Supreme Court of Canada
Canadian Pacific Ry. Co. v. Cheeseman, (1918) 57 S.C.R. 439
Date: 1918-11-18

The Canadian Pacific Railway Company (Defendants) Appellants;

and

Laura H. Cheeseman (Plaintiff) Respondent.

1918: November 4; 1918: November 18.

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

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Negligence—Railway Accident—Common Employment—Defective System —Findings of Jury.

A train bound for St. John, N.B., carrying frozen meat to be shipped overseas; in passing through the State of Maine substituted an auxiliary truck for one under the car next the engine that was damaged. The auxiliary truck was not connected with the braking apparatus of the car under which it was placed whereby the braking efficiency was diminished by one-half or more. On approaching Fairville the train had to be taken apart and one of the engines backed five cars, including the one next it with the auxiliary truck, on a siding where said engine was detached without the air-brakes being first released and the hand-brakes applied as required by a rule of the company. The engine then went on the main line but the cars, though the brakes on the foremost were applied, ran down and struck the cab causing the engineer's death. In an action by his widow for damages at common law and under the "Workmen's Compensation Act":—

Held, reversing the judgment of the Appeal Division (45 N.B. Rep. 452; 40 D.L.R. 437) Idington and Brodeur JJ. dissenting, that the use of an auxiliary truck is not evidence of a defective system and there was no other evidence thereof; that the accident was due to placing the car with said truck next the engine thus diminishing the braking efficiency and in detaching the engine on the siding without first attending to the brakes both of which are forbidden by the rules, and that these were acts of employees, fellow servants of the deceased, and could not be imputed to the company; the liability of the company, therefore, was limited to the damages that could be recovered under the "Workmen's Compensation Act."

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick[1], maintaining

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the verdict awarding the plaintiff $12,000 damages at the trial.

The facts are stated in the above head-note.

Tilley K.C. for the appellant.

[1] 45 N.B. Rep. 452; 40 D.L.R. 437.

Daniel Mullin K.C. for the respondents.

THE CHIEF JUSTICE.—I concur with my brother Mignault.

IDINGTON J. (dissenting)—There was evidence adduced which amply supported the finding of the jury that the equipment of the car in question was, having regard to the operation of the shunting of cars which led to the accident in question, so defective as to have been likely to, and did, produce the result complained of.

It was neither self-evident nor established that the said result was due to the negligence of any fellow employee or workman, and expressly found by the jury that it was not.

If the appellant was entitled to be relieved under the doctrine of common employment, it devolved upon it under such circumstances to demonstrate such defence by evidence, and in that it failed.

Such attempts to do so as were made either failed of proof, or were directed to matters that did not reach so far as to cover the actual cause of the defective equipment, by reason of want of an efficient handbrake, and trace its non-existence to the neglect of any fellow servant.

The duty of inspection of brakes seems to have been confined to the air-brakes, and no one seems to have had the duty of seeing that the hand-brakes were efficient for such an emergency as was occasioned by the need for the shunting operation in question and

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therewith the case of a car with a truck upon which it could not operate effectively. Who was to blame for that? If there was neglect on the part of any such person it was not proven.

I think, therefore, the only defence set up resting upon the doctrine of common employment fails.

Primâ facie the defective condition of the car in question rendered the appellant responsible.

The appeal should be dismissed with costs.

ANGLIN J.—I am, with great respect, unable to perceive in this case any evidence of breach of statutory duty, defective system or operation, or failure to furnish and maintain proper equipment such as would render the defendants liable at common law. On the other hand, negligence and breach of rules on the part of the defendant's servants are so patent that the findings of the jury negativing them can only be adequately characterized as clearly perverse. These findings must be entirely disregarded.

Assuming that the collision happened not owing to failure to back the cars placed on the Fairville siding clear of the main track, as Mr. Tilley suggested, but, as the plaintiff contends and the jury must have found, owing to their having moved down towards the main track after the engines were detached, there can be no doubt that the primary cause of the collision or "side swipe," which resulted in the death of the plaintiff's husband, was the neglect of the train crew to obey the company's air brakes rule No. 7:

> * * * If cars are to be detached from a train or engine the air-brakes must be released and hand-brakes immediately applied on train before same are detached.

Notwithstanding the equivocal use of the word "train" in the last line of this sentence, the meaning of the rule is reasonably clear, at all events in the

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case—such as this was—of cars to be detached from an engine. It is on the cars so to be detached that the hand-brakes must be applied before the engine is removed.

The brakes were not applied before the engines were detached, with the result that the cars, which were left on the siding with a slight incline, moved down towards the main track so rapidly that the corner of the foremost car caught the side of the cab in which the plaintiff's husband was as his engine moved back along the main line.

