Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Mary Jones v. *The Canadian Pacific Railway Company, and of The Canadian Pacific Railway Company* v. *Mary Jones, from the Court of Appeal for Ontario (Privy Council Appeal No.* 4 *of* 1913)*; delivered the* 1st *August* 1913.

PRESENT AT THE HEARING:

LORD ATKINSON.

LORD SHAW.

LORD MOULTON.

[DELIVERED BY LORD ATKINSON.]

This is an Appeal and Cross-Appeal by special leave from a Judgment of the Court of Appeal for Ontario dated the 18th June 1912, setting aside the verdict of a Jury and the Judgment of the High Court of Justice for Ontario entered on the 24th November 1911, and directing that there should be a new trial of the action or that, in the event of the Plaintiff accepting the sum of $2,000 paid into Court by the Defendants, Judgment be entered for the Plaintiff for that sum.

The action was brought by the Plaintiff, as administratrix of the estate of Gilbert Jones, deceased, for damages under the Ontario Statute (R.S.O. 1897 Ch. 166) corresponding to the Fatal Accidents Act in England, in respect of the death of the said Gilbert Jones, who was on the 14th February 1911 killed in a collision

at Guelph Junction between a snow-plough belonging to the Defendants and a train belonging to the Defendants which was standing in a siding at the said junction. A claim was also made under the Ontario Workmen's Compensation for Injuries Act, liability for which was admitted.

This snow-plough is used to clear the railway line of snow. It is a high truck or wagon furnished in front with metal scrapers, which can be raised or lowered by mechanism worked from the inside, and is also furnished with two wings, one on each side, which can by a similar mechanism be spread out or folded to the sides of the wagon as required. The function of the scraper is to lift the snow off the ground; the function of the wings is to throw it, when raised, off the track. The plough is built with a cupola, as it is styled, on its roof, in which windows are fitted both at the front and at the sides, through which the person in the cupola can get a clear view of what is in front and at the sides of the lines of railway. The plough is also connected by a cord with the engine, by which the steam whistle on the engine can be sounded. The plough placed in front of the train is pushed from behind by a locomotive engine and can be driven at a rate of 20 miles an hour or more.

On the 14th of February 1911, a train consisting of a snow-plough in front, an engine next, and a caboose or car used by the conductor and brakesman behind, was sent out.

An order called a train order was issued by the proper officials, and was read by the conductor, engine-driver, and a man named Weymark, who travelled in the plough with Gilbert Jones, the deceased, to the effect that the train was to proceed from the city of London

to Guelph Junction, and there meet certain trains. It did so. One at least of the expected trains had arrived at Guelph Junction before this snow-plough train.

The proper semaphore red light signals, home and distance, were properly set at Guelph Junction Station some time before the arrival of the snow-plough train, but, in entire disregard of them, it steamed into the station and collided with one of the trains it was to meet there, the latter being at the time engaged in getting from the main line into a siding. In this collision Weymark and Jones were both killed. An accident of this kind suggests the greatest want of skill or the utmost negligence in the working and management of this plough train. The employee whose duty it was to look out for the signals ahead, and to draw the necessary conclusions from them if observed, was either incapable of seeing them, or of drawing those conclusions from them if seen, or of taking the necessary action to secure the safe arrival of this train at its destination, or, being possessed of the skill, knowledge, and experience sufficient to enable him to discharge these various duties, he negligently omitted to perform them. Now, the Defendant Company gave no evidence at the trial.

The statement of claim bases the Plaintiff's right to recover on the violation by the Company of a statutory duty imposed upon them, namely, by putting in charge of this plough one Henry Weymark, who was merely a section foreman, or, as he would be styled in this country, a lines-man, *i.e.*, one whose business it was to see to the keeping in order of a portion or portions of the permanent way, and who had not passed the examination or submitted to the test required

by the 5th of the Orders of the Board of the Railway Commissioners of Canada of the 9th November 1910, to be passed by and submitted to every person whom the Defendant Company should permit to "engage in the operation of trains or handle train Orders."

