

# CASES

DETERMINED BY THE

## EXCHEQUER COURT OF CANADA.

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IN THE MATTER OF THE PETITION OF RIGHT OF  
DELIA HAMILTON.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1911  
Jan. 28.

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*Government Railway—Breach of Regulations by engine-driver—Injury to passenger—Negligence—Section 20 (c) of R. S. 1906, chap. 140—Liability of Crown—Evidence.*

Where an engine-driver of a train on a government railway in the manner of moving his train at a station transgressed the regulations of the railway, and a passenger was injured in alighting from the train by reason of the wrongful conduct of the engine-driver, a case of negligence was established for which the Crown was liable under the provisions of sec. 20 of *The Exchequer Court Act*, R.S. 1906, c. 140.

2. The rule as to the preponderance of affirmative evidence over evidence of a merely negative character as laid down in *Lefseunteum v. Beaudoin* (28 S.C.R. 89), applied.

**P**ETITION OF RIGHT for the recovery of damages against the Crown for personal injuries sustained by the suppliant on a Government railway.

The facts of the case are fully stated in the report of the learned Referee, L. A. Audette, K.C., Registrar of the Court [now one of the Judges of the Court.]

A. Lemieux, K.C., appeared for the suppliant, and A. Leblanc, for the respondent, on the reference.

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The learned Referee now filed the following report:—  
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The suppliant brought her petition of right to recover the sum of \$10,000 damages for the loss of her two legs, resulting from an accident while travelling on the Intercolonial Railway, a public work of the Dominion of Canada.

The Crown, by its plea, denies any liability and says that the accident occurred through her "own negligence in trying to jump from a car before the train came to a full stop at the station platform."

At about 7.40 on the morning of the 1st of August, 1904, the suppliant, a couple of months after having obtained her diploma as a trained nurse, started on the Intercolonial Railway from Montreal for Ste. Flavie, for the purpose of taking a holiday and seeing her father who resides at St. Gabriel.

Some time about 9 o'clock in the evening, about an hour late under the time-table then in force, Ste. Flavie station was duly called three times by one of the brakemen. The suppliant says she waited until the train was well stopped to get up from her seat, and at the same time the other travellers were also getting up. She is very sure the train was stopped when she got up.

On the arrival of the train at Ste. Flavie she was sitting on the first seat or bench near the western door of the down train, on the side next to the station, and after waiting as aforesaid till the train was well stopped she said she started to get out of the train, directing her steps towards the rear platform between the first class car and the pullman car. She was carrying in her hand a small satchel and lunch box and was holding on to the railing with the right hand. She was coming out by the rear steps of the first class car, and as she was placing her foot on the second degree of the steps she says the train gave a jerk

which made her fall. She contends (p. 8) the jerk was a violent one, because she says she endeavoured to hold on (garantir) to prevent herself from falling, but the jerk or shock carried her away notwithstanding. She slipped between the train and the platform of the station, and the front truck of the pullman car passed over her two legs, which were amputated a couple of hours afterwards, the amputation having been decided necessary to save her life.

She remained thirty-eight days at Ste. Flavie, when she returned to Les Sœurs de la Miséricorde, at Montreal, at whose hospital she had studied to become a trained nurse, and there she has since lived and been kept by charity, making herself useful by helping with the little binding the hospital does. She has ever since been kept by the nuns, fed and dressed, and true to their noble undertaking, the nuns, with their usual spirit of charity, say they are willing to keep her for nothing; but this has nothing to do with the merits of the case.

The suppliant had been ten months without walking when one of the doctors of the hospital gave her two artificial legs. The cost of such legs would run according to the evidence, from \$300 to \$500, and would have to be renewed from time to time. She says she is now and then obliged to use crutches, and further that she daily suffers from pains caused by the artificial legs.

The learned counsel for the suppliant contends that the accident resulted from the following acts of negligence of the officers of the railway while acting within the scope of their duties and employment, under sub-sec. (c) of sec. 20 of *The Exchequer Court Act*:—

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1. The bringing of the train to a stop and starting it again with a jerk a few moments after, without the order or signal of the conductor and before starting on its regular run.

