DAME FLORE LEGAULT..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT

1931

May 12.
May 26.

Crown—Responsibility—Negligence

At about 9 p.m. on the 15th November, 1921, one C. drove onto a wharf, Montreal Harbour, with his two children to visit some friends who were employed in transferring freight from a shed on the wharf, rented to private companies, to a warehouse in the city. C. had not been sent by his employer, had no business there and went solely to amuse himself. C. had been drinking and was under the influence of liquor. He was making a nuisance of himself and when told to go, got into his car and drove straight into the canal, and all were drowned.

Held that as C. had no business on the wharf on the evening of the accident and was there by tolerance, the Crown under such circumstances was under no obligation or duty to him.

2. Held further that the accident was the result of deceased's inebriated condition and that he was the victim of his own condition and conduct.

PETITION OF RIGHT seeking to recover $15,000 damages for the death of the suppliant's husband who was drowned off one of the wharves in the harbour of the city of Montreal.

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The action was tried before the Honourable Mr. Justice Audette at Montreal.

Maurice Gaudreau and Antonio Garneau for suppliant.
J. L. St. Jacques, K.C., and Z. Filion, K.C., for respondent.

The facts are stated in the Reasons for Judgment.

Audette J. now (May 26, 1931) delivered the following judgment.

The suppliant, by her Petition of Right, seeks to recover damages, in the amount of $15,000, for the death of her husband and her two children resulting from the alleged negligence of the Crown and its employees under the circumstances hereafter related.

On the 15th November, 1929, the deceased, Willie Chagnon, a mechanician in the employ of one Albert Gariepy, without being asked or invited, and not in the course of his employment or drawing any remuneration at that time, drove in his automobile, accompanied by his two minor children, Antonio, eight years old, and Gerard, ten years old, to the Warehouse or Shed No. 2, on the south of Ottawa street, in Montreal, where Mr. Albert Gariepy's men and trucks were engaged in loading freight, that evening. The *locus in quo* of the accident and the sheds in question are shown on Plan Exhibit B. The sheds abut respectively on basins Nos. 1 and 2 and there is a space at the southern end of the sheds, and the passage between the two sheds is about 20 feet in width.

On the evening in question, the lights from the middle of the sheds towards Ottawa street were lighted. Chagnon arrived at Shed No. 2 around 9 or 9.30 that evening—with the object of visiting his friends and the chauffeurs and some of the witnesses said he helped some in loading freight on the trucks.

Mr. Albert Gariepy, the employer of these men, testified Chagnon that evening *avait pris un coup et il était gai:* he had taken a drink and was jolly. Witness Archambault saw Chagnon at the shed and said he worked, was amusing himself, playing and talking to the men. Witness Glaude said Chagnon worked, he played with him, tugged at one another, "il n'était pas à jeun, il avait pris un coup, il n'était pas ivre, c'est-à-dire un homme à terre." He was not without drink, he had taken a drink, he was not drunk, that is, he

was not dead drunk. He had taken a drink with him. Then he adds: "Pour moi, c'était pas mal difficile pour lui de marcher droit, je ne veux pas dire qu'il s'en allait comme un homme qui ne peut se tenir debout, cela paraissait toujours un peu qu'il chambranlait, je ne veux pas dire qu'il était soûl, qu'il était ivre." Witness Cyr testified they both had taken a glass of beer. Chagnon had some altercation with some of the men at the shed and I told him to go away and he did. Witness Lamontagne, a chauffeur also in the employ of Gariepy, testified Chagnon was tugging at the men without malice and came to him when witness told him it was not the time to do so. Chagnon became angry at that remark; he was more or less sober, he was not without drink. Witness Fortin said Chagnon looked very gay, he was playing with the men and had an altercation with a chauffeur and was talking very loud. Two or three of the men told him to go away and he went. It was quite noticeable that when all these witnesses, at trial, were speaking of Chagnon's inebriation they were doing so with a great degree of reticence and caution with the object of protecting their companion.

Chagnon having left his Ford motor between the sheds, got on board and started pretty fast. Witness Fortin testified he was out of the shed and saw Chagnon *un peu vite,* rather fast. He contends there was space to turn a Ford car between the sheds; but Chagnon drove straight down toward the canal and drove right into it with his two children and they were all drowned. It had rained that evening, rain had stopped at the time of the accident; but the ground was wet and the trace of his wheels showed that he travelled straight down into the canal.

