IN THE MATTER OF THE PETITION OF RIGHT OF

MOSES SCHAFFER.....SUPPLIANT;

1912
Dec. 7.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Government Railway—Passenger—Failure to afford opportunity to alight at station platform—Passenger standing on lower step of car—Injury—Right to recover damages.

Suppliant purchased from the Intercolonial Railway, on the 13th July, 1908, a ticket entitling him to travel as a passenger on that railway between the stations at B——, and M——, and return. On the return journey to B——, the train, consisting of fourteen passenger cars, instead of proceeding to the station platform and giving the passengers an opportunity to alight there, pulled up at a tank, before reaching the platform, for the purpose of watering the engines. While the train was at the tank, a period of from 10 to 13 minutes, the greater number of the passengers alighted; but the suppliant did not, expecting the train to pull up at the station platform. During this same interval the suppliant went out of the car in which he was being carried, and stood upon the lower step of the platform of the car preparatory to alighting at the station. With his left hand he was holding on to the rail of the car, his coat being on his right arm and his umbrella in his right hand. There was evidence that the platform of the car was crowded, and that suppliant could not have got back into the car had he so desired. At all events, he remained on the step of the car after the train moved away from the tank. Instead of stopping at the station platform, the conductor, apparently on the assumption that all the passengers for B——, had previously alighted, started the train and allowed it to pass the station platform at considerable speed. As the train was so passing the station the suppliant was by some means thrown from the step of the car to the ground between the station platform and the rail of the track, and was severely injured.

Held, that the suppliant was justified in assuming that the conductor would stop the train at the station, after leaving the tank, and that under the circumstances he was justified in remaining on the step where he was standing.

2. That the accident would not have happened had the conductor fulfilled his duty under the law and regulations, and stopped his train at the platform of the station.

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Argument of Counsel.

PETITION OF RIGHT for the recovery of damages against the Crown for personal injuries sustained by the suppliant on the Intercolonial Railway.

The facts are stated in the reasons for judgment.

The case came on for hearing at St. John, N.B., on the 23rd and 27th days of April, 1911, and at Chatham, N.B., on the 14th and 20th days of May 1912. It was argued at Ottawa on the 28th day of November, 1912.

W. B. Wallace, K.C., *and R. Murray*, K.C., for the suppliant;

R. A. Lawlor, K.C., for the respondent.

Counsel for the suppliant cited *Rose* v. *North Eastern Ry.*, (1), *Robson* v. *North Eastern Railway* (2), *Beven on Negligence* (3), *The Government Railways Act*, R.S.C., 1906, cap. 36.

For the respondent the following statutes and authorities were relied on: *Audette's Practice Exchequer Court* (4); *Martin* v. *The Queen* (5); *Gilchrist* v. *The Queen* (6); *Lavoie* v. *The Queen* (7); *Radley v. The London & North Western Railway* (8); *The Quebec Central Railway* v. *Lortie* (9); *Adams* v. *The Lancashire and Yorkshire Railway* (10); *Lewis* v. *London, Chatham, and Dover Railway* (11); *Cockle* v. *The London and South Eastern Railway* (12); *Siner* v. *The Great Western Railway* (13); *Edgar* v. *The Northern Railway* (14); *Robson* v. *North Eastern Railway* (15); *Bridges* v. *The Directors of the North London Railway* (16); 50-51 Vict. chap. 16, sec. 16 (c).

(1) 2 Ex. Div. 248.
(2) 2 Q. B. D. 85.
(3) 3rd Ed. pp. 133, 983, 984, 985.
(4) 2nd ed. pp. 77,78.
(5) 20 Can. S.C.R. 240.
(6) 2 Can. Ex. C.R. 300.
(7) 3 Can. Ex. C.R. 96.
(8) L.R. 1 A.C. 759.
(9) 22 Can. S.C.R. 336.
(10) L.R. 4 C.P. 739.
(11) (1873) L.R. 9 Q.B. 66.
(12) (1872) L.R. 7 C.P. 321.
(13) L.R. 4 Ex. 117.
(14) 4 Ont. Rep. 201.
(15) (1876) 2 Q.B. 85.
(16) L.R. 7 E. & I. App. 213.

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CASSELS, J., now (December 7th, 1912) delivered judgment.

This action came before me for trial at St. John, N.B., on the 23rd day of October, 1911. After a considerable number of witnesses were examined, an application was made to postpone the trial in order to procure the attendance of a necessary witness. No objection was raised to the adjournment, and by consent the balance of the evidence was taken before Mr. Justice Audette on the 14th May, 1912.

