BETWEEN:

DAME ELIZABETH CORNELL OAKES ..... } PETITIONER;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1951

Feb. 19 & 20

May 17

Crown—Exchequer Court Act R.S.C. 1927, c. 34, s. (1) (c) and 50(A)—Pension Act R.S.C. 1927, c. 157, s. 11(1) (b), 18, 18(a) and 18(b)—Receipt of pension under provisions of Pension Act does not bar proceedings against the Crown under s. 19(1) (c) of the Exchequer Court Act.

Held: That the receipt of pension under the provisions of the Pension Act R.S.C. 1927, c. 157, is not a bar to proceedings against the Crown under s. 19(1) (*c*) of the Exchequer Court Act R.S.C. 1927, c. 34. *Bender* v. *The King* (1947) S.C.R. 172 followed.

(1) (1937) S.C.R. 261.
(2) (1940) 3 D.L.R. 693.
(3) (1942) S.C.R. 495.
(4) (1944) 1 All. E.R. 341.

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

The action was tried before the Honourable Mr. Justice Cameron at Montreal.

S. Leon Mendelsohn, K.C., Jean Martineau, K.C. and *Stanley Goldner* for suppliant.

Albert Theberge, K.C. and *Paul Fontaine, K.C.* for respondent.

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

CAMERON J. now (May 17, 1951) delivered the following judgment:

This is a petition of right in which the suppliant claims damages from the respondent. On June 5, 1945, George Walsh Oakes, then an airman in the Royal Canadian Air Force, was a passenger in a motor vehicle owned by the respondent; that vehicle was struck by a train of the Canadian National Railways in Montreal East, and Oakes was killed. At the trial it was admitted that L.A.C. Oakes was then on duty, that the motor vehicle was operated by L.A.C. R. E. Hitsman, a member of the Air Force of Canada and then acting within the scope of his military duties, and that the said accident occurred because of the fault and negligence of the said Hitsman.

The suppliant is the widow of the said G. W. Oakes, having married him on February 14, 1942. There were two children of the marriage, namely, George Stephen Oakes, born June 5, 1943, and Ross Bryan Oakes, born May 8, 1944, both of whom are still living. On May 28, 1946, the suppliant was duly appointed tutrix of the said two minor children. On June 3, 1946, she filed this petition of right claiming damages for the death of the said G. W. Oakes, both on her own behalf and in her quality as tutrix to the two minor children.

Under the provisions of the Pension Act, R.S.C. 1927, c. 157, as amended, the Pension Commission ruled that the death of L.A.C. Oakes was directly connected with Air Force Service. Upon the application of the suppliant, pensions were awarded to her and to the children at current rates with effect from June 6, 1945. That awarded to the widow was then at the rate of $60 per month, but on October 1, 1947, it was increased to $75 per month, and up to January 31, 1951, she had received a total of $4,670. The pension awarded to the elder child, George Stephen Oakes, was at the rate of $15 per month until October 1, 1947, when it was increased to $19 per month, and up to January 31, 1951, such payments totalled $1,177.50. The pension awarded to the other son—Ross Bryan Oakes—was at the rate of $12 per month up to October 1, 1947, when it was increased to $15, such payments totalling $934 up to January 31, 1951.

Under the provisions of the Pension Act and regulations thereunder, the pensions applicable to the children terminated at the age of sixteen; and as to the widow the pension is payable for life except upon her re-marriage, in which event she is paid a bonus of one year's pension and the pension then ceases. Should, however, her second husband die within five years of her re-marriage, the Pension Commission has a discretion to revive the pension.

