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MARY EVELYN GUNDERSON as Executrix of the Estate of John George Olaf Gunderson, deceased, MARY EVELYN GUNDERSON in her personal capacity, and GLORIA ANN GUNDERSON an infant, by her next friend, MARY EVELYN GUNDERSON (*Plaintiffs*) ..... APPELLANTS;

AND

CANADIAN PACIFIC RAILWAY COMPANY, ROBERT WILLIAMSON RUSSELL, JOHN KEHOUGH and THE CITY OF CALGARY (*Defendants*)

RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Railways—Level crossing—Order of Board of Transport Commissioners requiring installation of signals within 60 days after completion of street widening—Accident occurring before expiration of period—Statutory speed limit of 10 m.p.h. where order not complied with—Train travelling in excess of permitted rate—Negligence—Railway Act, R.S.C. 1952, c. 234, s. 312(1)(c).

An appeal from a judgment of the Appellate Division of the Supreme Court of Alberta dismissing the plaintiff's action and thereby reversing the judgment of the trial judge was brought to this Court. The trial judge had found the Canadian Pacific Railway Co. and its employees R and K to be solely responsible for the death of one G and the injuries sustained by his wife and daughter as the result of an accident in which the company's train, with the defendant R as its engineer and the defendant K as its conductor, struck a motor vehicle owned and operated by G while it was stationary with its front wheels on the company's railway line at a level crossing in the City of Calgary.

In July 1961 the City of Calgary applied for and obtained an order of the Board of Transport Commissioners authorizing the widening and paving of the street at the aforesaid crossing. It was provided in the order that: "Within sixty days after completion of the said work the Canadian Pacific Railway Company shall install, and shall thereafter maintain, two flashing light signals and one bell on each dual lane at the said crossing." At the time of the accident the 60 days had not elapsed and the signals had not been installed.

Held: The appeal should be allowed with variations from the trial judgment as against the defendant company and the defendant R; the appeal should be dismissed as against the defendant K and the defendant city.

It was provided by s. 312(1)(c) of the *Railway Act*, R.S.C. 1952, c. 234, that: "No train shall pass at a speed greater than ten miles an hour . . . over any highway crossing at rail level in respect of which crossing an order of the Board has been made to provide protection for the safety and convenience of the public and which order has not been complied with." The company's contention that these provisions should be interpreted as meaning that the company was not obliged to provide the

*PRESENT: Cartwright, Abbott, Martland, Ritchie and Hall JJ.

public with the required protection against trains travelling in excess of 10 miles per hour until 60 days had elapsed after the city's work had been completed was not accepted. The combined purpose of the order of the Board and s. 312(1)(c) of the *Railway Act* was the protection of the safety and convenience of the users of the highway against the use of this crossing by trains travelling in excess of 10 miles per hour without the requisite lights and bells having been installed. This being the purpose of the legislation and the order, it followed that the language employed should, if possible, be interpreted so as to give effect to it. The language used was consistent with this interpretation.

The speed of the train in the present case was in excess of 30 miles an hour. Applying the standards expressed in the authorities, it could not be said that the trial judge was clearly wrong in concluding that under the circumstances the railway company was guilty of negligence which was causative of the collision in failing to comply with the provisions of s. 312(1)(c) of the *Railway Act*. Accordingly, this Court deferred to the trial judgment in that regard. *Prudential Trust Co. Ltd. v. Forseth*, [1960] S.C.R. 210, referred to.

However, there was no evidence to justify a finding of negligence on the part of the conductor K. As to the engineer R, although the decision as to speed was not his, he did operate the train at a speed which constituted a breach of the provision of the *Railway Act*, and therefore, in the light of s. 392 of that Act, he, as well as the company, was technically liable for the damages which resulted.

The deceased was found negligent in that he failed to appreciate the existence of the railway crossing until his front wheels were on the track. Accordingly, it was held that the collision was caused by the combined fault of G on the one hand and the railway company and its employee on the other. In accordance with the provisions of s. 2 of *The Contributory Negligence Act*, R.S.A. 1955, c. 56, the fault was apportioned equally.

For the reasons given in the Courts below, the appeal against the judgment in favour of the City of Calgary was dismissed.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], reversing a judgment of Manning J. Appeal allowed in part.

