

IN THE MATTER OF THE PETITION OF RIGHT OF
CYRILLE TURGEON

SUPPLIANT;

1914
Nov. 7.

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Government Railway—Brakesman attempting to board moving train—Rules of 1889—"Person"—Acceptance of Risk—Faute Commune—Liability.

The suppliant while employed as a brakesman on a government railway attempted to board a way-freight train while in motion. In doing so he slipped and fell, a wheel of the last truck of the van passing over one of his legs injuring it to such an extent that it had to be amputated. By rule 48 of the railway regulations of the 7th December, 1889, it was provided that "no person shall be allowed to get into or upon or quit any car after the train has been put in motion, or until it stops. Any person doing so, or attempting to do so, has no recourse upon the Railway Department for any accident which may take place in consequence of such conduct."

Held, that suppliant was a "person" within the meaning of the above rule and was subject to its provisions.

2. That the suppliant accepted the risk incidental to his attempt to board a moving train.
3. That as the proximate cause of the accident was the suppliant's act in attempting to board a moving train, he had contributed to the determining cause of his injury and the doctrine of *faute commune* could not be applied even if the railway authorities had been guilty of negligence in allowing the platform of the car by which the suppliant attempted to board the train to be defective—a fact not found by the Court.

PETITION OF RIGHT for damages resulting from alleged negligence on the part of certain servants of the Crown on the Intercolonial Railway in the Province of Quebec.

The facts are fully set out in the reasons for judgment.

September 23rd, 1914.

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The case was tried at Quebec before the Honourable Mr. Justice Audette.

J. A. Lane, K.C., for the suppliant.

P. J. Jolicœur for the respondent.

AUDETTE, J. now (November 7th, 1914) delivered judgment.

The suppliant brought his petition of right seeking to recover the sum of \$20,000. for alleged damages arising out of bodily injuries received by him while employed as a brakeman on the Intercolonial Railway, which injuries, he claims, resulted from the negligence of the employees of the said railway, a public work of Canada.

The accident occurred on the 4th November, 1912, and the petition of right was filed in this Court on the 18th June, 1914, that is more than one year after the accident, a delay within which the right of action would be prescribed and extinguished under the laws of the Province of Quebec. However, the petition, under the provisions of sec. 4 of *The Petition of Right Act*, was left with the Secretary of State on the 18th day of September, 1913, and following the numerous decisions given in this Court upon this question, it is found that such deposit with the Secretary of State has interrupted prescription within the meaning of Art. 2224 C.C.P.Q.

The suppliant was one of three brakemen on the way-freight No. 50, which, on the morning of the 4th November, 1914, left Chaudiere for Riviere du Loup, arriving at Cap St. Ignace at 11.55 a.m., and leaving the same station at five minutes after twelve noon.

This way-freight is composed of freight cars and a passenger car at the rear, which has been called the van

all through the evidence. This van is divided into two compartments, one for passengers and one for baggage.

As will be seen by reference to exhibit No. 3, there was no side hand rails on that van on the day of the accident—they are, however, indicated in red on the said exhibit. By reference also to exhibit "A"—a photograph of the van in question taken sometime after the accident showing the hand side rail added to it thereafter—the construction of the step will be seen. It appears from the evidence that the last step, the one nearer to the ground, had to the right a rod of iron which ran from the body of the car to the middle of the last step, leaving about four inches of the eight inch step, without any right angle construction.

When the suppliant, in company with the other train hands, had finished loading the last car, which, according to him, was the second from the locomotive and according to others, the third—he, with brakeman N. Belanger, took down the gang-way, closed the door of the car, and says he walked towards the rear of the train for about ten feet.

The conductor says that when the gang-way had been taken away, he went to the station—went in the ladies' waiting room, and asked the agent if there were any orders and the latter told him there was nothing, that they could go. He then came out of the station, walked about 30 feet from the men towards the van. When he was about opposite the fifth car he gave the signal to start, and got on board the van by the steps at the rear end of the same. As the station was on the left of the train—and the engineer's place in the engine is on the right and that of the fireman on the left—the latter saw the signal given by the conductor and he transmitted it to the engine driver who was in the cab with him.

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The suppliant says that when this signal was given, his associates, the conductor and brakeman Belanger, started to get on board and he followed them, eight or nine feet behind. Belanger boarded the van by the front platform at the very same time the conductor was boarding it at the rear platform. The suppliant was the last one behind, the last one to get on board; but they all got on board after the train had started and while the train was in motion. Turgeon got on by the front of the van, and on getting on he seized the vertical iron rail on the front of the platform, his foot slipped on the step, he fell and the last truck of the van passed over his leg which was afterwards amputated three inches below the knee. His left arm was also forced and strained resulting in a partial paralysis caused by the lesion of the root of the nerves which are distributed at the arm. This arm is permanently affected in the ratio of a decrease of 75% of its normal power, according to the medical men heard as witnesses.

Having related the salient facts leading to the accident, the next question which presents itself is: What was the proximate, the determining cause of the accident?

The answer is, indeed very apparent and obvious. The cause of the accident was boarding the train in motion.

The suppliant contends, 1st—That the employees always board the train after it has been put in motion, 2nd—That the train at the time in question started at double the usual rate of speed, 3rd—That there were no side hand rails on the van in question at the time of the accident, and 4th—That the steps were defective, in that there was nothing to protect the foot on the side of half the last step.

Can the boarding of trains in motion be justified from the fact that the employees have fallen into the habit of doing so? This must be answered in the negative. If such a practice exists, it is clearly explainable from the fact that the employees with time familiarize themselves with danger and omit to take the most ordinary precautionary measures to protect themselves; notwithstanding that all through the Rules and Regulations hereinafter referred to, they are repeatedly warned they must always take the safe side and not run unnecessary risk.

