EDMONTON, DUNVEGAN AND BRITISH COLUMBIA RAILWAY CO., (DEFENDANT)..... APPELLANT;

AND

J. W. MULCAHY., (PLAINTIFF)..... RESPONDENT.

1920

*Nov. 3, 4.
*Dec. 17.

IN RE PUBLIC UTILITIES ACT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Master and servant—Railways—Injury to servant—Knowledge of dangers—Volenti non fit injuria—Liability of master.

The respondent, employed by the appellant railway company as road-master, had been specially instructed to repair a certain section of the road-bed which was in a dangerous condition owing to bad rails. The respondent frequently applied for new rails which the appellant company did not supply. While, in the course of his employment, the respondent was travelling over that section in a hand-car, an accident occurred through the car leaving the tracks and he was injured.

Held, Sir Louis Davies C. J. dissenting, that the appellant company was liable, the defence of *volenti non in injuria* not being applicable under the circumstances.

Judgment of the Appellate Division (15 Alta. L.R. 464) affirmed, Sir Louis Davies C. J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Hyndman J. (2) and maintaining the respondent's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

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*PRESENT: Sir Louis Davies C. J. and Idington, Duff, Anglin and Mignault J.J.

(1) 15 Alta. L.R. 464; [1920] 2 W. W.R. 583. (2) [1919] 3 W.W.R. 750.

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C. P. Wilson K.C. for the appellant.

Eug. Lafleur K.C. for the respondent.

THE CHIEF JUSTICE (dissenting): At the conclusion of the argument at bar I was of the opinion that Mr. Wilson had made out a good case for this appeal. As, however, my colleagues seemed to have a different impression, I found it necessary to read with care all the pertinent evidence in the case referred to by counsel on either side, as also the judgment of the trial judge, Mr. Justice Hyndman, and that of the Appellate Division reversing it.

As a result, I am clearly of the opinion that, alike on the applicability of the maxim *volenti non fit injuria* and of the law of contributory negligence, the defendants are not liable and that the appeal should be allowed with costs and the judgment of the trial judge restored.

If there ever was a case, in my opinion, to which the doctrine of the maxim was applicable and should be applied, it is this case.

The actual work and duty of the plaintiff, for which he was employed, was to put in repair the very roadbed, the dangerous condition of which, it is contended by the plaintiff Mulcahy, caused the accident in question. He undertook the employment and continued in it with full knowledge of the very bad and unsafe condition of the roadbed. His knowledge of its condition was probably better than that of any other man. He applied, after going to work at the repairs in August, for new rails, and before, and in the beginning of September, was informed that the company would supply new rails for a portion of the road but could not do so for that part of it where the accident occurred, namely, between McLennan and

Grande Prairie. On receiving this definite information, he, on the 6th September., 1917, wrote to his foreman the following letter.

Spirit River, Sept. 6, 1917.

Mr. Frank Donis,
Ex. Gang Foreman.

Dear Sir:

When you are working your gang from Manir Tank Mile 341 to Smoky 297 getting worst places out of track you will notice you will find some very bad rails. I have made requisitions for rails to Mr. Sutherland and he claims that he cannot give me any rails between McLennan and Grande Prairie so when you find a very bad one go to the nearest siding and take out rails from side track and put in main line and put your bad rail in side track that you take from main line leave a man to protect side track until you return with bent rail to replace good rail taken out. I understand this is a very expensive way to do but it is the only way we can get some of the very worst rails out which will cause bad derailments if left in track when repaired I know it will break up your gang so you cannot make a good showen but I understand all of this and will proct (protect?) you if anything is sayed about your work not showen up be shure and tamp up under new rail in low places good.

Yours truly,

J.W. Mulcahy,
R.M.

No evidence could more clearly establish plaintiff appellant's full knowledge of the road's condition and of the inability of the company to supply new rails on that portion of the road where the accident occurred. The instructions he gave his foreman in this letter as to how he should remove and replace very bad rails, taken in conjunction with the other letters in evidence, shew his complete knowledge of all the facts, namely, the bad condition of the road on this particular section, the inability of the company to supply new rails for that comparatively untravelled section as all the rails they could procure were required for the section of the road where there was the greatest

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traffic for freight and passengers, and the means he directed the foreman should take to supply the new rails required as substitutes for any "very bad ones."

This letter is, to my mind, also a complete answer to the suggestion that the company had aggravated the dangers to which plaintiff was exposed by neglecting to supply him with new rails. It shews his full knowledge of the company's inability to supply new rails between McLennan and Grande Prairie where the accident occurred as all the new rails they could procure were required for the more travelled sections of the road. With all this actual knowledge, the plaintiff continued in his position as roadmaster, repairing the road for which he had been specially employed. I can only, without quoting more from the evidence, repeat my strong opinion that the doctrine of *volenti non fit injuria* should be applied.

Then, as to the contributory negligence of the plaintiff, I am also of the clear opinion that it has been proved up to the hilt. He was in control of the car, called a speeder, at the time of the accident and sat in the front seat along with a workman named Carbonneau. Frank Donis, who was running the car under his instructions sat behind him, and the evidence shews clearly it was plaintiff Mulcahy's custom and duty to signal to him the rate of speed. As usual, the witnesses differ somewhat as to the rate, but Mulcahy's own evidence is that, at the time of the accident, the speeder was running at between 10 and 15 miles an hour.

Accepting plaintiff Mulcahy's own evidence of the state and condition of the roadbed and rails over which they were running, this rate of speed, I think, was not short of reckless imprudence and negligence. It no doubt thereby contributed to throw the car off the rails and cause the accident which occurred.

