

1920
June 15

IN THE MATTER OF THE PETITION OF }
RIGHT OF BESSIE M. ANDER- } SUPPLIANT;
SON..... }

AND

HIS MAJESTY THE KING..... RESPONDENT.

Railways—Breach of Statutory duty—Responsibility—Quantum of Damages—Res ipsa loquitur.

Held: that where there was no witness of the accident, but in going over the crossing one of the crew of the locomotive felt the pilot scraping over something, and going back, found an umbrella with ribs broken and near thereto, about four feet from the crossing, the body of the deceased on the track, one arm and one leg on the outside of the rails and the body between the rails, a few feet from the crossing, towards which he was seen going, just a moment before, with an umbrella; and having apparently been struck at the crossing and dragged; and, moreover, where the witnesses heard at trial took it for granted that he had been so killed by the said locomotive, the court, considering the probabilities and drawing necessary inference from the circumstances related in evidence, will find the deceased was killed at the crossing by the locomotive. (*Res ipsa loquitur*).

2. The crew of the locomotive, having failed to display either a headlight or two white lights on the rear of the engine, in breach of their statutory duties, and moreover having neglected to place a man on each side of the tender with a light, to warn people, which omissions were the proximate cause of the accident, the respondent will be held responsible for damages due to the death of a man so killed at a crossing.
3. That the life of a man of 78 years of age, who had retired 29 years before, but still attended to chores about the house, administered, his home and land, attended to the garden and made all carpenters' and plumbers' repairs in the house, was not without real value to his family; and as according to mortality tables, the victim had an expectation of life of from 5 to 7 years more, the Court declared suppliant entitled to recover the sum of \$2,000.

PETITION OF RIGHT to recover the sum of \$10,000 damages alleged to have been suffered by reason of the

premature death of her husband by being struck by a shunting engine of the Intercolonial Railway, and killed at a railway crossing.

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Facts.

Mr. J. Friel, K.C., counsel for suppliant.

Mr. R. Trites, counsel for the respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J., now (this 15th June, 1920) delivered judgment.

The suppliant, by her Petition of Right, seeks, both for herself and on behalf of her two minor children, to recover the sum of \$10,000 damages, alleged to arise out of the death of her husband, the result of an accident on the Intercolonial Railway.

At about 5.30 o'clock, p.m., on the night of the 31st October, 1918, Captain Anderson went over to the freight shed office, at Sackville, to see Mr. Harris, an old friend, a witness heard in the case, with the object of finding out what was the best time to go to Moncton to get in touch with one of the railway engineers, as related at trial by Mr. Harris. He remained at the latter's office for 15 to 20 minutes, and when leaving Mr. Harris accompanied him out in the alleyway, and afterwards saw him pick up, inside the building, an umbrella and a small parcel of 8 or 9 inches long by 5 inches in diameter.

This is the last ever heard of Captain Anderson until he is found dead on the crossing within comparatively a short time after leaving the freight shed building.

A few minutes after Captain Anderson's departure Mr. Harris was standing in the clerk's office, in the freight shed building, looking out of the window, and

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saw a locomotive passing from the direction of the station to the freight shed crossing,—the location of which is shown on plan, Exhibit No. 1, filed herein.

Now, from all accounts, this was a shunting engine doing work in the railway yard, at Sackville,—extending east and west of the station. It is in evidence that before the engine went over the crossing, fireman Carter had tried to light, with six matches, he says the headlight of the locomotive, and having failed to do so, the engineer had decided to back over the crossing in question to some place of shelter to light. It was a very stormy night, blowing and raining heavily. The wind was blowing quite hard. However, no attempts were made to light the side or tail lights, at the rear end, on both sides of the tender.

While the locomotive was thus moving reversely, brakeman Keswick was on the step at the western side of the far end of the tender, facing Lorne Street. He was holding on with one hand, and had a lamp in the other, which he moved for a while, and was unable to tell us with what hand he was holding; however, he says he did not signal all the time, because his hand could not stand it. And on this point, Engineer Ison says Keswick signalled within a few feet of the crossing, but not at the crossing.

Brakeman Hicks who was at the rear, on the pilot of the locomotive, with a lamp in his hand, when at the crossing or thereabout, felt the pilot scraping over something. He was then facing Lorne Street, and turning around saw something which, on jumping off and going back, he ascertained to be an umbrella, with two ribs sticking out, and close by it was the body of Captain Anderson lying, one leg and one arm on one side of the rail and the body between the two rails—

at about four feet from the crossing, as if the engine had struck him at the crossing and had dragged him that distance. He then advised the crew of the locomotive of the accident.

Some of the witnesses testify the bell was ringing, and engineer Ison says he blew the whistle before starting, and being inside of 60 rods of the two crossings contends one whistle was sufficient. However, brakeman Hicks says he does not know that they whistled before the crossing.

The accident happened somewhere around ten minutes to six o'clock in the evening, on a very stormy night, the wind blowing very hard and with heavy rain. Under the evidence which is somewhat conflicting on the subject, it must be found it was also quite dark at the time of the accident, as testified to by witness Hicks.

There was no witness of the accident, but it was taken for granted by the witnesses who spoke upon the subject, that Captain Anderson had been killed at the crossing, by the locomotive.—*Res ipsa loquitur*.—Considering the balance of probabilities and drawing the necessary inference from the circumstances related in the evidence, the court must come to the conclusion that the deceased was so killed at the crossing by the locomotive in question.