The suppliant's claim is based on section 19(1) (*c*) and section 50A of the Exchequer Court Act, R.S.C. 1927, ch. 34 as amended, as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> (*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.
>
> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

Before considering the amount of any damages sustained by the widow and minor children, it is necessary to determine the main issue between the parties. For the

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suppliant it is contended that her husband's death, having been occasioned by the negligence of an officer or servant of the Crown acting within the scope of his duties or employment, a claim for damages will lie against the respondent notwithstanding the fact that at the time of his death her husband was an enlisted man in the military forces of Canada, and notwithstanding, also, that she has been in receipt of a pension for herself and her children, which pension has been paid by the respondent as a result of her husband's death. For the respondent it is submitted that the suppliant has no recourse for damages following the death of her husband; and that if she has any recourse by reason thereof, it could only be in pursuance of the Pension Act.

At the trial certain admissions were made (Ex. 1) as follows:

> LAC G. W. Oakes, a member of the air forces of Canada, died on June 5, 1945, whilst on duty in Canada; that said G. W. Oakes was a passenger in a motor vehicle operated in the service of His Majesty and in charge of and driven by LAC R. E. Hitsman, a member of the air forces of Canada, acting within the scope of his military duties; being ordered by technical officer L. K. Kennedy at No. 12 E.D. in Montreal East with three men, one of whom was LAC G. W. Oakes, to go to the Pratt & Whitney Plant to have some equipment identified; that the death of said G. W. Oakes is attributable to an accident, which occurred on said date, when this motor vehicle came into collision with a Canadian National Railways train, at a level crossing, in the city of Montreal; that said accident happened through the fault and negligence of said R. E. Hitsman.

It will be noted that while the respondent admits that the death of L.A.C. Oakes was occasioned by the negligence of L.A.C. Hitsman, a member of the air forces of Canada while the latter was acting within the scope of his military duties, he does not admit that at the time Hitsman was an officer or servant of the Crown within the intendment of section 50A. His other contention is that inasmuch as the Pension Act provides a pension for the widow and dependents of servicemen who die or are killed while on duty, it could not have been the intention of Parliament to provide a further recourse against the Crown by way of damages when, as in this case, the death of one serviceman was occasioned by the negligence of another serviceman while on duty.

In my view, the matter is to be determined by considering the scope of section 19(*c*) of the Exchequer

Court Act, and the effect thereon of the enactment of section 50A of that Act, keeping also in mind the provisions of the Pension Act.

Section 19(1) (*c*) of the Exchequer Court Act was enacted in its present form by c. 28, Statutes of Canada, 1938, s. 1. The former section was repealed and the new section was identical with the former section except that the concluding words of the former section "upon any public work" were dropped. The history of the section and the scope of the new section enacted in 1938 were considered by the President of this Court in *McArthur* v. *The King* (1), in which he held:

> 6. That a person who enlists in an active unit of the Canadian Army for the duration of the present emergency and thereby becomes a member of the Non-Permanent Active Militia of Canada on active service is not an "officer or servant of the Crown" within the meaning, intent or purpose of section 19(*c*) of the Exchequer Court Act and the Crown is not liable for the negligence of such a person.

It is common ground that as a result of that decision, section 50A (*supra*) was enacted by c. 25, Statutes of Canada, 1943, s. 1, and since that date the words "servant of the Crown" in section 19(1) (*c*) have included a person who since June 24, 1938, has been a member of the naval, military, or air forces of His Majesty, in right of Canada, for the purpose of determining liability in any action or other proceeding by or against His Majesty. There is no doubt, therefore, that had the deceased Oakes been a civilian (and not in government employment), who had been run over and killed by a service vehicle of the respondent, the suppliant would have had a right of action against the respondent under the provisions of section 19(1) (*c*), in view of the admissions made by the latter. Has the suppliant, the widow of a serviceman, and receiving the benefits of the Pension Act, the same rights as a civilian?

The only reported case in which the matter has been directly considered is that of *Meloche* v. *The King* (2). In that case the father of a soldier in the Active Army of Canada, who allegedly had died from injuries occasioned by the negligence of another servant of the Crown (the

(1) (1943) Ex. C.R. 77.

(2) (1948) 4 D.L.R. 828.

