

1932
Oct. 5.
Dec. 30.

BETWEEN :

I. MURRAY CAPON SUPPLIANT ;

AND

HIS MAJESTY THE KING RESPONDENT.

*Petition of Right—Public work—Collision of motorboat with a buoy—
Exchequer Court Act, Sec. 19, ss. "C."*

Suppliant's motorboat collided with a buoy at the mouth of the Brace-bridge river, in the Muskoka Lakes region, on which there was no light, and by his petition seeks to recover \$500 by way of damages to the boat, alleged to be the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work, to wit, in not seeing that the buoy carried a light.

Held, that the buoy in question, was not a public work within the meaning of Sec. 19, ss. "C" of the Exchequer Court Act, and that, in consequence, the suppliant was not entitled to the relief sought by his petition of right.

PETITION OF RIGHT by suppliant seeking to recover a certain sum by way of damages for injury to his motorboat due to a collision with a buoy on the Muskoka Lakes alleged to be due to the negligence of a servant of the Crown in not keeping a light thereon.

The questions of law raised in the action, namely, whether the buoy in question was a public work, and that if the same was a public work, whether the person responsible for maintaining the buoy in good condition was an officer or servant of the Crown, were heard before the Honourable Mr. Justice Angers, at Ottawa.

C. A. Thoburn for Suppliant.

F. P. Varcoe, K.C., for respondent.

1932
CAPON
v.
THE KING.

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

ANGERS J., now (December 30, 1932), delivered the following judgment:

By his petition of right the suppliant seeks to recover from the Crown the sum of \$500, with interest and costs.

The petition alleges that on the 14th day of August, 1931, at about 10.30 p.m., a motorboat, belonging to suppliant, and driven by one Shields, an expert driver of motorboats in the Muskoka Lakes, left Bracebridge, Ontario, en route to the suppliant's home on Lake Joseph, and that, upon reaching the mouth of Bracebridge River, the said Shields drove in the proper channel past the range or beacon lights keeping a sharp lookout. The petition relates that the motorboat, having passed the last light which should have marked the entrance to the shallow channel, collided with a buoy, which carried no light and that, as a result of the collision, the boat was damaged and one of its passengers injured. The petition avers that the collision was due to the fault and negligence of the Crown's officers and servants acting within the scope of their duties and employment in that they neglected to see that the buoy carried a light. The petition further adds that the buoy had been, to the knowledge of the Crown's officers and servants, defective previous to the 14th day of August, 1931.

The statement of defence, after denying the material allegations of the petition, says

- (a) that the petition does not disclose any cause of action against His Majesty;
- (b) that the person or persons responsible for maintaining the buoy in question were not officers or servants of the Crown;
- (c) that the said buoy was not a public work within the meaning of paragraph (c) of section 19 of the Exchequer Court Act.

1932
 CAPON
 v.
 THE KING.
 —
 Angers J.
 —

In order to succeed, the suppliant must bring his case within the ambit of subsection (c) of section 19 of the Exchequer Court Act (R.S.C., 1927, ch. 34) which reads as follows:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(a)

(b)

(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 subsection (c) of section 19 of the statute, the injury or damage to the suppliant's motorboat must result from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment upon a public work. Three conditions are therefore required, namely: (a) a public work; (b) negligence of the officer or servant of the Crown upon such work; (c) an injury resulting from such negligence.

When the case came up for trial, it was, on the suggestion of the parties, decided that, before adducing any evidence to establish the cause of the accident and the amount of the damages, the two following questions should be submitted for the consideration and decision of the Court, to wit:

1. Was the buoy a public work within the meaning of subsection (c) of section 19 of the Exchequer Court Act?
2. Was the person responsible for maintaining the buoy in good condition an officer or servant of the Crown?

After carefully perusing the memoranda of argument filed by counsel and making a review of the decisions having some bearing on the interpretation of the words "public work" in subsection (c) of section 19 of the Exchequer Court Act, I have reached the conclusion that there is no public work in the present case.

See: *Manseau v. The King* (1) and the cases therein cited, particularly *Paul v. The King* (2); *Hamburg American Packet Co. v. The King* (3); *Desmarais v. The King* (4); *Macdonald v. The King* (5); *Montgomery v. The King* (6).

1932
CAPON
v.
THE KING.
Angers J.

See also: *Despins v. The King* (7); *Piggot v. The King* (before the amendment 7-8 Geo. V, ch. 23, s. 2) (8); *Wolfe Co. v. The King* (9).

