IN THE MATTER OF THE PETITION OF RIGHT OF

1918
April 2.

ORIZE DESMARAIS, OF THE PARISH OF ST. FRANCOIS DU LAC, DISTRICT OF RICHELIEU, WIDOW OF ISIDORE PINARD, IN HIS LIFETIME NAVIGATOR, ALSO OF THE PARISH OF ST. FRANCOIS DU LAC, COUNTY OF YAMASKA, DISTRICT OF RICHELIEU, ACTING HEREIN, AS WELL IN HER PERSONAL NAME FOR HER BENEFIT, AS WELL AS IN HER QUALITY OF TUTRIX DULY NAMED TO HER MINOR CHILD ISSUED FROM HER MARRIAGE WITH THE SAID ISIDORE PINARD,—TO WIT, CECILE PINARD, AGED TWO YEARS,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Crown—Negligence—Action for tort—"Public work"—Stone-lifter—Exchequer Court Act.

The suppliant's husband was an employee of the Crown working on a stone-lifter, the property of the Crown, in the deepening of the ship-channel in the harbour at Montreal, and while so engaged in lifting a boulder from the channel was thrown overboard and drowned. *Held,* that the action was, in its very essence, one of tort, and apart from special statutory authority, no such action would lie against the Crown, and that the suppliant, to succeed, must bring her action within sub-sec. (c) of sec. 20 of the *Exchequer Court Act* before the amendment of 1917, and that the injury complained of must have occurred on a public work, and was the result of some negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

Held, further, following *Paul v. The King,* (1906), 38 Can. S.C.R. 126, that the death of the deceased did not occur on a public work within the meaning of the Act, and further on the facts, even assuming that the stone-lifter was a public work, that the death of suppliant was an unforeseen event which was not the result of any negligence or misconduct of an officer or servant of the Crown.

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PETITION OF RIGHT for damages arising out of an accident on a Government railway.

Tried before the Honourable Mr. Justice Audette, at Sorel, P.Q., March 19th, 1918.

Aimé Chassé and *Adolphe Allard,* for suppliant.

A. Lanctot, for respondent.

AUDETTE, J. (April 2, 1918) rendered judgment.

The suppliant, by her petition of right, seeks to recover damages in the sum of $15,000, both on her behalf and on behalf of her minor child, as arising out of the death of her husband, Isidore Pinard, an employee of the Department of Marine, which occurred while engaged working on board a stone-lifter, the property of the Crown, in course of the operation by the Crown of deepening the ship-channel, at Montreal, P.Q.

The accident happened on the 14th October, 1916. Pinard was, at the time of the accident, first night officer on the Government Dredge No. 1, which was engaged in the harbour of Montreal, in dredging the ship-channel, between Montreal and Quebec, a work carried on by and at the expense of the Crown for the improvement of the navigation of the River St. Lawrence.

As part of the plant working in conjunction with the dredge, among others, were a stone-lifter, a tug serving the dredge, and a pontoon to which both the tug and the scows would moor.

The bed of the River St. Lawrence, at the place in question, is composed of sand and a number of boulders or rocks. In order to carry on the dredging and deepening of the channel, the dredge had to be

helped with or supplemented by a stone-lifter, which at the time of the accident, was lying at and tied to the port side of the dredge, as shown on Exhibit "B". On the day in question, after having lifted, with the stone-lifter, a rock or boulder of two to two and a half tons from the bottom of the river, the rock was placed alongside of the well, and was being rolled over on the deck by means of crowbars, toward the bow of the stone-lifter, when Lemoine's crowbar slipped while he was raising the boulder higher than the height obtained under Pinard's crowbar, and by the crowbar so slipping the boulder came back with a jerk on Pinard's crowbar, and as he was standing but a few feet from the side, he was thrown overboard and drowned under the circumstances detailed in the evidence. At the time of the accident Pinard was occupied in a kind of work with which he was familiar, having been engaged at such works for years before. For the purpose of the case it is unnecessary to go into further details in respect of the drowning of the suppliant's husband.

The case at bar is in its very essence in tort, and apart from special statutory authority, no such action will lie against the Crown.

