1916
*May 10.
*May 25.

THE CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

NORMAN DIPLOCK (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Railways—Negligence—Ejecting trespasser from moving train—Imprudence—Liability for act of servant.

As a train was moving away from a station, where it had stopped, the conductor ordered a brakesman to eject two trespassers from it. On proceeding to do so the brakesman found a man stealing a ride upon the narrow ledge of the engine-tender and, in a scuffle which ensued, the plaintiff, who was on the edge of the ledge but was not seen by the brakesman owing to the darkness was pushed off the train and injured. In an action for damages, the jury found that the brakesman had been at fault in attempting to eject the man whom he saw while the train was in motion and that it was "dubious" whether he was aware of the presence of the plaintiff in the dangerous position.

Held, per Fitzpatrick C.J. and Idington and Anglin JJ. (affirming judgment appealed from (9 West. W.R. 1052)), that the reckless indifference of the brakesman, in circumstances in which he ought to have been aware of the presence of the plaintiff, was a negligent act for which the railway company was liable.

Per Davies and Brodeur JJ. dissenting.—As it was not shewn by the evidence nor found by the jury that the brakesman was aware of the presence of the plaintiff in a dangerous position the plaintiff, being a trespasser, could not recover damages against the company for the injuries he sustained.

APPEAL from the judgment of the Supreme Court of Saskatchewan(1), affirming the judgment entered

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

(1) 9 West. W.R. 1052.

at the trial by Elwood J., on the findings of the jury, in favour of the plaintiff for damages assessed at $1,730 with costs.

The circumstances of the case are stated in the head-note.

O. H. Clark K.C. for the appellants.

Chrysler K.C. for the respondent.

THE CHIEF JUSTICE.—The questions submitted to the jury are so involved and so numerous as to lead necessarily to unsatisfactory results. They do not, however, appear to have been objected to.

From the answers we must assume the following facts are found: (*a*) that plaintiff, stealing a ride on the company's train, sought refuge on the ledge of the tender with the witness Thacker; (*b*) that the brakesman Wagner knew that both men were on the train when it started from the station; (*c*) that, instructed by the conductor to put them both off, he went forward and ordered them both off; (*d*) that Wagner, without any attempt at investigation to ascertain the relative positions of the men, shoved Thacker off and in so doing shoved the plaintiff off also; (*e*) that the reasonable and probable result of Thacker being put off was that plaintiff would go also and that the speed of the train made it dangerous to put the men off at the time.

Both plaintiff and Thacker were trespassing, but, although the general principle is that a man trespasses at his own risk, it is undoubted that in this instance it was the duty of the railway officials when aware of the presence of the two trespassers not to put them off in such a manner as to endanger their safety. Section 281 of the "Railway Act," although

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not directly in point here, is an application of this general principle, particularly when read with the instructions of the company that the train should be stopped before putting anybody off.

Whether, in the circumstances, Wagner was acting within the scope of his employment in view of the evidence is doubtful, but the point was not raised either here or below and he apparently thought that he had the authority of the conductor. *Vide Hutchins* v. *London City Council*(1).

There is no doubt that on the findings of the jury, and there is ample evidence to support them, unnecessary violence was used towards Thacker and his removal from the train in the circumstances endangered his safety. If the accident had happened to Thacker there would be little doubt that he would have his recourse against the company. Now, as to the plaintiff, Wagner had reason to believe that both men were together, otherwise he would not have ordered them both off. And in shoving Thacker off the train improperly he caused the injury of which plaintiff complains. If Wagner was acting within the scope of his employment, and this apparently is not denied, plaintiff must succeed. The principle of law is that a tort-feasor must be assumed to have contemplated and be liable for all those injuries which result from the wrongful act together with such incidents as a reasonable man might in the circumstances have expected to result in the ordinary course of nature. *Fletcher* v. *Smith*(2), in 1877, at pages 787, 788; *Ratcliffe* v. *Evans*(3). The rule of the ordinary course of nature and probable consequences "is after all only a guide to the exercise

