1939
* Oct. 13, 16.
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* Feb. 26.

AGNES DANLEY (PLAINTIFF) .....APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Accident—Damages—Railway trainman—Killed while engaged in switching operations—No eye-witness of accident—Verdict of jury in favour of plaintiff—Set aside by appellate court—Whether evidence sufficient to justify verdict or whether it was a matter of pure conjecture or speculation by the jury.

An action was brought under *The Fatal Accidents Act*, R.S. Sask., 1930, c. 75, by the appellant, widow of one John S. Danley, acting as executrix of his estate. Danley, an experienced railway trainman in the employ of the respondent company, was killed while engaged in his work of coupling and uncoupling of cars during switching operations on the night of October 8th, 1937. On that night, he was seen to approach the point where two cars were about to be coupled; and, a very short time later, his dead body was discovered badly crushed partly beneath one of the cars. There was no eye-witness of the accident, and therefore no direct evidence as to what the deceased actually did at the very moment he met his death or as to exactly how the accident happened; but counsel for both the appellant and the defendant exposed to the jury their respective theory as to the cause of the accident, according to the evidence. There was no exception taken to the charge to the jury by the trial judge. The jury found in favour of the appellant and awarded her $8,000 damages, bringing a verdict that Danley came to his death through the negligence of the respondent. The appellate court, setting aside the verdict, dismissed the appellant's action. The majority of the court, for the purpose of their determination of the appeal, assumed but did not hold that there was negligence on the part of the respondent company, Gordon J. being of opinion that there was no evidence of negligence; but the appellate court unanimously held that on the evidence the way in which Danley met his death was a matter of pure conjecture or speculation. On appeal to this Court,

Held, Rinfret and Kerwin JJ. dissenting, that the appeal should be allowed and the judgment of the trial judge restored.

Per Davis J.—A reasonable view, consistent with the appellant's right to recover, could be taken by the jury on the evidence; and their verdict, a verdict which reasonable men acting judicially could arrive at, ought not to have been disturbed. As Viscount Dunedin said in *Simpson* v. *L.M. & S. Ry. Co.* ([1931] A.C. 351, at 364), "the "question will always be whether the proved facts will reasonably "support the conclusion which has rested upon them."

Per Hudson J.—There was evidence before the jury upon which they could reasonably have arrived at the conclusion that there was negligence on the part of the respondent.

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

1940

DANLEY v. CANADIAN PACIFIC RY. CO.

Per Rinfret and Kerwin JJ. dissenting.—Assuming negligence of the respondent and assuming Danley did not know that a coupling apparatus was in a defective condition, there was not evidence from which it might be reasonably inferred that the death of Danley was caused by such negligence of respondent. Upon the evidence the jury had before them, they could do no more than guess at the cause of the accident.

APPEAL from the judgment of the Court of Appeal for Saskatchewan, reversing the judgment of the trial judge, Maclean J. with a jury, and dismissing the appellant's action.

W. G. Currie K.C. and *S. R. Broadfoot K.C.* for the appellant.

W. N. Tilley K.C. and *H. A. V. Green K.C.* for the respondent.

THE CHIEF JUSTICE—I should allow the appeal and restore the judgment of the trial judge with costs throughout.

DAVIS J.—This is a Fatal Accidents action from the province of Saskatchewan. The appellant's husband Danley was a railway trainman in the employ of the respondent company and about midnight on October 8th, 1937, was found dead, with his body badly crushed, in the respondent's railway yards in the town of Lanigan, Saskatchewan. A moment or two before his body was found he was engaged in the ordinary course of his employment in switching operations of the railway in the said yard. A train had come in with some forty freight cars; many of them were to be left in the yards in Lanigan and other cars taken out. A new train was being made up; the crew consisted of a locomotive engineer, a fireman, a conductor and two brakemen. Danley's duties required him to operate the switches and make the necessary moves for coupling up the different cars. In making up a train the practice appears to be to have the long haul cars at the back of the train and the short haul cars at the front. Switching operations had proceeded at Lanigan for about an hour and a half when the accident happened. At that time the engine had started pushing the tender, the water car, a long haul car and, what is for convenience called,

1940

DANLEY v. CANADIAN PACIFIC RY. CO.

Davis J.

car 65, in that order. When a little speed had been acquired it was intended that the pin between the last named two cars should be pulled. The engine and tender and cars attached to it would then stop and car 65 would go down on what was known as track 4. When this operation was being performed, Underwood, the rear-end brakeman, attempted to disconnect the cars by using the uncoupling lever. He found the lever on car 65 was disconnected. He signalled the engineer to stop, which the engineer did. Underwood asked Danley to give signals to the conductor, which resulted in car 65 being thrown down on track 4 and the long haul cars which were ahead of car 65 were put on track 1. The locomotive, tender and water car were now detached from all the other cars. The locomotive was facing east. The water car was the most westerly of the three units.