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driver of an Army ambulance) took proceedings to recover damages under section 19(1) (*c*) and section 50A. The headnote in that case is as follows:

A member of the armed forces on active service who is injured through the negligence of another servant of the Crown is not entitled to recover damages against the Crown under ss. 19(1) (*c*) (am. 1938, c. 28) and 50A (enacted 1943-44, c. 25) of the Exchequer Court Act, R.S.C. 1927, c. 34, since provision is made for him (or for his dependents) in such a case under the Militia Act, R.S.C. 1927, c. 132 and the Pension Act, R.S.C. 1927, c 157. Where a special remedy is provided by statute it prevails as against the provisions of general legislation.

In the *Meloche* case, Angers, J. said at p. 831 ff.:

Counsel for respondent expressed the opinion that the fact that the Crown adopted special legislation namely the *Militia Act* and the *Pension Act,* shows that indicates that the soldier, wounded or killed on Active Service has no other recourse against the Crown than that provided by these Acts. This opinion seems well founded to me. When special recourse is decreed by an Act, the recourse provided by the general Act must yield precedence to it. This doctrine is adopted by the following authors: Craies on Statute Law, 4th ed., p. 318; Maxwell on the Interpretation of Statutes, 9th ed, p. 183; Potter's Dwarris, General Treatise on Statutes, p. 131; Vattel's Rules, Rule No. 40.

And at p. 832:

The same doctrine prevails in the United States, as is shown by the judgment of the N.Y. Court of Appeal: *Goldstein* v. *New York,* (1939) 281 N.Y. 396, in which Hubbs J. at p. 403 makes the following observations: 'The statement that the State may be made liable in damages to a soldier or his dependents, because of injuries inflicted upon him through the negligence of a brother soldier or officer, except as provided in the Military Law, is rather startling. We think that the general understanding has always been that for injuries suffered by a soldier in active service the government makes provision by way of a pension. That this State has done in the Military Law (paras. 220-224), wherein it is provided when an allowance may be made, for what it may be made, the procedure to be followed and the amount that may be allowed. In fact, a complete system is set up for handling such claims. To justify a decision that another concurrent remedy has been created whereby the State may be made liable in unlimited amounts requires a statute to that effect, the meaning and intent of which is unmistakable. "Statutes in derogation of the sovereignty of a State must be strictly construed and a waiver of immunity from liability must be clearly expressed." (*Smith* v. *State,* (1920) 227 N.Y. 405, 410).'

And at p. 830 he said:

Counsel for the respondent put forward that there is no recourse against the Crown without a formal text in an Act opening the way for it. The doctrine and jurisprudence on this point are unanimous and I do not believe there is any reason to linger over it. It seems evident to me that the provisions of s. 19(1) (*c*) of the Exchequer Court Act would apply to a soldier as well as to any other person *if a special Act* creating a special recourse in favour of a soldier and taking away the general recourse provided by the Exchequer Court Act did not exist.

Counsel for the suppliant submits that the judgment of Angers, J. was right insofar as it determined that section 19(1) (*c*) would apply to a soldier as well as to any other person; but that the judgment was erroneous in its finding that the special recourse provided by the Pension Act took away the general recourse provided by section 19(1) (*c*) of the Exchequer Court Act. He also submits that the *Goldstein* case cited by Angers, J. had no application to the *Meloche* case inasmuch as in the State of New York there was no Act containing provisions comparable to those found in section 50A.

Counsel for the respondent submits that on the principles laid down in the *Meloche* case, the suppliant herein has no right of action. Counsel for the suppliant, however, refers to and relies on the case of *Bender* v. *The King* (1) (which affirmed the judgment of the President of this Court reported in 1946, Ex. C.R. 529). In that case it was held that:

> An employee of the Crown (Dom.) who has, under the Government Employees Compensation Act (R.S.C. 1927, c. 30, as amended in 1931, c. 9), claimed and received compensation for personal injuries by accident arising out of and in the course of his employment is not thereby barred from pursuing a claim for damages against the Crown for such injuries under s. 19(*c*) of the Exchequer Court Act (R.S.C. 1927, c. 34).
>
> The said enactments are not repugnant to each other; they deal with two entirely different matters; s. 19(*c*) of the Exchequer Court Act applies only where negligence is shown, while the Government Employees Compensation Act applies whether or not negligence on anyones' part is proved; the right thereunder arises, not out of tort, but out of the workman's statutory contract.

