1923
*Oct. 17.
*Nov. 5.

CANADIAN NATIONAL RAILWAYS (DEFENDANTS) ..... } APPELLANT;

AND

JOSEPH CLARK (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Railways—Level crossing—Automobile struck by train—Statutory warnings not given—Driver not looking more carefully—Contributory negligence.

Respondent's automobile was struck by appellant's train at a railway crossing. The statutory signals (ringing bell and blowing whistle) were not given. Owing to bluffs and shrubbery intercepting his view, the respondent was unable to see down the railway in the direction of the approaching train until he had reached the right-of-way. The respondent had listened for the whistle and looked for smoke. When he reached the right-of-way, he took a hurried glance along the track which did not disclose any danger. He then gave his attention to his automobile as it went up a grade towards the track and did not again look along the track until too late to avoid the accident. In an action for damages, the jury negatived contributory negligence on the part of respondent and he recovered damages.

Held, Davies C.J. dissenting, that the respondent's failure under the existing circumstances to make a more careful and complete observation, which would have disclosed the approaching train, did not so incontrovertibly amount to contributory negligence that no jury could reasonably find otherwise.

Wabash Railway Co. v. *Misener* (38 Can. S.C.R. 94), *Booth* v. *Ottawa Electric Railway* (63 Can. S.C.R. 444) and *Dublin, Wicklow & Wexford Ry.* v. *Slattery* (3 App. Cas. 1155) ref.—*Canadian Pacific Ry. Co.* v. *Smith* (62 Can. S.C.R. 134) distinguished.

Judgment of the Court of Appeal for Saskatchewan ([1923] 1 W.W.R. 1419) affirmed, Davies C.J. dissenting.

APPEAL from a decision of the Court of Appeal for Saskatchewan (1), affirming the judgment of the trial judge and maintaining the respondent's action.

The material facts are fully stated in the above headnote and in the judgments now reported.

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

Eug. Lafleur K.C. and *G. H. Yule* for the respondent.

THE CHIEF JUSTICE (dissenting).—At the close of the argument in this appeal I was of the opinion that it should be allowed on the ground of the contributory negligence of the respondent in not looking, after he had emerged from

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

(1) [1923] 1 W.W.R. 1419.

the shrubs and other obstructions which had impeded his view, to see if a train was approaching before he attempted to cross the level railway crossing. Had he looked when he did get an unobstructed view of the track he could not have failed to see the approaching train in time to avoid an accident. I have tried, but have failed, to excuse his neglect to look because he had not heard the statutory warnings. I cannot bring myself to doubt that had he looked, as the law obliges, before going on to the crossing, he could not and would not have failed to see the approaching train.

It is of the greatest public importance that this court should not fritter away the duty that is incumbent on all those who attempt to cross level railway crossings to look and listen before crossing to satisfy themselves that no train is approaching. This duty to look and listen before crossing is not abrogated because of a failure to hear the statutory warnings while approaching the crossing, or by the fact that the statutory warnings of ringing the bell or blowing the whistle were not given.

It may not be our law in Canada, as it is in some of the United States of America, that before crossing a level railway crossing there is a duty to "stop, look and listen," but it is law in Canada requiring alike to "look and listen" before attempting to cross such a crossing. Listening alone is not sufficient, particularly when looking is at the same time possible. To fail to look is to my mind such a breach of an obvious and necessary duty that it cannot be excused because there is or chances to be a concomitant breach of duty on the parts of the servants of a railway to give the statutory warnings.

Here the plaintiff before coming on to the crossing was driving his motor amongst shrubs and other obstructions which did not give him a clear view of the track. Whilst he was amongst these obstructions he did not hear the statutory warnings and so presumed that no train was approaching and that there was no duty on his part to look before crossing. In fact he says

I cannot say what I did, I merely glanced down.

I take this to mean that he did not look with such care as

1923

CANADIAN NATIONAL RAILWAYS v. CLARK.

The Chief Justice.

he should have, because if he had he could and would certainly have seen the approaching train.

It has been alleged that he had only a few seconds in which to see the train when he did get clear of the obstructions. This in my opinion is no ground of excuse for not looking. He had plenty of time to look after he emerged into the open, but negligently considered that because he had not already heard the statutory warnings no train was approaching and it was not necessary for him to look. Whereas when he did get into the open he would certainly have seen the train had he looked—the train then being about 50 feet from the crossing.

In my opinion this appeal should be allowed on the ground of the contributory negligence of the respondent, but for which the accident would not have happened.

IDINGTON J.—For the reasons assigned by the learned judges in the court below I think this appeal should be dismissed with costs.

DUFF J.—This appeal should be dismissed with costs. The evidence of the respondent, if accepted, affords a sufficient ground for a verdict within the principle of the observations both of Lord Cairns and of Lord Penzance in *Dublin, Wicklow & Wexford Ry.* v. *Slattery* (1).

