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*Oct. 28.
*Nov. 10.

THE WINNIPEG ELECTRIC RAILWAY COMPANY (DEFENDANT).... } APPELLANT;

AND

THE CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANT)..... } RESPONDENT.

AND

ANDREW JACKSON BARTLETT.....PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Railways—Joint defendants—Dangerous situation—Prompt action.

A street car had stopped at a railway crossing as a train was coming. When the latter was seventy-five or one hundred feet away the motorman, without a signal from the conductor, started to cross. When half way over the power was increased, the car went forward with a jerk and two ladies at the rear end were either thrown or jumped off and falling on the diamond were killed by the train. In an action against the Electric Ry. Co. and the Canadian Northern Ry. Co. by the husband of one of the victims:

Held, affirming the judgment of the Court of Appeal (29 Man. R. 91), that the motorman was guilty of negligence in crossing under these conditions and the Electric Company was liable.

Held also, reversing said judgment, Idington and Brodeur JJ. dissenting, that the Canadian Northern Ry. Co. was likewise liable; that on approaching the crossing it was the duty of the employees to exercise great caution; that it was shewn that the train was travelling slowly and could have been stopped in time if the train hands had acted promptly; that failing to stop when the situation of danger arose was negligence, and the fact that the manner in which the accident happened could not reasonably have been anticipated was of no importance and the further fact that but for the negligence of the Electric Ry. Co. the deceased would not have been killed no excuse.

Held per Duff J.—The respondent company was obliged to take precautions to obviate the risk of harming passengers in the electric car and the wrongful neglect of that duty having directly caused the harm the question of remoteness of damages cannot arise.

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

APPEAL from a decision of the Court of Appeal for Manitoba (1), affirming the judgment at the trial against the Electric Company and in favour of the Canadian Northern Co.

The facts are sufficiently stated in the above headnote.

Tilley K.C. for the appellant.

The respondent could have stopped its train in time to avoid the accident which must, therefore, be ascribed to its negligence. See *City of Calgary* v. *Harnovis*(2), *British Columbia Electric Ry. Co.* v. *Loach* (3).

O. H. Clarke K.C. for the respondent cited *"The Bywell Castle"*(4), at pages 223 and 227; *"The Tasmania"*(5), at page 226; *Weir* v. *Colmore-Williams* (6).

IDINGTON J. (dissenting).—This is a remarkable appeal. The appellant, and the Canadian Northern Railway Company, which I shall for brevity's sake hereinafter designate respectively the "Electric Railway" and "Steam Railway," were sued for damages arising from the death of the wife of the respondent administrator, alleged herein to have been caused by the negligence of both or one of the said railway companies at a point where their respective tracks cross each other in Winnipeg.

The declarations of the plaintiff therein alleged sufficient to constitute grounds of action which might render both or only one of said companies liable.

(1) 29 Man. R. 91; 43 D.L.R. 326, sub nom. *Bartlett* v. *Winnipeg Electric Ry. Co.*
(2) 48 Can. S.C.R. 494; 15 D.L.R. 411.
(3) [1916] 1 A.C. 719; 23 D.L.R. 4.
(4) 4 P.D. 219.
(5) 15 App. Cas. 223.
(6) 36 N.Z.L.R. 930.

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And the defendants each by its pleading not only denied the allegations made in the declaration as against itself but also alleged contributory negligence on the part of the deceased.

The plaintiff in reply denied each of these allegations of contributory negligence and joined issue.

The defendants each agreed with plaintiff before the trial that he was entitled to a verdict for $6,000 and $300 costs and reduced this to writing. The respective counsel for plaintiff and defendants at the opening of the trial announced the fact of settlement and the disposition of the case made thereby, and that there was nothing to be tried except this subsidiary question of whether or not either defendant was solely to blame or they were both liable.

No amendment of pleadings was made and nothing definitely settled in that regard.

Inasmuch as each of the companies in its pleading had carefully abstained from alleging anything against the other, how can we hold this an appealable case?

If the case had proceeded in the usual way of the plaintiff proving, or attempting to prove, his case then there might have arisen incidentally thereto ample grounds for adducing evidence, which would have disposed of such an incidental issue, but how there can be said to have been a trial of that sort of case made, I am unable to see.

To make matters worse the settlement agreement, which one of counsel said would be filed, is neither printed in the case presented to us, nor to be found in the record.

The novelty and difficulty of such a situation seems to have occurred to the learned trial judge, and respective counsel for each of the companies.

The following seems to cover all that there is in the final result of the discussion:—

Mr. Clark: It would be better for us to have this understanding that neither party be bound by the pleadings in this case, because practically a new issue has arisen now.

