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Street Railways—Negligence—Tramcar at night overtaking and striking sleigh on track—Degree of care required of Railway Company—Duty as to power of headlight.

In the Privy Council.

No. 27 of 1931.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

PAUL PRONEK - - - - - - (*Plaintiff*) *Appellant*

AND

WINNIPEG SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - - - (*Defendant*) *Respondent.*

CASE FOR THE APPELLANT.

1. This is an Appeal from a judgment of the Supreme Court of Canada (Newcombe, Rinfret and Smith, J.J.; Anglin, C.J.C., and Lamont, J., dissenting) dated the 5th February, 1929, reversing a judgment of the Court of Appeal for Manitoba (Perdue, C.J.M., Fullerton, Dennistoun, Prendergast and Trueman, J.J.A.) dated the 26th March, 1928, which affirmed a judgment of the Court of King's Bench for Manitoba (Curran, J.) dated the 27th May, 1927, whereby judgment was entered, upon the verdict of a jury, for the Appellant (the Plaintiff in the action) against the Respondents (the Defendants in the action) for the sum of $2,354.25 damages and costs. RECORD. p. 206. p. 183. p. 180, l. 15.

10 2. The principal question raised by the appeal is as to the duty owed by a Company lawfully operating a railway upon a public highway to members of the public lawfully using the highway upon which the Company's track is laid.

3. The facts giving rise to the present proceedings are shortly as follows :—

The Appellant is a farmer living at Rossdale about 15 miles North of the City of Winnipeg in the Province of Manitoba. The Respondents are a Railway Company incorporated by Special Act p. 6, ll. 9, 19. p. 6, l. 11.

RECORD.

p. 1, l. 14. p. 3, l. 3. of the Legislature of Manitoba, Statutes of Manitoba, 1900, chapter 78 (the Respondents' Special Act of Incorporation) as amended by Statutes of Manitoba, 1908 (Private), chapter 90, and the Manitoba Railway Act, Revised Statutes of Manitoba, 1913, chapter 168.

p. 1, l. 16. p. 3, l. 3. p. 39, l. 14. p. 7, l. 40. p. 7, l. 33. 4. The Respondents operate an electric railway between the City of Winnipeg and the Village of Selkirk, a distance of about 19 miles. The railway is situate upon and forms part of a public highway, known as the Selkirk Road, running North from the City, and occupies the most westerly portion of the highway. The total width of the highway is about 132 feet.

p. 6, l. 21. p. 6, l. 27. p. 10, l. 37. p. 64, l. 23. p. 7, l. 44. p. 7, l. 3. p. 7, l. 12. p. 7, l. 11. p. 7, l. 27. p. 6, l. 42. p. 9, l. 3. p. 10, l. 1. p. 9, l. 27. p. 10, ll. 4–12. p. 10, l. 15. p. 8, ll. 20–24. p. 10, ll. 23–27. p. 54, l. 47. p. 33, ll. 1–8. p. 33, ll. 31–34. p. 13, l. 17. p. 12, ll. 41–43. p. 22, l. 22. 5. On the 2nd January, 1926, the Appellant, driving a team and sleigh, was returning to his home from Winnipeg along the Selkirk Road. He left Winnipeg at about 5 o'clock in the evening, and it would appear that the night was dark but clear. At about 7 o'clock when the Appellant had proceeded about 12 miles from Winnipeg along the highway he met a large truck covered with white canvas which was flapping in the wind. This so frightened his horses that they got beyond control and ran away. They ran North, then turned left, crossed the Respondents line of railway at a private crossing and entered a field adjoining the railway track to the West, where the Appellant lost the left rein. The horses then circled to the right and came back to the railway track at the same crossing, but instead of crossing the track to the East, they ran South along the track towards Winnipeg, one horse running between the rails and the other horse just outside the West rail. When they had gone along the track at full gallop for a distance of about half-a-mile they were overtaken by one of the Respondents' electric cars which collided with the sleigh and team carrying the sleigh along the track for a distance of about 280 feet. The sleigh was demolished, one of the horses was killed and the other injured. The Appellant was rendered unconscious and seriously injured.

p. 1. p. 2, l. 37. p. 1. p. 2, l. 16. p. 2, l. 18. p. 2, l. 20. 6. On the 22nd March, 1927, the Appellant commenced an action against the Respondents in the Court of King's Bench for Manitoba in respect of the said accident claiming $6,484.00 as damages for negligence.

