IN THE MATTER OF THE PETITION OF RIGHT OF JOSEPH LAJOIE..... SUPPLIANT.

1921
March 10.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Railways—Trespasser—Acceptance of risk—Act of employee contrary to express instructions.

After his day's work was over, between 6 and 7 o'clock, in the evening, and when he was absolute master of his time and leisure, L., an employee, notwithstanding that he had been forbidden to do so by his foreman, took a hand car for the purpose of going on the railway track to procure coal for his sleeping van. Coal could have been obtained for overnight from an adjoining van. When running on track with the car, he was struck by a train running on schedule time, and killed.

Held: That under the circumstances, L. was in the position of a trespasser, *ab initio*, upon the right of way.

2. That moreover, such employee after his day's work was over, not then acting within the scope of his employment, but on the contrary acting in contravention of specific instructions given to him by his foreman, having entered upon a railway track, where trains ran, with full knowledge of the risk he was taking, must be held to have accepted such risk.

PETITION OF RIGHT to recover $2,000 for the death of his son which occurred whilst in the employ of the Canadian National Railways.

February 23rd, 1921.

The case was now heard before the Honourable Mr. Justice Audette at Arthabaskaville.

G. Ringuet, for suppliant.

John A. Sullivan, for respondent.

The facts are stated in the reasons for judgment.

1921

LAJOIE v. THE KING.

Reasons for Judgment.

Audette J.

AUDETTE J. now (this 10th March, 1921) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of $2,000, being the damages, he alleges, he suffered from the death of his son, resulting from an accident on the Canadian National Railways, a public work of Canada.

Lajoie, the son, who was 19 years old(hereafter called Lajoie, as distinguished from Lajoie, the father and suppliant) on the 26th November, 1918, formed part of an *extra* gang of men working upon the right of way of the said railroad.

The gang of men in question were under the superintendence and direction of foreman Chappedelaine, and their working hours were from 6.30 a.m., to 5.30 p.m. The railway was supplying them with 5 or 6 vans or box-cars in which they lived. That is one car was used for their tools and equipment, 3 or 4 cars were used for dormitories, and one car was used both as a kitchen and dining room. The men fed themselves at their own expense, the cook bought the food, and they clubbed together and each of them paid his share of such expenses at every week end.

After the day's work the men could at their will sleep in these cars or at their homes, or at any other place, provided they would report on time for work. The man sleeping in the car was paid the same wages as the man who would not. The car, under the circumstances, became a residence, a dwelling or habitation (1).

These vans were lighted by stationary oil lamps and heated with coal.

(1) *Rex* v. *Gulen*, (1917) 39 O.L.R. 539; *Corriveau v The King*, 18 Ex C.R. 275.

1921

LAJOIE v. THE KING.

Reasons for Judgment.

AUDETTE J.

On the 26th November, 1918, between 6 and 7 o'clock in the evening (as stated by witness Bernaquay) after his day's work, and after taking his evening meal, Lajoie went to foreman Chappedelaine and asked his leave to take a hand-car to go and get coal and oil. Foreman Chappedelaine refused him such leave or permission, stating that it was too dark to go and get coal, adding he would send for some next day, in day-time.

There was still some little coal left in Lajoie's van, but he stated he did not have enough for the night; but as Chappedelaine said, in such a case, coal could be borrowed and taken from another van,—there was no necessity to go any distance for coal.

After refusing Lajoie the permission to take the hand-car, Chappedelaine, all dressed up, threw himself on his bed, as was customary for him to do after his day's work and meal. His attention being attracted by some noise on the track, he got up and came to the door of his van and distinguished a hand-car already leaving easterly in the dark.

Lajoie, notwithstanding foreman Chappedelaine's refusal to give him permission to take the hand-car, took it out and secured three companions, among whom were Bernaquay and Plante, who testified at trial. He also procured an ordinary hand-lamp, with white light,—but not the kind of lamps daily used by railway employees.

The night was dark and cold, with a slight wind.

This hand-car was operated by these four men with the ordinary handle. Lajoie and Lepaille, had their back turned to the front or rather towards the direction

1921

LAJOIE v. THE KING.

Reasons for Judgment.

Audette J.

in which they were travelling and Bernaquay and Plante faced them. After leaving Blake on their errand towards Carmel, just after leaving a curve and after getting on a straight stretch, and going up grade, the hand-car was struck by a mixed train, that is a freight and passenger train, running on the usual time-table, and as a result of such accident Lajoie was killed. Hence the present action by the father on behalf of his son.

