

1894
 ~~~~~  
 April 16.

ODILON FILION.....SUPPLIANT ;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

*Petition of right—Person killed on a public work—Negligence of servant of Crown—Liability—50-51 Vict. c. 16—Interpretation.*

Under section 16, clause (c), of *The Exchequer Court Act* (50-51 Vict. c. 16) the Crown is liable for the death of any person on a public work resulting from the negligence of any of its officers or servants while acting within the scope of their duty or employment.

2. Within the limitation prescribed in sec. 16 of *The Exchequer Court Act*, 50-51 Vict. c. 16, the Crown is liable for injuries resulting from the negligence of its officers and servants in any case in which a subject would, under like circumstances, be liable.
3. While certain repairs were being made to the Lachine Canal, the superintendent of the canal had occasion to use a derrick for the purpose of such repairs. The derrick was borrowed from a contractor, and had been used by the superintendent before for similar work. The suppliant's son was, together with other labourers, working at the bottom of the canal under the derrick, but not in connection with it, while it was being erected by another gang of workmen under the immediate direction of the superintendent and his foreman. The work of setting it up was begun in the afternoon of the day of the accident and finished by electric light in the evening. The suppliant's son and the other men working with him were allowed to continue their labours at the bottom of the canal after the derrick was set up, and no notice was given to them by the superintendent or his foreman when they were about to put the derrick into operation. While the first load was being lifted (in weight much under the supposed capacity of the derrick) a portion of the derrick broke at a place where it had been cracked before and fell upon the men working at the bottom of the canal, injuring the suppliant's son so severely that he died a few days afterwards.

*Held*, that the superintendent and foreman, in failing to give notice to the men working beneath the derrick when they started to operate it, were guilty of negligence for which the Crown is liable.

**PETITION OF RIGHT** for damages arising out of the death of a person on a public work resulting from the negligence of the servants of the Crown.

1894  
 FILLION  
 v.  
 THE  
 QUEEN.

By his petition of right the suppliant averred as follows:—

Statement  
 of Facts.

“ L'humble requête de Odilon Filion, journalier, de la paroisse de la Côte St. Paul, dans le Comté d'Hoche-laga dans le district de Montréal, dans la Province de Québec, expose respectueusement:—

“ Qu'il est le père de feu Amédée Filion, en son vivant journalier du même lieu ;

“ Que le où vers le dix-neuvième jour de décembre mil huit cent quatre-vingt douze, le dit Amédée Filion était à l'emploi du Gouvernement Fédéral du Canada sur le Canal Lachine, l'un des canaux sous le contrôle du Gouvernement Fédéral du Canada ;

“ Que le dix-neuf décembre sus-dit, alors que le dit Amédée Filion travaillait au dit Canal Lachine pour le Gouvernement du Canada et sous les ordres et la direction des employés du dit Gouvernement du Canada, il lui arriva, sous les circonstances suivantes, un accident qui lui a coûté la vie.

C'est à savoir :

“ Une escouade d'hommes travaillait au dit canal et soulevait des fardeaux au moyen d'une grue (derrick), la propriété du dit Gouvernement :

“ La dite grue, usée et défectueuse, se brisa tout à coup et le bras du palan s'abattit sur les ouvriers, le tout tandis que ceux-ci travaillaient sous les ordres et la direction des officiers du dit Gouvernement du Canada ;

“ Plusieurs d'entre les dits ouvriers furent blessés plus ou moins grièvement ; le fils du requérant entre autres fut terrassé ; on le transporta chez lui et malgré des soins assidus et intelligents il est mort cinq jours