It was now desired to connect the west end of the water car to the east end of car 65. The engine, pushing the tender and water car, backed up slowly. Danley's job was to make the connection. He was walking west on the south side of the water car and about opposite to its west end. He had his lantern in his right hand and was giving a slow back-up signal. The engineer was taking the signals from Danley. Just before the cars (that is, the water car and car 65) actually came together, Danley, who was still walking just at the west end of the water car, gave a signal for a still slower movement. Then the light of his lantern disappeared. The engineer said it just disappeared "quietly and naturally as if it was carried out of sight." The cars had come together, the lantern disappeared, and the brakes were applied at about the same moment. The engine stopped. The connection did not make—the engine moved westerly approximately eight feet after the water car struck car 65; car 65 moved westerly about twelve feet. The conductor was at that time standing opposite the back of the tender. Danley had passed him only a few seconds before while walking beside the car giving the slow back-up signals. The engineer not seeing Danley or the light of his lantern after the engine stopped, asked the conductor where Danley was and said that he would not make any further move until he knew where the man was from whom he had been taking the signals. No shout or scream had been heard by either the engineer or the conductor.

The conductor looked and saw Danley's body lying under and about the centre of the water car. He was lying on his face, dead. His body was badly crushed from the left shoulder down to the belt region of his body. His left arm was practically severed below the elbow; the spine was completely severed in one place; all the ribs on the left side below the third rib were fractured; and the chest completely collapsed. The very severe crushing was such as to show that the body had been subjected to a great deal of force or pressure. Dr. Hindson, who made an autopsy, said he could state definitely that Danley was never caught between the couplings of the two cars. The lantern was found on the ground, still lighted under the water car near the body.

There was no direct evidence as to what the deceased actually did at the very moment he met his death or as to exactly how the tragic accident happened. The appellant's theory of the accident, as it was put on the evidence to the jury, was that Danley was attempting in the ordinary course of his employment to operate the lever to effect a coupling, not being aware of the fact (as Underwood, the rear brakeman, was) that the lever was not working; that with his lantern in his right hand, he had reached for the lever with his left hand, and as the cars came together, had pulled forward with his left hand on the lever; that had the lever been in working condition considerable resistance would have been met with, which Danley would anticipate and would therefore pull heavily on the lever to operate the mechanism; that the lever coming suddenly up without any resistance, Danley's left hand would slip from the lever and the weight he had intended to throw on the lever to operate the mechanism would cause him to lose his balance and fall in the direction in which he was pulling, which would be toward the trucks of the advancing water car; that his right hand being occupied with the lantern, it would be natural for him to thrust out his left hand to break his fall; that such a fall would place him on his face on the track beside the advancing car; with his left arm caught, the over-hanging of the arch bars would crush him down against the ties; and as the car drifted forward would push his body out at right angles to the tracks, and as the trucks advanced and stopped, would leave the body exactly where it was found.

1940

DANLEY v. CANADIAN PACIFIC RY. CO.

Davis J.

The respondent sought to meet the case made against it by saying that there was no evidence to reasonably support it and the respondent advanced a theory of its own that the deceased went between the cars when in motion for the purpose of operating the lever, a thing he knew was prohibited by his employer, and, alternatively, that if the deceased did fall in operating the lever as alleged, he had been warned by Underwood that the lever was not working and that it was therefore negligence in himself to attempt to pull it at the time in question.

By sec. 298, ss. 1 (*c*) of the *Railway Act,* R.S.C., 1927, ch. 170, it is provided as follows:

> 298. Every railway company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means—
>
> (*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

There was a good deal of evidence directed to the nature and extent, or lack, of inspection of the coupling lever by the respondent prior to the time Underwood discovered its defective condition. That was a question of fact on the evidence for the jury. It was open to the jury, as the trial judge told them, to find the inspection was not an efficient and proper inspection. The construction of the statutory provision by the trial judge—that " the defendant employer is bound in law to furnish to his employee reasonably safe equipment with which to work "—was not objected to at the trial and the respondent ought not now to be entitled to put a different construction upon it.

