IN THE MATTER OF THE PETITION OF RIGHT OF

1917
March 17.

ALEXANDER DUNNETT,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Public work—Railways—Collision—Stalled automobile.

The collision of a train with an automobile stalled on a level crossing of the Intercolonial Railway, occasioned by the delay of the engine driver to apply his brakes the moment he became aware of the presence of the motor upon the track, is an accident "on a public work" and caused by the "negligence of an 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 Intercolonial Railway", within the meaning of sec. 20 of the *Exchequer Court Act.*

PETITION OF RIGHT to recover damages for the destruction of suppliant's automobile by a train of the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Quebec, February 5, 1917.

C. D. White, K.C., and *A. Galipeault,* K.C., for suppliant.

Alleyn Taschereau, K.C., for respondent.

AUDETTE, J. (March 17, 1917) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $1,590 as representing alleged damages to his automobile and effects in an accident

1917

DUNNETT v. THE KING.

Reasons for Judgment.

on a level crossing of the Intercolonial Railway, near Old Lake Road Station, in the Province of Quebec.

The accident happened under the following circumstances. The suppliant and his friend, W. J. Bigelow, between 8 and 9 o'clock in the morning of September 30th, 1915, were returning by automobile to their home in St. Johnsbury, Vermont, from a fishing excursion to the Scott Fish and Game Club. They left Riviere du Loup that morning for Levis, and having found they had gone too far east, they retraced their way by a cross-road to get on the main road at another point, and came to the crossing in question some little distance from Old Lake Road Station, on the Intercolonial Railway, a few miles only from Riviere du Loup. The highway intersecting the railway crossing at the *locus in quo* runs diagonally, but the way across the rails is directly at right angles.

On approaching the crossing they were travelling upon an ordinary country road, with grass on the sides, and the road was slightly lower than the railway track; but they could see both ways for quite a distance. They looked up and down the railway and there was no sign of any approaching train. When they came close to the rails they saw a hand-car on the other side of the track, about eight feet from the rail, and it occupied about three-quarters of the travelled part of the road. On coming still closer a man stood up on their left hand side, threw up his hands, signalling to stop. He "occupied the "broad portion of the road between the hand-car "and the margin of the road." The suppliant applied his emergency brake, with the result that he suddenly stopped and stalled his car squarely on the

track, the front wheels of the car just reaching the south rail, the car itself covering more than the track, the hind wheels being north of the north rail.

Seeing there was space, on the grass, to pass by the hand-car to the left, the suppliant's companion got off the car to crank. He had never cranked a car before this trip, and it is always more difficult to crank a car after it has been stalled. He tried three or four times, and, failing to succeed, the suppliant sprang out of the car to do it,—they did not feel too secure in this position on the centre of the track,—and as the suppliant stepped to the ground a train whistled. The suppliant says he thinks it was then at the whistling post, about a quarter of a mile away. All then started to push the car, but as there was no one in front to steer, the motor sheered and the left wheel of the car, which was near the edge, left the planking and became stopped by the rail. Then it became difficult to move the car—the train was coming and they got away near the fence.

When the train was about half way between the whistling post and the crossing, witness Bigelow stepped out about ten feet from the fence and signalled the engineer of the train to stop. So also did witness Giles.

The whistling post in question is 1,386 feet from the crossing. Between the Old Lake Road Station and the crossing in question there is a slight curve, and witness Bigelow says he saw the train pass that station, then for a short time lost sight of it, and before it came to the whistling post it was again in sight. By reference to plan Exhibit "B," filed by the Crown, it will be seen that from the crossing one can see to about 1,600 feet in the direction from

1917

DUNNETT v. THE KING.

Reasons for Judgment.

which the train was coming,—the line of vision being unobstructed, as specifically shown upon the plan, and sworn to by the suppliant after actual measurement.

The train was coming at a good speed when it struck the car and practically destroyed it, and some of the baggage in it was also damaged.

This was a passenger-train of eight cars, engine and tender, and when it stopped, after the accident, the rear coach was right across the highway.

