In the Privy Council.

No. 93 of 1914.

32, 1915

ON APPEAL

FROM THE COURT OF KING'S BENCH FOR LOWER CANADA (APPEAL SIDE).

BETWEEN

THE CANADIAN PACIFIC RAILWAY COMPANY - - - - *(Defendant) Appellant.*

AND

JOSEPH ARTHUR FRECHETTE - *(Plaintiff) Respondent.*

CASE OF THE APPELLANT.
CASE OF THE RESPONDENT.
RECORD OF PROCEEDINGS.

BLAKE & REDDEN,
17, Victoria Street, S.W.,
for Appellant.

LAWRENCE JONES & Co.,
4, St. Mary Axe, E.C.,
for Respondent.

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CASE OF THE APPELLANT.

1. The present case arises out of an accident which happened to the Respondent, a brakesman in the Appellant's employ, while engaged in uncoupling cars on the wharves at Princess Louise Basin, in the Harbour of Quebec. The accident happened on the 13th October, 1912, at about 5 o'clock in the morning. Record. p. 1.

2. The Respondent, by his declaration, attributes the accident to two causes :— p. 2, l. 13, *et seq.*

(1) A defect in the mechanical coupler, which failed to act, wherefore he was compelled to go in between the cars ;

(2) The want of light on the dock.

The Respondent claimed $15,000.

3. The Appellant denied all negligence ; alleged that the coupler, a patent coupler of approved design, was in good order ; that there was no p. 4, l. 2, *et seq.*

V. & S., LTD.—45689.

Record.

necessity for the Respondent to have gone in between the cars, and, if such necessity had presented itself, he was bound to have waited until the cars stopped, and to have given notice of his intention of doing so; that, if the Appellant found difficulty in working the coupler, he should have given the signal to stop the cars and have given the signal to start only when safely clear of the cars; that the Dock where the accident happened was the property of the Quebec Harbour Commissioners and the Appellant was not responsible for the light—in any event the absence of light was not the cause of the accident.

p. 5, l. 16, *et seq.*

4. The Respondent answered that in going between moving cars he had not only not disobeyed orders but had followed the rules of the Company and the orders of his superior officers.

p. 188, l. 34, *et seq.*

5. The Jury found that the accident was due to the common fault of the Respondent and the Appellant's servants. The faults attributed to the Appellant are :—

(1) Not instructing the brakesman ;
(2) Allowing running shunts on a dark night without light ;
(3) That the coupling apparatus was out of order ;
(4) Not stopping work when the lights went out.

The fault attributed to the Respondent was imprudence in going between the cars to uncouple them.

p. 189, l. 6, *et seq.*

The Jury found damages for the full amount claimed, $15,000, and reduced the award by $3,000, by reason of the Respondent's fault.

pp. 115, 116.
p. 186, l. 40, *et seq.*
p. 190.
p. 192.

6. The Appellant moved for a non-suit, on the ground that no cause of action had been established against it, which motion was denied. The Appellant took exception, as required by Art. No. 498 of the Code of Procedure, to certain parts of the Judge's charge, and moved that the case be reserved for the consideration of the Court of Review, C.P.C. Art. No. 491, which was ordered.

p. 201.

7. The Court of Review, Lemieux, Cimon and Dorion, JJ., rendered judgment on the verdict, dismissing the Appellant's motion for a non-suit and in the alternative for a new trial.

p. 247.

8. The Appellant appealed to the Court of King's Bench, when the appeal was heard before Archambeault, C.J., Lavergne, Cross, Carroll and Gervais, JJ. The judgment was affirmed, Lavergne and Cross, JJ., dissenting.

It is from this judgment that the present appeal is brought.

p. 87, *et seq.*

9. The principal facts of the case are to be found in the evidence of the Respondent himself.

His statements were to the following effect : that on the night of the 12th-13th October, he began working at about midnight, as brakesman, under the orders of a foreman of the name of Tremblay, who was making up trains on the Princess Louise Dock ; that there was then no electric

p. 89, l. 12, *et seq.*
p. 89, l. 35, *et seq.*

light, and during most of the night there was none, and the night was dark ; that he had his signalling lamp ; that the train consisted of 14 or 15 cars, which were being shunted on different lines—those destined for Montreal on one side line, those for Winnipeg on another, and those for Vancouver on a third ; that he had just thrown the switch and had crossed the track when he received the order to uncouple the last car, which had to be done before it reached the switch ; that he tried three or four times to work the patent lever which raises the coupling pin and, finding it would not work, he went between the cars to raise the pin on the car in front with his hand, walking with the car, caught his foot in the switch, fell forward between the rails, and sustained injuries which necessitated the amputation of one leg below the knee ; that when he went between the moving cars he knew the train was about to stop ; that it was moving at the rate of 3 to 4 miles an hour ; that no person told him to go in between the cars, but no person forbade his doing so ; that he knew that it was dangerous and that he was risking his life ; and that he acted as he saw others doing, and, from fear of being blamed by the foreman, though he had never been found fault with, and had never heard a brakesman found fault with for not going between moving cars.

