IN THE MATTER OF THE PETITION OF RIGHT OF ANNIE McLEOD HARRIS ..... SUPPLIANT;

1921
October 15

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Railways—Statutory duties—Negligence—Railway yard.

On the 5th August, 1919, H. was, with a helper, unloading mill wood from a car standing on a siding in the railway yard of the Government railways, at Fredricton, into a cart on the platform. The box of this cart extended about 1½ feet behind the wheels and being wider than the door of the car, was backed slantwise, to the sill of the door of the car, the back of the box or dump-cart projecting inside the door a little over 1½ feet, the hind wheel resting against the side of the car, part thereof being inside.

Whilst so occupied H. was warned by a shunting crew that they were coming on that siding to shunt. H. moved his cart, a car of horses was moved from the siding, and H.'s own car was also moved some fifty feet, at his request, and then H. took up his position again as aforesaid. They returned about 15 to 30 minutes after, for some way-freight and backed toward H.'s car, and when a car length away the brakeman, seeing the cart was again backed into the car, signalled the train to stop, and "hollered" a warning to the helper on the wagon who went to the horses' head. After waiting "practically" a minute the train continued shunting in an easy and slow manner to make their coupling. After this shunting, H. was found in the car on his hands and knees bleeding from the nose, ears and mouth, and died shortly after. The helper was not heard as witness and there was no other eye-witness to the accident. H. had marks on both sides of the head and there was also blood marks on the side of the car door and side of his cart opposite each other, at a height where a man's head would come, and when found and asked what had happened, H. said he did not know. The bell of the engine was duly rung. Nothing in the rules provides for giving any warning but the ringing of this bell.

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Held: On the facts, that H. was victim of his own carelessness, the *causa causans* of the accident being the placing part of his wagon in the car; and was not due to any negligence on the part of any officer or servant of the Crown.

2. That even if placing the back of his wagon inside the car was not *per se* negligence, the fact of placing his head between the cart and the car door was reckless negligence which caused the accident. That a wrongful act cannot impose a duty on another.

PETITION OF RIGHT seeking to recover $15,000 damages alleged to have been suffered by reason of the death of suppliant's husband which occurred whilst he was unloading a car load of wood in the railway yard of a Government railway.

September 22nd and 23rd, 1921.

Case was heard before the Honourable Mr. Justice Audette, at Fredericton.

Mr. Hughes for suppliant.

Mr. Hanson, K.C., for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 15th day of October, 1921) delivered judgment.

The suppliant, by her petition of right, seeks to recover the sum of $15,000.00 for damages she alleges to have suffered from the death of her husband arising out of an accident occurring in the railway yard of the Government railways, at Fredericton, N.B., a public work of Canada.

On the 5th of August, 1919, Harris, the suppliant's husband, a teamster, who had been for 14 years in the employ of one R. T. Baird, a witness heard herein, was engaged with an Austrian (whose whereabouts, it was

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stated at bar, could not be found, and was therefore not heard at trial) in unloading a car of mill-wood stationed in the railway yard, at Fredericton, on siding No. 3.

Harris was driving a double team four-wheel dump cart, with high sides, i.e., about 3½ feet high from the axles and 6 feet from the ground,—the box extending about 1½ feet behind the wheels. The centre of the dumping box was resting upon the axle of the hind wheels which were about four feet and eight inches in diameter. The width of the dump-cart being greater than that of the door of the car, his waggon and team were backed slantwise, to the sill of the door, on the platform adjoining siding No. 3—with the back of the box or dump-cart projecting inside the door of the car from which the mill-wood was being unloaded into the waggon. As the platform was one foot lower than the floor of the car, the back of his waggon projected into the car a little over one foot and a half. The hind wheel was resting against the side of the car one foot from the ground, part of the wheel itself being inside the car.

Between about 3.30 and 4 o'clock in the afternoon, a shunting-train came in the railway yard, and after warning had been given to Harris, moved a car load of horses from said siding No. 3. It also moved Harris's car at his request, about 50 feet. This same shunting-train came back to siding No. 3, about 15 to 30 minutes afterwards to get some way-freight and backed towards Harris's car, under the signal of rear brakeman Hanson. This man was called as a witness by the Crown, and gave his testimony in a most creditable manner. It was frank, honest and truthful,—free from the entanglement and diffuseness which characterized that of some of the other witnesses. I will cite the following excerpt therefrom, viz.:—

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"I am prepared to swear the waggon was backed into the car at the time. There was a man on top of the waggon standing wood on its end. I saw that the waggon was backed into the car. I gave a stop signal to the train, I judge about a car length from where the coupling was to be made. I hollered something to this man, I think it was 'look out, we are going to move those cars,' or 'hit those cars'—some warning. If he made any reply I did not hear it.