Now, Lajoie was on this hand-car against the orders of his foreman or employer. Hand-cars are not allowed out at night except under very special circumstances, and whenever they are taken out there must be a foreman in charge,—and at night they must, under the regulations, carry a red light and signals for protection,—and the men operating them should at times stop and listen.

It is true they had that white light, from an ordinary hand-lamp, which was probably obstructed by the men working upon the handles, and the closeness of the light to these men would justify hazarding the inference that they were thereby blinded and prevented from seeing any distance. Moreover, when they were struck, they had just left a curve and therefore were not in a position to see and notice or to be noticed and seen from any distance. They were working their car on an up-grade and as some witness said, the noise of the hand-car was considerable.

Witness Bernaquay, on examination in chief, said he did not see any light on the coming train, and on cross-examination he said he saw something like an engine. Then he added, he jumped when he saw the engine, and adds Lajoie could not see it.

1921

LAJOIE v. THE KING.

Reasons for Judgment.

Audette J.

The suppliant lays great stress on his allegation that the engine which struck the hand-car had no head-light. In support of such allegation, he called four witnesses: Witnesses Bernaquay and Plante who were on the hand-car, said they did not see any light on the front of the engine. However, the collision occurred just as they had left the curve and had not much time or opportunity of taking their bearings before being struck. Their own light would prevent them from seeing any distance.

Then comes the evidence of Charles Jacques, an hotel-keeper, at St. Cyrille, who says his hotel is situate at 25 to 30 feet from the railway track, and that at 5 o'clock on the day of the accident, *a train* stopped for about 15 minutes at St. Cyrille, and he noticed the engine had no light in front, no "big light upon the engine which projects ahead." Joseph Laroche, the other witness, who was in the hotel with the previous witness says there was no light in front of the train; but he adds, that on leaving the crew placed, on the front of the engine, a white light, in the centre, but at about the height of the coupling device.

As against the suppliant's evidence, on the question of head-light, there is on behalf of the respondent the following evidence. Witness Chappedelaine testified he noticed a head-light on the train at the usual place when it passed near their vans, but adds he could not say what kind of light. There was even enough light to allow him to take the number of the engine. Conductor St. Pierre says that as the electric light was out of order, there was a hand-lamp in the head-light, inside the magnifying glass. He further says he saw the hand-lamp in place and burning when

1921

LAJOIE v. THE KING.

Reasons for Judgment.

Audette J.

they arrived at St. Leonard. Stoker Boucher, says that the engineer was looking out on his side of the cab, and he was looking out on the other side. They saw no light on the track, and never noticed the accident until after their arrival at St. Leonard, when boards and debris were found entangled on the front of the engine. He further testified he himself placed the lamp in question in the head-light space of the engine at Drummondville, because the dynamo was out of order. Their light could be seen at a pretty fair distance, and at every station they stopped he ascertained the head light was burning. Brakeman Arcand also testified there was a hand-lamp in the head-light's space of the engine, and contends that the light could be seen at a distance of 3 to 4 miles. When he got off at St. Leonard, the light was burning, and Brakeman Lebrun also testified they had a lamp in the head-light that night.

As against the positive evidence of these five witnesses on behalf of the respondent, in respect of the head-light,—a question not material in the view I take of the case,—there is the evidence of two persons who were on the hand-car who testified *they did not see* any light on the engine,—as above explained, together with the evidence of the two persons in the hotel at St. Cyrille, who saw a train there around five o'clock and one of them said there was no big light in front of the engine, which projects ahead,—and the other said they placed a hand-lamp in front. *Magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed. That train was seen at St. Cyrille around 5 o'clock, and the accident occurred between 6 and 7

o'clock and there is a distance of not quite four miles,— (as ascertained from the time-table) between St. Cyrille and Carmel. That train was not even identified as having been the train which collided with the hand-car.

Under the circumstances, I unhesitatingly find the engine carried an oil hand-lamp in the space inside the magnifying glass of the usual head light of the engine and such light was sufficient to comply with the railway regulations.

Now, I must also find that when Lajoie was out on this hand-car, without leave, after 5.30 o'clock in the evening, his day's work was over, and he was then absolute master of his time and leisure and therefore was not acting within the scope of his employment (1), he was not doing work arising out or in course of his employment.

