

1899
 *March 7.
 *May 30.
 EVAN JOHN PRICE (DEFENDANT)....APPELLANT;
 AND
 MARIE ARMAÏSSE ROY (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR
 LOWER CANADA, APPEAL SIDE.

Negligence—Volunteer—Common fault—Division of damages.

P. was proprietor of certain lumber mills and a bridge leading to them across the River Batiscan. The bridge being threatened with destruction by the spring floods, the mill foreman called for volunteers to attempt to save it by undertaking manifestly dangerous work in loading one of the piers with stone. While the work was in progress the bridge was carried away by the force of the waters and one of the volunteers was drowned. In an action by the widow for damages:

Held, Gwynne J. dissenting, that the maxim "*volenti non fit injuria*" did not apply, as the case was one in which both the mill owner and deceased were to blame, and that, being a case of common fault, the damages should be divided according to the jurisprudence of the Province of Quebec.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, appeal side (1), affirming the judgment of the Superior Court, District of Three Rivers, by which a verdict had been entered in favour of the plaintiff for damages incurred in consequence of the death of her husband.

The facts are sufficiently stated in the above head-note, and in the judgment of His Lordship Mr. Justice Girouard.

Stuart Q.C. and *Olivier* for the appellant.

R. S. Cooke for the respondent.

*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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Taschereau J.

TASCHEREAU J.--I do not dissent, but, had the result of this judgment depended upon my conclusions, I would have greatly hesitated before reducing the amount given to the respondent by the courts below. The appellant's right to have the damages reduced by saying, "it is true I ordered the deceased to go upon that bridge, but he should have disobeyed my orders," seems to me doubtful. If as now held he, the appellant, was guilty of imprudence in ordering the deceased to go upon that bridge on the occasion in question, it seems to me that the judgment should stand for the whole amount. Should he not be estopped from invoking the obedience to his orders as a ground to oppose wholly or partly the respondent's claim?

GWYNNE J. (dissenting).—However much entitled to sympathy the family of the brave young man who lost his life when exposing it to such manifest danger in the interest of the appellant is, I do not, with great deference, think that the case can be regarded as raising any question of negligence on the part of the appellant, or of contributory negligence on the part of the deceased. The case is rather one in which the deceased quite voluntarily, at the suggestion of his father, who was in the employment of the appellant, exposed his life to very manifest danger by entering upon the bridge which was perishing by the force of the waters of the stream over which it was built, in the forlorn hope of preventing its absolute destruction. He may have been guilty of rashness but not of negligence. The latter term is not applicable to the case. The risk he was running was quite apparent to himself and to every one present, but he was under no obligation whatever to undertake the risk and expose himself to such manifest danger. The case, in

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my judgment, is a plain case for the application of the principle *volenti non fit injuria*, and therefore the appeal should be wholly allowed with costs, and the action in the court below dismissed.

SEDGEWICK J.—I am opinion that the appeal should be in part allowed by reducing the judgment as specified in the judgment prepared by Mr. Justice Girouard. I concur with him also as to the disposition of the costs.

KING J. concurred in the judgment reducing the damages to nine hundred dollars with interest from the 22nd of April, 1898, and with costs incurred in the Superior Court, and also that each of the parties should bear their respective costs in the Court of Queen's Bench and the Supreme Court of Canada.

GIROUARD J.—Il s'agit encore de la responsabilité du patron envers l'ouvrier. L'appelant est propriétaire d'un moulin à scie et d'un pont sur la rivière Batiscan, dans la paroisse de Saint Stanislas. Lors de la débâcle en avril 1897, l'eau est montée à une hauteur qu'on n'avait jamais vue depuis près de trente ans. Le 27 avril, la glace avait fait des dégâts considérables au pont qui menaçait d'être emporté par le torrent. A la vue de ce danger, les représentants de l'appelant demandent à des hommes de bonne volonté, généralement employés à leur établissement, de venir sauver la propriété de leur maître, en consolidant un des piliers. Trois hommes s'offrent, entr'autres Gédéon Trudel, le fils du contre-maître qui dirigeait les travaux. Ce fut pendant que cet ouvrage se faisait, le 28 avril, que le pont fut emporté et que tous les travailleurs furent précipités à l'eau. Gédéon Trudel y perdit la vie. L'appelant est-il responsable de cet accident?

Il est admis que l'ouvrage était dangereux, mais tout le monde connaissait le danger, le défunt comme les autres. L'appellant était certainement en faute d'autoriser un pareil ouvrage; le défunt l'était davantage en exposant sa vie. C'est donc le cas de faute commune et de diviser le dommage souffert selon la jurisprudence hautement équitable de la province de Québec.

La cause de l'accident fut la faute du patron; celle de l'ouvrier n'en a été que la conséquence immédiate. Je ne crois pas que l'on doive appliquer ici la maxime *volenti non fit injuria*. Sans avoir été forcé à ce travail dangereux, l'on peut difficilement dire que l'ouvrier s'est exposé de son chef; il ne s'est pas offert sans requisition; son père l'envoya chercher; il aurait pu refuser, mais il voulut faire preuve de son dévouement aux intérêts de son maître, et parla même mieux assurer la continuation de ses services dans son établissement.

Je suis d'avis d'accorder l'appel et de réduire le jugement de la Cour Supérieure à neuf cents piastres avec intérêt à compter du 22 avril, 1898, et les dépens encourus devant la Cour Supérieure. Vu que l'appellant n'a rien offert et a contesté toute la demande, je serais aussi d'avis de laisser chaque partie payer ses frais tant devant la Cour du Banc de la Reine, que devant cette cour.

*Appeal allowed in part with special
directions as to costs.*

Solicitor for the appellant: *Arthur Olivier.*

Solicitor for the respondent: *R. S. Cooke.*

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