W. J. Major, for the plaintiffs, appellants.

H. M. Pickard, for the defendants, respondents, Canadian Pacific Railway Company, Russell and Kehough.

W. R. Brennan, for the defendant, respondent, City of Calgary.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] dismissing the action of the present appellants and thereby reversing the judgment rendered by Manning J. at the trial

[1] (1964), 46 W.W.R. 129, 43 D.L.R. (2d) 654.

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of the action whereby he had found the Canadian Pacific Railway and its employees Russell and Kehough to be solely responsible for the death of George Olaf Gunderson and the injuries sustained by his wife and daughter as the result of an accident in which the railway company's train, with the respondent Russell as its engineer and the respondent Kehough as its conductor, struck a motor vehicle owned and operated by Gunderson while it was stationary with its front wheels on the company's railway line at a point where that line crosses 66th Avenue in the City of Calgary.

The accident happened on the afternoon of Sunday, October 1, 1961, when Gunderson, accompanied by his wife and family, was driving in an easterly direction on 66th Avenue and having stopped at a stop sign situate 24 feet 7 inches west of a railway crossing, he proceeded forward until his front wheels were on the western rail of the track and then saw a train approaching from the north at a speed in excess of 30 miles per hour and only about 50 feet away from him. Gunderson at once tried to reverse gears so as to get out of the way but was struck by the train before completing this operation. As has been indicated, Gunderson was killed and his wife and daughter, Gloria Ann, were injured as a result of the collision.

Until a few months before the accident, 66th Avenue W. in the vicinity of the railway crossing was a gravelled road and at the crossing itself the space between the rails was occupied by planks, but in July, 1961, the City of Calgary applied for and obtained an order of the Board of Transport Commissioners authorizing the widening and paving of the street at this crossing and by September 8, the work had been completed and the old gravel road had become a paved four-lane highway with the space between the rails no longer occupied by planks but covered with the same paved surface as the rest of the highway.

In the course of her evidence, Mrs. Gunderson described the appearance of the crossing when she and her husband had last been there and at the time of the accident in the following terms:

> Q. Mrs. Gunderson, it wasn't too clear to me whether you knew whether your husband had been over this crossing or not?
>
> A. Well, we—both he and I were over the crossing, it must have been at least a year before that and *it was all, you know, rough and weedy and everything.*

Q. It was a different type of crossing, was it?
A. Yes.
Q. It was paved at the time of the—
A. At the accident it was paved, but before it wasn't paved.
Q. But it was along 66th Avenue, though?
A. Well, yes, I remember but a long time back. I guess he expected it would be still the same thing, you know, along there.
Q. What was the condition of the crossing, do you know that, Mrs. Gunderson?
A. At the time of the accident?
Q. Yes.
A. Well, it was good, only there seemed to be kind of a little height on the road and then it went down, the tracks seemed to be hidden down there because *they just sprung out all of a sudden like they came out of the ground.*

The italics are my own.

Before the widening and paving of the crossing, the rough planks and grass would give motorists some indication that they were approaching a railway line and, under those conditions, the only additional visual warning consisted of a white post with cross arms, bearing the words "Railway Crossing", and a stop sign, erected by the City of Calgary, directly to the westward and about 11 feet distant from the cross. That this was not considered to be adequate protection for the public under the new conditions is evidenced by that part of the order of the Board of Transport Commissioners which authorized the widening and "the installation of automatic protection at the said crossing", and which provided that:

> Within sixty days after completion of the said work the Canadian Pacific Railway Company shall install, and shall thereafter maintain, two flashing light signals and one bell on each dual lane at the said crossing.

At the time when this accident occurred the 60 days had not elapsed and the new signals had not been installed, so that the users of the highway were left with less than the maximum protection which the Board deemed necessary under the new conditions. Such a situation as this appears to me to have been contemplated by Parliament in passing s. 312(1)(*c*) of the *Railway Act*, R.S.C. 1952, c. 234, which provides that:

> 312. (1) No train shall pass at a speed greater than ten miles an hour
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> * * *
>
> (*c*) over any highway crossing at rail level in respect of which crossing an order of the Board has been made to provide protection for the safety and convenience of the public and which order has not been complied with.

