1939
Nov. 27-30.
1940
Aug. 31.

BETWEEN:

DAME EMMA DANIELS (SMITH) McNICOLL ..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT;

AND

CANADIAN PACIFIC RAILWAY COMPANY ..... } THIRD PARTY.

Crown—Petition of Right—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (c) as amended by 2 Geo. VI, c. 28—Negligence of employee or servant of the Crown acting within the scope of his duties or employment—Liability of Crown—Recovery from the Crown of money paid to a third person pursuant to award of Quebec Workmen's Compensation Commission—Subrogation—Quebec Workmen's Compensation Act, 21 Geo. V, c. 100, secs. 3, 9, 9a & 34; schedule 2, sec. 7.

M., suppliant's husband, employed by the Canadian Pacific Express Company, died from injuries received when at work in Windsor Station, Montreal. By an award of the Quebec Workmen's Compensation Commission the Canadian Pacific Express Company was ordered to pay to suppliant a certain sum of money plus $40 per month during her lifetime.

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Suppliant brought action against the Crown to recover damages for the death of her husband. The Crown took third party proceedings against the Canadian Pacific Railway Company. The Court found that the accident which caused the death of M., was attributable solely to the negligence of one, C., while acting within the scope of his duties or employment as a servant of the Crown, and that there was no contributory negligence on the part of M. Suppliant died subsequent to the trial of the action and before judgment was rendered. The third party proceeding was dismissed and judgment given in favour of suppliant against the Crown.

Held: That the cause being ready for judgment when suppliant died, there was no occasion for proceedings in continuance of suit; Articles 266 and 267 C.C.P.

2. That the suppliant is a proper party to produce marriage and burial certificates affecting her husband and to testify with regard thereto, certified copies of acts of civil status being authentic and making proof of their contents: Articles 50 and 1207 C.C.

PETITION OF RIGHT to recover from the Crown damages for the death of suppliant's husband alleged to have been caused by the negligence of a servant of the Crown acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice Angers, at Montreal, P.Q.

T. E. Walsh, K.C. for suppliant.

Roger Ouimet and *R. Gibeault* for respondent.

W. C. J. Meredith and *G. R. W. Owen* for third party.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J., now (August 31, 1940) delivered the following judgment:

The suppliant, by her petition of right, seeks to recover from the respondent the sum of $15,000 for damages allegedly caused to her by the death of her husband, who died as the result of an accident which occurred at the Windsor Station of the Canadian Pacific Railway, at Montreal, on the 8th of October, 1938.

An extract of marriage issued by the prothonotary of the Superior Court for the district of Montreal, filed as exhibit S2, shows that Dame Emma Daniels, widow of Harry Smith, in his lifetime of the City of Montreal,

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was, on the 13th of November, 1911, married to John McNicoll in Bethlehem Congregational Church, Westmount, by authority of licence.

A certified copy from the official records of Calvary Church (United Church of Canada), dated April 26, 1939, filed as exhibit S3, establishes that John McNicoll, husband of Emma Daniels, died in the Royal Victoria Hospital, Montreal, on October 10, 1938, and was buried in Mount Royal cemetery on October 13, 1938.

An objection was made by counsel for the respondent to the production of these marriage and burial certificates on the ground that the suppliant was not the proper party to testify with regard thereto; the objection is, in my judgment, unfounded and it is accordingly overruled: articles 50 and 1207 C.C.

The evidence discloses the following facts.

On October 8, 1938, between 6.30 and 6.45 p.m., John McNicoll, employed by the Canadian Pacific Express Company as warehouseman, was loading baggage on a mail and express car forming part of the Saint John, N.B., train stationed on track 4 of said Windsor Station, referred to in the evidence as train No. 42.

There were four trucks on the truck platform, lying between tracks 4 and 5, alongside train No. 42. The first three were mail trucks; the first one was stationed opposite the west end of the tender of the locomotive in a westerly direction; the second one which Paul E. Charbonneau and Charles Vezina, both employees of the Post Office Department, had just been unloading was opposite the door of the mail compartment of the mail and express car; the third one was a few feet behind. John McNicoll's express truck was behind these mail trucks and stood opposite the door of the express compartment of the mail and express car.