1894  
 FILION  
 v.  
 THE  
 QUEEN.  
 Statement  
 of Facts.

après des suites immédiates des blessures qui lui furent infligées par la dite grue usée et défectueuse ;

“ Que l'accident sus-dit est arrivé par suite du mauvais état de la grue en question ;

“ Que le vingt-sept décembre en l'an de grâce mil-huit cent quatre-vingt douze, une enquête fut ouverte afin de s'enquérir des causes de l'accident en question pour Notre Souveraine Dame La Reine, par son coroner Joseph Jones, dûment nommé pour remplir ces fonctions dans le district de Montréal sus-dit, et que le jury assermenté a rendu le verdict suivant : “ Que lorsque le derrick (grue) a craqué la première fois, l'ouvrage aurait dû être suspendu, et le derrick être essayé avec sa charge,” tel qu'il appert à la copie du dit verdict dument certifiée et jointe à la présente requête ;

“ Que votre requérant est âgé de soixante ans, sans emploi, et sur le point de ne plus pouvoir travailler ; qu'il lui reste encore quatre enfants qui sont des filles incapables de pourvoir à leur subsistance ; que le défunt Amédée Filion était le seul soutien de la famille ;

“ Que sous les circonstances votre requérant est bien fondé à réclamer des dommages de votre Gouvernement sus-dit ;

“ Que la perte soufferte par votre requérant est inappréciable à prix d'argent ;

“ Que votre requérant consent toutefois à fixer le montant des dommages qui lui sont dûs par votre Gouvernement sus-dit à la somme de cinq milles piastres.

“ Pourquoi votre requérant supplie humblement votre Très Excellente Majesté qu'il lui soit permis de se porter demandeur contre le dit Gouvernement de votre Majesté et qu'un *Fiat* lui soit octroyé en conséquence ; que le dit Gouvernement soit enjoint de répondre à la présente humble pétition de droit dans les délais ordinaires et votre requérant conclut à ce que par le juge-

ment à intervenir sur les présentes, en la Cour de l'Échiquier du Canada, il soit dit et déclaré que la mort du dit Amédée Filion advenue sur les travaux du dit canal Lachine est attribuable à la négligence coupable et à la faute des officiers du dit Gouvernement Fédéral du Canada; que le présent requérant a encouru par la dite faute une perte ou un dommage s'élevant à au moins cinq milles piastres dont il a droit d'être indemnisé par le dit Gouvernement et enfin à ce que le dit Gouvernement du Canada doit payer au dit requérant la dite indemnité de cinq milles piastres."

Her Majesty's Attorney General for the Dominion of Canada filed a statement in defence to the above petition, pleading, in substance, as follows,—

2. The Crown admits that Amédée Filion was working as a labourer on the Lachine Canal under the orders and directions of an officer of Her Majesty at the time he met with the accident complained of in the petition of right.

3. That at the time of the accident, the said Amédée Filion was engaged, along with a number of other labourers, in repairing a breach in the slope-wall of the Lachine Canal above the waste-weir at St. Gabriel's Locks, which breach had been caused by a "washout"; and in carrying on the work of repair, it was necessary to erect a derrick near the breach in the wall, and the said Amédée Filion assisted at the erection of the said derrick.

4. That the work of repairing the breach was a work of emergency and had to be carried on night and day, and that about ten o'clock at night on the 19th December, 1892, while the said Amédée Filion and others were working as aforesaid, the derrick slipped and fell, and he was injured by such fall.

5. That the injury to the said Amédée Filion was not caused through the fault or negligence of the agents

1894  
 ~~~~~  
 FILION
 v.
 THE
 QUEEN.