The driver of the engine of the plough train, the conductor of that train, Chas. Kelleher, the conductor of the train with which the plough train collided, Arthur Kelly, and the brakesman of this latter train were all examined as witnesses on behalf of the Plaintiff.

By their evidence the following facts were proved. That the plough is as high as the engine, that it to a great extent blocks the view ahead of the engine-driver and fireman; that from Woodstock, a station on the line between the city of London and Guelph Junction, there was snow on the line; that from that station the plough was throwing out snow as it moved along, that the engine-driver's view in front was thereby entirely obscured, that he could not see ahead at all, and that he was obliged to control and work his train by the whistles sounded by the men in the plough; that Weymark was in charge of the plough; that it was his (Weymark's) duty to whistle when approaching a level-crossing or a station; that he, Weymark, and his assistant, Jones, were the only officials on the train who could see ahead; that the driver relied upon Weymark to give the proper whistles, and that from a crossing half a mile beyond a station named Schaw, six miles distant from the place of collision, Weymark gave no whistle, made no communication of any kind to the engine-driver, though apparently he had duly whistled about half a mile away from that station as he was approaching it and had also apparently whistled

properly up to other points; that it was Weymark's duty to whistle a long whistle a mile from each station and quarter of a mile from level crossings; that Weller, the engine-driver, slackened down his speed to 12 miles an hour when he thought he was approaching Guelph Junction, but that he could not judge how fast he was going in a storm like that which prevailed at the time, and that he was waiting for Weymark to give the signal to stop.

The collision took place about 7.10 to 7.15. The general train rules of the Company were put in evidence. There was no evidence given that Weymark had ever had charge of a plough before, or ever had even travelled in one.

The Order of the Railway Commissioners runs as follows:—

"No Railway Company shall permit any employee to engage in the operation of trains, or handle train orders, without first requiring such employee to pass an examination on train rules and undergo a satisfactory eye and ear test by a competent examiner."

It was not suggested that the Commissioners had not jurisdiction to make this Order, or that it had been complied with in Weymark's case.

The 427th section of the Canadian Railway Act provides as follows:—

"Any company, or any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such company, that does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders or directions of the Governor in Council, or of the Minister or of the Board made under this Act, or omits to do any matter, act or thing thereby required to be done on the part of any such company or person, shall, if no other penalty is provided in this or the Special Act for any such act or omission, be liable for each such offence to a penalty of not less than twenty dollars and not more than five thousand dollars in the discretion of the court before which the same is recoverable.

"Such company, director, officer, receiver, trustee, lessee, agent or person shall also, in any case, in addition to any such penalty, be liable to any person injured by any such act or omission for the full amount of damages sustained thereby."

The company whose officers permit any employee not qualified in the way prescribed to do work such as Weymark was put to, *i.e.*, to engage in the operation or working of a train, is thus made liable in damages to any person injured by their breach of this statutory duty.

The Defendant Company in the present case did not rely upon any contributory negligence on Jones's part. And it does not appear to their Lordships that they could, even apart from the above-mentioned provision of the Railway Act, have relied upon the fact that Weymark and Jones were fellow servants, since Weymark was placed in the position he held in breach of the employer's clear statutory duty, and the breach of such a duty by an employer is not one of the risks which a servant can be assumed to undertake to run when he enters that employer's service. Lord Watson in *Johnson* v. *Lindsay*, 1891, A.C. 371, at p. 382, states the general common law principle thus :—

"The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow-servant who has been selected with due care by his master.

It is difficult to see on what principle a servant can be said to be selected with due care by his master when the master, in defiance of a positive statutory prohibition, selects for a particular work a servant whose fitness for that work has never been ascertained in the manner prescribed.

Moreover, there is an entire absence in this case of all evidence to show that Weymark was in fact fitted to discharge the duties he was put to discharge, or was ever considered so to be by any responsible official of the Company. It is not at all the case of a servant of proved and known efficiency for a particular work being selected to do that work without having passed a test which his employers knew, or *bonâ fide* and reasonably believed, he could pass. Not at all. The Defendant Company abstained from giving any evidence to that effect. They took that course no doubt for good reason, but they must bear the consequence.

