

CANADA / JUDGMENT

Mallory v. Winnipeg Joint Terminals

(1916) 53 SCR 323

COURT

Supreme Court of Canada

DECIDED

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Report

(1916) 53 SCR 323

Judges

Fitzpatrick, Charles; Davies, Louis Henry; Idington, John; Anglin, Francis Alexander; Brodeur, Louis-Philippe

On appeal from

Manitoba

Subjects

Transportation

Decision Content

Supreme Court of Canada

Mallory v. Winnipeg Joint Terminals, (1916) 53 S.C.R. 323

Date: 1916-05-25

Caleb R. D. Mallory (Plaintiff) Appellant

and

The Winnipeg Joint Terminals (Defendants) Respondent.;

1916: May, 9, 10; 1916 May 25.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Railways—System of construction—Exposed switch-rods—Negligence —Dangerous contrivance—Verdict—Findings against evidence.

In accordance with what was shewn to be good railway practice the tracks in the company's yards were provided with switch-rods which were left uncovered and elevated a slight distance above the ties. While in performance of his work, during the day-time, an employee sustained injuries which, it was alleged, happened in consequence of tripping on switch-rods while a car was being moved over the switch. In an action by him for damages, the jury based their verdict in his favour on a finding that the railway company had been negligent in permitting the switch-rods to remain in an exposed condition.

Held, per curiam, affirming the judgment appealed from (8 West. W.R. 853), that the finding of negligence by the jury in regard to the switch-rods in question was against the evidence as to proper method of construction and could not be upheld. Idington and Brodeur JJ. dissented on the view that evidence respecting the unsafe condition of the switch-rods had been properly submitted to the jury and their findings thereon ought not to be questioned.

APPEAL from the judgment of the Court of Appeal for Manitoba[1] reversing the judgment entered at the trial by Prendergast J. on the findings of the jury, and dismissing the plaintiff's action with costs.

The circumstances of the case are stated in the head-note. Wallace Nesbitt K.C. and McMurray for the appellant.

O. H. Clark K.C. for the respondents.

The Chief Justice.—I would dismiss this appeal and confirm the judgment below for the reasons given by Mr. Justice Perdue.

The general principle applicable in negligence cases is expressed by Lord Halsbury in *Wakelin v. London and South Western Railway Co.*[2] in substance as follows:—It is incumbent upon the plaintiff to establish by proof that the death or injury was caused by some negligent act or omission to which the death or injury complained of is attributable. That is the fact to be proved. If circumstances are equally consistent with the negligence of the plaintiff or the defendant then the action fails.

At the time of the accident in question the plaintiff was employed by the defendant company as one of a switch-crew of five, and was actually engaged in the terminal yards handling, at the point of intersection of three different lines, a train of four cars one of which, known in these proceedings as car No. 39112, was to be switched by what is known as a "flying switch" from the track on which it stood to a track known as the "B. lead." To do this it was necessary to throw the

switch for the latter track and open the knuckle of the coupler on the car. Both of these operations should, to avoid accident, be carried on in that order. The plaintiff was acting in direct co-operation with the switch-foreman, Lait, apparently was directing the movements of the engine attached to the cars and it was his duty to give the signal to the engineer, when he saw by the switch signal that the line was ready, to shunt the car from the track on which it stood to the "B. lead." There is a good deal of evidence as to what occurred between the plaintiff and Lait to which, in my view, no importance attaches because the jury find that the accident was attributable directly to the defective condition of the switch-rod, and that no negligence is attributable to Lait. If plaintiff had done his work in the regular and proper order he should have first adjusted the coupler and then thrown the switch, in which case Lait would not have given the signal to the engine and in all human probability the accident would not have happened.