Statement
 of Facts.

1894
 ~~~~~  
 FILION  
 v.  
 THE  
 QUEEN.  
 \_\_\_\_\_  
 Statement  
 of Facts.  
 \_\_\_\_\_

or officers of Her Majesty, who had the charge and control of the said work for and on behalf of Her Majesty, while acting within the scope of their duty or employment, and that Her said officers and agents were not negligent in the discharge of their duty in connection with the said work.

6. That the said derrick was not worn out or defective, or in a bad state of repair, as alleged in the said petition of right.

7. That the said Amédée Filion was well aware at the time he was so engaged upon the said canal of the character and condition of the derrick, and of the manner in which it had been placed and erected for the conduct of the work; and, in accepting such employment, accepted all the risks incident to or connected with the same, and that the slipping and falling of the derrick, in the manner described in the petition, was one of the risks incident to the said employment, and that the suppliant is not entitled to recover from Her Majesty, as the employer of the said Amédée Filion, any damages for the injury and death which, it is alleged, was caused by reason of the accident aforesaid.

8. That the accident and injury to the said Amédée Filion was due to and happened by reason of the negligence and carelessness of the said Amédée Filion while working in the immediate vicinity of the said derrick, and that if he had exercised ordinary care and caution the injury to himself would not have occurred when the said derrick accidentally fell.

9. That the falling of the derrick was a fortuitous event, beyond the control of Her Majesty's officers employed in connection with the said work, and was not the result of any act of commission or omission on their part, and that Her Majesty was not liable for any damages which may have been sustained by reason of such accident.

10. That one of the causes of action alleged in the petition is based upon the worn out and defective condition of the said derrick, but no action will lie against Her Majesty on this ground, and the same benefit is claimed from this objection as if a formal demurrer was filed to the said petition.

1894  
 FILLION  
 v.  
 THE  
 QUEEN.  
 Statement  
 of Facts.

11. That one of the claims and causes of action set out in the said petition, is based upon the negligence and carelessness of Her Majesty's officers and agents who had charge and control of the said work; but it is alleged that Her Majesty cannot be rendered liable to an accident, nor is the suppliant entitled to recover damages against Her Majesty for or in respect to the said causes of action.

12. That under no circumstances is Her Majesty, as representing the Dominion of Canada, answerable or responsible to the suppliant for or in respect to the claim for damages, and in respect to the said petition of right mentioned, and denies that the suppliant is entitled to the relief prayed for therein.

The material facts of the case appearing upon the evidence may be stated as follows:—

The Lachine Canal is a public work of Canada.

On the 19th of December, 1892, a break occurred in the slope-wall of the canal above the waste-weir at St. Gabriel's Locks, which required immediate repair. In order to facilitate the work, Mr. Kennedy, the superintendent of the canal, borrowed a derrick from a contractor which he had used before for a similar purpose. This derrick was supposed to be capable of lifting a weight of five tons. In his evidence the superintendent stated that he examined the several portions of the derrick by looking it over in a general way before it was set up, and did not discover anything wrong with them. There was, however, a crack in the iron-work of one of the parts which escaped his

1894

FILION

v.

THE

QUEEN.

Statement  
of Facts.

observation, and which subsequently caused the accident in respect of which this action was brought. The evidence showed that the crack in the iron could not have been detected without cleaning the rust from the sides of the metal, which was not done. The derrick was set up under the direction of one Huot, foreman of the work of repairs, but the superintendent was also present during the time of its erection. The work of setting it up commenced in the afternoon of the day of the accident and was completed by electric light the same evening.

The suppliant's son, Amédée Filion, since deceased, and some other labourers, were working at the bottom of the canal while the derrick was being set up. They were engaged in some work preparatory to making the repairs, at a place underneath where the derrick was being erected; but they had nothing to do with the business of erecting it, which was done by another gang of men. There was some evidence showing that a slight noise as of cracking had been heard, by the men employed in connection with it, while the derrick was being set up; but it is not at all probable, looking at the plate itself, that it was cracked or broken by any strain put upon it while it was being placed in position.

The suppliant's son, and the other men working with him were allowed to continue their labours underneath the derrick until it had been fully set up; and although both Kennedy and Huot were present when the men in charge of the derrick started to lift the first load, neither of them gave, or caused to be given, notice to the men working below of their intention to begin operations with the derrick. The first load attempted to be lifted was much under the supposed capacity of the derrick when it was in good condition; but, when the strain of the load came upon