When Lajoie was killed, he was not acting in the course of his day's work. After his daily work was over, Lajoie was not working for his employer. He chose to live in the van to avoid expenses, and he did so of his own volition, and to serve his personal advantage (2).

By the employer forbidding an employee to do a certain thing it makes it an act which is not incidental to his employment, and takes the employee outside the sphere of his employment, so as to disentitle him to recover (3).

Lajoie was on the railway track, on the hand-car, not only without leave but in face of a refusal by his superior officer to allow him to do so and without

(1) *Philbin* v. *Hayes*, 34 T.L.R. 403; *Corriveau* v. *The King*, 18 Ex. C.R. 275.

(2) *Limpus* v. *London General Omnibus Co.*, 1 H. & C., 526, 543.

(3) *A.G. Moore & Co.* v. *Fife Coal* Co., 37 T.L.R. 198.

1921

LAJOIE v. THE KING.

Reasons for Judgment.

Audette J.

taking the usual necessary precautions in handling the hand-car. He was therefore in the position of a trespasser *ab initio*, having deliberately contravened the instructions of his superior officer. "When entry, authority, or license is given to anyone by the law, and he doth abuse it, he shall be a trespasser *ab initio*." (1).

Furthermore, knowing as he did the risk he took in entering upon a track used by trains, he must be held to be *volens* in respect of the risk confronting him and which he accepted.

Lajoie had no right to go upon the railway in the hand-car, as he did (2). There was no duty infringed on behalf of the railway, and Lajoie by his wrongful act cannot impose any new duty upon the same (3).

The following observation from Sington's Law of Negligence, is quite apposite:

"A trespasser, who is an adult, cannot, as a general rule, recover damages. If, however, the defendant has done an inhuman or an unlawful act, such as setting a spring gun, then, although the trespasser be by his own act the immediate cause of the injury he sustains, he can maintain an action. The view of the law seems to be that no duty is owed to a trespasser; but there is a duty owed to all the world not to do something unlawful, or inhumanely cruel. When, however, it is said that no duty is owed to a trespasser, this only means that there is no such duty towards him to prevent consequential injury happen-

(1) Pollock, Law of Torts, 11 Ed. 399-400. See also Beven, on Negligence, 13 Ed. 430, 935. *G.T.R.* v. *Barnett* (1911) A. C. 361, at 370; *C.P.R.* v. *Henrich*, 48 S.C. R. 557.

(2) *Walsh* v. *International Bridge and Terminal Co.*, 44 Ont. L.R. 117.

(3) *Degg* v. *Midland R. Co.* 1 H. & N. 773, at 782. See also the Rule of the Roman law in the Institutes 4,3, 5, under the Lex Aquilia.

ing, as would be owed to one who is not a trespasser. It does not mean that you have no duties to him at all, merely because he is a trespasser; and therefore if you go out of your way to inflict injury upon him deliberately you would be liable."

"In the cases where a plaintiff has succeeded notwithstanding that he was a trespasser, circumstances were present which made the trespass immaterial." (1).

The proximate and determining cause of the accident was the conduct of Lajoie in venturing upon the track, at night, in a hand-car, against the will of his superior officer and in violation of the regulations above mentioned and he is therefore responsible for the determining cause of the accident and the doctrine of *faute commune*, mentioned at bar, does not apply. He was the victim of his own negligence and reckless conduct.

No action sounding in tort will lie against the Crown, unless it is made liable therefor by statute. To succeed in the present case, the suppliant must bring his case within the ambit of sec. 20 of the Exchequer Court Act and he can only succeed where the accident is the result of negligence on behalf of an officer of the Crown acting within the scope of his duties and employment. It is a law of exception. I find there is not a tittle of evidence in respect of actual negligence. The only duty owed to Lajoie by the railway was not to run him down knowingly and recklessly. *Maritime Coal Ry. Co.* v. *Herdman* (2).

Having found as above set forth, it becomes unnecessary to pass upon the question of insurance raised at bar.

(1) Hunter's Roman Law, 4th Ed. 246; de Couder, 2 p. 322.

(2) 59 S.C.R. 127.

1921

LAJOIE v. THE KING.

Reasons for Judgment.

Audette J.

There will be judgment declaring that the suppliant is not entitled to any part of the relief sought by his petition of right.

Judgment accordingly.

Solicitors for suppliant: *Garceau & Ringuet.*

Solicitor for respondent: *John A. Sullivan.*