

IN THE MATTER OF THE PETITION OF RIGHT OF  
DAME MARIE - ANNE LAPOINTE,

ET AL.,.....SUPPLIANTS;

1918  
Feb. 4.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Government Railway—Negligence—Fatal injury to workman—Brakesmen—Defective coupling on car—Faute commune—Unskilled workman—Standard of prudence—Liability.*

T. was employed on the Intercolonial Railway as a brakesman. At the time of the accident whereby he lost his life he was one of the crew on a shunter-train working between different stations along the line of the Intercolonial Railway in the Province of Quebec. The coupling device of one of the cars in this train was defective in that the chain connecting the pin and the lever was broken and disconnected, so that the device would not act automatically. It is the practice of brakesmen to uncouple cars when the train is in motion by means of this automatic device. There are no rules or regulations of the road forbidding the work being done in this way. It was shown by the evidence that when the train left the last divisional point the railway authorities knew that the coupling on this particular car was defective. The deceased was not a permanent employee and had not acquired that skill in coupling and uncoupling cars that more experienced brakesmen have. His attention was called by one of his fellow-workmen to the fact that the coupling was defective, but notwithstanding this he undertook to uncouple the car while the train was in motion. Finding that he could not accomplish this with the defective device, he went between the cars and attempted to do the work of uncoupling with his hands. He fell between the cars and the wheels passed over him injuring him fatally.

*Held*, that the railway authorities were guilty of negligence in allowing the coupling device to be out of repair, but that T. had also been at fault in not waiting until the train had stopped before he attempted to make the coupling. Under such circumstances the doctrine of *faute commune* applied, as the case arose in in the Povince of Quebec.

(2) If an inexperienced workman knowing from observation of his skilled fellow-workmen that a particular piece of work is hazardous if done in the method pursued by them, undertakes to so perform it, while another and less dangerous method is open to him, he is not observing a proper standard of prudence and ought not to be held blameless if any accident results from his lack of care.

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PETITION OF RIGHT for damages arising out of a fatal accident to a workman while engaged in shunting cars on the Intercolonial Railway in the Province of Quebec.

The facts are stated in the reasons for judgment.

January 13th, 1913.

The case now came on for hearing before the Honourable Mr. Justice Audette, at Rivière du Loup.

*E. Lapointe*, K.C. and *C. A. Stein*, K.C. for the plaintiffs. *E. H. Cimon*, for the respondent.

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

The petition of right herein is brought to recover, both by the consort of the late Adelard Tardif and by the minor children, issue of their marriage, the sum of \$15,000. damages, for the death of the said Tardif, alleged to have resulted from the negligence, fault, imprudence and want of skill of the employees of the Crown, and the violation by them of the regulations and laws governing the operation of the Intercolonial Railway, a public work of Canada.

The respondent, by the statement of defence, avers, *inter alia*, that the death of Adelard Tardif if not purely accidental was occasioned by his own negligence and fault.

On the early morning of the 16th day of April, 1911, at about 2.35 A.M., the shunter-train, on board of which Tardif was employed as brakesman, reached St. François. The work to be performed by this shunter train consists in taking and leaving cars at the different stations along the line of the I.C.R. The work this train had to do, according to the orders,

at that station, was to leave one car at St. François and take one, that was already there, to Montmagny. The train was travelling east.

From St. Valier to St. François the two brakemen, Demeule and Tardif, were riding on the engine, and on arriving at St. François, Demeule alighted on the south side of the engine and Tardif on the north, at the point marked "A," on the diagram or plan filed herein as Respondent's Exhibit "A," and which will hereafter be called the plan. There are two sidings at St. François; the loading siding marked "B," and the Farmers' siding marked "C" on the plan.

On alighting Demeule turned the switch, at point "A," and Tardif went behind and uncoupled from the train the first car, which was to be left at St. François. Tardif entered the siding with the engine and that car attached thereto and went to point "B," whence the train backed to the Farmers' siding, marked "C," where there was a car for Montmagny. There were two cars on the Farmers' siding; the one required was the last and Demeule coupled them together, while Tardif coupled them to the engine. Then the train moved east, out of the Farmers' siding to the loading siding. Then Tardif closed the switch at the point "B," and the train with the three cars began backing on the loading siding; the car for Montmagny being the last,—on the west. The two brakemen were then on the north of the loading siding. Demeule was at the frog, and as the train began backing he called out to Tardif that the lever was not working on the Montmagny car; but there is no evidence as to whether Tardif heard him or not. However, Tardif, seemingly having understood the warning, passed to the south, expecting perhaps that the lever on the south side would work. Neither lever did work. The chain joining the pin and the lever

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was broken—disconnected. Shortly afterwards Demeule heard a cry, Aie! Aie! before Tardif was opposite, and he saw Tardif fall just opposite him. He had probably slipped or was tripped by the wheel catching his heel and was killed. It was found afterwards that the heel of one of Tardif's boots was crushed appearing as if it had been caught by the flange of the wheel. Demeule says he saw him between the two cars with his left hand on the pin when he fell with his lamp. The moon gave some light and there was some wet snow falling. It was wet, but there was no snow on the track. The point marked "D" on the plan is where Tardif was picked up after the accident. When Demeule heard Tardif's cries he signalled with his lamp to stop the train. When Tardif was picked up he was lying on the north rail, one arm and one leg on each side of the rail, with his head to the south, and the coupling pin was about eight feet behind him. The body was found on the track and disentangled from the train.