Now, this is clearly an action sounding in tort and such an action, apart from the statute, will not lie against the Crown. Therefore, the suppliant to succeed must bring his case within the ambit of sections "c" or "f" of sec. 20 of the *Exchequer Court Act.*

The accident happened on a public work, the Intercolonial Railway being by statute declared to be a public work of Canada. The only point to be decided is, whether or not the injury to the suppliant's property was caused by the negligence of an 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 Intercolonial Railway.

It must be found, as established by the evidence, that the automobile at the time of the accident was in good working order, and that had it not been for the signal to stop, the suppliant would not have stopped his car right across a railway track, and that the machine did not stop of itself, as attested by the suppliant and his companion.

Warren, an employee of the Crown, who was around at the time of the accident and who might have thrown some light upon the facts, was not heard as a witness. Giles swears he did not give

the signal in question, but his memory is not very reliable, especially when he states, of the suppliant and his companion, that one was sitting in the front seat and the other at the back of the automobile. On this point he was contradicted by two witnesses. Then when he says that one person was still sitting inside the automobile, at the back, when they were pushing it, he is contradicted by three witnesses. Taking into consideration these salient facts, and the general nervous and peculiar demeanour of the old man Giles when giving his testimony, I have no hesitation in accepting in preference to his evidence that of both the suppliant and his companion.

Now Giles was a servant of the Crown acting within the scope of his duties and employment, and had it not been for him, the highway would not have been partly obstructed by the hand-car, and the suppliant's motor would not have been signalled to stop. But while Giles' negligence made the accident possible, was there any other negligence which determined the accident? Was the engineer in charge of the train guilty of any negligence?

Witness Bigelow says when the train was halfway between the whistling post and the crossing he stood about ten feet from the fence and signalled the engineer to stop the train. Witness Giles also swore that when the suppliant and his companion had got out of the motor, he made a sign to the engineer to stop when he was standing on the southwest side and that he so signalled the train from a place where the engineer could have seen him.

Tardif, the engine-driver, swears he did not see anyone making signals to stop. However, the motor was in the centre of the track and his line of vision was unobstructed for 1,600 feet. The whistling

1917

DUNNETT v. THE KING.

Reasons for Judgment.

post was 1,386 feet from the crossing. He saw the whistling post, since he says he whistled when he passed it. Had he exercised reasonable care and diligence, since he could see the stalled motor 1,600 feet before getting to it, had he looked ahead as he should have done, he would have seen the motor in full view, the line of vision being unobstructed for that distance, and could have avoided the accident. He blew his whistle at the whistling post. Therefore his attention was thereby attracted to the fact that the crossing was quite close—he had knowledge of the conditions obtaining, and it was his duty to look for the crossing, as he had no excuse or justification taking an unnecessary and improper chance where even human life could have been in jeopardy and peril. He knew of the crossing. Two persons signalled to him to stop, and he swears he did not see them. Did he or did he not see them? If he did not see them it is because he was not looking ahead, as he should have done. However, I would feel very much inclined to apprehend and believe that he took an improper chance, and did not see fit to apply his brakes the moment he became aware of the presence of the motor upon the track, and that delaying in doing so he only applied his emergency brakes when it was too late. *Canadian Pacific Railway v. Hinrich;*[1] *Long v. Toronto Railway;*[2] *City of Calgary v. Harnovis.*[3]

He stated he stopped his train in one length and a half, and that he applied his emergency brakes about half-way between the whistling post and the crossing, perhaps a little closer to the crossing. Had

[1] 48 Can. S.C.R. 557, 15 D.L.R. 472.
[2] 50 Can. S.C.R. 224, 250, 20 D.L.R. 369.
[3] 48 Can. S.C.R. 494, 15 D.L.R. 411.

