IN THE EXCHEQUER COURT OF CANADA.

1919
Nov. 8.

PATRICK McCANN,

SUPPLIANT;

v.

HIS MAJESTY THE KING,

DEFENDANT.

Railways—Government Railway Act, fencing—Damages—Negligence —Evidence, weighing of—Proximate cause.

Held, That where a person approaching a level railway crossing, which he had frequently crossed before and the dangers of which were known to him, does so without proper caution and care, and is struck by an on coming train, his own actions being the sole and proximate cause of the accident, his claim for damages cannot be maintained.

2. That it does not become the duty of the Crown to fence, under sections 22 and 23 of the Government Railway Act, until asked to do so by adjoining proprietors. *Viger v. The King,* referred to.[1]

3. That inasmuch as one who testifies to a negative may have forgotten a thing that did happen, yet it is not possible to remember a thing that never existed. It being conceded that the witnesses are of equal credibility, the evidence of the one who testifies to an affirmative is to be accepted in preference to one who testifies to a negative. *Lefeunteum v. Beaudoin,* referred to.[2]

4. That in order to succeed in an action for damages against the Crown, under sub-section F, sec. 20, Exchequer Court Act, as amended by 9 & 10 Edw. VII., ch. 19, proof must be made that an officer or servant of the Crown has been guilty of negligence whilst acting within the scope of his duties, which negligence was the cause of the accident.

[1] (1908), 11 Can. Ex. C. R. 328.
[2] (1897), 28 Can. S. C. R. 89.

HIS is a case brought by a petition of right seeking to recover the sum of $3,550.00 for damages arising out of an accident on the Intercolonial Railway.

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This trial came on for hearing, before the Hon. Mr. Justice Audette, at the City of St. John, N.B., on May 28 and 29, 1919.

G. H. V. Belyea, K.C., and *W. M. Ryan,* for suppliant.

Fred. R. Taylor, K.C., for respondent.

The material facts of the case are clearly dealt with in the reasons for judgment of the Honorable Mr. Justice Audette who rendered the judgment herein, and which follows:

AUDETTE, J. (November 8, 1919) delivered judgment.

The suppliant by his petition of right, seeks to recover the sum of $3,550.00, for damages arising out of an accident on the Intercolonial Railway, a public work of Canada.

On the 15th September, 1917, between the hours of 10.30 and 11.30 in the forenoon, of a fine bright day, the suppliant, who is a hack-driver in the City of St. John, N.B., was driving a closed coach, with glass windows back and front, on a return trip from the Catholic cemetery near St. John, with passengers who had attended a funeral there. He was himself sitting on the box six feet from the ground, and was travelling from east to west, on Brussels Street, in the City of St. John, N.B., which street is separated from the City Road by Haymarket Square, which is crossed by a spur or branch line of the Intercolonial Railway, as more particularly shown on plan, Exhibit No. 1.

At the time of the accident the suppliant had as passengers in his coach, Messrs. Hunt, Rolston, Massey and two boys; but unfortunately none of these were heard as witnesses.

The suppliant testified that on the day of the accident, he did not see the train travelling on Marsh Street, thence across the Square, and that he did not hear any ringing of the bell and sounding of the whistle. He swears that he saw the train for the first time when he was on the track at Brussels Street when his horses and front wheels were on the track, and that his attention was first attracted to the train by one of two men, who he says were on the top of the last box-car, and that one of them called to him "Look out Pat", and further that he did not see any flagman at the crossing. This train was working reversely, with fifteen cars behind the engine and one in front, and the suppliant's coach was struck on one of the hind wheels and smashed, when he and the passengers were injured. Hence the institution of the present action.

To succeed in such an action, the suppliant must bring his case within the provisions of sub-section (f) of sec. 20, of *The Exchequer Court Act*,[1] as amended by 9-10 Edw. VII., 1910, ch. 19. In other words there must be, 1st a public work, 2nd an officer or servant of the Crown who has been guilty of negligence while acting within the scope of his duties or employment; and, 3rd, the accident must result from such negligence.

