

being done by defendants in the raising of the tug, any work or business being carried on, or any road or way defined by bushes or marks or by travel on the ice, that would give notice to defendants that any one would be likely to drive or ride or walk near to where the hole was, and the ice was not in condition to be skated upon.

Assuming that the hole through the ice was made by defendants, it was of sufficient size or area to endanger human life, and so was within the letter of sec. 255 of the Criminal Code, but *Tompkins v. Brockville Rink Co.*, 31 O. R. 124, is authority for the conclusion that, even if defendants are guilty of an offence within the meaning of that section, that of itself does not give plaintiff a right of action. The action is founded upon negligence, and, upon all the facts and circumstances which are beyond dispute, I am of opinion that there was not evidence of negligence that should have been submitted to the jury.

Then as to the cause of death, it is quite as reasonable to conclude from the evidence that the deceased voluntarily sat down or fell upon the ice, close to the edge, and perished from cold, as that he accidentally walked into the hole. Upon the evidence, the way in which Plouffe met his death is as consistent with the theory that he did not fall into the water as that he did, and, that being so, the case should not go to the jury: see *Armstrong v. Canada Atlantic R. W. Co.*, 4 O. L. R. 560, 1 O. W. R. 612.

If I am wrong in my present opinion, plaintiff is entitled to recover, unless the Court considers that the answer to the 5th question is a finding in favour of defendants on the point of contributory negligence. Defendants contend that it is such a finding. It may have been so intended by the jury. Their answer to the first part of the question is simply "yes." Then they add that deceased might have taken another road. That amounts to nothing. But they further add, "if sober on a bright night he might have avoided the hole." Upon the undisputed evidence the deceased was not sober on the evening of the 6th, but this answer is not, in my opinion, an express finding that deceased was intoxicated. Upon the evidence the night was a bright one, but the finding as to that is not direct. Even if it amounts to an argumentative finding, I am of opinion that, although the answer is in two distinct sentences, it must be considered