

IN THE MATTER of the Petition of Right of

1904  
June. 13.

ELIZA HARRIS.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Railway—Public work—Death arising from negligence—Defective engine—Dangerous crossing—Undue speed—“Train of cars”—The Government Railways Act (R. S. C. c. 38) sec. 29—Discretion of minister or subordinate officer as to precautionary measures against accident.*

The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks, in the City of Halifax. The evidence showed that the crossing was a dangerous one, and that no special provision had been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed, or shunted, over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engine did not lift quickly but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over toward the track on which the engine and tender were running, and obscured them from the view of anyone who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the rate of six miles an hour.

*Held*, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway both in using a defective engine, as above described, and in maintaining too high a rate of speed under the circumstances.

2. An engine and tender do not constitute a "train of cars" within the meaning of sec. 29 of "The Government Railways Act" (R. S. C. c. 38).

*Hollinger v. Canadian Pacific Railway Company* (21 Ont. R. 705) not followed.

2. Where 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 employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the court to say that the minister or the officer was guilty of negligence because the facts show that the crossing in question was a very dangerous one.

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PETITION OF RIGHT for damages for injury to the person arising out of an accident at a crossing on the Intercolonial Railway, at Halifax, N.S.

The facts of the case are stated in the reasons for judgment.

May 5th, 1904.

The case was now argued at Halifax, N.S.

*W. B. A. Ritchie, K.C.* and *R. Harris, K.C.*, for the suppliant, contended that there was negligence both in respect of the defective engine used by the officers and servants of the railway, and in going over the crossing at too high a rate of speed consistent with safety, while there were no special measures taken to warn the public of danger. The fact of the shunting engine leaking steam at and near the crossing was the chief cause of the accident.

The engine and tender constituted a "train of cars" under sec. 29 of *The Government Railways Act*, R. S. C. c. 38. That section enacts that whenever any train of cars is moving reversely in any city, town or village, the locomotive being in the rear, a person shall be stationed on the last car of the train to warn persons using the crossing. (*Hollinger v. Canadian Pacific Railway Co.* (1).

(1) 21 Ont. R. 705.

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*H. Mellish, K.C.*, for the respondent, contended that the deceased was guilty of contributory negligence in not heeding the statutory warnings given by the men on the shunting engine. He cited *Heaney v. Long Island Railroad Co.* (1); *Debbins v. Old Colony Railway Co.* (2); *Fletcher v. Fitchburg Railroad Co.* (3); 3 *Rapalje & Mack's Railway Digest* (4).

THE JUDGE OF THE EXCHEQUER COURT now (June 13th, 1904) delivered judgment.

The suppliant, the widow of the late James H. Harris, of Halifax, and the administratrix of his estate, brings her petition claiming the sum of ten thousand dollars as damages sustained by her through the death of her husband, which was caused by his being struck by the tender of an engine while he was crossing the Intercolonial Railway tracks, at the Green Street crossing, in the city of Halifax.

It is alleged, among other things, that the death of the deceased was caused by the unskillfulness, negligence and carelessness of the servants and agents of His Majesty.

And first, it is said that the accident would not have happened had there been gates or a watchman at the Green Street crossing referred to, and that His Majesty's officers and servants in charge of the Intercolonial Railway were guilty of negligence in not maintaining either a watchman or gates at that crossing. That view I am not able to adopt. There can be no doubt that the crossing was a dangerous one; and that it would have been prudent to keep, as at times had been done, a watchman at this place to warn persons using the crossing, or to have set up gates there to prevent them from using it while engines or trains

(1) 112 N. Y. 122.

(2) 154 Mass. 402.

(3) 149 Mass. 127.