His Lordship: I do not see why you should not leave the pleadings as they stand, subject to any amendments you may suggest, because I cannot try the case without any pleadings.

Mr. Clark: Then we will go on, it being understood that neither party will hold the other down to the pleadings.

Mr. Guy: I would very much prefer that the Canadian Northern Railway Company put in their evidence first. When the question of the settlement was discussed, there was a question as to which one would put in his evidence first.

Mr. Clark: I was not present then.

Mr. Guy: And the question was left open.

His Lordship: Is it material? You are both defendants.

Mr. Guy: We were not in a position to have an examination for discovery, and in order for me to proceed, it may be necessary for me to prove my case by calling employees of the Canadian Northern Railway Company, and I do not want to do that and be bound by their evidence.

His Lordship: They are in the same position.

Mr. Guy: Yes, but I don't think their case is affected in the same way as our case is.

His Lordship: I think you had better proceed with the evidence and do the best you can. It is a very unusual kind of a case, and we are dealing with it in an unusual manner.

So far as I can find there was no amendment of any kind to the record of pleadings.

The formal judgment gave the plaintiff a recovery of $6,300 against the Winnipeg Electric Company, and then dismissed the action as against the Canadian Northern Railway Company, and awarded the latter as against the former its costs of this action.

I regret the actual situation I have thus outlined was not presented to us or present to my mind intent on hearing what counsel had to say.

I am so much impressed with the nature of such a trial of an issue not raised by the pleadings being one by a court chosen by the parties as *persona designata* and hence non-appealable, that if I could come

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to the conclusion that both courts below upon what was tried have erred in mere concurrent finding of the facts, I should have desired to hear argument on the question before so determining.

I have considered all that was argued as to the facts and relevant law.

I am, after reading not only all that we are referred to, but also much more of the evidence, unable to see wherein the courts below can properly and judicially be now held to have erred.

As quite natural in such an extraordinary and shocking exhibition of foolhardy conduct on the part of the man in charge of the car that ventured to cross under the circumstances presented, the witnesses were liable from mere excitement, and haste due thereto, to give inaccurate and unreliable estimates of distances.

One can pick out, if he discards all else, quite enough in the evidence to constitute grounds for holding the steam railway company not only liable but also solely liable.

Any such conclusion would seem to disregard the impressions of fact which a great many people, no doubt better placed than we are to appreciate the local situation and hence be probably seized of the right view of the facts, would receive.

It appears on the case before us that several duly constituted authorities had acted in a way quite contrary to what one would expect if the "Steam Railway" Company was alone to blame.

And then we have in accord with the action of these other authorities a view taken by the learned trial judge of the facts presented to him at the trial for which there is ample ground and that maintained by a court of appeal consisting of three judges,

all from local knowledge of the situation having an advantage over us, unanimously concurring in the finding.

I cannot, without anything conclusive and uncontradicted to guide me, save in one particular which I am about to refer to, reverse such a finding, which ought not to be controlled any more than the verdict of a jury, by us here unless we can find undisputed facts and circumstances which beyond reasonable doubt would demonstrate error on the part of those making such concurrent findings.

The fact that appellant's argument is made only to turn upon its view of a very narrow margin of time and space, ascertained from guesses of fact, makes one pause.

I have been unable to find from which side of the electric car the deceased jumped or was thrown, and yet that fact alone, if I apply experience and common sense, would make a possible difference in what we are asked to deal with of ten or twelve feet.

Nobody at the trial, I venture to think, deemed that the issue could reasonably be decided upon a calculation or finding of such a narrow nature as it is to be herein unless upon our holding that every car in the "Steam Railway" train must, by law, be linked up by the air brakes and the use thereof applied with the utmost celerity on pain of those applying them being possibly held liable to conviction of a charge of manslaughter in such events as presented herein.

As to the engineer acting upon the signal given him by his brakesman, I accept his story and as between two statements prefer his to that of the brakesman who was placed in a distressing situation, which probably accounts for the evident doubts,

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inaccuracies and inconsistencies that exist in his evidence.

The only conflict pressed herein was whether or not the engineer acted on the first emergency signal given, or the second a few seconds later. The engineer swears he was looking and acted promptly. He knows probably better than a brakesman what time is necessarily lost in the operation.

The section 264, sub-section 3 of the "Railway Act" then in force, reads as follows:—

> 3. There shall also be such a number of cars in every train equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed, or bring the train to a stop in the quickest and best manner possible, without requiring brakesmen to use the common hand brake for that purpose.

Then follows sub-section 4 which renders it imperative to have, in the case of passenger trains, a continuous system of brakes applied to the whole train capable of being applied by engineer or brakesman instantly.