On his examination in chief, Turgeon says that there was a space of two minutes between the time when they had finished unloading and the starting of the train. On cross-examination he, however, adds that, in those two minutes, he closed the car and took off the gangway with his associate. But Belanger on the other hand, who was the person who took off the gangway with Turgeon, says that Turgeon closed the door, they both took off the gangway and adds, "*Ca "été court après avoir tiré le gangway. Deux minutes "se sont écoulées après avoir tiré le gangway."*"

There must have been some delay between the time the gangway was taken off and the time the train left. That is further corroborated by the conductor's evidence, when he says that, when the gangway had been taken off, he went in to the station, in the ladies' waiting room, enquired from the agent if there were any orders, received an answer from the latter that there was nothing and that they could go. When he came out of the station he walked about thirty feet from the men, and when opposite the fifth car gave the signal to start. When the men took off the gangway, they all knew that was the last piece of work they had to do at that station, and instead of walking towards the back of the train, they waited for the

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signal to start again and got on board when the train was moving.

The getting on board the train while in motion was of Turgeon's own choosing, thus voluntarily and rashly exposing himself to injury, and in so acting he also took the consequences of such risk. Had he walked to the van the moment his work was over he could have boarded the train before it left, or at least before it had acquired the speed it had when he actually boarded it. If he perceived the train was going too fast to get on board, he was not bound to attempt it; he could have signalled to stop the train, as the conductor said he himself did on a former occasion, and the conductor further adds he would not have found fault for once stopping his train on such an occasion to allow Turgeon to get on board.

Did the train start with unusual speed? On this point the evidence is conflicting. While the Conductor Belanger, the porter and the suppliant, say it did; both the fireman and the engine-driver say they started at the usual speed. The latter adding they had on that occasion an old (*ancien*) passenger-engine, commanding 20 to 25% of decrease in power. Such engines, he says, are placed on such way-freight trains when they are ruined, and the one he had that day was ruined and ripe to be sent for repairs. It was contended on the one hand the train started at seven or eight miles an hour, while on the other hand that it started at the usual speed of three or four miles. However, when the train was stopped after the accident, it had covered between 200 to 300 feet. The train cannot have actually started at seven or eight miles, while it must no doubt have increased its speed as it went along; but there is no speed assigned to the engine-driver at which he should start his train.

Fault is further found because there were no hand side rails on the van at the time of the accident. But it is clearly and admittedly conceded that a hand side rail would be of no avail or use for one boarding a train by the front platform. However, it is said had there been hand side rails Turgeon could have boarded the rear of the car with the help of that rail, and he thus would have cleared the rear truck of the car. The boarding of the train by the rear platform would have delayed only the more his boarding the train, and in no case was it justifiable or excusable, under the circumstances, to board the train in motion. This latter argument would also apply to the step, notwithstanding that it is impossible to find that such a step is defective. It was under all the circumstances safe and more particularly so for boarding a train which is not moving. And while, under the evidence, it is impossible to find whether Turgeon's foot slipped lengthwise or crosswise, the probability is that he merely slipped crosswise from the side of the step and not from the end.

Turgeon knew the van in question—knew how it was equipped—even knew it was dangerous to board a train in motion, and his only excuse for so boarding it was that they always did it (which is no excuse). He knew the danger and risk. There was nothing to constrain him to get on board in the manner he did—he did it of his own accord.

The suppliant, contrary to the Rules and Regulations, a copy of which was given him when he entered the Government employment, boarded a moving train. *Grand Trunk Ry. v. Birkett*, (1); *Cook v. Grand Trunk Railway Co.* (2).

(1) 35 S.C.R. 296.

(2) 31 Ont. L.R. 183.

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Under section 49 of *The Government Railway's Act*, the Governor in Council is authorized to make regulations, *inter alia*, (c) "to be observed by conductors, "engine drivers and other officers and servants." Among the Rules and Regulations so made and published in the *Canada Gazette* on the 7th December, 1889, is found Rule 48, reading as follows:

"No person shall be allowed to get into or upon
 "or quit any car after the train has been put in
 "motion, or until it stops. Any person doing so, or
 "attempting to do so, has no recourse upon the
 "Railway Department for any accident which may
 "take place in consequence of such conduct."

This rule is under the heading of "Passenger and "Station Regulations," and it was questioned at the trial as to whether or not it applied to the employees of the railway. It will be noticed that the regulations made under that heading are not only with regard to "passengers," but also with regard to "station," and apply to a number of persons who are not passengers. Whenever a rule under that heading deals only with passengers it says so; but whenever the rule deals with more than passengers, the more general word of "person" is used. It would therefore seem that the word "person" in rule 48 is broad enough to cover all persons, and that it lays down the rule for all persons at a station, passengers and employees of the railway. As the proximate cause of the accident is the boarding by him of a train in motion, he thus contributed to the cause which determined the accident, and the doctrine of *faute commune* does not apply when the person injured contributed to the determining cause of the accident. If the accident occurred Turgeon has but himself to blame, and *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.*

The unfortunate position in which the suppliant is now placed appeals greatly to one's sympathy, and while the Court cannot grant any relief in such a case, it is to a certain extent comforting to know he is getting, under the Provident Fund Act (6-7 Ed. VII, ch. 22) an allowance of \$20 per month during his lifetime.

There will be judgment in favour of the Crown, the suppliant being denied any relief under his Petition of Right.

*Judgment accordingly.**

Solicitor for the suppliant: *J. A. Lane.*

Solicitor for the respondent: *P. J. Jolicœur.*

*EDITOR'S NOTE:—Affirmed on Appeal to Supreme Court of Canada.

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