(4) Pp. 570, 607.

were passing over it. But that, I think, was a matter for the decision of the Minister of Railways and of the officers to whom he entrusted the duty and responsibility of exercising in that respect the powers vested in him. There is always some danger at every crossing; but it is not possible in the conditions existing in this country to have a watchman or gates at every crossing of the Intercolonial Railway. The duty then of deciding as to whether any special means, and, if any, what means shall be taken to protect any particular crossing of the railway must rest with the Minister of Railways, or the officer upon whom, in the administration of the affairs of his Department, that duty falls. If it is decided that certain special means shall be taken to protect the public at any particular crossing, and some officer or employee is charged with the duty of carrying out the decision, and negligently fails to do so, and in consequence an accident happens, then, I think, we would have a case in which the Crown would be liable. But where the Minister, 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 employ a watchman or to set up gates at any crossing, it is not, I think, for the court to say that the Minister or the officer was guilty of negligence because the facts show that the crossing was a very dangerous one; and that it would have been an act of ordinary prudence to provide, for the public using the crossing, some such protection. At the same time, if, as was the case here, the crossing is one where those who use it are exposed to great and more than ordinary danger, then, in the absence of the special means of protection referred to, greater and more than ordinary care should be taken by those responsible for the running of trains and engines over such crossing.

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The deceased was struck and killed by the tender of an engine backing out from the Halifax Station to the roundhouse at Richmond. The engine was at the time in charge of the driver who had the assistance of a fireman and of no one else. The driver was at his post in the cab of the engine and was keeping a proper look-out. The fireman was on the apron between the engine and the tender and was keeping a look-out on his side of the engine, his opportunities for observation being on the whole better than they would have been had he been in the cab of the engine. The bell of the engine was ringing. And the rate of speed at which the engine was being backed is estimated to have been about six miles an hour.

In this connection it is contended for the suppliant: first, that there should have been some one stationed at the rear of the tender to give warning and prevent accidents, and that there was negligence on the part of some officer or servant of the Crown in not seeing that that was done; and secondly, that the rate of speed was greater than under the circumstances was prudent.

It is one of the regulations for the operation of the Intercolonial Railway that between Halifax and Richmond engines and trains must be run slowly, a good look-out must be kept, and the bell must be kept ringing. It is also a rule or instruction for the running of trains on this railway that always, when backing a train, there must be a man specially stationed on the rear part of it to give warning and prevent accidents. And that rule corresponds with the provisions of the twenty-ninth section of *The Government Railways Act*, (1) by which it is enacted that whenever any train of cars is moving reversely in any city, town or village, the locomotive being in the rear, a person shall be

(1) R. S. C. c. 38.

stationed on the last car in the train, who shall warn persons standing on, or crossing, the track of such railway of the approach of such train. Now as to this rule and provision the question at once arises as to whether or not an engine and tender constitute a "train" or a "train of cars." The contention of the suppliant that they do is supported by the opinion of the court in *Hollinger v. The Canadian Pacific Railway Co.* (2), and the opinion of the learned Judges who decided that case is entitled to the greatest consideration. But I have not been able to come to the same conclusion. So far as appears from the evidence in this case, and so far as I am aware, an engine and tender is not, in the running of trains, treated as a train or train of cars. An engine and tender without cars attached are, in practice, left to the control and management of the engine-driver, assisted by his fireman. Whenever cars are attached so as to constitute a train, other men are employed, of whom one of the witnesses speaks as "the crew," and by one of whom the duty pointed out in the rule and provision mentioned is performed. Then everyone who has observed these things will, I suppose, have noticed that a tender has no platform or place at the rear on which anyone could with convenience stand. In general there is, I think, a timber (part of the lower framework of the tender) on which one could stand by holding on to the box above. But it would be a place of some danger, and I do not think it could have been the intention of the regulation to always put one man in danger for the purpose of warning some other person of a possible danger. Of course if there were no coal in the tender, any one who was in the cab of the engine could walk to the rear of the tender and take up there a position for observation and warning. But that