It seems the connection in the case in question was only between the engine and tender which those in charge had deemed sufficient for the service which was to be performed.

The witnesses explain why, in the shunting operations, on which they had been engaged, it was deemed impracticable to have brakes on each car to be shunted connected with the tender.

There is a discretion evidently permissible under the Act in that regard. And the weight of the evidence clearly is that so far as concerned the train in question running at the slow rate it was, the said method adopted herein of bringing into effect the air brake was usually sufficient.

The test of highest possible efficiency and results known to be got therefrom, as testified to by an expert,

does not seem to me a fair one or such as the statute imperatively requires in such circumstances as in question.

Each case must be determined upon the circumstances in question as to how far beyond the connection of the air brake with the tender its connection is to be extended and to be made with the other cars, and may be reasonably necessary.

The courts below have held that the connection adopted was in this case sufficient for the required efficient service being performed with such a train. I am unable to say they erred.

It is to be observed that though citing the decision in the case of *Muma* v. *Canadian Pacific Ry. Co.* (1), the Court of Appeal does not rest upon that but upon the result of applying the facts in question herein.

I may point out that the decision in the *Muma Case* (1), proceeded upon the "Railway Act" when in this regard different from that now in question. The Act has been so amended as to make the law in question much clearer.

The rigid enforcement of the statute, or any other statute designed to protect life and property, I hold to be imperative. But reason must be applied and when it comes to a minute calculation of how many, or few, feet and seconds are involved in the application of the law we must decide reasonably.

Fifteen seconds was the guess of one man as to the time involved and so many as fifteen feet in falling short of safety in performance is the guess of appellant's argument, and all dependent on the guesses of naturally excited people, unless as to one man who claims he was so cool and collected that he sat still and could

(1) 14 Ont. L.R. 147.

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by the eye measure, when looking from a moving car crossing at right angles the path of the moving train, its exact distance from his car.

The primary gross negligence of the appellant as the *causa causans* of that which is complained of, and in the circumstances was the natural consequence, is unrelieved by the interposition of independent responsible human action, and is all too obvious to be swept aside by any such guesses if the appellant is not to be allowed to escape having justice meted out to it.

The same proof of reasoning would lead to absolving both companies on the ground they each set up of contributory negligence, for, as I may repeat, why could not the unfortunate ladies have picked themselves up in four or five of these fifteen seconds of time which they had?

For aught we know their necks were broken and they dead already as the result of appellant's car jerking them off.

And if we had to decide this case as against the "Steam Railway" we would have to ascertain exactly the measure of damages each company was responsible for.

There is no room for joint liability.

Their acts were distinctly separate and each responsible for the consequences of its own conduct and dependent in part upon the application of distinctly different principles.

I need not elaborate this and illustrate how the law has stood at least ever since the case of *Davies* v. *Mann* (1), was so long ago decided.

The court below does not go further than to find upon the peculiar circumstances in this case that

(1) 10 M. & W.546.

there was no negligence of respondent which led to the accident.

On that view of facts I am not able to reverse.

This case was one for the application of sound sense and not fine spun theories of what might have been, and I am sure the former was applied and guided the courts below.

Hence I would dismiss the appeal with costs.

DUFF J.—This litigation arises out of a most regrettable accident in which the deceased wife of the plaintiff Andrew Jackson Bartlett, was run over by a train of the respondent company and killed. Mrs. Bartlett was a passenger on a car of the Winnipeg Electric Company on Portage Avenue, which crosses the Canadian Northern track. She and two other passengers were thrown from the car on to the railway track in front of a freight train the front truck of which passed over Mrs. Bartlett's body. The surviving husband sued both companies charging both with negligence. The claim was settled but the litigation proceeded for the purpose of determining whether both or only one, and if so which, of the companies was properly chargeable with the negligence that was the real cause of the accident. On the facts the negligence of the Electric Railway Company was not seriously open to dispute. Mr. Justice Galt who tried the action and the Court of Appeal from Manitoba unanimously acquitted the railway company of negligence.

Negligence or no negligence is of course a question of fact and the two courts have pronounced in favour of the railway company upon that issue. The judgment is therefore one which ought not to be disturbed unless the appellant has clearly established error in

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some specific matter and error of such importance as to vitiate the conclusion of the courts below. Careful judgments were delivered by Galt J. and by the Chief Justice of Manitoba in Court of Appeal. I have examined these judgments closely and, with very great respect, I am unable to escape the conclusion that they cannot be sustained.