(1) 32 Times L.R. 179. (2) 2 App. Cas. 781.
(3) [1892] 2 Q.B. 524.

of common sense." And the jury have found on the evidence that the fall of plaintiff from the train was the reasonable and probable consequence or result of the violence used improperly to eject Thacker. When we consider the dark night, the narrow ledge on which both men stood, the unnecessary violence of Wagner's attack on Thacker and his knowledge of the plaintiff's presence somewhere on the ledge, the finding of the jury must be sustained.

I would dismiss with costs.

DAVIES J. (dissenting).—This is an appeal from a judgment of the Supreme Court of Saskatchewan affirming the judgment for the plaintiff entered by the trial judge on the findings of the jury. Mr. Justice Newlands dissented on the ground that the plaintiff was one of two trespassers stealing rides upon the railway train and that the trespasser's only right in such cases is that

> the railway company must not wilfully injure him or unnecessarily and knowingly increase the normal risk by deliberately placing unexpected dangers in the way

and that it had not been proved or found by the jury that the company or its servants had done so.

The admitted facts are that the plaintiff and one Thacker were stealing rides upon the appellant's railway and were discovered by the conductor while the train stopped at Hanley Station, a small side station on the railway line. The conductor ordered them off the train and they got off and walked across the track to the east side and hid themselves behind some box cars there. The plaintiff says that as soon as the train began to move he and Thacker climbed on again between the tender of the engine and the baggage car, Thacker going ahead, and that when he (Diplock)

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got up, Thacker had already taken up a position alongside of the ladder which ran down the centre of the back of the tender and that he was standing on the ledge of the tender. He says:

> Thacker was holding on to the ladder and he (Diplock) was holding on to the hand-rail at the outside.

His position was either on the ledge of the tender or on the steps leading to it. The only light there was what was shining out of the car door. The brakesman says he only saw "just one man" on the back of that tender, that he "did not know that the other man was on the outside on the west side" and that he "did not see him at the time."

Now whether the plaintiff was actually upon the ledge holding on the hand-rail or was on the step and so holding is uncertain. The jury did not find that he either saw or should have seen him though they answered the question whether he should have investigated where Diplock was before shoving off Thacker in the affirmative. Answering the question of fact "whether Wagner knew that Diplock was in the position he was" they say "dubious." The question whether he should have investigated and found out is one of law, not of fact for the jury. The facts as stated by the brakesman are that, when he opened the door of the baggage car, he saw only one man on the ledge, that he called to him and asked him to come in the car; that the man refused, and he (Wagner) grappled with him and pushed him off. It may well be that if Thacker who was seen by Wagner and pushed by him had been injured the company would under the findings of the jury as to the dangerous rate of speed of the train have been liable to him in damages. But how can that liability arise with respect to a trespasser whose presence there the brakesman did not

know of? The jury were unable to find that Wagner knew that Diplock was in the position he was. Without such a finding, it is impossible for me to hold that the company should be held liable.

Plaintiff was a trespasser. He was trespassing at his own risk. The company was undoubtedly under a duty not wilfully to injure him. But how could they be said to have wilfully injured him when they did not know of his presence there? It is said they must be held to have known because the conductor told the brakesman there were two men stealing a ride and to put them off. But the brakesman swears that when he went to put them off he only saw *one* man and did not see the other. The jury cannot have disbelieved him or they could not have found it was "dubious" whether Wagner knew that Diplock was in the position he was. If the knowledge of Diplock's position at the time he pushed Thacker off was known to Wagner, the brakesman, there might be a very strong contention made that the company was liable for damages to Diplock for any injuries he sustained on the ground that he had been wilfully injured by Wagner's improper and illegal action. But he could only recover in cases where there was either wilful injury caused to him or where the deliberate action of one of the company's servants placed unexpected dangers in his way. The company could not be held liable to a trespasser for the mere negligence of their servants. There must be much more than negligence. There must be deliberate or wilful wrongful action causing the injuries complained of.

