Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Grand Trunk Railway Company of Canada v. *William H. McAlpine, since deceased, and others, from the Court of King's Bench for the Province of Quebec (Appeal Side)—(Privy Council Appeal No. 47 of 1912); delivered the 15th July 1913.*

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD DUNEDIN.
LORD ATKINSON.
LORD MOULTON.

[DELIVERED BY LORD ATKINSON.]

This is an Appeal from a Judgment dated the 25th of November 1911, of the Court of King's Bench for the Province of Quebec (Appeal side), whereby a Judgment, dated the 11th of October 1910, of Mr. Justice Demers in favour of William H. McAlpine, deceased, for a sum of $6,500 and costs was affirmed. This sum was the amount of the damages awarded to McAlpine by the verdict of the Jury in an action instituted by him against the Appellants in respect of injuries he sustained by being knocked and injured by one of their locomotive engines.

The action was founded on the negligence of the Company's servants. During the proceedings McAlpine died, and the suit has been revived in the name of the added Respondents,

one of whom, Dame E. Cauzeneuve, is his widow. During the hearing of this Appeal, on the first occasion, their Lordships were clearly of opinion that on several points the Jury had been so misdirected by the learned Judge who presided at the trial, that the verdict could not be allowed to stand, and that a new trial should be directed.

Neither the Company or the Respondents very much desired this course; but the Company were in this difficulty, that rules and principles of law had been laid down by Mr. Justice Demers, in his charge to the Jury, and approved of by the Judgment of the Court of King's Bench, which they insisted were erroneous, and would embarrass and prejudice them in the conduct of the business of their Railway, so that while perfectly ready and willing to entertain favourably any suggestion for the amicable settlement of the claim of the Respondents, they could not do so unless their Lordships could see their way to express the opinions they had formed upon the different directions of the learned trial Judge which in their view would necessitate a new trial of the action.

Their Lordships gave to the Appellants the assurance that the course they desired would be followed. The case has been compromised, and it only remains for their Lordships to express their views on the directions complained of. To make these views intelligible it is necessary to refer briefly to the material facts of the case. Guy Street, in the city of Montreal, is crossed on a level at right angles by two main tracks and two side tracks of the Appellants' Railway. The side tracks are the outer tracks at each side of the line. They are siding

tracks, and the two inner tracks main tracks, the northern main track carrying west-bound traffic and southern east-bound.

These tracks also cross several streets running parallel to Guy Street, and situated some short distance from it east and west. In their order of proximity to Guy Street on the west there are Richmond Street, St. Martin's Street and Seigneur Street, and on the east in the same order Luisignan Street and Versailles Street. All these six streets are comparatively close together, each being separated from the other by a distance much less than a quarter of a mile.

There is no curve in the Railway as it crosses these streets, and any one crossing them at Guy Street has a clear view up and down the line for some considerable distance.

On the morning of the 12th of October 1908 an engine and tender belonging to the Company was engaged in shunting operations in connection with the work being done in a yard also belonging to them, called Bonaventure Yard, and for that purpose was running backwards and forwards on the northern siding track. The morning was fine, and there was nothing abnormal in the state of the atmosphere. McAlpine, who lives in the vicinity on the southern side of the line, and was well acquainted with the place where the accident was alleged to have occurred, was, about 9 a.m., in the act of walking up Guy Street and crossing the tracks from south to north, on his way to his employment, when he was struck by the tender of this engine then being driven backwards and proceeding eastwards towards Bonaventure Yard. The speed of the engine was about 5 or 6 miles an hour. Two gates are erected at both sides of the line across

Guy Street. They are 60 feet apart, and the actual width of the track is 46 feet. McAlpine "ducked" under the gate on the southern side, and proceeded to traverse the lines in a north-westerly direction. He must have crossed three of the lines of rails and the whole or part of the northern side track before he was struck. The engine carried three men at the time of the accident, an engineer and a fireman on the body of the engine, and a man named Dowden, a coupler, who was standing on the footboard of the tender. There was some dispute whether there were not cars on the southern side track at this time, but McAlpine apparently admits that there was an opening between these cars opposite Guy Street. Two sections of the Canadian Railway Act were relied upon as imposing on the Company certain statutory duties which their servants, it was alleged, had negligently omitted to perform.