Portage Avenue is a much used thoroughfare traversed as already mentioned by an electric car line. As the Canadian Northern train which was made up of a number of cars preceding and a number of cars following a locomotive approached this street, it was the duty of those in charge of the train to exercise great caution and particularly to be on the alert for the perception of any dangerous situation which might arise as the train reached the street car track. There is a rule of the railway company governing this crossing requiring trains to stop at least one hundred feet before reaching the Winnipeg Electric Company's tracks and requiring them not to proceed until a proper signal is received from the signalman or from one of the train crew "located in a proper position" on the crossing.

It is not very material for the purposes of this appeal whether this instruction does or does not strictly apply to a train of this character—which, it is alleged, was engaged in a shunting operation. The instruction is valuable evidence of the view taken by competent persons responsible for the working of trains approaching this crossing as to the kind of precaution necessary to obviate the risks incidental to the running of a train over it.

The grounds of Mr. Justice Galt's judgment are indicated in the following passages quoted textually from his reasons:—

When it was about 75 or 100 feet from the crossing, the motorman of the electric car, without having received any signal from the conductor, started his car to get across before the train arrived. As I have said, the situation was perfectly apparent, and some of the people in the car, seeing the freight car coming towards them, got alarmed and moved towards the door at the rear end of the car. Amongst these people were two ladies; one of them was Grace Jane Bartlett, wife of the plaintiff.

By the time the electric car reached the diamond crossing the freight train was perhaps within 30 or 40 feet of the car. The evidence (to which I will allude more particularly hereafter) shewed that at this juncture the brakesman, who was stationed on the front freight car, shouted to the motorman to get across. Whether the motorman heard him or not does not appear, but there is evidence that the car, which was ahead in motion, started forward with a jerk and the two ladies either stepped off hurriedly, or were thrown off the rear steps of the car and fell on the diamond crossing. The brakeman on the freight train had already given a violent signal to the engine-driver to stop, but the freight train was not completely stopped before the front truck of the freight car had run over the two ladies and inflicted such injuries upon them that they both died.

* * * * *

Then again it was argued that the steam railway was negligent, that the engineer did not apply his emergency brake to the engine soon enough. It is quite possible, and the evidence seems to indicate that the engineer missed the first violent signal given by the brakesman, but the engineer had no reason to expect such a signal and had every reason to suppose that the way was clear.

As I read the "Railway Act" and the rules and regulations applicable to these defendant companies, I should certainly say that at the time in question the steam railway had the right-of-way across Portage Avenue. Even if it had been otherwise, the action of the motorman of the electric car in approaching the crossing and then stopping operated as an invitation to the engineer of the freight train to continue on his course. The whole trouble was caused by the frantic haste of the motorman to get across the diamond before the freight train.

The opinion of the learned judge that the train was about 75 or 100 feet from the crossing is affirmed by the Court of Appeal and is fully supported by the evidence. It does not appear to be necessary for the purpose of deciding the appeal to discuss or to consider any of the earlier incidents. When the motorman was seen by the brakesman to be starting his car across the track, a situation full of grave risk arose if the train were not stopped. The brakesman must have

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realized this if his story is to be accepted because he had already given a signal to stop the train, and he says that in doing so—although he had the rule in mind—he was also influenced by the fact that he had noticed a car approaching the crossing. Upon seeing the motorman start his car he immediately gave the more vigorous signal used to indicate to the locomotive engineer that an emergency had arisen requiring the instant stopping of the train. It matters little whether one accept the evidence of the brakesman or not, for if he acted as he says he did, he appears to have done his duty, if he did not he was incurring a grave and quite unnecessary risk in not taking instant steps to stop the train upon perceiving that the motorman was about to cross the track. So also as regards the locomotive engineer (if the signal was given) it is of no consequence whether he observed the signal or did not observe it, it was his duty to be on the alert for signals and instantly to obey a signal to stop.

With great respect, I think these considerations are not met by the reasoning of the learned trial judge or by that of the Court of Appeal.

The learned judges of the Court of Appeal appear to have considered that a dangerous situation requiring special precautions arose for the first time when, in consequence of the violent jerk forward of the Electric Company's car, Mrs. Bartlett was thrown to the ground. That, with respect, appears to be a misconception of the position. The approach by a train of this character towards a much used street having on it a street car line in operation, was in itself a situation involving risk and this, as I have already said, is recognized in the instruction mentioned above. It was a situation requiring in itself exceptional precautions as the instruction shews. Add to that the fact

that a street car was on the line approaching the point of intersection and you have a not inconsiderable increase of risk; a situation imperatively demanding that the precaution prescribed by the instruction, namely, of coming to a stop, should not be omitted; and, as I have already said, a situation full of grave possibilities arose and became apparent when the street car was seen to move forward across the track.