The facts of the case are peculiar. The allegation of the suppliant in his petition of right is, that on the 13th July, 1908, he purchased from the Intercolonial Railway a ticket entitling him to travel as a passenger on the said railway between the stations at Blackville and Marysville and return. The allegation is that on the return trip, the suppliant went out of the train, believing that the train in question had stopped at Blackville Station, but instead of stopping at the Blackville station, the train passed the station at a rapid rate, that the train increased its speed and gave a violent jerk causing the suppliant to be thrown from the train, and he claims damages for the injuries received by him by reason of such accident.

The defence denied that the suppliant was thrown from the train. The contention of the Crown apparently is, that the suppliant jumped from the car to the platform while the train was in motion, and that he was therefore guilty of contributory negligence, and not entitled to recover.

I have analysed the evidence with care. The facts are shortly as follows:—

The train in question left Blackville on the morning of the 13th July, and proceeded to Marysville, at which place an Orangemen's picnic was to be held.

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It returned in the evening, reaching Blackville somewhere about ten o'clock at night. It seems to have been a bright starlight night. The train was hauled by two engines. The length of the platform at the Blackville station is about 270 feet; and the width of the platform 8 feet 6 inches. A small portion of the platform nearest the tank has been constructed since the accident in question, but this addition only amounted to very few feet, and has not much bearing upon the matters in question before me.

The following distances may be of importance. The distance from the centre of the tank to the end of the platform, is 17 feet and 4 inches; from the centre of the tank to the station house door, it is 112 feet; from the rail to the edge of the platform, it is 3 feet and 6 inches; and from the top of the platform to the ground, it is 2 feet and 3 inches.

The suppliant was standing on the lower step of one of the cars. The distance of this lower step to the ground was 2 feet and 4 inches, being one inch higher than the top of the platform. The train in question consisted of 14 passenger cars.

As the train approached the Blackville station, it pulled up at the tank in order to water the engines, and was probably standing there for about from ten to thirteen minutes. The greater number of the passengers for Blackville alighted when the train stopped at the tank, taking their risk of injury by jumping from the lower step of the cars to the ground. Some of the passengers for Blackville remained on the cars expecting that the train would pull up at the station platform. The suppliant, apparently, was proceeding to the rear end of the car, thinking the train had stopped at Blackville. Owing to the large number of people in the car, he turned and proceeded

to the front end of the car. Before reaching the front end, the train moved ahead and stopped. This was apparently with the view to supplying the second engine with water. The front door of the car was open,—and when the plaintiff went out, he noticed that the train had not reached the platform but was still at the tank. He had descended to the lower step of the platform, and was holding on to the rail of the car with his left hand, his umbrella and coat being on his right arm and hand.

According to the suppliant he did not wish to take the risk of alighting. He states that there was considerable *débris* about, and I think he showed good judgment in not taking the risk.

He was standing upon the lower step, as I mentioned his left hand gripping the rail of the car. In cross-examination a question was put to the suppliant the answer to which might indicate that he had gone to the rear platform of the car in front of him. This is obviously a mistake, as there is no conflict of testimony as to his being on the step of the car out of which he had proceeded, and was holding on to the rail of that car. The question is put as follows:

"Q. You moved from the car you were in to the platform of the car ahead of you ?

"A. Yes."

He evidently understood the question as meaning that he moved to the front platform of the car. Had he moved to the car ahead of him, he could not have held on to the rail of the car with his left hand, and at the same time faced the station.

As to his position, there is no doubt, under the evidence, that the step was the lower step of the platform at the front of the car out of which he had passed for the purpose of getting off at Blackville.

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Several others followed the suppliant, among others being one Connors, who gives evidence, and it is apparent, that the platform of the car was crowded, and as the suppliant says, he could not go back to the car.

Moreover, the car was but a short distance from the platform of the station, and the suppliant no doubt believed that the train would pull up at the station. He stood there expecting the train to pull up at the platform where he would have alighted. To my mind the whole trouble has arisen from the conductor assuming there were no passengers for Blackville remaining on the train. He apparently chose to take it for granted, and instead of stopping the train at the platform of the station as he should have done, he started the train, passing the station at considerable speed, varying according to the views of various witnesses.