At about 6.43 p.m. the Ottawa train (No. 504), due to arrive at 6.40 p.m., pulled in on track 5. She hit a mail truck of the Post Office Department, the rear wheels of which had fallen from the truck platform, as Charbonneau, who jointly with Vezina, had unloaded part of the mail which they had on their truck and had transferred it on the mail compartment of the mail and express car of the Saint John, N.B., train, was endeavouring to turn the truck so as to bring it back to the door of the baggage car which was immediately behind the mail and express car.

The Ottawa train struck the mail truck and threw it back upon the platform; the truck hit the suppliant's husband and injured him fatally; McNicoll was taken to the Royal Victoria Hospital forthwith, where he received the necessary medical treatment; he died at the hospital as a consequence of his injury at about 6 p.m., on October 10, 1938.

John McNicoll, at the time of the accident, was fifty-four years old. He was in good health. He lived with his wife, the suppliant. He was earning $140 per month and he had prospects of securing an increase of salary in the future.

McNicoll was in the habit of giving to the suppliant his salary every month, save what he needed for his own personal use. He was not only attentive to her financial wants, but he surrounded her with care and gave her moral support.

The suppliant was 77 years of age at the time of her husband's death, as shown by the birth certificate filed as exhibit R2 and as further admitted at the trial by counsel for suppliant.

The mail truck, the rear wheels of which Charbonneau shoved on track 5 and which struck and fatally injured the suppliant's husband, was the property of the respondent. At the time of the accident it was in charge of two servants of the Crown, namely, Vezina and Charbonneau, Post Office employees, acting within the scope of their duties and employment.

After they had put in the mail compartment the mail bags which were to go in it, Vezina gave instructions to Charbonneau to turn the truck so as to bring it opposite the door of the baggage car, where the remaining mail bags had to be unloaded. Charbonneau thereupon started to turn the truck.

The platform between tracks 4 and 5 is only used for trucks; its width is ten feet according to Ernest Rousseau, statistician in the Post Office Department, and nine feet and ten inches according to James L. Looney, draftsman for the Canadian Pacific Railway. The floor of the mail trucks is 10 feet long by 3·8 feet wide. The handle exceeds the floor of the truck by 27 inches.

The evidence is to the effect that, when there is no train on either side of the platform, a mail truck can be

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turned without difficulty. When a train is stopped on one of the tracks alongside the platform it is difficult to turn a truck, although apparently it can be done provided that the driver in charge of the truck is cautious.

Notwithstanding that train No. 42 was standing on track 4, Charbonneau, who had little experience in handling mail trucks, endeavoured to turn his truck, whilst Vezina who had more experience than he had, stood watching him. The rear wheels of the truck fell off the platform. Vezina and Charbonneau tried to lift the truck back on the platform but did not succeed. Almost simultaneously train No. 504 from Ottawa, which was due at Windsor Station at 6.40 p.m. but was about three minutes late, entered the station. When they saw the train approaching, Vezina and Charbonneau endeavoured to run to safety. The train hit the truck and threw it back on the platform. As a result of the collision, the truck was knocked against another truck. One of the trucks hit McNicoll; he fell between the edge of the platform and the axle box of the mail and express car of train No. 42 on track 4, from where he was picked up after the accident, to be taken on a truck to the ambulance.

Seeing that train No. 42 was standing on track 4 and that train No. 504 was liable to come in on track 5 at any moment, Charbonneau, who admitted he knew that train No. 504 was due at 6.40 p.m., should not have attempted to turn his truck the way he did. He could and, in my opinion, should have gone ahead of the engine of train No. 42 to turn his truck. The reason which he gives for not having done this is that he would have had to walk a distance of 100 feet in order to reach the nose of the locomotive and travel the same distance on his way back, which, in his estimate, would have taken three minutes. The least I can say is that he would have had to walk very slowly indeed to take three minutes to cover a distance of 200 feet. I do not believe that it was a question of time, but rather a question of laziness or carelessness.

In my judgment, Charbonneau was grossly negligent in allowing the rear wheels of his truck to fall on track 5 when he knew, or at least should have known, that the

train from Ottawa was due to come in at any moment; in fact the time of its arrival had already passed; train No. 504 pulled into the station at about 6.43 p.m.

