

Privy Council Appeal No. 56 of 1919.

Canadian Pacific Railway Company - - - - *Appellants*

v.

Denton Dale Pyne - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR MANITOBA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 6TH AUGUST, 1919.

Present at the Hearing :

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD PARMOOR.

MR. JUSTICE DUFF.

[*Delivered by Mr. Justice Duff.*]

The respondent on the 25th January, 1916, was a passenger on the appellant Company's train proceeding from Regina to Brandon by way of Bulyea and Kirkella; when passing over a switch near Kirkella the coach in which the respondent was travelling left the rails and capsized, and in consequence the respondent was severely injured.

The action was first tried before a jury in 1917, when a verdict was given against the appellant Company. A new trial was ordered on the application of the railway company, and the respondent again succeeded in obtaining a verdict and judgment in his favour. The appeal of the Company from that judgment was dismissed by the Court of Appeal for Manitoba, and leave to appeal to this Board was given by that Court in exercise of the discretion vested in it by sub-section b of section 2 of the Order in Council of 28th November, 1910.

Carriers of passengers are, of course, not insurers of the safety of the persons whom they carry, nor does their contract of carriage imply an absolute warranty that the vehicles and their

equipment are perfectly sound and sufficient. They do, however, incur an obligation to use due care, and as far as due care and competent forethought can secure that end, to carry their passengers with safety. Moreover, the accident in which the plaintiff suffered was due to something which does not as a rule occur except through default in the performance of the carrier's obligation to see that proper care and skill are used, and the action is therefore one of a class in which the Courts have repeatedly held that the maxim *res ipsa loquitur* applies, and that, in the absence of explanation by the carrier, proof of the accident itself affords some evidence that what happened did in fact arise through the failure to discharge this obligation.

The immediate cause of the derailment of the coach is not in dispute. One of the "equalising bars" supporting the body of the car was broken; one of the parts was caught by the outer rail of the diverging track as the coach passed over the switch; and the truck in consequence was wrenched from the rails. The Court of Appeal for Manitoba unanimously held that there was evidence to support the jury's conclusion that the Company had not acquitted itself of the burden of explanation cast upon it by proof of the fact of derailment, and their Lordships concur in that view.

The evidence adduced by the Company showed that the broken bar was forged of suitable steel and by a proper process conformably to the pattern in general use; that theoretically, after allowing a proper margin of safety, it was of sufficient strength for sustaining the weight it was designed to support and resisting any strain which it was likely to undergo in the course of railway operation; that it had been in actual use since 1912; and that, although it had been examined carefully a few months before the accident, no defect in it and no evidence of its inadequacy had in fact come to the knowledge of the Company's servants. It is admitted that the capacity of the bar to withstand pressure had not been put to proof by experiment; but it was alleged that the process of forging itself would have disclosed any flaw in the material then existing.

On the other hand, it was admitted that this accident was by no means the only occasion in the experience of the Company on which a bar of the same design, produced by the same process and of the same material, and serving a like purpose, had proved inadequate to resist the strains to which it was subjected.

The Company's witnesses referred to several cases of the collapse of such bars, the earliest case specifically mentioned having occurred six or seven years before the date of the trial. It was not suggested that these fractures were due to conditions involving any test more severe than the Company's engineers might fairly be expected to anticipate. The broken bar itself was not produced for inspection by the jury, and there is no evidence of latent defect in the metal. There was evidence from at least one of the Company's witnesses as well as from witnesses called by

the respondent to the effect that nothing connected with the process of forging would in itself supply a satisfactory criterion of capacity to resist pressure; and, moreover, that tests by actual pressure and shock affording adequate criteria of such capacity could with no great difficulty or inconvenience be devised and applied, and indeed that in practice such tests are employed for the purpose of ascertaining the sufficiency of the steel used for the manufacture of other parts of the equipment of railway cars. It is, in their Lordships' opinion, impossible to contend that it was the duty of the jury to disregard this evidence.