ANGLIN J.—Accepting the jury's finding that the plaintiff's injuries were ascribable to the omission by their servants to give the statutory crossing signals, the defendants appeal from the unanimous judgment of the Court of Appeal of Saskatchewan holding them liable, contending that contributory negligence on the part of the plaintiff is so clearly established by his own evidence that no jury could have reasonably found otherwise and that the case should therefore have been withdrawn by the learned trial judge and the action dismissed. Failure to look with reasonable care for an approaching train before crossing the railway is the fault charged against the plaintiff.

Owing to bluffs and shrubbery intercepting his view, the plaintiff was unable to see down the railway tracks in the direction of the approaching train until he had reached the

(1) 3 App. Cas. 1155.

right-of-way—at a distance of about 50 feet from the tracks. He testified that because of these conditions he listened with great care for bell and whistle signals but heard none and looked for smoke but saw none. Being thus more or less lulled into a sense of security, he did not, when he reached the right-of-way, look down the track as carefully as he would otherwise have done, contenting himself with a hurried glance, which did not disclose the danger, and then fixing his attention upon guiding his automobile over the crossing, approaching which the highway is only 9 feet or 10 feet wide and is flanked by ditches running along the railway and about 7 feet in depth. Can it be said that his failure under these circumstances to make a more careful and complete observation, which would have disclosed the approaching train, so incontrovertibly amounted to contributory negligence that no jury could reasonably find otherwise or could hold that he was excused from doing more than taking the hurried glance he did, which served to confirm the impression, already created by the omission of the statutory signals and his failure to see any smoke when approaching the railway, that no train was coming? The four learned judges who constituted the Court of Appeal have already answered this question in the negative. Were they so manifestly in error that we should reverse their judgment? I think not. I regard the following observations of Lord Herschell in *Peart* v. *The Grand Trunk Ry.* (1), as most apposite:

> Then, on the other hand, it is to be remembered that, although the deceased knew perfectly well there was a crossing, and knew that some train might be coming along there, he also knew that if a train was coming, and if the duty of the company was performed there must have been from Lossings crossing and those other crossings a continuous whistling which he could not fail to hear, and that might, as the learned judge pointed out to the jury it was a fair thing for them to consider, deprive him of all suspicion that a train could be coming. Their lordships do not say that the evidence was conclusive at all to show that the deceased was not guilty of contributory negligence, but it shows that it was a fair and proper case for the jury to consider whether or not he was guilty of contributory negligence.

The case at bar appears to me to fall within the principles underlying the decisions of this court in *Wabash*

(1) 10 Ont. L.R. 753 at p. 757.

1923
CANADIAN NATIONAL RAILWAYS
v
CLARK.
Anglin J.

Railway Company v. *Misener* (1), and *Ottawa Electric Railway* v. *Booth* (2), and of the House of Lords in *Slattery's Case* (3), and is readily distinguishable from *The Canadian Pacific Ry. Co.* v. *Smith* (4), where the plaintiff had failed to take any precautions and in the view of the majority in this court there were no circumstances upon which a jury could have found that neglect excusable.

The damages awarded, while possibly too large, cannot be said to be so excessive as to shock the conscience of the court.

MIGNAULT J.—Judgment was rendered in this case in favour of the respondent for $11,483.25 on the verdict of a jury, and this judgment was unanimously affirmed by the Court of Appeal for Saskatchewan. The appellant brings the case to this court on practically two grounds:

1. That there was no evidence on which the jury could find that the plaintiff was not guilty of contributory negligence in not looking down the railway line to see whether a train was coming, before he attempted to cross the track.
2. That the amount of damages granted by the jury was excessive. No criticism is made of the charge to the jury of the trial judge.

The facts of the accident may be stated in the language of Mr. Justice Turgeon of the Court of Appeal:

> The accident occurred through the collision of the appellant's train and the respondent's automobile on a level crossing at the intersection of the railway line with a public highway. The company's servants were negligent in not ringing the bell and blowing the whistle as required by "The Railway Act," 1919, ch. 68. The respondent, who was driving the automobile accompanied by one Birkett, says that he was proceeding eastward towards the track at a speed of about 10 or 12 miles an hour. He knew that the train (a regular passenger train) was due to pass at about the time in question, and while still some distance away from the track he kept a lookout for smoke and listened for the whistle, but neither saw nor heard anything. His view of the track towards the south, from which direction the train was coming, was obscured by trees until the right-of-way was reached, 50 feet from the track. On arriving at this right-of-way he glanced down the track, but did not see the train. He then gave his attention to his automobile and continued towards the track. Just before reaching the rails he looked again, and this time he saw the train, as he says, "practically on top" of him. In the emergency

(1) 38 S.C.R. 94.
(2) 63 S.C.R. 444.
(3) App. Cas. 1155.
(4) 62 Can. S.C.R. 134.

he tried to speed up his car so as to clear the track, but this attempt failed. The collision occurred, his automobile was wrecked and he himself was severely injured. He admits that he would likely have seen the train in time to avoid the accident if he had looked more carefully, and that if he had seen the train from the entrance to the right-of-way he could have stopped his automobile in time. But he says he felt sure there was no train coming, because he had listened for the signal and had not heard it.

