TANCRÈDE DUBÉ.....SUPPLIANT; 1892

AND Nov. 11.

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of Right—Injuries sustained in an accident on a Government Railway—Burden of proof—Latent defect in axle of car—Undue speed in passing sharp curve.

On the trial of a petition claiming damages for personal injuries sustained in an accident upon a Government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of proof is upon the suppliant. He must show affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *primâ facie* case of negligence.

The immediate cause of the accident was the breaking of an axle that was defective. It was shown, however, that great care had been used in its selection and that the defect was latent and not capable of detection by any ordinary means of examination open to the railway officials. The train had immediately before the accident passed a curve which, at its greatest degree of curvature, was one of 6° 52'. It was alleged that the persons in charge of the train were guilty of negligence in passing this curve and a switch near it at too great a rate of speed. On that point the evidence was contradictory, and, having regard to the rule as to the burden of proof stated above, it was—

Held, that a case of negligence was not made out.

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

By his petition the suppliant alleged, *inter alia*, as follows:—

"L'humble pétition de Tancrède Dubé, marchand, de la paroisse des Trois-Pistoles, dans le comté de Témiscouata, district de Kamouraska, représente humblement:

"1. Que le dix-huit décembre dernier (1890), le requérant s'est embarqué à la station des Trois-Pistoles sur le convoi express du chemin de fer Intercolonial

1892

DUBÉ v. THE QUEEN.

Statement of Facts.

qui est un ouvrage public et la propriété du Gouvernement de la Puissance du Canada et exploité par celui-ci ; "

" 2. Qu'il s'est ainsi embarqué sur le convoi du dit chemin de fer après avoir pris son billet de passage et avoir payé le coût de son transport des Trois-Pistoles à Lévis ; "

" 3. Que le convoi *express* qui était la propriété et en la possession de Notre Souveraine Dame la Reine, représentée par le Gouvernement de la Puissance du Canada, était sous la direction et le contrôle des employés de notre dite Dame Souveraine la Reine représentée comme susdit, et que, par la faute, la négligence et imprévoyance des dits employés de notre dite Dame Souveraine la Reine agissant dans la sphère de leurs devoirs et à cause de la mauvaise construction du dit chemin de fer Intercolonial possédé et administré par le Gouvernement de cette Puissance, le dit convoi *express* dérailla près de la station de St-Joseph de Lévis dans le comté de Lévis, dans le district de Québec, et le dit Tancrède Dubé fut grièvement blessé ; "

" 4. Que par suite des blessures reçues lors du dit accident, le dit requérant a fait de grandes dépenses pour soins de médecins et par l'absence de son bureau d'affaires, et qu'il a souffert des peines morales et physiques considérables ; "

" 5. Que le dommage subi lors du dit accident s'élève à la somme de deux mille piastres ($2,000.00) ; "

" 6. Que le dommage ainsi subi et les blessures infligées sont le résultat de la faute, de la négligence et imprévoyance des employés du dit chemin de fer Intercolonial, agissant dans la sphère de leurs devoirs, propriété de notre Souveraine Dame la Reine ; lesquels employés sont sous le contrôle immédiat du Gouvernement de cette Puissance ; "

1892

DUBÉ v. THE QUEEN.

Statement of Facts.

"A ces causes votre pétitionnaire prie humblement qu'une pétition de droit soit accordée afin qu'il puisse faire valoir suivant la loi sa réclamation contre notre Souveraine Dame la Reine, et que la dite somme de deux mille piastres demandée en compensation des dommages réels qu'il a éprouvés lui soit accordée avec dépens distraits."

The Crown pleaded the following defence:—

"1. Her Majesty's Attorney-General is not aware of the truth of the facts set out in the first paragraph of the suppliant's petition of right, and he therefore denies the same and puts the suppliant to the strict proof thereof."

"2. Her Majesty's Attorney-General for a defence to the second and third paragraphs of the said petition of right says, that the derailment of the express train on the 18th day of December, 1890, near the station of St. Joseph de Lévis, by which it is alleged the suppliant met with serious injury, was not caused by the default, negligence or improvidence of the employees of Her Majesty on the said Intercolonial Railway, while acting within the scope of their duty, nor by the bad and defective construction of the said railway at the place of the accident, as alleged in the said two paragraphs; but the derailment of the said express train was the result of inevitable accident and was a fortuitous event beyond the control of Her Majesty's employees and in respect to which Her Majesty cannot be rendered liable."

"3. Her Majesty's Attorney-General denies that the employees of Her Majesty who had the management of the said express train on the said 18th day of December, 1890, were negligent or improvident in the discharge of their duties, and further denies that the said railway was defective in its construction at the place where the said derailment of the said express train is alleged to have occurred."

