CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT)..... } APPELLANT;

AND

WILLIAM HOWARD HAY (PLAINTIFF)..... } RESPONDENT.

1919
*Feb. 24.
*Mar. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Railway — Liability — Injury to passenger — Negligence — Moving train—Jumping off—Under guidance of brakesman.

The plaintiff, an experienced traveller, wishing to alight at a flag station, instead of insisting on the train being stopped, assented to a suggestion of a brakeman that, if it should be merely slowed down, he might jump off, and he was injured in doing so.

Held that he took all the risks of alighting from the moving train and could not recover.

Judgment of the Court of Appeal (11 Sask. L.R. 127; 40 D.L.R. 292; (1918), 2 W.W.R. 233), reversed.

APPEAL from the judgment of the Court of Appeal (1), reversing the judgment of Elwood J. at the trial (2), and ordering a new trial. The trial judge had dismissed the action with costs.

The respondent, who was a passenger on appellant's train travelling from Swift Current to Piapot, changed his mind as to his destination and got off the train at Cardell and was injured. According to evidence, the appellant knew that the train would not stop at Cardell being told so by the brakesman; but the latter added that he would slow up the train and that the respondent could jump off. When respondent was ready to get off, the brakesman told him not to do it until he told him to; then respondent waited a short time until the brakesman told him to jump and he did so. The trial

*Present:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 11 Sask. L.R. 127; 40 D.L.R. 292; (1918), 2 W.W.R. 233.

(2) (1917), 2 W.W.R. 1106.

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judge has found that the train was then travelling at the rate of about twelve miles an hour.

W. N. Tilley K.C. for the appellant.
W. E. Knowles K.C. for the respondent.

THE CHIEF JUSTICE.—In my opinion this appeal must be allowed.

The plaintiff respondent in jumping off the car at the time and under the circumstances he did clearly did so "taking a chance" and at his own risk. Even if his statement as to having done so with the actual concurrence of the brakesman of the car and at the latter's suggestion to jump when the brakesman told him to is accepted that will not absolve the plaintiff from blame or remove the case from the category of contributory negligence. He was a man 28 years of age, experienced in travelling and knew well the risk he was running as he stated the train was going at the rate of from eight to ten miles an hour when he jumped off. It was a foolhardy thing to have done, and he must be taken to have assumed the risks which such an action inevitably involved.

I would allow the appeal with costs throughout and dismiss the action.

IDINGTON J.—I cannot say as a matter of law that a man in jumping from a train going at the rate of eight or ten miles an hour is doing what a reasonably prudent man should permit himself to do, much less so if going at twelve miles an hour. The former rate of speed is respondent's own guess of rate in question. The latter rate is the finding of fact by the learned trial judge.

The respondent seems to have been an experienced traveller and had the advantage of daylight to guide

him in making an estimate of the rate of speed and of his chances in doing what he did.

There are many circumstances evident in this case which should appeal to another court (either that of Parliament or its delegate the Board of Railway Commissioners) to supply for the public an efficient protective remedy in such like circumstances as respondent was placed, if the contentions set up on behalf of appellant are well founded.

The one feature I have referred to in respondent's case seems an insuperable barrier in his way in this court and in this case.

Therefore I can see no good to be gained by directing as the court below has done, a new trial. If respondent is entitled to succeed the proper disposition of the case would be to so adjudge.

On the facts as found by the learned trial judge he suffered a wrong, but took a risky remedy when induced by the appellant's brakesman to jump, and an equally risky one when he launched this suit. *Grand Trunk Railway Co.* v. *Mayne* (1), where plaintiff had a much stronger case but failed, must stand as a warning to travellers trusting brakesmen.

ANGLIN J.—The proper conclusion from the plaintiff's own evidence, in my opinion, is that he assented to a suggestion of the brakesman that instead of the train being stopped at Cardell (a flag station and not the destination for which he had bought his ticket), to let him off, it should be slowed down and he might jump off. His story is that he asked the brakesman if he would stop the train at Cardell to let him off and when the brakesman replied that he would not but that he would slow up the train and the plaintiff could jump off, he, the

(1) 56 Can. S.C.R. 95; 39 D.L.R. 691.

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plaintiff, answered "all right." He adds that he was prepared to do that and elsewhere he says that he did not want to insist on the train stopping, as he knew he was entitled to, because he "thought it would be all right." Upon such a state of facts I find it extremely difficult to hold that there was any breach of duty or negligence imputable to the defendant company. I think there was not.

But assuming that there was breach of duty on the part of the brakesman for which the defendant should be held responsible in failing to stop the train at Cardell to permit the plaintiff to alight, his act in knowingly jumping from the moving train, even if running only at 8 or 10 miles an hour, as he says it was (other witnesses place its speed at from 12 to 22 miles per hour), was not thereby excused. He certainly assumed the risk of being injured in doing so. Although by no means of the opinion that the mere fact of stepping or jumping off a train in motion is always to be regarded as contributory negligence *per se*, under the circumstances of this case I am satisfied that the plaintiff's admitted act amounted to such negligence—if indeed it was not the sole negligence—and his recovery is thereby debarred.

The appeal should be allowed and the judgment dismissing the action restored with costs here and in the Court of Appeal, if the defendant should see fit to ask them.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—I concur with my brother Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *Begg & Hayes.*

Solicitors for the respondent: *Buckles, Donald, MacPherson, Thomson & McWilliam.*