If Wagner did not know and, in the absence of a finding to the contrary, we should accept the evidence that he did not, then no such responsibility arises.

I am quite at a loss to understand how it can be

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successfully argued that because the brakesman was told to go and put off two men who were stealing rides and in discharging that duty he found only one man that he was bound before putting that one off to institute a search for the other. He may well have assumed that when he gave the order to the man he did see to get off the other man whom he did not see obeyed it. But whether that be so or not he neither saw nor knew of the presence of the other man (the plaintiff) and therefore owed him no duty.

The law on the subject of the liability of a railway company is laid down by the Judicial Committee of the Privy Council in the case of *Grand Trunk Railway Co.* v. *Barnett*(1), at page 369, as follows:—

> The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled, unnecessarily and knowingly to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances. A carrier cannot protect himself against the consequences which may follow on the breach of such an obligation (as for instance, by a charge to cover insurance against the risk), for there can be no contracts with trespassers; nor can he prevent the supposed obligation from arising by keeping the trespasser off his premises, for a trespasser seeks no leave and gives no notice.
>
> The general rule, therefore, is that a man trespasses at his own risk. This is shewn by a long line of authorities, of which *Great Northern Ry. Co.* v. *Harrison*(2), *Lygo* v. *Newbold*(3) and *Murley* v. *Grove*(4), are familiar examples.

Accepting this law and applying it to the findings of the jury and the facts as admitted, I am of opinion that the appeal should be allowed and the action dismissed with costs.

(1) [1911] A.C. 361
(2) 10 Ex. 376.
(3) 9 Ex. 302.
(4) 46 J.P. 360.

IDINGTON, J.—The respondent and one Thacker were stealing a ride on appellant's train. When, as it was starting, the conductor said to the brakesman, Wagner,

> There are two men on the end of the car; go and put them off.

It was at night time. The men were standing on the ledge of the tender next the baggage car. Wagner proceeded to the place indicated and tried ineffectually to get Thacker into the baggage car and then said to him "well get off" and gave him a shove which had the desired effect.

The jury find the train was then moving at a speed such as to make it dangerous for him to alight. The result upon respondent of the shoving of Thacker by Wagner appears in the answers to the questions, as follows:—

1. Q. Was the plaintiff injured by the wheels of the C.N.R train passing over his feet? A. Yes.

2. Q. How did he get under the train? A. Result of being pushed.

(a) Q. Did Wagner assault Thacker by kicking or pushing? A. Yes.

(b) Q. Where was Diplock when Wagner attacked Thacker? A. On ledge of tender, west of Thacker.

(c) Q. Was the reasonable and probable result of Wagner kicking or pushing Thacker that Diplock would be pushed off the train? A. Yes.

(d) Q. Did Diplock fall off the train as a result? A. Yes.

(e) Q. Was that the cause of his injury? A. Yes.

(f) Q. Was Wagner's conduct towards Thacker adopted with the object of putting Thacker off the train? A. Yes.

(g) Q. If yes, was Wagner acting in course of his employment? A. Yes.

(h) Q. Did Wagner know that Diplock was in the position he was? A. Dubious.

(i) Q. If he did not know, should he have investigated to find out where Diplock was before he shoved or kicked Thacker? A. Yes.

The other questions and answers relevant to the issues involved in these are as follows:—

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(m) Q. Was the speed of the train when ordered to get off such as to make it dangerous for him to alight? A. Yes.

(n) Q. Did Wagner know it was dangerous, or should he have known, having regard to all the circumstances? A. Yes.

(o) Q. Was the conduct of Wagner reasonable and proper? A. No.

(p) Q. Was Wagner, in ordering Thacker and Diplock off the train acting in the course of his employment? A. Yes.