If, however, the evidence of the other witnesses, Donis and Sutherland and Carbonneau, is accepted, that the roadbed, at the place in question, was not at all in the very bad condition that Mulcahy describes, but, as one of them Sutherland said:

> about the best piece of track up there, the land dry and the ditching very good, there was no chance for water to remain around the track and keep it soft or give it a chance to become rough,

then the proper conclusion to be drawn is that which I think the trial judge, accepting their evidence, drew that the car ran off or jumped the track, not from the bad condition of the roadbed or rails, but from some unexplained cause.

My conclusion, therefore, is clear that the appeal should be allowed with costs and the judgment of the trial judge restored.

IDINGTON J.—The learned trial judge rested his judgment herein upon the application of the doctrine expressed in the maxim *volenti non fit injuria*.

Assuming, for argument's sake, such a defence would have been applicable if the accident had happened the next day after the respondent had entered upon his new employment, relying upon the reasonable expectation of his being supported in his effort to improve the dangerous condition then existent and to be rectified, I cannot see how it can be made applicable to the circumstances created by the gross neglect of appellant to supply the rails which the respondent so repeatedly urged upon its managers to be used in rendering the very spot in question safe.

The Appellate Division, in my opinion, was quite right in reversing, for the reasons assigned by it, the judgment of the learned trial judge on that ground,

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unless there was pressed upon it, and shewn to be well founded, the ground of contributory negligence on the part of respondent which is now urged upon us.

Although a casual expression by the learned trial judge is quoted by counsel for appellant as indicating that, in the said judge's opinion, the defence of contributory negligence was established, I cannot read it as an express finding upon the conflicting evidence that appears or think that, if he so intended to find, he would have so passed over what he found on the facts and let the matter rest there, and then turned to elaborate the ground upon which he does rest his judgment.

And the absence of any reference thereto in the able and fully considered opinion of the court below, seems to indicate that no such defence had been pressed on that court.

The evidence on the point, I repeat, is most conflicting. And in one view presented is reduced to a narrow point, which does not seem by any means to render it safe for us to act upon, under the foregoing circumstances.

Indeed it amounts to no more than a possible suspicion that when the speeder car approached the point in question it might have been wiser for respondent to have indicated, to the man operating, a reduction in the rate of speed.

I do not think, in face of the foregoing history of the alleged defence, and the conflict of evidence, as well as the fact that the motorman knew the road as well as respondent, that we would be justified in allowing the appeal on that ground, and, therefore, I think the appeal should be dismissed with costs.

DUFF J.—This appeal involves a controversy touching the application of the maxim *volenti non fit injuria*. Long ago Bowen, L. J., called attention in a well known judgment to this—that the maxim is *volenti non fit injuria* not *scienti non fit injuria*. I make this observation because I should like it to be quite plain that some sentences in the judgment of the learned trial judge seemingly not quite consistent with this should not be accepted as an accurate exposition of the rule.

I do not find it necessary to discuss the question whether if we had been confronted with a case in which the essential elements were the request by the company to Mulcahy to undertake the work he did undertake in the circumstances known both to him and to his superiors, the learned judge's finding of fact that the conduct of the parties properly interpreted evinced an intention that Mulcahy should bear the risk of the dangerous condition of that part of the railway where his duties were to lie could properly be set aside by the Appellate Division. I shall proceed upon the hypothesis that Mulcahy did undertake the risk but his agreement to undertake the risk must, as the Appellate Division have held, be qualified by the condition necessarily implied that the company would do what they reasonably could to assist him in minimizing the risk. That must, I say, be taken to have been one of the terms upon which the risk was assumed and I think an essential term. It follows that the failure on the part of the company to fulfil this term disables them from relying upon Mulcahy's undertaking unless at all events they can establish that by their default Mulcahy was not prejudiced. The Appellate Division have taken the view apparently that this was not shewn. Mr. Wilson has not satisfied me that that view is erroneous.

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ANGLIN J.—The judgment of the Appellate Division is challenged by counsel for the defendant company on two grounds. It is urged (*a*) that the plaintiff voluntarily incurred the risk of the defective condition of the railway which has been found to have been the cause of his injury; (*b*) that excessive speed of the car, or "speeder," on which he was travelling was the true cause of the accident and that he was so far responsible for it that he should either be deemed the author of his own wrong or at least guilty of contributory negligence.

As to the first defence, depending upon the applicability of the maxim *volenti non fit injuria*, I agree with the opinion delivered by Mr. Justice Ives in the Appellate Division concurred in by the learned Chief Justice of Alberta and Mr. Justice Beck. The plaintiff did not agree to relieve the company from liability for accidents that might happen from an unnecessary prolongation of the risk arising from irremediably defective rails owing to its failure to comply with his reasonable and reiterated request that he should be sent a supply of good rails to replace them. No such implication is warranted either from his assumption or his retention of the post of roadmaster of the section.

That the speeder was running at an excessive speed at the time of the injury was not found by the learned trial judge, who dismissed the action because he was "by no means satisfied" that the speeder did not

> jump the rails, * * * without any explainable cause.

But, assuming in the defendant's favour that the speed was too great, the evidence is not convincing either that the driver should be regarded as the plaintiff's *alter ego* so as to make him responsible for negli-

gent driving or that the plaintiff had such an opportunity of observing and controlling the speed immediately before the moment of the accident that a case of contributory negligence on his part is clearly made out. Notwithstanding the able argument presented by Mr. Wilson I am not satisfied that there is error in the judgment *a quo*.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Parlee, Freeman, Mackay & Howson.*

Solicitors for the respondent: *Woods, Sherry, Collisson & Field.*