

J. H. MANSEAU.....SUPPLIANT;

1922
Nov. 30.

AND

HIS MAJESTY THE KING.....RESPONDENT.

"Public Work"—Exchequer Court—Jurisdiction—Tort.

On October 15th, 1921, between 7 and 7.30 p.m., it being quite dark at the time, the launch *Delilah C.* was approaching St. Denis wharf on the Richelieu River. In making her course she guided herself by a buoy, passing from 25 to 30 feet therefrom. While on this course she ran aground and suffered damages. The buoy belonged to the Crown and was under its control at the time in question, under the provisions of R.S.C. 1906, c. 44, sec. 5, and R.S.C. 1906, c. 113, sec. 832. At the time of the accident it was shown that the buoy was wrongly located.

Held: that at the time of the accident herein, neither the Richelieu river nor the buoy in question were "public works" within the meaning of section 20, subsec. c, Exchequer Court Act, and that as the action sounded in tort the court had no jurisdiction to grant the relief sought by the petition of right.

PETITION OF RIGHT seeking to recover \$2,430 damages to a vessel occasioned by running aground near St. Denis on the Richelieu river.

October 30th, 1922.

Case now heard before the Honourable Mr. Justice Audette at Montreal.

A. Forest for suppliant:

L. A. Rivet, K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (November 30th, 1922) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of \$2,430 as damages to his vessel occasioned by her having run aground, opposite St. Denis, on the Richelieu river, in the province of Quebec, as a result of the alleged mis-placement of a buoy under the control and care of the Crown.

On the 15th October, 1921, while cruising with passengers between Sorel and Beloeil. the gasoline-launch *Delilah*

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C., between 7 and 7.30 o'clock in the evening, when it was quite dark, arrived near St. Denis wharf and, guiding herself by the buoy, or light on the float, passed, as testified, from 25 to 30 feet therefrom,—ran aground and suffered damages.

Now, on that night, at the time of the accident, the buoy was on the shoal instead of being at the extremity thereof, and it is contended by the suppliant that it was thus wrongly placed ever since the beginning of the season of 1921, but on that point the evidence is absolutely conflicting.

On behalf of the suppliant, witnesses J. H. Manseau, Leblanc, Phaneuf and Parent testified that the buoy was wrongly placed in the spring of 1921, and that it was in the same position at the date of the accident.

On behalf of the defendant, T. W. Weir, captain of the *Argenteuil*, a government vessel, testified that in 1921, he was engaged in the service of placing buoys, and that he then checked the placing of the buoy in question,—and he further checked it on the 27th July of the same year, and that on both occasions the buoy was in its proper position.

Captain J. D. Weir, the superintendent of the marine department for that division, testified that on the 18th July, 1921, in course of an inspection, he checked the buoy in question and that it was in proper position. Witness Hector Charbonneau who was with the superintendent on the 18th July, 1921, further says, on that occasion he moored at the buoy and found it in good position, after having checked its position from their land-marks.

The conflict between the witnesses is indeed very material and is upon a fact which should not offer much controversy. However, I think, it can, to some extent but to some extent only, be reconciled by some explanatory and corroborative statements taken from the evidence adduced by both parties.

I primarily find that the buoy or float,—about 6 to 7 feet square, with a pole thereon of about 6 feet to which is attached a lantern fed with oil,—was out of its normal position on the evening of the accident.

However, the evidence establishes that at the end of each season, the buoy or float is taken ashore into winter quarters, and that the anchor and chain holding it in proper place is let remain at the bottom of the river, and the chain is picked up the following spring and tied again to the float which is thus placed in proper position and at the same place as in the previous year. That course having been followed it would primarily establish that it was just in the same place in the spring of 1921, as it was in the previous year. That is the necessary inference.

Now, sometime during the season a short piece of rope or cable the size of one's wrist was found tied to the float at one end, and cut at the other end. It was very difficult if not impossible to make out anything satisfactory from the evidence of witness Bourgeois, who testified to having found such rope and having removed it. It would appear to be on in the fall; but, it was not there on the 22nd October, 1921, when the buoy was moved to its proper site. Be that as it may, the discovery or finding of this rope, would go a long way to confirm the conjecture respecting this displacement, suggested by witness Charbonneau, when heard on behalf of the suppliant. He contends the buoy might have been displaced, moved or dragged by the act of a scow or barge mooring to it in stormy weather—such occurrences having to his knowledge already taken place with even heavier buoys. And upon this conjecture he is confirmed by Captain J. D. Weir, who actually saw such occurrence on Lake St. Louis, and by witness T. W. Weir, who confirming this view, adds that he attends to displaced buoys two or three times a week. Then the size of the rope would convey the idea that a large and heavy vessel had used it.