The finding of the jury as to the rate of speed of the train shews it was an unlawful assault and battery that was thus committed upon Thacker by Wagner. As a legal result thereof he and his employers are liable for the consequences thereof to others.

This is not a case of negligence in which other considerations might have been involved as in *Grand Trunk Railway Company* v. *Barnett*(1), so much discussed in the case.

It is the law involved in the well known squib case *Scott* v. *Shepherd*(2), that should be our guide herein subject to the qualifications to be found as the result of later development of the law resting upon the principle laid down in that case.

The above question (c) and answer thereto seems to me to cover all that need concern us as to these qualifications.

The undisputed terms of the conductor's order indicated to the brakesman that there were two men at the place where the scuffle was had and that both were to be dealt with. Thus the answer of the jury was amply justified by the facts.

The questions of wilfulness and actual accurate knowledge of how these men stood though much discussed below and in argument here and held by the jury "dubious" seems to me beside the question.

Assuming in such case the brakesman had, as I

(1) [1911] A.C. 361. (2) 1 Sm. L.C. (12 ed.) 513.

imagine probable, authority to arrest Thacker and hand him over to the police as a trespasser and had been merely discharging that lawful duty, when a scuffle ensued as result of Thacker's resistance, and the respondent had as part of the consequences accidentally been knocked off the car and injured he, as a trespasser, could have had no remedy.

I assume in stating the law thus that there had been in such supposed case no undue violence on the part of the brakesman and that he had been duly and properly discharging his duty to arrest and keep Thacker in charge.

I desire only to illustrate the wide difference that exists between the case of a man doing an unlawful act and that of a man doing a perfectly legal act.

In the latter case knowledge and wilfulness might have a very important bearing in determining the consequences of what one so placed should be held liable for in a way that is not open to him doing an unlawful act to urge on his behalf.

There was much made in argument, and by the learned judge who dissented in the court below, of the inconsistent nature of the questions first put and later by reason of the learned trial judge putting the following question:—

(j) Q. If Diplock jumped from the train and was not shoved off did he jump because of any order or command of Wagner? A. Yes.

If there had been nothing else in the case than this question and some others following it evidently related thereto or intended to be so there would have to be a new trial to determine the fact of whether Diplock in fact did jump in obedience to what was said and was not pushed off for strangely enough there was no question put to elicit the fact.

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The putting of such an hypothetical case and getting an answer thereto leads nowhere.

However, the whole of these academic questions relative to an assumption of jumping off are rendered harmless as they are needless by the express answer to the second question and others I have quoted.

I think the appeal should be dismissed with costs.

ANGLIN J.—Very reluctantly, because of the unmeritorious features of the plaintiff's case and because I realize and appreciate the grave dangers and difficulties to which trainmen are exposed in dealing with such characters as the plaintiff and his companion, Thacker, when stealing rides on trains, I have reached the conclusion that this appeal cannot succeed. A perusal of the record has left me under the impression that, if trying it without a jury, I should not improbably have dismissed the action on the ground that it had not been satisfactorily shewn that the plaintiff was injured as a result of what took place between the brakesman, Wagner, and Thacker. But findings of the jury which have not been seriously attacked establish that the plaintiff was pushed or forced off the defendant company's train, while it was travelling at a speed which made it dangerous for him to alight, as the result of an attempt made by Wagner, in carrying out orders of the conductor, to force the plaintiff's companion Thacker off the train.

I fully agree that if Wagner had not had reason to believe that the plaintiff, Diplock, was in the narrow and admittedly dangerous space between the tender of the engine and the baggage car, when he pushed or shoved Thacker, no liability to Diplock would have been incurred. The plaintiff was a trespasser and liability to him would not arise from any mere negli-

gence. But the railway company's employee was not on that account

> entitled unnecessarily and knowingly to increase the normal risk by placing unexpected danger in his way.

Grand Trunk Railway v. *Barnett*(1), at page 369.