Dr. Vezina, who examined Tardif's body after his death, says there was a fracture of the skull at the base, a fracture of the right arm, a bruise on the stomach, and the little finger was cut off. The fracture of the skull, in his opinion, was sufficient to have caused Tardif's death.

Now, the two cars in question had been taken from Chaudière on the 10th April, 1911, and left at St. François by Conductor Couture, who says he did not examine or inspect them specially before leaving Chaudière; and the two brakemen he had with him at the time, and who are now dead, made no mention to him about these cars.

The coupling of the car, No. 17567, which Tardif was trying to uncouple, was defective and out of order. While the car was properly equipped to be uncoupled

without going between the cars, as it had a lever on each side by means of which the coupling pin could be lifted, the chain connecting the pin and the lever was broken and disconnected—a link was broken. It also appears from the evidence that the chain had already been temporarily repaired with an open link, filed as Exhibit No. 8, which was found on the dead-timber of the car ahead. The proper link, however, for such a chain is like Exhibit No. 7, and not like Exhibit No. 8—but it had neither of them at the time of the accident, as it was disconnected. The coupling of the other car, No. 18876, which was on the Farmers' siding, was also defective. It had a connected chain, but the chain was placed underneath and the lever could not be worked, and here again the pin could be moved out outwards only with the hand.

It appears from the evidence that while it was dangerous to uncouple cars when the train is moving, it is, nevertheless, done most of the time. There are no Rules or Regulations in evidence forbidding the doing of it, and some of the witnesses say there are no instructions given to that effect, and that brakemen do it daily. The usual practice is to uncouple them when the train is in motion, and witnesses go so far as to say that it is quite seldom that the train is stopped for doing so. One of the witnesses says there are regulations preventing coupling cars in motion; but the majority say there are none, and none are produced or to be found in the pamphlet of the Rules and Regulations in force, which are filed as Exhibit "B."

One reason given why the cars are uncoupled when the train is in motion, is that often if the brakeman waits until the train is stopped, he finds that the train is *taut* and that it is impossible to pull the pin out. The brakeman has then to signal the engineer

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to move the train, and that entails delay which they generally endeavour to avoid.

It would appear, in the result, that the two cars that were at St. François on the night in question were defective, and that under Rule 176, of Exhibit "B," conductors and drivers of trains are responsible for seeing that running gears on all cars are in perfect working order before starting from terminal stations; and under Rules 125 and 130, they have to see that the rules are observed by the employees, and that the brakemen are attentive to their duties. Under Rule 149, conductors are to call the attention of the Repairer of Cars, or, in his absence, that of the Station-Master, to any repairs required or damage that may have been sustained by the cars, and, in the latter case, report the particulars to the Superintendent. These rules and regulations are made under the provisions of Section 49 of the *Government Railways Act* (1), and have, therefore, statutory force.

There was, therefore, negligence in allowing these two cars to leave Chaudière with defective couplings, and if the couplings had been broken at St. François when the cars were on the Farmers' siding, the Station-master should have been notified in compliance with the Rules and Regulations above cited.

Tardif, at the time of the accident, was acting in the ordinary discharge of his duty and was working in the usual manner and taking the usual risks taken by other brakemen in such instances. He could have had the train stopped before uncoupling; but he was not a permanent employee and was probably ambitious to please those in charge and to perform his duties in as expeditious a manner as possible, like those having longer experience, with the object of obtaining promotion.

(1) R. S. 1906, c. 36.

On his attention being called by Demeule to the fact that the lever was defective, he passed to the south, expecting perhaps, as Demeule said, that the lever on that side was in working order; but having started to uncouple whilst the train was in motion and finding that the lever on that side was also defective, he imprudently persisted in uncoupling. Had the lever been in order, he could have uncoupled without danger, without being obliged to go between the cars; but having started to uncouple and wishing probably to give satisfaction, he outstepped the ordinary line of prudence by going between the cars, and in attempting to make the uncoupling with his hands. In doing so he took a risk which ended fatally.

We have, then, to consider whether what he did was the act of a prudent man in the circumstances. The standard of prudence required of one engaged in the practice of any industrial occupation involving risk of bodily injury is necessarily different from that required of a man employed in a less hazardous occupation. While it is true that the character of a workman's duties determines the measure of care he should observe, on the other hand it is obvious that one skilled in the practice of a dangerous employment need not observe the same degree of prudence or caution that should mark the conduct of a novice in the art. If an inexperienced workman, knowing from observation of his skilled fellow-workmen that a particular piece of work is hazardous if done in the method pursued by them, undertakes to so perform it, while another and less dangerous method is open to him, he is not observing a proper standard of prudence and ought not to be held blameless if any accident results from his lack of care.