2. The want of light at the place where the accident happened.

3. The defective construction of the station platform,—it being too low and too distant from a train on the track.

4. The negligent omission of the employees of the train, or any of them, from being near the steps of the car from which suppliant was alighting, with the object of helping and giving light with their lantern, as required from instructions from their superior officers.

Let us consider the first count or allegation of negligence. Twelve witnesses swear that after the train had arrived and stopped at Ste. Flavie, it moved again a few moments after for a distance of 25 to 30 feet, more or less, before starting on its regular run. Four witnesses swear the train stopped once for all and did not start again until it went on its regular run. Let us weigh the evidence pro and con.

The suppliant herself swears emphatically she was quite certain the train was stopped when she got up from her seat and walked to the back of the car to get out, and that it must have remained stopped certainly during several seconds (p. 14); but that it started with a jerk when she was on the step in the act of alighting.

Alfred Gagnon, the next witness, who was on the station platform at the arrival of the train, testifies that a few moments after the train had arrived and stopped, while he was standing opposite the first class car, the train gave a jerk and advanced for 15

or 20 feet (p. 151). He adds further that he is positive the train stopped a first time, and that it started again as above mentioned,—he noticed it. He further adds that he saw passengers getting off the train before the suppliant did, from the first class car on the eastern side, and not at the Pullman end. It is perhaps worth noticing here that this is contrary to what brakeman Boucher swears.

Etienne Beaupré, the yard-master of the Intercolonial Railway at Ste. Flavie, on duty 1st August, 1904 from 6 p.m. to 7 a.m. next day, is rather an intelligent and bright witness who gave well reasoned testimony. He says when the train arrived he was on the platform of the station and was on his way to meet the conductor of the Pullman, as his duty called for, to ascertain whether there were passengers for Metis, and if there were some he was to detach the Pullman. He says the train came in, stopped, stuck there, was stopped (p. 112). Passengers alighted at once and the train remained stopped perhaps half a minute. He, in the meantime, saw two or three passengers getting off from the same step by which the suppliant was coming out. When the train stopped the first time the front step of the first class car had gone by him 10 or 12 feet (p. 109), and when he saw the train was stopping, he walked in the western direction towards the Pullman.....and the train started headways. He says he found that rather peculiar, looked around, and was exactly opposite the rear step of the car when the suppliant fell, the train having advanced 30 to 35 feet, more or less. He then signalled the engine-driver with his lantern to stop the train. He saw the suppliant fall,—she first slipped under the train and the truck of the Pullman car passed over her two legs.

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Cyprien Thibault was on the train in question on the 1st August, 1904, on board the second class car, coming back to Ste. Flavie from Fall River, after five years absence, accompanied by his wife and two children. He says that after Ste. Flavie had been announced the train stopped, and he got off with his two satchels which he brought out and left on the platform of the station, and states that the train was then well stopped. He had walked out from the front step of the second-class car and noticed no brakeman there at the time. After having safely deposited his satchels on the platform he went back on board the train to get his wife who had remained on the train with her two children. Two or three passengers had alighted from the car ahead of him; he was following them (p. 132). When he went back on board the train, it moved with a jerk (p. 133) and his wife nearly fell, but held on to a bench. When he went off the train the second time he was not opposite his luggage, and he perceived the train had moved, and he found his satchels at about the middle of the car, adding that he presumed that would mean the train had advanced by about half a length of a car.

Leon Roy, a merchant of Ste. Flavie, was on the platform of the station on the evening of the accident, and saw the train arriving, then stop, and after having been stopped for hardly half a minute started headway again with a jerk and moved on for 25 to 30 feet half the length of a car. It was at the time the train started again he saw both the suppliant and Dr. Lavoie fall. Two or three persons had come out of the train ahead of the suppliant (p. 141). He says he would have come out in the same manner as the suppliant did, because there was no reason to believe that the

train would thus start anew. He saw the train start, he was near the cars.

Joseph Roy, merchant, ex-mayor of Ste.-Flavie, testifies that he remembers the accident and was at the time on the sidewalk, at about 70 or 75 feet from the train, and ascertained that the train had arrived, stopped some time, and that it started again a few moments after.