Mr. Clark in his concise and able factum faces the difficulty thus:—

> The appellant's contention amounts to this, that when Cammell saw the street car start to move it should have occurred to him that some of the passengers might fall on the track in front of the train, and his duty to avoid the consequences of the appellant's neglect began then and not when the last dangerous situation actually arose. Admitting that it was the natural thing for passengers in such a critical situation to rush to the front or rear of the car, no one would presume that when jumping they would select the diamond—the only dangerous spot there was upon which to alight. But even assuming that the brakesman should have foreseen what actually took place, the appellants are not entitled to complain if Cammell, who was thrown into a state of excitement by their negligence, did not act in the most reasonable manner.

This extract from the respondent's factum puts very forcibly the point upon which the respondent company must rely in view of the findings of fact already referred to. These contentions are first open to the observation—although in the present state of the litigation the controversy has become one between the appellant company and the respondent company—that the decision of that controversy must be dictated by the answer given to the question whether the plaintiff had or had not a cause of action against the respondent company. And it is perhaps needless to say that in passing upon that issue the conduct of the Electric Company's servants is not to be imputed to Mrs. Bartlett as her conduct; and further the situation if it was critical and embarrassing was brought about, at least in part, by the failure to bring the train to a stop conformably to the practice.

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The substance of the contention is that the persons responsible for the train might reasonably in the exercise of their judgment assume, and act upon the assumption, that the car would clear the railway track before the train reached the point of intersection; and that in the circumstances there was no ground for apprehending that the passengers would leave or be thrown from the car and remain helpless on the track as the train approached them. The first observation to suggest itself is an important one. The onward motion of the train was not the result of the judgment of the brakesman that it was safe to proceed; on the contrary he, as we have seen, took the opposite view. The second is virtually a repetition of what already has been said, namely, that once the electric car started forward the risk of the situation imperatively demanded that the train should be stopped. The fact that in the event the car did clear the track without injury is little to the purpose; failure of the mechanism might have brought it to a standstill before the track was passed. The duty of the respondent company was to take suitable measures to obviate the danger incurred by the passengers of the car of injury from the respondent company's train arising out of the situation, and the fact that the particular manner in which the injury did occur was one not naturally to be anticipated is really of no importance. See *Hill* v. *New River Co.*(1); *Clark* v. *Chambers* (2).

The obligation to take care, default in respect of which constituted the negligence charged, was an obligation due to the passengers in the car, and that being so, the respondent company is responsible for harm suffered by them in consequence of its default

(1) 9 B. & S. 303. (2) 3 Q.B.D. 327.

to the extent to which the damages are not, in the language of the law, too remote.

Are the damages too remote? Was the running down of Mrs. Bartlett in the circumstances a consequence for which in law the respondent company was responsible? The rule as regards remoteness of damage was recently discussed by the President of the Probate and Divorce Division in *H. M. S. London*(1), and, with respect, I concur in the view there expressed that where the harm in question is the direct and immediate consequence of the negligent act then it is within the ambit of liability. Here the injury complained of was the direct and immediate consequence of the failure to stop the train.

Moreover, it is sufficient in this case to say that the railway company being under an obligation to take precautions to obviate the risk of harming the passengers in the electric car through the instrumentality of its train moving across the car track and the wrongful neglect of this duty having resulted directly in the very harm it was the duty of the company to avoid, remoteness of damage is out of the question. *Clark* v. *Chambers* (2).

Where there is a duty to take precautions to obviate a given risk the wrongdoer who fails in this duty cannot avoid responsibility for the very consequences it was his duty to provide against by suggesting that the damages are too remote, because the particular manner in which those consequences came to pass was unusual and not reasonably foreseeable.

One aspect of the case was the subject of a good deal of discussion and I refer to it only to make it quite clear that I neither dissent from nor concur in the views expressed by the courts below with regard to it.

(1) [1914] P. 72. (2) 3 Q.B.D. 327.

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The point to which I refer is that which arises upon the contention of the Electric Company's counsel that section 264 of the "Railway Act" is applicable and that the railway company should be held responsible for failure to observe the requirements of those sections with reference to braking appliances. I express no opinion upon the question whether this section applies to a train such as this.

ANGLIN J.—The liability of one or other or both the defendants to the plaintiff being admitted, the purpose of continuing this litigation is to determine where the responsibility rests, the defendants having agreed amongst themselves for contribution (on some basis with which we are not concerned) should both be held liable. The learned trial judge's view was that the appellant is solely answerable and his judgment was unanimously affirmed on appeal. The evidence so conclusively establishes that its negligence was a cause of the death of the plaintiff's wife that so far as it seeks to be wholly discharged its appeal is quite hopeless. Assuming that due care by its co-defendant would have enabled it to avoid running down the plaintiff's unfortunate wife, notwithstanding the peril in which she had been placed by the appellant's negligence, that fact could afford the latter no answer to the plaintiff's claim. *City of Toronto* v. *Lambert* (1); *Algoma Steel Corporation* v. *Dubé* (2).