By his Statement of Claim the Appellant alleged that the Respondents were negligent in the following respects :—

(*a*) In proceeding at a reckless and dangerous rate of speed and in failing to maintain a careful and proper lookout on the car.

(*b*) In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop.

(*c*) In not keeping the car properly equipped with sufficient and adequate brakes and in failing to apply the brakes and slow down the car in time to avoid a collision.

p. 3. 7. By their Statement of Defence the Respondents denied negligence on their part and alleged negligence and contributory negligence on the part of the Appellant as the cause of the accident.

p. 180, ll. 24, 25. 8. The action was tried on the 25th, 26th and 27th May, 1927, before Mr. Justice Curran and a jury.

RECORD.

The evidence disclosed that the electric car in question was equipped with a headlight which, according to the Respondent's principal witness, ordinarily threw a light 500–700 feet ahead of the car and according to the motorman of the car, who was called on behalf of the Appellant, ordinarily illuminated the track 7–8 pole lengths ahead of the car, a pole length being about 140 feet; that when the light was functioning properly the motorman could distinguish a person on the track at a distance of about 5 pole lengths; that on the evening in question the motorman in charge of the car had had trouble with the headlight on the outward journey from Winnipeg to Selkirk, the light flickering and being very dim; that the Respondents kept at Selkirk a barn foreman whose duty it was to superintend the equipment of the electric cars, including the headlight, and keep it all in working order; that the barn foreman left the barn each day at 6 p.m., after which time the Respondents had no one at the barn except a night watchman who knew nothing about repairing headlights; that on arriving at Selkirk with the car in question at about 6.20 p.m. on the 2nd January, 1926, the motorman, thinking that the fault in the headlight might be due to the carbon, obtained a new carbon for the light from the nightwatchman, the barn foreman having left the barn; that the new carbon failed to effect any improvement in the headlight which continued to give trouble on the return journey from Selkirk and was so dim that the motorman could not distinguish objects on the track until they were within about 60 feet of the car; that twice between Selkirk and the scene of the accident the motorman stopped to examine the headlight and then noticed that the felt around the door of the light was worn, allowing the wind to blow in; that owing to the condition of the headlight the motorman failed to see the Appellant's team and sleigh on the track until the car was about one pole length's distance from them and was unable clearly to distinguish the nature of the object on the track until the car was within about 60 feet of it; that at the time when the motorman first saw the Appellant's team and sleigh on the track the car was running at a speed of about 30 miles per hour; that when running at a speed of 30 miles per hour it was impossible to stop the car in a distance less than 3 pole lengths (*i.e.*, about 420 feet); that the motorman reversed the motor and applied the brakes and the sand as soon as he saw that there was an object on the track, but was unable to pull up in time to avoid the collision; that the track was straight and level for about one mile on either side of the spot where the collision occurred; that the headlight on the car in question was of the best type known and standard on 90 per cent. of similar cars in use on the North American Continent.

p. 89, l. 4.
p. 32, l. 8.
p. 36, l. 19.
p. 114, l. 39.
p. 36, ll. 11–16.
p. 34, ll. 30–41.
p. 35, ll. 1–4.
p. 37, l. 13.
p. 121, ll. 33–40.
p. 130, l. 13.
p. 130, l. 21.
p. 133, l. 26.
p. 34, ll. 30–44.
p. 35, l. 28.
p. 133, l. 26.
p. 36, l. 3.
p. 38, l. 7.
p. 32, l. 38.
p. 37, l. 16.
p. 37, l. 28.
p. 38, l. 1.
p. 31, ll. 30–35.
p. 32, l. 14.
p. 32, l. 39.
p. 31, ll. 38, 39.
p. 32, l. 17.
p. 33, l. 3.
p. 12, l. 16.
p. 76, l. 20.
p. 81, l. 9.