this statement been accurate it would seem he should have stopped his train before getting to the crossing, since it was giving him a margin of about 690 feet. He further stated in his testimony that his train was going 3 miles an hour when he struck the motor, a statement which on its face is obviously wrong. A speed of 3 miles an hour is the ordinary step of a man. Had the train been going only 3 miles an hour when it struck the motor, it would have shoved it away and not sent it up in the air, smashing everything. In making that statement was he actuated by the consideration of sec. 34 of the *Government Railway Act,* with respect to the six-mile limit of speed at certain places? However, such a statement goes to the reliability of the evidence. The stoker on board the very same engine swore the train was going at 15 to 20 miles an hour at the time of the accident, and the suppliant puts it at from 40 to 50 miles. All of this goes to shake the strict accuracy of the engine-driver's evidence, and would go much to militate in favour of the hypothetical assumption, as above stated, that he really did take chances and neglected to apply his brakes when he did see the motor for the first time and applied his emergency brakes only when it was too late. And how could it be otherwise, when it is established beyond peradventure both by the plan and the testimony of the suppliant, after actual measurement, that the line of vision was unobstructed for over 1,600 feet, that he whistled at the whistling post, which indeed notified him, so to speak, of the crossing in question. Had he looked ahead, as a reasonable man should have done, as his duty called upon him to do, exercising due and reasonable care and diligence, he would have seen the stalled automobile, around

1917

DUNNETT v. THE KING.

Reasons for Judgment.

which men were engaged pushing it, in time to stop his train well before reaching the crossing. The engine-driver neglected to apply his brakes until he was too near the place of the accident for him to do so in time. He only attempted to stop when in the agony of the accident, as is said in collisions at sea, and should have done so before, as he should have seen the stalled car and the men around it, before only about 300 to 400 feet from the crossing,—had he attended to his duty by looking ahead and exercised due care and diligence. *Connell v. The Queen;*[1] *Harris v. The King.*[2]

The duty of the engine-driver, a breach of which would constitute ultimate negligence, arose when the danger was or should have been apparent. He should have looked ahead, and if he did not he became guilty of want of care and diligence, which amounted to the negligence causing the accident. And as said by Mr. Justice Anglin in *Brenner v. Toronto R. Co.*,[3] a judgment most favorably commented upon by Lord Sumner in *B. C. Electric R. Co. v, Loach*[4]: "If, notwithstanding the difficulties of the "situation, efforts to avoid injury duly made would "have been successful but for some self-created in- "capacity, which rendered such efforts inefficacious, "the negligence that produced such a state of dis- "ability, is not merely part of the inducing causes,— "a remote cause or a cause merely *sine qua non*,—it "is in very truth the efficient, the proximate, the de- "cisive cause . . . of the mischief."

The ultimate negligence which was the cause of the accident in this case would therefore arise either

[1] 5 Can. Ex. 74.
[2] 9 Can. Ex. 206.
[3] 13 O.L.R. 423.
[4] [1916] 1 A.C. 719 at 726, 23 D.L.R. 4 at 9.

1917

DUNNETT v. THE KING.

Reasons for Judgment.

in the engine-driver's incapacitating himself to stop his train in time by his want of looking ahead as he should have done, or in his want of care and diligence in delaying to apply his emergency brake in time to avoid the accident.

Coming to the question of quantum, one must not overlook that the damaged automobile was a second-hand car bought by the barter of an old second-hand car and some cash.

It was a second-hand six-cylinder Mitchell car, model of 1913, which had been operated for 14,000 miles in July, 1913, when it was purchased by the suppliant for the barter of an old second-hand 4-cylinder model, same make of 1911, and $750.

He had to disburse some money, as shown in the evidence, to pick up the pieces of the machine after the accident and ship them to the United States by freight, because his machine was bonded for duty. He sold the scrap in the United States for $65. He also suffered some damages to a rifle, telescope and a few other things of minor value.

Under all the circumstances of the case I am of opinion that judgment should be entered for the suppliant, who is declared entitled to recover from the respondent the sum of $750 and costs.

Judgment for suppliant.

Solicitors for suppliant: *Cate, Wells & White.*

Solicitor for respondent: *Charles Smith.*