it, it broke at a place where it had been cracked before, and part of it falling upon the men working below injured the suppliant's son so severely that he died a few days afterwards.

1894  
 FILON  
 v.  
 THE  
 QUEEN.  
 ———  
 Argument  
 of Counsel.  
 ———

Upon the evidence as to damages it was shown that the suppliant was at the time of the trial a man sixty years of age, that he had a wife and several children to support, to whose maintenance his deceased son had regularly contributed. That his son at the time of his death was twenty-two years old, unmarried, and was living with his father. That the deceased had been earning a sum of one dollar and twenty-five cents per day as a labourer.

The action was brought within one year after the death of the person injured, and by an ascendant relation of the deceased duly qualified to bring such action under the provisions of Article 1056 of the Civil Code of Lower Canada.

March 20th, 21st and 22nd, 1894.

The trial and argument of the case took place at Montreal.

*Coderre*, for the suppliant, contended that there was a clear case of negligence made out by the evidence, and that the Crown could not escape liability therefor in view of the provisions of clause (c) of the 16th section of *The Exchequer Court Act*.

There was negligence on the part of the superintendent in not making a careful inspection of the derrick he borrowed before it was set up; there was negligence on his part and that of his foreman in allowing the deceased and the rest of his gang to go to work underneath where the derrick was being erected; there was negligence in the manner and time of setting up the derrick. When the crack was heard by the men there should have been an immediate and ex-



1894  
 FILION  
 v.  
 THE  
 QUEEN.  
 Argument  
 of Counsel.

haustive examination of the whole machine. Notice should have been given to the men working below when it was intended to start operations with the derrick. The fact that something occurred calling for some examination, and the further fact that Huot was not called by the Crown, and that his answers were not explained, are matters which cannot be overlooked in coming to a conclusion on the question of negligence.

*Monk*, Q.C., following on the same side, cites *City of Quebec v. The Queen* (1); *Brady v. The Queen* (2). The superintendent was guilty of negligence upon the facts in evidence under Art. 1053 *Civil Code*, and by clause (c) of sec. 16 of *The Exchequer Court Act* the doctrine of *respondeat superior* is applied to the Crown in such a case. [He cites also Art. 1054 *C.C.L.C.*]

He contends that the respondent should be held liable for the following reasons: (a) the derrick was not examined before its erection, as it should have been; (b) when they began to operate the derrick the men working below it should have been, as they were not, warned to leave their dangerous position,—especially was this necessary when the derrick was an old one such as this; (c) when the noise as of cracking was heard while the derrick was being erected, those in charge of it should not have neglected to exhaust every means of discovering its cause; (d) the mere fact of the derrick breaking in the manner and under the strain it did, shows it was not sound when put up, which fact the Crown's servants should have known.

The suppliant in this case is afforded a *locus standi* by Art. 1056 *C.C.L.C.* He is properly qualified, being the father of the deceased, to bring the action; and it has been brought within the prescribed time.

(1) 2 Ex. C.R. 252.

(2) 2 Ex. C.R. 273.

The suppliant is entitled to substantial damages. His deceased son was earning \$1.25 per day and at least one-half of that amount was contributed by him towards the household expenses of the suppliant. A round sum of \$1000 would not be an excessive award of damages. [He cites *The Canadian Pacific Ry. Co. v. Robinson* (1)].

1894  
 FILION  
 v.  
 THE  
 QUEEN.  
 Argument  
 of Counsel.

*Hogg*, Q.C., for the respondent, contended that the evidence did not show negligence by an officer or servant of the Crown within the meaning of clause (c) of sec. 16 of *The Exchequer Court Act*. Kennedy, the superintendent, was an officer of the Crown, but Huot his foreman was not; and it was under the immediate direction of the latter that the derrick was put up. The superintendent cannot be charged with negligence in putting up the derrick when he secured the services for such work of a man of acknowledged skill and ability in matters of this sort. If the evidence shows any negligence it is the negligence of Huot, the foreman of the works appointed by the superintendent, and not the negligence of the superintendent himself, who, as an officer of the Crown, was the only person in this case whose negligence would bind the Crown. There was no duty upon him which he either totally failed to do or negligently performed.

He cites *Wigmore v. Jay* (2); *Municipality of Pictou v. Geldert* (3).

*Monk* Q.C. replied.

BURBIDGE, J. now (April 16th, 1894) delivered judgment.

The suppliant brings his petition of right to recover damages for the death of his son, Amédée Filion, which was occasioned by an accident that happened to the

(1) 19 Can. S.C.R. 292.

(2) 5 Ex. 354.

(3) [1893] A.C. 524.

1894  
 ~~~~~  
 FILION
 v.
 THE
 QUEEN.
 ———
 Reasons
 for
 Judgment.
 ———