McConnell, who was the night watchman of the locomotives at Blackville, and probably qualified to judge, deposed that in his view, at the time of the accident, the train was going at the rate of from 12 to 15 miles an hour. Dunn, the station agent, thought it was going at the rate of from 8 to 10 miles an hour.

At about 300 feet east of the door of the station there is a curve upon the line. As the engine reached this curve, there would necessarily be given what one of the witnesses for the Crown calls an oscillation, and this oscillation with the quickening of the speed would, I have but little doubt cause a jerk, as it is called by some of the witnesses, which would probably cause the suppliant to lose his balance, the result being that he was thrown from the train and seriously injured.

There is some confusion as to which car the suppliant was in. Connors, who was standing immediately

behind the suppliant on the step of the platform of the car, thought they were on the fifth car from the rear. The conductor, Hoben, states that the suppliant was on the fourth car from the engine. The result was that the suppliant while endeavouring to save himself as far as possible was dragged some little distance, and no doubt struck the side of the platform and was precipitated between the platform and the rail, and found lying unconscious on the ground on his right side, his face towards the station and his back towards the rail. The consequence was that there was a severe spraining of the left wrist, a compound fracture of one of the bones a little above the ankle on the left leg, and a fracture of the sixth and seventh ribs on the left side.

The contention raised by the Crown is that the suppliant deliberately jumped from the moving train, and by reason of such action received the injuries in question. If the evidence disclosed that state of fact, I would be of the opinion that the suppliant could not succeed. It would have been his duty to have remained in the car, and bring an action for breach of contract if so advised.

I am of the opinion, however, that the suppliant did not jump from the car. Connors, the man who was immediately behind the suppliant, gives evidence. He sets out in his evidence the relative positions of Schaffer and himself. He also shows the difficulty of getting back. He is asked the question:

"Q. What about getting back into the car?

"A. You could not get back.

"Q. Why?—A. Because there was such a crowd "in the car, they were all crowding in the passage way.

"Q. And around the platform of the car too?

"A. Yes.

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"Q. And you stood there?—A. Yes.

"Q. And Moses Schaffer stood in front of you?

"A. Yes."

And he is asked:

"Q. Did you notice whether the car gave any "jerk?—A. Yes."

Then he goes on and describes the accident. He states that "Moses Schaffer fell and went down—and he went with the cars when he went." (Meaning, no doubt, that he was dragged slightly by the momentum.) "He fell face towards the platform and with "his back towards the car."

And he is asked:

"Q. Did you feel the jerk yourself?

"A. Yes. * * * * * * * I was standing "holding the outside rail of the step. When he, (Schaffer) went off, I jumped. I jumped on to the "platform."

He is asked on cross-examination:

"Q. When did you first know that anything "happened to Schaffer?

"A. When I saw him fall, I thought there must "be something happened.

"Q. You saw him fall?

"A. Yes. I was standing next to him when he "fell.

"Q. Do you swear he fell?

"A. I can say that he was jerked off." * * *

"Q. You swear you could see that, the train going "15 miles an hour?

"A. I will swear I was close enough to him to say he was jerked from the train."

Benjamin Walls, a lumber surveyor, was at Blackville station on the night of the accident. As the train passed the station, he states he was standing

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near the station house door; that the train was running pretty fast, gradually getting faster as it went by. He was asked whether Schaffer was jumping off. He did not see him jump, but according to his evidence he could not be positive enough to say whether he jumped or was thrown.

George R. McConnell, a locomotive engineer, in the employ of the Intercolonial Railway, was at the time of the accident the night watchman of locomotives. He was standing close to the platform, and testified as follows:

He is asked to describe how he saw Schaffer fall. He states "As a man would naturally fall, he lost "his balance. He done his best to get his balance "back again, and was hanging on to the side of the car "and was trying to get his balance back again, and he "gave a pitch under the car. The momentum of the, "train or something pitched him under,—I dont "know what it was."

He is asked:

"Q. Did he jump off?

"A. No, he did not jump off. I had a lantern and "could see distinctly.

He describes the speed of the train as between 12 and 15 miles an hour,—"It was going pretty fast "down hill."

Further on in his evidence he states:

"Q. And you say he did not jump?

"A. No, sir, he did not jump.

"Q. When he came off what did he do?

"A. He would naturally try and get his balance "back.* * * * He was trying to get his feet "back again to save himself."