Therefore, to succeed, the suppliant must bring her case within the provisions of sub-sec. (c) of sec. 20, of the *Exchequer Court Act,* before the amendment in 1917, by 7-8 Geo. V, ch. 23, and the bodily injury complained of must have occurred: 1st. On a public work; and 2nd, must be the result of some negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

With the object of shortening the evidence, Counsel for the Crown admitted that the dredge No. 1, and the stone-lifter in question in this case were, at the

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time of the accident, the property of the Government of Canada, and that the said dredge and stone-lifter were at that time employed at the execution of works done by the Dominion Government for the deepening of the maritime ship-channel of the St. Lawrence.

The first question to be *in limine* decided is whether or not the accident occurred *on a public work.*

Counsel at bar for the suppliant relied very forcibly upon the definition of the expression, a "public work", which is to be found both in the *Public Works Act,* and the *Expropriation Act.*

Sub-sec. (c) of sec. 3, of the *Public Works Act,* enacts that "public work" or "public works" means and includes any work or property under the control of the Minister. And by sec. 9 of the Act, among the properties enumerated under the control of the Minister is to be found, *"the works for improving the navigation of any water"*—and by sub-sec. (h) of that section it also covers *"all other property which now belongs to the Crown".*

As was observed by Mr. Justice Burbidge in the *Hamburg-American Packet Co. v. The King,*[1] the *Exchequer Court Act* contains no definition of the expression "public work"; but the Act from which this provision, now found in sub-sec. (c) of sec. 20 of the *Exchequer Court Act,* was adopted, contained such a definition. The Act from which it was adopted is the old official *Arbitrators Act* (ch. 40, R.S.C. 1886), sub-sec. (c) of sec. 1, which reads as follows:

"(c) (The expression) 'public work' or 'public "works' means and includes the dams, hydraulic "works, hydraulic privileges, *harbours,* wharves, "piers and works for improving the navigation of

[1] (1901), 7 Can. Ex. 150 at 173.

"any water—lighthouses and beacons—the slides, "dams, piers, booms, and other works for facilitating "the transmission of timber—the roads and bridges, "the public buildings, the telegraph lines, Govern-"ment railways, canals, locks, fortifications and "other works of defence, and all other property "which now belong to Canada, and also the works "and properties acquired, constructed, extended, en-"larged, repaired or improved at the expense of "Canada, or for the acquisition, construction, repair-"ing, extending, enlarging or improving of which "any public moneys are voted and appropriated by "parliament, and every work required for any such "purpose; but not any work for which money is "appropriated as a subsidy only."

The same definition of a "public work" is also to be found, in the same wording, as sub-sec. (d) of sec. 2 of the *Expropriation Act* (R.S.C. 1906, ch. 143), as now in force,—with, however, the addition of the words *"docks"* and *"dry docks"*.

Now, under this state of the law, as presented by counsel at bar, it was decided in the *Hamburg-American* case[1] by the Exchequer Court of Canada, (affirmed by the Supreme Court of Canada) that:

". . . . it cannot be doubted that the ship-channel "between Montreal and Quebec is a work for improv-"ing the navigation of the St. Lawrence River; and "that while the work was in the course of construc-"tion or under repair it was a public work under the "management, charge and direction of the Minister "of Public Works. The same may be said of any "work of dredging or excavation to deepen or widen "the channel of any navigable water in Canada. But "it does not follow that once the Minister has ex-

[1] 7 Can. Ex. 150 at 177; (1907), 39 Can. S.C.R. 621.

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"pended public money for such a purpose, the Crown "is for all time bound to keep such channel clear and "safe for navigation; and that for any failure to do "so it must answer in damages."

From that decision it would appear that while the works were being actually carried on in the ship-channel, they would be a "public work", and after the works had been completed and public moneys expended that they would cease to be a public work.

Had we only that decision for a guidance, it would apparently let in the present case, since the accident happened while the works were in course of construction; but after this decision came the judgment of this court in the case of *Paul v. The King*[1], confirmed by the Supreme Court of Canada, wherein Davies, J., with whom Maclennan and Duff, JJ., concurred, at p. 131 says:

"This court has already held, in the case of *The "Hamburg-American Packet Co. v. The King*[2] . . . . "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 improve- "ment, become a public work within the meaning of "the section under consideration. . . .

"To hold the Crown liable in this case . . . we "would be obliged to construe the words of the sec- "tion so as to embrace injuries caused by the negli- "gence 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 opera- "tions for the dredging of these harbours or rivers

[1] 9 Can. Ex. 245; (1906), 38 Can. S.C.R. 126.
[2] (1902), 33 Can. S.C.R. 252.

