1922
September 28.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE NASHWAAK PULP AND PAPER CO.....DEFENDANT.

Damages—Circumstantial Evidence—Burden of Proof—Appreciation of evidence.

Where plaintiff is forced to prove his case from presumptive or circumstantial evidence, such evidence in order to prevail should not only give rise to a presumption in favour of plaintiff's contention, but should also exclude the possibility of the accident having been occasioned by any other causes than those relied upon by the plaintiff.

INFORMATION filed by the Attorney General of Canada on behalf of His Majesty the King to recover from the defendant damages to a train and crew of the Canadian National Railway resulting from the said train toppling over a embankment at the bridge over the Nashwaak River in the Province of New Brunswick.

July 26th, 1922.

Case now heard before the Honourable Mr. Justice Audette at Fredricton, N.B.

Mr. P. J. Hughes and *Mr. Raleigh Trites* for plaintiff.

Mr. W. Henry Harrison and *J. J. F. Winslow* for defendant.

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AUDETTE J. now (this 28th day of September, 1922), delivered judgment.

This is an information exhibited by the Attorney General of Canada, whereby the Crown claims the sum of $24,319.22 as damages resulting from an accident on the Canadian National Railway. It is alleged that the right of way caved in as a result of the use, in the manner hereinafter mentioned, by the defendants, of their piers and dams in driving logs on the Nashwaak River, near Marysville, in the County of York, in the Province of New Brunswick.

The defendants, who as well as their predecessors in title have been driving logs on the river in question for a number of years, deny having, in any manner whatsoever, done anything on the river which caused the accident in question; and aver by their pleadings that the accident resulted from the improper and negligent construction of the embankment which caved in and slid down the river on the 10th May, 1920.

The parties herein have filed for the purposes of this action, as exhibit No. 11, the following admission, viz.:—

"1. That the defendant is riparian owner on both sides of the river from the highway bridge at Marysville to a point above the abutments and the piers holding the booms of the defendant company, which were carried out at the time of the accident.

"2. That a dam above the highway bridge at Marysville was in existence for over sixty-five years prior to the time it was carried out.

"3. That the C.N.R. authorities knew of the building of the dam and had the plan thereof."

And by exhibit No. 10, it is further, *inter alia*, admitted:

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"(7) That the right of way upon which the Nashwaak Bridge and its approaches are situate, to a width of 200 feet on the west bank and 425 feet on the east bank, is vested in His Majesty the King in fee simple."

The accident took place on the early morning of Monday, the 10th of May, 1920.

On that morning of the 10th May, 1920, Moore, a locomotive engineer on the C.N.R. left South Devon at 4.40 a.m. and passed over the fill adjoining the railway bridge, where the accident occurred later—at between 4.50 and 4.55 a.m., with engine and tender running backwards and saw nothing, felt nothing unusual. He got over the place in question without accident and without noticing anything wrong.

On the same morning of the 10th May, 1920, Conductor Long testified that he left South Devon, at 4.50 a.m. with the local freight train, loaded with pulp wood, composed of engine and about fifteen cars and van, and proceeded to Marysville, which he left at 5.30 a.m., and at about 1¼ miles therefrom when he came to the west embankment of the Railway bridge built across the Nashwaak river, the engine, tender and two cars went over the embankment—as more particularly shewn by the two photographs, exhibits Nos. 1 and 2.

Two of the crew lost their lives, one was injured, the track and rolling stock were damaged; and for the recovery of all such elements of damage the Crown is now suing the defendants.

Long says he came over from his van to the place of the accident and found half of the filling gone—from the centre of the road it had slid out. The rails and sleepers had toppled over, leaning towards the river. He judged about 65 feet in length had so slid. The centre of the track between those 65 feet was worn out more than the ends.

The embankment at that place is 18 feet high.

The engine and two cars took also a deal of material with them when falling down the embankment.

There had been a steady and heavy rain all of Saturday and Sunday (8th and 9th May) preceding the Monday (10th) upon which the accident happened. One witness said he thought the rain had started during the night of Friday.