Joseph Arseneault, farmer, of St. Damase, was on board the second-class car of the train in question on the day of the accident, with his wife, two children and his mother-in-law. He testifies the train arrived quietly at Ste. Flavie, it stopped, but after a minute to one minute and a half, it started again with a terrible shock, and the train then advanced about thirty feet.

Eusèbe Bourgoïn, of Ste. Flavie, brakeman in the employ of the Intercolonial Railway for seven years, who, however, did not belong to the crew of the train in question, was at the station on the evening of the accident, and says the train arrived at the usual speed, stopped for about a minute, and then moved on for about half the length of a car, about 35 feet. The train did not start very suddenly, but enough to make a person who does not expect it lose her balance.

Miss Agleae Bourgoïn, who resides at Ste. Flavie, was at the station on the evening of the accident, saw the train arriving, then stop for a minute, a few moments, and start again. She was on the platform of the station opposite the first-class car at about ten feet from the car, and the suppliant, when the train stopped, was on about the second step, when the train started with a shock which threw her (the suppliant) down, as well as Dr. Lavoie. She had also noticed two or three passengers getting off the first-class car during the first stop.

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Dr. Lavoie, of Ste. Flavie, was on board the train in question, and says that after the station had been called, the train stopped. When the train had thus stopped he got up from his seat with his three year old child in his arms. Just as soon as the train had stopped he took his child and started towards the western door of the car (p. 234). The train was stopped when he arrived on the platform of the car in the vestibule (p. 235). The suppliant was then going down; she was on the last step and in the act of placing her foot endeavouring to reach the side of the platform of the station, and he saw her disappearing under the car, without exactly realizing what was the matter, when the train was starting anew. He came down believing the train was stopped, and took care in placing his foot; he came straight down with the child in his arms, and in placing his foot on the platform of the station, turned upon himself, made a few steps backwards, and fell on his back. Then on getting up he ascertained the train was moving. If there had been no movement the suppliant would not have fallen. The train stopped as it came in, moved anew to stop again.

Joseph Gagné, of Ste. Flavie, an employee of the Intercolonial Railway, was on the platform of the station on the arrival of the train on the evening of the 1st August, 1904, and remembers the accident. The train arrived and stopped from one to two minutes (p. 263), and started again for 20 to 25 feet. It did not take a minute before the train started again (p. 270). He was about six feet from the suppliant when he fell and saw her fall when the train started anew to cover the distance of 20 to 25 feet. She fell as she was to place her foot on the platform of the station. She tried to put her foot on the platform and she put

it in the open space. The space is too large between the platform and the train.

This concluded the suppliant's evidence on this important point as to whether or not the train started anew after its arrival, for a distance of 20 to 25 feet, more or less. Let us now review the evidence of the defense on this point. Four witnesses testified upon the question.

Louis Levesque, of Ste. Flavie, carter and mail carrier, 63 years old, who was on the platform of the station opposite the second-class car, on the evening of the accident, gave very loose and intangible evidence. His testimony seems to have been given on the assumption that everything occurred as usual on the arrival of the train. His memory was somewhat at fault. He first states he heard of the accident after having received the mail bag (p. 348). Then he says he cannot swear whether there was any mail bag that evening (p. 351). Further on, at page 352, he says there was no mail bag on that train. The baggage man, however, swears he delivered two mail bags from that train (p. 360). This witness swears the train stopped once for all.

Léandre Chenard, the baggage man on board the train and belonging to the crew at the time of the accident, says that before arriving in front of the baggage room, the train slackened, then it came very near stopping, but it did not stop altogether according to his idea (p. 360). It jerked, simply a jerk from ahead, a little.

Eugène St. Pierre, the engine-driver of the train in question and who was in charge of the engine which is said to have caused the accident, testifies that on the evening in question he made only one stop, and that when he again moved it was to go on his regular

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course. Asked if what he has said—the accident having taken place six years ago—he has so said from personal recollection, or is it because he is in the habit of arriving in that manner, he answers:—“It is because I am in the habit of always doing the same work, but I am certain that I did not start anew.”

“Q.—You do not remember specially that day?