The jury has not found that Wagner knew "that Diplock was in the position he was." They have found that "he should have investigated" to find where Diplock was before he "shoved or kicked Thacker." Wagner's evidence is that, as the train was about to leave Hanley Station, the conductor said to him,

> There are two men on the end of the car; go and put them off.

He immediately proceeded to do so. He opened the door of the baggage car and saw Thacker standing on a ledge at the back of the tender. He could see only one-half of the back of the tender. The light was weak and uncertain. He says he did not know that the other man was on the west side and that he could not see him. Although he "assumed" there were two men there, he did not take any steps to locate the second man. He did not concern himself about him.

Reading the jury's findings in the light of this evidence, I understand them to mean that, although Wagner did not see Diplock and did not know his exact position, he had reason to believe that he was somewhere in the narrow space between the tender and the baggage car and acted on that assumption, and that in failing to look for him before wrongfully dealing with Thacker in a way which necessarily increased the risk to anybody else in the perilous position in which he had reason to believe the plaintiff might be, he had disregarded the right which even

(1) [1911] A.C. 361.

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a trespasser has that he should not be wantonly or recklessly exposed to unnecessary risk by one who has reason to believe that his acts will have that effect. The duty of a common carrier to a trespasser is thus stated by Bailey J. of the Supreme Court of Illinois in *Chicago, Burlington and Quincy Railroad Co.* v. *Mehlsack*(1), at page 20:—

> His duty rests merely upon the grounds of general humanity and respect for the rights of others, and requires him to so perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons whether such persons are on or off the vehicle.

An observation of Lord Robson, at page 371 of the report of *Grand Trunk Railway Co.* v. *Barnett*(2), is apt to mislead. Referring to the speech of the Earl of Halsbury in *Lowery* v. *Walker*(3), at page 13 he quotes His Lordship as having said that

> the word "trespasser" would have carried the learned counsel for the defendant all the way he wants to get

i.e., one would infer from the use made of this passage, to the conclusion of non-liability. But the rest of Lord Halsbury's sentence was

> to a somewhat difficult and intricate question of law upon which various views might be entertained.

In the same case Lord Shaw of Dumferline had pointedly withheld his assent to the pronouncements of Darling J. and Vaughan-Williams L.J., in the lower courts, as to immunity for injuries caused to mere trespassers.

Wagner, though aware of Diplock's probable presence in a position of peril, seems to have allowed himself to be carried away by excitement, caused, no doubt, by Thacker's successful resistance to his efforts to draw him within the baggage car and, with reckless

(1) 19 Am. St. Rep. 17. (2) [1911] A.C. 361.
(3) [1911] A.C. 10.

indifference to the consequences either to Thacker or to Diplock, tried to push the former off the train. His attitude towards Diplock is probably correctly expressed in his answer

> I did not bother my head about him.

Under these circumstances I think the verdict and judgment for the plaintiff should not be disturbed.

BRODEUR J. (dissenting).—The jury in their verdict have not found that the brakesman Wagner knew that the respondent, Diplock, was in the position he was in when Wagner tried to push Diplock's companion off the car. Diplock had no business to be on the car of the appellant company; he was even stealing a ride at the time.

The Privy Council in the case of *Grand Trunk Railway Co.* v. *Barnett*(1), has decided that

> although the common carriers are under a duty to a trespasser not wilfully to injure him, they are not liable to him for mere negligence and that as the accident was due to the negligence of the carrier's servants and not to any wilful act the trespasser was not entitled to recover.

Applying that decision to the present case I find that the plaintiff respondent was not wilfully injured because the jury have been unable to state in their verdict whether the brakesman knew that Diplock was there.

I think the appeal should be allowed and that the action should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants:

Borland, McIntyre, McAughey & Mowat.

Solicitors for the respondent:

Bence, Stevenson & McLorg.

(1) [1911] A.C. 361.