Charbonneau, in order to explain the mishap, stated that McNicoll put his express truck in his way, that he (Charbonneau) got his feet entangled and that this is what caused him to push his mail truck beyond the edge of the platform. Charbonneau's evidence on this point is corroborated in part only by Vezina. On the other hand, it is contradicted by Felix Martin, warehouseman, Andrew Brown, warehouseman who on the evening of the accident was working with McNicoll, Lionel Robert Clark, assistant station master, Charles McCurry, fireman on train No. 504, and Andrew Hill, yard foreman; according to them, McNicoll's truck was, at the time Charbonneau pushed the rear wheels of his truck on track 5, alongside train No. 42. But even if McNicoll had tried to move his truck and turn it, I do not think that this would exculpate Charbonneau. The latter was doing an act which was difficult by reason of the fact that a train was standing on track 4 and required great caution particularly at a time when a train was expected to run in on track 5 at any moment. I may say that I was not very favourably impressed by the evidence of Vezina and Charbonneau. Having participated in the accident, they were naturally inclined to endeavour to exonerate themselves.

Two witnesses, namely, Joseph P. Grimard and Joseph Edmond Gaudette, both in the employ of the Post Office Department, testified that McNicoll was often negligent in handling his truck; he was in the habit, when his truck was unloaded, to shove it ahead and thereby obstruct the door of the mail compartment.

Grimard, who said he was senior agent at Windsor Station for the transfer of mail, declared that, at the time of the accident, he was on track 1. He went to the platform between tracks 4 and 5 a few minutes after the accident; he saw an express truck and a mail truck damaged. He stated that he had knowledge of McNicoll's negligence in handling his truck; according to him, when McNicoll had finished unloading his truck, he pushed it ahead, thereby obstructing the mail doorway. Grimard insisted that McNicoll did that every day. He asserted that on many occasions he was present when employees

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of the Post Office Department complained to McNicoll that he was obstructing the entrance of the mail compartment.

In cross-examination, Grimard stated that he had never made any complaints to his employers nor to employees of the Canadian Pacific Railway. He further declared that he could not say anything about the conditions which existed on the evening of the accident.

Gaudette, transfer agent in the Post Office Department, said that he heard Grimard's testimony and that he corroborated it. He added that he often saw McNicoll move his truck ahead and cause obstruction.

Charles Edouard Vezina, who was working with Charbonneau, testified that immediately before the accident the express truck was not opposite the door of the express compartment but was ten or twelve feet ahead. He added that there is a slope on the platform towards the west, which may cause a truck to move in that direction. He could not say if this slope caused the mail truck to fall off the platform.

Counsel for the suppliant objected to this evidence regarding McNicoll's habit of moving his truck ahead and obstructing the door of the mail compartment. I allowed the evidence under reserve of the objection. I think that the objection was well founded and that the evidence in question should be struck from the record. I may say however that, if this evidence were admissible, it would not, in my opinion, carry much weight. The fact that McNicoll may have, on various occasions, moved his truck ahead and left it opposite or near the door of the mail compartment seems to me immaterial. Besides, if, according to Grimard's statement, McNicoll did that every day, the mail as well as other employees should have been aware of it and should not have tried to turn trucks at or near the place where he was in the habit of placing his own truck.

If McNicoll really were a constant nuisance, as claimed by Grimard, it seems to me extraordinary that no report was ever made to the station master or his assistant or to the depot agent about it. I am inclined to believe, and perhaps I should add do believe, that there is a great deal of exaggeration in the versions of Grimard and Gaudette regarding McNicoll's conduct, of the former especially.

William Alex. McKay, depot agent, said that he knew McNicoll and met him every day. McNicoll worked under the witness's orders. McKay stated that McNicoll had worked for the Canadian Pacific Express for at least twenty-five years. His salary, at the time of the accident, was $140 a month, including a bonus of $15 a month for long service. As far as he could recall, McKay never had any report of a serious nature against McNicoll.

After a careful perusal of the evidence, a large portion of which I may say is immaterial, I can reach no other conclusion than that the accident is attributable to the negligence of Charbonneau, while acting within the scope of his duties and employment as servant of the Crown.

