61, 1932

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 RESPONDENT.

RESPONDENT'S CASE.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 5th February, 1929, which reversed the judgment of the Court of Appeal for Manitoba dated the 26th March, 1928, affirming the judgment at the trial dated the 27th May, 1927. At the trial the Appellant had been awarded the sum of $2,354 for damages to person and property caused by a collision on the 2nd January, 1926, between a sleigh in which the Appellant was driving and an electric car running on the Respondent's Railway. Record. p. 206. p. 183. p. 180.

2. The Respondent operates under statutory authority an inter-urban Electric Railway between the City of Winnipeg and Selkirk, a town some nineteen miles north of Winnipeg. The railway, which was formerly operated by steam, occupies the west side of a public road allowance 132 feet in width. The track is separated from the travelled part of the highway by a wide ditch. p. 229.

3. The Appellant brought his action on the 22nd March, 1927. In his evidence he stated that after dark on the 2nd January, 1926, he was returning home with a team of horses and a sleigh on the main highway running north from Winnipeg to Selkirk parallel to the Respondent's Railway line; that when about twelve miles from Winnipeg his horses took fright, got out of control and turned to the west at a crossing over the Railway and galloped over the prairie; that he then lost his left rein; that the horses after circling to the right returned to the same crossing and galloped down the westerly line of rails of the Respondent's railway p. 6, l. 21 *et seq.*

VACHER.—9504.

Record. in a southerly direction towards Winnipeg and that when he had gone about half a mile from the crossing he was overtaken by the Respondent's electric car.

4. The negligence alleged by the Appellant was as follows :—

p. 2, l. 16. " (*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. **5.** The Defendant in its Statement of Defence denied negligence on its part and alleged negligence and contributory negligence on the part of the Plaintiff and pleaded the general issue.

p. 229. **6.** The evidence established that the highway in question is 132 feet in width ; that the Respondent's railway between Winnipeg and Selkirk p. 1, l. 14. had been for many years operated under statutory authority upon the p. 154, l. 36. p. 155, l. 27. western edge of the highway ; that the travelled portion of the highway, upon which is a gravelled road, is separated from the railway by a wide ditch ; that the part of the highway appropriated to the railway was unsuited for use and was not in fact used by vehicular traffic and that at p. 45, l. 26. intervals farm and other crossings over the railway had been constructed. p. 229. A plan of that part of the highway upon which the accident occurred is included in the Record.

The evidence of the Respondent's motorman was that at the time of the accident he was proceeding towards Winnipeg at a speed estimated at p. 31, l. 38. about thirty miles per hour ; that owing to the dimness of his headlight he was unable to see objects at a greater distance than 150 feet ; that on p. 35, l. 10. his previous run from Winnipeg to Selkirk the headlight which had been working well flickered and became dim ; that on his arrival at Selkirk at 6.20 p.m. no mechanic to attend to the light was available ; that at Selkirk he had fitted a new carbon to the light but that this did not materially p. 33, l. 1. increase the light, and that as soon as he distinguished the Appellant's sleigh he applied his brakes and reversed but that there was not sufficient time to stop the car or prevent the collision.

Evidence was given to the effect that the headlight in question was the p. 76, l. 20. p. 80, l. 43. best type of light that could be found ; that it was in use on about ninety p. 81, l. 9. p. 124, l. 22. per cent. of similar electric railways in America and that it had been tested p. 123, l. 27. p. 132, l. 26. both before and after the accident and found efficient.

7. The Manitoba Railway Act (R.S.M. 1913 ch. 168) to which the Respondent is subject contains the following provisions :—

" 38. No person other than those connected with or employed by " the railway company shall walk along the track thereof, except

" where the same is laid across or along a highway, and not even then Record.
" if the track be laid on a separate and distinct part of such highway
" and it be so expressed or understood between the company and the
" municipal council in whose territory such highway is comprised. . . .

" (40) Every railway company shall at all times provide adequate
" equipment and motive power for the efficient working and operation
" of the railway. . . . . ."

