

IN THE MATTER OF THE PETITION OF RIGHT OF

1917
Jan. 8

DAME ROSE-ANNA JACOB, OF THE PARISH OF NOTRE-DAME DE LA VICTOIRE, WIDOW OF FERDINAND BEGIN, AS WELL PERSONALLY AS IN HER QUALITY OF TUTRIX TO HER MINOR CHILDREN,

SUPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Negligence of Crown's Servant —“Upon, in or about railway”—Death—Measure of Damages.

Sub-sec. (f) of sec. 20 of the Exchequer Court Act (R.S.C. 1906, ch. 140, as amended by 9-10 Edw. VII, ch. 19) does not require, in order to recover against the Crown, that the death or injury occur on a public work, but it is sufficient that the injury complained of be caused by the negligence of the Crown's servant acting within the scope of his duties "upon, in or about the construction, maintenance or operation of the Intercolonial Railway or the Prince Edward Island Railway." The Crown is liable for an accident in the course of unloading coal for the Intercolonial Railway from a steamer moored at a wharf, belonging to the Crown and used as part of the Intercolonial railway, such accident being occasioned by the negligence of an officer or servant of the Crown.

In an action to recover for death by negligent act the plaintiffs are entitled to such damages as will compensate them for the pecuniary loss sustained thereby, together with the pecuniary benefits reasonably expectant from the continuation of life, taking into account the age of the deceased, his state of health, his expectation of life, his earnings and his future prospects. Insurance money received or about to be received by plaintiffs should also be taken into consideration when making the assessment.

PETITION OF RIGHT to recover for the death of suppliant's husband occasioned by the negligence of the Crown's servants.

Tried before the Honorable Mr. Justice Audette, at Quebec, November 11 and 23, 1916.

E. Belleau, K.C., for suppliant; *E. Gelly*, for respondent.

AUDETTE, J. (January 8, 1917) delivered judgment.

The suppliant brought her petition of right, on her own behalf and as tutrix to her minor children, to obtain relief from the Crown for the death of her late husband which occurred as the result of an accident, in October, 1914,

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at Lévis, P.Q., while he was engaged unloading coal for the Intercolonial Railway. And it is further alleged that the accident has been occasioned by the negligence of the Crown's servants while acting within the scope of their duties or employment.

The accident occurred under the following circumstances. The steamer "Wacona" was moored at the Princess Pier, at Lévis, and her cargo of coal for the Intercolonial Railway was being unloaded at that pier, a wharf belonging to the Crown, and upon which spur lines of the Intercolonial Railway are constructed up to the crane trestle, at the edge of the wharf. This crane trestle, which is operated by steam, is composed of three clams working on booms, under the direction of three separate hatchmen superintending three separate gangs of men. The clam, which caused the accident, and which weighs about 3,000 lbs., goes down in the hold of the steamer and grips coal which it takes up and dumps in the Intercolonial Railway cars for distribution, or deposits the same on the wharf when there is no car available.

On the morning of the day of the accident Begin, the suppliant's husband, was working with Hatchman Dumont's gang at bunker or hold No. 3, when at about 9.30 a.m., Dumont ordered his gang to quit working at No. 3 and go and work at bunker or hold No. 2. This kind of shift was customary, being adopted in order to unload the ship evenly, and to prevent a list or disturbance of the cargo. Dumont's gang was composed of from 12 to 15 men. This gang of men then started from No. 3 and worked their way towards the bow to No. 2, and to reach that bunker, as will be seen by reference to plan, Exhibit No. 2, they had to get out of No. 3, walk on deck a piece and then go down a ladder to that hold, near the place marked "M" on the plan, and work their way back across or past the hatchway of No. 2 hold where Dickson's gang of men of also about 12 to 15 were working at gathering coal for the clam that was dropped through the hatchway in question.

Hatchman Dickson, in charge of the men working at hold No. 2, and under whose control the clam in question was operated, was stationed on deck, on the starboard side

of the hatchway. His duty or employment consisted in directing the work of his gang, and especially in directing the clam by signalling to Paquet, the driver of the crane locomotive standing on the trestle on the edge of the wharf in question. And indeed, Paquet very clearly defines the scope of Dickson's work, as far as it was concerned with respect to the operation of the clam, by stating that Hatchman Dickson *is there all the time, he watches every dip of the clam, and if Dickson is not there, I do not work the clam.*

To take the ladder leading to Bunker No. 2, Dumont's gang had to pass through the hold or aperture leading to the ladder in question at point "M" on the plan, and that hold was only a few steps from where Dickson was stationed. After quite a number of Dumont's gang had already gone down the ladder, had travelled on the coal and passed by the hatchway through which Paquet's clam was working, Begin, the suppliant's husband, in turn got down the ladder and ran towards the stern on the port side of the steamer, following, as stated by most of the witnesses, nine or ten of his gang who had already passed the same way, and when reaching about the middle of the port side of the hatchway, he was struck on the head by the clam and knocked down, dying a few hours afterwards. Dickson, who was at his post, saw the clam which was coming down under his direction, and at the time when the accident was inevitable and before striking the coal, but not in time to save Begin's life—he put his hands up and ordered it to stop. The clam was stopped at four feet odd from the coal, with the effect of striking Begin with the spring or bounce produced by the sudden jerk of stopping, only making matters worse.