The first requirement has been duly satisfied; but has there been any negligence on behalf of an officer or servant of the Crown as contemplated by the statute?

There is, indeed, conflicting evidence with respect to the flagman, the ringing of the bell and sounding of the whistle; but, such evidence must be approach-

[1] R. S. C., 1906, Ch. 140.

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ed 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 benn, 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. *Lefcuntcum v. Beaudoin.*[1]

The presence of a flagman is denied by the suppliant, and most of his witnesses, yet the policeman called on his behalf saw the flagman signalling on City Road and waving his hands. That is one step towards establishing the presence of a flagman, and that is amply corroborated by the crew of the train, and by one who was in Cogger's store, who saw him running ahead of the train, through Haymarket Square, and who even recognized Breen as such flagman. Witness Hunter says he actually saw Breen giving signals at both streets, and Breen him-

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

self testifies to the same effect. Now the policeman says he did not see the flagman on Brussels Street, but he said that at that time there was a good deal of traffic, and therefore his attention must have been otherwise engaged.

The same thing may be said with respect to the bell and the whistle. Some of the witnesses for the suppliant heard the sounding of two long and two short blasts; but, that has been denied by the suppliant himself and some of his witnesses. It is now well known that the ringing of the bell is mostly always done automatically, and the crew testified to its being rung.

Now, coming to the evidence of the respondent, it is established by Flagman Breen, that on the day of the accident, he flagged City Road and that he also flagged Brussells Street. After explaining how he flagged at City Road, he said that he then ran through the square to Brussells Street, where he stopped McCann's coach which was then about a length east of the track, and that after stopping the coach he stopped two little children on the southern sidewalk. After protecting these children, he turned around and saw that McCann had disregarded his warning and was on the track, his horses about going over, when the train was coming pretty close to him.

Then coming to this part of the evidence respecting the words "Look out Pat", so often referred to in the evidence, and that the suppliant endeavoured to establish as coming from the lips of the man on the top of the last car, I must find that this was denied and cannot be otherwise explained than from the reasonable conjecture that it came from some of the occupants of the coach driven by the suppliant

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who realizing the danger of their position called out to him to be careful, and being known to them, they called to him by his name.

The suppliant contends the respondent or his officers or servants were negligent in that:—1st. The crossing was not fenced; 2nd. That there being no fence at this level crossing, there was an obligation upon the Crown, under section 33, of *The Government Railway Act*,[1] to have an employee stationed at the intersection of the railroad with City Road and the extension on Brussels Street. 3rd. That notwithstanding section 34 of that Act, there was transgression of the rule as to speed in a thickly-peopled community. 4th. That there was no protection afforded by the presence of a man in rear of the car, when the train was moved reversely; and 5th. There were the omissions of sounding the whistle and ringing the bell at a crossing.

As to the first charge of negligence, I may say, following the decision in re *Viger v. The King*[2] that there being no evidence establishing that the Crown was ever asked to fence in the *locus in quo*, there is no duty cast upon it to fence under sections 22 or 23 of *The Government Railway Act*. In other words the statute does not in the present instance impose upon the Crown the duty of fencing such a place as a public square in the centre of a city.

With respect to the second charge of negligence, it will be sufficient to state that section 33 of the said Act, only contemplates the case of two railways intersecting one another, and is not at all apposite to the present state of affairs.

[1] R. S. C. 1906, C. 36.
[2] (1908), 11 Can. Ex. C. R. 328.

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Coming to the third charge, I must find it answered by what has been said with respect to the first one, and that is, no fence being required there was no restriction as to speed. And further that under the evidence it cannot be found that the train was proceeding at an excessive speed.

Then the fourth objection is answered by the evidence of the suppliant, which placed two men on the rear car and that of the respondent which placed one. And it was further established that the man on the rear of the car applied the emergency brakes just as soon as he saw the suppliant on the track, and he contended that at that time McCann had his head turned towards the south.

