place (question 6); that the deceased was not ejected from the train in question at a usual stopping place for trains of the respondent company (question 7); that the deceased at the time he was ejected was not in a fit state as regards sobriety to take care of himself (question 8); that under the circumstances the place

1920

DUNN v. DOMINION ATLANTIC RLY. CO.

Mignault J.

where the deceased was ejected from the train, was not a proper place for that purpose (question 9); and the jury assessed the damages at $2,000 equally divided between the deceased's father and mother.

The learned trial judge, notwithstanding the findings of the jury, dismissed the action because in his opinion the negligence found against the respondent in putting the deceased off the train at Hantsport was not the cause of the accident and may have had no connection with it.

In my opinion, with all deference, the jury could infer from the circumstances of the case, that putting off the deceased at 1.30 a.m., on the ash extension of the station platform, near a closed and unlighted station, in a town without any lights, was the cause of Dunn's death. He was found killed on the tracks some distance to the west and it was a matter for the jury to determine, and there was evidence from which they could draw the inference, whether putting off this drunken and helpless man at such a place and at such an hour was the cause of his having been killed by one of the engines of the excursion train which returned through Hantsport a couple of hours later.

If, therefore, there be negligence in ejecting Dunn from the train at such an hour and in such a place, the connection between this negligence and Dunn's death is established by the jury's finding which I cannot consider perverse.

But was there negligence, or in other words did the respondent fail in any duty which it owed the deceased? Dunn had a ticket for this train and had a right to travel on it, but he had no right to conduct himself

in a disorderly manner, or to interfere with the comfort of the other passengers. The jury found that he had conducted himself in a disorderly manner and this, under the by-laws of the company, authorized the conductor to eject him

> at any usual stopping place, or near a dwelling house.

Hantsport was a usual stopping place of the railway, and the finding of the jury that it was not, seems hard to reconcile with the evidence, unless the jury considered the ash extension of the platform not a usual stopping place, but, reading together the answers to questions 7 and 9, it is clear that they did not consider this place, even if it were a usual stopping place, as a proper place to leave a drunken man at such an hour, on a dark night, with the electric lights of the town not burning and the station closed and without any lights.

The right to eject a drunken man and disorderly passenger from a train, according to the by-law, is not an absolute one. He must be removed at a usual stopping place or near a dwelling house. This clearly shews that he must be ejected at some place where he can be looked after. To leave him in the middle of the night on the extension of a station platform with a closed station and no light anywhere, would not place him in a better position than if he were ejected in the fields. This does not mean that the company must keep him on the train, but if they choose to eject him in his drunken state, they must eject him at a proper place so as not to leave him in his helpless condition where no one can look after him, and where he is in obvious danger of getting on the railway track and being injured or killed by a

1920

DUNN v. DOMINION ATLANTIC RLY. CO.

Mignault J.

passing train. The dictates of humanity as well as the by-law itself seem to me to require this of the railway company.

The respondents, in paragraph 16 of their plea, somewhat in contradiction of a previous statement of the plea, say that the deceased on the day in question

> was intoxicated, or otherwise unable to take care of himself and while in the said condition was found in a car of the defendant company and was removed therefrom by servants or employees of the defendant company.

If he was unable to take care of himself, and the jury so found, I cannot think the verdict of the jury perverse in finding negligence against the respondent.

I would therefore allow the appeal and give judgment to the appellant according to the jury's verdict, with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *James Terrell.*

Solicitor for the respondent: *W. A. Henry.*