Privy Council Appeal No. 27 *of* 1931.

Paul Pronek - - - - - - - - - *Appellant*

v.

The Winnipeg, Selkirk and Lake Winnipeg Railway Company - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH OCTOBER, 1932.

Present at the Hearing:

LORD TOMLIN.
LORD THANKERTON.
LORD MACMILLAN.
LORD WRIGHT.
SIR GEORGE LOWNDES.

[Delivered by LORD WRIGHT.]

The appellant in this case was plaintiff in the action. He is a farmer living at Rossdale, about 15 miles north of the City of Winnipeg, in the Province of Manitoba, and his claim is that he suffered damage by the respondents' negligence and breach of duty. The respondents are a Company incorporated by Special Act of the Legislature of Manitoba, Statutes of Manitoba, 1900, c. 78, as amended by Statutes of Manitoba, 1904, c. 90, and as affected by Manitoba Railway Act of 1913, c. 168. The respondents' line ran from Winnipeg northwards to Selkirk, about 19 miles in distance, and was laid on the west side of the highway between these points and actually along the highway, but in a distinct portion, separated by a wide ditch from the gravelled roadway ordinarily used by vehicles and foot passengers: the ditch and railway were traversed at intervals by crossings from the roadway to the places to the west. Power so to lay the track along the highway was given by the Act of 1900, and in particular Section 13 of that Act provided (though in fact this

provision was not observed in the *locus in quo*) that as far as practicable the railway should be laid as nearly flush as possible with the street or highway along which it is laid so as to offer the least possible impediment to the ordinary traffic of the streets and highways consistent with the proper working of the railway. Section 24 provided for the making of agreements by the respondents with the rural municipalities through which the railway passed. Such agreements were scheduled to and confirmed by the Act of 1904. These agreements, which, while varying in details, granted to the respondents on certain conditions the privilege or franchise of laying their lines and erecting poles, etc., along and on the highway, expressly provided *inter alia* that all cars and trains should have the right of way on the tracks and highways, and any vehicles, horsemen or foot passengers should, on the approach of any car, give the car right of way. The agreements also contained a term that all cars running after dark should be provided with signal lights to be conspicuously displayed thereon. With these agreements there is to be considered Section 38 of the Railway Act, which provides that no person other than those connected with or employed by the railway company, shall walk along the track except where the same is laid across or along a highway, and not even then 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. So far from there being in the present case any such matter expressed or understood (whatever may be the meaning of that latter term), the language of the agreements just quoted shows that the respondents were to have no exclusive user of their track along the highway, but were merely to have a preferential right of way on the approach of a car. Section 40 of the same Act provides that every railway company shall at all times provide adequate equipment and motive power for the efficient working of the railway, subject to the directions of the Public Utility Commissioner, whose functions do not appear to have been invoked in regard to this railway, so that they are irrelevant in this dispute.

The appellant sustained the injuries complained of while returning home from Winnipeg along the Selkirk Road on a sleigh drawn by a pair of horses: the casualty occurred about 7 p.m., about 12 miles north of Winnipeg. The horses, while proceeding along the gravelled roadway, took fright at the flapping canvas of a passing truck, swerved to the left across the respondents' track by way of a crossing, and galloped on to the field beyond. The appellant pulled them with his right rein, the left rein having slipped from his hand, back on to the crossing, but they were still out of control and went at full gallop down the rail track for about half a mile, when the outfit was run into from behind by the respondents' electric car: sleigh, horses and appellant were carried along for about 280 feet before the car,

which had been travelling at about 30 miles an hour, stopped. One horse was killed, another badly hurt, the sleigh was damaged, and the appellant was rendered unconscious and seriously injured. According to the evidence of McLeod, the motorman who was driving the car from Selkirk to Winnipeg, the single headlight which the car carried was not on that trip functioning properly and threw a light so dim that he could not distinguish the appellant's outfit till within 60 feet: the car could not at the speed it was going be stopped in less than 420 feet. If the headlight had been in order it would have thrown a light for 500 or 700 feet or substantially more. According to the same witness, the respondents kept at Selkirk a superintendent or barn foreman, who attended to matters of equipment of cars, including headlights, but he went off duty at 6 p.m.: the light had been giving trouble on the way up from Winnipeg, and on arrival at Selkirk about 6.20 p.m. McLeod tried to put it right by changing the carbon, but there was no one to help him save a night watchman, who had no expert knowledge or skill. He accordingly started on the return journey in order to keep schedule time, but the light was so bad that he stopped twice before the accident to examine it. The respondents' evidence was that the light was not only of standard make, used in 90 per cent. of the cars in North America, but had been tested shortly before and after the accident and found in order.

The appellant, having commenced an action, alleged in his particulars of negligence 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.

The case was tried before Curran J., who, notwithstanding the insistence of Counsel for the appellant, refused to submit to the jury any question whether the accident was due to the excessive speed, having regard to the defects in the headlight, at which the car was driven.

The learned Judge submitted questions and received answers from the jury as follows:—

"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."

The anwer 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 adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted 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."

