BETWEEN:

IRVING H. GROSSMAN and GUS SUN....SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1949
Oct. 4, 5 & 6
1950
Nov. 15

Crown—Petition of Right—Airplane damaged in landing on airfield owned and operated by the Crown—Crown liable to licensee for damage sustained because of a danger not obvious and not warned against—Failure of suppliant to ascertain conditions at landing field before landing plane—Action dismissed.

Suppliant Grossman when attempting for the first time to land his airplane operated by himself at an airport owned and operated by respondent and which was open to the public and which he was entitled to use, came in contact with an open ditch on the grass strip of the landing field used by him, with the result that his plane was seriously damaged. He now claims for the value of the damage done to his plane and suppliant Sun seeks to recover for certain out-of-pocket expenses incurred because of personal injuries sustained by him.

(1) (1898) 6 Ex. C.R. 69. (2) (1917) 17 Ex. C.R. 488.

1950

GROSSMAN *et al* v. THE KING

Cameron J.

The Court found that pilots with previous knowledge of the ditch could readily locate its position: that a pilot with no previous knowledge of its existence could observe its location and nature if he flew over the landing field at height of 1,000 feet or less, on the date of the accident: that a pilot with no previous knowledge of the existence of the ditch who failed to fly over the landing field at a height of 1,000 feet or less would have difficulty in seeing the ditch or the warning flags and under those circumstances the ditch would not be obvious to him.

Held: That the status of suppliant Grossman when using the airfield was that of a licensee to whom respondent owed a duty to give adequate warning of any danger unless such danger were obvious, Grossman being required to use reasonable care under all the circumstances.

2. That suppliant Grossman failed to take reasonable care in that he did not inform himself of the nature of the ground on which he proposed to land his plane and failed to take any steps to acquaint himself with the nature of the landing field and which were available to him for his own protection.

3. That the failure to give adequate warning to licensees, lawfully using the facilities of a public airport, of the existence of a ditch which constitutes an obstruction on the runway, is negligence on the part of the Crown for which it would be liable unless the obstruction would be obvious to those using reasonable care.

PETITION OF RIGHT by suppliant to recover from the Crown damages sustained by his airplane when landing on an airfield owned and operated by the Crown.

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

J. M. Cuelenaere, K.C. for suppliant.

G. H. Yule, K.C. and *A. J. MacLeod* for respondent.

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

CAMERON J. now (November 15, 1950) delivered the following judgment:

The suppliants claim damages for losses sustained on July 19, 1948, when a 1948 model Stinson Station Wagon Aircraft, owned and operated by the suppliant Grossman and in which the suppliant Gus Sun was a passenger, landed on the Saskatoon Airport and ran into the side of an open ditch thereon. While admitting that at all material times the airport was owned by the respondent in the right

of Canada and was established, constructed and operated by the Department of Transport, the respondent denies all liability and alleges that such damages as the suppliants sustained were caused by the negligence of the suppliant Grossman.

The airport is situated a few miles north of the City of Saskatoon. It was originally operated by the Royal Canadian Air Force, but after the late war was taken over by the Department of Transport and many additional facilities added. Ex. B is a plan dated April 9, 1946, which shows those parts of the port area which are here of any importance. When used by the Royal Canadian Air Force there were two hard-surfaced landing strips as lightly outlined on Ex. B; these will be referred to as the R.C.A.F. strips. There was also in the northeast corner of the airport area a grass landing strip running about north and south; and a small frame building having the word "Airport" on its roof, clearly visible from the air, and owned by the Canadian Pacific Air Lines. Some of the boundary markings originally used on that grass landing strip were still there at the date of the accident.

When the airport was taken over by the Department of Transport, it was decided to build two new hard-surfaced landing strips capable of being used by the heaviest planes. These are shown in heavy outlines on Ex. B (they will be referred to as the new strips). Each is about 1 mile long, 200 feet in width, and there are unsurfaced safety strips on each side, one being 200 feet wide and the other 300 feet wide. These new strips had been in use long before July 19, 1948. The R.C.A.F. strips were also used when needed and had not been abandoned (except in some parts), some maintenance work being done thereon. The grass strip in the northeast corner, so far as the Department was concerned, was considered to be abandoned and no monies were being spent thereon for maintenance. It was used, however, by the Saskatoon Flying Club, the Saskatchewan Air Lines and by other companies using light planes, although these organizations did not use it exclusively.