Miles Arbeau, a brakesman on the Intercolonial Railway, was a passenger on the train in question. He

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was asked if he saw the suppliant fall—and he is asked to describe how he saw him fall. His answer is, "I just saw him come off the train. He seemed to be "coming kind of head first. To the best of my "knowledge he was coming head first—not head first "but the body half falling, and he struck the platform, "and then glided ahead a little piece and then rolled "between the platform and the cars.

"Q. Did he appear to you like a man jumping or "falling off?

"A. He appeared to me like a man who was falling "off."

Again he says:

"I think that he looked like a man who was falling "off the way he came off the train."

Thomas Dunn, the station agent, a witness called by the defence, states that Schaffer was facing sqare towards the station building when his feet struck the platform. He is asked when he first saw Schaffer, and his answer is, "When he alighted on the platform. I "did not see him until then. He is asked "What "happened", and his answer is, "As soon as he struck "the platform he immediately went down between "the cars and the platform." He says, "He appeared "to be like a man who was falling and he could not "regain his footing and went down."

"Q. Did he look like a man who was jumping or "falling?—A. Falling I said."

He is giving his evidence under oath. He is confronted with a previous statement in a letter in which he had stated apparently, that Schaffer's manner of alighting would indicate he jumped. This seems to have been a letter procured from him by the respondent's claims agent.

The suppliant himself states that he did not jump.

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I think on the whole evidence there is no question but that Schaffer was thrown from the step of the car. I think, moreover, that the accident would not have happened had the conductor complied with the provisions of the statute, and stopped the train at the platform of the station. I think it was reasonable for the suppliant to believe that the train would stop, and he would not apprehend any danger from remaining in the position he was in, had the train merely pulled up to the station.

It is said there were 14 cars, averaging about 50 feet for each car, whereas the length of the platform was in the neighborhood of 260 feet, and that therefore all the cars could not have been stopped so as to enable the passengers to alight from each car at the station. I do not think this forms any justification. If, as the conductor states, Schaffer was on the fourth car from the engine, his car would have been abreast of the platform.

It has to be kept in mind in the consideration of the English authorities, that the cars in use on the Intercolonial Railway and other railways in this country, differ materially from the greater number of the cars used in England. If the train was so long that the cars could not all be brought up alongside of the platform, the passengers could easily pass from one car to the other until they reached a car from which they could alight. In one case *The Quebec Central Railway* v. *Lortie* (1) the Supreme Court reversed the judgments of the lower courts and dismissed the action.

The head note is:

"*Held*, reversing the judgments of the courts below, "that in the exercise of ordinary care, E. could have "safely gained the platform by passing through the

(1) 22 S. C. R. 336.

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"car forward and that the accident was wholly attri-"butable to his own default in alighting as he did and " therefore he could not recover."

Referring in that case to the manner in which he brought about the accident, Mr. Justice Gwynne states: "The accident is attributable wholly to the "Plaintiff's own default in alighting as he did. Every "man travelling by rail, in this country, must have "known that it was not the way he should have "alighted or by which there was any necessity for his "so alighting or was ever intended that he should "alight."

In my view, had the suppliant alighted at the tank and injured himself by reason of the distance between the step and the ground, he might probably have disentitled himself to recourse against the Crown, as the evidence would have then been presented.

The question of the effect of contributory negligence is succinctly stated in *Brenner* v. *The Toronto Railway Co.*, in the judgment of Mr. Justice Duff (1).

I have read all the cases referred to me by counsel, and a great many others. Most of them are referred to in the last edition of *Pollock on Torts* (2).

The conductor attempts to justify his conduct in not stopping by reason of the probability of accidents on account of the shortness of the platform. It is quite customary for all passenger trains to stop at the platform at Blackville. Dunn, the station master, so states. I think they were bound to stop when they had passengers who desired to alight. In point of fact the conductor must have assumed that there were no passengers. It appears in the evidence, that several passengers who had tickets for Blackville were carried beyond the station; and the train subsequently stopped

(1) 40 S. C. R. 556.

(2) 1912, 9th ed. p. 471 et seq.

and let them off at a distance of about a mile and a half or thereabouts from the station, which distance the passengers had to walk.

On this train consisting of 14 passenger cars, there were two brakesmen and the conductor, in addition to the engine drivers and firemen. The conductor states that he gave instructions to the engine drivers not to stop at the platforms as far as possible, and that he also gave instructions to the two brakesmen to inform the passengers that the train would not stop at the Blackville station. Rock Allen, who was the brakesman at the rear of the train, contradicts the conductor on this point, and states that he never told the passengers that the train would not stop. He states in his evidence "We were supposed to stop at the "station platform, that is the only announcement I "had."