As the cars started to move down the siding towards the main track the brakesman in charge applied the hand-brakes on the foremost car, which had been next to the engine before it was detached and was proceeding, as was proper, also to apply them on the second car of the "train" when the accident occurred. The brakes on the first car were insufficient to stop the train. There is evidence that had they been of full efficiency they would have sufficed. Their efficiency at the most was 50% and there is some evidence that it was even less. The jury has found that this defective equipment was a cause of the accident, and I am not disposed to quarrel with the view, which has prevailed in the

provincial courts, that, taking their verdict as a whole, it implies a finding that its presence on the train next to the engine amounted to negligence. For the plaintiff it is maintained that this negligence was of such a character that it must be imputed to the defendant itself and that as to it the defence of common employment is not open.

So far as appears the car in question was in good condition when it was started on its journey to St. John laden with frozen meat intended for transatlantic shipment from that port. It seems reasonably clear that

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it was necessary to have this freight reach St. John with all possible expedition. *En route* the rear truck of the car became unfit for further service and if the car was to proceed it was necessary to replace it. It was replaced with what is known as an auxiliary truck which cannot be connected with the braking system of the car. The brakes, however, can be, and, according to the evidence, they were in fact so arranged as to operate on the wheels of the remaining front truck. Hence their partial efficiency.

The change of trucks was made at Greenville in the State of Maine, through which the car was proceeding in bond. At that point only an auxiliary truck could be provided, and the evidence is that transhipment there of the freight to another car would have entailed three days' delay owing to the necessity of obtaining authority from Washington, D.C., to break the bonding seals. The train afterwards passed Brownville, also in the State of Maine, where there are shops and an ordinary truck with brakes attached might have been substituted for the auxiliary truck, but a delay of thirty-six hours would be involved in this operation. The same thing might have been done at McAdam Junction in the Province of New Brunswick after the train had crossed the international boundary, or the load could there have been transhipped to another car which would involve a delay of six hours. The responsible officials, however, thought that even this delay would have been unjustifiable and allowed the train to proceed with the auxiliary truck. Allowing for the car in question and two others with defective brakes, the braking capacity of the train was stil over the 90% prescribed by the defendants' rules and of course exceeded the 85% prescribed by an order of the Board of Railway Commissioners.

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But the car in question was wrongly placed or allowed to remain next to the engine when the train left McAdam Junction, in direct violation of the company's rule No. 25 (*a*):

> * * * More than two consecutive brakes must not be cut out on a freight train and none on the car next the engine which must always have a quick action triple in good working order.

Had this car not been in that position—had a car with brakes of full efficiency been next to the engine— when the brakesman set the brakes on the foremost car of the train of detached cars at the Fairville siding it would probably have been held and the accident would thus have been avoided.

There is no evidence of defective system, and a perusal of the record has satisfied me that no such issue was present to the minds of the court, the jury, or counsel, at the trial. Had it been raised, the learned Chief Justice who tried the action would undoubtedly have submitted to the jury some question appropriate to elicit a finding upon it. He did not do so. I am certainly not prepared to hold that under no circumstances should a freight car on which a truck becomes disabled *en route* be permitted to proceed to its destination with an auxiliary truck. Whether it should or should not must depend on the nature of the freight, the degree of urgency in its transmission, and other circumstances, upon all of which the responsible officials of the railway company on the spot must exercise their judgment. In the present case the judgment of these officials may have been erroneous—they may even have grossly neglected their duty—but such mistake or neglect, if any, was that of fellow employees of the plaintiff's deceased husband and cannot be imputed to the company itself, so that such common employment would not afford a defence to a claim based on it.

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The law on this branch of the case is fully discussed in the judgment delivered in this court in the comparatively recent appeals in *Bergklint* v. *Western Canada Power Co.*[2]. The duty was of such a character that its discharge was necessarily deputed to officials along the line of the railway. There is no suggestion in the evidence that the company had employed incompetent officials for this purpose or had failed to provide all material and equipment necessary to enable them to do whatever they might deem requisite or proper. The case was not one of defective original installation or its equivalent, as in *Ainslie Mining and Railway Co* v. *McDougall*[3], nor of negligence in allowing a permanent part of a plant to fall

[2] 50 Can. S.C.R. 39; 54 Can. S.C.R. 285; 34 D.L.R. 467.
[3] 42 Can. S.C.R. 420.

into dangerous disrepair, as in *Canada Woolen Mills* v. *Traplin*[4], due to a defective system of inspection.

> A master is not bound to give personal superintendence to the conduct of the works, and there are many things which in general it is better for the safety of the workmen that the master should not personally undertake. It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants. *Toronto Power Co.* v. *Paskwan,*[5].

If there was any negligence in sending forward the car in question with an auxiliary truck it was in the "subsequent care," rather than in the "providing" of proper plant—it was in the discharge of a duty naturally devolving on the person or persons to whom the company was entitled, and, indeed, from the very necessity of the case, compelled to entrust it. *Wilson* v. *Merry*[6].