HIS LORDSHIP: "How far away were you from him?"

"A. I judge seventy feet,—two car lengths, I imagine. He got off the waggon and went to the horses heads. I waited a matter of practically a minute, and took it for granted that his waggon was clear of the car, and gave a slow signal to back up, and the coupling was made.

"Q. What kind of a coupling was it? A. Very easy. Do you mean the impact, or automatic coupling?

"Q. I mean the impact? A. Very easy.

"Q. Did the coupling push the cars back? A. I don't think a coupling could be made that would not move the cars a little bit. In that case I don't think it moved the cars but very little, because it was an exceptionally easy coupling.

"Q. What happened after that? A. I cannot just remember what it was, what we had to do. I, of course, took my orders from Conductor Arbeau. At least I pulled the pin on the train and we left No. 3 siding.

"Q. Before you left No. 3 siding, was there not another operation? A. That was the operation in its going in there and getting this car.

"Q. Was there not after the coupling took place a further signal given, to back for certain purpose? A. Not my orders.

"Q. You did not give the order? A. No.

"Q. Do you know if the train did back up? A. I do not . . . .

"HIS LORDSHIP: After you moved out that time did you come back again? A. Not that afternoon, not until evening, as well as I can remember. We went right out from there then to run our suburban train to Marysville.

"Q. At that time you saw this cart backed in against the car? A. Yes, otherwise I would not have stopped the train.

"Q. You thought it was in rather a dangerous position. A. I did.

"Q. And if you shoved the train back it would be dangerous? A. Yes.

Q. For anybody who might be there? A. Yes.

"Q. And you don't know that they did move it. You hollered? A. The man I hollered to got off and went to the horses' heads.

"Q. Did he move the cart away? A. I took it he did.

"Q. Did he? A. I am not prepared to swear that. I was standing two car lengths away near the engine.

"Q. Close to the track? A. Right alongside the cars.

"Q. And was your eye on him? A. I looked, yes.

"Q. And you cannot tell whether he moved? A. I am not prepared to swear he did, no."

The evidence of this witness with respect to slow and easy character of the shunting is overwhelmingly corroborated all through the evidence. He is also corroborated by witness Staples with respect to the man going to the horses' head, and as to the dangerous practice of placing the back of the waggon into the cars.

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Now after the operation of this second shunting on siding No. 3, Harris was found in the car on his hands and knees, bleeding profusely from the nose, ears and mouth and he died fifteen to twenty minutes afterwards.

Witness Staples, who was one of the first to come to the car after the accident, asked Harris "what did it" and the latter answered he did not know.

There was no eye-witness to the accident. The theory advanced by some of the witnesses,—and I cannot see any other—is that Harris, at the time of this second shunting, while he was in the car, put his head between the side of the dump-cart and the frame of the door of the car—probably to see what was going on outside the car, with the result that his head became jammed between the two when the car moved in the process of shunting. This is no strained theory and I accept it. Witness Baird, who saw Harris after the accident said he noticed a cut on the temple; marks on both sides of the face; a cut on one side and bruise on the other. Blood was also found on the side of the door, about 5 feet from the floor of the car and blood on the side of the waggon, at a corresponding height.

As established by evidence there is no rule providing that when shunting is going on in the railway yard notice must be given to all or any person loading or unloading cars in the yard; but the rule provides that the bell must be rung when the engine is in motion. Upon this latter question there is in this case the usual conflicting evidence that the bell rang and that it did not ring because I did not hear it. I have had occasion many a time in the past to consider this class of evidence. While in the view I take of the case it may not be necessary to offer any observation upon this

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point, I will, however, state that in my estimation such evidence must be approached with due allowance for the difference between the mental habits of persons in taking cognizance of what is happening in their immediate vicinity, for instance one person may have apprehended perfectly a portion of the phenomena surrounding him at a given time and yet have been insensible to the rest. One witness may answer that he did not hear the bell and whistle of a locomotive although both were sounded and he was near enough to hear them both, the psychological reason being that his attention was engrossed in some other fact. In such a case the evidence of another witness who did see the flagman, hear the bell, etc., must be taken in preference to the negative evidence. Indeed, in estimating the value of evidence one must not lose sight of the rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negatibus;* because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed. *Lefeunteum* v. *Beaudoin* (1).

Having set out so much of the facts of the case as is deemed necessary for its determination there now remains the consideration of its legal aspect.

Harris was a licensee or invitee.