Upon the other question—that of the joint liability of the respondent—there is much more to be said.

The learned trial judge could

find no particular in respect of which the steam railway company were guilty of any negligence conducing to the accident,

(1) 54 Can. S.C.R. 200; 33 D.L.R. 476.

(2) 53 Can. S.C.R. 481; 31 D.L.R. 178.

and the Court of Appeal took the same view. I gather from his judgment that the learned trial judge was of the opinion that there was no evidence on which a jury could have found actionable negligence on the part of the employees of the steam railway company and in effect so directed himself; and from the reasons for judgment of the Court of Appeal, delivered by the learned Chief Justice of Manitoba, I infer that in his opinion because, the electric tramcar having crossed in safety, the immediate peril to the deceased caused by her jumping or being thrown from that tramcar and falling on the diamond crossing in front of the approaching train was a situation which the steam railway employees could not reasonably have been expected to anticipate and because when it actually arose it was possibly too late to stop the train and prevent the accident, or, at all events, the train crew had little, if any, opportunity to think and act, liability on the part of the steam railway company could not be found. With profound respect, although the idea is not very clearly expressed, these views would seem to imply that the liability of the doer of a negligent act is restricted to consequences which he should have anticipated would flow from it as natural results.

Where there is no direct evidence of negligence the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not * * * ; but when it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

Smith v. *London and South Western Ry. Co.* (1), at page 21, *per* Channel B.

What the defendants might reasonably anticipate is, as my brother Channel has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence. *Ibid, per* Blackburn J.

(1) L.R. 6 C.P. 14.

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Mr. Beven in his work on Negligence (Can. ed., p. 85), introduces a discussion of this and other cases bearing on this aspect of the law of negligence by stating

> a distinction of importance for understanding this branch of the law; between acts from which injurious consequences in the result flow to others, but which are not negligent in law, because these consequences would not antecedently have been anticipated to flow as natural results; and acts which carry liability because their probable outcome is injurious acts, though, in fact, the consequences which flow are not those anticipated.
>
> The doer of a negligent act, says the learned author, is responsible for the consequences flowing from it in fact, even though antecedently, to a reasonable man, the consequences that do flow seem neither natural nor probable.

See too Shearman and Redfield on Negligence (6 ed.), secs. 26a, 29a, and 30.

The Canadian Northern train was moving very slowly—between one and two miles an hour. The evidence establishes that, equipped as it was, it could easily have been stopped in 40 feet. The engineer deposed that he believed he had in fact stopped it within 15 feet on receiving the first signal to do so. The evidence also establishes that when the electric tramcar started to move towards the crossing, thus creating a situation of danger, which in my opinion made it the duty of those in charge of the advancing steam railway train to stop it, or at least to get it under such control that it could be instantly stopped if the reckless conduct of the motorman in driving the electric tramcar on to the diamond crossing should give rise to a situation making that necessary—a duty which they owed to all the people on the tramcar—the train was at least 75 feet from the diamond crossing. The brakesman on the front car so tells us. He saw the tramcar start. Had he at once signalled the engineer to stop or even to prepare to stop before reaching the crossing and had

the latter promptly obeyed the signal, no harm would have ensued. Still later, when the electric tramcar was approximately two-thirds across the diamond and had almost stopped, as the brakesman informed us, the danger being thus greatly increased and the duty to stop all the more pressing, the train was still 50 feet from the crossing, and prompt action by the brakesman and engineer would have brought it to a stand at least 10 feet before it reached the crossing. That the appellant's train may have had the right of way over the electric tramcar affords no excuse for not fulfilling this duty. It would not justify the respondent running down the appellant's car if it could avoid doing so by reasonable care—still less killing the plaintiff's wife. Whatever the brakesman may have done to signal the engineer, the evidence indicates that no attempt to stop or even lessen the speed of the train or to get it under better control was made by the engineer until it was almost upon the crossing, since when it was actually stopped the foremost part of the front car was in fact 16 feet beyond the crossing. There was in my opinion abundant evidence on which a jury might have found negligence imputable to the steam railway company either on the part of the brakesman or on that of the engineer.