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would be an exceptional case, and the regulation was not made for exceptional cases. The engine-driver must of course remain at his post. To do anything else would be to fail in his duty. It is the duty of the fireman, when not otherwise engaged, to keep a look-out. But for that purpose he has his place in the cab. There can, however, be no objection to his taking up, as the fireman in this case did, a position equally as good, for maintaining a look-out, as that provided for him. But I do not think he is bound, when the engine is backing, to clamber over his coal and stand or sit down on it at the rear of the tender. That is not, so far as I know, the practice; and I do not think it was the intention of the rule or provision referred to that he should do anything of the kind. In my view neither the engine-driver nor the fireman failed in anyway in their duty in respect of the matter now under consideration. But it is contended that the engine-driver should have asked for, or some one should have sent him, a third man to stand on the rear of the tender when the engine was backing out to Richmond. For the reasons that I have mentioned I am not able to support and give effect to that contention. But again it does seem clear that the fact that when an engine and tender are being backed, the view of the engine-driver and fireman directly to the rear of the tender is to some extent obscured by it, imposes upon them the duty and necessity of taking all the greater care and precautions to prevent accidents.

Before dealing with the question of the rate of speed at which the engine and tender were moving at the time of the accident, it will be convenient to refer to another matter in which it is very clear there was negligence, and which in some measure, I think, contributed to the accident that caused the death of the suppliant's husband. Immediately before he attempted

to cross the railway tracks, a train of cars had been backed or shunted over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was admittedly defective and was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engines did not lift quickly, but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over toward the track on which the engine and tender were running, and obscured them from the view of anyone who approached the crossing from the direction in which the deceased approached it. The train that was being shunted, and the engine and tender by which the accident was caused, passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing, the deceased attempted to cross, and when he had reached the track, on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. That, it seems to me, is the way the accident happened, and I have no doubt that the use of this defective engine for shunting trains, at and over this crossing, was one of the things that contributed to the accident resulting in the death of the deceased. In that way and to that extent, his death resulted from the negligence of the officers and servants of the Crown, whose duty it was to see that no such engine was used for that purpose.

Then with reference to the rate of speed at which the engine-driver was backing the engine and tender, it does not seem to me that such rate of speed was of itself excessive, or such as to fix the engine-driver with negligence. Under ordinary circumstances it might,

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I think, be safe and reasonable to back an engine and tender at the rate of six miles an hour. But under the circumstances here, prudence and ordinary care demanded, I think, that a lower rate of speed should be maintained. The engine-driver was approaching a dangerous crossing over which a good many people passed and at which no special provision had been made for the protection of the public; and the engine and tender were being enveloped to a considerable extent in the steam and smoke from a train that was being shunted from an opposite direction. All the circumstances called for great care and a very moderate rate of speed. The conditions which the shunting engine had created and the rate of speed at which the engine was being backed combined to occasion the accident, and for that the Crown's officers and servants were, I think, responsible.

It is contended, however, that the deceased was guilty of contributory negligence, and that for that reason such suppliant is not entitled to maintain her petition. My finding on that issue of fact is to the contrary of such contention. The circumstances, it seems to me, were such that a very careful and alert person might have met with the accident. There is no reason to think that the deceased was careless or inattentive. The approaching engine and tender were no doubt obscured from his view by the steam and smoke discharged from the shunting engine. And then with respect to the warning that was at the time being given by the ringing of the backing engine's bell, there is no reason, I think, to suppose that he negligently failed to hear or heed the warning. It is possible, I think, that he heard the bell; but not seeing the engine, attributed the noise to the bell of the shunting engine which was at that time, or had immediately before, been ringing. Anyone might, I think, make

such a mistake as that, and without laying himself open to the charge of contributory negligence.

I assess the damages at five thousand five hundred dollars, for which sum there will be judgment for the suppliant, with costs to be taxed.

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*Judgment accordingly.*

Solicitor for suppliant : *W. A. Henry.*

Solicitor for the respondent : *H. Mellish.*

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