This case, it is contended, comes within the ambit of sub-sec. (f) of sec. 20 of *The Exchequer Court Act*¹, as amended by 9-10 Ed. VII, ch. 19, which reads as follows:

"(f) Every claim against the Crown arising out of any death or injury or loss to the person or to property caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon, in or *about* the construction, maintenance or opera-

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¹ R.S.C. 1906, c. 140.

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"tion of the Intercolonial Railway or the Prince Edward "Island Railway."

It is well to note here that this new sub-sec. (f) is very different from sub-sec. (c), repeatedly passed upon both by this court and the Supreme Court of Canada. Sub-sec. (f) does not require that the death or injury occur on a public work, but it is sufficient that the negligence complained of be caused by the negligence of the Crown's servant acting within the scope of his duties *upon, in or about* the railway, a public work of Canada.

Therefore, to bring the case within the provisions of sub-sec. (f) and recover against the Crown, the damages resulting from the death of her husband, it is sufficient for the suppliant to establish that his death was caused by the negligence of a Crown servant while acting within the scope of his employment, *upon, in, or about* the construction, maintenance or operation of the said railway.

Does the evidence in the present case disclose such negligence as would give a right of action, as above mentioned?

There can be no doubt that Hatchman Dickson was derelict in his duties and guilty of very serious negligence in allowing a gang of 12 to 15 men to pass and meet, under the hatchway, upon coal whereupon they were also liable to stumble; another gang of men of about the same number, without first stopping the operation of the clam during the space of time necessary to perfect such shift. It was his obvious duty to stop the clam which indeed was part of and attached to the crane trestle, a public work, itself in turn part of the Intercolonial Railway, and the clam is a piece of machinery which travels and works very fast. It is true the evidence discloses that while Ryan, the general foreman, says he would not stop the clam under such circumstances, but the other Hatchman Dumont states he has already stopped the clam under such circumstances, when he had ordered the shift of a gang. This diversity of opinion between these two witnesses may only go to show the difference between sound judgment and prudence, reckoning with consideration of the value of men's lives, as against recklessness, often acquired as the result of getting familiarized with dangerous work which too often

proves fatal. Ryan, however, added that the hatchmen are supposed to take care, and that he never gave orders to the hatchmen to stop the clam when men are passing; that, he says, is left to the judgment of the hatchmen.

However, in neglecting to stop the clam under the circumstances, Dickson obviously failed to do what should be expected of a reasonably prudent hatchman, careful of the limbs and lives of his fellow-men working with him:

*Filion v. The Queen*¹.

The accident happened on board the steamer which was moored at the Government wharf, the Princess Pier, upon which extended the Intercolonial Railway trains or cars as far as the crane trestle, from which they were loaded, by means of the clams—and it must be found that the negligence of the Crown's servant, which caused the accident, happened upon, in or about the operation of the Intercolonial Railway, a public work of Canada.

It is found unnecessary to go into further details with respect to the circumstances of the accident.

With regard to the insurance moneys which the suppliant has already recovered, and the \$250 she will ultimately receive, they should be taken into consideration in assessing the damages to which she is entitled. I have already discussed this point in *Saindon v. The King*,² and will content myself with a reference to that case.

The suppliant's husband was a ship-laborer, 45 years old, earning 37½ cents an hour in the intermittent work of unloading these colliers, during the season of navigation, and was also earning outside of that work; but the evidence, both with respect to his earnings on board the vessels and otherwise is very unsatisfactory, and the amount he earned each year cannot be ascertained with any degree of even proximate certainty. There was an average of one vessel a week or so, and it took from 2 to 3 days, or so, to unload them.

However, in estimating the compensation to which the suppliant is entitled under the circumstances, while it is impossible to arrive at any sum or amount with any mathematical accuracy, several elements must be taken into

¹ 4 Can. Ex. 134; 24 Can. S.C.R. 482.

² 15 Can. Ex. 305.

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consideration. One must strive, however, to give the suppliant and her children such damages as will compensate them from the pecuniary loss sustained by the death of a husband and father; to make good to them the pecuniary benefits that they might reasonably have expected from the continuation of his life, which by his death they have lost. In doing so one must also take into account the age of the deceased, which at the date of the accident was about 45, his state of health, the expectation of life, the nature of his employment, a laborer, the wages he was earning and his prospects. But, on the other hand we must not overlook that the deceased in such a case as this must, out of his earnings, have supported himself, as well as his wife and children, and that there are contingencies other than death, such as illness, as the being out of employment, to which in common with other men he was exposed.

All of these considerations are to be taken into account, and under all the circumstances of the case, I am of opinion to allow the widow the sum of \$1,400, and the children the sum of \$2,400, to be equally divided among them—making in all the sum of \$3,800 for which there will be judgment with costs.

Judgment for suppliant.

Solicitors for suppliant: *Belleau, Baillargeon & Belleau.*

Solicitors for respondent: *Gelly & Dion.*
