Hendricks (*Suppliant*) *v.* **The Queen** (*Respondent*)

Cattanach J.—Ottawa, September 17, 1970.

Jurisdiction—Appeal—Damages—Fatal accident—Supreme Court of Canada reversing dismissal of damage action—Application to this court to apportion damages under Lord Campbell's Act—Want of jurisdiction—Supreme Court Act, R.S.C. 1952, c.259, s.46.

Following an accident in the Red River resulting in the drowning of *H*'s wife and the loss of his boat, a petition of right was filed in this court for damages against the Crown. The trial judge found *H* solely responsible for the accident and dismissed the petition but assessed special damages at $1,599.11 and general damages at $20,000 for *H* and his daughter under the *Fatal Accidents Act* and the *Trustee Act* of Manitoba. The Supreme Court of Canada on appeal ([1970] S.C.R. 237) attributed negligence equally to *H* and the Crown, and gave judgment for half of the amounts assessed by the trial judge, *viz* $10,799.55. *H* then applied to this court to apportion that sum between himself and his daughter under the provisions of the *Fatal Accidents Act*.

Held, the Supreme Court of Canada having in accordance with *s.46* of the *Supreme Court Act* given the judgment that should have been awarded, the Exchequer Court was *functus officio* and without jurisdiction to entertain the motion.

MOTION to apportion award of damages between suppliant and his daughter.

A. O'Connor, Q.C. for suppliant.

L. Sali for respondent.

CATTANACH, J.—The suppliants bring this notice of motion in order that the judgment in favour of the suppliants by the Supreme Court of Canada in the amount of $10,799.55 might be apportioned as between the suppliant, Egan Hendricks, and his daughter Marjory Jane Brule under the provisions of *The Fatal Accidents Act*[1].

To properly consider the motion it is expedient to briefly review the circumstances under which it has been brought.

The suppliant by petition of right in the Exchequer Court of Canada, sought to recover damages from the Crown (1) as administrator of the estate of his late wife under the *Trustee Act*[2] and also under and by virtue of the *Fatal Accidents Act* for the benefit of himself and his daughter, Marjory Jane Brule, and (2) on his own behalf, for damages for injury to himself and for property lost. By coincidence I was the judge who heard the trial in Winnipeg, Manitoba, on April 24 and 25, 1968.

In the reasons for judgment which I gave dated May 31, 1968, I concluded that the suppliants were not entitled to the relief sought by their petition of right.

[1] R.S.M. 1954, c. 84.
[2] R.S.M. 1954, c. 273.

Notwithstanding that my decision was adverse to the suppliants, I proceeded to assess the amount of damages sustained by the suppliant in accordance with what I understand to be the accepted practice. Those damages I would have assessed had I found in favour of the suppliants on the question of liability were as follows:

(1)	Special damages to the suppliant on his own behalf for damage to the boat and loss of personal property	$ 670.00
(2)	General damages to the suppliant on his own behalf	nil
(3)	Special damages under the *Trustee Act* for funeral expenses	929.11
(4)	General damages under the *Fatal Accidents Act* and the *Trustee Act* for pecuniary loss to the suppliant and his daughter	20,000.00
(5)	General damages under the *Trustee Act* for pain and suffering and loss of expectancy of life	2,500.00

In so assessing the amount of the damages I did not (in item 4 above) apportion the damages as between the suppliant Egan Hendricks and his daughter Marjory Jane Brule under the *Fatal Accidents Act* for reasons I considered valid at that time.

The pertinent part of the formal judgment dated May 31, 1968, reads as follows:

> This Court doth order and adjudge that the said suppliants are not entitled to the relief sought by their petition of right herein, and that Her Majesty the Queen recover from the said suppliants Her costs herein, to be taxed.

Subsequently an appeal was brought to the Supreme Court of Canada. The pertinent portion of the judgment of the Supreme Court of Canada dated November 17, 1969 reads as follows:

> This Court did order and adjudge that the appeal be allowed, the judgment of the Exchequer Court be set aside and it is decided that judgment be entered declaring that the appellant is entitled to recover the sum of $10,799.55 from the respondent.

Section 46 of the *Supreme Court Act*[8] provides:

> 46. The Court may dismiss an appeal or give the judgment and award the process or other proceedings that the Court, whose decision is appealed against, should have given or awarded.

Obviously the Supreme Court of Canada, by its judgment dated November 17, 1969, gave the judgment which should have been awarded. In the reasons for judgment by the majority the negligence of the suppliants and the Crown was apportioned 50% to 50% so that in the result the damages that I would have awarded had I found in favour of the suppliants were divided in half.

Therefore, in my view, I became *functus officio* when I gave the judgment that I did on May 31, 1968, and the motion is tantamount to me being asked to vary the judgment of the Supreme Court of Canada which, in the absence of a specific direction to that effect from the Supreme Court of Canada, I cannot possibly do.

[8] R.S.C. 1952, c. 259.

In short it is my opinion that I am without jurisdiction to entertain this motion for which reason the motion is dismissed.

Had I considered myself to have jurisdiction I would apportion that award at $1,000 to the suppliant's daughter, Marjory Jane Brule and the balance to the suppliant, Egan Hendricks. I would make such apportionment on the basis of the fact that Marjory Jane Brule had lost the comfort, advice and pecuniary support of her mother between the ages of 15 and 17, at which latter age she was married, or for a period of approximately two years. I might also add that the parties suggest and would consent to such apportionment.

There will be no order as to costs.