

IN THE MATTER OF THE PETITION OF RIGHT OF

1918

Sept. 5.

DAME ADELE LUCAS, OF THE PARISH OF ST. JEAN BAPTISTE DE L'ISLE VERTE, IN THE COUNTY OF TEMISCOUATA, WIDOW OF MAJORIQUE DUBE, IN HIS LIFETIME, FARMER, OF THE SAME PLACE, AS WELL, PERSONALLY AS TUTRIX DULY NAMED TO ROSE-ALMA DUBE, GABRIELLE DUBE, AND BLANCHE DUBE, MINOR DAUGHTERS, ALL OF THE SAME PLACE,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Crown—Railway—Level crossing—Government Railway Act—Gross negligence.

The suppliant's husband and two children were foolishly and recklessly driving along the highway in a buckboard, and while passing over a level crossing of the Crown's railway, the horse struck the engine of a train on said crossing, and they were killed. In the action the Crown was charged with negligence on four points, namely, that (1) the level crossing was a dangerous one and the Crown should have either built a viaduct or placed gates on the highway; (2) that the *locus in quo* "was a thickly peopled locality"; (3) and that therefore the train should have crossed the highway at a speed of not greater than six miles per hour; (4) that the trainmen failed to give the signals required by law.

Held, following *Harris v. The King* (1904), 9 Can. Ex. 206, that where the Minister or the Crown's officer in the exercise of his discretion comes to the conclusion not to make a viaduct or put gates across a highway, it is not for the Court to say that the Crown was guilty of negligence, even where the facts show the crossing to be a very dangerous one; and further on the facts that the crossing in question was not located in "a thickly peopled portion of any city, town or village" within the meaning of the *Government Railway Act* (R.S.C. 1906, c. 36), and that therefore there was no negligence in running the train at a greater speed than six miles per hour and that the proper signals were given by the trainmen.

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Held, further, that the deceased behaved in a manner not only amounting to want of ordinary care, but foolishly and recklessly, and was guilty of gross negligence, and this was the decisive cause of the accident.

PETITION OF RIGHT for damages arising out of an accident on a Government railway.

Tried before the Honourable Mr. Justice Audette, at Fraserville, P.Q., July 2, 3, 1918.

E. Lapointe, K. C., and *A. Stein*, K.C., for suppliant.

Léo Bérubé, *E. H. Cimon*, for Crown.

AUDETTE, J. (September 5, 1918) rendered judgment.

The suppliant, by her petition of right, as well on her own behalf as well as tutrix on behalf of her minor children, seeks to recover the sum of \$8,000, as damages against the Crown, occasioned by the death of her husband and two of her children.

On Sunday, October 10, 1915, at about 11.30 a.m., the late Majorique Dube, the suppliant's first husband (she has since remarried), was returning from church, with two of his children. His son, 28 years of age, was driving and sitting on the front seat of a one-seated "slide" or buck-board, and his 17 years old sister was sitting alongside of him. The father was sitting on a chair behind them, holding on to the back of the seat.

The church, at Isle Verte, is about eight arpents to the north from the Intercolonial Railway crossing, which runs at right angles to the highway leading from the village to the south. Dube resided about 4½ miles south from the village, and was on his way home from church, having travelled over this cross-

ing a great many times before, and was quite familiar with the different aspects of the same.

Within $4\frac{1}{2}$ arpents from the crossing on the north there is a small group of houses, together with three residences on the south thereof. This small settlement is practically separated from the village by a hill of about 75 feet, and from the top of this hill to the crossing there is a flat space of 4 to $4\frac{1}{2}$ arpents.

The line of vision, on the west, is intercepted by buildings at certain points, but not for any distance, and a train at certain places could be seen as far as two miles from the crossing.

On the day of the accident, the deceased were driving a spirited horse of five years old, which had previously been used for reproduction, but which had been gelded the previous year. They were driving very fast, spurring "*ils bauchaient*", as put by one of the witnesses. On the hill they first passed Joseph Michaud and two rigs, and afterwards they passed other carriages that were ahead of them. When they reached the top of the hill they passed Boucher, who was driving the first rig in front between the hill and the crossing. Michaud followed Dube, and he cried out to him not to cross because he would not have time to do so; but the occupants of the "slide" seemed not to hear him. Michaud says he saw the train coming out of the woods, saw it coming, saw the smoke of the locomotive, and when he so saw the train he says Dube was about half an arpent distant from him. In the $4\frac{1}{2}$ arpents from the top of the hill to the crossing, Dube distanced Michaud, whose horse was trotting, by two arpents. He was going very fast.

When Dube passed opposite the Beauchesne Hotel, Beauchesne was in his garage, about 40 feet from

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the highway. Beauchesne said he noticed the carriage passing very fast opposite his place, and having heard the train, he rushed out thinking the carriage was going too fast to be able to stop on time.

Witness Elise Berube, at the time of the accident, a servant in the Beauchesne Hotel, was standing in the doorway of the hotel, with one Mr. Gosselin, watching the carriages passing on their return from church. She says, that after hearing the incoming train, she saw Dube coming, his horse was galloping; but when he passed opposite the hotel, the horse had ceased galloping and was going very fast. "*Il allait au grand trot*", not frightened, but pushed to go fast. Mr. Gosselin, who was with Elise Berube, remarked, "They have no time to pass" ahead of the train. And Elise Berube adds that, from what she could see, the horse threw itself between the tender and the engine of the incoming train.