9. In the course of his summing up Mr. Justice Curran directed the jury that there was no statutory limitation to the rate of speed at which the Respondents might operate their cars, and that it was therefore not open to them (the jury) to find that the Respondents were guilty of negligence in running the car in question on the night in question at a speed of 30 miles per hour; that there was no evidence that would substantiate a

pp. 154–168.
p. 156, l. 38.
p. 157, l. 7.

RECORD.

charge of negligence against the driver of the Respondents' car by reason of his having failed to maintain a careful and proper look out; that there
p. 157, l. 28. was no evidence upon which the Respondents could be held guilty of negligence in connection with the braking apparatus of the car, or which
p. 158, l. 4. could justify a finding that there was any failure to apply the brakes and slow down the car at the earliest possible moment after the danger had
p. 158, l. 6. become apparent; that the allegation that the Respondents had failed to supply and maintain sufficient and adequate lights upon the car was the only element of negligence that there was any evidence to support; and
p. 157, l. 19. the learned Judge left it to the jury to say whether upon that evidence they thought the Respondents had been guilty of negligence.

p. 176, l. 30. p. 180, l. 3. 10. The jury found that the collision was due to the negligence of the Respondents in not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted showed the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident.

p. 177, l. 4. p. 177, l. 6. They also found that the Appellant was not guilty of any contributory negligence and assessed the damages at the sum of $2,354.25.

p. 180, ll. 16–40. Upon these findings the learned Judge entered judgment for the Appellant for $2,354.25 damages and costs.

11. From this judgment the Respondents appealed to the Court of Appeal for Manitoba.

p. 183. The appeal was heard before the Court of Appeal for Manitoba (Perdue, C.J.M., Fullerton, Dennistoun, Prendergast and Trueman, J.J.A.) on the 5th March, 1928, and on the 26th March, 1928, the Court by an unanimous judgment dismissed the appeal with costs.

pp. 184–186. Mr. Justice Fullerton held that a railway company operating cars at
p. 185, l. 42. a high rate of speed along a public highway was bound to operate its cars
p. 186, l. 4. with due regard to the safety of the public and owed a duty to the public using the highway to take reasonable care to discover their presence and to
p. 185, l. 44. avoid injuring them after discovery. He failed to see how the Respondents could discharge that duty if they did not use a headlight or some other means of illuminating the track ahead while operating cars at night, or if they
p. 186, l. 7. were unable to stop on the appearance of danger. He expressed the view
p. 186, l. 19. that the finding of the jury meant that, having regard to the condition of the headlight, it was negligent on the part of the Respondents to operate their car at a speed of from 30 to 35 miles an hour.

pp. 186–188. p. 188, l. 18. Mr. Justice Trueman held that, while under no duty by statute, the Respondents were under a common law duty to exercise reasonable and proper care in the operation of their cars for the protection of the public
p. 188, l. 23. on the right of way as part of the highway; and that it was clearly required in the performance of their duty that at night the speed of the cars should be governed by the power of the headlight so that when an object on the track was seen the car could be stopped in time.

RECORD.

Mr. Chief Justice Perdue, Mr. Justice Dennistoun and Mr. Justice Prendergast concurred in dismissing the appeal without giving reasons. p. 184, l. 3. p. 186, l. 23.

12. From the decision of the Court of Appeal for Manitoba the Respondents appealed to the Supreme Court of Canada, alleging error in the following respects :—

(*a*) That there was no finding of negligence sufficient to support the verdict. p. 194, l. 32.

(*b*) That it was not open for the Court of Appeal for Manitoba to hold that the accident was due to the excessive speed of the car, and they erred in so doing. p. 194, l. 33.

(*c*) That the Court of Appeal erred in holding that the Respondents must operate their cars so that the same could be stopped within the radius of the headlight. p. 195, l. 1.

(*d*) That the learned trial Judge failed to direct the jury as to the duty of the Respondents in respect of the headlights on their cars. p. 195, l. 4.

