GRAND TRUNK PACIFIC RAILWAY CO. v. BRULOTT.

1911

*Nov. 15.
*Dec. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Railway company—Findings of jury—Volens—Pleading.

APPEAL from a decision of the Court of Appeal for Ontario (1), maintaining the verdict at the trial in favour of the plaintiff (respondent).

The plaintiff Brulott, an employee of the defendant company, was assisting T., another employee, in repairing a car on a track in the yard when other cars were propelled against it whereby plaintiff was injured.

On the trial of an action against the railway company under the "Workmen's Compensation for Injuries Act," a verdict was found for the plaintiff and maintained by the Court of Appeal. On appeal to the Supreme Court of Canada the defendants contended that the verdict could not stand for two reasons:—1. That there was no finding that the injury to plaintiff resulted from his conformity to an order of a person in defendants' employ which he was obliged to obey:—2. That the trial judge, although requested by counsel for defendants to do so, refused to submit to the jury the question of whether or not the plaintiff voluntarily assumed the risk attendant upon working as he did when the accident happened.

The Supreme Court held, following the reasoning

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 24 Ont. L.R. 154.

1911

GRAND TRUNK PACIFIC RY. CO. v. BRULOTT.

of the Court of Appeal as to the first objection, that the jury were sufficiently directed on the point as to the plaintiff being bound to obey the order of the employee whom he was assisting in repairing the car and the evidence shewed that he did follow the latter's directions.

On the second objection Mr. Justice Davies dissented, holding that the question as to the plaintiff being *volens* should have been submitted. Mr. Justice Idington took the view that the issue as to *volens* should have been pleaded, while Duff and Anglin JJ. were of opinion that it was covered by the finding that the plaintiff was not guilty of contributory negligence. Mr. Justice Brodeur held that as plaintiff was acting under the orders of a superior at the time the maxim *volenti non fit injuria* did not apply. The appeal was accordingly dismissed.

Appeal dismissed with costs.

D. L. McCarthy K.C. for the appellants.

T. N. Phelan for the respondent.