Although in my opinion unnecessary for the determination of the action, several points of interest having been raised, I will give them a passing consideration.

The negligent acts charged against the Crown are:
1st. That the level crossing is a dangerous one, and that the Crown should have either built a viaduct or placed gates on the highway.

2nd. That the *locus in quo* is a peopled part of the municipality.

3rd. And that therefore the train should have crossed the highway at a speed of only six miles an hour, and

4th. That the train-hands failed to give the signals required by law.

1st. All level railway crossings, be they in cities, towns or villages, are dangerous. Dube was quite

familiar with the crossing in question, having had occasion to go over it time and again on business or otherwise, and if he considered it dangerous, he should have taken all the more care and precaution. There was no justification for his reckless conduct. Upon this question of viaduct and gates, I will refer to the case of *Harris v. The King*,¹ where the point was clearly decided against the suppliant's contention. Where, indeed, the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to make a viaduct or put up gates across the highway, it is not for the court to say that the Minister or the officer was guilty of negligence, even where the facts would show that the crossing was a very dangerous one. See also *Hamilton v. The King*;² and *Quebec & Lake St. John R. Co. v. Girard*.³

2nd. The few residences, distant from one another, in the neighborhood of the crossing at the station, could not constitute, a "thickly peopled portion of any city, town or village", within the meaning of the words used in section 34 of the *Government Railway Act* (R.S.C. 1906, ch. 36). *Andreas v. C.P.R.*;⁴ *Parent v. The King*.⁵ And as each side of the railway right of way was properly fenced, as required by sec. 22 of the *Government Railway Act*, and as on each side of the crossing there were return fences to the cattle guard on the track, although not required by the *Government Railway Act*, there was no statutory limit to the speed at which a train was to be run at the crossing in question. The speed of

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¹ (1904), 9 Can. Ex. 206, 208.

² (1911), 14 Can. Ex. 1, 13, 14.

³ (1905), 15 Que. K.B. 48 at 52.

⁴ (1905), 37 Can. S.C.R. 1.

⁵ (1910), 18 Can. Ex. 93 at 101.

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20 to 25 miles an hour at which the train was running was not excessive under the circumstances.¹

3rd. Therefore, there was no negligence in running the train, at the time of the accident, at a greater speed than six miles an hour.

4th. The evidence further establishes beyond peradventure that the proper signals were given by the men in charge of the train. The bell was rung and the whistle was sounded at the proper distance from the crossing. That is clearly established and remains uncontroverted.

Moreover, there is a feature of the case which is of especial significance and that is, the train did not strike Dube's horse and carriage, but it was Dube's horse and carriage that struck the train, between the tender and the cab of the engine. Indeed, the brakeman, who was standing at the left or northern window of the cab, with the engine-driver at the right window, at the time of the accident, says he saw the horse coming and throwing itself between the cab and the tender, and as to that fact, he is corroborated by other testimony. He says the horse "s'en venait a l'epouvante", and he saw it run under the train. The shock of the collision was even felt in the engine.

The engine-driver states in his evidence that he was told by the brakeman that a carriage had just struck them between the engine and the tender. And that fact, he adds, was corroborated by marks on the train, a plate of the lapboard was bent and there was some hair of the horse upon it.

There can be no doubt that the deceased were guilty of gross negligence, of what might be termed

¹ *G. T. R. Co. v. McKay*, (1903), 34 Can. S.C.R. 81; *Quebec & Lake St. John Ry. Co. v. Girard*, *supra*; *Parent v. The King*, *supra*; *G. T. R. Co. v. Hainer*, (1905), 36 Can. S.C.R. 180.

suicidal negligence under the circumstances. Approaching a railway crossing, one is bound to use such faculties of sight and hearing as he is possessed of, and display, at least, what might be called rudimentary precaution and prudence. Had the horse been stopped from this fast trotting and put at a walking pace, the accident would have been averted. As put by Sir Louis Davies in *Wabash R. Co. v. Misener*¹: "Persons travelling along a highway while "passing or attempting to pass over a level railway "crossing, must act as reasonable and sentient "beings, and unless excused by special circum- "stances, must look before attempting to cross, to "see whether they can do so with safety. If they "choose blindly, recklessly or foolishly to run into "danger, they must surely take the consequences."

Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire. The deceased were clearly the victims of their own recklessness, and this action cannot be maintained.

If the horse had been beyond control,—a question upon which there is perhaps evidence both ways, with, however, preponderance that he was under control—he could have been turned and driven into the railway yard by a 40-foot entrance, or on the other side of the road, into a 12-foot entrance to the hotel premises. It was broad daylight,—the train had been seen approaching,—it had given at the proper time the proper signals, and the deceased were endeavoring to get over a crossing well known to them and upon which they had often travelled in the past.

¹ (1906) 38 Can. S.C.R. 94 at 100.

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Not only did the deceased behave in a manner amounting to want of ordinary care, but foolishly and recklessly they rushed, with eyes open, on to their own destruction. It was obviously this conduct and the want of rudimentary precaution, prudence and care on their behalf that was the decisive cause of the accident.

The suppliant, therefore, fails in her action, not being, under the circumstances, entitled to the relief sought by her petition of right, and judgment must be entered in favor of the respondent.

Judgment accordingly.

Solicitors for suppliant: *Lapointe, Stein & Levesque.*

Solicitor for respondent: *Léo Bérubé.*