No doubt the placing of the car with defective brakes next to the engine or allowing it to remain there when the train left McAdam Junction was clearly a

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direct violation of Rule 25 *(a)*; but it was equally clearly the act of a servant of the company to whom the discharge of the duty of seeing that such a car was not so placed was properly entrusted. The same may be said of the failure to "card" the car as defective.

In no aspect of the case can I discover any evidence which would justify a finding of negligence imputable to the defendant itself as distinguished from its employees—negligence consisting of breach of a duty which it could not delegate so as to relieve itself of responsibility at common law for its discharge— negligence to which the defence of common employment would not afford an answer.

I would, therefore, restrict the plaintiff's recovery to the sum of $2,000 under the "Workmen's Compensation Act," to which her right is now admitted, as it was in the provincial appellate court. The appellant is entitled, should it see fit to exact them, to its costs in this court and the Appellate Division. But, as the company did not admit liability under the "Workmen's Compensation Act" for $2,000 in its plea, or make any tender of that amount, or pay it into court, the plaintiff should have her costs of the action down to and inclusive of the judgment at the trial.

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[4] 35 Can. S.C.R. 424.
[5] [1915] A.C. 734, 738.
[6] L.R. 1 H.L. Sc. 326.

BRODEUR J. (dissenting)—I. concur with Mr. Justice Idington.

MIGNAULT J.—I have given to this case my most serious and anxious consideration, and have carefully read the evidence, but I cannot come to the conclusion that the judgment appealed from was rightly decided.

There is really no dispute or contradiction in the evidence as to the material facts: The respondent's husband, Justus G. Cheeseman, was an engineer in

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the employ of the appellant, and on the 21st February, 1917, was in charge of a locomotive which, with another locomotive of the appellant, in charge of one Kaine, was hauling, on that night, a train of forty-seven freight cars from McAdam, N.B., to West St. John, Cheeseman's locomotive being the second, and Kaine's the first. The train was a regular freight train, but was some hours late; it carried a consignment of frozen meat to be transhipped at St. John to Europe, and apparently was proceeding with all possible haste. The car which came into collision with Cheeseman's locomotive was a box car, No. 67639 C.R.I.M.P., and on its way from Montreal had sustained damage to its rear truck, near Greenville, Maine, necessitating the removal of this truck, and its replacing by an auxiliary truck. The latter truck was not connected with the brakes, but the front truck was, and the evidence of the assistant superintendent, David H. Ryan, is that the hand brake connected with the front truck was found, after the accident, wound up and in good condition, but the braking capacity of the car was diminished by at least fifty per cent. The train was made up at McAdam, and car No. 67639 was placed immediately behind Cheeseman's engine. On the way, near Fairville, the train was stalled on an up grade, and even with the aid of the locomotive of the Boston train, which had come up behind, could not be moved, and in the effort to move it, the coupling between the fifth and sixth cars broke, so it was decided to bring the five first cars into Fairville and to return for the rest of the train. At Fairville, the conductor, Sullivan, had the five cars backed on No. 1 siding—how far they were backed being somewhat uncertain, the conductor thinking it was three or four car lengths, but it is possible they

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were left nearer the switch—and then the engines were uncoupled from the cars and went down to the main line, the conductor following them to the switch. Sullivan directed the brakesman, O'Leary, to get on top of the cars and to set the hand brakes. O'Leary states

that he wound up the brake on the first car, after the engines were uncoupled, and then went on to the second car, but the evidence of Mr. Ryan— who arrived on the scene about an hour after the accident—shews that he did not wind its brakes. O'Leary noticed, when he was on the first car, that the cars were moving, and he is the only witness who saw that they were moving, but his memory seems hazy on this point, so it is difficult to say whether it was merely the slack between the cars easing off, or whether they started down the siding on account of a slight down grade. At all events car No. 67639 struck the side of Cheeseman's locomotive, which was then backing up the main line, bending in the cab, so that the engineer was pinned in and so severely scalded by escaping steam that he died a couple of days later.

The respondent, Cheeseman's widow, acting for herself and her four young children, sued the appellant both under the New Brunswick "Workmen's Compensation Act," and under chapter 79 of the New Brunswick Consolidated Statutes, 1903, embodying the provisions 'of "Lord Campbell's Act," claiming $20,000 damages.

The appellant admitted its liability under the "Workmen's Compensation Act" for the full amount allowed by the Act, $2,000, but denied liability under "Lord Campbell's Act."

The case was tried before Chief Justice McKeown and a jury and a verdict was rendered for $12,000, for which sum (including the $2,000 admitted under the

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"Workmen's Compensation Act"), judgment was entered. This judgment was affirmed by the Appeal Division of the Supreme Court of New Brunswick, Hazen C.J. White and Grimmer JJ., White J. taking no part in the judgment. It is from the latter judgment that this appeal is taken.

