IN THE MATTER OF THE PETITION OF RIGHT OF

1917
Oct. 25

GERTRUDE S. NORTHRUP.............SUPPLIANT;

AND

HIS MAJESTY THE KING............RESPONDENT.

Crown—Liability for negligence—Uncovered basin—Public building—Trespassers.

A pedestrian falling into an uncovered catch-basin constructed by the Crown, on property not owned by it, to protect a post office building against accumulation of surface water, at a place not used for public travel, is a trespasser, and has no redress against the Crown for injuries sustained thereby.

PETITION OF RIGHT for damages for any injury sustained from falling into an uncovered basin constructed by Crown.

N. R. McArthur, for suppliant: *T. S. Rogers*, K.C., for respondent.

CASSELS, J., (October 25, 1917) delivered judgment.

The petitioner, S. Gertrude Northrup, lives at Glace Bay, in the County of Cape Breton. She alleges that on or about April 11, 1915, while walking to the public buildings (the post office), she suffered damages by falling into a catch-basin which she alleges was uncovered and unprotected and in a dangerous condition, because of the negligence and unworkmanlike construction of the same by the respondent, its agents, servants and workmen, etc.

The allegation is that she fell into the catch-basin and was seriously injured, and she prays that the Crown be condemned to pay the petitioner the sum of $22,235 with costs.

The case came on for trial before me at Halifax on September 13 last. The evidence, with the exception of that of William Bishop, was taken by consent by a commissioner agreed to by all parties. By consent it was used at the trial. I had no opportunity, therefore, of personally seeing or hearing any of the witnesses, except Bishop.

The public building in question is the post office. It fronts upon Main St. Exhibit No. 2, filed at the trial, shows roughly the situation of the property. The post office was constructed about the year 1910. It appears

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from the evidence that the land sloped from the north towards the building, with the result that the surface water which drained from the ground on the north soaked into the northerly side of the post office—and thereupon, under directions of the Government, a catch-basin was constructed in order to catch the waters, and, by means of a drain, the water from this catch-basin is conducted into drains which drain the post office into the main sewer on Main St.

On the west of the public building and on the Government land there was a passageway leading from Main St. and to the north of the building. It would appear that this passageway was utilized for the passage of teams and persons travelling on foot, and led to the houses situated on the north of the post office, This passageway had a width on Main St. of about 9 ft., and became wider towards the northern end. It was a beaten path like a public street, and was used by the public. This passageway, while utilized by the public, was in part on Government property. The people passing by this western passageway walked clear of the catch-basin in question.

On the easterly side there was an open piece of ground between the Government building, which at Main St. was about the width of 12 ft. At the north-east corner of the building the width was about 3 ft. There was no beaten path on this westerly piece of land. This is conceded by the petitioner and also by the witnesses. The catch-basin in question was constructed on lands owned by the late Senator McDonald, and was at some distance from the northerly boundary of the land owned by the Crown.

The allegation of the petitioner is that she was going to Rice's Gents' Furnishings when, she says, I was taking a short cut through Senator McDonald's field when I got injured near the post office. She is asked:—

Q—Were you on the beaten path? A.—No. Q—Were you passing a place where apparently nobody else passed? A.—I noticed no tracks and there was no road.

The case was presented before me on behalf of the petitioner by Mr. McArthur with great ability. He informed me at the trial that he had made a very careful search of authorities, but could find none in point.

In my opinion, the action does not lie against the Crown. Mr. Bishop seems to think that in Glace Bay people were in the habit of crossing any commons promiscuously. The land in question to the east of the post office building and to the Commercial Hotel is the property of the Crown. In utilizing this land with a view of taking a short cut the petitioner was a trespasser, and there was no duty on the part of the Crown towards the petitioner. Had she chosen to take the beaten road on the west passage, the question of a different character might arise—but for her own convenience she chose to take this short cut through grounds of Senator McDonald, upon whose lands the catch-basin in question was situate, with a view of passing down on Government lands to the east of the post office.

The case of *Lowery* v. *Walker*,[1] reversed a decision of the Divisional Court,[2] and a decision of the Court of Appeal.[3] It is stated on page 11:—

"The contentions on both sides were so clearly and fully set forth in the report of the decision of the Court of Appeal that it is unnecessary to repeat them here. In this House their Lordships expressed no opinion upon the authorities, their decision turning on the construction of the learned County Court Judge's findings."

By referring back to the decision of the Court of Appeal it will be found that the judges dealt exhaustively with the principles that should govern the case of a trespasser. As their Lordships pointed out, there are authorities, perhaps, not all in harmony, but the general principles of law governing such cases are fully dealt with.

Reference may also be had to Pollock on Torts,[4] *Leprohon* v. *The Queen*,[5] may also be referred to, although in some respects this case may be modified by the law as enunciated by the Supreme Court of Canada in the case of *Leger* v. *The King*,[6]. The case of *Brebner* v. *The King*[7], may also be referred to, and the collection of authorities therein cited.

I am sorry for the petitioner, as she seems to have suffered considerably. I would have preferred that she had

[1] [1911] A.C. 10.
[2] [1909] 2 K.B. 433.
[3] [1910] 1 K.B. 173.
[4] 10th ed. (1916), at p. 544.
[5] 4 Can. Ex. 100.
[6] 43 Can. S.C.R. 164.
[7] 14 Can. Ex. 242, 14 D.L.R. 397.

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been examined in open court before me. Looking at the doctor's evidence, the same injury might have been caused by slipping without getting, as she alleges, into this hole.

Another serious defence has been raised on the part of the Crown which I have not considered it necessary to investigate, namely, that the accident in question did not arise on any public work, and the Crown invokes the law as decided in the *Chamberlin* case[1] and the *Piggott* case,[2] and numerous other authorities.

Any amendments to the Exchequer Court Act[3] remedying the law as decided in the *Chamberlin* case would not apply to this case; and the legislation in the last Parliament, namely, the statute passed in 1917, would not be retroactive.

The petition is dismissed, and, if the Crown exacts them, with costs.

Petition dismissed.

Solicitor for suppliant: *N. R. McArthur.*

Solicitors for respondent: *Henry, Rogers, Harris & Stewart.*

[1] 42 Can. S.C.R. 350.
[2] 32 D.L.R. 461, 53 Can. S.C.R. 626.
[3] R.S.C. 1906, ch. 140.