Some witnesses said it was dark, others said the moon was out and gave some light. Moreover, no one could testify as to whether or not he had his light on his motor at the time of the accident; but witness Albert Gariepy, who came back to the shed that evening after the accident, testified he was present when the auto was withdrawn from the canal, at about 4 o'clock next day, and that the lights were on the motor, as the car was being brought up, one could see light and the lights were even still on when the auto was brought up on the pier.

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No one actually saw the accident. But no sooner had Chagnon started than someone cried that he had driven into the canal. The men rushed to his assistance. One of them threw a cable, which Chagnon did not catch; he was at about ten feet from the edge of the canal and with the help of the moon, the men could distinguish him, the water was bulbing and they could distinguish his bald head when he came to the surface.

The suppliant charges the respondent with negligence in that there was not enough light at the end of the canal, at the south end of the shed; furthermore that there were no buoys, no poles and no means of saving him, but one of the chauffeurs threw him a rope. However, these sheds were rented to two companies who made use of them for their own purposes and Chagnon had no business there that evening, he was there entirely by tolerance and the Crown in such circumstances was under no obligation or duty toward the deceased. *Leprohon* vs. *The Queen* (1).

Now, approaching the consideration of the present controversy in its legal aspect, it is quite clear that this is an action against the Crown sounding essentially for damages in tort and in such a case where there is no statutory authority therefor, no such action lies against the Crown.

To succeed in a case of the kind, it is necessary to bring the case within the ambit of sub-section (*c*) of section 19 of The Exchequer Court Act (R.S.C. 1927, ch. 34), which reads as follows:

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

Where a liability not existing at common law is created by statute, and the statute provides a particular remedy, that remedy must be followed. *Fort Francis Pulp & Paper Co.* vs. *Spanish River Pulp & Paper Co.* (2).

The first requirement has been satisfied as I find the canal to be a public work; but coming to the second and third requirements, I first find there was no officer whose special duties were to supply the precautions alleged by the suppliant and that there was no negligence. I may add, as was decided in the case of *Harris* vs. *The King* (3), that

(1) (1894) 4 Ex. C.R. 100, at p. 114.

(2) (1931) 2 D.L.R. 97.

(3) (1904) 9 Ex. C.R. 206, at p. 207.

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when the Minister of Railways and Canals, or the Crown's Officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to have lights, gates, buoys, poles, etc., at the *locus in quo*,—it is not for the Court to say that the Minister or the Officer was guilty of negligence because the facts may even show that it was a dangerous place.

Suppliant's Counsel, in support of his contention of negligence cited the case of *The Grand Trunk Co.* v. *Boulanger* (1); but this case is not apposite and bears no analogy to the present one. In the Grand Trunk case, the victim was clearly an invitee and in the present case the victim had no business there, he was only allowed there by tolerance and the Crown owed him no duty for the neglect of which it could be held liable. The deceased voluntarily encountered the danger, if any, and was the victim of his own conduct.

The accident is obviously the result of the deceased's inebriated condition. He was not in a normal condition, both physically and mentally. Byrne's Law Dictionary says that a man may be held drunk for the purpose of an offence when he could not be held drunk for the purpose of another offence. When it comes to driving a motor car, a man whose physical and mental conditions are affected by the use of liquor is not fit to do so. Sir James Purves-Stewart, as related in the Law Journal, 1925, at p. 87, says: "A drunk person is one who has taken alcohol in sufficient quantity to poison his central nervous system, producing in the ordinary process of reaction to his surroundings a temporary disorder, which causes him to be a nuisance or danger to himself or others."

In some circumstances, nuisance is the chief consideration; in the motor car offences, which are now so numerous, it is the danger.

The deceased was much affected by drink, his normal condition had disappeared and he was the worse for drinking. When leaving the shed he lost all his bearings, he was absolutely *disorientated,* and getting in his car with his children, he dashed south instead of travelling north, and notwithstanding that the lights of his car were on, he threw himself in the canal. Under such circumstances, it is not in his mouth or in that of his representative and successor to charge the respondent of neglect for want of

(1) Cass. Dig. 2nd Ed. 733; (1885) 14 R.L. 321; 11 Q.L.R. 254.

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attending to unnecessary precautions. He had abused of liquor, thereby making himself a danger to his children and himself and was ultimately the victim of his own condition and conduct.

There will be judgment ordering and adjudging that the suppliant is not entitled to the relief sought by her petition of right.

Judgment accordingly.