Under the Government Employees Compensation Act as it was at the time of the *Bender* case, certain employees of His Majesty (but not including persons who were members of the permanent forces), who were injured by accident arising out of and in the course of their employment, and the dependents of such employees whose death resulted from such accident, were entitled to be paid compensation by the Dominion Government at the same rate as provided for such employees or their dependents under the law of the province in which the accident occurred.

(1) (1947) S.C.R. 172.

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In the *Bender* case, Kerwin, J. in referring to the Exchequer Court Act and the Government Employees Compensation Act said at p. 177:

> At whatever stage the two enactments are compared, it is clear that they are dealing with two entirely different matters, since the Exchequer Court Act applies only where negligence is shown, while the Government Employees Compensation Act applies where negligence on anyone's part is proved or not.

And at p. 179 he said:

> The two enactments are dealing with entirely different matters since, as Viscount Haldane pointed out in connection with the British Columbia Workmen's Compensation Act in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.*, (1920) A.C. 184 at 191, the right under the Compensation Act arises, not out of tort, but out of the workman's statutory contract. Separate and distinct rights are conferred and the present claim is not barred.
>
> An alternative submission by the appellant was that, assuming that claims under both Acts did exist, the suppliant was put to his election, and having claimed and received compensation under one Act, he had waived any right he might have under the other. However, while there is but the one injury, the causes of action are different and the doctrine of election does not apply.

It is of interest to note that following the decision in the *Bender* case, the Government Employees Compensation Act, R.S.C. 1927, c. 30, was repealed and by c. 18, Statutes of Canada, 1947, the Government Employees Compensation Act, 1947, was enacted. That Act has no application to the members of the Royal Canadian Navy, the active forces of the Canadian Army, the Royal Canadian Air Force (Regular) or the Royal Canadian Mounted Police. Section 9(5) thereof is as follows:

> 9(5). No employee or dependent of such employee shall have a claim against His Majesty or any officer, servant or agent of His Majesty except for compensation under this Act, in any case where an accident happens to such employee in the course of his employment under such circumstances as entitle him or his dependents to compensation under this Act.

Under the new Act, therefore, an employee or a dependent of an employee entitled to compensation thereunder would have now no other recourse against His Majesty, and could not, if so entitled, where the injuries or death were occasioned by the negligence of a servant of His Majesty, invoke the provisions of section 19(1) (*c*).

I turn now to the Pension Act, R.S.C. 1927, c. 157, as amended. The pension payable to the suppliant herein was paid under the provisions of section 11(1) (*b*) thereof, as follows:

11. (1) In respect of military service rendered during World War I or during World War II and subject to the exception contained in subsection two of this section:

(*b*) pension shall be awarded in accordance with the rates set out in Schedule B to this Act in respect of members of the forces who have died when the injury or disease or aggravation thereof resulting in death in respect of which the application for pension is made was attributable to or was incurred during such military service.

It is to be noted at once that there is nothing in that Act comparable to the provisions of section 9(5) of the Government Employees Compensation Act, 1947, which I have just quoted. In the Pension Act, therefore, there is nothing which specifically deprives a pensioner thereunder from asserting a claim against the Crown under the provisions of sections 19(1) (*c*) and 50A of the Exchequer Court Act. Sections 18, 18A and 18B of the Pension Act do provide for the manner in which the Pension Commission, in determining the amount of pension to be awarded, shall take into consideration any amounts recovered by or on behalf of the pensioner by way of damages, or under the provisions of any provincial workmen's compensation Act, which sections are as follows:

18. (1) Where a death or disability for which pension is payable is caused under circumstances creating a legal liability upon some person to pay damages therefor, if any amount is recovered and collected in respect of such liability by or on behalf of the person to or on behalf of whom such pension may be paid, the Commission, for the purpose of determining the amount of pension to be awarded, shall take into consideration any amount so recovered and collected in the manner hereinafter set out.