The principle upon which the cases of *Groves* v. *Wimborne* (1898) 2 2.B. 402, *David* v. *Britannic Merthyr Coal Company* (1909) 2 K.B. 146, and *Butler* v. *The Fife Coal Company, Ltd.*, 1912 A.C. 149 were decided, applies, in their Lordships' view, to the present case. In the first-mentioned of these cases it was held that the doctrine of common employment does not apply where a statutory duty is violated by the employers. In the second, the Master of the Rolls, at page 152, says :—

"But, on the other hand, a master is liable to his servant for the consequences of an accident caused to that servant by the breach of a statutory duty imposed directly and absolutely upon the master, and the master cannot shelter himself behind another servant to whom he has delegated the performance of the duty. In such a case the negligence is the master's negligence, and the doctrine of common employment has no application."

And at page 157, Moulton L.J., as he then was, says :—

"The risk of an employer failing to perform a statutory duty incumbent upon him seems to me to be clearly not a risk that can be considered one of those which the workman must be assumed to have accepted. On the contrary, he in his position as a member of the public has a right to

assume that his employer will fulfil the duties which the statutes impose upon him. But we are not left to decide this question only as a matter of principle. There is clear authority to the same effect. In the case of *Groves* v. *Lord Wimborne* this Court decided that the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of a duty imposed on the master.

And in the last case of the three, Lords Kinnear and Shaw, at pp. 160, 162 and 174 of the reports, expressly approve of the decision in the last-mentioned case, and Lord Loreburn apparently concurred with them. Indeed it appears to their Lordships that the above-mentioned decisions on this point are but applications of the principle laid down in 1856 by the then Lord Chancellor and approved of by the other noble lords in the House of Lords in the case of the *Bartonshill Coal Company* v. *Reid*, 3 Macqueen, 266, at pp. 276, in these words :—

"With reference to the law of England, I think it has been completely settled that in respect of injuries occasioned to one of several workmen engaged in a common work (and I know of no distinction whether the work be dangerous or not dangerous) the master is not responsible if he has taken proper precautions to have proper machinery and proper servants employed."

Such being the position and rights of Jones, the deceased, and such the evidence in the case, the learned Judge who presided at the trial left to the Jury the following questions, and received from them the following replies :—

1. Were the Defendants guilty of negligence that caused the death of Gilbert Jones? A. Yes.

2. If so, what was the negligence? A. By not having a competent employee in charge of snow-plough train.

3. Did the Defendants permit Weymark to engage in the operation of the train on which Jones was when he came to his death without first requiring such employee to pass an examination in train rules and undergo a satisfactory eye and ear test by a competent examiner? A. Yes.

4. Did the Plaintiff suffer the damage complained of thereby? A. Yes.

5. Did the deceased come to his death by reason of the Defendants operating the railway by a negligent system? A. Yes.

6. If so, what was the negligent system? A. By allowing Weymark to operate snow-plough train without having passed the eye and ear test.

7. Might the deceased, Gilbert Jones, have avoided the accident by the exercise of reasonable care? A. No.

8. At what sum do you assess the damages? A. Six thousand dollars.

(*a*) To the widow $3,500.

(*b*) To the daughter $500.

(*c*) To the son $2,000.

The learned Judge, accordingly, on the 3rd October 1911, gave judgment for the Plaintiff in accordance with the finding of the jury.

The Respondents, with the consent of the Plaintiff, appealed direct to the Court of Appeal for Ontario, and by the judgment appealed from the latter Court set aside the judgment of the Trial Judge on the ground of misdirection and ordered a new trial, on the terms, however, that if the Plaintiff would accept the sum of 2,000 dollars paid into Court to the credit of the action, and if the Company did not object thereto, judgment should be entered for the Plaintiff for that sum.

The misdirection relied upon by the Court of Appeal is, as stated by Mr. Justice Meredith, this, that the jury were not told, as they should have been, that the mere breach of the rule or order of the Commissioners did not give a right of action, that injury must flow from that breach to give such a right, and that unless the injury was caused by the incapacity or negligence of the signalman the Plaintiff had

no right of action, and again at page 60 he says :—

"Upon the whole evidence it might reasonably be found that the accident was not caused by any want of qualification or negligence on the part of the signalman, and in that case the Defendants' liability would be limited, because, as the Defendants admit, the accident was caused, not by any breach of the rule, which, it is admitted, has the effect of an enactment, but by the negligence of the engineer a fellow workman in common employment with the man in respect of whose death this action is brought."