At the time the new strips were built it was deemed necessary to provide for their adequate drainage, and for that purpose about one million dollars was expended.

1950

GROSSMAN *et al* v. THE KING

Cameron J.

Much of this drainage was accomplished by special installations, including underground piping. As part of the drainage scheme it was decided to construct a large open ditch commencing 1,000 feet from the easterly end of the new strip "14 to 26," the ditch as so constructed in 1946 being marked in red on Ex. B. It is about 2,000 feet in length, about 48 feet in width at the top, and varies in depth from 7 feet to 11 feet. Being 1,000 feet distant from the end of the new strip, it was deemed unnecessary to fill it in owing to the very large additional expense that would be involved. This ditch intersects the old grass strip at about right angles and is about 2,800 feet from the north limit of the airport and about 1,300 feet from the hangars, situate at the southern limit of the old grass strip. On each side of the ditch, poles about 10 feet in height had been erected and on each were placed red flags made of cloth, to serve as danger warnings.

The suppliant Grossman is a theatrical producer and agent residing at DesMoines, Iowa. He first obtained a pilot's license in 1946, holds a Federal licence, and had about 450 hours' flying experience. On this trip he entered Canada at Winnipeg about two weeks previously and had stopped at airports in Saskatchewan, Manitoba and Western Ontario. His plane was equipped with a two-way radio which permitted him to contact and to be guided by airport control towers and ranges where these facilities existed. He says that at Winnipeg he endeavoured to secure suitable aerial maps of the airports at which he intended to call, but was unsuccessful.

On July 19 he left Prince Albert about 2.30 p.m. to proceed to the Saskatoon Airport, equipped with a small scale map he had previously obtained—Ex. 1. It was printed at the Hydrographic and Map Services in Ottawa in 1941. He made inquiries at Prince Albert and was informed as to the four surfaced strips which were available at the Saskatoon Airport, but was told nothing about the grass landing strip or the radio range, and his map did not contain any information about them.

He arrived over the airport about 3.30 p.m., weather and flying conditions being very good with excellent visibility. He observed from the wind sock and the tetrahydrant

that the wind was light from the southeast and variable. He tuned in to tower frequency and made one attempt to contact the control tower, but received no answer. He flew over the airport and, intending to land on the new runway "14 to 32" descended to a height of about 200 feet. He then observed men and equipment on that strip about halfway between its ends, and, deciding not to land there because of these obstructions, regained altitude to about 600 feet and turned along the east boundary of the airport. There he observed the frame building marked with the word "Airport," and to the west thereof a grass landing strip which he says was marked as available by conventional signs, with markers at the ends and at the cross points of the runway, limiting the landing strip. He decided to land there and, having observed the Administration Buildings and hangars at the south end thereof and wishing to finish his run on the ground at that point, decided to land well down on the grass strip. He therefore approached it from the north and landed at about the point "B" on Ex. 2. He describes his landing speed as a "stalled landing," about 55 m.p.h., and that it was an excellent landing. He continued to roll towards the hangars at the south. When he was about 200-300 feet north of the ditch to which I have referred and was about to cross a portion of the old R.C.A.F. surfaced strip, he says that for the first time he saw the ditch and the red flags on its edges. Faced with the danger of running into the ditch and being of the opinion that if he applied his brakes his plane would turn over, he decided immediately to endeavour to take off. His speed at that time he estimated at 45 m.p.h. and he considered that he had a chance to make a successful take-off. He attempted to do so but was unsuccessful, the under part of his plane caught on the far side of the ditch and the plane was crashed into the ground about 25 feet south of the ditch, causing the damages for which recovery is now sought.

Mr. Cuelenaere, counsel for the suppliants, while admitting that no objection could be taken to the actual construction of the ditch, submitted that it was the duty of the respondent to provide adequate warning of the danger occasioned by the open ditch on the grass strip, and that

1950

GROSSMAN *et al* v. THE KING

Cameron J.

the Crown had failed in that regard; that, while certain flags had been placed at the edges of the ditch, they were insufficient and inadequate to give notice of the danger and that the respondent was therefore liable for the losses sustained. Mr. Yule, counsel for the respondent, submitted that the evidence disclosed no cause of action against the Crown, that what was here done by the respondent amounted merely to non-feasance and that the Crown is not liable therefor; and that the damages sustained by the suppliants were occasioned by the negligence of Grossman.