(2) In any such case the Commission may require such person or anyone acting on his behalf, as a condition to the payment of any pension, to take all or any steps which it deems necessary to enforce such liability and for such purpose shall agree to indemnify such person or anyone acting on his behalf from all or any costs incurred in connection therewith.

18A. Where a disability or death for which pension is payable is caused under circumstances by reason of which compensation is payable in respect of such disability or death under any Provincial Workmen's Compensation Act or legislation of a similar nature either in the place of, or as additional to, or apart altogether from any amount which is recovered or collected in respect thereof under the last preceding section, if any compensation is awarded to or on behalf of any person to or on behalf of whom such pension may be paid, the Commission, for the

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purpose of determining the amount of pension to be awarded, shall take into consideration any compensation so awarded in the manner hereinafter set out.

18B. (1) Where any amount so recoverable and collected or the capitalized value of any compensation so awarded, or both, is greater than the capitalized value of the pension which might otherwise have been payable under this Act, no pension shall be paid.

(2) Where any amount so recovered and collected or the capitalized value of any compensation so awarded, or both, is less than the capitalized value of the pension which might otherwise have been awarded under the provisions of this Act, a pension in an amount which, if capitalized, equals the difference between such amount or the capitalized value of such compensation, or both, and the capitalized value of the pension which might otherwise have been payable under this Act, may be paid.

(3) If any amount so recovered and collected, or any part thereof, is paid to His Majesty, a pension which, if capitalized, equals the amount so paid but is not in any event greater than the total pension which, apart from this section, would be payable under this Act, may be paid. 1919, c. 43, s. 19; 1941, c. 23, s. 10.

I have quoted these paragraphs in order to point out that particularly in section 18(1) it is clearly indicated that the right of action for damages, if death is caused for which a pension is payable under circumstances also creating a legal liability to pay damages therefor, is not by that Act done away with; nor is the Crown subrogated to the rights of the pensioner to recover such damages. The extent of such recovery and its payment over to His Majesty are matters which may affect the quantum of the pension, but there is no requirement that any amount so recovered *shall* be paid to the Crown.

The Pension Act, it will be observed, provides pensions for dependents of a member of the forces whose death was attributable to or was incurred during military service (subject to certain limitations such as those found in section 11(1) (*f*) and section 12, which are not here relevant), such pension being payable whether the death was occasioned by enemy action, the negligence of a fellow serviceman or otherwise. In enacting the Pension Act, Parliament gave special consideration to the maintenance of servicemen who were incapacitated by illness or injury during military service and to the dependents of those who died or were killed during such military service. It would seem to me that having already given its attention to the particular subject and having provided for it, it could not be readily assumed that in enacting section 50A

of the Exchequer Court Act to broaden the meaning of "servant," as contained in section 19(1) (*c*) of that Act, Parliament intended to confer upon servicemen (or, in case of their death, upon their dependents) an additional recourse in the nature of an action for damages when both pension and damages would be payable by the respondent. There is nothing in section 50A which would indicate that in enacting it the attention of Parliament had been drawn to the Pension Act or that it intended to include in the general provisions of section 50A a second recourse for those who already were entitled to the special benefits of the Pension Act. Moreover, I would have been inclined to take into consideration the fact that section 50A was enacted to amend the law as laid down in the *McArthur* case (*supra*), in which there was no claim by a serviceman or his dependents entitled to the benefit of the Pension Act, to a claim for damages as well. In *Att. Gen.* v. *Metropolitan Electric Supply Co. Ltd.* (1), Farwell, J. said at p. 31:

> No doubt one is entitled to put oneself in the position of the legislature at the time the Act was passed in order to see what was the state of knowledge, what were the circumstances brought before the Legislature, and what it was the Legislature was aiming at.