The first section, 274, runs thus:—

"When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such a crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway."

And the second section, 276, thus:—

"Whenever in any city, town or village any train is passing over or along a highway at rail level, and is not headed by an engine moving forward in the ordinary manner (that is, a train moving reversely) the Company shall station on that part of the train or of the tender of the engine which is then foremost a person who shall warn persons standing on or crossing or about to cross the track of such railway."

Having regard to the plan which has been filed showing the proximity of these several streets one to the other, and the nature of the work in which the engine was engaged,

their Lordships think that the former section cannot apply to the state of things existing at the time this accident occurred. The engine only ran west to Richmond Street about 100 yards. It then reversed, and was coming back towards the yard. It never was more than about 100 yards from one of these streets. The Statute evidently contemplates the case of a train which approaches a level crossing from a greater distance than 80 rods or quarter of a mile, and cannot apply to an engine engaged in shunting, which, though according to the definition clause of the Statute is a train, yet does not in its work get 80 rods away from any one of these level crossings. It was, moreover, proved by the men on the engine and tender that, though no whistle was sounded, their bell, which rings automatically, was kept ringing constantly from the time they left Bonaventure Yard till the happening of the accident.

As to the statutory duty imposed by the second section, Dowden, the coupler, deposed that he was on the tender to make couplings if necessary and attend to switches, that he first saw McAlpine about 30 feet west of Guy Street, that his engine was then going about 5 or 6 miles an hour, that when he came a little nearer to McAlpine he (Dowden) saw that McAlpine was paying no attention to the bell, that he (Dowden) immediately thereupon shouted to McAlpine, gave to the engineer a signal to stop, and shouted to McAlpine, that the engine stopped in its own length, but that McAlpine came on and apparently paid no attention and was struck, the engine being then practically on the Guy Street crossing. The fireman and engineer corroborated Dowden's evidence. This was the evidence

given on behalf of the Company to prove the discharge by them of their statutory duties towards the plaintiff McAlpine. The latter's account of the accident was this: He said there were cars on the southern side track, that when he passed through the opening left between these cars opposite Guy Street the remaining three tracks were quite free and open to him, that there were men in front of him passing over the tracks whom he was following, that after he had passed the first track he "threw his eyes quickly up and down the main line" but did not see anything approaching from either side, that he did not see the engine that struck him while he crossed over the main tracks and the spaces between them, that he heard a shout, and got a blow before he could turn his head, that he must have been then on the track. He further stated (p. 58) that he did not hear any whistle or bell, but apparently declined to swear that the bell was not ringing.

That was the important evidence with which the presiding judge had to deal in his summing up to the Jury, and it is upon his treatment of it that the question of misdirection turns. Now as to Section 274, he (at page 37) stated simply that he would leave to the Jury the question whether according to the evidence the Company obeyed "the dispositions" of that section. He said nothing about the applicability of the provision as to whistling, to shunting operations such as those carried on on this occasion, or as to whether the omission to whistle or to ring the bell—if they believed it did not ring—was the sole effective cause of the accident, or was so connected with it as to be a cause materially contributing to the accident.

As to Section 276, he told the Jury that the Article stipulated that the Company was obliged to have somebody to warn people, that this person must not only be in a position to warn, but must also warn people who are standing on or about to cross the line, that he must warn in time, that it was not the engineer or the fireman who has to give the warning, that their notice was no good unless it was proved that it was heard by the victim and he had time to act upon it.

In their Lordships' view this last direction is erroneous, it is not necessary for the protection of the Company that the victim should hear the warning. It is only necessary that the warning should be such as ought to be apprehended by a person possessed of ordinary faculties in a reasonably sound, active and alert condition, and the time given to avoid the danger should be such as would be reasonably sufficient for such a person as the one above-mentioned to avoid it. If a Company permits persons whose faculties it knows to be defective to cross its line, that knowledge may, possibly, impose upon them the duty to take greater care than what would be required towards the ordinary wayfarer who is not so affected. But that case does not arise here. McAlpine was at the time of the accident only 51 years of age, and was employed as a book keeper. His health, he said, was perfectly good, and there was no suggestion that his faculties were in any way defective.