No doubt the learned Trial Judge did make to the jury the remarks quoted in the judgment of Mr. Justice Meredith at p. 59 of the Record, but the latter learned Judge omits to notice that earlier in the learned Trial Judge's summing up he had addressed to the jury the following words :—

"I must tell you that the Company would not be liable for the death of this person while in their employ unless they had neglected some duty owing to him by reason of which the death was caused, that is negligence upon their part."

It appears to their Lordships that this is a clear statement that the violation by the Defendants of their statutory duty would not entitle the Plaintiff to recover unless the injury to the Plaintiff followed from that breach, that is, that the breach of the statutory duty was either the sole effective cause of the injury, or was so connected with it as to have materially contributed to it.

Again at p. 44 the learned Trial Judge put to the jury the question, "Has there been a " breach of that rule ? Has that breach resulted " in the death of Jones ?" And again at p. 45, the learned Judge said :—

"The different questions are put in order to bring out your views as far as they can be brought out as to what was the cause of the death of this man, and what was the negligence (if any) on the part of the Company, and whether that negligence resulted in the death."

Thus the learned Trial Judge has in effect told the jury what Mr. Justice Meredith says he ought to have told them. If the charge of the learned Judge be taken as a whole, as it ought to be (*Clark* v. *Molyneux*, L.R. 3, Q.B.D. 237, 243), and its general meaning and effect be judged of when so taken, their Lordships think that the jury were not left under any erroneous impression whatever as to the real nature of the issues they had to determine, or at all led to think that they were entitled to find for the Plaintiff unless they were of opinion that the negligence of the Defendants in employing Weymark for the work he was set to do was the cause of the death of Jones. They are, therefore, of opinion that the order directing a new trial on the ground of misdirection cannot be sustained. There remains, however, the much more difficult question raised by the Cross-Appeal of the Respondent Company, namely, whether they were entitled to have a verdict entered for them on the ground that there was no evidence before the jury upon which they could reasonably find that the breach by the Company of their statutory duty caused, in the sense already mentioned, the death of the deceased. Many conjectures may no doubt be indulged in as to how it came about that neither Weymark nor Jones sounded the whistle, or applied the brakes they had at their command, or made any communication to the engine-driver, but disregarded all the signals, and allowed the train to steam into the station and collide with one of the trains awaiting them. But is not the most probable reason this, that Weymark was unskilled in, and unfit for, and without any experience of, the difficult work he was set to

do? His eyes were in truth the eyes of the engine-driver and fireman. These latter might as well have been actually blind for all that their eyesight enabled them to see. Weymark's ordinary occupation, repairing the permanent way, afforded no training for work such as this; he apparently had no other training, at least no other was proved to have been undergone by him. He was not proved to have been considered in any way fit for the work. He was not tested, and, was it not reasonable for a jury to have believed that he was not tested because he could not pass the test?—No reason was given why he was not subjected to the test. In *Ayles* v. *South-Eastern Railway Company*, L.R. 3 Ex. 146, a train belonging to the defendants was, while stationary outside Cannon Street Station, run into by another train. Several railway companies had running powers over the part of the defendants' line at which the collision occurred. There was no proof as to whether the moving train belonged to, or was under the control of the defendants, but it was urged that no train could pass over their line without some arrangement with them, or by their authority and subject directly, or indirectly, to their control. It was held that in the absence of evidence to the contrary it must be held that the train which caused the accident belonged to or was under the control of the defendants. Baron Martin, at p. 149 of the Report, said:—

"The collision which did take place ought not to have taken place. Then what is the presumption as to the ownership of the train which caused the mischief? I think the jury might properly say that it was, in the absence of evidence to the contrary, under the control of the Company to whom the line belonged. The fact is not 'proved,' perhaps, but 'proof' of a fact is one thing and 'evidence' of it to go to a jury is another."