Reference may be made to *The King* v. *Hochelaga Shipping & Towing Co. Ltd.* (1). In that case the Supreme Court of Canada unanimously affirmed the judgment of Angers, J., in this Court, finding liability on the Crown under the following circumstances: "The Dominion Government undertook the construction of a jetty projecting from a breakwater; the upper part was carried away in a storm leaving the lower part in position, but entirely submerged. The suppliant's vessel some two years later became a total loss as a result of having struck the submerged portion of the jetty which had been left without any buoy or other warning to indicate its presence there." It was

Held, affirming the judgment of the Exchequer Court of Canada and dismissing the appeal to this Court, that, upon the facts of the case, the submerged cribwork, which was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation, and in leaving that obstruction without providing any such warning, the officials and servants of the Crown in charge of these works were chargeable with negligence for which the Crown is responsible by force of section 19(*c*) of the Exchequer Court Act.

At p. 163 Crocket, J. said:

The evidence of the material facts I have endeavoured to outline is undisputed and I think fully justifies the conclusion of the learned trial judge, not only that the *Ostrea* struck the submerged and invisible obstruction in turning around the end of the jetty, but that its collision therewith was attributable to such negligence on the part of officers and servants of the Crown, while acting within the scope of their duties or employment upon a public work as rendered the Crown responsible therefor under the provisions of s. 19(*c*) of the Exchequer Court Act. It was not a case of mere non-repair or non-feasance, but of the actual creation of a hidden menace to navigation by a Department of the Government through its fully authorized officers and servants in the construction of a public work.

(1) (1940) S.C.R. 153.

And at p. 169 Davis, J. said:

> The case made against the Crown is that having undertaken and completed the restoration and change in the structure, leaving the impression upon those using the waters at the point that the end of the jetty was as it appeared above water, it was negligence on the part of the officers or servants of the Crown not to have either removed the submerged rocks and cribwork, or, placed a buoy or some warning of their existence and danger; in other words that it was not, as contended by the Crown, a case of nonfeasance but was in fact a case of misfeasance. That was the view of the evidence accepted by the learned trial judge and I think it was right. The Crown undertook the repair and reconstruction of the structure and did it in such a manner as to create a condition dangerous to those using the waters beside it. While in one sense the acts complained of might be regarded as an omission, in substance the result of the acts of those in charge of the work of restoration of the jetty constituted misfeasance . . . but I agree with the view taken by the learned trial Judge on the evidence, that is, that in the restoration and changes made in the jetty, there was negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon the public work.

The principles there laid down, in my opinion, are equally applicable to the construction of a ditch which constitutes an obstruction on the runway of a public airport. Failure to give adequate warning thereof to those lawfully using the facilities of the airport and exercising reasonable care, would, I think, constitute negligence for which, in the absence of contributory negligence, the Crown would be liable.

The first question to be considered is the nature of the duty, if any, of the respondent to the suppliants under the circumstances above disclosed and that necessarily involves the further question of the status of the suppliants. The airport was admittedly one which was open to public use and Grossman was therefore entitled to use it and so could not be considered a trespasser. There is no evidence as to whether any fees were charged to the owners of airplanes which landed on the airport or whether such services as the supplying of gasoline and oil or storage were supplied by the respondent or by tenants on the property. Grossman said that he intended to land on the runway and to finish up his run somewhere near the hangars, but whether he intended to avail himself of the services supplied at the hangars, and who occupied the hangars, is not made clear. On this limited evidence I am unable to find that Grossman was "invited into the premises by the owner or occupier

1950

GROSSMAN *et al* v. THE KING

Cameron J.

for some purpose of business or of material interest." In my opinion, therefore, he is not an invitee. But having permission to enter the premises although lacking a common interest with the occupier of the premises, he was, I think, a licensee.

The duty of an occupier of premises to a licensee was laid down by the House of Lords in *Fairman* v. *Perpetual Building Society* (1) where Lord Wrenbury said:

> The licensee must take the premises as he finds them; but this is apart from and subject to that which follows as to concealed dangers. The owner must not expose the licensee to a hidden peril. If there is some danger of which the owner has knowledge, or ought to have knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it. If the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable.

In *Mersey Docks and Harbour Board* v. *Procter* (2), Lord Sumner at p. 274 stated:

> A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself; if it is one to be expected, he must expect it and take his own precautions . . . The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee.

