

1918
 March 25.

IN THE MATTER OF THE PETITION OF RIGHT OF

DAME EUGENIE THIBAULT,
 SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Railways—Injury to brakeman—Accident.

The death of a brakeman riding on a box car while in the discharge of his duties on the Intercolonial Railway, occasioned by the overturning of the car when it suddenly jumped the track, the road-bed and the car being in perfect condition and the train travelling at a moderate speed, must be regarded as an accident due to an unforeseen event and is not attributable to the "negligence of any officer or servant of the Crown . . . in or about the construction, maintenance or operation of the Intercolonial Railway", within the meaning of sec. 20 of the *Exchequer Court Act*.

PETITION OF RIGHT to recover damages for the death of a brakeman while in the discharge of his duties on the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Fraserville, Que., January 15, 16, 1918.

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

Léo Bérubé, for respondent.

AUDETTE, J. (March 25, 1918) delivered judgment.

The suppliant, by her petition of right, seeks to recover the sum of \$22,000 as damages arising out

of her husband's death, resulting from an accident while engaged in the discharge of his duties as brakeman on the Intercolonial Railway, a public work of Canada.

On August 25th, 1916, Horace Levesque was working, as brakeman, on a train travelling on the spur or branch line, between Tobin Junction and The Trois Pistoles Pulp & Lumber Co.'s mills, a part of the Intercolonial Railway. They took up 17 empty cars from Tobin Station to the mill, and they had 15 loaded cars to take from the mill to Tobin. Arrived at the mill, they first took 8 loaded cars down to Tobin Station, and on that first trip passed the place of the accident, at a speed of 10 or 11 miles an hour. They returned to the mills and took down to Tobin the remaining 7 loaded cars, and on their way down the conductor was on the top of the last box car with Levesque, who was sitting on the walking board at the end of the last car, when suddenly that car jumped and left the track, uncoupled and rolled down an embankment, about 40 feet below the track. Levesque was then severely injured and died on the 3rd September following, as a result of the accident which happened at between 5.30 to 5.45 p.m., on the 26th August.

While this train travelled at 10 or 11 miles on the previous trip with 8 cars, at the place of the accident, she only travelled at between 6 or 7 miles with 7 cars, at the time of the accident. The track, at the *locus in quo*, winds around a hill, and the train at the time of the accident was travelling through a parabolic curve, that is, after leaving a 16 degree curve, ran into an 8 degree curve, both bends curving in the same direction.

Without entering into unnecessary details it can

1918

THIBAULT
v.
THE KING.Reasons for
Judgment.

1918

THIBAUT
v.
THE KING.
Reasons for
Judgment.

be stated that in the result the suppliant's evidence established beyond doubt that the road bed at the place of the accident was in especially good condition. The track lay in a rock cut, with rock foundation,—the ties were new, having been placed there the preceding summer or autumn, and were clamped or braced with iron at every other tie,—the road-bed had been attended to during the summer, and, as put by witness Rioux, the place where the accident took place was as good as on the main track. The rails were in perfect order. Then, after an endeavour had been made to prove that steel framed cars were hard to curve, it was established, beyond peradventure, by the suppliant's evidence, that the box-car which jumped the track was a Delaware & Hudson car, and that such cars were very good and perfect. And, moreover, the evidence establishes that this very car was examined after the accident and it was found to be "first class," the wheels and the track "perfect." It further appears from the evidence that certain steel frame cars built at New Glasgow in March, 1917, the year following the accident, have proved defective and had been repaired; but that the Delaware & Hudson cars were perfect, and further, that steel frame cars, used for coal had been in use on the Intercolonial Railway for over 10 years and had given entire satisfaction.

With respect to the rate of speed, the witnesses say, at the time of the accident, the train was travelling at 6 to 7, or 6 to 8 miles, and on the previous trip, over the same ground, on the same day, at a speed of 10 to 11 miles,—and finally they concur in saying that the speed was not excessive and was not the cause of the accident.

The suppliant to succeed in the present instance

must bring the facts of her case within the ambit of sub-secs. (c) and (f) of sec. 20 of the *Exchequer Court Act*, as amended by 9-10 Ed. VII. ch. 19. (The Act. 7-8 Geo. V. ch. 23 (1917), not being in force at the time of the accident.) In other words, the claim must arise "out of the death * * * of Levesque "caused by the negligence of any officer or servant "of the Crown while acting within the scope of his "duties or employment upon, in or about the construction, maintenance, or operation of the Inter-colonial Railway or the Prince Edward Island "Railway."

The suppliant's evidence has amply convinced me that the road bed was in perfect condition, the ties were new and clamped at every other tie, the rate of speed was moderate and far from excessive, and that the box-car which jumped the track was in perfect order. Some of the witnesses have suggested the accident might have been the result of a bolt falling on the track, and which could have caused the accident, but this is only conjecture and surmise. It might also have been the result of a latent defect somewhere and not capable of detection by any ordinary means of examination open to the railway officials.

The *onus* of establishing negligence is upon the suppliant and she has failed to do so. The accident remains unexplained. The case is not within the statute and the action fails. *Colpitts v. The Queen*;¹ *Dubé v. The Queen*.²

What happened was fortuitous and unexpected. *Thompson v. Ashington Coal Co.*³ The event was unforeseen and unintended, or was "an unlooked-

¹ 6 Can. Ex. 254.

² 3 Can. Ex. 147.

³ 84 L.T.R. 412; 3 B.W.C. Cas. (O.S.) 21.

1918

THIBAUT
v.
THE KING.

Reasons for
Judgment.

1918
 THIBAUT
 v.
 THE KING.
 Reasons for
 Judgment.

“for mishap or an untoward event which was not
 “expected or designed.” *Fenton v. Thorley Co.*;¹
*Higgins v. Campbell.*² It was a personal injury by
 accident. In *Briscoe v. Metropolitan St. Ry. Co.*³
 an accident is defined as “such an unavoidable cas-
 “ualty as occurs without anybody being to blame
 “for it; that is, without anybody being guilty of
 “negligence in doing or permitting to be done, or
 “in omitting to do, the particular things that caused
 “such casualty.”

The accident in this case was an unforeseen event
 which was not the result of any negligence or mis-
 conduct of an officer or servant of the Crown, and
 while the court cannot grant any relief in such a
 case as the present, it is to some extent comforting
 to realize the widow and children are receiving in-
 surance moneys to the amount of \$3,000 and that
 they have a home free of the mortgage of \$600 paid
 out of such insurance moneys.

The suppliant is not entitled to the relief sought
 by her petition of right and there will be judgment
 in favour of the Crown.

Action dismissed.

Solicitors for suppliant: *Lapointe, Stein & Le-
 vesque.*

Solicitor for respondent: *Léo Bérubé.*

¹ [1903] A.C. 443; 89 L.T.R. 314; 52 W.R. 31.

² [1904] 1 K.B. 328.

³ 120 Southwestern Rep. 1162 at 1165.