The last charge is that of the failure to comply with the requirements of section 37 of *The Government Railway Act,* which says that: "The bell shall "be rung or the whistle sounded at the distance of "at least eighty rods from every place where the "railway crosses any highway, and shall be kept "ringing or be sounded at short intervals, until the "engine has crossed such highway."

This section provides for the ringing of the bell or the sounding of the whistle, but not for both. It is clearly in evidence on behalf of both parties that the whistles were sounded at one and at two separate intervals respectively, and it is further established by the respondent's evidence that the bell was ringing the whole time. This evidence that the bell was ringing the whole time can practically be given only by the crew, as given in the present case. Yet, if that evidence were challenged and if I were to conclude that the bell was not ringing at the time of the accident, a fact I cannot find under the evidence—I must also find that such fail-

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ure was not the proximate cause of the accident, it was not the *injuria dans locum injuria.* Indeed the proximate cause of the accident is the want of caution and care in approaching the crossing by McCann, and his determination to take his chances in going over the crossing, after he had been ordered to stop, and while the flagman was attending to other members of the public for their protection.

Moreover, while there are imperative statutory duties cast upon a railway operated under legislative authority, there are also duties cast upon the public travelling over railway crossings. A person cannot with perfect immunity approach a railway crossing without a reasonable amount of caution—especially is that so, when that crossing is well known and has often been travelled over by the party complaining about it. This crossing is in no sense in the nature of a concealed trap. According to witness Murdock heard on behalf of the suppliant, there would be no difficulty for a person travelling east to west on Brussells Street, to see a train backing, travelling on the square.

Clearly, as it was said in the *B. C. Electric Railway Co. Ltd. v. Loach,*[1] if the suppliant had not got on the track,—whether or not we accept the evidence that he was warned off by the flagman, and that he did so with absolute disregard to warning, the question which suggests itself is did he approach it and did he get there with ordinary care and diligence on his own part, as it was incumbent upon him to do.

As stated in the *McAlpine* case,[2] "There is no rule "of law in England as that if a person about to cross "a line of railway looks both ways on the approach-

[1] (1915), 23 D. L. R. 4; [1916] 1 A. C. 719.
[2] 13 D. L. R. 618; [1913] A. C. 845.

"ing track, he need not look again just before cross-"ing it." Yet I cannot dispel from my mind that the suppliant should have been more careful and diligent in approaching and taking the track. He knew that crossing, having often travelled over it, and under the circumstances, must it not be expected from a person exercising ordinary care and prudence to look before venturing upon the track? The greater the danger, the greater should be the care and prudence. By taking the track as he did he was the sole and proximate cause of the accident. The omission to do the things which he ought to have done, and his doing the things he should not have done, constitute the negligence which determined the accident. He was the victim of his own negligence and carelessness.[1]

Therefore, under the circumstances and under the evidence adduced, I am unable to find any negligence on behalf of an officer or servant of the Crown, acting within the scope of his duties to which, under the provisions of section 20, of *The Exchequer Court Act,* should be attributed the cause of the accident. The suppliant has failed to prove his case, and there will be judgment declaring that he is not entitled to any portion of the relief sought by the petition of right.

Solicitors for suppliant: *Wm. M. Ryan.*

Solicitor for respondents: *Fred. R. Taylor,* K.C.

[1] *Parent v. The King,* (1910), 13 Can. Ex. C. R. 93; *Brilliant v. The King,* (1914), 15 Can. Ex. C. R. 42; *Cantin v. The King,* (1915), 18 Can. Ex. C. R. 95; *Andreas v. The C. P. R.,* (1905), 37 Can. S. C. R. 1; *Morrison v. The Dominion Iron & Steel Co.,* (1911), 15 N.S.R. 466; and *Villeneuve v. C. P. R.,* (1902), 2 Can. Ry. Cas. 360.