A.—Not all (*pas tout à la lettre*) all exactly, you understand (p. 438).”

Napoléon Boucher, of St. David, one of the brakemen on board the train in question and the one who took out Dr. Lavoie's satchels by the front steps of the first-class car, says he had been 22 years brakeman at that date, and 28 years now. He testifies he got off the train only when it was stopped. His idea is that the train stopped but once (pp. 450, 460). He further says after having come out of the train, he waited on the station platform for passengers, but not one passenger got off on his side that night (p. 455) (although witness Gagnon swears he saw some passengers getting off from that place), so he went westwards to deliver his satchel to Dr. Lavoie, and it was then he heard of the accident, and after delivering his satchels he went to the station to notify the conductor. Huppé, the conductor, had just registered and was coming out of the station when I met him (p. 453). Huppé, says, however, that Boucher notified him before he registered and in the station (p. 306). Would not the attention of this witness appear to have been, on the arrival of the train, much involved with the delivery of Dr. Lavoie's baggage?

From the evidence above referred to, it appears that twelve witnesses heard on behalf of the suppliant, swear that the train moved a second time for a distance of 25 to 30 feet, more or less, after having stopped on its arrival.

and before starting for good, and that it is in the course of this short move that the suppliant met with the accident while in the act of getting off the train. Four witnesses on behalf of the Crown swear to the contrary, and say the train stopped but once. The first witness is an old man 63 years old, a carter and mail carrier, who contradicts himself with respect to the mail bags on the evening in question, as already mentioned above, and is also contradicted by Chenard. His memory seems at fault, and he says by way of excuse that the accident has happened quite a while ago, and that since then he has been sick in the hospital for a month. On perusal of his evidence it will be found that his testimony is rather loose and unreliable. Then we have the three men of the crew who swear the train stopped but once, yet their evidence on that point is not as positive and satisfactory as it might be. In estimating the value of the evidence one must not lose sight of the rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed (*Lefeunteum v. Beaudoin* (1)). Then, the evidence of the crew, without casting any discredit upon them, whose interest is not only closely identified with that of the Crown, but is even larger because they may think their employment is perhaps at stake, ought not to prevail against the testimony of strangers who are disinterested witnesses and even against other employees of the Intercolonial Railway who were in a better position to verify the stop, because they were on the platform of

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the station. The crew's evidence is certainly that of interested persons, because upon them is thrown the blame for the accident. It will, moreover, obviously appear that it is easier for one standing on the platform of the station, which is stationary, to ascertain whether a train moves or is at a standstill, than for one on board of the train. Then one of the witnesses substantiates his evidence by a very important fact. He gets off the train at the first stop with his baggage, leaves this baggage on the platform of the station and starts back to the train to help his family out. While on board of the train at that time he says it started with a jerk, and when he comes out of the train he finds his baggage about the middle of the car, while it had been left opposite the steps. Can anything be more conclusive?

Then Beaupré, the yard-master of the Intercolonial Railway, ascertained the train had stopped, and is astonished to see it start again, and signals with his lantern to stop.

Moreover, if Conductor Huppé came out of the train the first time it stopped, as he says he did, and that the accident happened, as he says, while he was in the station, then one must necessarily presume that the train moved after he had left it, since the suppliant fell while the train was moving. Another reason also why the facts should be as related is that the conductor did not hear the cries of the suppliant when he passed at the distance of one car from the place of the accident when he went into the station, and that her cries were loud enough to be heard by Mrs. Roy, on the landing of her house, at a certain distance from the station.

In face of the overwhelming weight of the evidence, the undersigned must find, and he so finds, that the

suppliant met with her accident while the train was in motion for the 25 to 30 feet, more or less, mentioned above, and that the train after its arrival stopped, moved again without orders for this short distance, and stopped again before its final departure from Ste. Flavie, and that the engine-driver in moving his train in that manner transgressed the regulations and did so in contravention of the same, and was guilty of negligence from which the accident resulted and for which the Crown is liable under section 20 of the *Exchequer Court Act*.