While the grass landing strip may have been officially abandoned by the department in charge (which spent no money on its maintenance), it was well known to those in charge that that part of it north of the ditch was in daily use by a large number of light planes. Mr. Burbidge, Inspector of Civil Aviation for the Department of Transport, a witness for the respondent, admitted that the ditch was an obstruction and that by reason of its existence the area north thereof (where Grossman landed) would be unfit for taking off and landing. He also stated that the place where Grossman landed was within the landing area of the airport for light aircraft; and that a pilot, seeing the grass strip with the ground markings that remained there adjacent to a building marked "Airport" would be entitled to assume—as did Grossman—that there would be a small area in which he could land. Mr. Burbidge also stated that it was the duty of Mr. P. R. Nicholas,

(1) (1923) A.C. 74. (2) (1923) A.C. 253.

1950

GROSSMAN *et al* v. THE KING

Cameron J.

Foreman of the Saskatchewan Airport, to mark any obstructions and that Mr. Nicholas was actually in the position of Aerodrome Manager.

Mr. Nicholas must have recognized, also, that the ditch constituted an obstruction, for without orders from any superior authority in 1946 he placed red cloth flags (about 24″ x 36″) on poles 10 feet high on each side of the ditch, spacing them about 100 feet apart. These were the only markers or warnings placed at or near the ditch, and it is admitted that they were placed there to give warning to pilots who were intending to land, as well as to those who were taking off from or manoeuvring on the grass strip itself.

These posts were originally old boundary markers and when first placed on the ditch were brightly painted. At the time of the accident they had become quite dull and had not been repainted, but the cloth flags when worn out had been replaced. Many of the original posts seem to have disappeared and the actual number in use at the time of the accident is quite uncertain. Some witnesses placed the number as low as six in all. Nicholas said there must have been eighteen or twenty but was not sure whether there were any on the south side of the ditch. In the year following the accident the posts were painted international orange and white and the red flags were put on a solid panel or framework capable of swinging a full circle. The evidence is that the new flags are much more easily discernible from the air and ground than were the former ones.

The respondent therefore had knowledge of the danger created by the ditch, and, unless such danger was obvious, owed a duty to give adequate warning thereof to the licensee, the latter being required to use reasonable care under all the circumstances.

In dealing with what is obvious in this connection, Lord Wrenbury in the *Fairman* case (*supra*) said at p. 96:

> If the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable. But something must be said as to the meaning of "obvious". Primarily a thing is for this purpose obvious if a reasonable person, using reasonable care, would have seen it. But this is not exhaustive unless the words "reasonable care" are properly controlled. There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see

1950

GROSSMAN *et al* v. THE KING

Cameron J.

them when, if he had been on the alert and had looked, he could have seen them. For instance: if one step in a staircase or one rung in a ladder has been removed in the course of the day and a man who had used the staircase or the ladder in the morning comes home in the evening finding the staircase or ladder still ostensibly offered for use, and comes up or down it without looking out for that which no one would reasonably expect—namely, that a step or rung has been removed, he has nevertheless suffered from what has been generally called a "trap," although if he had stopped and looked he would have seen that the step or rung had been removed. He was not guilty of negligence, he was not bound to look out for such an unexpected danger as that, although if he had proceeded cautiously and looked out it would have been obvious to him. He was entitled to assume that there was no such danger.

The difficulty of determining whether the danger here was obvious is increased because of the fact that Grossman was approaching it from the air and the question therefore arises as to the place from which it must be obvious. To that extent the problem differs from the relatively simple case of one using a defective stairway or ladder.

The ditch was not concealed. As I have said it was an open ditch with very considerable dimensions, being 200 feet long, 48 feet in width, and in depth varied from 7 to 11 feet. Its visibility was somewhat lessened by the presence of weeds along its upper edges. From very high altitudes and at great distances it would not be seen by a pilot who had no knowledge of its existence.

The evidence as to its visibility is most conflicting. Leslie Deane at the time of the accident was Superintendent of Maintenance and Operations for the Saskatchewan Government Airways, located at Prince Albert. The following day he was flown to the Saskatoon Airport to inspect the damaged plane. He said that he was unable to spot it as a ditch and did not notice any warning flags. He emphasized the fact that he was not a pilot and was speaking merely as a layman. I do not attach much weight to this evidence, particularly as he could not recall whether he landed on one of the paved strips or on the grass strip, nor did he know the height at which he had been flying over the airport.