Now, the locomotive, which was travelling at a low rate of speed, at the time of the accident, was travelling without her headlight and her two side lights or tail lights at the rear,—the tail lights being missing entirely, and with proof establishing that no attempt had even been made that night, to light them before going over the crossing.

The Rules and Regulations in force at the time of

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the accident, respecting trains on the Canadian Government railways, approved by the Governor-in-Council, were filed as Exhibit "A" herein.

At page 7 of the booklet containing these rules we find that the definition of a train covers the case of an engine without cars,—and under rule 9, that night signals are to be displayed from sunset to sunrise. That, under rule 17, a headlight must be displayed at the front of every train by night. And, under rule 18, that yard engines, (as in the present case), *must display the headlight to the front and rear by night*; and that when not provided with a headlight at the rear, two white lights must be displayed, and that yard engines will not display markers. And under conditions not requiring display of markers, *road engines* without cars will display a white light on the rear of the tender by night.

Then, under rule 102, whenever an engine is moving reversely in any city, town or village, *a man must take a position on the tender to warn persons* standing on or crossing the track of the railway of the approach of such train or engine.

These rules and regulations which are made under the provisions of section 49 of the Government Railway Act, have, under section 54 thereof, the same force and effect as if made by the statute itself, since it is there said that they shall be taken and read as part of the Act.

In starting to travel over the crossing without his headlight and tail lights, the engineer became guilty of a breach of rules 9, 17 and 18.

There can be no doubt that there is good reason to assume that if the strong headlight had been lighted, the glare of that light could have been seen by the

deceased; but it is obvious the accident would not have happened if the engine had had proper tail lights burning when they went over the crossing. Being a yard engine, the locomotive should have displayed a rear light by night when not provided with a headlight at the rear, two white lights should have been displayed, as required by rule 18.

There was no attempt made to light the tail lights,—the most important lights under the circumstances. These side lamps, with which the locomotive was provided, could, as testified to, have been taken out of their sockets, and very likely lighted in the cab of the locomotive or in the shelter of the locomotive.

One brakeman with a lamp was placed on the side step of the tender facing Lorne street. No one was on the corresponding side step, on the side next to the freight shed, upon which side Captain Anderson was travelling.

Under rule 106, in all cases of doubt, or uncertainty,—the safe course must be taken and no risks run. Obviously, the crew of the locomotive assumed a great and unnecessary risk in travelling without lights. They should have placed the other brakeman on the other side of the tender with a lamp in hand. In that position, he would either have been seen by the deceased before taking the crossing, or the brakeman himself would have seen the Captain and warned him and thereby, in both hypothesis, the accident would have been avoided.

If the hearing of the deceased was not the very best, we are told his eyesight was good. And if the wind was blowing with such violence, and the rain falling so heavily on that occasion, is it unreasonable to assume that a person of ordinary hearing could

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very well not hear a locomotive travelling at the slow speed of 4 to 5 miles an hour? Had the lights been on, they would very likely have been seen.

Therefore, I find that the crew was under the circumstances, guilty of a breach of their statutory duties as above defined and set forth.

On the question of *quantum*, the evidence is conspicuously meagre. We have evidence showing that the Captain was 78 years old, that he retired 29 years ago. He had a nice home of about 3 acres with buildings, valued at about \$2,500. He kept five cows and two horses, and had 48 acres of marsh land, and \$500 of stock in a paper box company; but there is no evidence as to his yearly revenue or income. However, his services were not without real value. He attended to the chores, administered his home and lands, and he attended to his garden, and made all carpenter's, plumber's and painter's repairs to his home.

All of his estate has passed to his wife and children at his death. By the accelerated enjoyment of the estate by the suppliant and her children, it is a question whether this share in the expenses of the deceased is not made up by his work, management and services generally. It would, however, be improper for the purpose of ascertaining the pecuniary loss to treat the widow and the children as benefiting by the Captain's premature death.

Under some of the tables of mortality, the expectation of life, at the age of 78, is between 5 and 7 years.

Now in assessing damages in a case of this kind, while it is obviously impossible to arrive at any sum with mathematical accuracy, several elements must be taken into consideration and one must strive to com-

pensate for the loss, to make good the pecuniary benefit which might reasonably have been expected had the accident not taken place. In doing so one must necessarily take into account the age of the deceased at the time of the accident, his state of health, his expectation of life, his income, not overlooking on the other hand the several contingencies to which every person is subjected, such as being subject to illness, involving expense and care. All of these circumstances must be taken into account.

It is alleged by the statement in defence the Crown tendered \$1,500 without admitting liability. However, the suppliant did not reply to that allegation, and under rule 114 that allegation is deemed denied and put in issue. No evidence was offered upon this point. This fact is mentioned because it is with great hesitation I have come to the conclusion that \$1,500 was not a reasonable offer under the circumstances. However, taking all the circumstances into consideration, I hereby fix the compensation at the sum of two thousand dollars.

There will be judgment declaring that the suppliant and her children are entitled to recover from the respondent the sum of two thousand dollars—and with costs.

Judgment accordingly.

Solicitors for suppliant: *Messrs. Friel and Clark.*

Solicitors for respondent: *Messrs. Trites and Richards.*

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