There is really no dispute about the fact that Underwood, the rear brakeman, knew that the lever was not working. The common law doctrine of common employment does not exist in Saskatchewan. But Underwood said at the trial that he had told Danley five minutes before the accident occurred that the lever on the particular car was not working. Asked if Danley could hear what he had said, his answer was " I could not say. He never said anything about it." The jury obviously disbelieved Underwood's statement that he had told Danley. It is hardly reasonable to assume that Danley would have proceeded in the ordinary course to attempt to couple the cars if he had been warned that the coupling was defective. It is,

of course, possible that he would have done so, but, on the other hand, it is more probable that he would not. Counsel for the respondent several times during the argument repeated the phrase " a man who knows that a lever is not working." But the jury plainly did not believe that Danley had been told.

All these matters were questions of fact for the jury. The jury found in favour of the appellant and awarded her $8,000 damages. The questions and answers were as follows:

1. Did John Steelman Danley, while in the employ of the defendant company as a trainman come to his death on the 8th day of October, 1937, through the negligence of the defendant?

Ans.—Yes.

2. If your answer to no. 1 is in the affirmative, state particulars of that negligence and in what did that negligence consist?

Ans.—The defendant company failed to provide the deceased with safe and proper equipment and that the rear end brakeman when on duty and acting for the defendant company upon noticing the defective coupling did not inform the deceased that a certain box car number C.P. 212665 had the defective coupling and thereby did not exercise the utmost precaution to avoid injury to his fellow workman.

3. Was there contributory negligence on the part of the late John Steelman Danley, and if so in what did such contributory negligence consist?

Ans.—No.

4. If your answer to no. 1 is in the affirmative and your answer to no. 3 in the negative, what damages do you allow?

Ans.—$8,000. Eight thousand dollars.

On this verdict the trial judge directed judgment to be entered for the appellant.

The use by the jury of the words " utmost precaution " in their answer to question no. 2 no doubt arose out of their reading of exhibit D. 3—the instructions from the general manager of the company to all employees, dated February 1st, 1930 (put in by the respondent), no. 2 of which instructions reading

Every employee is required to exercise the utmost caution to avoid injury to himself or his fellows, and especially in switching or other movements of trains.

Upon an appeal by the present respondent to the Court of Appeal for Saskatchewan the verdict was set aside and the action dismissed with costs. Three of the learned judges of that Court did not examine the question of negligence on the part of the company but for the purpose of their determination of the appeal assumed that

1940

DANLEY v. CANADIAN PACIFIC RY. CO.

Davis J.

there was negligence. Gordon, J.A., alone examined the evidence as to negligence and came to the conclusion that it was not open to the jury upon the facts to say that the deceased came to his death due to any negligence of the respondent. All four judges who heard the appeal took the view that there was no evidence from which the jury could reasonably infer that the defendant's negligence was the cause of Danley's death. In their view it was pure speculation to conclude that Danley fell and was crushed because he had lost his balance when pulling the defective lever; that any such theory was not only highly improbable but lay in the region of mere conjecture.

The appellant appealed to this Court, asking us to restore the judgment at the trial upon the jury's verdict.

After a careful reading of the evidence and the charge to the jury of Mr. Justice Maclean, the learned trial judge (to which charge no objection was taken) and the jury's answers to the several questions submitted to them (with which answers the trial judge expressed no dissatisfaction), I put to myself the question put by Lord Herschel in delivering the judgment of the Judicial Committee in *Peart* v. *Grand Trunk Railway Company* (1):

> * * * the question is, is there ground for saying that in this case there was no evidence upon which the jury could properly have so found; or rather is the evidence such, or so scanty, that the jury ought not to have so found, and that the verdict ought at least to be set aside on the ground that it was against the weight of evidence.

I am satisfied that a reasonable view consistent with the appellant's right to recover could be taken by the jury on the evidence and that the verdict ought not to have been disturbed. As Viscount Dunedin said in the House of Lords in *Simpson* v. *L.M. & S. Ry. Co.* (2) (repeating what he had said in *Mackinnon* v. *Miller* (3)):

> * * * each case must be dealt with and decided on its own circumstances, and inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony.

And again at p. 364:

> The question will always be whether the proved facts will reasonably support the conclusion which has rested upon them.

The case before us was tried with a jury and it is not for an appellate court to treat the case as one for a fresh

(1) (1905) 10 O.L.R. 753, at 756 (Appendix I).

(2) [1931] A.C. 351, at 357.

(3) [1909] S.C. 373.

decision even though the jury's verdict may not commend itself to the judgment of the Court. This consideration, as Lord Tomlin said in the *Simpson* case (1), at p. 367, dealing with the conclusion of the arbitrator, "necessarily determines the angle of approach to the problem."