Floyd R. Glass, the Manager of the Saskatchewan Airways, is a very experienced pilot and well acquainted with the Saskatoon Airport. He says that to him the ditch was fairly visible but that to inexperienced persons not trained in detecting a ditch of that sort it would be quite

possible not to see it; but added that in failing to see it "they may have been somewhat careless." On his first landing at the airport after the construction of the ditch he had no difficulty in seeing it from the air although he had no knowledge that it had been constructed. He did know, however, that new runways were being built at the airport.

Harold Mitchinson is the owner and operator of a flying service at the airport and also an experienced pilot. He knows the airport well and often uses the north part of the grass strip as a landing field. He says that in 1948 the warning flags from the air were not very visible and that one would have to be looking for them to see them, and that otherwise one might not see them. Normally, he adds, one would not be looking for a ditch of that sort.

J. R. Turner in 1948 was Managing Instructor for the Saskatoon Flying Club at the airport and held a commercial pilot's licence. In regard to the ditch he says, "Well, passing directly over the airfield, say a thousand feet, there definitely appears a black line that could be a roadway or a ditch. The only indication of its depth looking straight in an easterly or a westerly direction, down the length of the ditch, you might get an idea of its depth at a height of 800, using a radius of two miles that could easily be mistaken for a road leading to the ILS marker. I have had to drive up the field and lead visting aircraft round the edge of that field. Whether these people didn't recognize it I don't know, but they definitely landed on the northeast part and taxied out and threw them to the land on the north part and we have to go out and lead them around."

He added, "I would say any normal flag from the air, you would be lucky if you saw one."

Archie Neal is a flying instructor at Des Moines, Iowa, and landed at the airport shortly before the trial. He says, "I knew the ditch was there and was looking for it. To me it looked as if it might be just a little roadway or passage for vehicles, such as I have seen before. From 2,500 to 3,000 feet you cannot spot the depth, nor at 1,500 feet. Nor could you recognize it as a ditch."

1950

GROSSMAN *et al* v. THE KING

Cameron J.

Mr. B. F. Burbidge, Inspector of the Department of Transport, Civil Aviation, an experienced pilot holding a public transport pilot's licence, gave evidence for the respondent. He says that a few days before the trial he flew over the ditch to observe it, and stated, "I saw the ditch from the air at 600 feet, at 800 feet, a radius from the ditch of 360 degrees. At all times I could recognize it as a ditch." He says that from the same height one could have seen the red flag markers in place at the time of the accident if one were looking out for them.

Mr. S. L. Young—the officer in charge of the radio range at the airport—observed the landing and crash of the suppliant's plane from a point quite near the ditch and he said that at that time all the red flags along the ditch (some 15 or more) were fluttering vigorously in the wind.

In this connection it should be noted also that since the construction of the ditch in 1946 the grass strip north thereof had been used by a great many light planes. Students receiving instruction in flying landed or took off from that field as did the planes of the Saskatchewan Government Airways and many visiting planes from other areas, and in no case had the presence of the ditch resulted in an accident of any sort. Some of the witnesses who used it frequently described it as something of a nuisance but I think that they meant that to reach the hangars at the south it was necessary to taxi around it rather than that it constituted any danger so far as they were concerned. Knowing of its location, they could and did use the grass strip north of the ditch with perfect safety.

On the whole of the evidence on this point, I have come to the following conclusions: (*a*) that pilots with previous knowledge of the existence of the ditch could readily locate its position and that to them it was obvious and constituted no danger; (*b*) that a pilot with no previous knowledge of the existence of the ditch would easily observe its location and nature if he flew over the landing field at a height of 1,000 feet or less, the visibility being as it was on the date in question; and (*c*) that a pilot with no previous knowledge of the existence of the ditch who failed to fly over the landing field at a height of 1,000

1950

GROSSMAN *et al* v. THE KING

Cameron J.

feet or less would have difficulty in seeing the ditch or the warning flags and to him, under those circumstances, the ditch would not be obvious.

Under the principles laid down by Lord Wrenbury in the *Fairman* case (*supra*), the owner owes a duty to inform the licensee of the danger only if it is not known to the licensee *or obvious to the licensee using reasonable care.* In this case Grossman did not know of the ditch and the question therefore arises as to whether it would have been obvious to him had he used reasonable care in making his landing.