"or the improvement of navigation, and all analo-"gous operations carried on by the Government, "were either in themselves public works, which "needs, I think, only to be stated to refute the argu-"ment, or to hold that the instruments by or through "which the operations were carried on were such "public works.

"If we were to uphold the latter contention, I "would find great difficulty in acceding to the distinc-"tion drawn by Burbidge, J., between the dredge "which dug up the mud while so engaged and the "tug which carried it to the dumping ground while "so engaged. Both dredge and tug are alike engaged "in one operation, one in excavating the material "and the other in carrying it away.

"I think a careful and reasonable construction of "the clause 16 (c) (now clause 20) 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."

The above-mentioned definition of the expression "public work" covers "harbours." This accident occurred in the harbour of Montreal. Would that bring the case within the ambit of sec. 20 of the *Exchequer Court Act*?

The decision in the *Paul* case has since been mentioned and followed by the Supreme Court of Canada in many cases, and is now remaining undisturbed and binding upon this court. See *Piggott v. The King;*[1]

[1] (1916), 32 D.L.R. 461; 53 Can. S.C.R. 626.

Chamberlin v. The King;[1] *Olmstead v. The King,*[2] and others. Therefore, following that decision, it must be found the accident did not happen on a "public work."

In *Montgomery v. The King,*[3] it was further held, following the views expressed by the Judges of the Supreme Court of Canada in the *Paul* case, that a dredge belonging to the Dominion Government is not a public work within the meaning of sec. 20 (c) of the *Exchequer Court Act.* And again, under the dictum of Sir Louis Davies in the *Paul* case, it would be impossible, under the circumstances, to establish any difference between the dredge and the stone-lifter in the present case.

If this decision in the result were—as was contended—a curtailment by the court of a clear and unambiguous definition given by Parliament itself, for the reason that if effect were given to it, it would take us too far afield, and on that very account criticized, —I must say that, even assuming the stone-lifter were a public work, under the full circumstances of the case, I would be unable to find any negligence as further required by sec. 20. Evidence on record fails to disclose anything upon which a court could find that an officer or servant of the Crown, while acting within the scope of his duties or employment, had been guilty of negligence from which the present accident resulted. And it must be stated that everything within human power appears to have been done to save the drowning man. A lifebuoy was thrown to him, he was caught with a boat-hook when he floated down by the stern of the dredge, but his coat

[1] (1909), 42 Can. S.C.R. 350.
[2] (1916), 30 D.L.R. 345; 52 Can. S.C.R. 450.
[3] (1915), 15 Can. Ex. 374.

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gave way when a small boat from the dredge was lowered to his rescue, but unfortunately, without success.

The injury complained of is the result of a mere accident. "What happened was fortuitous and unexpected." As I already had occasion to say in *Thibault v. The King*:[1]

"The event was unforeseen and unintended, or was "'an unlooked-for mishap or an untoward event "which was not expected or designed'. *Fenton v.* "*Thorley Co.*;[2] *Higgins v. Campbell.*[3] It was a per- "sonal injury by accident. In *Briscoe v. Metropol-* "*itan St. Ry. Co.*[4] an accident is defined as 'such an "unavoidable casualty as occurs without anybody "being to blame for it; that is, without anybody being "guilty of negligence in doing or permitting to be "done, or in omitting to do, the particular things that "caused such casualty.'"

The accident in this case was an unforeseen event which was not the result of any negligence, misconduct of an officer or servant of the Crown.

It is gratifying, however, to know that the suppliant has received $500 in insurance, and that the Crown offered her, by the statement in defence, but without assuming any legal liability, the sum of $1,000.

Therefore, judgment will be entered in favour of the Crown, and the suppliant is declared not entitled to the relief sought by her petition of right.

Solicitor for suppliant: *Aimé Chassé.*

Solicitors for respondent: *Lanctot* and *Magnan.*

[1] (1918), 17 Can. Ex. 366, 41 D.L.R. 222.
[2] [1903] A.C. 443; 89 L.T.R. 314; 52 W.R. 31.
[3] [1904] 1 K.B. 328.
[4] 120 Southwestern Rep. 1162 at 1165.