

IN THE MATTER of the Petition of Right of

AMANDA DESROSIERS..... SUPPLIANT;

1907
June 24

AND

HIS MAJESTY THE KING.....RESPONDENT.

Railway—Accident to the person—50-51 Vict. c. 16, sec. 16 (c) (now R. S. C. 1906 c. 140 sec. 20 (c)—Brakesman—Negligence of section foreman—Liability.

Suppliant's husband while engaged in coupling cars as a brakesman on the Intercolonial Railway, at Sayabec Station, P.Q., caught his heel between the rail and the guard rail and being unable to get clear was run over by the cars and killed. It was shown to be the duty of the section foreman to see that the space between the rail and guard rail was properly filled or packed, and that he had been guilty of negligence in respect of such duty.

Held, that the Crown was liable for such negligence.

PETITION OF RIGHT for damages for the death of the suppliant's husband alleged to have been occasioned by the negligence of an officer or servant of the Crown on a public work.

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

April 10th, 1907.

The case was heard at Quebec.

L. Taché, for the suppliant, argued that the facts in evidence showed negligence in respect of keeping the road in repair. The nature of the repairs done after the accident show that it was negligent to leave the rail as it was at the time of the accident.

[THE COURT: It is immaterial what they did after the accident.]

There is no doubt as to the right of the suppliant to recover for the death of her husband notwithstanding

that the accident was caused by the negligence of a fellow-servant of the deceased. The case of *Grenier v. The Queen* (1), as decided in the Exchequer Court, is right, and the Supreme Court was wrong in reversing that decision (2) in so far as the Supreme Court held that the right of action of the widow and children under art. 1056 could be barred by the agreement of the husband in his life time. That is the result of *Miller v. Grand Trunk Railway Company* (3) which holds that the right of action accruing to the widow and children under art. 1056 C.C. is an independent and personal right, and not derived from the deceased or his representatives.

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 of Counsel.

E. L. Newcombe, K.C., for the respondent, argued that upon the facts the death of the suppliant's husband was produced by his own negligence. He was walking backwards over the track engaged in conversation with some one on the platform when the accident happened. He stumbled over the guard rail and the cars passed over him. His heel was caught between the rail and the guard rail, and being unable to get clear, he was killed. The space between the rail and guard rail had been filled a few days previous to the accident, so there was no negligence on the part of the Crown. In any event the deceased knew of the dangerous character of his work in coupling cars, and he must be assumed to have taken the risks incidental to his work. In any case his conduct did not show reasonable care.

If there is negligence at all affecting the Crown it is negligence of a fellow-servant for which the Crown is not liable. *Priestly v. Fowler* (4); *Smith on Master and Servant* (5). In the Province of Quebec, no more than by the law of England, can a servant recover against his master for injury sustained in consequence of his negli-

(1) 6 Ex. C. R. 276.

(3) [1906] A. C. 187.

(2) 30 S. C. R. 42.

(4) 3 M. & W. 1.

(5) 6th Ed. p. 192.

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gence. As to the case of *Grenier v. The Queen* (1), it is not overruled by *Miller v. Grand Trunk Railway Company* (2), in so far as the Supreme Court held that the deceased could by contract in his life time exonerate his employer from liability for injury or death in the course of his employment.

Mr. *Taché* replied.

THE JUDGE OF THE EXCHEQUER COURT (now June 24th, 1907) delivered judgment.

The suppliant brings her petition on her own behalf and as tutrix to her minor child, to obtain relief from the Crown for the death of her late husband which occurred on the 22nd day of May, 1900, at Sayabec Station, on the Intercolonial Railway, and which is alleged to have been occasioned by the negligence of the Crown's servants while acting within the scope of their duties or employment. The deceased was a brakeman, and at the time of the accident was engaged in coupling cars at the station mentioned. In doing this work he caught his heel between the rail and guard rail and being unable to get clear was run over by the cars and killed. It was the duty of the section foreman at that place "to see that all spaces less than five inches between rails at frogs, crossings, switches, guard rails, etc., were filled and kept filled in with wood packing or other suitable material, such packing not to reach higher than the underside of rail head." The evidence shows, I think, that the section foreman who was at the time in charge of the permanent way at Sayabec had failed in his duty in respect of the place where the deceased caught his foot between the rail and guard rail. In other respects the case does not materially differ from that of *Armstrong v. The King* in which judgment has just now been given; and there is in this case as in that, a

(1) 30 S. C. R. 42.

(2) [1906] A. C. 187.

defence founded upon the fact that the deceased was at the time of the accident a member of the Intercolonial Railway Employees' Relief Insurance Association. It will be sufficient if I refer to my reasons for judgment in that case, and without repeating them make them a part of the reasons for judgment in this case.

There will be judgment for the suppliant, and a declaration that she is entitled to the following relief, that is to say, to recover from the Crown as damages for the death of her late husband the sum of three thousand dollars in her own right, and the further sum of one thousand dollars in the right of her minor child.

She will also be allowed the costs of the petition.

Judgment accordingly.

Solicitors for suppliant: *Louis Taché.*

Solicitors for defendant: *E. L. Newcombe.*

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