McNicoll, as far as is disclosed by the evidence, left no will. His only heir at law was his wife. The suppliant was examined at her residence, owing to illness and incapacity to attend court; transcript of her testimony was produced as exhibit S1. She testified that her husband left no ascendant and no descendant relatives; that she lived with him and that he contributed to her support; that her husband gave her $140 each month.

The suppliant said that her husband did not receive any compensation for his injuries by reason of the accident in question. This fact was admitted by counsel for respondent.

According to the suppliant, her husband was very good to her; he looked after her and gave her everything she wanted.

At the time of the accident McNicoll was in good health; according to the suppliant, he had never seen a doctor in his life. This last statement is broad and presumably applies to the period during which the suppliant lived with the deceased, a period of nearly twenty-seven years.

The suppliant declared that she had always been well until the accident to her husband; when it occurred and, as a result, her husband died, she got a terrible shock and became sick. Before the accident, she could walk; now she cannot get up; she has to have a nurse with her all the time.

The suppliant's recourse is governed by section 19, subsection (*c*), of the Exchequer Court Act (R.S.C., 1927 chapter 34, as amended by 2 Geo. VI, chapter 28):

> The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

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(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.

Before the amendment made by 2 Geo. VI, chapter 28, subsection (c) of section 19 contained at the end thereof the words: "on a public work." The amendment came into force prior to the accident, viz., on the 24th day of June, 1938.

In the circumstances I am of the opinion that the suppliant had a valid and legal claim against the respondent for the damages occasioned to her as a consequence of her husband's death.

McNicoll was 54 years of age when he died; his expectation of life, according to Kenneth Maclure, an actuary with the Sun Life Assurance Company, was over twenty-one years.

The suppliant, as previously mentioned, was born on April 27, 1861, so that on October 8, 1938, date of the accident, she was 77 years, 5 months and 11 days old.

The expectation of life of a woman of 77 years was fixed as follows:

by Kenneth Maclure at 9·2 years;

by Paul Vallerand, actuary with l'Alliance Nationale, and previously for about ten years with the Sun Life Assurance Company, at about 6 years.

Dr. Ildefonse Côté, called as witness by the respondent, said that he had been in practice since 1912 and had specialized in industrial cases for the last fifteen years. He examined the suppliant a couple of days before the trial; he declared that he believed that she could live for a period of six years on the condition that she got out of her bed from time to time.

With the evidence before me concerning the probable longevity of the suppliant, I would have felt disposed to fix the suppliant's expectation of life, from the date of the accident, at seven years. The question however has been settled by the decease of the suppliant, which occurred on March 9, 1940, as shown by the burial certificate filed on

April 20, 1940, pursuant to an order dated April 16, 1940. The cause being ready for judgment, when the suppliant died, there was no occasion for proceedings in continuance of suit: Arts. 266 and 267 C.C.P.; *Burry et al.* v. *Shepstone* (1); *McAnulty Realty Co. Ltd.* v. *Mendelsohn et al.* (2).

Dr. Thomas F. McCaffery examined the suppliant on March 25, 1939. He found her in bed with a very weak heart. He treated her and her condition showed some improvement. Later she complained about pains in her left hand and her left leg; he treated her since for rheumatism. According to Dr. McCaffery, the rheumatic condition of the suppliant is not attributable to the death of her husband. I may note that Dr. Côté expressed a similar view. In Dr. McCaffery's opinion, if the suppliant had a weak heart at the time of the accident, which he believed was the case, the news of the accident and of her husband's death would affect her heart condition. Dr. McCaffery said that he saw the suppliant two days before the trial and that she was unable to attend court.

Dr. McCaffery produced two bills, one for $60 (exhibit S5) and one for $6 (exhibit S6). Unfortunately these bills contain no details whatever. Dr. McCaffery could not state what proportion of these bills applied to services and treatments concerning the suppliant's heart condition. In the circumstances I do not think that the suppliant is entitled to claim from the respondent the full amount of these bills ($66), a substantial portion whereof undoubtedly relates to treatments given to the suppliant with respect to her rheumatic condition. I believe that, if I allow her half of this sum, viz., $33, I will be doing justice to both parties.