1892

DUBÉ v. THE QUEEN.

Statement of Facts.

"4. Her Majesty's Attorney-General for a further defence says, that the said petition of right does not disclose any claim which the suppliant can enforce by petition of right, nor does the said petition disclose any cause of action for which Her Majesty can be rendered liable inasmuch as the claim and cause of action therein alleged and set out are founded upon the negligence and misconduct of the servants and employees of Her Majesty upon the said Intercolonial Railway; and it is submitted that the control and management of the said Intercolonial Railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right because of any negligence or misconduct in the management thereof, and that even assuming the said railway to be under the management and control of Her Majesty, no negligence can be imputed to her, and Her Majesty is not answerable by petition of right for the negligence or misconduct of her servants, and no action will lie against Her Majesty for damages in consequence of such negligence or misconduct on the part of her servants; and Her Majesty's Attorney-General claims the same benefit from this objection as if he had formally demurred to the said petition of right."

"5. Her Majesty's Attorney-General for a further defence says, that the said petition of right alleges a cause of action based upon the bad and defective construction of the said Intercolonial Railway, which is a charge of tort against Her Majesty; but it is submitted that no action will lie against Her Majesty for damages, founded upon the bad and defective construction of the said railway, and Her Majesty's Attorney-General takes the same benefit from this objection as if he had formally demurred to the said petition of right."

1892

DUBÉ v. THE QUEEN.

Statement of Facts.

"6. Her Majesty's Attorney-General for a further defence says that the suppliant has not suffered pecuniary loss or damage by reason of the said accident to the extent of $2,000 as alleged in the said petition of right."

Quebec, November 4th, 1892.

Flynn, Q.C., *Choquette* and *Carroll* for the suppliant;

Osler, Q.C., *Hogg*, Q.C. and *Angers*, Q.C. for the respondent.

On the opening of the case, Mr. Choquette stated that in his view of the case it would be sufficient for him to prove that the suppliant was a passenger on the train on the day of the accident, that the accident happened and that the suppliant was injured, and that then the Crown would have to answer the *primâ facie* case of negligence so made out.

[BURBIDGE, J.—I do not think that is sufficient in a petition against the Crown in an accident on a Government railway. You will, I think, have to go further and show in the terms of the statute that the accident was occasioned by the negligence of some officer or servant of the Crown while acting within the scope of his duties or employment.]

November 4th, 5th, 7th, 8th, 9th and 11th, 1892.

Evidence was taken on behalf of both parties and the following facts, amongst others, were established:

The accident took place on the 18th December, 1890, shortly after the express train of the Intercolonial Railway, upon which the suppliant was a passenger, had passed the station at St. Joseph de Lévis. The train was derailed and the suppliant was injured. Near the spot where the accident occurred is a curve in the rails, which, at its maximum curvature, attains a degree of 6° 52'. There was evidence adduced by the suppliant to show that the train was being run at too

1892

DUBÉ v. THE QUEEN.

Argument of Counsel.

great a rate of speed to be consistent with safety in passing this curve and a switch immediately beyond it; this evidence was, however, met by testimony on behalf of the Crown, equally as strong in its character, negativing the fact that undue speed was the cause of the derailment. The weight of the evidence went to show that a defective axle was the cause of the accident. The defect in the axle was, however, a latent one, and was not discoverable by the ordinary means taken by the railway authorities to test the efficiency of this portion of their equipment. It was, moreover, shown that great care had been taken in the selection of this particular axle. The Crown also established the fact that the curve in question had not so great a degree of curvature as to make it a menace to the safety of trains.

At the conclusion of the evidence, counsel on behalf of both parties addressed the court.

Choquette: I submit that the suppliant has made out his case. There can be no doubt that, under the law as it exists to-day, the Crown is a common carrier in respect of Government railways. That being the case, I maintain that where an accident occurs in the operation of trains a *primâ facie* case of negligence is at once established and the *onus* is on the carrier to rebut the same. (Cites Art. 1672 C.C.L.C.; *The Government Railways Act*, 1881; *Lavoie* v. *The Queen* (1); *The Grand Trunk Railway* v. *Vogel* (2); *The Canadian Pacific Railway Co.* v. *Bate*) (3).

Flynn, Q.C.: The case has to be decided under section 16 (*c.*) of *The Exchequer Court Act*. I admit that there is no specific evidence of negligence, but there is a chain of evidence which leads up to that result. The evidence shows that the train was going at forty miles

(1) 3 Ex. C.R. 96. (2) 11 Can. S.C.R. 612.
(3) 18 Can. S.C.R. 697.

1892

DUBÉ v. THE QUEEN.