Now, as to the negligence found, it is admitted that the car was properly equipped in accordance with the requirements of the statute. The coupler was operated by a lever from the side of the car. The complaint is that the lever was out of order and that the plaintiff was obliged, to adjust the coupler, to go behind the car and shake the coupler loose with his hand. I can see no reason why he should have assumed that risk and, to have attempted to work at the coupler with his back turned towards the moving car, as he did, was in the circumstances highly imprudent. *Plumb v. Cobden Flour Mills Co.*[3]. However, it will not be necessary to say more as to this because I am satisfied that the accident cannot be fairly attributed, on the evidence, to the cause assigned by the jury—a defective switch-rod. In the first place, admitting what, in my opinion, is not proved, that the plaintiff slipped on the switch-rods, there is no evidence to support the finding that they were not properly constructed or that they should have been covered. It is admitted by all the witnesses including the plaintiff, that switch-rods worked from a switch-stand on the level like those in question are always left uncovered. When they are worked from an interlocking tower it is different because of the delicate mechanism of the locking part. It is also said, although not so found by the jury, that the line was badly ballasted and that a vacant space existed between the switch-rod and the ground which was a cause of danger, but I think the weight of evidence is to the effect that the switch-rods were placed and maintained in accordance with good railway construction and the general practice of railways in this country. Further, the "Railway Act" makes ample provision for the equipment of trains and the construction of road bed, tracks and switches for the general protection of all those who travel or are connected with the operation and maintenance of railways, and it has not been suggested here that the respondent company in any way failed to observe the requirements of the statute. Section 280 of the "Railway Act," which deals with switches, contains no provision relating to the covering of switch-rods and no order or regulation has been made by the Board under the general powers conferred by section 30 of the Act, nor has the inspecting engineer made any order under section 263. The rule applicable to cases like this is well expressed by Pollock in his work on Torts (10 ed.) p. 476, referring to the case of *Crafter v. The Metropolitan Railway Co.*[4]:—

A staircase * * * cannot be pronounced dangerous and defective merely because the plaintiff has slipped on it, and somebody can be found to suggest improvements. This is an analogous case. Here the switch-rod is proved to have been constructed in the usual way, according to the system generally adopted in this country. If it is left to the jury to decide what improvements ought to be made in the interests of good railway construction then we will have custom or local usage set up as a test of negligence. The standard of care is a legal one and the question for the jury is whether the master or the servant, as the case may be, has lived up to it. If it is for the jury to decide as to proper railway construction in view of the provisions of our "Railway Act," then we will have juries in Manitoba, deciding differently from juries in Ontario on the same state of facts with respect to the same railway. I agree absolutely with Mr. Justice Perdue:

The question as to whether all switch-rods should be covered for the protection of the railway employees is one of very great importance. The form of the protection to be adopted, if protection is to be made obligatory, would necessitate the assistance and advice of experts and the most careful consideration by the legislature or body possessing the power to compel the adoption of the device. Should it be left to a jury to say that defendants were negligent because they adopted the course followed by every railway company in Canada, and left the switch-rods uncovered? It appears to me that the matter is essentially one to be dealt with by Parliament or the Railway Board, so that the device to be adopted will be put in general use by all railways, and it will not be left to the conjecture of a jury to pronounce upon the necessity for, or the sufficiency of, the protection in each case.

The appeal should be dismissed with costs.

Davies J.—This was an action brought by the appellant, a switchman in defendants' employ, to recover damages for injuries sustained by him while in the performance of his duties as switchman in defendants' yard or station. The accident happened in broad daylight. A "flying switch" had been made and the plaintiff had cut off two cars which had moved to their proper place. Plaintiff then set the switch so that another car might be pushed to another track. The setting of the switch automatically moved the switch-signal so that the switch-foreman, Lait, who was standing by ready to signal the engineer when to back up, seeing the switch was thrown for the "B lead" and Mallory was standing by it, walked towards the engine and gave the signal to "shunt the car," which was done.

It appears from his evidence that Mallory after turning the switch walked over towards the car to be switched and noticed that the knuckle of the coupler in the end of the car was not open. He crossed the track and tried with the lever to open it but for some reason it would not open. Mallory then stepped on the track between the rails and with his back to the car and with one hand on the lever and another on the coupler tried to open the knuckle. He knew that the opening of the switch by himself a few moments before was the signal for the engineer to "shunt the car." He put himself in this very dangerous position with knowledge that he could not be seen by the engineer and that the train would in all human probability immediately move towards him to shunt the car. As he ought to have expected, the car did move with the result that he was knocked down and injured.

The jury properly found that Lait, the signalman, was not guilty of negligence in giving the signal to the engineer to shunt and they also found that Mallory was not guilty of contributory negligence in placing himself where he did with his back to the end of the car to be shunted with one hand upon the lever and one upon the coupler. I must say I think this finding is contrary to the evidence. I do not propose, however, to base my judgment upon that conclusion.

The jury further found that the defendants were guilty of negligence "in not properly covering the switch-rods" and that the "exposed condition of the switch-rods" constituted "negligence on the part of the defendants" and that the tripping of the defendant was "due to the exposed condition of the switch-rods."

