

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of James Francis White and another v. The Victoria Lumber and Manufacturing Company, Limited, from the Supreme Court of British Columbia; delivered the 29th July 1910.

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ATKINSON.

LORD SHAW.

LORD MERSEY.

SIR HENRI ELZÉAR TASCHEREAU.

[DELIVERED BY LORD SHAW.]

This is an Appeal from a Judgment of the Full Court of the Supreme Court of British Columbia, dated the 7th September 1909, setting aside a Judgment by Clement, J., in favour of the Appellants, dated the 14th March 1908, and ordering a new trial of the cause.

The Respondents own and work a short mountain railway used for bringing timber down from the uplands in the interior to Chemainus in British Columbia. Certain portions of the line are of steep gradients, requiring that the trains should be worked with powerful engines and powerful brakes.

The Appellants claimed damages from the Respondents under the "Families Compensation Act" for the death of their son, George Thislow Leonard White, and in the suit negligence was attributed to the Respondents in respect of

White's death, which occurred on the 5th November 1907, while he was acting as engineer of a lumber train. The points of negligence made by the Plaintiffs were, the incompetence of the brakeman, a man called Ben Guy, who on the occasion was making his first trip in the capacity of brakeman on the train and who had had no previous experience with side brakes. Another ground of negligence was that the train was equipped with defective brakes. In the course of the pleadings of parties it was also alleged that what was denominated on the plans as a safety switch, that is to say, a siding into which trains which had upon the steep gradient got beyond control might be switched so as to avoid accident, had in point of fact never been constructed either to receive a full train or even been properly laid. In consequence thereof, it was alleged that the men who were handling the train had to jump from it while in motion, taking the chance of life, rather than enter what they called this "death-trap." Of the four men handling the train two were killed and two were injured; one of those killed was the engineer White.

In addition to the general denial of negligence on their part, the Defendants pleaded contributory negligence by White. In answer to the allegations as to the safety switch they averred that it was sufficient for the purpose for which it was intended, and that White's death was caused "by his wrongfully jumping from the said train while the said train was in motion." It should be noted that the pleadings of the Defendant Railway Company with regard to the safety switch specially took this shape.

The case was tried in March 1908 before Clement, J., and a special jury. The jury found a verdict for the Appellant James Francis White for \$2,600, and for the Appellant Elizabeth Lucy White for \$3,400, and judgment was entered

accordingly in their favour in the Supreme Court of British Columbia.

Thereafter a certain element of what may be termed judicial misadventure appears in the case. The learned Chief Justice Hunter clearly took a different view from that of the jury with regard to the effect of the evidence, and in particular he held that White had been guilty of contributory negligence. On these grounds he favoured entering up a verdict for the Defendants. He further thought that a certain misdirection had been made as after referred to. In all those particulars his judgment was not concurred in by his two learned brethren. Mr. Justice Irving, on the other hand, thought that the verdict was good in all points except, that in his opinion, the damages were too high, and on that ground he thought there should be a new trial. On this point his judgment was not concurred in by his two learned brethren. Mr. Justice Morrison thought that the verdict should in all points be left undisturbed. There being thus two Judges dissatisfied with the verdict a new trial was ordered, although each of those two Judges differed from the other as to the grounds for ordering it. It is from the order for a new trial pronounced in these circumstances that this Appeal is brought.

The misadventure, however, does not appear to end there, because the point of misdirection in respect of which a new trial was ordered by the learned Chief Justice, had not been taken either at the trial or in the Reasons for Appeal lodged with the Supreme Court, or even argued before that tribunal. On the other hand, the point of excessive damage which was the ground of ordering a new trial, so far as Irving, J., was concerned, does not appear to have been argued either; and the learned Judge, it was practically conceded at their Lordships' Bar, had formed an opinion upon that subject grounded largely upon

a misapprehension of the evidence in the cause. A principal element in his view as to excessive damage was that he thought White was a man earning only \$75 a month, whereas in point of fact he drew \$85 a month with board and with overtime, and his average drawings were \$135 a month.