Exhibit "B", produced by witness Bourgeois, would also tend to throw some more light upon the displacement, but that document, written by his wife at his demand, was tendered in evidence in the course of his testimony under such circumstances that it becomes incumbent upon me to find it unreliable.

It is immaterial, to a great extent, to know whether the buoy was properly located in the spring of 1921, but the

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suppliant himself in the course of his evidence stated that when they began navigating that season, the buoy was there and the first time they saw it they thought (on pen-sait) that it had been correctly placed, but I unhesitatingly find it was in a wrong location at the time of the accident.

That brings us to the consideration of the question as to whether, as a matter of law, the Crown could be found liable in damages under the circumstances.

Under the "Department of Marine and Fisheries Act," R.S.C. 1906, ch. 44, sec. 5, and the "Canada Shipping Act," R.S.C. 1906, ch. 113, sec. 832, it must be found the buoy in question was vested in the Crown and under its control at the time of the accident.

The present action is in its very essence grounded on damages and sounding in tort. In such a case there is no liability on behalf of the Crown, unless it is made so liable by statute or is the result of a breach of contract, Audette's Exchequer Court Practice, pp. 106, 108 (L.), *Hopwood v. The King* (1); *Poisson v. The King* (2).

To succeed the suppliant must therefore bring his case within the ambit of sec. 20 of the "Exchequer Court Act," as amended in 1917, by 7-8 Geo. V, ch. 23, whereby subsection (c) of said section now reads as follows:

(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 upon any public work.

To bring this case within the provisions of subsec. (c), as amended in 1917, the injury to property must result from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon a public work. In other words three cardinal conditions are required: (1st) a public work; (2nd) negligence of the Crown officer thereon; (3rd) and the injury must be the result of such negligence.

There is no public work in question in this case.

The first requirement is wanting. The river Richelieu and the buoy are not public works. Indeed, I must come

(1) [1917] 16 Ex. C.R. 419.

(2) [1918] 17 Ex. C.R. 371.

to that conclusion, following the several decisions in the cases of *Wolfe Company v. The King* (1); *Piggot v. The King* (2); *The City of Quebec v. The Queen* (3); *Macdonald v. The King* (4); *Larose v. The King* (5); *Brown v. The Queen* (6); *Montgomery v. The King* (7); *La Compagnie Générale d'Entreprises Publiques v. The King* (8); *Courteau v. The King* (9); and *Desmarais v. The King* (10).

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Two cases decided by the Supreme Court of Canada are perhaps specially apposite, and they are the *Hamburg American Packet Company v. The King* (11) and *Paul v. The King* (12). In the former case it was held that the channel of the river St. Lawrence, near Cap à la Roche, between Montreal and Quebec, was not a "public work",—after the Crown had spent money in widening and deepening it, and notwithstanding that subsec. (a) of sec. 9 of the *Public Works Act* placed under the control of the minister "works for improving the navigation of any water." In the latter case (the Paul case) it was held that a Government steam-tug and a scow, its tow, working in conjunction with a government dredge, and which caused a collision while engaged in improving the ship channel of the St. Lawrence, was not a public work.

No right of action has accrued to the suppliant under the circumstances of the present case.

On the question of costs, as raised by the argument, I must find that the Crown has pleaded the question of law under sec. 20 of the statement in defence, and further that this case might be distinguished from the Piggot case (*ubi supra*), in that in the present case there might have been some justification to contend that the buoy or float came

- (1) [1921] 20 Ex. C.R. 306; [1922] 63 S.C.R. 141.
- (2) [1915] 19 Ex. C.R. 485; [1916] 53 S.C.R. 626.
- (3) [1891] 2 Ex. C.R. 252, 270; [1894] 24 S.C.R. 420 at 448.
- (4) [1906] 10 Ex. C.R. 394 at 397.
- (5) [1900] 6 Ex. C.R. 425; [1901] 31 S.C.R. 206.
- (6) [1892] 3 Ex. C.R. 79.
- (7) [1915] 15 Ex. C.R. 374.
- (8) [1917] 57 S.C.R. 527 at 532.
- (9) [1915] 17 Ex. C.R. 352.
- (10) [1918] 18 Ex. C.R. 289.
- (11) [1901] 7 Ex. C.R. 150; 33 S.C.R. 252.
- (12) [1906] 38 S.C.R. 126.

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within the definition of what is a public work as defined in some of the statutes. There will be judgment finding and adjudicating that the suppliant is not entitled to the relief sought by his petition of right.

Judgment accordingly.