Record.
p. 90, l. 5.
p. 91, l. 21. *et seq.*
p. 94, l. 14. *et seq.*
p. 102, l. 1. *et seq.*
p. 103, l. 30.
p. 104, l. 8. *et seq.*

10. It happens rather frequently that a coupler does not work, owing to unevenness in the track, too great pressure on the coupling pin and the fact that it does not work is not evidence of its being defective.

p. 104, l. 27. *et seq.*

11. The only other direct evidence of the accident is that of the foreman Tremblay, under whose orders the Respondent was working, who says that after giving the order to uncouple the cars he turned away ; that he then heard a lantern fall and the Respondent cry out ; and that he went towards him and found him crawling out from under the cars, which had come to a standstill.

p. 21, l. 23. *et seq.*

After the accident, he tried the lever but it would not work, but this was when the cars were stopped.

p. 26, l. 3. *et seq.*

At the time that he gave the order to uncouple the car he also gave the signal to the engineer to stop the train, and the train would, under such circumstances, stop within a distance of 30 to 35 feet.

p. 31, l. 26. *et seq.*

12. It was proved that the fact that the lever would not work the pin is no evidence that the coupler was defective. A coupler will not work if the situation of the two connected cars is such that there is pressure upon the coupling pins. This may be due to the cars being too close or too far apart, or one car being slightly higher than the other due to a joint in the rail being uneven, or, if the cars are on a curve. This difficulty presents itself with couplers of all models, and is a necessary incident of railway operations.

p. 32, l. 26. *et seq.*
p. 129, l. 17 *et seq.*
p. 140, l. 1.

An hour and a half after the accident, when the car had been moved and the train was standing on a siding, the yard master tried the lever and found that the coupler worked without difficulty.

p. 150, l. 7. *et seq.*

13. The Respondent relied greatly on the evidence of a discharged employee of the Appellant, of the name of Bégin, who was present shortly

Record.
p. 53, l. 18. p. 53, l. 25, *et seq.*

after the accident and pretended that the coupler was liable to get out of order if the pin got too far down in the lock; that this was liable to happen if a ring on the end of the pin, which was intended to prevent the pin from going down too far, was missing, and he added that he could not remember but thought that the ring was not there on the day of the accident.

p. 150, l. 21. p. 124, l. 40, *et seq.* p. 135, l. 27, *et seq.* p. 140, l. 37, *et seq.*

The Appellant not only proved that the ring in question was on the pin but showed, by the evidence of expert witnesses and the production of drawings of the coupler, that the ring had nothing whatever to do with keeping the pin in position and that by the construction of the coupler, the pin could not go down too low, as it rested on the lock of the coupler.

14. The evidence on the subject of the light was that the electric lights on the Dock had been intermittent on the night in question, until about 1.30 a.m. or 2 o'clock, and had then gone out. All the railway employees had lamps and the work was proceeding by means of these lights—a usual course.

p. 45, l. 30, *et seq.* p. 42, l. 40. p. 150, l. 29, *et seq.*

The lamps are amply sufficient for the purpose and are the only lights available at a large number of stations on the railway, at most of which shunting of cars is necessary and is carried out at night.

p. 188.

15. The verdict of the Jury, while finding both parties to blame—the Respondent for imprudence in going between the cars, and the Appellant for not instructing brakesmen, for allowing running shunts on a dark night, without light, for not stopping the work when the lights went out, and that the apparatus was proved to be out of order—found that the Respondent, acting on the orders of the foreman to uncouple the cars, had tried to lift the pin on the other car, and that if there had been a double lever attachment it would not have been necessary to do so.

p. 198, l. 40.

16. The Appellant moved for judgment *non obstante veredicto* before the Court of Review, to which Court the Trial Judge had referred the case for decision, and asked, in the alternative, for a new trial on the ground of

p. 199, l. 31, *et seq.*

improper admission of evidence; on the ground that the verdict was against the weight of evidence; on the ground that the damages were excessive; and on other grounds mentioned in the notice.

p. 201.

17. The Appellant's objections were over-ruled and judgment was given in accordance with the verdict.

p. 248.

18. On appeal to the Court of King's Bench, Mr. Justice Carroll, who gave the judgment of the majority of the Court, while doubting whether there was any evidence of defect in the coupler, considered that the findings of the Jury that the coupler was an old model, and that there was negligence in not instructing the brakesmen and in proceeding with the work in the darkness were sustained by the evidence, and it was, therefore, immaterial whether they had been allowed to find, without evidence, a third fact of negligence. He also was of opinion that a part of the Judge's charge was open to objection, but that no prejudice had been occasioned thereby to the Respondent.

Mr. Justice Lavergne was of opinion that the Respondent was alone responsible for the accident from which he suffered. Record. p. 259, l. 25.

Mr. Justice Cross was of opinion that the findings were such as twelve men acting reasonably could not make. p. 258, l. 3, *et seq.*

19. The Appellant humbly submits that the judgment appealed from should be reversed and the Respondent's action dismissed, or, in the alternative, a new trial ordered for the following among other

REASONS.

1. Because the Respondent's action in going in between the cars whilst they were still in motion was the sole cause of the accident.

2. Because the acts of negligence imputed to the Appellant were not direct or immediate causes of the accident.

3. Because none of the acts of negligence on the part of the Appellant alleged in the verdict of the Jury are supported by the evidence.

4. Because the mechanical coupler was not in any way defective; the Appellant was not responsible for the lack of light on the wharves and there was no negligence in not giving specific instructions to the brakesmen.

5. Because the verdict is grossly excessive in amount, and the Jury could not reasonably apportion the damages between two parties both of whom they held to be in fault in the proportion of $12,000 to $3,000.

6. Because the learned Trial Judge misdirected the Jury in leaving the case to them on the footing that there was evidence of negligence on the part of the company and in directing them that there is a presumption against the proprietor of an object; if the object causes damage, he is responsible for it, unless he can show that it was not his fault.

7. Because the learned Trial Judge ought to have ruled that there was no evidence of negligence upon which the case could properly have been left to the Jury.

8. Because the evidence as to the accident to Tweedell earlier in the evening ought not to have been admitted.

9. Because the evidence of Morin as to the sum required to purchase an annuity for the Respondent ought not to have been admitted.

10. Because the judgments of Mr. Justice Lavergne and Mr. Justice Cross are right.

R. B. FINLAY.

GUSTAVUS G. STUART.

GEOFFREY LAWRENCE.

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