

IN THE MATTER of the Petition of Right of  
CECILE SAMSON, AND OTHERS. . . SUPPLIANTS.1913  
Nov. 4.

AND

## HIS MAJESTY THE KING. . . . RESPONDENT.

*Railways—Negligence—Accident to workman in repairing cars—Failure of workman to observe rules—Faute commune.*

Under certain rules prescribed by the Department of Railways and Canals for the observance of employees on the Intercolonial Railway at the time of the accident in question, a blue flag was required to be placed at the end of a car, engine or train during the day when workmen were engaged under or about the same. Special instructions were also given from time to time by the foreman of car-repairers that this rule should be strictly adhered to, and each car-repairer was supplied with two of such flags. L., on the day of the accident, had his flags in his tool-box but neglected to use either of them as a signal that he was working under a certain car on the siding. There was evidence that he asked another employee to watch the trains while he was working and to notify him of any train or locomotive approaching. While L. was so engaged, certain cars while being moved by means of a flying-shunt under the orders of the yard-master came into contact with the car under which L. was working with the result that he was fatally injured.

At the trial it was admitted by counsel for the suppliants that L. had been negligent in not putting up his flag but it was charged that there was *faute commune* because the yard-master had ordered the cars to be moved by means of a flying-shunt. The evidence showed that while flying-shunts were not prohibited under the rules, the yard-master would not have let the cars go on to the siding where the car stood under which L. was working, had he seen a blue flag on that car.

*Held*, that the proximate cause of the accident was the negligence of L. in failing to put up a blue flag, and it was not a case in which the doctrine of *faute commune* should be applied.

**P**ETITION OF RIGHT for damages arising out of a fatal accident to an employee of the Crown on the Intercolonial Railway in the Province of Quebec.

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

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The case was heard before the Honourable Mr. Justice Audette at Quebec on 27th October, 1913.

*E. Belleau*, K.C., for the suppliants;

*G. G. Suart*, K.C., for the defendant.

AUDETTE, J., (now November 4th, 1913) delivered judgment.

The petition of right herein is brought to recover the sum of \$10,000 for alleged damages resulting from the death of Benjamin Lemieux, the husband of the late Cecile Samson and father of the three children above mentioned as suppliants by revivor.

The action comes under sub-sec. (c) of Section 20 of *The Exchequer Court Act*.

On the 30th October, 1906, between ten and eleven o'clock in the morning, both Benjamin Lemieux, the deceased, and Octave Lavoie, received instructions from their foreman to go and repair a car on Siding No. 5, shown in diagram, Exhibit "J". The repairs consisted in fixing or placing a packing bolt, at about the centre of the car. Lavoie said he calculated the work might take from five to six minutes; but Lafresnaie, another witness, says sometimes it takes quite a while when the bolt to be extracted is crooked.

This witness Lafresnaie, who is also a car-repairer, received instructions at the same time to go and repair the knuckle-block of a car on another siding. When the latter's work was through, he came to siding No. 5 and joined Lemieux and Lavoie. On arriving there Lafresnaie asked Lemieux if he had placed his flag below.

Under Rule 81 of Exhibit "L" (intituled "Time Table and Special Rules for the Use of Employees Only",—effective at time of accident) a blue flag must be placed at the end of a car, engine or train, when workmen are at work under or about the same. Special

instructions were also given from time to time by the foreman, as appears from the evidence, that this rule must be strictly adhered to, and each car-repairer was supplied with two such blue flags. Lemieux had them in his tool-box at the time of the accident, but had neglected to put them up. These flags are between 14 to 18 inches long attached to a three foot stick, and one should have been placed at the end of the last eastern car on the siding. The car under which the deceased was working, was the last to the west and there were ten to twelve cars, perhaps more, to the east towards the switch marked "D", on Exhibit "J".

It was customary to attend to the large repairs on a special siding, for instance where they had to take the wheels off a car and to use a jack; but small repairs were attended to where the car was,—on the siding.

Lavoie says he cannot swear he went inside the car before Lafresnaie arrived or not; but he seems to incline that way, and says Lafresnaie was asked to watch for them. It may be well to say here that such watching, if entrusted to him by Lemieux or Lavoie, was not such work as would come within the scope of Lafresnaie's duties and employment, and that the manner provided by the regulations to avoid any accident was by means of the blue flag.

It is therefore established under the evidence, that Lemieux, to his own knowledge and even after his attention had been called to it by Lafresnaie, was working under the car without having, before beginning his work, put up his flags, as required both by the regulations and his instructions from his foreman.

The yard-master was having trains made up and he had ordered the pilot,—the engine used for shunting in the yard,—to get some loaded cars from Breakey's yard to the East, and take them on the siding No. 5 for

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the purpose of having them weighed. He had given instructions to the engineer of the pilot and the brakemen, to give those cars a flag shunt or flying shunt, and that he would be at the switch "D" when they came there. The engineer did as he was instructed to do, and on arriving at the switch he remained and ran on the main line, while his cars ran into siding Number 5, with the brakemen on the cars. These cars ran into the cars east of the one under which the deceased was working and started the same, which passed over his legs in his endeavour to come from underneath, when Lafresnaie called out that the cars were coming.

It is in evidence that while *flag-shunting* or *flying-shunts* are not actually forbidden, they are discouraged, especially for the protection of the rolling stock,—and for no other reasons. And the yard-master tells us that he has been 32 years in the employ of the railway, and that he has always done such shunting, adding that up to the time of the accident he had never seen any circular or order to the above mentioned effect,—except that it was said, among the men, that it was discouraged for the protection of the rolling-stock. The yard-master further says, and this Court adopts his view, that had the engineer run on the siding with his cars, it would have been at the rear instead of the front as it was on this occasion, and that the accident would likely have happened just the same,—if the blue flags had been negligently omitted to have been put up. Had the blue flags been up, he says, he would never have let the cars run thus on the siding; there was nothing to indicate to him that anyone was working under any of the cars.

It is admitted by Counsel, on behalf of the suppliants that the deceased was negligent in not putting up his

flag; but he claims that there was *faute commune*, contributory negligence, by reason of the flying shunt.

What was the determining, the proximate cause of the accident? Obviously it was the want of the blue flag being put up at the last eastern car.

There can only be *faute commune* where the negligence on behalf of the victim is not the proximate cause determining the accident. In the present case, the accident happened because he neglected to put up the blue flag.

The suppliants are barred from recovering. *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* The deceased alone has been derelict in the performance of his duties,—he alone should suffer,—or those claiming under him. He was the victim of his own negligence. Employees working under cars are expected to act as reasonable and sentient beings, and if they choose blindly and recklessly to run unto danger, they must take the consequences.

It is so common to see how persons engaged in work attended with danger, will familiarize themselves with such danger and ignore the most elementary rules of prudence. There is no doubt the deceased thought, as Lavoie said, that the work would take just a few minutes, and he took the risk resulting in his death.

Under the circumstances it becomes unnecessary to decide the questions of law raised by counsel, the action fails on the facts.

There will be judgment that the suppliants are not entitled to any portion of the relief sought by the petition of right herein.

*Judgment accordingly.*

Solicitors for the suppliants: *Belleau, Belleau and Belleau.*

Solicitors for the respondent: *Pentland, Stuart, Gravel and Thomson.*

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