

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Matthews and Chipman, JJ.A.

BETWEEN:

J.P. MACINNES TRUCKING LIMITED	)	David A. Graves
and AUBREY TIMMONS	)	Christopher Robinson
	)	for the appellants
)	
Appellants	)	Myer Rabin
	)	for Canadian National
	)	Railway and Russell Clarkson
)	
- and -	)	Robert M. Purdy
	)	for Via Rail Canada Inc.
)	
CANADIAN NATIONAL RAILWAY COMPANY,	)	Appeal Heard:
VIA RAIL CANADA INC., and RUSSELL	)	April 3, 1992
CLARKSON)	
	)	Judgment Delivered:
	)	April 3, 1992
Respondents)	

THE COURT: Appeal dismissed with costs per oral
reasons for judgment of Matthews, Clarke,
C.J.N.S. and Chipman, J.A. concurring

The reasons for judgment were delivered orally by:

MATTHEWS, J.A.:

This appeal arises out of a collision between a dayliner train and a large truck at the Auld's Cove railway crossing at 11:36 a.m. on May 30, 1986. At that place the main line railway tracks leading from Sydney to Truro and highway number 344 which runs from the Trans Canada highway to Mulgrave intersect. That highway is more or less parallel with the tracks for some considerable distance proceeding from east to west and then turns to intersect the tracks at about 90 degrees. Both the train and the truck prior to that turn were proceeding in a westerly direction.

After a three day trial, on April 18, 1991, Mr. Justice Kelly dismissed the appellants' claims against the respondents and allowed the respondents' claims against the appellants.

In essence this appeal concerns findings of fact and inferences from those findings by the trial judge.

The crossing is controlled by railway crossing warning signals erected on both sides of the track.

They were properly installed in accord with the relevant regulations. The appellants' allege that the trial judge erred in failing to find that the signals were not operating at the time of the accident. Faced with conflicting testimony in this regard the trial judge said:

"The burden of proving its case and each major area of negligence is on the Plaintiff and I do not find that the Plaintiff has discharged its obligation to such an extent that I can make a finding that the signal lights in particular were not working at the time in question."

While it would have been more helpful to the parties had the trial judge been able to resolve this issue, he is not required to do so.

The trial judge then turned to the other evidence to determine the issues of negligence. The day of the accident was clear and fine. Although the operator of the truck, the appellant Timmons, did not see the train as he travelled along the highway parallel to the tracks, the operator of a truck close behind him, Mr. Hadley, did. Because of the then location of the train further to the east, it would have been easier for Hadley to see the train than Timmons. However, Timmons did not look. The headlights of the train were illuminated. The engineer of the train, Mr. Clarkson, testified that upon approach to the crossing, the required whistle signal sequence

was commenced as the train passed the whistle post located 1,522 feet east of the crossing. The sequence followed by Mr. Clarkson was two long whistles, one short whistle, two "snap" warning whistles and then a long whistle up to the crossing. Hadley testified "You couldn't miss it". The trial judge found that the whistle was blown in the manner required by the regulations ...". Various witnesses including Hadley heard the train's whistle blow prior to collision, but Timmons did not hear the whistle until the instance of the collision. As Timmons neared the crossing a mound of earth with some trees upon it interfered with his view of the tracks in an easterly direction. However, Timmons did not stop his vehicle near the crossing where he could see up the tracks in that direction. He admitted in cross-examination that he did not look for a train at any time. Timmons knew the area well; he was hauling gravel along that road on a daily basis, several times a working day. Although the configuration of the road, necessitating a sharp turn to his right before the crossing, and a mound of earth were problems confronting Timmons, he was well aware of them. He knew that he could expect to meet a train there at any time. He admitted that he should approach the crossing with caution. Simply put, he did not look, he did not listen for

the whistle and he certainly made no effort to stop his vehicle prior to the crossing.

This is but a brief overview of the evidence which is contained in three volumes. We have studied the transcript, the relevant exhibits, watched the video, studied the factums and heard oral argument from counsel.

In dismissing the claim and allowing the counter-claim the trial judge found that the only negligence which caused the collision was that of Mr. Timmons.

In order to reverse the trial judge, we must not merely entertain doubts as to whether his decision is right, we must be convinced it is wrong. We have concluded that there was no error on his part which would permit this court to reverse or set aside his decision.

We dismiss the appeal with costs.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.


J.A.


Clarke, C.J.N.S.


Chipman, J.A.

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5 (Trial Division)
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7 BETWEEN
8 J.P. MacINNES TRUCKING LIMITED and
9 AUBREY TIMMONS
10 Plaintiffs
11 - and -
12 CANADIAN NATIONAL RAILWAY COMPANY, VIA
13 RAIL CANADA INC. and RUSSELL CLARKSON
14 Defendants
15 -----
16 Oral decision of the Honourable Mr. Justice F.B. William
17 Kelly given in Halifax, Nova Scotia, on Thursday, the 18th
18 day of April, 1991.
19 -----
20 APPEARANCES:
21 Christopher Robinson, Esq.) For the Plaintiffs
22 Myer Rabin, Esq.) For the Defendants
23) Canadian National
24) Railway Company and
25) Russell Clarkson
Robert Purdy, Esq.) For the Defendant
Via Rail Canada Inc.