In determining the question of liability in all cases as the one before the court, it is necessary to examine the conduct of both parties in the circumstances, and note the bearing the acts of each had upon the resultant injury. Want of care must be posited as the cause of the injury. Then, whose *incuria* was the proximate

(1) [1897] 28 S.C.R. 89.

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or active cause of the accident? Liability is established where it is shown that the party injured had some legal right to be on the locus of the accident and *did not know of a peril* to his safety that was known to the respondent, but in respect of which he took no care to warn the party injured.

Negligence is want of care in the circumstances and every case must be determined upon its own set of facts.

The legal doctrine applicable to this class of cases is that when a person is on the premises of another upon business in which both are concerned, *the visitor is bound to use reasonable care for his own safety* and is further entitled to expect that the occupier or owner shall on his part use reasonable *care to prevent* damage from unusual danger which he knows or ought to know—*Beven on Negligence,* 3rd Ed., 451, 682; *Indermaur* v. *Dames* (1); *Heaven* v. *Pender* (2); *Pollock on Torts,* 11 Ed. 514; *Southcote* v. *Stanley* (3); *Davies* v. *Mann* (4); *Loiselle* v. *The King* (5); *Cook* v. *G. T. Ry.* (6); *Norman* v. *G. W. Ry. Co.* (7), and see also 53 Can. L. J. 417 et seq., and 21 Hals. 387 et seq., where a general discussion of the question is to be found.

Much stress has been laid on the ringing of the bell when the locomotive was moving in the railway yard,—a statutory duty which, under the evidence, I have found to have been discharged. However, must it not be realized that even if there had been no ringing that Harris would not have been in any worse

(1) [1886] L.R. 1, C.P. 274; 15 W. R. 434.
(2) [1882] L. R. 11 Q. B. D. 503, at 507 et seq.
(3) [1856] 1 H. & N. 247.
(4) [1842] 10 M. & W. 546, at p. 549.
(5) [1921] 20 Ex. C.R. 93, 56 D.L.R. 397.
(6) [1914] 19 D.L.R. 600; 31 O.L.R. 183.
(7) [1915] 1 K.B. 584.

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position. The bell of the locomotive was presumed to be ringing the whole time when moving. Harris must have heard the bell when the shunting took place on sidings No. 1, 2, 4 respectively. The ringing to him was no special warning, and he was not entitled to any more, although the evidence disclosed he did receive special additional warning. Can it be earnestly contended that when at a station, on a passenger train, a car is added or taken off, involving shunting, that the passengers should be notified of such shunting, if it is done in the usual and easy manner? No such duty, no such unnecessary burden is imposed upon the railway company.

There was no trap set by the railway company and Harris was bound to use reasonable care for his own safety and he was not entitled to be protected or insured upon the property in its ordinary state. *Sullivan* v. *Waters* (1).

If it can be said that a trap was set on the premises, that trap was set by Harris himself in placing the back of his waggon inside the car in a way that its high sides could jam his head against the side of the door if the car moved; and by putting his head into such a trap no negligence could be imputed the employees or servants of the Crown acting within the scope of their duties and employment, as provided by sec. 20 of the Exchequer Court Act and its amendments.

Had his waggon not been placed by him in such a dangerous position, it is self-evident that this easy shunting would have had no fatal result. The *causa causans* of the accident was the placing part of his waggon in the car; but the proximate cause, the cause *sine qua non* was putting his head between the casing of the door and the side of the waggon.

(1) [1864] 14 Ir. C. L. 460; [1903] 58 L.R.A. 77 (cited).

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If the placing of the back of his waggon inside the car was not *per se* negligence, and the evidence of both parties state it is a dangerous practice,—the fact of placing his head between the waggon and that car door was reckless negligence which caused the accident. A wrongful act cannot impose a duty on some one else. There is no act of negligence on behalf of any officer or servant of the Crown which caused the injury and there is no breach by the respondent of any duty owed to Harris. The proximate and direct cause of the accident is the obvious *incuria*, want of ordinary care and prudence for Harris to have thus set a trap and to have run his head into it. The accident was the result of his own negligence. Harris has no one to blame but himself. He was the victim of his own recklessness, imprudence and negligence.

Having come to this conclusion it becomes unnecessary to consider the numerous other questions of law raised at bar.

Therefore the accident being obviously the result of Harris's *incuria*, want of elementary care and prudence, he is adjudged not entitled to any portion of the relief sought by the petition of right herein.

Judgment accordingly.

Solicitors for suppliant: *McLellan & Hughes.*

Solicitors for respondent: *Slipp & Hanson.*