The same remarks apply to the bill produced by Mrs. Alice Bull (exhibit S7), for services rendered to the suppliant from October 12, 1938, to November 27, 1939 (412 days) as nurse and housekeeper. The charge of $1 a day does not seem excessive. I think that I should allow the suppliant one-half of the amount of this bill (which should be $412 instead of $430), namely, $206.

(1) (1858) 2 L.C.J. 122.

(2) (1924) 26 Q.P.R. 244.

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After giving the matter my best consideration, I have reached the conclusion that judgment must be given against the respondent for $1,389.05 as follows:

for the loss by the suppliant of the receipts from her husband's earnings during 17 months, from October 8, 1938, to March 9, 1940, at $80 per month	$1,360 00
for aggravation of the suppliant's heart condition caused by the news of the accident to and the death of her husband and the nervous shock resulting therefrom	500 00
bill of Royal Victoria Hospital for treatment of suppliant's husband as a result of the accident (exhibit S8)	55 05
bills of Dr. McCaffery for medical attendance on suppliant following the accident to her husband (exhibits S5 and S6)—one-half	33 00
bill of Mrs. Bull, nurse and housekeeper, from October 12, 1938, to November 27, 1939 (exhibit S7)—one-half	206 00
medicines	15 00
	$2,169 05
less amount received from Canadian Pacific Express Company in compliance with an award by the Quebec Workmen's Compensation Commission dated April 3, 1939, a copy whereof was filed as exhibit R3, to wit 17 monthly payments of $40 each from October 11, 1938, to March 9, 1940, date of suppliant's decease, and the special allowance of $100 provided for by paragraph 3 of section 34 of the Workmen's Compensation Act	780 00
	$1,389 05

On March 2, 1939, the suppliant made a claim under the Quebec Workmen's Compensation Act, 1931 (21 Geo. V, chap. 100); a certified copy of her claim was filed as exhibit R1. On April 13, 1939, the Workmen's Compensation Commission decided that the Canadian Pacific Express Company was liable towards the claimant, suppliant herein, and that it should pay her (*inter alia*) a sum of $40 per month during her lifetime, the said sum being payable at the end of each month, from October 11, 1938; a certified copy of the Commission's award was filed as exhibit R3.

The Workmen's Compensation Act, 1931, contains, among others, the following enactments:

9. (1) Where an accident happens to a workman in the course of his employment under such circumstances as entitle him or his dependents to an action against some person other than his employer, such workman or his dependents, if entitled to compensation under this Act, may, at their election, claim such compensation or bring such action.

(2) If an action is brought and less is recovered and collected than the amount of the compensation to which the workman or his dependents are entitled under this Act, such workman or his dependents shall receive compensation for the difference.

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Section 9 (*a*) was added to the Workmen's Compensation Act, 1931, by 1 Ed. VIII (2nd session), chap. 39, which came into force on November 12, 1936; section 9 (*a*) reads as follows:

9. (*a*) Notwithstanding any provision to the contrary and notwithstanding the fact that compensation may have been obtained under the option contemplated by subsection 3 of section 9, the injured workman, his dependents or his representatives may, before the prescription enacted in the Civil Code is acquired, claim, under common law, from any person other than the employer of such injured workman any additional sum required to constitute, with the above-mentioned compensation, an indemnification proportionate to the loss actually sustained.

In compliance with the provisions of the Workmen's Compensation Act, counsel for the suppliant gave credit in his factum for the monthly payments received by his client to the date of the drawing thereof, amounting then to $480.

After a careful perusal of the evidence I am satisfied that there was no contributory negligence on the part of the suppliant's husband.

There will be judgment against the respondent for $1,389.05, with costs.

The next question arising for determination is the responsibility, if any, of the third party.

Train No. 504 from Ottawa came into Windsor Station on the evening of the 8th of October a few minutes late—three or four as disclosed by the evidence—at her usual speed, namely, between ten and twelve miles an hour. This speed was said by the witnesses who dealt with this subject to be normal and reasonable.