I accept that part of the evidence which indicates very clearly that for the protection of planes and passengers, as well as for persons or objects on the ground, it is essential for a pilot before landing to know the conditions existing on the landing field. Glass stated, "I always look for obstructions," and "A good pilot always looks on the ground itself." He also said that calling on a control tower or radio range for information as to the landing area was advisable, if not essential. Mitchinson said that if he were approaching a strange airport and knew there was a radio range there he would (if equipped with a two-way radio) as an experienced pilot, contact radio range to make sure that it was safe to land. Burbidge, whose right to give expert opinion evidence on the matter was not objected to, gave evidence as follows:

Q. What information or steps should a pilot follow before proceeding from one airport to another airport with which he is not familiar? . . . (to Counsel): Have you any objection?

Mr. CUELENAERE: I was wondering, if he starts on opinion evidence, if he has qualified the witness.

HIS LORDSHIP: There is not much question about it now?

Mr. CUELENAERE: No, I won't raise the objection.

A. He should first of all obtain all the rules and data regarding the serviceability of the other airport he is going to. He should in my opinion carry navigation maps, he should check the weather. If he is flying with the aid of radio he should know the frequency of the different ranges en route and also the frequency of the flying control. He should also check the weather.

Q. In your opinion what procedure should a pilot follow when landing on an unfamiliar airport?

A. He should first of all land on a serviceable runway. If he is not familiar with that particular airport, if he never landed there before, if he is not in touch with flying surely he should make a dummy run on the landing strip on which he chooses to land.

1950

GROSSMAN *et al* v. THE KING

Cameron J.

Q. What do you mean by a dummy run?

A. To run over the area of the ground he intends to land on at a low altitude.

Q. At what altitude?

A. Any safe altitude.

Q. HIS LORDSHIP: What do you mean by that?—low enough to give him—?

A. Accurate vision.

Q. Observation of the strip?

A. Yes.

Q. Mr. MacLEOD: What do you say as to the necessity of a dummy run at a familiar airport as compared with an unfamiliar airport?

A. If a familiar airport, if a pilot takes off in the morning and he is stationed at that particular airport, he knows the hazards of the obstructions on the airport, and therefore he would not always require to make a dummy run.

Q. What do you say as to the procedure to be followed by a pilot when confronted at an unfamiliar airport by two vehicles and two men on the runway that he intends to use?

A. That is a common practice, when that happens many pilots make a dummy run at such an altitude to warn the workers that they intend to use that particular runway.

Q. What happens ordinarily when that is done?

A. The workmen on the runway clear the vehicles and all obstructions on the ground away, off the runway, and the pilot makes a complete circuit and comes in to land after these obstructions are removed from the runway. Or he may make two dummy runs to make sure the second time everything is off the runway.

Q. Have you ever observed obstructions on Canadian airports?

A. Yes.

Q. What kind of obstructions?

A. On the general airport, or on the runway?

Q. On the area within the airport boundaries?

A. I have been a pilot and always looked for obstructions on any runway. There is a certain amount of maintenance has to be carried out to keep these runways in good working order. Therefore I ran into such things as cracks in the runway, and if work had been going on and the runway had just been repaired, to keep on the other side of that area.

Q. But are there other kinds of obstruction that you have observed on Canadian airports?

A. Yes, off the runways you can have soft ground, boulders, you can have workmen, you can have buildings, you can have radio facilities, you can have ditches.

Reference may also be made to *Peavey* v. *City of Miami* (1) where at p. 36 it is stated:

As a practice, it should seem that common sense would require a careful pilot to obtain in advance such information available, from reliable sources, as would enable him to determine the condition of the field which is his destination; and if the circumstances indicate that dangers not ordinarily encountered are to be apprehended, as in the case at bar, prudence should demand such a course. The evidence in this case shows that a pilot could ignore this practice, however, and still

(1) (1941) U.S. Aviation Reports 28.

exercise that care and caution required in landing at an airport under construction by observing the procedure known as "dragging the field"; that is, by flying over the field at a reasonably low altitude so that obstructions which would be hazardous to a landing plane might be spotted. One witness, who was also a pilot, testified this was a rule or general practice which airmen followed. This witness also said he thought the plaintiff exercised "poor judgment", and that such a landing as was made could not be justified unless the pilot had been "familiar" with the field on a local flight and knew the condition of the field.

