

the mouth and nose had been covered with water, and there was a thin coating of ice on the mouth, which was broken off upon the body being moved. The deceased came to his death by drowning or exposure. There was no post mortem examination of the body.

On the evening before the morning when the body was found, the deceased was at Midland; he had been drinking that day, and upon the undisputed evidence there is no doubt that he was that evening in a state of intoxication. . . . Le Rush (his brother-in-law) left deceased at Midland about 10 o'clock on the evening of the 6th, and that is the last that was seen of deceased when alive.

At the close of plaintiff's case, and again after all the evidence was in, defendants asked for a nonsuit. I reserved decision upon this motion and submitted certain questions to the jury, all of which were answered by the jury in favour of plaintiff except the 5th question, which was: "Could the deceased, by the exercise of ordinary and reasonable care, have avoided the accident which occasioned his death, and, if so, in what respect or how could the deceased have avoided the accident?" The latter part of the question was added at the request of counsel for plaintiff. To this question the answer was: "Yes. He might have taken another road, or if sober on a bright night he might have avoided the hole." The jury assessed the damages at \$1,200. . . .

There is no doubt that the deceased had a right to be on the ice in the vicinity of the hole. He was not a trespasser. He was upon the ice over navigable water. He was, when he lost his life, at a place "open to" but not "frequented by" the public.

Defendants in making the hole through the ice did so in the exercise of their rights for the purpose of saving their tug, which, without fault of theirs, so far as appears, had sunk in navigable water. Defendants had no reason to suppose that in the ordinary course of business or travel any one other than those in their employment would be near enough to their boat or to this hole to be in any way in danger. While the public had the right to be, or travel, upon the ice, there was no invitation by defendants to deceased or to any of the public to travel upon the ice or to go near the opening. There was not, apart from what was