8. The Public Utilities Act (R.S.M. 1913, ch. 166) providing for the establishment of the Manitoba Public Utilities Commission contains the following provision :—

" 21. The Commission shall have a general supervision over all
" public utilities subject to the legislative authority of the Province,
" and may make such orders regarding equipment, appliances, safety
" devices, extension of works or systems, reporting and other matters,
" as are necessary for the safety or convenience of the public or for
" the proper carrying out of any contract, charter or franchise involving
" the use of public property or rights. The Commission shall conduct
" all inquiries necessary for the obtaining of complete information as
" to the manner in which public utilities comply with the law, or as
" to any other matter or thing within the jurisdiction of the Com-
" mission."

9. The questions submitted to the jury and the jury's answers thereto were as follows :— p. 176, l. 30.

" Q. No. 1. Were the Defendants guilty of negligence ?—A. Yes.
" Q. No. 2. If so, in what did this negligence consist ?—A. 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.
" Q. No. 3. If the Defendants were negligent, was the injury to
" the Plaintiff caused by their negligence ?—A. Yes.
" Q. No. 4. Was the Plaintiff guilty of contributory negligence ?—
" A. No.
" Q. No. 5. If so, in what does such negligence consist ?—
" A. None.
" Q. No. 6. Might the Defendants' servants after the position of
" the Plaintiff became apparent, by the exercise of reasonable care
" have prevented the accident ?—A. No, none from evidence submitted.
" The motorman did all in his power to avoid the accident.
" Q. No. 7. At what sum do you assess the Plaintiff's damages ?—
" A. Special $354.25. General damages $2,000.00."

10. The answer to Question 2, not being a finding of any of the acts of negligence alleged, the jury, after being asked to reconsider their answer to that question, returned the following amended answer :—

" Not having any man on duty at Selkirk capable of making p. 180, l. 3.
" adjustments to the lights or other equipment to the car before

Record.

" leaving Selkirk on the night of the accident, as the evidence sub-
" mitted shows 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. 180.

11. On these findings the trial Judge (Curran J.), on the 27th May, 1927, directed judgment to be entered in favour of the Appellant for $2,354.25.

p. 181.
p. 183.

12. The Respondent having appealed, the Court of Appeal for Manitoba (Perdue C.J.M., Fullerton, Dennistoun, Prendergast and Trueman JJ.A.) on the 26th March, 1928, delivered judgment dismissing the appeal.

p. 184.

13. Mr. Justice Fullerton considered that the trial Judge had sufficiently directed the jury as to the duty of the Respondent in regard to having a headlight on its cars; that the Respondent was bound to operate its cars with due regard to the safety of the public and must use some means of illuminating the track ahead while operating cars at night; that the Respondent when operating cars at night was bound to be in a position to stop on the appearance of danger and that the jury's finding meant that having regard to the condition of the headlight it was negligent to operate the car at a speed of 30 or 35 miles an hour.

p. 186, l. 26.

Mr. Justice Trueman, who also delivered a written judgment, was of opinion that the only question for consideration was the effect or sufficiency of the jury's answers, that the Respondent's duty was to exercise reasonable and proper care in the operation of its cars; that the performance of this duty required the motorman to keep a look out and that at night the speed of the car should be governed by the power of the headlight.

p. 184.
p. 186, l. 24.

Perdue C.J.M. and Dennistoun and Prendergast JJ. concurred in the dismissal of the appeal, but without giving reasons.

p. 206.

14. The Respondent having appealed, the Supreme Court of Canada (Anglin C.J., Newcombe, Rinfret, Lamont and Smith JJ.) on the 5th February, 1929, delivered judgment allowing the appeal by a majority of three to two.

p. 209, l. 6.

15. Mr. Justice Rinfret did not think the jury's verdict could stand. The first answer to question No. 2 not being sufficient, having regard to the pleadings and the course of the trial, upon which to enter judgment, the addition to that answer did not in his opinion introduce a new and independent finding. If the finding was to be looked upon as a separate finding of negligence it was difficult to understand its true meaning. The learned Judge considered that there was no legal duty on the Respondent to have the headlight of sufficient power to illuminate the track so as, in all circumstances, to avoid an accident; that the evidence was that the headlight was the best type of light to be found; that there was no evidence that it was out of order and that the cause of the light becoming dim at the time of the accident was not satisfactorily explained.

