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Fleming v. Toronto Railway

Fleming v. Toronto Rw. Co.

Ontario Court of Appeal

Hon. Mr. Justice Maclaren, Hon. Mr. Justice Meredith

Judgment: December 30, 1911

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Counsel: *D. L. McCarthy, K.C.*, for the defendants.

H. D. Gamble, K.C., for plaintiff.

Subject: Civil Practice and Procedure; Torts

Trial — New — Negligence — Street Railway — Electric Explosion on Car — Person Injured — Action for Damages — Exclusion of Evidence by Trial Judge — Findings of Jury.

In an action for damages for negligence, causing an electric explosion on defendants' street car, which injured plaintiff, the plaintiff asserted failure or defendants to properly inspect the car, and defendants submitted their records of car inspection and sought to substantiate them by evidence of the person who made the inspections.

Court of Appeal, *held* that this evidence was material and was improperly excluded by Middleton, J., at trial. New trial ordered that this evidence might be received.

An appeal by the defendants from a judgment of Hon. Mr. Justice Middleton, awarding plaintiff \$1,200 on the findings of a jury.

The action was brought to recover damages sustained by plaintiff from an electric explosion in one of the company's cars, on which he was a passenger, on the 10th August, 1910.

Defendants claimed that the evidence did not justify the findings of the jury; but in case the Court did not accede to that view they asked for a new trial on the ground that the trial Judge improperly excluded material evidence tendered by them.

The appeal to the Court of Appeal was heard by Hon. Sir Chas. Moss, C.J.O., Hon. Mr. Justice Garrow, Hon. Mr. Justice Maclaren, Hon. Mr. Justice Meredith, and Hon. Mr. Justice

Magee.

Hon. Mr. Justice Maclaren:

1 I consider that it would not be in the interests of justice that the case should be finally determined on the evidence admitted; but that there should be a re-trial in order that the tendered evidence may be received.

2 In his statement of claim the plaintiff alleged that the accident was caused by the negligence of the company in "not having properly inspected the controller, or if so inspected, in not having it put in proper order, and in leaving it out of repair or not in proper condition to be in operation." The defendants pleaded not guilty by statute.

3 The evidence excluded was on the examination of one Barton, a witness for the defence, who was the foreman at one of the company's barns and in charge of the inspectors and repairing at that barn and superintended the work done there. The following are the material parts of the examination which will shew how the difficulty arose:

Mr. McCarthy: Q. Now can you speak, looking at the records, which I notice is signed by you, of the report of cars inspected on August 7th, 1910 —

Mr. Gamble: Is that evidence, my Lord?

His Lordship: He can refresh his recollection. He must have a recollection to refresh. He must say, I recollect.

Mr. McCarthy: I don't suppose, my Lord, that I could ask a man to recollect what controllers were inspected on August 7th, last year?

His Lorship: I do not suppose he can.

Mr. McCarthy: Q. I don't suppose you can recollect what particular cars were examined on August 7th? A. No.

His Lorship: . . . Unless the witness can say, I have a recollection, he cannot use that in order to refresh his memory; but if in the refreshing of his memory he can say he can recollect, that can be used.

4 (After a discussion), Mr. McCarthy: Q. So you have no way of recollecting when that car was inspected in August of 1910? A. Only by the sheets, that is all I can go by.

5 Q. You have seen the sheets? A. I have seen the sheets. I have the sheets for six or seven years.

6 His Lordship: I think the situation is plainly that the witness can recollect one incident in the case. All he can say is that he can go by the sheets.

7 Mr. McCarthy: Subject to your Lordship's ruling I would submit the question in refer-

ence to the sheets which he has.

8 His Lorship: In 99 cases out of 100 it is not objected to, because we want to get at the actual facts, but if the objection is taken I am afraid I shall have to so rule, but it is against my own desire."

9 Mr. Gamble pressed his objection, and was proceeding to discuss the matter further when his Lorship reminded him that he had ruled in his favour.

10 The law on the subject is, I consider, correctly laid down in Phipson on Evidence (5th ed.), at p. 466, as follows: "A witness may refresh his memory by reference to any writing made or verified by himself concerning and contemporaneously with the facts to which he testifies . . . The writing may have been made either by the witness himself, or by others, providing in the latter case that it was read by him when the facts were fresh in his memory and he knew the statement to be correct." In the present case the question of the defendants' counsel was not completed, as he was interrupted before the sentence was finished; but the fair inference from so much of the facts as was allowed to be brought out, is that the sheets in question contained a daily record of the cars inspected or repaired, either prepared by the witness himself or examined by him at the time and then certified by his signature from his personal knowledge. That the facts were not more fully brought out is owing to the premature objection of the plaintiff's counsel.