In the case of *Paul v. The King, ubi supra*, Sir Louis Davies J., commenting upon the expression "public work" said (p. 131):—

This court has already held in the case of *The Hamburg American Packet Co. v. The King*, confirming the judgment of the Court of Exchequer, that the channel of the St. Lawrence River after it had been deepened by the Department of Public Works did not, in consequence of such improvement, become a public work within the meaning of the section under consideration. An appeal taken from this judgment to the Privy Council was afterwards abandoned. This judgment is, of course, binding upon us and somewhat narrows the point now before us.

To hold the Crown liable in this case of collision for injuries to the suppliant's steamer arising out of the collision we would be obliged to construe the words of the section so as to embrace injuries caused by the negligence of the Crown's officials not as limited by the statute "on any public work," but in the carrying on of any operations for the improvement of the navigation of public harbours or rivers. In other words, we would be obliged to hold that all operations for the dredging of these harbours or rivers or the improvement of navigation, and all analogous operations carried on by the Government were either in themselves public works, which needs, I think, only to be stated to refute the argument, or to hold that the instruments by or through which the operations were carried on were such public works.

I think a careful and reasonable construction of the clause 16 (c) must lead to the conclusion that the public works mentioned in it and "on" which the injuries complained of must happen are public works of some definite area, as distinct from those operations undertaken by the Government for the improvement of navigation or analogous purposes; not confined to any definite area of physical work or structure.

In his memorandum of argument, counsel for suppliant submits that section 19 of the Exchequer Court Act includes all "public works mentioned under the Public Works Act and other Acts, in which such expression is defined." I must say that I cannot agree with this proposition.

- | | |
|--|--|
| (1) (1923) Ex. C.R., 21 at p. 24. | (5) (1906) 10 Ex. C.R., 394. |
| (2) (1906) 38 S.C.R., 126. | (6) (1915) 15 Ex. C.R., 374. |
| (3) (1901) 7 Ex. C.R., 150 and
(1902) 33 S.C.R., 252. | (7) (1916) 16 Ex. C.R., 256. |
| (4) (1918) 18 Ex. C.R., 289. | (8) (1915) 19 Ex. C.R., 485. |
| | (9) (1921) 20 Ex. C.R., 307, and
(1921) 63 S.C.R., 141. |

1932
 CAPON
 v.
 THE KING.
 Angers J.

In the case of *Wolfe Co. v. The King, ubi supra*, the Honourable Mr. Justice Audette, at page 316, said:

The words "public work" mentioned in sec. 20 of the Exchequer Court Act must be taken to be used as verily contemplating a public work in truth and in reality, and not that which is mentioned in the Public Works Act or in the Expropriation Act for the purposes of each Act. Moreover, each definition given in these two Acts is prefaced by the words "In this Act, unless the context otherwise requires," that is to say it is limited to each Act. Indeed for the purposes of each Act that definition is obviously acceptable, because it is used, so to speak, as a key to what comes within the ambit or provision of each Act. However, it does not follow that it can be accepted as a general definition in all cases. It is not because a desk and chair belong to and are used in the Department of Public Works that it must therefore be construed as a public work, any more than the same furniture, the property of the Department of Militia, can be called military works, military engines.

The Crown's liability cannot be enlarged except by express words or necessary implication—*City of Quebec v. The Queen* (2 Ex. C.R. 270)—and all properties belonging to the Crown are not necessarily public works. (Idem. 24, S.C.R. 448.)

I think that the remarks of the learned judge are exactly to the point.

In his memorandum of argument, counsel for suppliant, much to my surprise, suggests that "the question of whether this particular buoy was a public work could not be determined unless evidence were taken to show why it was not, in view of the fact that it clearly comes within the definition of a public work." The situation is exactly the same as it was when the parties agreed to submit the case on the questions of law; the change of attitude of counsel for suppliant is rather tardy. However, notwithstanding the delay, I would not hesitate a moment to order that the case be reopened and fixed anew for trial, if I thought that anything could be gained by so doing. But for the purpose of my decision, I have taken for granted that the facts alleged in paragraphs 4 and 5 of the petition of right are true; surely the suppliant could not expect to be allowed to make proof beyond the allegations of his petition. I accordingly see no reason to adopt the suggestion made by counsel for suppliant in his memorandum of argument.

Having come to the conclusion that the buoy, with which the suppliant's motorboat is alleged to have collided, is not a public work within the meaning of subsection (c) of section 19 of the Exchequer Court Act, I need not discuss the second question submitted by counsel, viz., whether the per-

son responsible for keeping the buoy lighted was an officer or servant of the Crown or not.

No right of action has accrued to the suppliant and his petition must accordingly be dismissed.

There will be judgment finding that the suppliant is not entitled to the relief sought by his petition of right and dismissing the said petition with costs.

1932
CAPON
v.
THE KING.
Angers J.

Judgment accordingly.