

IN THE MATTER of the Petition of Right of

1908
Sept. 16.

J. C. MILLER.....SUPPLIANT ;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Obstruction to navigation—Submerged portion of breakwater constructed by the Public Works Department—Liability of Crown.

The suppliant, a resident of the State of Michigan, U.S.A., sought to recover damages against the Crown for injury to two barges of American registry, which ran upon a submerged portion of a breakwater erected by the Department of Public Works at the entrance to a public harbour in Canada. The top of the breakwater had been washed away some time previously, and had not been re-built. The suppliant charged negligence against the Crown in allowing the breakwater to fall into disrepair, and in not sufficiently indicating the obstruction to navigation by means of buoys or otherwise. Information concerning the obstruction had been given to mariners prior to the accident by means of notices issued by the Department of Marine and Fisheries, and such information was also printed in official notices issued to American mariners by the Government of the United States.

Held, that upon the facts there was no negligence of any officer or servant of the Crown within the meaning of R. S. c. 140, sec. 20 (c).

The Queen v. Williams (9 App. Cas. 418 distinguished).

2. The fact that after the occurrence of the accident an officer of the Department of Public Works ordered buoys to be placed on the obstruction had no bearing upon the issue of negligence raised in the action.

PETITION OF RIGHT for damages arising out of an accident to foreign vessels navigating Canadian waters.

The facts are stated in the reasons for judgment.

May 8th, 1908.

The case came on for hearing at Toronto.

L. E. Dancey, for the suppliant, relied on *The Queen v. Williams* (1). He also cited *Filion v. The Queen* (2);

(1) 9 App. Cas. 418.

(2) 4 Ex. C. R. 134.

Letourneux v. The King (1); *Brady v. The King* (2);
Gilchrist v. The King (3); *Martin v. The Queen* (4);
Gagnon v. The Queen (5); *McKays' Sons v. The*
Queen (6).

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C. J. R. Bethune, for the respondent, cited *Hart v. L. & N. W. Ry. Co.* (7); *Cole v. Canadian Pacific Ry. Co.* (8); *Columbia Ry. Co. v. Hawthorne* (9).

CASSELS, J., now (September 16th, 1908) delivered judgment.

The petition in this matter was filed on behalf of one J. C. Miller, a resident of Marine City, in the State of Michigan.

The petitioner is the owner of the steam barge *Rand* and the barge *Annie P. Grover*, both being ships of American register.

The allegations of the petition are that in the month of May, 1907, the two barges were chartered to carry cargoes of coal from the City of Cleveland to the Town of Goderich in the Province of Ontario.

The allegation is that on Monday, the 6th May, 1907, the two barges were about to enter the harbour of Goderich when they ran upon a sunken breakwater placed there by the Public Works Department of the Government of the Dominion of Canada and sustained damages to the extent of \$1,500.

I quote verbatim the 4th and 5th paragraphs of the petition:—

“That said breakwater was in the course of construction by the said Department of Public Works during the year 1906 and is situated in Lake Huron about three quarters of a mile from the entrance to the piers of the

(1) 33 S. C. R. 335.

(2) 2 Ex. C. R. 273.

(3) 2 Ex. C. R. 300.

(4) 2 Ex. C. R. 328.

(5) 9 Ex. C. R. 189.

(6) 6 Ex. C. R. 1.

(7) 21 L. T. N. S. 261.

(8) 19 Ont. P. R. 104.

(9) 144 U. S. 202.

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said port of Goderich, and during the fall of said year 1906, the top of said breakwater through improper construction was washed off and there remained the submerged portion referred to in paragraph 3 hereof.

“That said portion of submerged breakwater was left by the said Department of Public Works in a very dangerous condition and a menace to the safe navigation of vessels entering the said port of Goderich, and no buoys or other marks were stationed by the said Department of Public Works at or near the submerged breakwater to indicate the danger to vessels about to enter the said port of Goderich, and by reason of the negligence of said Department of Public Works in not placing buoys or other marks to indicate said danger, your petitioner’s said barges ran upon said breakwater and sustained the damages hereinbefore mentioned.”

The Attorney-General of the Dominion of Canada acting for His Majesty the King, pleads want of care and caution upon the part of the captain and men in charge of the barges in attempting to enter the harbour of Goderich otherwise than by the proper channel, and that but for such want of care the accident would not have happened.

The defence also raises the question that even admitting the allegations contained in the said petition to be true, that no right in law exists against the Crown in favour of the petitioner.

The petition was tried before me at Toronto and subsequently written arguments were put in.

A considerable portion of the evidence was taken by commission.

There is no dispute as to the fact that the barges ran on the sunken breakwater.

At the trial it was agreed by both counsel for the petitioner and the Crown that in the event of the petitioner

being entitled to damages, the amount of such damages should be assessed at the sum of \$1,000.

This agreement obviates the necessity of considering a considerable portion of the evidence relating solely to the amount of damages.

There is but little dispute as to the facts of the case.

It appears that in the year 1904 the Department of Public Works undertook the construction of a breakwater to protect the harbour of Goderich.

A contract was entered into by the Department with Messrs. Battle & Conlon, of Thorold, for the construction of this breakwater, being about 500 feet in length and 35 feet wide. The construction of this breakwater was proceeded with when in the fall of 1905, a large portion of the superstructure was washed away. No further work was done towards the completion of the breakwater, and during the year 1905, the balance of the superstructure was washed away leaving no portion of the breakwater above the surface of the water.

The claim to relief is founded upon sub-sec (c) of section 20 of the Exchequer Court Act, cap. 140 R. S. C. It is contended that injury has resulted to the petitioner on a public work arising from the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment.