Had the electric tramcar been run into on the crossing, as would have happened if the motorman had failed for any reason to get it clear, the liability of the steam railway company for damages sustained in the collision at all events by passengers on the tramcar would seem to me to be incontrovertible. It was only by suddenly "speeding up" in response to the shouted warning of the brakesman, given when his train was only 30 feet from the crossing, that

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the motorman succeeded in taking his car out of danger, possibly as a result precipitating the plaintiff's wife and two other persons on the crossing in front of the still advancing train then only 15 feet away. The actual danger which the brakesman should have anticipated, and apparently did in fact, anticipate, viz., collision with the tramcar, was thus obviated. But the negligence of the Canadian Northern employees, which was a cause of that peril having continued until the car escaped from the danger zone, did not thereupon cease to operate. It had a further and, under the circumstances, a natural consequence, in the sense explained in Shearman & Redfield's work (sections 29a and 30), in the running over of the plaintiff's wife, and the steam railway company, in my opinion, cannot escape liability merely because that particular consequence or the immediate situation in which it occurred cannot be said to have been something which was or should have been within the contemplation of the train crew when they negligently failed, while the tramcar was in a position of peril, either to stop their train or to have it under such control that it could at any moment have been stopped before reaching the crossing.

Considerations such as arise between a plaintiff and a defendant in cases of contributory negligence are quite foreign to the question now before us—that of the liability of a defendant to a plaintiff against whom no contributory negligence is suggested.

In my opinion not only was there evidence of negligence on the part of the respondent—proper for submission to a jury—but on the uncontroverted facts a finding of such negligence should be made.

The negligence of both defendants conduced to the death of the plaintiff's wife. Had that of either

been absent the lamentable tragedy would not have occurred.

It is our duty to give the judgment which the court appealed from should have given. Exercising the power conferred on the Court of Appeal by sec. 9 of R.S.M. [1913], ch. 43, I would set aside the judgment of the learned trial judge and direct the entry of judgment declaring both defendants liable to the plaintiff for the sum agreed on as damages with costs. There should be no costs as between the defendants of the proceedings in the Court of King's Bench, but the appellant is entitled to be paid its costs here and in the Court of Appeal by the respondent.

BRODEUR J. (dissenting)—The question in this case is whether the Canadian Northern Company has been at fault in the accident which caused the death of Mrs. Bartlett. The evidence may lead to the conclusion that there was negligence on the part of the employees of the railway company in not stopping the train after the engineer in charge of the locomotive had received the proper signals. But the evidence is not very positive and is in some respects conflicting. In view of the unanimous findings of the courts below in that respect I would not feel disposed to interfere.

The appeal should be dismissed with costs.

MIGNAULT J.—The whole question here is not whether the plaintiff, Bartlett, was entitled to recover damages for the death of his wife, for both the appellant and the respondent admitted that he was, but whether the plaintiff had a valid cause of action against the respondent as well as against the appellant.

In other words, would the plaintiff on the evidence be entitled to recover damages for the death of his wife against both defendants or against one only of

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them? The learned trial judge came to the conclusion that judgment should be entered in favour of the plaintiff against the defendant, the Winnipeg Electric Railway Company, and that the action should be dismissed against the defendant, the Canadian Northern Railway Company, with costs to be paid by Winnipeg Electric Railway Company to its co-defendant, the Canadian Northern Railway Company.

The conduct of the trial to a certain extent obscured this simple issue, for, as the learned trial judge observed:—

> The whole course of the trial consisted of evidence and arguments adduced by each of the co-defendants to shew that the other should be held liable.

And so before this court the argument was directed to shew that one company rather than the other should bear the burden of the admitted liability towards the plaintiff, with the result that the one emphasized the negligence of the other, especially the respondent the negligence of the appellant, while the latter, which could not deny that its motorman had been grossly in fault, endeavoured to shew that, but for the negligence of the respondent, this fault would not have caused the accident.

I propose to look at the case solely on the basis of the real question which was in issue, that is to say, on the evidence, would a jury, or a judge sitting without a jury, have been justified in finding against both defendants negligence entitling the plaintiff to recover against both of them, or would a verdict or a judgment be justified only against the appellant, so that the respondent would have been entitled to have the plaintiff's action dismissed, as it was, in so far as it was concerned?

And on this basis and in answer to the question so submitted by the agreement of the parties, I have

come to the firm conclusion, with deference, that the plaintiff was entitled to recover damages against both defendants as being jointly liable for the accident.