It is neither our duty nor our right in this appeal to draw any inference—that was for the tribunal of fact, the jury in this case. "Our duty," as Lord Shaw said in *Kerr* or *Lendrum* v. *Ayr Steam Shipping Co. Ltd.* (2).

> is a very different, a strikingly different, one. It is to consider whether the arbitrator appointed to be the judge of the facts, and having the advantage of hearing and seeing the witnesses, has come to a conclusion, which conclusion could not have been reached by a reasonable man.

I am far from saying that the verdict of the jury in this case does not commend itself to me; I think I should have arrived at the same conclusion. But that is not the point. To set aside the verdict an appellate court must be satisfied that it was a verdict which reasonable men acting judicially could not arrive at.

It is hardly necessary for me to say that I have not overlooked a careful consideration of such authorities as *McArthur* v. *Dominion Cartridge Company* (3), *Richard Evans & Co. Ltd.* v. *Astley* (4), *Grand Trunk Railway* v. *Griffith* (5), *Canadian Pacific Railway Co.* v. *Pyne* (6) and *Jones* v. *Great Western Railway Co.* (7).

I would allow the appeal and restore the judgment at the trial with costs throughout.

HUDSON J.—Danley, the deceased, was an experienced railway trainman in the employ of the defendant company and came to his death while engaged in his work for the company, towards midnight on October 8, 1937. It was the duty of Danley to attend to the coupling and uncoupling of cars during switching operations. On the night in question he was seen to approach, if not arrive at, the point where two cars were about to be coupled. A very short time later his dead body was discovered badly crushed partly beneath one of the cars. No one witnessed the intervening events and what happened can be inferred

(1) [1931] A.C. 351, at 357.
(2) [1915] A.C. 217, at 232.
(3) [1905] A.C. 72.
(4) [1911] A.C. 674.
(5) (1911) 45 Can. S.C.R. 380.
(6) (1919) 48 D.L.R. 243.
(7) (1930) 47 T.L.R. 39; 144 L.T.R. 194.

1940

DANLEY
v.
CANADIAN
PACIFIC
RY. CO.

Hudson J.

only from the surrounding circumstances. It appears that the knuckles of the couplings on the two cars were closed and the cars could not be coupled by merely coming in contact. By law the railway company is obliged to provide a lever to open couplings in such an event. There was a lever on the car in question but it had become disconnected from the coupling.

The explanation advanced by the plaintiff in the case for Danley's death was that when he pulled the lever, it being disconnected, he lost his balance and fell on the track toward and alongside the approaching water-car and was caught and crushed to death thereunder.

The defendant's contention was that Danley, in violation of his instructions and consequently of his duty, went in between the cars in order to adjust the couplings with his hands and that he was caught between the couplings and crushed.

Evidence was given to show the movement of the cars, the position and condition of the body when found, the description of the cars and of the equipment, particularly of the lever and coupling mechanism and other similar matters. Apparently the jury were not fully satisfied with the evidence given by the witnesses and asked permission to take a view of the cars in question or similar cars with similar equipment. This was arranged and two cars of the defendant with similar equipment were placed on a track and made available for inspection and were inspected by the jury and counsel for the two parties.

No exception is taken to the charge to the jury by the learned trial judge. In dealing with the question of negligence of the defendant, he adverted to the fact that the jury had had the advantage of making a personal inspection of the lever. He also said:

> If you come to the conclusion on reasonable inferences that Danley did go in there in violation of that rule, even to further his work and help things along, then he was doing something which he was absolutely forbidden to do and he is not entitled to any compensation for doing that. That in itself is contributory negligence on his part and no matter what amount of sympathy or sentiment you may have it is absolutely forbidden and the plaintiff is not entitled to damages if you find that is the way he received his injury. Now is that the way he came to his death? You have heard the doctor describe where the injuries started, at a point up on the left shoulder, then the ribs beginning to be pressed in and so on down to the belt line. You have the evidence as to his

height. You have the evidence he was holding a lantern in his right hand, that he was leaving his left hand free to work. You have the position where he was found with his head on one rail, one arm nearly off. It is a question for you gentlemen. Can you account for that position and those injuries by coming between those couplings? If you find he went in to these couplings, and he was an experienced trainman, then he violated the rules of the company and is not entitled to damages. If on the other hand you come by reasonable deduction to the conclusion that he did not have proper information, did not understand or hear, did not have definite enough information from Underwood, went along, reached for the lever, that it moved more freely than he expected and as a result of the freer movement he was thrown, stumbled or got into or under the car, got his injuries that way, then there was no contributory negligence on his part. It is a matter for you, gentlemen, as I have said. There is no little evidence, there has to be a certain amount, not guess work but reasoning from undisputed facts and reasoning in such a way that you are satisfied as to the reasonable probabilities.

