

Joseph Fournier - - - - - *Appellant*

v.

The Canadian National Railway Company - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1926.

Present at the Hearing :

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD ATKINSON.

LORD SHAW.

LORD PARMOOR.

[*Delivered by* LORD ATKINSON.]

This is an appeal *in formâ pauperis* by special leave from a judgment of the Supreme Court of Canada dated the 27th May, 1925, reversing a judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) dated the 4th December, 1924, which, confirmed on the points material to this appeal, but set aside on other grounds, the judgment of the Superior Court of the Province of Quebec (District of Rimouski) given in favour of the appellant on the 17th May, 1924.

On the 5th September, 1922, at about 2 o'clock in the morning, Adelard Fournier and his wife and their young child were driving towards their home at Padoue, in the County of Rimouski, returning from the house of Fournier's brother where they had spent the evening. When they came to the point where the roadway crosses the Intercolonial Railway tracks on the level they were struck by a locomotive and tender which were moving

reversely. Fournier was instantly killed and his wife was so severely injured that she died a few days afterwards. The child was less severely injured.

The appellant is the tuteur of the six minor children of Adelard Fournier deceased, whose ages on the 5th September, 1922, varied from three to ten years. The appellant as such tuteur on the 30th August, 1923, brought against the respondents, The Canadian National Railway Company, the action out of which this appeal has arisen, claiming on behalf of the above-mentioned children to recover damages for the loss they sustained by the death of their father, which, as he alleges, was caused by the careless, negligent and, in the several respects mentioned in the statement of claim, illegal manner in which the respondents worked and regulated the traffic over the above-mentioned level crossing.

The 15th paragraph of the appellant's statement of claim contained the definite statement that he elected to have his case tried by a jury. The statement was met by a motion to strike out the said paragraph, but the motion was dismissed by Mr. Justice Sevigny, sitting in the Practice Division of the Superior Court of Quebec at Rimouski, and by the Court of King's Bench of Quebec (Appeal Side), and the action was ultimately tried before a judge and jury on the 16th and 17th May, 1924.

The jury found that the Canadian National Railway Company were by their servants guilty of the negligence charged, but most unfortunately shaped the damages they awarded in a form quite improper and illegal. Instead of finding a verdict for a lump sum, they awarded an annuity of \$300 to be paid annually to each of the children of whom the appellant was the tuteur till he or she should reach the age of 18 years. It is much to be regretted that the learned Judge who presided at the trial did not refuse to accept a verdict so shaped, did not instruct the jury that it was not legally permissible for them to so shape it, and did not explain to them the proper principle upon which damages should be awarded. That course, however, was not adopted, but instead of it the appellant moved the Court that the annuities awarded should be capitalised at a sum of 15,000 dollars, and that a verdict should be found and judgment entered up for that amount with costs. To this course the presiding judge apparently assented. It is in a trial before a judge and jury the function of the jury, not of the judge, to fix the amount of the damages to be awarded. This sum of \$15,000 was never awarded by them, and the learned judge had no power to consent to the substitution of the sum of \$15,000 for the illegal award of annuities for which the jury had in fact found their verdict.

On the 4th June, 1924, the respondents appealed from the above-mentioned judgment of the Superior Court to the Court of King's Bench of the Province of Quebec, praying that either

judgment for them in the aforesaid action might be entered up, or that a new trial might be awarded on the following grounds, amongst others :—

- (1) That the respondents were not in existence at the date of the accident.
- (2) That the railway (*i.e.* the railway on which the accident occurred) was at that time owned and operated by His Majesty, and that the proceedings should have been taken before the Exchequer Court.
- (3) That the damages were excessive.
- (4) That the judgment did not accord with the verdict, and that the Judge had no power to alter the verdict.

The question of the right of the appellant to a trial by jury was not raised by or mentioned in the notice of appeal, having been disposed of by the decision of the Court of King's Bench delivered on the 7th February, 1924, on the appeal from the Superior Court touching the appellant's right to a trial by a judge and jury. It did not appear to their Lordships that Mr. Pritt, in the very able argument which he addressed to the Board in this case, sought to challenge the grounds number three or four. On the contrary, he appeared to their Lordships to admit that the verdict, taken as having been found by the jury, which, in fact, it was not, and the judgment entered up upon it could not possibly stand, and that, therefore, the question as to whether the damages of \$15,000 were excessive could not, in the circumstances, arise for decision. The question of the right of the appellant to a trial by jury under section 15 of the Statute only arises if their Lordships decide the main question in favour of the appellant. This main question is not very easy of solution, and the consideration of it necessitates examination of an Order in Council, No. P.C. 115, approved by His Excellency the Governor-General on the 20th January, 1923, and of several sections of a statute passed in the Parliament of the Dominion of Canada in the 9-10 years of the reign of His present Majesty, entitled an Act to incorporate the Canadian National Railway Company and respecting Canadian National Railways. The statute came into force on the 6th June, 1919, and may be conveniently referred to in this judgment as the statute of 1919.