The jury found that Cheeseman's death was not caused by the negligence of any of the employees of the appellant, but that the accident was the result of a defect in the equipment or arrangement of the train, that defect being

> auxiliary truck and defective brakes on said car, the brakes being connected with only one truck, therefore not having sufficient power to hold the cars which ran back and struck the engine on the main line at Fairville No. 1 siding.

The jury absolved the deceased from any contributory negligence, and found that there was no negligence on the part of the defendant in the employment and retention of the

brakeman O'Leary, and that the latter was not inefficient or incompetent for employment or retention as a brakesman on a freight train. The following question was also put to the jury:—

> 7. If you find that there was negligence both on the part of the defendant company and on the part of the deceased as well, whose negligence was the final cause of the accident—in other words, who had the last chance of avoiding the accident?

To this the jury answered:—

> Canadian Pacific Railway. Co.

Viewing all the evidence, I am of the opinion that the jury could not reasonably find—if their answer to question 7 be construed as a finding of negligence against the appellant—that the accident was caused by the appellant's negligence as distinguished from the negligence of its employees, the fellow servants of the deceased. Leaving aside the use of an auxiliary truck

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for car No. 67639 without brake connection, and the placing of this car immediately behind the locomotive, which—if they amount to negligence—are the negligence of the employees of the company, and coming to the real cause of the collision, it was undoubtedly due to the fact that the conductor failed to comply with the following rule of the company, being rule 7 of the air brakes rules:—

> When necessary for a train with an engine to stand on a grade for over five minutes, air-brakes must be released and train held by handbrakes. If cars are to be detached from a train or engine, the airbrakes must be released *and hand-brakes immediately applied on the train before same are detached.*

Sullivan knew that there was an auxiliary truck under the first car, and had he caused the hand-brakes to be set before uncoupling the engines, as it was his duty to do, no accident could have happened, and therefore the negligence of Sullivan alone, and his failure to comply with this rule, was the cause of the five cars moving down the siding and colliding with Cheeseman's engine, so that the latter's death was brought about by the negligence of one of his fellow workmen.

There can be no doubt that under these circumstances the defence of common employment is a fatal objection to the respondent's action in so far as it is based on "Lord Campbell's Act," and exclusive of her remedy under the "Workmen's Compensation Act."

The object of the latter Act was to give to the workman a remedy where none could be claimed under the common law, the risk of injury through the negligence of a fellow servant being a risk assumed by the workman at common law. *Bartonshill Coal Co.* v. *Reid*[7]; *Wilson* v. *Merry*[8].

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The jury have expressly found that O'Leary was not inefficient or incompetent for employment, and even granting that the braking power of the first car was reduced by the fact that an auxiliary truck, unconnected with the brakes, had been placed under the car, this was not the cause of the accident, which would have been impossible had Sullivan complied with rule 7 and had seen that the hand brakes were applied on the five cars before uncoupling the engines.

With all possible deference, it would seem to me somewhat of a mockery to hold the appellant negligent and liable for this accident, when it had done all it could do to render such an accident impossible by expressly ordering that the hand-brakes be applied before the engines are detached, and when no accident could possibly have occurred had this order been complied with.

The "Workmen's Compensation Act" was adopted, as I have said, to provide a remedy in cases where, on account of the negligence of a fellow servant, no remedy existed at common law. The respondent should have been content with the scale of compensation provided by this Act, the maximum amount of which is conceded to her. When she goes further and also claims damages under "Lord Campbell's Act," her claim is clearly, in the circumstances of this case, defeated by the application of the fellow servant rule.

Mr. Mullin argued that the company had allowed a negligent system to be established in operating its cars, whereby the accident in question was caused, and that therefore the company is liable. There was no evidence of any such system; on the contrary, had the system or rules of the company been followed, the accident could not have occurred.

In my opinion the verdict is clearly against the

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[7] 3 Macq. 266
[8] L.R.I.H.L. Sc. 326.

weight of the evidence and should be set aside, and the respondent's action dismissed for anything in excess of the $2,000.00 admitted by the appellant under the "Workmen's Compensation Act."

My brother Anglin thinks the respondent should have her costs in the trial court, but should pay those of the appellant in the Appeal Division of New Brunswick Supreme Court and in this court, if the appellant sees fit to exact them. In this I am disposed to concur, but I must say that it deals most liberally with the respondent, who should have been satisfied with the remedy provided for cases like this one by the "Workmen's Compensation Act," liability under which was never denied, but on the contrary expressly admitted by the appellant.

I would allow the appeal.

Appeal allowed with costs.

Solicitor for the appellants: Hugh H. McLean.

Solicitor for the respondent: Daniel Mullin.