I have very great doubts whether the evidence was such as justified the finding that the plaintiff tripped on the switch-rods. Plaintiff does not say so himself. He says he does not know what he tripped on, whether the switch-rods or a stone or something else. Mr. Nesbitt suggested that there was a space below the switch-rods in which plaintiff's foot may have caught and that the defendants' negligence consisted in their leaving that open space there; but that is all pure speculation. The jury have not so found. They have specially found that the defendants' negligence consisted in "leaving the switch-rods uncovered and exposed" and this is the only negligence found.

The question therefore is fairly and squarely raised whether leaving these switch-rods uncovered was negligence.

It was not contended that the "Railway Act" required them to be covered or that the Railway Board had ever made any order to that effect. It was proved beyond doubt that, except in the case of an interlocking plant which for some special reasons called for a covering of the switch-rods, it was the universal railway practice in Canada and always had been to leave the switch-rods uncovered—that it was good railway practice and that the same practice prevailed universally throughout the United States. As is stated by Perdue J. the question on these facts is one to be dealt with by Parliament or the Railway Board.

To that body Parliament had delegated the amplest powers in such a matter as this. The Board is a body of men specially experienced in dealing with such matters and is assisted by skilled experts. In my judgment unless Parliament expressly dealt with such an important matter of universal railway practice the Board was the proper tribunal to do so and it having seen fit by its silence to sanction this practice it is not open to a jury, at any rate in the absence of some evidence that the practice of leaving the switch-rods uncovered was bad and negligent, to hold that it is

Parliament did expressly deal in part with the subject by making provision, in section 288 of the "Railway Act," requiring packing of the fixed rails at switches. That Act vests in the Railway Board power to make regulations respecting the appliances, devices, structures and works to be used on a railway for the protection of the company's employees (sections 50 and 269). It was conceded that the Board, in the many orders it has made since it was established, has not made any order or regulation requiring the covering of switches. I am not qualified to give an opinion on the subject, neither, I venture to say, are juries so qualified, at any rate in the absence of proper

evidence. To pronounce an opinion upon the subject condemning the universal practice in Canada would require much knowledge of the actual working of our Canadian railways under our climatic conditions and much expert knowledge.

In the case before us there was no evidence that the existing practice and one which has always prevailed in Canada, was other than good railway practice, except that of Mr. Haddow, whose knowledge on the point was confined" to Great Britain. The findings of the jury that the uncovered switch-rods was in itself negligence and that such negligence caused the damage, cannot be upheld.

For these reasons I think the appeal should be dismissed.

Idington J (dissenting).—I think there was evidence to submit to the jury on all the points upon which their findings have been questioned.

As to the question of whether or not the appellant was justified in making the effort he did to serve his masters by stepping behind a car liable to be put in motion, there is abundant uncontradicted evidence that it is usual for men engaged in the service he was, to do the like, to perform the like service, and the respondent no doubt expected it to be done or the prohibition embodied in the contract the appellant signed would, have been extended so as to include the doing so.

As to the fact of the appellant having tripped upon the exposed switch-rods there was evidence reasonably applied justifying that inference.

And as to the negligence involved in leaving the switch-rods exposed that would seem to be rather patent so long as men engaged as appellant was were expected to do their work under such circumstances as he did and travel over said rods.

It is idle to talk of what is done on other roads so long as the uses to which that part of the track on other roads is put, or permitted to be put, is not (as it was not herein) shewn to have been used in the like dangerous condition, by men employed in and about their work, in the same manner and liable to the same risks as appellant had to encounter in serving respondents.

No matter how dangerous a track may be so long as men have not to walk upon it. When men are invited and expected to do so in order to save the employers' property, it is negligence to fail to cover as in other cases mentioned.

The law imposes upon the employer the duty to furnish a reasonably safe place for his men to work. The respondent did not do so in the case in question.

We are told these rods are covered at interlocking switches to protect the mechanical device.

The cost of repairing the mechanical device makes it worth while protecting the metal, but human flesh and blood come cheaper and therefore needless to bother about that.

Such is the logic by which the railway man reaches the prudent conclusion we are asked to accept as a conclusive answer to this charge of negligence to provide a safe place for men to work in.

Again we are pressed with the so-called argument that the legislature has not intervened, though it has in many other cases, to protect workmen.

The unfortunate truth is that the oft failure, of courts of justice to maintain the elementary principle of the common law that the safe place to work in should be provided, so far as reasonably possible, has rendered it necessary for the legislature time and again to step in and address itself to specific results of failure on the part of the courts.

But in doing so it has not abrogated the common law but added new sanctions thereto and in one instance cited in appellant's factum has declared no inference is to be drawn therefrom.

