1901
Nov. 2.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN McDONALD, ADMINISTRATOR OF THE ESTATE OF JOHN WILLIAM McDONALD..... } SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Government railway—Accident to the person—Negligence of Crown's servants —Action by parent of deceased—Pecuniary benefit—Damages.

In the case of death resulting from negligence, and an action taken by the party entitled to bring the same under the provisions of *Revised Statutes of Nova Scotia*, 1900 c. 178, s. 5, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.

2. Such party is not to be compensated for any pain or suffering arising from the loss of the deceased, or for the expenses of medical treatment of the deceased, or for his burial expenses, or for family mourning. *Osborn* v. *Gillett* (L. R. 8 Ex. 88) distinguished.

PETITION OF RIGHT, under R. S. N. S. 1900 c. 178, s. 5, for an injury to the person, resulting in death, on a Government railway, such action being alleged to have been caused by the negligence of the servants of the Crown.

The facts of the case are stated in the reasons for judgment.

May 28th, 1901,

The case was heard at Halifax, N.S.

H. McInnis, for the suppliant, contended that the suppliant in addition to damages for his reasonable expectation of benefit from the continuance of his son's life, should be allowed the funeral expenses in view of Lord Bramwell's dictum in *Osborn* v. *Gillett* (1).

(1) L. R. 8 Ex. 88.

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H. Mellish, for the Crown, pointed out that *Osborn* v. *Gillett* was not decided under *Lord Campbell's Act* (1). He also contended that the offer of $100 by the Crown was ample compensation to the suppliant under the evidence.

THE JUDGE OF THE EXCHEQUER COURT now (November 2nd, 1901) delivered judgment.

This action is brought by the suppliant as administrator of the estate of his son John William McDonald, to recover damages for the injury resulting from the death of the latter, who was killed on the 28th of September, 1898, in a collision on the Intercolonial Railway, near Westville, in the County of Pictou and Province of Nova Scotia. The Crown has offered to suffer judgment by default for one hundred dollars, and the only question in controversy is as to whether or not that amount is sufficient.

By the second section of chapter 116, Revised Statutes of Nova Scotia, Fifth Series (now R. S. N. S. 1900, c. 178, s. 5) it is, among other things, provided that in an action such as this the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought. The language of the statute is copied ver-

(1) The following are the provisions of sec. 5 of the Act of the Nova Scotia Legislature, R. S. N. S. 1900, s. 178, which reproduce the provisions of *Lord Campbell's Act*: "Every action brought under the provisions of this chapter, shall be for the benefit of the wife, husband, parent or child of such deceased person; and the jury may give such damages as they think proportioned to the injury resulting from such death to the persons respectively for whose benefit such action was brought; and the amount so recovered, after deducting the costs not recovered (if any) from the defendant, shall be divided among such persons, in such shares as the jury by their verdict find and direct."

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batim from that used in *Lord Campbell's Act* (1) under which it has been decided that the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right, or otherwise, from the continuance of the life (2). The parties for whose benefit the action is brought are not to be compensated for any pain or suffering arising from the loss of the deceased (3); or for the expenses of medical treatment of the deceased or for his burial expenses, or for family mourning (4).

It was argued that the question of funeral expenses should be reconsidered in view of Lord Bramwell's expression of opinion in *Osborn* v. *Gillett* (5); but that was not an action under *Lord Campbell's Act*, but one in which the father sought to recover for the loss of his daughter's services and for expenses incurred in respect of the injury that occasioned her death, and it was held that the action would not lie. Although the decision has been the subject of comment by text writers it has never been overruled or judicially questioned (6).

John William McDonald at the time of his death was eighteen years old. His father, who then lived at Pictou, was, at the time he was examined for discovery, sixty-five; his mother about fifty. He had four brothers and four sisters, whose ages ranged from four to twenty-eight. One brother and one sister

(1) 9 & 10 Vict. c. 93, s. 21.

(2) *Franklin* v. *The South Eastern Railway Co*, 3 H. & N. 211; *Dalton* v. *The South Eastern Railway Co.*, 4 C. B. N. S. 296; *Duckworth* v. *Johnson*, 4 H. & N. 653; *Pym* v. *The Great Northern Railway Co.*, 2 B. & S. 759; *Boulter* v. *Webster*, 11 L. T. N. S. 598; *Rowley* v. *London and North Western Railway Co.*, L. R. 8 Ex. 221; *Hetherington* v. *The Great North Eastern Railway Co.*, L. R. 9 Q. B. D. 160.

(3) Per Watson, B. in *Duckworth* v. *Johnson*, 4 H. & N. 653.

(4) *Dalton* v. *The South Eastern Railway Co.*, 4 C. B. N. S. 296; *Boulter* v. *Webster*, 11 L. T. N. S. 598.

(5) L. R. 8 Ex. 88.

(6) Pollock on Torts, 5th ed. 63.

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were married. None of them appear in any way to have been dependent upon the deceased for support. The father had been a rigger, but work for riggers had fallen off and but little was to be had. He appears, however, to have had some means. The deceased had, after leaving school, lived at home and worked off and on, giving whatever he earned to his mother. His father says that he was very little idle, but he was unable to state how much the deceased had earned and given to his mother. At the time of the accident that resulted in his death he was on his way from Pictou to Providence, Rhode Island, to become an apprentice with a silver-plating company. His wages were to be three dollars a week at first, and every three months he was to get an advance, his wages to depend upon the amount of work he could do. In *Franklin's* case (1) it is stated by Pollock, C.B., delivering the judgment of the court, "we do not say "that it was necessary that actual benefit should have "been derived, a reasonable expectation is enough, "and such reasonable expectation might well exist, "though from the father not being in need the son "had never done anything for him. On the other "hand a jury certainly ought not to make a guess in "the matter, but ought to be satisfied that there has "been a loss of sensible and appreciable pecuniary "benefit, which might have been reasonably expected "from the continuance of the life." But there is, I fancy, much greater difficulty in applying such a rule than in stating it. For after all can one do more than make a fair guess as to what in the particular case the reasonable expectation of pecuniary benefit may be? In such a case as this it depends more upon the father's necessity than upon the son's power to earn. As long as the father is not in need the son may well

(1) 3 H. & N. at pp. 214, 215.

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make the best use he can of his labour for his own advancement in life. But if in the changing circumstances of life the father or the mother comes to need the son's help he or she is very sure of getting it. In this case I understand counsel for the Crown to concede that there was some reasonable expectation of pecuniary benefit accruing to the father from the continuance of the son's life. The question is to appreciate that expectation and state it in money, and I am free to confess that I cannot give any very good reason why it should be stated at two hundred dollars rather than at one hundred dollars. All I can say is that granted that the father should recover something, the latter sum appears, as it seems to me, to be a small sum, and the former not by any means a large or excessive one.

There will be judgment for the suppliant for two hundred dollars.

Judgment accordingly.

Solicitors for suppliant: *Drysdale & McInnis.*

Solicitors for respondent: *Ross, Mellish & Mathers.*