Argument of Counsel.

an hour. That is a fair inference to draw from the whole evidence, and there is no doubt that such a rate of speed was inconsistent with the safety of the train at the point where the accident occurred.

Osler, Q.C.: A case has not been made out even if it had been a matter between subject and subject. The view of the law taken by my learned friend who opened the case is not the view of the courts of the province of Quebec. The case of *The Canadian Pacific Railway* v. *Chalifour* (1) shows that Art. 1672 C.C.L.C. does not apply to the carriage of passengers, but the carrier's liability in such a case must be determined under Art. 1053 C.C.L.C. The burden of proof is certainly upon the suppliant under section 16 (*c.*) of *The Exchequer Court Act*, and he must prove that the engine-driver was guilty of negligence, or that there was negligence in construction, or both combined. On the contrary, the evidence here shows that the engine-driver was a cautious man. It could hardly be assumed that he would be so careless of his own life as to endanger it on that day. (Cites *Daniel* v. *Metropolitan Railway Co.*) (2).

Choquette, in reply, maintained that the whole current of authority showed that the suppliant was entitled to judgment.

BURBIDGE, J.—The duty of the court after a most careful trial, in which counsel for the suppliant and for the Crown have with great ability and fairness presented the evidence and summed up the case, is simply to find upon the question of fact.

If I thought, in a matter where the responsibility is so great, that I could come to a better conclusion by

(1) M.L.R. 3 Q.B. 324. (2) L.R. 3 C.P. 216.

1892.

DUBÉ v. THE QUEEN.

Reasons for Judgment.

taking more time to consider it, I should certainly do so; but on a trial lasting several days I have had every opportunity to consider the evidence as it has been given and to come to a conclusion.

I think there is a great difficulty in finding upon a question of fact in a case such as this, because the evidence is very conflicting. A considerable number of respectable witnesses say that the speed was unusual. Of course, as it has been said, no one doubts their truthfulness; no one doubts, I think, that these witnesses speak of what they saw and experienced. But they all look back to the events of that day through the accident; and we also have it proved that from St. Charles to Harlaka the rate of speed was great, but not more than forty miles an hour; and it may be that the impressions which they received do not attach to the rate of speed between Harlaka and St. Joseph, although, no doubt, they were under the impression that the train was running quite as fast at that place.

In regard to the train hands, there is a general concurrence—not a suspicious concurrence. Of these, the engine-driver and conductor, are perhaps the most interested witnesses. The others are not brought into the accident in any way, and there is nothing to discredit them except that they are in the employment of the Crown; and taking their evidence it shows that the rate of speed was from twenty to twenty-five miles per hour.

In regard to the passengers, I may say that I attach very considerable weight to Mr. Hudon's evidence. He was a passenger and seems to have been in a position to determine whether the train was going at an undue rate of speed better than any person who has spoken at this trial. I do not know him, but anybody who saw him and heard him give his evidence in the box must conclude that he stated what he thought to

1892

DUBÉ v. THE QUEEN.

Reasons for Judgment.

be true; and he stated that immediately before the accident he passed from near the rear end of the first-class car to the postal car and noticed nothing unusual about the speed of the train. His opportunities for observing the speed were therefore better, I think, than those of any other person who spoke on that point.

Then, with regard to the witnesses who saw the train pass, while they speak of the train going very fast, and some, of its going faster than usual, I think, on the whole their evidence rather supports than conflicts with the view of the train men and Mr. Hudon that there was nothing unusual in the speed of the train on that day.

I think on the question of speed I cannot hold that the suppliant's case is made out. There is too much evidence the other way; and, undoubtedly, if it is an even matter, as Mr. Osler stated, I have no right to fix upon the officers of the Crown any negligence in the management of the train on that day.

I think it is unnecessary to discuss at length the other points of the case, as the case turns upon that.

There is considerable evidence as to the curve which the train had passed immediately before the accident. At the point of greatest curvature, this curve was one of 6° 52′. That was considerable, but not, it appears, extraordinary. One witness, Mr. Macquet, a most intelligent witness, thinks it is dangerous; but against his evidence we have that of a number of practical engineers who have been engaged in constructing and operating railways, and who say that it is not a menace to the safety of trains. I would attach this much importance to it, however, that if the rate of speed had been excessive, I should have thought it necessary to have entered judgment the other way; but, holding the view which I do, that the probable cause of the

1892

DUBÉ v. THE QUEEN.

Reasons for Judgment.

accident was the breaking of the axle, and that having regard to the weight of evidence it has not been proved that the rate of speed was unusual or extraordinary or greater than twenty or twenty-five miles an hour, I think judgment must be entered for the respondent.

Judgment accordingly.

Solicitor for the suppliant: *P. A. Choquette.*

Solicitors for the respondent: *O'Connor, Hogg & Balderson.*