Were it not for the principles laid down in the *Bender* case (*supra*), I would in this case have reached the conclusion that inasmuch as the suppliant and her children were entitled to the benefit of the Pension Act, they were debarred from asserting a claim under section 19(1) (*c*) and section 50A of the Exchequer Court Act. I would have read these general sections as silently excluding from their operation the cases which had been provided for in the special Act, namely, the Pension Act.

Notwithstanding the fact that since the *Bender* case was decided Parliament has re-enacted the Government Employees Compensation Act in the form I have above mentioned, the principles laid down in that case are binding upon me. Counsel for the respondent endeavoured to distinguish that case from the present one, but while the facts differ in some respects, the principles upon which that case was decided cannot, in my view, be distinguished from the ones which I must apply to this case. As I have

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said above, that case decided that receipt of benefits under the former Government Employees Compensation Act did not deprive a claimant of his remedy under section 19(1) (*c*) of the Exchequer Court Act. There it was decided that the Exchequer Court Act and the Government Employees Compensation Act were not repugnant to each other but that they dealt with two entirely different matters; that the former applied only where negligence was shown while the latter applied whether or not negligence on anyone's part was proved; and that the right under the latter Act arose not out of tort, but out of the "workmen's Statutory contract." It was held that separate and distinct rights arose under these two Acts. In my opinion, the same situation exists in the present case for, as I have said above, the pension applicable to dependents under the Pension Act is payable whether or not negligence on anyone's part is proven. The Government Employees Compensation Act, prior to its re-enactment in 1947, was entitled "An Act to provide compensation where employees of His Majesty are killed or suffer injuries while performing their duties." Moreover, rights under the Pension Act arise not out of tort but out of the "servicemen's statutory contract," entitling him in the event of injury or illness, and his dependents in the event of his death, to the payments provided in the Act. In the *Bender* case, the Government Employees Compensation Act was held to be a "workmen's statutory contract," and, while perhaps a serviceman cannot be said to be a "workman" in the sense in which the word is used there, I consider the Pension Act as being just as much a statutory contract for "servicemen" as the Government Employees Compensation Act is a statutory contract for "workmen" or employees.

That being so, and finding as I do that the suppliant and her children were entitled to the provisions of the Pension Act, and that the driver of the respondent's vehicle at the time of the accident was a servant of the respondent within the intendment of section 50A, it must follow that the plaintiff is entitled to invoke the provisions of section 19(1) (*c*) of the Exchequer Court Act and therefore, on the admitted facts, is entitled to damages.

I am not unaware of the possible results of the finding which I have made. Instead of granting a speedy settlement under the Pension Act, it may be necessary before a pension is awarded to closely investigate the cause of every injury to or death of a serviceman, to consider the question of contributory negligence, and in many cases to await the result of protracted litigation. But with such matters the Court is not concerned. That is a matter for Parliament to consider.

In the case of *Miller* v. *Salomons* (1), Pollock, C.B. said at p. 560:

> I think, where the meaning of a statute is plain and clear, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right, or the contrary. If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it—to administer it as we find it; and I think to take a different course is to abandon the office of judge, and to assume the province of legislation.

The suppliant personally claims $20,000 damages "as a result of the loss of support she would have been receiving from her husband had he lived;" and, as tutrix to her minor children she claims a further sum of $10,000 for each "as a result of the loss of support, comfort, succour and guidance of their father." Both the suppliant and her husband were approximately twenty-five years of age at the time of the latter's death. The two children were then approximately one and two years of age. At the time of his death Oakes was in perfect health. Prior to his enlistment he was an assistant purchasing agent at Fairchilds Aircraft Ltd. of Montreal, and when he enlisted in April, 1943, was earning approximately $45 to $49 per week. The amount of his wages is not definitely established due to the destruction of the company records but there is no doubt that it was within that bracket. He had graduated from high school and had attended technical school for one year. He was a careful and efficient employee and had he returned to his employment upon discharge from the services, would probably have received promotion and increases in salary. The evidence is that had he continued his employment up to the present time he would now be in receipt of a salary of about $55 per week or more for the

(1) (1852) 7 Ex. 475.