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With respect to the second, third and fourth points raised by the suppliant's learned counsel, namely, the want of light, the defective construction of the station platform, and thirdly the negligent omission of the employees of the train to be near the step, with their lantern, when the passengers were coming out of the train, the undersigned may say that it is unnecessary to pass upon these points in view of his finding on the more important point of the moving of the train in contravention of the following Regulations of the Railway, viz.:—

“178. He must not start his train until the bell be rung, and he receives the signal from the conductor; he must invariably start carefully, without jerking, and see that he has the whole of his train; he must run the train as nearly to time as possible, arriving at the station neither too late nor too soon. He must not shut off steam suddenly, so as to cause concussion of the cars, unless in case of danger.”

“190. In bringing up his train the Driver must pay particular attention to the state of the weather and the condition of the rails, as well as to the length of the train, and these circumstances must have due weight in determining him when to shut

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off steam. Stations must not be entered so rapidly as to require a violent application of the brakes, or to render necessary the sounding of the signal whistle. He must report every instance of overshooting a station to the Superintendent."

In view of the following decision and opinion expressed in the case of *Harris v. The King* (1), viz:—

"And first, it is said that the accident would not have happened had there been gates or a watchman at the Green Street crossing referred to, and that His Majesty's officers and servants in charge of the Intercolonial Railway were guilty of negligence in not maintaining either a watchman or gates at that crossing. That view I am not able to adopt. There can be no doubt that the crossing was a dangerous one; and that it would have been prudent to keep, as at times had been done, a watchman at this place to warn persons using the crossing, or to have set up gates there to prevent them from using it while engines or trains were passing over it. But that, I think, was a matter for the decision of the Minister of Railways and of the officers to whom he entrusted the duty and responsibility of exercising in that respect the powers vested in him. There is always some danger at every crossing; but it is not possible in the conditions existing in this country to have a watchman or gates at every crossing of the Intercolonial Railway. The duty, then, of deciding as to whether any special means, and, if any, what means shall be taken to protect any particular crossing of the railway must rest with the Minister of Railways, or the officer upon whom in the administration of the affairs of the Department, that duty falls. If it is decided that certain special means

shall be taken to protect the public at any particular crossing, and some officer or employee is charged with the duty of carrying out the decision, and negligently fails to do so, and in consequence an accident happens, then, I think, we would have a case in which the Crown would be liable. But where the Minister 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 employ a watchman or to set up gates at any crossing, it is not, I think, for the Court to say that the Minister or the officer was guilty of negligence because the facts show that the crossing was a very dangerous one; and that it would have been an act of ordinary prudence to provide, for the public using the crossing, some such protection. At the same time, if, as was the case here, the crossing is one where those who use it are exposed to great and more than ordinary danger, then, in the absence of the special means of protection referred to, greater and more than ordinary care should be taken by those responsible for the running of trains and engines over such crossing,"

it would appear to the undersigned that the want of additional lights and the defective construction of the platform of the station are matters which are left to the Minister of Railways and the Crown's officers, whose duty it is to decide as to the same, and that it is not for the Court to say that the Minister or the officers were guilty of negligence because the facts show that there was actual want of light, accentuated on the occasion in question by the crowd standing between the lights and the train, and that under the evidence the station platform might be held to be somewhat defective. (See Sec. 39 of the *Government*

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*Railways Act.*) On the evening in question a concurrence of events which would go to show that there was something wrong or defective—too much distance between the train and platform in both height and space between the edge of the station platform and the car steps—three persons fell, the suppliant, Dr. Lavoie, and Arsenault's mother-in-law. This is what Arsenault says in this respect (p. 177):—

“Q.—Il n'est pas arrivé d'accident à votre belle-mère?

R.—En débarquant des chars la plate-forme est assez loin du step, si ce n'avait pas été que moi elle aurait enfilé, si le train avait fait seulement deux pas, j'ai mis mon enfant à terre, j'ai pris ma belle-mère par le bras.

Par M. le Régistrare.

Q.—Elle a tombé?

R.—Elle a tombé entre la plate-forme et le step du char. Quand on prend quinze à seize pouces partant du step à la plate-forme, une vieille personne et surtout quand il fait bien noir qu'il fait noir comme chez le loup, qu'on ne voit seulement pas un pas devant nous autres, une distance de même une vieille personne enfile, et moi j'étais bien plus jeune et j'ai été bien près d'enfiler, j'ai été obligé avec mon pied de tater, pour voir la plate-forme.

