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FRANCOIS XAVIER JOUBERT.....SUPPLIANT;  
 AND  
 HIS MAJESTY THE KING.....RESPONDENT.

1931  
 Apr. 8.  
 Apr. 15.

*Crown—Petition of Right—Negligence—Tort—Imprudence of deceased  
 —Grace and bounty of Crown*

*Held* that no action in tort will lie against the Crown except where and when such right of action is given by Statute.

2. That in order to succeed in an action against the Crown, for damages resulting from the death of a son, on a public work, the onus is upon the Suppliant to prove that the accident occurred on a public work,

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and that there was an officer or servant of the Crown whose duties or employment involved the doing or omitting of doing something which was the *causa causans* of the accident.

3. That the act of the Crown in paying the expenses of and incidental to the funeral and burial, is referable to the grace and bounty of the Crown and did not constitute an acknowledgment by it of a right of action.

*Quære:* Would not a person who came to his death by drowning, in choosing to walk on and along the coping of the retaining wall of a wharf some 2 to 4 feet wide, on a dark night, with the knowledge of indentations therein where mooring posts were placed, and when he had ample room to walk on the inside of such coping be the victim of his own imprudence?

ACTION by suppliant claiming damages for the death of his son, alleged to be due to the fault and negligence of the Crown.

The action was tried before the Honourable Mr. Justice Audette at Three Rivers, Province of Quebec.

*M. G. LaRochelle, K.C.*, for suppliant.

*Frs. Desilets, K.C.*, and *L. D. Durand* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (April 15, 1931), delivered the following judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of \$12,473 for alleged damages arising out of the death of his son under the following circumstances.

The deceased Charles Wilfrid Xavier Joubert, at the time of his death was employed by the Department of Marine and Fisheries, on Barge No. 7 which was occupied by the Buoys Branch, in laying the buoys, etc. He was not part of the crew, but a labourer on board, called by one of the witnesses, a *spare*, helping generally in the work. He was paid so much an hour being fed and lodged on board the barge.

On the 25th April, 1929, after his day's work and after having taken his supper at 6 o'clock, the deceased, shortly after eight o'clock in the evening, in company with witness Lefebvre, who was engaged on board in similar work, left the barge moored at Bureau Wharf, at Three Rivers, to go to the theatre. It was beginning to be dark at the time.

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At eleven o'clock that same evening they returned to the Bureau Wharf for the purpose of sleeping on board of the barge for the night. When they arrived at the place where the barge was moored when they left at 8 o'clock, they found the mooring of the barge had in the meantime been changed,—she had been moved 800 or 900 feet west, although still at the Bureau Wharf.

The wharf in question, which is slightly over 2,000 feet in length, is built with a concrete wall and facing and the inside filled with earth. The top of this concrete facing, the flat coping immediately adjoining the water, which has been called the *Band* by some of the witnesses, is according to some of them 2 to 2½ feet, and by one witness placed at 4 feet, in width. The level of this coping was at some place irregular where nigger heads were installed.

When the deceased and witness Lefebvre realized that the barge had been moved, they walked along on this *Band*, or top of the wall. The deceased while walking thereon tripped on a nigger head, fell in the water and was drowned.

A nigger head is an iron post placed inside of an indentation in the top of the wall, the device being used for tying thereto the cable or rope by which a vessel is moored, and is, as said by someone at trial, in the shape of a saucer with a mushroom head in it. The efforts of Lefebvre in trying to rescue the deceased were fruitless; but with the view of marking the place where his companion fell he laid a stone at the nigger post and went up to the barge asking for help. They returned to the place in question so marked and identified without however achieving anything. The body was found long after.

The night was dark and the nearest light was at about 150 feet from the place of the accident. Under the circumstances the deceased was really guilty of recklessness in walking on that coping in the dark. Was he not the victim of his own imprudence?

The evidence establishes that the Bureau Wharf, at the place where the accident occurred, is entirely under the jurisdiction, management and control of the Harbour Commission of Three Rivers.

Now, approaching the consideration of the present controversy in its legal aspect, it is quite apparent that it is an action against the Crown sounding essentially for dam-

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ages in tort and in such a case where there is no statutory authority therefor, no such action lies against the Crown.

The suppliant, to succeed, must bring his case within the ambit of subsec. (c) of sec. 19 of the Exchequer Court Act (R.S.C., 1927, ch. 34) which reads as follows:

19. The Exchequer Court of Canada shall have *exclusive original* jurisdiction to hear and determine the following matters:—

- (a) . . . . .
- (b) . . . . .

(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*.

To bring the case within the provisions of subsec. (c) of sec. 19, the injury must be 1st—on a public work; 2nd—there must be some negligence of an officer or *servant of the Crown* acting within the scope of his duties or employment; 3rd—the injury must be the result of such negligence.

There is not in this case a tittle of evidence upon the record establishing that there is a *public work* or that there was any particular *officer or servant of the Crown* whose duties or employment involved the doing or omitting of doing something which was the *causa causans* of the accident. From these facts, it necessarily follows that the Court cannot find that there was any *negligence* of any officer or servant of the Crown acting within the scope of his duties for whose *negligence* the Crown can be held responsible.

There is no evidence on the record to show that the Crown was in any manner, under any obligation to do anything which it failed to do in the circumstances of the case. *Mavor v. The King* (1); *McHugh v. The Queen* (2); *Harris v. The King* (3); *Municipality of Pictou v. Geldert* (4); *Sanitary Commissioners of Gibraltar v. Orfila* (5); *Hopwood v. The King* (6); *Theriault v. The King* (7).

At the time of the accident the deceased was not acting within the course or scope of his employment. After 6 o'clock in the evening he was perfectly free to do what he

(1) (1919) 19 Ex. C.R. 304, at p. 307.	(4) (1893) A.C. 524.
(2) (1900) 6 Ex. C.R. 374.	(5) (1890) 15 A.C. 400.
(3) (1904) 9 Ex. C.R. 206.	(6) (1917) 16 Ex. C.R. 419 at 421; 39 D.L.R. 95 at 97.
(7) (1917) 16 Ex. C.R. 253.	

cared to do. No particular person can be found to be blamed for the accident which obviously was the result of the victim's own negligence in walking, in the dark, upon the coping of the edge of the wharf.

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The suppliant's counsel alleged at bar that the Crown paid the expenses of the funeral, of the coffin of the deceased, etc., and thereby recognized its own liability resulting from the accident. But all that was done in that respect is referable to the grace and bounty of the Crown and does not constitute an acknowledgment of a right of action. *Martial v. The Queen* (1).

In the result it is quite clear that this action which is essentially one in tort for damages, in the nature of *quasi delicto*, will not lie against the Crown at common law, and in the absence of any statute making the Crown liable in such a case, the action cannot be maintained.

The suppliant has failed to bring the facts of the case within the provisions of sec. 19 of The Exchequer Court Act. There is no evidence that the injury complained of resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. The *onus probandi* was upon the suppliant and he has failed to discharge such obligation. His case has not been proven.

Therefore there will be judgment declaring that the suppliant is not entitled to the relief sought by his Petition of Right herein.

*Judgment accordingly.*