After giving the matter the most careful consideration, I have reached the conclusion that Grossman completely failed to take any of the steps which were available to him for his own protection and which, had he taken them, would have been the "reasonable care" which on the evidence I find he was required to exercise under the circumstances. Because of his failure to do so he lacked proper knowledge of the ground on which he proposed to land. On the other hand, had he acquainted himself with the ground conditions in any of the ways which I shall enumerate, the accident admittedly would not have occurred.

A knowledge of the conditions existing at the airport or on a particular landing strip could have been ascertained in several ways. Information could be obtained from pilots at other airports who had an intimate knowledge of conditions existing at Saskatoon. A telephone call to the airport would have secured all necessary data. It is common knowledge among aviators in Canada that air navigation charts for the various large airports are published by the Department of Transport and available upon request to the proper authorities. Ex. 2 is such a chart for the Saskatoon Airport, dated May 17, 1948, and contains much information regarding runways, the existence of a radio range and its frequency, a chart of the landing strips (but not including the grass strip), length of runways, approach procedure and the like. But Grossman did not secure any such up-to-date information. He was equipped only with an out-of-date map (Ex. 1) issued in 1941 before the radio range was installed. At the Prince Albert Airport he was informed "by the boys at the hangars" that there were four paved landing strips at Saskatoon, namely, the two newly installed ones and the older R.C.A.F. runways, but was told nothing about a grass strip or the existence of such

1950

GROSSMAN *et al* v. THE KING

Cameron J.

facilities as a control tower or radio range and concerning which he made no inquiries. From advance sources, therefore, Grossman had no information whatever about the grass landing strip, its conditions, limits, dangers, or anything else.

The second method of securing the information is by using the two-way radio in the plane to contact either the control tower or radio range on the airport, where there are such facilities. In this case there was no control tower, but the radio range took its place and was so equipped that it would receive any such calls and furnish all information relative to weather conditions, landing conditions, and give information to pilots where and how to land and what obstructions were to be avoided. Grossman seems to have considered it normal practice to call the control tower for in this case he did call once, and, not receiving a reply, came to the conclusion that none existed and did not repeat the call. The manager of the radio range says that the records show that no such call was received and he seemed to be of the opinion that had it been given within the proper area it would have been received and answered. It may have been that the call was given out of range or that the attending operator at the radio range was momentarily absent from his post. In any event, I think it would have been wiser for Grossman to have repeated his call when over the airport, or at least when he came to the conclusion that he could not land on the 14-32 runway due to the obstruction thereon. Had he done so his call would have been received and full information would have been given him.

Again, I think Grossman erred in not landing on one of the paved strips which he had been told at Prince Albert were the strips he could use. Had he "buzzed the field" over the 14-32 runway, the workmen there engaged in making repairs would at once have cleared the landing strip for him. In any event, under the wind conditions existing at the time, he could have landed safely on any of the other three paved strips in perfect safety. Being paved, their length and surface conditions could have been readily ascertained.

1950

GROSSMAN *et al* v. THE KING

Cameron J.

But there is no regulation which requires private planes to use the facilities of radio range or control tower prior to landing, or to land on the paved runways, however advisable it may have been to do so. The evidence is that many light planes do land on the grass strips without contacting radio range. Moreover, as Burbidge stated, the existence of the old boundary markers there and of the building marked "Airport" would indicate to a pilot that there was there a small area available for landing.

Assuming, therefore, that he had a right to land on the grass strip—and I think he had—I think he was negligent in not first ascertaining the conditions existing in the landing area there. He saw no planes taking off or landing on the grass strip. He knew nothing about its extent or any obstruction thereon and took no steps to inform himself in regard thereto. I accept the evidence that the proper practice to follow in approaching a strange landing area and where the facilities of the control tower or radio range are not used is that of "dragging the field," or making "a dummy run" over the landing strip at such an altitude as would give full information as to existing conditions thereon. There was nothing which prevented Grossman from doing so but, in fact, he did nothing which would have assisted him in noting obstructions or the available length and width of the runway. He did not fly over the landing area at any time. From the east side of the airport—a very considerable distance away—he observed the building at the north marked "Airport," a grass strip with markers thereon, and no doubt the hangars at the south. But he made no inspection or examination of the extent of the landing strip available but merely assumed that it ran from the northerly limit as far south as the hangars and that everything was alright. He said that he was taught that where there is an airport he could make a safe landing without reference to any control; that "a runway is a runway to be used as such and you do not have to examine it if you are coming to a civilized field; that you do not have to examine the runway to see if there is anything that might be a hazard." Acting in that belief he admitted that he had made no examination of the runway at all.