The ground for the claim is as stated in the 5th paragraph of the petition hereinbefore quoted, namely, that the Department of Public Works should have placed buoys or other marks to indicate the danger to vessels entering the harbour.

The breakwater in question is a lawful structure. In the early spring of 1909 the contract with Battle and Conlon was terminated and a new contract for the completion of this breakwater entered into.

At the time of the accident the day was fine and clear and the water smooth. William Shackett was the cap-

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tain of the steam barge *Rand* and was responsible for the navigation of the vessels. The captain had been to Goderich at least four times previous to the trip in question, his last trip previous being at least three years previous to the one in question. On entering the harbour on the morning in question, the captain, apparently ignorant of any change in the ranges, proceeded to enter on the course pointed out by the ranges previously in use instead of by the channel indicated by the new ranges. Had the captain been aware of the change of the channel and of the new ranges, it is obvious from his own evidence that the accident would not have occurred.

The notice to mariners and the warnings given as to obstructions in entering any of the harbours are issued by the Department of Marine and Fisheries. These notices are widely circulated and every facility is afforded for obtaining such notices. The following notices were issued by the Department of Marine and Fisheries :—

“DOMINION OF CANADA.”

Notice to Mariners.

No. 46 of 1905.

(Inland Notice No. 7.)

All bearings, unless otherwise noted, are magnetic, and are given from seaward, miles are nautical miles, heights are above high water mark and all depths are at mean low water.”

“ONTARIO.

(115) LAKE HURON—GODERICH—CONSTRUCTION OF BREAK-WATER—TEMPORARY LIGHTS.

A breakwater is being built about 1,400 feet outside the pier forming the sides of the channel into Goderich Harbour, Lake Huron, to shelter the entrance, and mariners are now warned of this fact in order that the cribs already sunk in place may not prove dangerous to navigation.

The cribs as sunk are below the surface of the lake but are marked in daytime by timbers standing up out of the water. At night the contractors keep them marked by lights. The number, description and position of these lights is not stated.

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N to M No. 46 (115) 13—6—05.

Source of information, report from Harbour Master, 6th June, 1905. Admiralty Charts affected—Nos. 407, 519 and 678. Publication affected—Sailing Directions for Lake Huron 1905, page 61. Department of Marine and Fisheries of Canada, File No. 5686.

F. GOURDEAU, *Deputy Minister.*

Department of Marine and Fisheries,
Ottawa, Canada, 13th June, 1905.

Pilots, masters or others interested are earnestly requested to send information of dangers, changes in aids to navigation, notice of new shoals or channels, errors in publications, or any other facts affecting the navigation of Canadian waters to the Chief Engineer, Department of Marine and Fisheries, Ottawa, Canada. Such communications can be mailed free of Canadian postage."

“ ONTARIO.

(250) LAKE HURON—GODERICH—NEW BREAKWATER—
DAMAGED—CAUTION.

Messrs. Battle and Conlon, contractors, report that a portion of the new breakwater in process of construction across the entrance to Goderich harbour, Lake Huron, has been carried away by a gale, leaving it partially submerged and a possible danger to vessels entering. At this season of the year it is difficult if not impossible to maintain lights on the submerged portion of the breakwater and mariners are notified that they must invari-

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ably enter on the new range of red lights described in Notice to Mariners No. 82 (198) of 1905.

N to M No. (250) 20—11—05.

Source of Information—Departmental Records.

Admiralty Charts affected—Nos. 3,319, 3,390, 519 and 678.

Publication affected—Sailing directions for the Canadian shore of Lake Huron, 1905, page 61.

Department of Marine and Fisheries of Canada, File No. 17, 380.

F. GOURDEAU, *Deputy Minister.*

Department of Marine and Fisheries,

Ottawa, Canada, 20th November, 1905.

Pilots, masters or others interested are earnestly requested to send information of dangers, changes in aids to navigation, notice of new shoals, or channels, errors in publication, or any other facts affecting the navigation of Canadian waters, to the Chief Engineer, Department of Marine and Fisheries, Ottawa, Canada. Such communication can be mailed free of Canadian postage."

Mr. O'Hanly in his evidence shews the care taken to have these notices brought to the attention of the mariners. Bulletin No. 16 of the War Department of the United States, issued in 1906, at page 22, shows the full information given to mariners. It also appears that in the Coast Pilot Book which Captain Shackett had, the information was contained. It would appear the captain made no inquiries from any one as to changes in the ranges, but took his chances.

No officer of the Public Works Department had any duty cast on him of placing buoys.

The protection of navigation was under the supervision of the Marine and Fisheries Department. They adopted all the precautions they considered necessary. These precautions were sufficient if the captain had exercised

reasonable care. I think no legal cause of action lies in favour of the petitioner.

I cannot see how the Crown can be made liable even if the Marine Department might in my opinion have taken extra precautions. The case of the petitioner is not brought within the statute. Even if it were the taking for granted on the part of Captain Shackett is the real cause of the accident.

I have read over and considered the numerous authorities quoted by counsel. *The Queen v. Williams* (1) was greatly relied on by the petitioner; I do not think this case entitles the petitioner to relief. This case depends on a statute differing from the one governing this case.

Great stress is placed in the case upon the fact that no steps had been taken to indicate to mariners the hidden danger. On the day of the accident and after learning of it, Lamb ordered buoys to be placed to indicate the sunken breakwater. It was a wise precaution and taken of his own motion. This fact cannot create a liability if it did not exist.

Mr. *Bethune* cited several cases holding that such subsequent precautions cannot create liability.

Having regard to the facts of this case, if a legal liability did not exist, such subsequent acts would not creat it.

I think the petition should be dismissed with costs.

Judgment accordingly.

Solicitor for suppliant: *L. E. Dancey.*

Solicitors for respondent: *Chrysler, Bethune & Larmonth.*

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