The jury brought in a verdict holding that Danley came to his death through the negligence of the defendant, such negligence consisting in that:

> The defendant company failed to provide the deceased with safe and proper equipment and that the rear end brakeman when on duty and acting for the defendant company upon noticing the defective coupling did not inform the deceased that a certain box car number C.P. 212665 had the defective coupling and thereby did not exercise the utmost precaution to avoid injury to his fellow workman;

and that there was no contributory negligence on the part of Danley.

From this verdict the defendant appealed to the Court of Appeal for Saskatchewan and in that court the verdict was set aside and judgment entered for the defendant, dismissing the plaintiff's action. The majority of the court assumed but did not hold that there was negligence on the part of the defendant company, but held that on the evidence the way in which Danley met his death was a matter of pure conjecture. Mr. Justice Gordon agreed with the majority on the last point and further held that there was no evidence of negligence on the part of the defendant.

In my opinion, on the authorities, the question to be answered by the appellate court is this: Was there no evidence before the jury upon which such jury acting reasonably could infer that Danley probably came to his death in the way suggested by the plaintiff?

The line between mere conjecture and reasonable inference in this case is particularly difficult to draw. The evi-

1940

DANLEY v. CANADIAN PACIFIC RY. CO.

Hudson J.

dence of the witnesses as appearing on the record in regard to the circumstances surrounding the accident was, in the opinion of the learned judges of the Court of Appeal, insufficient to say more than that what happened must necessarily be a matter of pure conjecture. The jury after proper instructions by the trial judge took a different view. Their personal inspection of the cars and equipment probably added to their knowledge and certainly did add to their appreciation of the oral evidence. Their visit to these cars might well have changed what theretofore seemed "possible" to what appeared "probable."

We in this Court have not had the advantages of the jury and I do not feel justified in holding that there was no evidence before the jury upon which they could reasonably have arrived at the conclusion which they did. The jury found negligence on the part of the defendants and I think there was evidence to support that finding. I would, therefore, allow the appeal and restore the judgment at the trial with costs throughout.

The judgment of Rinfret and Kerwin JJ. (dissenting) was delivered by

KERWIN J.—After going over the entire record, I have concluded that the appeal should be dismissed, as, generally speaking, I agree with the reasons for judgment of Chief Justice Turgeon. Assuming negligence, and assuming that Danley did not know that the coupling apparatus on car 212665 was in a defective condition, was there any evidence from which it might be reasonably inferred that the death of Danley was caused by negligence, or is that matter one of pure conjecture?

The latest decision in the House of Lords, on the subject, would appear to be *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1), where upon the facts it was found that if it had not been for the defendants' breach of a statutory duty the accident there in question would not have happened. In the later case of *Stimson* v. *Standard Telephones* (2), the Court of Appeal referred to the same matter and found in favour of the plaintiff. Sir Wilfrid Greene extracted the following from the opinion of Lord MacMillan in the *Caswell* case (1):—

(1) (1939) 3 A.E.R. 722; 55 T.L.R. 1004.
(2) (1939) 4 A.E.R. 225.

The mere fact that at the time of an accident to a miner his employers can be shown to have been in breach of a statutory duty is clearly not enough in itself to impose liability on the employers. It must be shown that the accident was causally associated with the breach of statutory duty. Sir Wilfrid Greene then continued:—

I take that to mean this. To adopt an example put by MacKinnon, L.J., in the course of the argument, it would not be sufficient to show that a workman was found in the neighbourhood of a dangerous machine unconscious, with a wound upon him which might have been caused by the dangerous part of the machine, or might have been caused in some other way by the use of, for instance, a hand tool which the workman had to use. If that were all that appeared, then it would not be shown—although the breach of statutory duty would be established owing to the failure to fence the machine—that that accident was causally associated with the breach of the statutory duty, because the facts would be equally consistent with its having been due to some other cause.

In each case the circumstances must be examined. Having examined the proof in the present appeal and considered the able argument of counsel for the appellant, I am unable to find that the jury had before them any evidence upon which they could do more than guess at the cause of the unfortunate accident. I agree with the learned Chief Justice of Saskatchewan that the matter is one of pure conjecture and I would dismiss the appeal, with costs.

Appeal allowed and judgment of trial judge restored with costs throughout.

Solicitor for the appellant: *W. G. Currie.*

Solicitors for the respondent: *Weir & Hamilton.*