There is a curve on the railway line at a distance of about 196 feet from the entrance into the station. As soon as he saw the signals given by Clarke, assistant station master, Michael R. Martin, general yard master, and Hill, yard foreman, the engineer on train No. 504 (Thomas Allen) applied the full service brake and endeavoured to stop his train. When Charles McCurry, the fireman on train No. 504, who was on the left side of the cab of the locomotive and saw the mail truck on track 5, shouted to the engineer to stop, the latter was already in the process of applying the brake. Obviously no time was lost. The distance however was too short and the train struck the mail truck.

It was urged by counsel for the respondent that the engineer should have applied the emergency brake. The

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witnesses do not agree on this point. After weighing the evidence carefully, I have come to the conclusion that it would have been dangerous for the passengers on board the train, a certain number of whom were likely standing as the train entered the station and preparing to alight, to apply the emergency brake; the sudden jerk would have been liable to cause some of them to fall and thereby be more or less seriously injured. The evidence of William H. Blevins, chief inspector of air brakes for Canadian Westinghouse Company, who had been previously fireman and engineer on railway locomotives for several years, concerning the application of emergency brakes, is interesting. He stated that Allen handled the brake as he himself would have done. Blevins said that he would not have applied the emergency brake, because it is liable to cause injury to the passengers. I do not think that the engineer in acting as he did and trying to stop his train without the aid of the emergency brake, was guilty of negligence; he may have made an error of judgment, although I must say that I believe that he acted judiciously, but this, to my mind, does not constitute a fault or negligence and cannot render the third party responsible for the mishap.

Another ground on which the respondent relied in order to establish the liability of the third party is that the platform between tracks 4 and 5 has an incline or slope towards the west and that this caused the truck to roll down on the tracks. The evidence on this point is most indefinite and is not at all satisfactory. The question of the slope or incline on the platform was only brought up at the last moment, by way of amendment made at the trial. Nevertheless counsel for the third party agreed to proceed. This incline or slope was said to be towards the west. Now the west has been referred to in the evidence as the direction leading out of the station. Track 4 was mentioned as being north of the truck platform and track 5 as being south. These directions are not exact. The direction from the station outwards is approximately southwest; track 4 is to the northwest of the platform and track 5 to the southeast; see plan exhibit T.P.5. However, I must take the directions stated by the witnesses. A slope or incline towards what has been called the west would not drive a truck on track 5, but would rather lead it towards the end of the platform.

Charles Miller, investigator with the Canadian Pacific Railway, who made an investigation in connection with the accident in question herein, testified that there was no incline on the truck platform to cause a truck to move from north to south. Ernest Rousseau, statistician in the Post Office Department, called as witness on behalf of respondent, declared that there was an incline in the centre of the platform from east to west at a point 712 feet from the concourse for a distance of 61 feet. It seems evident that this incline or slope can have no relevant bearing upon the accident.

It was incumbent upon the respondent to establish that the accident was caused by the negligence of servants or employees of the third party; after carefully perusing the evidence adduced, I am satisfied that the respondent has failed.

There will accordingly be judgment declaring that the suppliant is entitled to the relief sought by her petition of right to the extent of $1,389.05, without interest but with costs, and dismissing the third party proceedings, with costs against the respondent.

Judgment accordingly.

The action of *Canadian Pacific Express Co.* v. *The King* No. 18435, was tried before the Honourable Mr. Justice Angers immediately after the close of the trial of the case reported above, judgment being rendered on August 31, 1940. In that action the suppliant claimed from the Crown the money paid to M.'s widow under the award of the Quebec Workmen's Compensation Commission. Judgment was given in favour of the Canadian Pacific Express Company for the amount so paid, the learned judge holding that since the company was obligated to pay to M.'s widow the amount awarded by the Workmen's Compensation Commission and by paying the same became subrogated in the rights of M.'s widow pursuant to the Quebec Workmen's Compensation Act, 21 Geo. V, c. 100, it is therefore entitled to recover that amount from the Crown who was responsible for the accident and death of M.

Reporter's Note: Attention is called to the case of *Williamson* v. *John I. Thornycroft & Co. Ltd.*, reported in (1940) W.N. 308, in which the date in respect of which damages are to be assessed, the dependant having died before trial, is discussed.