The second question left to the Jury was framed thus: Was the accident caused by the sole fault of McAlpine? And the third, Was it caused by the sole fault and negligence of the Company or its employees? The Jury answered both these questions in the negative.

The fourth question put by the learned Judge to the Jury ran as follows:—Was the accident caused by the common fault of the Plaintiff and the Defendant, its servants and employees, and if you answer "yes," state in what the fault and negligence of each consisted? To this question the Jury gave the following answer:—"The Plaintiff was to be blamed in not taking sufficient precautions in crossing the track, and the employees of the Defendants are to be blamed for not blowing the whistle, and the man on the footboard for not giving the Plaintiff timely warning according to law." It is in reference to this question, it appears to their Lordships, that the learned Judge fell into some grave errors in addition to those already mentioned. For instance, at page 39 of the Record, he says:—

"A party who crosses a railway is obliged to look, there is no doubt about that, but to what extent he is obliged to look is a question which is disputed. It seems to be considered now that it is sufficient if a party . . . . . looks both ways on approaching the track. He need not necessarily look again just before crossing. That is the English Law."

This is an entirely erroneous view of the English law. Whether in a case of this character, the Plaintiff's negligence was the sole cause of his own misfortune, or whether he was guilty of contributory negligence are questions of fact to be decided in each case on the facts proved in that case. There is no such rule of law in England as that if a person about to cross a line of line of railway looks both ways on approaching the track, he need necessarily not look again just before crossing it. Neither is it true, as the learned Judge apparently supposes, that according to the law of England a plaintiff who is guilty of negligence cannot recover damages. On the contrary a plaintiff

whose negligence has directly contributed to the accident, that is, that his action formed a material part of the cause of it, can recover, provided it be shown that the Defendant could by the exercise of ordinary care and caution on his part have avoided the consequence of the Plaintiff's negligence. Again, on the same page, he says:—

> "So far as the contestation is concerned it is not that there was not a man there. I do not think it is in the contestation that there should have been a man there. The real point at issue is that there was no warning, and this absence of warning consisted in the fact that they did not whistle, and that there was no warning from a man on the tender. These are the two faults which you can find against the Company, and you may find them guilty of only one or both of them."

The answer of the Jury to the 4th question was evidently based on this finding. Where a statutory duty is imposed upon a Railway Company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the Company or its servants. If, as in the example taken by Lord Cairns in *The Dublin, Wicklow and Wexford Railway* v. *Slattery* (3 A.C. 1-155, 1166), the folly and recklessness of the Plaintiff, and not the admitted negligence of the Company be the cause of the injury to the Plaintiff then the negligence of the servants of the Company in omitting to whistle, for instance, as the train approached a station or level crossing would "be an *incuria*, but not an "*incuria dans locum injuriæ*." In *Davey* v.

The London and South Western Railway Company (12 Q.B.D., 70) this principle was applied.

In the last passage quoted from the charge of the learned Judge in the present case, he never pointed out to the Jury that it was necessary, in order that the Plaintiff should recover, that the omission to whistle or to give the warning, or both combined, and not the folly and recklessness of the Plaintiff himself, caused the accident. For all that appears, the omission to whistle might not have contributed in any way to the happening of the accident. The Jury, instructed as they were, may well have been under the impression that the two alleged breaches by the Company of its statutory duties—the two faults of which the Jury found them guilty—rendered them liable whether or not those faults caused to any extent the injury to the Plaintiff or the contrary.

These are, in the main, the reasons which led their Lordships to the conclusion that a new trial should be directed. Since the parties have arrived at a compromise, their Lordships have now, however, only to intimate that they will humbly advise His Majesty that the Appeal ought to be allowed.

In the Privy Council.

THE GRAND TRUNK RAILWAY COMPANY

v.

WILLIAM H. McALPINE.

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