The jury, in answer to questions put to them, found that the plaintiff was injured by the negligence of the defendant, such negligence consisting in that the defendant had failed to blow the whistle and ring the bell, and that no negligence of the plaintiff had contributed to the accident. The damages were assessed at $1,483.25 as special damages and at $10,000 for general damages.

The rule which has frequently been applied in cases of this character is that a person in the position of the plaintiff is bound to exercise reasonable care, having due regard to all the circumstances of the case. Whether he has or has not done so is a question for the jury, properly instructed, to decide, and an appellate court will not interfere with their finding if there was evidence on which it could reasonably be based.

The case under consideration is very close to the line as will be apparent when it is compared to the recent decision of this court in *Canadian Pacific Ry. Co.* v. *Smith* (1), strongly relied on by the appellant.

In that case, a majority of the court held that the trial judge was justified in withdrawing the case from the jury at the close of the plaintiff's evidence and dismissing the action.

The facts were that Smith had driven his car for half a mile in full view of the defendant's railway where a train was then approaching the highway crossing, and the testimony of persons driving an automobile immediately behind Smith's car was that they had seen the approaching train during the whole of the time occupied in traversing this half mile stretch of the highway. The engine did not whistle until it gave two short blasts immediately before the accident, nor did the bell ring. Smith stated that he could not remember turning his head and looking to see

(1) 62 Can. S.C.R. 134.

1923

CANADIAN NATIONAL RAILWAYS v. CLARK.

Mignault J.

whether a train was coming, although he thought he had looked because he always did so. Under these circumstances and because, in my opinion, no jury could reasonably find in favour of the plaintiff, I concurred in the judgment allowing the appeal from the Court of Appeal which had ordered a new trial.

The statement of the facts of this case above quoted shows that the respondent, when approaching the railway, knew that a train, a regular passenger train, was due to pass at about the time in question, and while still some distance from the track he kept a lookout for smoke and listened for the whistle, but neither saw nor heard anything. Until he reached the right-of-way, fifty feet from the track, his view in the direction whence the train was coming was obstructed by trees. On arriving at the right-of-way he glanced down the track, but did not see the train, and then he gave his attention to his car, for the roadway was rather narrow and the railway ditches were on either side. He admitted that had he looked more carefully on reaching the right-of-way he would likely have seen the train in time to prevent the accident, but he added that he felt sure there was no train coming because he had listened for the signals and had not heard any.

There is a difference between the two cases in that Smith for a full half mile had a clear view of the track and could have seen the train, as the people in the car behind him saw it, had he looked, and the inference was irresistible that he did not look. Here the plaintiff could not see the train until he reached a point fifty feet from the tracks, but then had he looked carefully he would have seen it. In both cases there was a failure to give the statutory signals and had these signals been given there was room in both cases for the contention that they might have prevented the plaintiff from crossing the tracks. In this case, there is also to be considered the statement of the plaintiff that the absence of signals led him to conclude that no train was coming, lulled him into a sense of security, to use the terms found in many of the cases, and so convinced him that he could cross the track in safety.

I think this statement of the plaintiff, which was evidently believed by the jury, sufficiently distinguishes

this case from the *Smith Case* (1) and permits us to consider whether on the whole evidence the conclusion of the jury that the plaintiff was not guilty of contributory negligence is so unreasonable that it should be disregarded as being perverse. While I do not think I would have acquitted the plaintiff of contributory negligence had I tried the case, the point is that the jury were the sole judges of the facts and I am not in position to say that there was no evidence whatever on which they could reach the conclusion they did.

There is a rather close parity between this case and the decision of this court in *Wabash Railroad Co.* v. *Misener* (2). The circumstances there were even more favourable to a finding of contributory negligence than the facts proved in the case under consideration. And yet this court declined to set aside a judgment of the appellate court which confirmed the judgment of the trial judge giving effect to the verdict.

Perhaps it may not be amiss here to refer to what I said in *Grand Trunk Pacific Co.* v. *Earl* (3), as to the doctrine of common fault which prevails in the province of Quebec. In my judgment, the facts of the present case would furnish a typical case for the application of such a doctrine, were it in force in Saskatchewan. But this is of course beside the question we have to consider.

The practice of this court is against interfering with the quantum of damages which, although undoubtedly large in this case, is not so unreasonable that it cannot be upheld.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Borland & McIntyre.*
Solicitors for the respondent: *G. H. Yule.*

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(1) 62 Can. S.C.R. 134. (2) 38 Can. S.C.R. 94.
(3) [1923] S.C.R. 397, at p. 408.