I think the appeal should be allowed with costs. Anglin J.—I am not disposed to disturb the finding negating contributory negligence and I think that there was evidence to support the finding that the plaintiff tripped upon the switch-rods. The only negligence found against the defendants was "the exposed condition of the switch-rods."

While I attach little weight to the argument that the only duties incumbent upon railway companies in regard to the construction, maintenance and operation of their undertakings are those specifically prescribed by Parliament and the Board of Railway Commissioners, and that the fact that neither the "Railway Act" nor any order of the Board has imposed an obligation to pack or cover railway switch-rods, affords a conclusive answer to this action, with the learned Chief Justice of Manitoba, upon the evidence in this record, I am not prepared to say that "where the ordinary switch-rods universally used in Canada and the United States are not covered, a jury may infer negligence against a railway company." There is no evidence from any person qualified to speak upon the subject that, having regard to climatic and other conditions in this country, it is practicable to cover ordinary switch-rods, as is suggested, or that so covered they would not be a greater menace and source of danger and inconvenience than in their present condition. Without such evidence I think it is not within the province of a jury to condemn as negligent a practice universally observed on this continent. *Jackson v. Grand Trunk Railway Co.*[5]; *Zuvelt v. Canadian Pacific Railway Co.*[6]; *Phelan v. Grand Trunk Pacific Railway Co.*[7]. The fact that interlocking switches are covered is referred to. But the necessity for protecting the delicate mechanism of these switches may make the covering of them indispensable although attended by risks and inconvenience which would render unjustifiable the covering of ordinary switches where such a necessity does not exist.

In the alternative the plaintiff asks a new trial, because the learned trial judge refused to submit the condition of the coupler to the jury as a ground of negligence. There was no evidence of any lack of proper inspection—no evidence of any defect in the coupler which such inspection would have disclosed; and, upon the evidence, any defective condition of the coupler that may have existed could not properly have been found to be a proximate cause, of the accident.

The appeal, in my opinion, fails.

Brodeur J. (dissenting).—The plaintiff appellant, was in the respondents' employ and, when in the discharge of his duties, he was injured. He claims that the accident is due to the negligence of the company.

The jury found in his favour in declaring that the exposed condition of the switch-rods in the yard constituted an act of negligence.

It was suggested that some other obstruction might have been the cause of the accident and some evidence to that effect was adduced, but the jury believed the facts as told by the appellant and then we have to accept their verdict in that regard, so that the only question that remains is whether the railway companies in failing to cover their switch-rods between the tracks or in exposing those rods as is proved in this case are guilty of negligence.

It is in evidence that in England switch-rods are covered and in our country semaphore and signal wires of the interlocking systems in the yards are also covered.

The evidence does not shew the reason why the covering is made in the case of interlocking plants. But I have reason to believe that it is due to the intervention of the Railway Committee of the Privy Council at first and of the Railway Board after.

Those interlocking plants have been brought into our railway system when the applications for crossing railway tracks were being considered. Specifications of those interlocking plants were supplied by the Government authorities and the railways had to cover those wires.

Why the same system was not introduced in the switching apparatus is because the matter was likely never considered by the Railway Board.

It seems to me, however, that in extensive yards like the one under consideration, where employees have to walk on tracks all the time in the discharge of their duties, it is only a reasonable measure of precaution that those dangerous holes in the track should be removed.

The evidence shews that in some cases in Canada those rods are covered. If the Railway Board had passed judgment on the advisability of covering them I might come to a different conclusion. But the fact that the Board has not passed any order would not debar the courts of justice from inquiring as to whether negligence should be charged or not.

When the risk attendant on some act is larger than in some other cases, special precautions should be taken and the degree of care is proportionately larger. *Grant v. Great Western Railway Co.*[8]. The question of negligence with regard to those rods was properly left to the jury. No objection had been made to that procedure.

For these reasons the appeal should be allowed with costs of this court and of the court below and the verdict of the jury should be sustained.

Appeal dismissed with costs.

Solicitors for the appellant: McMurray, Davidson & Wheeldon.

Solicitors for the respondents: Clark & Jackson.

[1] 8 West. W.R. 853.

[2] 12 App. Cas. 41, at p. 44.

[3] [1914] A.C. 62.

[4] L.E. 1 C.P. 300.

[5] 32 Can. S.C.R. 245.

[6] 23 Ont. L.R. 602.

[7] 51 Can. S.C.R. 113.

[8] 14 Times L.R. 174.

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