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The Appellate Division agreed with the submission made on behalf of the railway company that these provisions should be interpreted as meaning that the company was not obliged to provide the public with the required protection against trains travelling in excess of 10 miles per hour until 60 days had elapsed after the city's work had been completed. With the greatest respect for the reasoning of Macdonald J.A., expressed in the decision which he rendered on behalf of the Appellate Division, it appears to me that the combined purpose of the order of the Board and s. 312(1)(*c*) of the *Railway Act* is the protection of the safety and convenience of the users of the highway against the use of this crossing by trains travelling in excess of 10 miles per hour without the requisite lights and bells having been installed. This being the purpose of the legislation and the order, it follows that the language employed should, if possible, be interpreted so as to give effect to it. In my view the language used is consistent with this interpretation and I accordingly agree with the views expressed by the learned trial judge in the following paragraphs of his judgment:

> I am unable to accept this argument of the railway company. It would mean that for a period of sixty days after work was complete at this railway crossing the public were not entitled to be safe when crossing the railroad; that the public became entitled to safety only on the sixty-first day after the work was complete.
>
> It appears to me that s. 312 was passed for the protection of people crossing railways and means that if the Board of Transport Commissioners makes an order, as it did in this case, that provides for warning signs on a railway crossing, the order is not complied with until the signs are installed. The fact that the railway company is allowed sixty days in which to comply with the order does not alter the fact that compliance had not yet taken place. I think that subs. (*c*) of s. 312 of the *Railway Act* as applied to this case means that during this sixty day period of "grace" when the railway company may continue to operate its trains without warning signs, it is required to operate them at the reduced speed of ten miles per hour.

Manning J. then proceeded to make the following finding of fact:

> The speed of the train was over 30 miles an hour or more than three times as great as the ten miles per hour provided for by the *Railway Act*. I consider that there was negligence on the part of the railway company, the engineer who drove the train at this unlawful speed and the conductor who was in charge of the train and who could have had this speed reduced.

Applying the standards expressed in the authorities which were reviewed and adopted in this Court in *Prudential Trust*

Co. Ltd. v. Forseth[1], at p. 217, I am unable to say that the learned trial judge was clearly wrong in concluding that under the circumstances the railway company was guilty of negligence which was causative of the collision in failing to comply with the provisions of s. 312(1)(*c*) of the *Railway Act* and I accordingly defer to his judgment in that regard.

I am, however, unable to find any evidence in the record to justify a finding of negligence on the part of the conductor Kehough. It is said that he was "the conductor who was in charge of the train and who could have had this speed reduced" but the only evidence in this regard is to be found in his own examination for discovery which he reaffirmed at the trial. That evidence was as follows:

Q. How fast was the train going at this time?
A. Well, up to there and about that time I would estimate the speed to be around 30 to 35 miles an hour.
Q. Have you any control over the speed of the train?
A. In what way, sir?
Q. In any way?
A. Well, we have what we call on the railroad a speed limit of 35 miles an hour on main tracks.
Q. Is the conductor in charge of the train?
A. Yes.
Q. Can the conductor advise the engineer to slow down?
A. Yes.
Q. How would you advise the engineer to slow down if you thought it necessary when the train is going?
A. Well, out of here the only way you can do that is if you were leaving Alyth, you would tell him there is a slow order here, or speed limit over so-and-so of so many miles an hour, but when the train is running the only way you are going to slow it down is to put the train into emergency, you come to a stop.
Q. You have no communication with the engineer?
A. No communication.
Q. There is no way you can signal him?
A. No.
Q. And track speed on this day in this area was 35 miles an hour?
A. Yes.
Q. Even though it was within the City of Calgary?
A. Yes.

Kehough was never asked whether or not he had told the engineer to slow down after leaving Alyth and the record is lacking in any affirmative evidence to prove that he was guilty of a breach of duty which caused or contributed to the accident. I would accordingly dismiss this appeal in so far as Kehough is concerned but without costs.

[1] [1960] S.C.R. 210.

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The position of the respondent, Russell, is different. The only fault that can be attributed to him is that he was operating the train which, as we have now held, was travelling at a speed in excess of the permitted rate under s. 312(1)(*c*) of the *Railway Act*, and the decision to travel at that speed was not his. He was operating in accordance with his instructions. There is no evidence to show that he knew of the existence of the order of the Board of Transport Commissioners respecting the crossing in question. This is not a case in which the railway company employer is being made liable in respect of the negligent conduct of its employee. In this case the decision as to speed was that of the employer.

However, notwithstanding this, Russell did operate the train at a speed which constituted a breach of the provision of the *Railway Act*, and therefore, in the light of s. 392 of that Act, he, as well as the company, is technically liable for the damages which resulted.

