

1897
Oct. 11.

HER MAJESTY THE QUEEN ON }
 THE INFORMATION OF THE ATTOR- } PLAINTIFF;
 NEY-GENERAL FOR CANADA..... }

AND

WILLIAM J. POUPORE, JOHN G. }
 POUPORE AND JOHN B. FRASER } DEFENDANTS.

Contract—Public works—Damages—Negligence—Sufficiency of proof.

In an action by the Crown for damages arising out of an accident alleged to be due to the negligence of a contractor in the performance of his contract for the construction of a public work, before the contractor can be held liable the evidence must show beyond reasonable doubt that the accident was the result of his negligence.

THIS was an action for damages for negligence in the performance of a contract for the construction of a public work.

The facts are stated in the reasons for judgment.

The case came on for hearing on the 6th and 7th days of May, 1897.

B. B. Osler, Q.C. and *E. L. Newcombe, Q.C., D.M.J.*, for plaintiff;

A. B. Aylesworth, Q.C., W. D. Hogg, Q.C. and *J. Christie*, for the defendants, relied on *The Montreal Rolling Mills Co. v. Corcoran* (1).

THE JUDGE OF THE EXCHEQUER COURT now (October 11th, 1897) delivered judgment.

The information is exhibited to recover from the defendants a sum of forty-four thousand nine hundred and nine dollars and forty cents, which after judgment therefor in this court the Crown paid as damages to the owners of the steam propeller "Acadia" (2)

(1) 26 Can. S. C. R. 595.

(2) See ante p. 1.

injured while navigating the Rapide Plat Division of the Saint Lawrence Canals, and to the owners of the cargo with which the steamer was laden at the time of the accident.

The steamer was injured by running upon a rock or boulder in the canal, and the principal question in the former cases was whether the injury resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. That issue was found against the Crown, it being clear that there had been carelessness or negligence in not discovering the presence of the boulder in the channel used by vessels.

The issue in this case is different. The accident happened at a place adjacent to where the defendants, who were contractors for deepening the canal, had been carrying on their work. It was the duty of the contractors to see that none of the material used by them was allowed to fall into the channel of the canal and obstruct it. That would, I think, have been their duty apart from their contract. But they had also thereby stipulated that their operations should be so conducted during the season of navigation as not for any continuous length of time to interrupt or interfere in any way with the passage of vessels through the canal; that any loosened stones or material the top of which was higher than the bottom of the canal should be at once removed; and that this condition as to keeping the channel-way free and uninterrupted and the bottom clear should be strictly carried out. It was contended for the Crown that this imposed upon the contractors the duty of keeping the channel clear of all obstructions irrespective of how such obstructions were occasioned. With that contention I do not agree. The undertaking to keep the channel of the canal clear of stones and other material applies to stones and

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other material moved or loosened by the contractors in carrying on their work of dredging and does not apply to stones or boulders that were in the channel of the canal when they commenced their operations, or that were dropped or deposited there by other persons or carried there by the action of the ice while the work was being carried on.

That being the case, the issues in this case, and the former cases are by no means the same. In the former cases it was not necessary to come to any conclusion as to how the boulder that occasioned the accident came to be in the channel of the canal. The fact that it was allowed to remain there was sufficient to render the Crown liable. It was the duty of its officers to take the necessary means to discover it, and then to remove it. But here before the defendants can be made liable it is necessary to go further and to find that the defendants or their servants were in some way responsible for the boulder being in the channel of the canal. Were they so responsible? It is possible that they were. One may go further and say that according to the evidence it is in a measure probable that this boulder was part of the material loosened during the work carried on by the defendants, and that they were responsible for its being where it was when the accident happened. But there is not, it seems to me, that degree of certainty about the matter to justify a judgment against them. The particular boulder may have been in the channel before the defendants commenced their operations. The enquiry, which if it had been made at the time of the accident, might have afforded the means of coming to a conclusion as to that, was neglected; and it is also possible that the boulder may have been placed where it caused the accident by other persons using the canal, or it may

perhaps have been carried there by the action of the ice.

There will be judgment for the defendants, and with costs.

Judgment accordingly.

Solicitor for the plaintiff: *E. L. Newcombe.*

Solicitors for the defendants: *Christie, Green & Green.*

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