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Applying these considerations to the facts of the case before us, it must be conceded no accident would have occurred if Tardif had waited till the train had stopped; but it must also be said that had the coupling gears been effective and not out of repair he would have uncoupled his car without accident as it would not have been necessary for him to have gone between the cars. And there was no regulation preventing him from doing what other brakemen were daily doing before his eyes in the majority of cases, for the reasons above mentioned, and, that is, to uncouple cars while the train was in motion. It is the method followed in the majority of cases by brakemen. And is not the object of these levers to facilitate the uncoupling of cars while the train is moving, avoiding the necessity of going between the cars to perform the uncoupling?

Now some of the employees of the Crown, namely the conductor or train-driver, were negligent in allowing these cars to leave Chaudière with defective couplings. They should have seen to their being repaired. Or if the coupling had been broken at St. François the station-master should have been notified. There has been negligence by omission, and Tardif was imprudent in persisting to uncouple when he realized the coupling was defective, and he thus contributed to the accident. He took the unnecessary risk. There is therefore *faute commune*.

The present case has to be decided under this legal doctrine of *faute commune* obtaining in the Province of Quebec, and that is, where the employer and employee are both at fault, the damages are to be divided according to the degree of the fault contributed to the accident by each of them. *Price vs. Roy*, (1); *G.N.W. vs.*

(1) 29 S. C. R. 494.



*Cyr*, (1); *Nichols Chemical Co. vs. Lefebvre* (2); *Lamothe, Accidents du Travail* (3).

Counsel for the suppliant cited and relied upon the case of *Scott v. C.P.Ry.* (4), where a very similar state of facts presented itself, although the case was decided under the general Railway Act. However, while the facts are almost identical in the two cases, and in both cases negligence has been proven, in the former case the negligence consisted in the failure to comply with the requirements of section 264 of *The Railway Act*, R.S. 1906, ch. 37, and in the present case, which comes under section 20 of the *Exchequer Court Act*, the negligence lies in the failure to comply with the requirements of the Rules and Regulations made under the provisions of the *Government Railways Act*. The case of *Armstrong v. The King* (5) is also relied upon. In the *Armstrong* case the widow succeeded where in consequence of a broken switch, at a siding on the Intercolonial Railway, which failed to work properly, although the moving of the crank by the pointsman had the effect of changing the signal so as to indicate the line was properly set for an approaching train, an accident occurred by which the locomotive engine was wrecked and the engine-driver killed. See also *Desrosier vs. The King* (6).

The present case comes within the provisions of section 20 of the *Exchequer Court Act*, as amended by 9-10 Ed. VII. ch. 19. The injury complained of occurred on a public work through the negligence of an employee of the Crown, to whom some duty was assigned and which he omitted to discharge, while acting within the scope of his duties and employment.

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(1) Q. R., 18 K. B. 410.

(2) 42 S. C. R. 402.

(3) Nos. 156, 157, 159, 160, at pp.  
86, 69 and 71.

(4) 19 Man. R. 165.

(5) 40 S.C.R. 229.

(6) 41 S.C.R. 71.

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The deceased Tardif was in his thirty-first year at the time of his death. At that time he was not permanently employed on the I.C.R., being only a spare man, who, however, had been employed consecutively for about fifteen days. Counsel for both parties admitted at the time of his death the deceased realized an average yearly salary of \$800.

In assessing damages in a case of this kind, while it is impossible to arrive at any amount with mathematical accuracy, several elements must be taken into consideration and one must strive to compensate the suppliants for the pecuniary loss suffered to make good to them, as much as possible, the pecuniary benefits they might reasonably have expected from the continuation of the deceased's life, and which by his death they have lost. In doing so one must take into account the age of the deceased, his state of health, his expectation of life, his employment, the wages he was earning and his prospects; and, on the other hand, one is not to overlook that the deceased in such a case must, out of his earnings, have supported himself as well as his wife and children, and that there were contingencies other than death, such as illness and the being out of employment to which, in common with other men, he was exposed. Under all these surrounding circumstances, which must be taken into consideration, this court is of opinion to allow the suppliants the total sum of \$2,400. Out of this amount the sum of \$800 will go to the mother, and the sum of \$400. to each of the four children. In arriving at this total amount of \$2,400, the Court wishes to convey the idea that a much larger amount would have been allowed had the deceased not been guilty of contributory negligence, and had he not by his own fault contributed so materially to the accident.

There will be judgment that the suppliants are entitled to recover the sum of \$2,400. in the proportions above mentioned and with the costs.

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*Judgment accordingly.*

Solicitor for Suppliant: *C. A. Stein, K.C.*

Solicitor for Respondent: *E. L. Newcombe, K.C.*