latter by the breaking of a derrick beneath which he was working at some repairs to the Lachine Canal, in the Province of Quebec. The action is rested upon clause (c) of the 16th section of *The Exchequer Court Act*, and Articles 1053, 1054 and 1056 of the *Civil Code of Lower Canada*.

I have had occasion elsewhere to express my views at considerable length in regard to the Crown's liability, in Canada, for injuries resulting from the negligence of its officers and servants (1). On that subject I have nothing to add at present, except that I think it was the intention of Parliament that the Crown should, within the limitations prescribed in section 16 of *The Exchequer Court Act*, be liable in any case in which a subject would, under like circumstances, be liable.

As to the facts of this case, I find in favour of the suppliant and against the respondent the issues raised by the 5th, 6th, 7th, 8th and 9th paragraphs of the statement in defence. Whatever else may be said, I think this much may be said, that Kennedy, the superintendent of the canal, and Huot, the foreman of the workmen, ought not to have commenced work with a derrick procured and set up under the circumstances existing in this case, without giving some notice or warning to the men who were working in the canal, under the place where the derrick was being set up. In neglecting to give such warning before subjecting the derrick to the strain of its first load, they failed to do what I think might be fairly expected of a prudent superintendent or foreman reasonably careful of the limbs and lives of the men whose work he was directing. I think the case is within the section of *The Ex-*

(1) REPORTER'S NOTE: See C. P. 300; *Martin v. The Queen*, *Brady v. The Queen*, 2 Ex. C. R. 2 Ex. C. R. 328; *Lavoie v. The Queen*, 3 Ex. C. R. 96; *Leprohon Quebec v. The Queen*, 2 Ex. C. R. v. *The Queen*, 4 Ex. C. R. 100. 252; *Gilchrist v. The Queen*, 2 Ex.

chequer Court Act relied upon, and that the claim is one arising out of the death of a person on a public work, resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duty or employment.

It was argued that the suppliant could not recover because the negligence which was the cause of the accident, was that of a fellow-servant of the deceased. At one time it appears to have been thought that such a rule formed part of the law of Lower Canada. In *Fuller v. The Grand Trunk Railway Company* (1), Mr. Justice Badgely, and in *Bourdeau v. The Grand Trunk Railway Company* (2), Mr. Justice Monk, expressed the opinion that a servant of the railway company had no action for damages against the company for any injury he might sustain through the negligence of his fellow-servant. But in the case of *The Canadian Pacific Railway Company v. Robinson* (3), in which the two cases mentioned were referred to on the argument, the present learned Chief Justice of the Supreme Court of Canada, [citing *Demolombe* (4), and *Sourdat* (5)], said that "according to the best French authorities, the rule of the modern English law upon which that defence is founded, is rejected by the French law, which governs the decision of such questions in the Province of Quebec." Sir Frederick Pollock holds the same view. Discussing the rule of the English law, as it stood before 1880; as to the master not being liable to his servant for the negligence of a fellow-servant, he says that "no such doctrine appears to exist in the law of any other country in Europe" (6).

There will be judgment for the suppliant for \$1,000 and costs.

Judgment accordingly.

Solicitors for suppliant: *Primeau & Coderre.*

Solicitors for respondent: *O'Connor & Hogg.*

(1) 1 L.C.L.J. 68.

(4) Vol. 31, No. 628.

(2) 2 L.C.L.J. 186.

(5) Vol. 2, No. 911.

(3) 14 Can. S.C.R. 114.

(6) Pollock on Torts, p. 88.

1894

FILLION

v.

THE
QUEEN.Reasons
for
Judgment.