Q.—Vous ne pouviez pas la voir?

R.—Non, il faisait trop noir, on ne voyait pas un pied en avant de nous autres. Il n'y avait pas une lumière du tout où on a débarqué.

The second and third points upon which the learned counsel relied are thus disposed of. Coming to the fourth count, viz:—4. The negligent omission by the employees of the train, or of any of them, from being near the steps of the car from which the suppliant

came out, with the object of helping and giving light with the lantern, as required from instructions by their superior officers,—suffice it to say that in that respect that while a better distribution of the crew could have been made with the view of helping and lighting the passengers alighting from the train, the want of doing better could not amount to an act of negligence by itself whereby the Crown could be held liable, while it might perhaps be taken into consideration in a concurrence of acts of minor negligence which could be held to be the decisive cause of the accident.

Coming now to the question of quantum, the evidence establishes that while the suppliant had been the recipient of a diploma as a trained nurse a couple of months before the accident, she had never earned anything in that capacity. Trained nurses' fees range from \$1.50, \$2.00, 2.50 to \$3.00 per day. It further results from the evidence, that since the accident the suppliant has attempted, during an epidemic of typhoid fever in Montreal, to help in the hospital, but was obliged to discontinue. Ever since the accident the suppliant has been looked after by the religious community called "Les Sœurs de la Miséricorde" at Montreal, entirely by charity. She has, however, made herself useful in working at the binding the community does for itself, but it is not such binding as could be considered of any commercial nature, being confined to the binding for the establishment only.

The suppliant's life is practically wrecked, her prospects blighted; she is deprived of her livelihood. She cannot, as stated by Dr. Fiset, practise as nurse,—a walk of life quite remunerative in our days. Dr. Fiset thought she could easily have earned yearly an income ranging from \$500 to \$900, and when pressed

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with questions as to her present state he admits she might make herself partially useful in a hospital, but adds that an accident of this kind is one of a nature which would tend to shorten one's life.

The suppliant claims \$10,000. She owes \$83.00 to Dr. Fiset for having performed the operation and paid her transportation back to Montreal. She owes the further sum of \$80.00 to Dr. Lavoie who assisted Dr. Fiset in the operation. The medical charges, it may be said, *en passant*, are very moderate.

Now, in estimating the compensation to which the suppliant is entitled under all the circumstances, bearing in mind all the legal elements under which she is entitled to recover, some consideration should be given to the fact that while she may not be entirely prevented from earning, her chances of employment in competition with others are very much lessened, and her earning powers consequently almost rendered nil.

In assessing damages in a case of this kind, while it is impossible to arrive at any sum with mathematical accuracy, several elements must be taken into consideration, and one must strive to compensate the suppliant for her loss generally, to make good to her the pecuniary benefits she might reasonably have expected had she not met with the accident. In doing so one must take into account the age of the suppliant, who at the time of the accident was 26 years old, her state of health, her expectation of life, her employment, the income she was earning or had reason to expect to earn, and her prospects, not overlooking, on the other hand, the several contingencies to which every person in her walk of life is necessarily subjected, such as being out of employment to which in common with other persons she was

exposed, and her being also subject to illness. All these surrounding circumstances must be taken into account.

In the present case the suppliant was in her prime, in good health, with bright prospects ahead of her, in possession of a good diploma, covering even cases of obstetrics, thus commanding perhaps higher remuneration and enlarging thus the scope of her employment.

Under all the circumstances of this case, the undersigned is of opinion to allow the sum of Five thousand dollars (\$5,000), together with the amount of the two doctors' bills, viz: Dr. Fiset's for \$83.00 and Dr. Lavoie's for \$80.00, making in all the sum of \$5,163.00.\*

Solicitor for the suppliant: *A. Lemieux.*

Solicitor for the respondent: *E. L. Newcombe.*

\*EDITOR'S NOTE:—This report was confirmed by the Judge of the Exchequer Court (February 21st, 1911) on motion for judgment by the suppliant

*Judgment accordingly.*

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