The river was running high and rising on Saturday and Sunday, the volume of water being increased by the melting of snow in the forests and the heavy rain during several days. Freshets were manifested at different places on the river, around the date in question. And witness Underhill said that he noticed quite a freshet, but that it was nothing unusual for that time on the river.

The Nashwaak river, as put by one witness, is a "savage river," liable to rises and falls.

About three-quarters of a mile or so below the railway bridge, adjoining which the western embankment is built on the edge of the shore and which slid out—the defendant company had erected a concrete dam, and in 1919-1920, at 1,000 feet above the dam, they had five piers diagonally set across the river and at the same height as the dam, being composed of two shore abutments and three piers, in front of which was a floating boom tied to the piers, for the purpose of gathering their logs. In the result two new piers had been added at that date. The whole installation was approved by the Provincial Government. 28 Vict. c. 53. N.B.; 9 Geo. V., c. 109. N.B. *C.P.R.* v. *Park* (1).

(1) [1899] A.C. 535.

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The theory of the Crown is that during the night between Sunday and Monday the top of these piers gave out under the pressure of the logs which had formed a floating jam; but there was no eye witness of the actual occurrence heard before me. Yet it would appear from the evidence that the piers had given away and the water receded before the first train passed over the embankment in question on the morning of the accident.

The river is about 200 feet wide and 14 feet deep, which would give quite a large cross-section.

Now it is contended by the plaintiff that the gathering of a large quantity of logs at the piers had the effect of raising the water about three feet higher than the highest level of the past, and that, assuming the logs went over suddenly during the night of Sunday to Monday, the flow of the water being impeded and retarded by the logs, in suddenly receding, created a suction under the embankment at the railway bridge about three-quarters of a mile up the river. While this theory is supported by some evidence and contradicted by other, it may be stated, that under conflicting evidence, it is so asserted. And as admitted at trial, the evidence does not disclose the cause of the accident. Even if, as surmised, the jam at the piers might have occasioned the damage to the bank there is no evidence that it did and there is no reason to take that inference as a fact and be on the alert to accept it. Was this alleged flood on the river the result of the piers or of the heavy rain? No one saw the waters receding suddenly, as alleged. Washouts on railways are continually occurring in the course of the year, and more especially in the spring, as a result of heavy rain and freshets, as well near and away from rivers. The accident itself affords no just inference

against the defendants— it is a matter of proof. One must look around and see if the accident might just as well be the result of other causes. It is contended by witnesses heard on behalf of plaintiff that a floating jam would not affet the height of water to the extent mentioned by some other witnesses.

Now confronting this wide field of conjecture, there is sufficient evidence of a positive character to justify the inference that it was not good and prudent workmanship to construct of sand and gravel an embankment 18 feet high on this edge of a shore without the protection of rip-rap. How indifferent the railway people were to the possibilities of trouble here is further manifested by the fact that the workmen engaged in constructing the embankment were taken away before the same was completed to the satisfaction of the person in charge of such construction. Moreover, if the waters had only reached a level of 3 feet less, the slide and the accident might just as well have happened from the same cause on account of defective construction. There is no evidence establishing that the scouring or caving in started high or low on the bank.

There is ample evidence on the record to find that the building of such a railway embankment with a bank of light gravel and sand exposed to the action of the water in the river would not be proper workmanship and would amount to negligence. All reasonable care in the construction and maintenance of the bank does not seem to have been established.

It is important, however, to note and consider that while it is contended that the water went to this height of 2 to 3 feet above the normal height—that no one ever saw it. The contention is exclusively based upon the evidence of witnesses who gather and reason it from indicia upon the ground—upon the soil.

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And more especially, upon the evidence of witness Wade, a section man upon this very section which was under his care, who, after the accident—at about 9 o'clock on Monday morning, the 10th May, 1920, crossed over the east side, the side opposite where the accident happened and made a mark on a telegraph post at the height he thought the water had gone up to. Again it will be noted this witness speaks not from having seen the water at that height but at the height he theorized and surmised it went from *indica* on the post. In appreciating this testimony one must not forget that it had been raining heavily for several days and that this telegraph post must have been wet and soaked with rain from top to bottom. How could Wade with certainty distinguish the wet from the rain and the wet from the water from the river?

