

PHILANDER HOWARD .....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1924  
May 23.

*Crown—Public work—Lachine Canal bridge—Damages—Section 20, Exchequer Court Act—Pecuniary loss for child of seven—Funeral expenses—Upkeep and education.*

In July, 1923, H's son, aged 7, while crossing the Lachine Canal, over a bridge the property of the Crown, climbed the railing, 2 feet 9 inches high, to see a boat pass, and in letting himself down slipped through an opening of 8½ inches, between the end of the floor planking and

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the said railing and was drowned. The care and maintenance of the bridge were upon the superintendent of the Lachine Canal. This flooring had been renewed in 1922, leaving the opening in question.

*Held*, that such a hole constituted a dangerous place, amounting almost to a trap, at night, and that the officer in charge, in allowing it to remain, was guilty of negligence for which the Crown was responsible.

2. That in such an action it is not sufficient for suppliant to prove he has lost a speculative possibility of pecuniary benefit by the death of his son, but he must show he has lost a reasonable probability of pecuniary advantage.
3. That any amount expended in the upkeep, instruction, etc., of the child is not recoverable; nor is there any right of action in the father for recovery of expenses of burial.
4. That damages claimed for loss of time and for the expenses of a doctor in attending the child's mother, are too remote and not recoverable.

PETITION OF RIGHT to recover \$2,450 for damages it is alleged suppliant suffered by the loss of his son by drowning, having fallen through a bridge over the Lachine Canal, a public work of Canada.

May 14th, 1924.

Case now heard before the Honourable Mr. Justice Audette at Montreal.

*A. I. Popliger* for suppliant.

*L. A. Rivet, K.C.* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 23rd May, 1924, delivered judgment.

This is a Petition of Right whereby it is sought to recover damages amounting to the sum of \$2,450 as the result of the drowning, in the Lachine Canal, of the suppliant's son, a boy of seven years of age.

The accident happened under the following circumstances. In the course of the afternoon, on the 11th July, 1923, in company with two small boys, the suppliant's son, while crossing the Government bridge at St. Patrick Street, near Côte St. Paul, in the city of Montreal, having his attention attracted by the noise of a motor boat on the canal, and desirous of seeing the same, got on top of the railing of the bridge, which is two feet nine inches from the flooring. When he came to come down, he slipped in an opening of 8½ inches, between the end of the planking of the bridge and the truss or railing of the same, fell in the canal and was drowned. Hence the present action by the father.

The bridge in question is the property of the Crown and its care and maintenance are upon the Superintendent or Acting Superintendent of the Lachine Canal, as established by the evidence. The bridge's construction is composed of three large trusses; one on each side and one in the centre dividing the bridge into two separate sections, one of which is assigned to the railway, and the other of 18 feet 2 inches, to the public for use by vehicles and pedestrians. These large steel trusses have flanges above and below and one of these trusses acts as a railing, two feet nine inches above the flooring of the bridge, on the side where the boy fell.

Between the end of the flooring and the truss in question, at the place where the accident happened, there is an open space of  $8\frac{5}{8}$  inches,—and the flange at the top,—2 feet 9 inches in height, from the floor, extends inside, to  $1\frac{1}{2}$  inch of the edge of the flooring, leaving, however, under that flange the space in question of  $8\frac{5}{8}$  inches through which the child slipped into the canal.

When the Acting Superintendent took charge in June, 1922, he says the flooring of the bridge had just been renewed leaving the opening in question which had been maintained up to date. It is customary, he says, to leave a small space between the edge of the flooring and the truss, for the purpose of letting surface water fall in the canal and for throwing the sweepings in the same manner; but at no other bridge was such opening so large; two or three inches would have been sufficient.

The edge of the planking had been unevenly cut and there was such an opening of  $8\frac{5}{8}$  inches only for a width of about 8 to 10 inches and the average opening all through the bridge is of about 5 to 6 inches.

I must therefore find, under the circumstances, that the case comes within the provision of section 20 of the Exchequer Court Act. There is a public work, the property of the Crown; an officer of the Crown whose want of proper care of the paving, in allowing it to remain in such a state as found when he took possession, amounts to negligence, while acting within the scope of his duties or employment and that the accident resulted therefrom.

This hole in the bridge constituted a dangerous place, almost amounting to a trap at night, and the officer in

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charge owed to the public the duty of protecting those who use the bridge from an accident of this kind; and he failed to discharge such duty. If the mind of a child is immature and incapable of weighing danger like an adult, therefore an adult owes a greater degree of care to an infant than to another adult. That is applicable when the adult, as in the present case, owes the child, as one of the public, some duty, and the child is in a place where he has a lawful right to be and where danger is either known or apparent.

Now coming to the consideration of the intricate question of damages, under the circumstances of the case, I find the damages must be limited to the loss of a life of substantial or pecuniary benefit to the relatives to entitle them to recover. The evidence is conspicuous for the want of establishing any pecuniary loss to the father by reason of the child of seven years of age having been killed. *Damnum absque injuria*. There is not a tittle of evidence upon which damages could be found for the obvious reason that there is none.

In such an action it is not sufficient for the suppliant to allege or even prove that he has lost by the death of the deceased a speculative possibility of pecuniary benefit; to succeed it is necessary to show he has lost a reasonable probability of pecuniary advantage. In the case of *Barnett v. Cohen* (1), damages were refused for the death of a four years old son, following the well established jurisprudence upon that branch of the law. See also *Runciman v. Star Steamship Line* (2) and the long catena of cases cited in support of that view in Messrs. Macmurchy and Denison, *Railway Law*, 3rd ed. 454.

The suppliant is not entitled to recover any amount he would have expended in the upkeep, instruction, etc., of the child, *Beaudet v. Grace Co.* (3). Furthermore, there is no right of action in the father for the recovery of the expenses incurred for burying his child for the elaborate reasons given in the case of *Clark v. London General Omnibus Co. Ltd.* (4); *Toronto Railway Co. v. Mulvaney* (5); *Filiatrault v. C.P.R.* (6); 2 *Beauchamp*, *General Digest* 1827.

(1) [1921] 2 K.B. 461.

(2) [1900] 35 N.B.R. 123.

(3) [1904] 7 R.P.Q. 82.

(4) [1906] 2 K.B. 648.

(5) [1906] 38 S.C.R. 327.

(6) [1900] R.J.Q. 18 S.C. 491.

The damages claimed for loss of time and for the expenses of a doctor for attendance on the child's mother are too remote and are not recoverable.

Upon all grounds the action fails and there will be judgment adjudging that the suppliant is not entitled to any portion of the relief sought by his petition of right. I trust the respondent will be generous enough to forego any claim for costs.

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*Judgment accordingly.* °