This statute begins with a recital that His Majesty, on behalf of the Dominion of Canada, has acquired control of the Canadian Northern Railway Company and of the various constituent and subsidiary companies comprising the Canadian Northern system, as specified in the first schedule to the Act annexed, and that it is expedient to provide for the incorporation of a company under which the railways, works and undertakings of the companies comprised in the Canadian Northern system might be consolidated, and together with the Canadian Government Railways, operated as a National Railway system. His Majesty then, with the advice and consent of the Senate and House of Commons of

Canada, assents to this statute of thirty-one sections. It is not necessary to deal with more than three or four of these. By the first of these the Governor in Council is empowered to nominate such persons as may be deemed expedient, not less than five or more than fifteen in number, to be directors of the company thereby incorporated, and upon such nomination being made the persons so nominated and their successors, and such other persons as may from time to time be nominated by the Governor in Council as directors, shall be and are thereby incorporated as a company under the name of the Canadian National Railway Company, thereafter and hereinafter called the Company. Adelard Fournier met his death on the 5th September, 1922. On the 4th October, 1922, a month all but one day after that event, an Order in Council of that date, reciting the first section of the statute of 1919, already recited, was passed appointing the nine gentlemen therein named directors of the Canadian National Railway Company. Upon that nomination and only then, according to the provision of the first section of the statute of 1919, was the Canadian National Railway Company incorporated and brought into existence. Accordingly, it did not, up to this date, manage, operate or exercise any control whatever over the Intercolonial Railway, upon whose lines Fournier met his death.

By the tenth section of this Act of 1919, the terms Canadian Government Railways, Canadian Northern, Canadian Northern System, and His Majesty are defined, and then by section 11 it is enacted that

“the Governor in Council may from time to time by Order in Council entrust to the Canadian National Railway Company the management and operation of any lines of railway or part thereof, and any property or works of whatsoever description, or interest therein, and any powers rights or privileges over or with respect to any Railways, properties or work, or interests therein, which may be from time to time vested in or owned, controlled or occupied by His Majesty or such part or parts thereof or rights or interest therein, as may be designated in any Order in Council, upon such terms and subject to such regulations and conditions as the Governor in Council may from time to time decide ; such management and operation to continue during the pleasure of the Governor in Council and to be subject to termination or variation from time to time in whole or in part by the Governor in Council.”

It is obvious that by this section the Governor in Council was empowered to approve of and adopt a rigid and permanent scheme for the management and operation of the railways and parts of railways mentioned in the section, or he might, on the contrary, if it seemed good to him, approve of and adopt a temporary and flexible scheme, susceptible of modification in whole or in part, from time to time as he, the Governor in Council, thought fit, and altogether experimental in character. The Governor-General on the 20th January, 1923, but not before, purported to exercise the powers by this section conferred upon him by an Order in Council of that date. This Order begins by reciting at length the eleventh section of the aforesaid Act of 1919, and then proceeds to state that the Canadian National Railway

Company was brought into existence by virtue of an Order in Council of the 4th October, 1922, that the authority of the General Manager of the Canadian Government Railways was to be discontinued, and that in lieu thereof the management and operations of these railways was to be entrusted to the Company, *i.e.* the Canadian National Railway Company, pursuant to the provisions of the eleventh section of the above-mentioned statute. The effect of this change is stated to be to make applicable to the management and operation of the said railways many of the provisions of the said statute, namely, to provide for the incorporation of a company under which the railways, works and undertakings of the railways comprised in the Canadian Northern System might be consolidated, and together with Canadian Government Railways operated as a national railway system.

It is then set forth that

“ The Minister accordingly recommends that the Canadian Government Railways, which for the purpose of Section 10 of the said Act shall include the following lines designated specifically :—

“ The Intercolonial Railway.

“ The National Transcontinental Railway.

“ The Lake Superior Branch leased from the Grand Trunk Pacific Railway Company.

“ The Prince Edward Island Railway.

“ The Hudson Bay Railway.”

and as a general designation all other railways and branch lines, the title to which and to the lands and properties whereon such railways are constructed are vested in His Majesty, by Order in Council entrusted in respect of the management and operation thereof to the Company on the terms in the aforesaid statute expressly specified, namely, that such management and operation shall continue during the pleasure of the Governor in Council, and shall be subject to termination or variation from time to time in whole or in part by the Governor in Council.

It is further set forth that

“ The Minister also recommends that the full benefit of all powers, rights, privileges and interests vested in His Majesty under any agreement for joint operation or running right with any other corporation in connection with the operation of the said Canadian Government Railways, be also entrusted in respect of such operation and management to the Company on the same terms as heretofore set forth.”