In reaching the conclusion that there was no contributory negligence on the part of Mr. Gunderson, Manning J. made certain assumptions based in large measure upon inferences which he drew from photographic exhibits which were before this Court as they were before him. I am unable to agree with this finding as I have formed the opinion that Mr. Gunderson was negligent in that he failed to appreciate the existence of the railway crossing until his front wheels were on the western rail. In this regard I accept the evidence of Mrs. Gunderson where she said in cross-examination:

> Q. Now, how long was the car, the automobile stopped at the stop sign?
> A. Oh, it just stopped and went, you know. Just enough to change it into the gears he had to change it into. You usually come to a stop, change gears and start it up.
> Q. And what happened after that, Mrs. Gunderson?
> A. Oh, all of a sudden the tracks just sprung up in front of me just like it came out from the ground in front of me and I said to my husband, "Isn't that a dangerous crossing, dangerous tracks?" probably I said, and he looked like that (indicating) and said, "A train".
> Q. And where was the car when he looked and he said, "There is a train"?
> A. I think almost on the track. By the time he got his mind set one way or the other it was on the tracks by that time. It takes a little while, you know, to get your mind working, I guess.
> Q. Yes, of course. How far would the train be when you first saw it?
> A. About fifty feet from me, I would say.

Q. Did you look when your husband said, "A train", did you look?
A. Yes, I looked when he said, "A train", I looked. I could see it.

This indicates to me that Mr. Gunderson having stopped at the stop sign and failed to see the railway crossing sign which was directly in front of it, moved forward into the path of the oncoming train. The learned trial judge, basing his conclusion in this regard on one photographic exhibit (ex. 14) thought that it could be assumed that while at the stop sign Gunderson's view of the train approaching from the north was blocked by a line of telegraph poles, but if this line of poles obscured the view of the tracks it was only at the one angle from which the photograph exhibited on behalf of the appellant (ex. 14) was later taken. It appears to me that even a slight movement of the driver's head would have brought his vision out of line with these poles and given him a clear view of the tracks, and in any event, the assumption that Gunderson looked at the tracks from this one position and that it was for this reason that he did not see the train, assumes also that he never looked again which he should, and no doubt would, have done if he had seen the railway crossing sign.

I am accordingly of opinion that the collision was caused by the combined fault of Mr. Gunderson on the one hand and the railway company and its employee on the other.

From the time that the front wheels of the Gunderson car touched the railway track the accident could not in my opinion have been avoided and in seeking to apportion degrees of fault, nothing is to be gained by attempting to reconstruct the actions of the people concerned during the last seconds before the impact, nor do I find it possible to establish with any reasonable degree of certainty whether one party was more to blame than the other in creating the position of danger which made the collision inevitable. In accordance with the provisions of s. 2 of *The Contributory Negligence Act*, R.S.A. 1955, c. 56, I therefore find that the fault should be apportioned equally.

As was indicated at the hearing of this appeal, the appeal against the judgment in favour of the City of Calgary should be dismissed with costs for the reasons stated by both the learned trial judge and the Appellate Division.

I see no reason to disturb the assessment of damages as awarded by the learned trial judge.

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In the result, I would allow this appeal as against the Canadian Pacific Railway Company and Robert Williamson Russell with costs in this Court to be recovered from the Canadian Pacific Railway Company, and I direct that the order of Mr. Justice Manning be varied so as to provide that Mrs. Mary Evelyn Gunderson as executrix of the estate of George Olaf Gunderson do recover from the respondents, except the City of Calgary, the sum of $40,000 to be apportioned $2,500 to Linda Darlene Gunderson, $3,000 to Gloria Ann Gunderson, and $34,500 to Mary Evelyn Gunderson; and that it be further varied to provide that Mary Evelyn Gunderson in her personal capacity do recover the further sum of $672.50, and that Gloria Ann Gunderson do recover the sum of $200.

I would not interfere with the disposition of the costs in the Courts below.

Appeal against Canadian Pacific Railway Company and Robert Williamson Russell allowed with costs in this Court to be recovered from Canadian Pacific Railway Company, and judgment at trial varied. Appeal against John Kehough dismissed without costs. Appeal against City of Calgary dismissed with costs.

Solicitor for the plaintiffs, appellants: W. J. Major, Calgary.

Solicitor for the defendants, respondents, Canadian Pacific Railway Company, Russell and Kehough: D. B. Hodges, Calgary.

Solicitors for the defendant, respondent, City of Calgary: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.