13. The appeal was heard on the 29th October, 1928, and on the 5th February, 1929, the Supreme Court of Canada (Newcombe, Rinfret and Smith, J.J.; Anglin, C.J.C., and Lamont, J., dissenting) gave judgment allowing the appeal with costs and directed that the Appellant should pay to the Respondents their costs of the appeal to the Court of Appeal for Manitoba and of the action in the Court of King's Bench for Manitoba. p. 206.

14. The opinions expressed by the learned Judges of the Supreme Court respectively were shortly as follows :—

Mr. Justice Rinfret said that the verdict of the jury was unsatisfactory and could not stand. If the verdict meant that the Respondents were under the duty to have on their cars headlights of sufficient power to illuminate the track so as under all circumstances to avoid an accident there were no legal grounds upon which the verdict could be maintained. p. 209, l. 7. p. 209, l. 24.

If the verdict meant that the headlight on this particular car was insufficient it could not stand because :— p. 209, l. 29.

(*a*) The uncontradicted evidence showed it was the best type of headlight that could be found.

(*b*) There was no evidence that the headlight was out of order.

He pointed out that, while it was true that for some time previous to the accident the headlight flickered and became dim, that was not common to that type of headlight nor due to any particular defect in the particular headlight then in use; it was a temporary condition unknown to any official agent or employee of the Respondents outside of the motorman. It might have been a reason for the jury to find the motorman at fault in driving at that rate of speed under the circumstances, but that was not what the jury found. p. 210, l. 4.

RECORD.

15. Mr. Justice Smith pointed out that the learned trial Judge's
p. 219, l. 18. direction to the jury did not enlighten them as to whether it was the duty of the Respondents to have on the car a headlight sufficiently powerful to
p. 219, l. 22. enable the motorman to see the Appellant in time to stop. The jury found there was such a duty, and also a duty to have had a man at Selkirk on the night of the accident capable of making adjustments to the lights and other equipment of the car before it left Selkirk, and that the Respondents had been guilty of a breach of both those duties.

p. 219, l. 26. He held that as a matter of law the Respondents were under no such
p. 222, l. 20. duties; that the obligation upon them to use reasonable care would require them to have a headlight of reasonable efficiency having regard to the state of the art of artificial lighting at night of cars operating as the Respondents'
p. 222, l. 25. cars did; that the only evidence offered showed that the lights used by the Respondents on their cars were the very best lights in use for the purpose
p. 225, l. 5. and the standard equipment of similar cars all over the North American
p. 221, l. 1. Continent; and that there was no finding that the particular light in use on this occasion was ineffective by reason of being out of order.

p. 217, l. 13. Mr. Justice Newcombe concurred with Mr. Justice Smith.

p. 207, l. 2. 16. Mr. Chief Justice Anglin (dissenting) said that he agreed with the opinion expressed by Mr. Justice Lamont.

p. 207, l. 27. The finding of the jury meant that, the motorman being required to maintain a speed of not less than 30 miles an hour, the duty of the Respondents was to provide him with a headlight which would always enable him to discern objects on the track at least 420 feet ahead, that being the shortest distance within which his car, running at that speed, could be stopped; and it was negligence to fail to furnish such a headlight, from whatever cause the light so failed to function.

p. 208, l. 28. He further held that a headlight which functioned effectively should be deemed part of the "adequate equipment" which every Railway Company is required, by Section 48 of the Manitoba Railway Act, at all times to provide for the efficient working and operation of the railway; and that the Respondents had been guilty of a breach of statutory duty which the jury had found to be negligence causing the accident.

p. 207, l. 39. He was also of opinion that, if for any reason the finding of the jury should be deemed insufficient to support a judgment for the Appellant, a new trial would be inevitable because of misdirection on the issue of excessive speed.

p. 212, l. 32. 17. Mr. Justice Lamont was of opinion that the finding of the jury amounted to a finding that under the circumstances the Respondents were negligent in not having on the car in question a headlight functioning with sufficient power to enable the motorman to see objects on the track in time to avoid running over them; that there was evidence upon which the jury
p. 215, l. 26. could so find; that the Appellant had the right to be upon the highway; that
p. 214, l. 12. apart from any question as to the statutory duty of the Respondents they were
p. 215, l. 1. under a duty at Common Law to exercise that degree of care which a reasonably prudent man would exercise in the circumstances; and that there was

evidence to justify the jury in finding that a headlight which illuminated the track for one pole length (140 feet) only was totally inadequate where the car was being driven at night on the country highway at a speed of 30 miles an hour. RECORD. p. 215, l. 26.