It is in evidence that by Sunday and even Monday morning there was a serious and large accumulation of logs occasioned by the piers of the railway bridge for 50 yards back, as testified to by witness Easterbrook—above the place where the accident happened—and yet this large accumulation of logs—as shown on several photographs filed as exhibits—did not seem to have interfered with the flow of the water in the river below. There is no evidence to that effect and it is with this jam above the railway bridge that this high water and the floating jam below would have manifested itself at the piers near the dam, three-quarters of a mile below, according to the theoretical and surmising evidence, placing the cause of the accident to such jam.

There was a strong current in the river during the days in question—but it is well in this respect to consider that the embankment that gave way and where the accident happened, is at almost right angle at the

bend of the river where the full strength of the current strikes the very opposite side of the river where the accident happened. Moreover, one must not overlook that the lower end of the western wing wall of the railway bridge, adjoining the place of the accident, extends about 15 feet from the shore, as testified by witness Maxwell, a civil engineer, who recently made a survey of the locality, and the main abutment is almost at right angle with the river.

From the evidence adduced by witness Price it appears that the bank would have—either partly or entirely—gone only between the passages of the first train and that of the freight train that morning. He saw the accident from the opposite side of the river, at a distance of about 200 yards. He says that at about 5 o'clock, or before, that morning, when there was a dense fog he "thought he noticed something like fresh dirt on the south side of the embankment."

And at about six o'clock, when "the fog had lifted some," he heard the train coming and then could see that the bank had gone and the sleepers curved in.

At that time, according to the plaintiff's contention, the waters had subsided. At no time did the logs gather within between 50 and 150 feet below the railway bridge, where it remained clear water. The logs would have gathered between the piers—a thousand feet above the dam—and this distance of 50 to 150 feet from the railway bridge.

The question left to the Court to determine is whether this theory or surmise is a sufficient discharge of the burden of proof cast upon the plaintiff in proving his case—when it is obvious the accident might under the circumstances have happened through and resulted from severall other causes which will have to be examined and analysed.

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(a) The defendants contend the embankment in question "was improperly and negligently constructed"

Upon this point there is clear and distinct evidence, by competent witness, that had the embankment been properly rip-rapped there would have been no caving in, no slide and therefore no accident.

From the examination of all the photographs taken on the 10th May, the date of the accident, there is nothing showing any stone or any rip-rap, but quite the contrary.

There does not seem to have been any slide between the dam and the bridge, except at this embankment made of the material mentioned at trial. Would not that go to show that if there has been any slide there, that it is due to the material used, which was left unprotected?

There is conflict in the evidence of the engineer who was supposed to have the charge of filling behind the western wing wall at the time of the construction of the railway bridge—and Astle, the section foreman who was in charge of the men making the fill of this western approach—with respect to the nature of the material used. However, witness Howie, a civil engineer and one of the contracting firm for that bridge, testified that he saw the material used in the embankment and that while he qualified it as good material, he says that it was not material that would protect itself against water—it would be all right if protected. But would not such a construction become a dangerous menace under flood condition? Even witness Condon, district engineer, C.N. Railway, says he would not leave a bank of light material exposed to water. Coming back to what has already been said which is that if properly rip-rapped, no accident would have

happened, and as testified to by several witnesses the embankment should have been properly rip-rapped above extreme high water and that it would be negligence not to so protect it.

In *The Great Western Railway Co.* v. *Braid, et al* (1), Lord Chelmsford, at p. 116, said: "There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency and this evidence may become conclusive from the absence of proof on the part of the Company to rebut it. See *Wing* v. *London General Omnibus Co.* (2).