It is true that the testimony is a little indefinite upon the point whether any of the instances of the breakdown of equalising bars, specifically mentioned by the Company's witnesses, occurred before the forging of the bar in question. But one at least of these instances took place as early as 1912, the year in which the bar was forged; and as there was no evidence that no such fractures had occurred earlier than that date, the jury, in considering whether they were in possession of all the relevant available information touching the experience of the railway company, were entitled to weigh the fact that such evidence was not produced. Moreover, an opportunity for the testing of the particular bar under investigation had been presented only a few months before the accident, when, as already mentioned, the truck to which it was attached was dismantled and examined.

Before their Lordships' Board the principal contention of the appellant Company was that a reasonable explanation of the derailment was to be found in a cause for which it could not be held responsible: on the day of the accident and for several days before the weather was intensely cold, and steel under the action of extreme cold may become frangible under impacts which it could resist without injury in ordinary temperatures. In very low temperatures unaccountable fractures of steel frequently occur; and it was alleged that there is no known practicable precaution by which such fractures can be prevented in such circumstances.

If the facts in evidence pointed to something beyond the control of the appellant Company as the cause of the accident with a probability equal to that attaching to the inference which ascribes it to the default of the Company, then, of course, a verdict against the Company ought not to have been given. But the jury were not conducting a scientific investigation. "Courts," as Lord Loreburn said in *Evans v. Astley*, 1911, A.C. at p. 678, "like individuals habitually act upon a balance of probabilities"; and it was within the province of the jury to estimate the comparative degrees of probability ascribable to the rival explanations advanced by the parties. Their Lordships agree with the Manitoba Court that the probabilities were not so precisely balanced as to justify the conclusion that the jury acted unreasonably in preferring the hypothesis presented by the respondent.

Their Lordships are of opinion that there is another and independent ground on which the judgment of the Court of Appeal

ought to be supported. The jury attributed to the Company default in respect of the duty of inspection as well as in respect of the duty of testing. Their Lordships see no reason for differing from the view of Galt, J. that this finding referred to the obligation of the Company to inspect its trucks from day to day *en route*; and the jury might well have thought that after the incident (about to be mentioned) of the 24th January, the day before the accident, this obligation called for an examination of exceptional rigour, especially in view of the evidence of the Company's officials, already mentioned, touching the action of the weather.

On the day before the accident the train had been brought to a stop in a snowdrift, and it became necessary to bring up a more powerful locomotive to push it through.

The evidence given by one of the Company's divisional superintendents indicates that such an operation was calculated in the ordinary course to subject this particular equalising bar to a shock of some severity, and the jury found in answer to the fourth question that it was a shock then received which caused the bar to break.

Assuming in favour of the railway company that the bar had become abnormally brittle through the effect of the weather, their Lordships agree with the Court of Appeal that the jury were not without solid grounds for rejecting the suggestion advanced by some of the Company's officials that the fracture might with equal likelihood be ascribed to a jar occasioned by a wheel encountering a pebble or an uneven joint in a rail or by the ordinary oscillation of the coach.

It was for the jury, having come to this conclusion respecting the result of the incident of the 24th at Kirkella, to consider whether in all the circumstances the failure of the Company's officials to discover evidence of the injury in time to repair it was satisfactorily explained.

The contention was advanced that ocular inspection would be the only practicable method of examination for detecting a fracture, and that the most rigorous ocular inspection could avail nothing, because the fracture, if it existed when the truck was examined at Regina and Neudorf, would be concealed from view. In weighing this explanation of the failure to discover the condition of the bar the jury would, of course, consider the character of the examination made at the places mentioned, and they would also consider with what degree of accuracy the position of the break had been determined by the oral testimony of the railway company's witnesses.

It was for the railway company to satisfy the jury upon these points; and having regard particularly to the inconclusiveness of the testimony as to the position of the break, and to the non-production of the broken parts of the bar, the conclusion at which the jury arrived cannot, their Lordships think, be successfully impugned as without reasonable foundation.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

CANADIAN PACIFIC RAILWAY COMPANY

v.

DENTON DALE PYNE.

DELIVERED BY MR. JUSTICE DUFF.

Printed by Harrison & Sons, St. Martin's Lane, W C.

1918.