1950

GROSSMAN *et al* v. THE KING

Cameron J.

I am quite unable to agree that the duty that lies on a pilot who proposes to land on an airport (where he has not previously landed and of which he knows nothing) to take reasonable care, is as limited as that suggested by Mr. Grossman. In my opinion, to assume under these circumstances that an unknown runway was of a suitable length or extended to a certain point, or that it was clear of traffic or other hazards, would be contrary not only to law but to sound common sense. Runways may be in use by other planes taking off or taxiing on the ground, or may be undergoing repairs. Or, as pointed out by Burbidge, there may be cracks on the runway and near the runways there may be soft ground, boulders, buildings, ditches and the like. Pilots who have a personal knowledge of current conditions in the landing area would probably not be required to "drag the field," but would in any event have to ensure by observation that the field was clear for landing. But the degree of care required of pilots who have no knowledge of the local conditions and who are not controlled or under the direction of a control tower or radio range should be much more than that. They should make an inspection of the area in such a manner as to ascertain the limits of the field, the obstructions and warning flags, that practice being commonly described as "dragging the field." Had Grossman taken such precautions I think undoubtedly he would have seen both the ditch and the warning flags and the danger therefore would have been obvious to him. It follows, therefore, that as the duty of the respondent to the suppliants was that of giving adequate warning only when the danger was not obvious to a licensee *using reasonable care,* and as my finding is that the danger would have been obvious to Grossman had he used reasonable care, the suppliant's claim must fail. It was his lack of care which in my opinion caused the damages sustained.

I have not overlooked the requirements of the Air Regulations (P.C. 2129-Ex. 7) established under The Aeronautics Act, R.S.C. 1927, ch. 3 as amended, or the fact that the respondent had not placed yellow panels in the area as required by section 13(*d*) (1-2) thereof. Inasmuch as

Grossman did not fly over the landing area at any time prior to landing, I think it improbable that he would have seen them had they been in position.

The amount of the damages should in any event be ascertained.

Grossman's plane was purchased on January 8, 1948, for $7,292.95. It was damaged to such an extent that it was not worth repairing. Due to Customs regulations it could not be sold in Canada without payment of duty on the original value. It was therefore removed to Des Moines and efforts were made to dispose of it. It was finally sold at the highest offer received, namely, $850. Deducting from the cost price of $7,292.95 the sum of $570, which was established as the amount of depreciation, and the sum of $850 realized on the sale, Grossman's loss in regard to the plane itself is fixed at $5,872.95. In addition he expended or lost the following amounts:

(*a*) Saskatchewan Government Airways—inspection of plane following the accident	$ 70 95
(*b*) Removing wreckage from the airport and storage charges	15 00
(*c*) Dismantling plane	150 00
(*d*) Moving plane to Des Moines	355 00
(*e*) Expenses in returning home, less estimated cost had he returned by his own plane	80 00
(*f*) Telephone calls following the accident	60 00
(*g*) Living expenses and disbursements incurred at Saskatoon following the accident	100 00
(*h*) Loss of income resulting from the accident	300 00
	$ 7,003 90

I find, therefore, that Grossman's total damage amounted to $7,003.90.

The suppliant Gus Sun suffered personal injuries and was confined to hospital in Saskatoon for about ten days. No claim is advanced for his personal injuries but the following disbursements are claimed, and, if the suppliants had succeeded, would have been allowed.

(*a*) Paid Saskatoon City Hospital	85 00
(*b*) Paid Dr. Langford	75 00
(*c*) Paid Dr. Coldwell	20 00
(*d*) Paid Dr. Daymond	10 00
(*e*) Expenses incurred in returning home	145 00
	$ 335 00

1950

GROSSMAN *et al* v. THE KING

Cameron J.

A further claim is advanced on behalf of the suppliant Sun, namely, $100 for loss of earnings due to the accident. No satisfactory proof was given as to this item and it will be disallowed.

In the result, I find that the suppliants are not entitled to any of the relief sought in the Petition of Right and the claims will therefore be dismissed with costs.

Judgment accordingly.