He held that the Respondents were under the duty to keep their car equipped with a headlight which would properly illuminate the track; that if any cause interfered to prevent adequate illumination the Respondents should have removed it; and that it was idle to contend that the Respondents discharged their full duty by equipping the car with a standard headlight if that headlight for some reason or other did not function. p. 216, l. 13. p. 216, l. 22.

In his opinion the Respondents appeal should be dismissed with costs. p. 217, l. 12.

18. By Order in Council dated the 27th February, 1930, the Appellant obtained special leave to appeal to His Majesty in Council against the said judgment of the Supreme Court of Canada. pp. 225–227.

19. The Appellant humbly submits that (save as to the view taken by Anglin, C.J.C., and Lamont, J.) the judgment of the Supreme Court of Canada was wrong and ought to be reversed and that the judgment of the Court of Appeal for Manitoba and the judgment of the Court of King's Bench for Manitoba were right and ought to be restored, and that the Respondents should be ordered to pay the costs of the appeal to the Supreme Court of Canada and of the Petition for special leave to appeal and of the Petition of Appeal and of this Appeal, or that such further or other Order may be made as this Honourable Court may think fit, for the following among other

REASONS

1. Because it was the duty of the Respondents as a Street Railway Company operating electric cars along a public highway to maintain and operate its cars with due regard to the safety of the public using the highway.
2. Because the Appellant had a right to be upon that part of the highway occupied by the Respondents' track.
3. Because upon the evidence given the jury were entitled to find, as they did, that the Respondents were guilty of negligence which caused the accident.
4. Because it was the duty of the Respondents to have on duty at Selkirk at all times when his services might be required, a man capable of making such adjustments to the headlight or other equipment of cars as might be necessary to render the headlight or other equipment reasonably fit for the purpose for which it was required, having proper regard to the safety of the public.
5. Because upon the evidence given the jury were entitled to find, as they did, that the Respondents were negligent in not having

a man on duty at Selkirk capable of making adjustments to the headlight of the car before leaving Selkirk on the night of the accident.

6. Because it was the duty of the Respondents to have the car in question equipped with a headlight functioning properly and/or with sufficient power, having regard to the speed at which the car was required to be driven, to enable the motorman to see objects on the track at night in time to avoid running into them.

7. Because on the evidence given the jury were entitled to find and their verdict meant that the Respondents were negligent in that the car in question was not equipped on the night of the accident with a headlight functioning with sufficient power to enable the motorman to see objects on the track in time to avoid running over them.

8. Because it was the duty of the Respondents to govern the speed at which their cars were run at night by the power of the headlights so that the cars could be stopped in time to avoid colliding with objects seen on the track.

9. Because on the evidence given the jury were entitled to find that on the night of the accident the car in question was being driven at an excessive speed having regard to the manner in which the headlight was functioning.

10. Because the verdict of the jury was right and was supported by the evidence given.

11. Because on the finding of the jury the learned trial judge was right in entering judgment for the Appellant.

12. Because the judgment of the Court of Appeal for Manitoba was right for the reasons given by Mr. Justice Fullerton and Mr. Justice Trueman.

13. Because the judgment of the Supreme Court of Canada was wrong for the reasons given by Mr. Chief Justice Anglin and Mr. Justice Lamont.

H. BENSLEY WELLS.

P. M. WRIGHT.

In the Privy Council.

No. 27 of 1931.

On Appeal from the Supreme Court of Canada.

BETWEEN

PAUL PRONEK - *(Plaintiff) Appellant*

AND

WINNIPEG SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY

(Defendant) Respondent.

CASE FOR THE APPELLANT.

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W.C.1.

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