The suppliant was not told the train would not stop at the station platform.

Upon the whole case, I think the suppliant was justified in assuming that the conductor would stop the train, and I think, under the circumstances of the case, he was justified in remaining where he was. Each case has to be governed by the facts of the particular case. I can quite understand that in certain cases it might be considered culpable negligence for a passenger to stand on the lower step of the platform of a moving train. Such a case was that of the *Grand Trunk Railway Co., of Canada* v., *Barnett* (1).

It was contended that under the provisions of *The Government Railway Act*, chapter 36, section 44, Revised Statutes of Canada, 1906, the plaintiff could not recover.

That section reads as follows:

(1) (1911) A.C. 361.

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"44. No person who is injured while on the plat-"form of a car, or on any baggage, wood or freight "car, in violation of any printed regulations posted "up at the time in a conspicuous place inside of the "passenger cars then in the train, shall have any "claim in respect of the injury, if there was at the "time room inside of such passenger cars, sufficient "for the proper accommodation of the passengers."

I am not called upon to decide whether or not under the particular circumstances of this case, that section would have debarred the suppliant from recovering, as in point of fact there is no proof whatever of any printed regulations being posted up in a conspicuous place inside of the passenger cars then in the train. There was some evidence that they had been posted up in the station house.

The provisions of *The General Railway Act* differ from the *Government Railways Act*. Section 282 of *The General Railway Act*, chapter 37, of the Revised Statutes, reads as follows:

"282. No person injured while on the platform "of a car, or on any baggage, or freight car, in "violation of the printed regulations posted up at "the time, shall have any claim in respect of the "injury, if room inside of the passenger cars, suffi-"cient for the proper accommodation of the pass-"engers, was furnished at the time."

In connection therewith section 312 of the same Railway Act has to be considered as to the method of posting, it "shall be openly affixed, and kept affixed, "to a conspicuous part of every station belonging to "the company."

On the argument before me, the question was asked of counsel, that if judgment were in favour of the suppliant, what would they consider a reasonable

allowance? Counsel for the suppliant suggested $5,000 and counsel for the Crown suggested $2,000.

It does not appear from the evidence what the age of the suppliant was at the time of the accident in question. It is agreed, however, by both counsel on the argument, that his age was about fifty.

There is no doubt that the suppliant received severe injuries. I explained in the former part of my judgment the nature of his injuries. It seems he was in the hospital about six weeks.

According to the evidence of the suppliant he paid out at the hospital the sums of $72 and $49; to Doctor Loggie $100; to Doctor McManus $35; and moving to Chatham and back, $40; in all about $300.

Doctor McManus, who attended him at the time of the accident, was asked whether he considered the injuries will be permanent. His answer was, that

"in a sprain there is always an injury there. It is a "rare case that they ever grow out of any in my "experience—and as far as a fracture is concerned "there is permanent injury."

Doctor McManus had not seen the suppliant from the time of the accident. It was suggested by me that as the suppliant was in court, it would be easy to examine him, and find out whether permanent results had followed the accident. This was agreed to by counsel for both parties. Mr. Lawlor, K.C., for the Crown asked to have Dr. Emory, who was in court, examine the man at the same time. Dr. McManus was recalled after the examination, and states in answer to the question what the result is with regard to the injuries being permanent or otherwise, the following:

"The injuries are permanent. That is the result "of the diagnosis I made. Of course as far as the

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"dislocated wrist is concerned, there is a thickness "of the tendons there; and there is evidence of a "fracture in the tibia—but not so much on the "ribs."

Dr. Loggie, who had attended him in the hospital also examined him on the day of the trial. He is asked:

"—Now you have examined him here since, with "the other doctors to day?

"A. Yes.

"Q. And what would you say with regard to the "injuries being permanent or otherwise?

"A. I would say that the injuries to the wrist and "leg were permanent in a degree. They are not as "badly injured or as bad as they were first—they have "improved, but they are certainly not as good as they "were before they were hurt."

Dr. Emory who was present at the examination representing the Crown, was not called as a witness. I think it may be taken for granted that he did not disagree with his brother doctors.

I think a fair allowance would be the sum of twenty five hundred dollars, and three hundred dollars for his outlay. I direct judgment to be entered for this amount together with the costs of the action.

Judgment accordingly.

Solicitor for the suppliant: *G. H. Murray.*

Solicitor for the respondent: *W. C. Winslow.*