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same job; but had he made the normal progress expected of him, and received promotion, his salary might be approximately $80 per week.

His life expectancy at the time of his death was forty-six years and that of his wife forty-eight years. It is in evidence that the cost of a life annuity of $2,600 per year (the approximate annual income of the deceased at the time of his enlistment) on the life of the deceased would be $61,240. That figure is arrived at by adding the cost of a Government annuity of $1,200 per annum (the maximum purchasable from the Dominion Government) to the cost of an annuity of $1,400 purchased from an insurance company—all on the basis of the cost as of the date of Oakes' death. It is also shown that on the basis of the Government actuarial tables the cost of an annuity for life of $900 to Mrs. Oakes (based on her present monthly pension of $75), at the time of Mr. Oakes' death was $18,360; and also that the present values of the monthly amounts of $19 and $15 now paid to the infant children under the Pension Act, as of the date of the father's death and payable until each attained the age of sixteen years were, respectively, $2,745.87 and $2,055.00.

In order to maintain her family and support herself, the suppliant has taken employment as a key punch operator. Her evidence is that *at the present time* it costs her $804 per annum to maintain each child, that amount representing the cost of their clothing, food, medical, dental and other incidentals; that her other expenses, for rent telephone, light, gas, her own food and clothing and other incidentals, total $1,680 per year.

Where a claim for compensation to families of persons killed through negligence is made, the right to recover is restricted to the amount of the actual pecuniary benefit which the family might have expected to enjoy had the deceased not been killed. The difficulty arises not in the statement of the principle but in its application to a case in which the extent of the actual pecuniary loss is largely a matter of estimate, founded on probabilities, of which no accurate forecast is possible. It is advisable, of course, to assess the total amount and then to apportion it. (*Royal Trust Co.* v. *C.P.R.* (1))

(1) 67 D.L.R. 518.

In fixing the amount of damages sustained, it is necessary, to take into consideration the life expectancy of both the deceased and his widow, and also the ages of the two children as well as the amounts which the deceased would likely have contributed to their support had he lived. But such consideration must also take into account the ordinary exigencies of life, such as the possible early death of the husband, his incapacity through illness, loss of employment, a reduction in wages, and other similar matters. The award should not be based on a perfect and complete indemnity but must be reasonable under all the circumstances; the extent of the loss depends upon data which cannot be ascertained with certainty and must necessarily be a matter of estimate, and, it may be, partly of conjecture.

Taking all these and other relevent matters into consideration, I have reached the conclusion that the sum of $30,000 would fairly represent the total amount of the loss sustained. I would apportion that amount as follows —to the widow in her personal capacity the sum of $18,000; and to each of the two children the sum of $6,000.

There is also a claim by the suppliant for $104 made up of disbursements for mourning apparel, hire of cars for funeral, and the publishing of death notices. While she may have considered it advisable to expend these sums at the time of her husband's death, I do not think they are claims for which the respondent is liable and they will be disallowed.

The petition of right also claims interest on such amount as may be awarded for damages. It is well settled, however, that interest may not be allowed against the Crown unless there is a statute or contract providing for it—*The King* v. *Carroll* (1). That condition does not exist here and the claim for interest will be disallowed.

In the result there will be judgment declaring that the suppliant in her personal capacity is entitled to be paid by the respondent the sum of $18,000; and in her capacity as tutrix to her two infant children, the sum of $6,000 in respect of each of such children—being part of the relief sought in the petition of right. The suppliant is also entitled to be paid her costs after taxation.

Judgment accordingly.

(1) (1948) S.C.R. 126.