The plaintiff's wife was a passenger on an electric car of the appellant which had to cross the line of the respondent on the level on Portage Avenue, Winnipeg. At that time a freight train of the respondent was approaching the crossing very slowly, its speed being about two miles per hour. It consisted of four box cars in front, then an engine and some twelve empty cars. A brakesman, named Kenneth Cammell, was on the front car. The electric car, as the rules required, stopped within a few feet of the railway track, and the conductor got off and went ahead to see if the track was clear, and it was the duty of the motorman to wait until the conductor gave the signal to go ahead, which signal he never gave. What happened then is best described in the language of the learned trial judge:—

> When the freight train was within perhaps 75 feet of the crossing the motorman of the electric car suddenly decided to get across in front of the freight train and started forwards. When the electric car was partly on the diamond the brakesman on the freight car saw imminent danger of collision, and as the car seemed to be stopping, shouted to the motorman to "go ahead." The motorman thereupon apparently applied extra power, the car went ahead with a jerk, and three passengers, including the deceased, were either thrown off the rear platform of the car or else in desperation jumped from it and alighted on the diamond where the deceased was run over.

During all the time the brakesman had the electric car in full view, and when it suddenly started to go ahead, the train should have been stopped. The time card of the respondent required the train to stop 100 feet from the crossing, and Cammell says that he gave at that distance the usual stop signal but it was not obeyed. He was, he adds, about 50 feet from the diamond, or crossing of the railway and electric

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car tracks, when the motorman ran his car ahead so that it came right on the diamond, where it seemed to stop and the brakesman gave several violent stop signals which the engine driver either did not see or failed to obey, and the brakesman shouted to the car to go ahead which it did with a kind of jerk and cleared the diamond, but at its sudden jerk forward, the plaintiff's wife who with two other passengers had run to the rear platform of the car, was either thrown off or jumped off and fell on to the diamond where she was run over.

There can be no doubt as to the gross negligence, not to use a much stronger term, of the motorman when he started forward with a moving train coming towards him so close to the crossing. But this does not mean that the railway company was itself free from negligence so that the plaintiff would not have a right of action against it also. The learned trial judge stated that he could find no particular in respect to which the steam railway company was guilty of any negligence conducive to the accident. With deference, I think it was negligence not to have stopped the train, which could have been done, when the electric car first started forward in an attempt to clear the track. If the railway train was then "within perhaps 75 feet" of the crossing, as found by the learned trial judge, or even about 50 feet away, as testified by Cammell, the train, which he says was just crawling, could have been stopped short of the crossing had the stop signals been obeyed.

In view of these circumstances I cannot think for an instant that if the plaintiff had sued the respondent alone he would not have been entitled to a verdict or judgment, and surely the respondent could not have escaped liability by emphasizing—as it does here—

the gross negligence of the Winnipeg Electric Railway Company.

The learned Chief Justice of Manitoba made use of an argument which at first impressed me when it was urged at the hearing by counsel for the respondent. He said:—

> The accident was a natural sequence of the negligent conduct of the motorman: See *Prescott* v. *Connell*,(1). The brakesman on the front of the train had urgently signalled the engine driver to stop and had repeated his signals. There was not sufficient time to do anything further after the deceased fell on the track. The train was stopped as soon as possible. The trainmen were suddenly faced with a new situation of danger, which gave them little, if any, time to think and act. Even if they could have done anything more than was done to avoid the accident, the court ought not to require of them, in the new situation that was created, perfect nerve and presence of mind enabling them to do the best thing possible.

And it was urged that the respondent could not have foreseen that passengers in the electric car would jump out or be thrown out of the car.

With great deference and upon full consideration I am of the opinion that this argument cannot prevail. Before "a new situation of danger was created," there was a situation of danger created by the attempt of the electric car to cross before the train reached the crossing, and as the learned Chief Justice observed, the brakesman had urgently signalled the engine driver to stop and had repeated his signals.

There was then time for the train crew, and especially the engine driver, if he was heeding the signals, to think and to act. Wooden, the engine driver, was examined before the Public Utilities Commissioner, and stated that he could have stopped his engine within 15 feet, and he did not contradict this statement when he was cross-examined at the trial. And as to the argument that it could not have

(1) 22 Can. S.C.R. 147.

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been foreseen that passengers would jump out of the car in the dangerous situation created by the joint negligence of the two companies, the learned Chief Justice rightly observes that the passengers did what might have been expected in such a case and rushed to the door and tried to leave the car.

On the whole I am of the opinion, with deference, that the judgment which absolved the respondent of any negligence conducive to the accident cannot stand, and that it should be declared that the plaintiff is entitled to recover against both defendants as being jointly liable for the accident.

The appeal should therefore be allowed with costs here and in the Court of Appeal and the two defendants condemned to pay the plaintiff the amount agreed upon. There should be no costs of the trial as between the defendants.

Appeal allowed with costs.

Solicitors for the appellant: *Moran, Anderson & Guy.*
Solicitors for the respondent: *Clark & Jackson.*