(b) The accident happened on the 10th of May when the frost was coming out of the ground and when the railway authorities knew so well that their road bed was not in good and proper order, that witness Long—the engineer in charge of the wrecked freight train—testified that it was an ordinary freshet and that at the time of the accident he was going at a speed of 5 to 6 miles—because they had had "orders limiting their speed to 10 miles an hour due to the softness of the track—that frost was then coming out of the ground, that pulp wood was heavy." Would not the limiting of speed to such a low rate as 10 miles an hour for these reasons amount to the knowledge that their tracks or right of way was in precarious condition and that it would be as plausible to surmise or accept the theory that the accident might have been the result of this bad state of the right of way rather than that assumed sudden receding of water, in the river—which no one ever saw?

(1) [1863] 1 Moore P.C.N.S. 101. (2) [1909] 2 K.B. 652, 663.

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(c) Witness Campbell said that "the jar of a train would start a slide." Would not this be also more likely when the road bed of the railway was in such bad condition that freight trains were not allowed to travel at a greater speed than 10 miles an hour.

(d) A train—or rather an engine and tender—had passed over the place of the accident shortly before the mishap without its crew noticing anything out of the ordinary. Before approaching the railway bridge and the place of the accident there is in the track a curve running into a tangent. Is it not also reasonable to surmise or suggest that a rail might very well have spread after the passage of the first train that morning, and started the slide described by witness Price. Is not that theory as reasonable as the sudden receding of the water on the river having the effect claimed as above mentioned? Witness Condon says the spread of a rail would have the same effect on the embankment as that claimed by the sudden receding of the waters on the river.

(e) Respecting the filling of the approach or embankment at the back of this wing wall, extending 15 feet from the shore, the evidence discloses that it was entrusted to section-foreman Astle, who declared there was no engineer in charge while he did the work—notwithstanding the statement of the railway engineer, who stated he occasionally went over to inspect. The same engineer was also contradicted respecting his statement as to the nature of the material used or rather where the material was also taken from. Witness Astle, the person in charge, stated rock had been thrown at the foot of the fill, but he adds that "we had not time to put rock as we wanted, we were called away." *Withers v. The North Kent Railway Co.* (1).

(1) [1858] 27 L.J. Ex. 417.

Be that as it may, there is no satisfactory evidence to establish that the embankment was properly riprapped and that the necessary stone was put into the embankment.

I must also find, under the evidence, that the riprap mentioned in exhibit No. 9 was not placed on that embankment. The context of the evidence establishes that clearly as the construction contract had nothing to do with the filling at the back of the embankment.

(f) It is further established by the evidence and Exhibit "I" that the building of the wing-wall at almost right angle with the river—at that bend—and extending 15 feet from the shore has had the effect of deflecting the course of the water or current onto the opposite shore and of creating an eddy (or a whirlpool as put by one of the witnesses), at the very foot or toe of this embankment which so caved in. The eddy was observed and noticed by some of the witnesses. Could not that eddy work into a sandy bank—if it was not riprapped—and undermine and scour at the toe, thus provoking the slide in question? Witness Bishop contends that the embankment should not only have been riprapped on the surface, but that the bottom of the fill should have been made entirely of stone. The plaintiff rests his case upon the theory and surmise of one single manner in which the accident might have happened and I find that out of the many other causes above mentioned the one suggested by the plaintiff is the most unlikely of all.

However, the onus was upon the plaintiff to prove his case, and this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility

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of the accident having been occasioned by other causes which are just as plausible, if not more, than that surmised and relied upon by the plaintiff. The plaintiff failed to show with any reasonable degree of certainty—there is no direct evidence, flowing from weighty, precise and consistent presumptions or conjecture arising from the facts proved—that the accident was actually caused by the positive fault, imprudence or neglect of the defendant. In the result I must find that the plaintiff has failed to prove his case. *The Quebec and Lake St. John Railway Co.* v. *Julian* (1); *The Montreal Rolling Mills Co.* v. *Corcoran* (2); *Beck* v. *C.N.R.* (3).

Therefore, there will be judgment, declaring and adjudging that the plaintiff has failed to prove his case and dismissing the action with costs.

Judgment accordingly.

(1) [1906] 37 S.C.R. 632. (2) [1896] 26 S.C.R. 595.
(3) [1910] 13 W.L.R. 140.