The provisions of this Order in Council suggest several points for consideration. The Intercolonial Railway, upon the lines of which Fournier met his death, was not included in the Canadian Northern system. The group of railways with which these latter railways should combine are to be operated as a national railway system under the name and title of the National Railway Company. But the Intercolonial Railway was not defined to be a member of the Canadian Government Railways until this Order in Council was passed on the 20th January, 1923, about four and a half months after the accident had befallen Fournier. And yet it is contended that the railway, *i.e.* the Canadian National Railway Company, is liable for damages for a tort committed by one of the

constituent members of this combined railway before the combination was effected and called into existence, and before the constituent member in default was introduced into the combination. Of course, it was competent for the legislature of Canada to have provided by express and specific legislation that this result should follow, but in the absence of such legislation it is not an inference which can be drawn from the general phrases in the fifteenth and other sections of the statute of 1919. Again, the provisions contained in the passage from line 20, page 156, of the record to line 35 on the same page strongly support Mr. Lafleur's argument that the formation of this group of railways under the name of the Canadian National Railway was not, and was not intended to be, a fixed permanent arrangement, but was rather a temporary arrangement in the nature of an experiment, its composition varying from time to time if that should be thought desirable. The management of the combined group of railways is to be subject to termination or variation in whole or in part from time to time at the will of the Governor in Council, and under the lines from 30, page 156, to 36, some new adventure might be introduced into the group of the company so formed.

The section of the statute upon which the decision of the Board in this case must mainly turn is the fifteenth. It runs thus :—

“ Actions suits or other proceedings by or against the Company in respect of its undertaking or in respect of the operation or management of the Canadian Government Railways, may, in the name of the Company, without a fiat, be brought in, and may be heard by any judge or judges of any Court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in Court under the rules of Court applicable thereto. Any defence available to the respective corporations (including His Majesty) in respect of whose undertaking the cause of action arose shall be available to the Company, and any expense incurred in connection with any action taken or judgment rendered against the Company in respect of its operation or management of any lines of railway or properties, other than its own lines of railway or properties, may be charged to and collected from the corporation in respect of whose undertaking such action arose. Nothing in this Act shall affect any pending litigation.

The section is very badly drafted. It would have been quite easy to have provided that any action, suit or proceeding arising from breaches of contract or tort committed before the formation of the group, designated the Company, by corporations or companies which subsequently became members of the group shall be brought against the Company on or after its formation, or *vice versa*. The draftsman preferred obscurity, however, apparently.

The actions, suits or other proceedings mentioned in the opening lines of the section are actions, suits or other proceedings in respect of the undertaking of the Company—the Canadian National Railway Company—or respecting the operation or management of the Canadian Government Railways. As to these latter, it is clear that the cause of action, suit or other proceeding must be something done or omitted to be done by this group during

the management and operation mentioned. The same interpretation must be given to the actions and suits arising in respect of the Company's undertaking. Well, the directors of the Canadian National Railway Company were not appointed or the Company incorporated until the 4th October, 1922. And the Intercolonial Railway Company was not declared to be one of the Canadian Government railways until the 20th January, 1923. Therefore, the accident to Fournier on the 4th September, 1922, cannot be held to be something arising in any way out of the management and operation of a group of railways which until four months after the accident did not include the Intercolonial Company, on which the accident occurred. Nor can an accident which happened a month before a particular undertaking came into existence be held to arise out of the conduct of or in respect of that same undertaking. Whatever might be the right conclusion as to this latter group, there cannot be any doubt as to the management of the Canadian Government Railways, since the Intercolonial line did not belong to them until January, 1923.

The next point is the provision as to the defence available to any of the constituent companies being available to the Composite Company. It is not easy to give a rational construction to this involved section. It was not apparently contemplated by its authors that where an intended constituent member of a particular group has before its absorption into that group been guilty of a tort or cause of action for which it might be sued, that on its absorption into the group two actions can be or are to be brought for the same cause of action one against the constituent member of the group and the other against the group itself, nor does it apparently contemplate that on absorption the group is to be added as a defendant. It apparently deals only with a case in which the group is sued in respect of something done on the system of one of its constituent members after absorption and provides that the group may, if so sued, avail itself of any defence which the constituent member might have availed itself of if it had been sued before absorption.

The next provision as to the recovery of expenses is merely subsidiary to the last. It would appear that the words pending litigation must be confined to litigation pending at the passing of the Act. There is nothing of that kind in this case, it is therefore unnecessary to deal with it.

For these reasons their Lordships are of opinion that the appeal fails and should be dismissed, and they will humbly advise His Majesty accordingly.

In the Privy Council.

JOSEPH FOURNIER

v.

THE CANADIAN NATIONAL RAILWAY COMPANY.

DELIVERED BY LORD ATKINSON.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1926.