In *Williams* v. *The Great Western Railway Company*, L.R. 9, Ex. 157, a child of tender years was found upon a footpath crossing a line of railway on the level, upon which footway the Company were bound by statute to erect gates but did not do so, with one of its feet severed from its body by a passing train. It was contended that notwithstanding the negligence of the Company in respect of not erecting the gates, this negligence was not so connected with the accident as to entitle the plaintiff to recover; but it was held that though there were many possibilities as to how the accident might have happened, the negligence was so reasonably connected with it as to allow of a jury saying that it did in fact give occasion to it; and that the case ought therefore to have been left to the jury.

In *McArthur* v. *Dominion Cartridge Company* A.C. (1905) 72, the plaintiff had obtained a verdict against the defendant for $5,000 damages for injury sustained by him while in the defendant's employment, caused by an explosion of an automatic loading machine used in this factory. The explosion was instantaneous and it was not actually proved how it was caused. Evidence was given that the machine had many times failed to work properly, that cartridges were frequently presented in a wrong posture, and that a blow consequently fell sometimes on the side of the cartridge and sometimes on the metal end where the percussion cap was placed. Lord Macnaghten, in delivering the Judgment of the Judicial Committee of the Privy Council reversing a Judgment setting aside the verdict, said, p. 76: –

"It seems to be not an unreasonable inference from the facts proved that in one of these blows that failed a percussion cap was ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it

was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the operator."

In *Richard Evans & Company* v. *Astley* (1911) A.C. 674, a case under the Workmen's Compensation Act, two trains, both belonging to the appellants, were being pushed into a siding, had passed one set of switches, and were approaching another. The deceased was the guard or brakesman of the hindermost, he was stationed in a brake truck. This truck was in touch with, but was not coupled to, the brakesman's van of the other. It was easier to descend from the van than from the wagon. The guard in the van was about to make his tea. The deceased endeavoured to clamber from his truck into the van. He fell and was killed.

There was no evidence whatever as to what was the object of the deceased in seeking to get into the guard's van. It was suggested it might have been to get a cup of tea from the guard who was about to make his tea, or to gossip with him, or it might possibly have been to descend on to the line to hold open the points the trains were approaching, as it might have been his turn to do so, the other guard having admittedly opened the other points, but no evidence was given as to whether it was the practice for guards to do this work alternately as suggested.

The County Court Judge drew from these facts the inference that this last-mentioned object was the object of the deceased; that he was therefore about to do his master's work, and that consequently the accident arose out of his, the deceased's, employment. The case of *Wakelin* v. *London and South Western Railway Company*, 12 A.C. 41, was much relied upon, but

it was held by the Court of Appeal and by the House of Lords that the County Court Judge was justified as a judge of fact in drawing the inference he had drawn, and that there was evidence sufficient to support his finding. Lord Loreburn at p. 678 of the Report in the former case says :—

"It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities. In the present case, the theory that this man climbed upon the van or tried to do so for his own purposes, whether to gossip with the other brakesman or to amuse himself, seems to me most improbable. The theory that he meant to get upon the van because in a couple of minutes the train would be passing the points, and he had to arrange the points, and would save time by alighting where the points were, and could conveniently do so by using the steps which were on the brakes van, whereas there were none on the truck, seems to me very probable."

Applying the principle of these authorities, which could be multiplied, to the present case, their Lordships think that the reasonable conclusion to draw from the evidence is that the flagrant failure of Weymark to discharge his duty on this occasion was most probably due to his want of skill, knowledge, or experience, or to some physical incapacity or defect which the examination or test prescribed for him would have revealed. If so, this failure was but a natural consequence of the act of the Company in setting him, such as he was, to do the work actually set him to do; and that their action in that respect was either the sole effective cause of the accident or a cause materially contributing to it. Their Lordships are therefore of opinion

that there was evidence before the jury from which they could have reasonably drawn the conclusion at which they arrived; that the case could not have been properly withdrawn from them; and that therefore the appeal of the Appellant should be allowed with costs, and the cross-appeal of the Respondents dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

MARY JONES

v.

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DELIVERED BY LORD ATKINSON.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1913.