11 With great respect I am of opinion that the rule laid down by the trial Judge is too narrow, and is not justified by the authorities. I think the law is more correctly stated by Phipson (5th ed.), at p. 467, where he says: "It is not essential that the witness should have any independent recollection of the facts. Thus, an attesting witness from seeing his own signature to a deed may say that he is sure that the party has executed it (*Manghan v. Hubbard*, 8 B. & C. 14); so a barrister may refer to notes on his brief, though he has no recollection of the case (*R. v. Guinea*, Ir. Cir. R. 167); or an agent who has made a memorandum of the terms of a lease, but forgotten the transaction, may swear from seeing the memorandum he has no doubt the lease was granted (*R. v. St. Martin's*, 2 A. & E. 210). And a journalist may refer to the copy of an article written by him, although he has forgotten the facts narrated (*Topham v. McGregor*, 1 C. & K. 320).

12 I am of opinion that the appeal should be allowed with costs to the defendant in any event; the costs of the previous trial to be in the action.

Hon. Mr. Justice Meredith:

13 There are really but two questions for consideration, upon this appeal, because there are really findings of negligence in two respects only, failure to apply the brakes, and failure to discover and remedy the defect which was the cause of the accident; the finding as to the incompetence of the motorman affords, in itself, no cause of action; the incompetence of the man might have had some bearing upon the question of failure to apply the brakes, but otherwise it was immaterial, because, competent or incompetent, he was the defendants' servant, for whose conduct, in the course of his employment, the defendants are answerable; if the case

had been one coming under the rule as to "common employment" the question might have been quite material; in this case it is not possible that it alone can be made a cause of action.

14 The first question, then, is whether there was any reasonable evidence of negligence on the part of the motorman in failing to apply the brakes before seeking to reassure the passenger and to have the electric current cut off by the removal of the pole from the wire. And this question is not to be looked at as it may now appear, looking back upon the event and having days for considering what might have been done to have prevented the panic, on the part of the passengers in the car, which was the cause of the plaintiff's injury.

15 The explosion caused by the electricity was an unusually violent one; and the motorman got the brunt of it, and was somewhat stunned by it. His first act was to turn off the power, obviously the proper thing to do. Finding that that did not cut off the electricity, which would, if not cut off, burn up the car, and the quickest and best means of cutting it off being by detachment of the pole at the other end of the car, and the passengers being panic-stricken, not knowing what had happened or what might happen next, he immediately turned to the body of the car and called to the conductor to detach the pole, and then to the passengers to keep their seats, and then back to his motor in the vestibule of the car, from which he had to be carried, owing to the injury which he had sustained.

16 In the imminent danger there were three things which the man might have done, disregarding his own interests and safety in the interests and for the safety of his passengers: (1) Get the power cut off; (2) Re-assure the passengers, who in their panic might injure one another, and (3) Apply the brakes so that there might be less danger in panic; the man, in the instant, deemed the first two the most important, and left the third until he had done what he could to effect the other two; and it seems plain to me that no reasonable man could conscientiously say that in doing so he was guilty of negligence. That which was most urgent of all things was the cutting off of the power; unfortunately the passengers, in their panic, threw the conductor twice off the car before the motorman's injunction to remove the pole from the wire could be obeyed; but he did not know, he could not tell, that it would not be immediately complied with; his reassurance of the passengers was next in importance; if it had succeeded no one would have been injured; there would have been no need to stop the car, to prevent injury if the pole were removed and the passengers remained in their seats; these things failing, it was important to stop the car as soon as possible to prevent the additional danger to panic-stricken passengers alighting from a car moving at a slow rate of speed over a car being stopped by the immediate application of the brakes. If the man had stopped to apply the brakes first and then had turned to reassure the passengers and to call for the disconnection of the current, he might, much better, have been found fault with; but whichever he did first, in the moment of the explosion and consequent fire, he could hardly be accused, reasonably, of negligence. In my opinion there is no reasonable evidence to support this finding; and I desire to add that I hope all "competent" men act in as courageous a manner upon such an extraordinary occasion of — if judged by the panic of the passengers — very considerable cause for alarm, as this man, found by the jury to be "incompetent," did.

17 On the other branch as well there must, I think, be a new trial, because of the improper rejection of evidence. The plaintiff made a *prima facie* case of neglect on the part of the de-

fendants to take reasonable care that the car was road-worthy and free from the defect which caused the accident. The defendants then proceeded to meet that case by testimony as to examinations to ensure road-worthiness and freedom from such defect; but upon objection made, on the plaintiff's behalf, the evidence in question was rejected, and rejected upon erroneous ground, as is now generally admitted. The witness could not, from memory alone, testify to an inspection shortly before the accident, it would hardly be possible that he could; it was then proposed to put into his hand a report, signed by him in the usual course of his work, shewing that the car had been examined at that time, but, upon such objection, that was prevented. If, looking at the report, the witness could have said, that is my report, it refers to the car in question, and shews that it was examined at the time, and, though I cannot, from memory, say it was then examined, I can now swear that it was, because I signed no report that was untrue, and at the time I signed this report I knew that it was true, that would, of course, be very good evidence, but the defendants were not allowed to get that far; and so the defendants are entitled to a new trial.

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