On these findings the learned Judge, on the 27th May, 1927, entered judgment for the appellant for $2,354.25 and costs. The respondents appealed to the Court of Appeal for Manitoba, who dismissed the appeal. The respondents then appealed to the Supreme Court of Canada, who on the 5th February, 1929, allowed the appeal by a majority consisting of Rinfret, Newcombe and Smith JJ., Anglin CJ. and Lamont J. dissenting, and ordered judgment to be entered for the respondents and refused a new trial to the appellant. From that judgment this appeal to His Majesty in Council is brought by special leave.

Their Lordships are of opinion that on any view the Supreme Court ought to have ordered a new trial, so as to put to the jury the question whether the accident was not due to the negligence of the respondents by their motorman in driving at an excessive speed having regard to his knowledge that the headlight was inadequate—that is, at an excessive speed in view of all the circumstances; but this need not be further considered for reasons which will appear hereinafter.

It is in the discretion of a trial Judge to ask a jury to give a general verdict, or require them to answer specific questions. But the language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly. Their final answer to Question 2 may fairly be taken to mean that, according to their finding, the headlight on the journey in question was not functioning properly, and there was negligence on the part of respondents or their servants in proceeding or allowing the car to proceed with a headlight so dim that if there was an object on the track the driver could not see it in time to avoid it. They must also have thought that there ought to have been at Selkirk expert men available who could deal with emergency repairs, not only up to 6 p.m., but as long as the cars were running. If that latter element be excluded as not sufficiently pleaded, the other finding is not open to that objection.

It is convenient first to determine the legal position of the appellant when on the track at the time he was struck. The

statutes referred to above gave the respondents the right to lay and operate the track—that is, to do something which, apart from the statutes, would have constituted a nuisance, because the track was laid on what was and remained part of the highway. Members of the public still continued entitled to use that part of the highway, though the respondents had a preferential right in the sense that, on the approach of a car, other users of the highway were to give the car "right of way." But that did not involve that the cars were to be driven in disregard of other users of that part of the highway: no doubt members of the travelling public would prefer to use the ordinary gravelled part of the highway; apart, however, from the special circumstances which placed the appellant, against his will, on the track, the same position might arise in other ways: a horse and buggy might be exposed to be caught by a car while passing over a level crossing, or a man might be driving sheep or cattle over a crossing, or a motor car might break down on the track at the crossing, or a motor car in winter going along the gravelled way might skid across the ditch and on to the track. To these instances may be added that of straying animals.

In their Lordships' judgment, notwithstanding contentions to the contrary, the respondents were under a legal duty by their servants to be on watch for the safety of people on the track and to equip the car with lights adequate at night to enable the driver to stop in time to avoid wayfarers: this affords a legal basis for the finding of the jury. No doubt on the part of the wayfarer there was also a reciprocal duty to take reasonable care to avoid the car and not to be guilty of contributory negligence. The jury here found the appellant was not guilty of contributory negligence. In effect, therefore, the appellant was lawfully on the highway, and was neither a trespasser nor a mere licensee, nor was he there at his own risk. It is true that he was on the track much against his will, and it is also true that the circumstances under which he was there were abnormal and very unlikely to occur. But the jury must be taken to have been familiar with local conditions and to have weighed all the facts of the case when they found as they did that the respondents were negligent, and by that negligence caused the appellant injuries and damage. It cannot, in their Lordships' opinion, be said of that finding that it was without evidence or perverse: that is enough to dispose of the case unless there is some reason of law on which the verdict should be upset.

It was objected on behalf of the respondents that there was no evidence on which the jury could reasonably find that the headlight was out of order, but their Lordships do not agree with this contention; nor do their Lordships think that it was essential for the appellant's case to establish some particular defect: in a case like this it was enough to show that the headlight in fact was not then functioning properly. It was further objected that the respondents discharged any possible legal duty in regard to the

headlight because they had used reasonable care to have a headlight which was sufficient according to the ordinary standards, and had supplied a headlight of recognised standard make and of a type commonly in use. But the question is not as to the general sufficiency at other times of the headlight, but whether it was so out of order when the journey was undertaken that it was negligent to proceed with it in that condition. It was further objected that the respondents had satisfied the statutory requirements by having a signal light and hence could not be held liable in damages on the well-known principle that a person cannot be held to answer for damage caused by carrying out an operation authorised under statutory powers, if the statutory conditions are fulfilled. This principle is illustrated by *Canadian Pacific Railway Company* v. *Roy* [1902], A.C. 220. But the principle only applies if the authorised operation is conducted without negligence, whereas in this case there is a finding of negligence; and, further, their Lordships do not think that the provisions contained in the agreements scheduled to the Act of 1904 are of a nature to bring the principle into operation. The statutes recognise as basic the travelling public's rights on the highways just as in the case of *Rex* v. *Broad* [1915], A.C. 1110, where though the railway company was given by statute a preferential but not exclusive right of way at the highway crossing over the railway, this Board held that those using the highway had still "the right to have some appropriate measure of care observed by those directing the train."

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the judgment of the trial Judge be restored, and that the respondents pay the appellant his costs of this appeal and his costs in the Courts below.

In the Privy Council.

PAUL PRONEK

v.

THE WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY.

DELIVERED BY LORD WRIGHT.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1932.