16. Mr. Justice Smith, with whom Mr. Justice Newcombe concurred, expressed the opinion that the Respondent was under no obligation to have a man on duty at Selkirk to adjust the headlight; that the Appellant's case must rest upon the jury's additional finding and that this additional finding could not be interpreted as a finding of excessive speed, but indicated that in the opinion of the jury it was the duty of the Respondent to have a headlight of the power mentioned regardless of whether it was functioning properly or not. He thought there was no evidence on which the jury could reasonably find that there was in the headlight in question some particular defect that caused it to function less effectively than it and other similar headlights used by the Respondent ordinarily function; that the Respondent was not under an obligation to carry a headlight of the power mentioned; that the Respondent's duty to the Appellant was only to operate the cars with the care that a reasonably prudent person would exercise under the circumstances; that the Respondent had no reason to anticipate such an unusual occurrence as finding a runaway team on the line and that to accept the view expressed in the Court of Appeal would amount to holding that under extraordinary circumstances the Respondent was bound to insure the Appellant against accidents. He considered that the Appellant at the trial had grounded his case on his pleading that the Respondent's duty was to supply and maintain sufficient and adequate lights to enable his motorman to see the Plaintiff in time to stop; that the judgment grounded on that proposition of law was unsound and that there was no reason for allowing the Appellant a new trial.

Record. p. 217, l. 13.

17. Chief Justice Anglin agreed with the conclusions of Mr. Justice Lamont. He thought the finding of the jury in answer to the second question meant that the motorman, being required to maintain a speed of thirty miles an hour, the duty of the Respondent was to provide him with a headlight which would always enable him to discern objects at least 420 feet ahead, that being the shortest distance within which his car running at that speed could be stopped, and that it was negligence to fail to furnish a headlight which, from whatever cause, whether inherent defect, loose connections or lack of power, failed so to function. But, if the jury's findings were insufficient to support a judgment, a new trial would be inevitable because of misdirection and the insufficiency of the sixth question.

p. 207.

18. Mr. Justice Lamont considered that the jury's answer to question No. 2 amounted to a finding of negligence in not having on the car a headlight of sufficient power to enable the motorman to see objects on the track in time before running over them. In his opinion an effective headlight was part of the "adequate equipment" which a railway was by Statute bound to provide, but if not, he considered that the Respondent was under a common law duty to exercise that 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 only (140 feet) was totally inadequate when the car was being driven at night at a speed of thirty miles an hour.

p. 211.

Record.

19. The judgments in favour of the Appellant appear to proceed upon the view either that the Respondent was under an absolute duty to maintain a headlight of a certain power or that the motorman was negligent in
p. 177, l. 1. the operation of the car. It is submitted that there is no such absolute duty and that negligence on the part of the motorman is negatived by the jury's findings.

20. The Respondent submits that the appeal should be dismissed and the judgment of the Supreme Court of Canada affirmed for the following, among other :

REASONS.

1. Because the jury's findings did not disclose the breach of any duty either statutory or at common law.
2. Because the jury's findings attribute no negligence or want of care to the motorman.
3. Because there is no finding that the rate of speed was in the circumstances excessive or that the brakes were defective.
4. Because the Respondent supplied and maintained the best available headlight on the car.
5. Because the Respondent was not bound to provide a headlight sufficiently powerful in all circumstances to enable objects to be discerned at a distance within which the car could be stopped.
6. Because the motorman was justified in assuming that there would be no vehicular traffic on the railway.
7. Because the accident was due to the Appellant's failure to keep control of his horses.
8. Because the judgment of the Supreme Court is right.

W. N TILLEY.

R. D. GUY.

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 RESPONDENT

BLAKE & REDDEN,
17, Victoria Street, S.W.1.