Their Lordships think it quite unnecessary to go in detail into the evidence put forward. They are clearly of opinion that there were ample materials before the jury to find that the Defendants (Respondents) were guilty of negligence, that the jury cannot be said to have been under any error in acquitting White of contributory negligence, and that there are no sufficient grounds for a new trial on the head of excessive damages.

Before leaving these parts of the case, their Lordships think it right to say, in view of the minutely critical examination which has been made of the charge of Clement, J., that in their opinion that charge not only fully and impartially placed the substance of the evidence before the jury, but contained no element tending to mislead or confuse.

The above, however, is apart from a ground of misdirection which was pleaded at their Lordships' Bar. In the close of his charge to the jury, Clement, J., referring to the safety switch and without doubt, although he is not reported to have said so expressly, having in his mind the allegation that White was to be blamed for wrongfully jumping off the train rather than trusting to it, said: "If you say they should have had a safety switch, and if the presence there of a safety switch would have, in your opinion, actually prevented White's death, then the Defendant Company are liable, notwithstanding the fact that you might find that there had been carelessness or negligence on the part of

“Leonard White,” and then the report adds, not “in jumping off the engine,” but “in managing “the engine on the way down.” The Respondents (the Railway Company) found upon the sentence thus broadly expressed and plead that this is bad law, citing *Butterfield v. Forrester* (11 East 60). To this the Appellants reply that even in its broad sense the proposition is good law, citing the judgment of Lord Penzance in the case of *Radley v. The London and North-Western Railway Company* (1 A.C. 758). And on these contentions a not unfamiliar argument was presented.

In their Lordships' opinion it is unnecessary to make any pronouncement upon the point, because it is quite too late in this litigation for the Respondents to plead it. Both the Appellants and the Railway Company have been ably represented by Counsel at the trial and since; but at the trial no point of misdirection was taken. Their Lordships incline to the opinion that, if such a point had been indicated on the spot, the learned Judge who presided at the trial might, and probably would, have instantly explained that his reference to the safety switch bore merely, and was meant to bear merely, upon the limited point upon which the pleadings of the parties had expressly joined issue, viz., whether a man was to be blamed for jumping from a train rather than remaining on it trusting to a safety switch which, owing to the fault of the Defendants, afforded no safety but involved a fatal peril. In the next place, the notice of appeal stating the grounds thereof in writing, according to the forms of the British Columbian Court, contains no ground or plea of misdirection. In the third place, their Lordships were informed and the information is borne out by the report of the case, that such a ground was not even verbally pleaded before the Supreme Court. Reference was made to Section 66 of 3 & 4 Edward VII.,

Statute 15 of the Province of British Columbia, and to cases in the British Columbia Court, as to the necessity, on the grounds of fairness to the other party, of a clear intimation of the grounds of appeal; but, in their Lordships' opinion, it is also unnecessary to pronounce upon these authorities. For in their judgment it is not open to a party who has not used the opportunity at the trial, nor, either in writing or in argument, used the opportunity in the Court of Appeal, to state for the first time at their Lordships' Bar an objection to the verdict of a jury on the ground of misdirection. It is, of course, possible that some highly exceptional case might arise, but in general it may be laid down that neither party to proceedings before the Privy Council should be permitted to start fresh points of objection which have been open to him and have been neglected at opportune and convenient stages of the litigation in the Colonial Courts. It is not in accordance with justice to the parties that, after an appeal has been made to the Privy Council, they should for the first time learn what the true nature of the case to be made against them is. Nor is such a course fair to the Colonial Courts, whose judgments would thus be attacked upon grounds which they had not had an opportunity of considering.

Their Lordships will humbly advise His Majesty that the Order of the Full Court of the Supreme Court of British Columbia should be reversed, and the verdict and judgment of Clement, J., should be restored, and that the Appellants should have their costs here and in the Courts below.

In the Privy Council.

JAMES FRANCIS WHITE AND
ANOTHER

v.

THE VICTORIA LUMBER
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