Vancouver 1968

Mar. 19-21

Ottawa Apr. 4

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

SOCIEDAD TRANSOCEANICA CANOPUS S.A., OWNERS OF THE VESSEL M.S. *PROCYON* ..... PLAINTIFF;

AND

NATIONAL HARBOURS BOARD .....DEFENDANT.

Crown—Shipping—National Harbours Board Act, R.S.C. 1952, c. 187, s. 39—Displaced mooring buoy in Vancouver Harbour—Whether duty of Harbour Board to warn ships—Collision—Whether negligence—Liability of Board for negligence of servants and agents—Limitation of actions—Action against Crown for negligence of servant—Statute of Limitations, R.S.C. 1952, c. 370, s. 11(2).

The M.S. *Procyon* suffered damage to her propeller on the night of November 22nd 1959 in Vancouver Harbour when she collided with a mooring buoy which as defendant Board's officers knew had some weeks earlier been displaced by a storm from her charted location to a position away from shipping channels, and the day before the accident had again been shifted away from shipping channels by floating logs; but defendant's officers did not know that the buoy had again been displaced shortly before the collision to a position where it was a hazard to navigation. The ship's owner sued defendant Board on the Admiralty side claiming damages under s. 39 of the *National Harbours Board Act* by reason of the negligence of defendant, its servants or agents in failing to give warning of the displaced buoy.

Held, dismissing the action, if a proper lookout had been kept as it should have been whilst the ship was navigating Vancouver Harbour at night the lookout should have observed the buoy and warned the ship's pilot of its position, and the accident would have been avoided.

Held also, the effect of s. 39 of the *National Harbours Board Act* is to make the liability of the Crown for the negligence of officers and servants of the Board enforceable by action against the Board in a court having jurisdiction between subjects (*Smith v. C.B.C.* [1953] O.W.N. 212; *Formea Chemicals Ltd v. Polymer Corp.* [1967] 1 O.R. 546; *Langlois v. Can. Commercial Corp.* [1956] S.C.R. 954, referred to); but such an action can only succeed against the Board if it would have succeeded against an officer or servant of the Board. (*The King v. Anthony* [1946] S.C.R. 569 referred to).

Semble: The limitation period of 12 months fixed by s. 11(2) of the *Statute of Limitations* for commencing an action against a person for an act, neglect or default, &c, does not apply to a claim against the Crown (or, as in this case, its statutory agent) in respect of the negligence of its servant.

ACTION FOR DAMAGES.

J. R. Cunningham for plaintiff.

N. D. Mullins and *L. T. R. Salley* for defendant.

JACKETT P.:—This is an action instituted in the Registry for the British Columbia Admiralty District for damages sustained by the Motor Ship *Procyon* when it came in contact with a mooring buoy in Vancouver Harbour on November 13, 1962.

The defendant is a corporation constituted by the *National Harbours Board Act,* R.S.C. 1952, c. 187, and is, for all purposes of that Act, the agent of Her Majesty in right of Canada (s. 3(2)) and, as such, has jurisdiction over Vancouver Harbour (s. 6). It has, as agent for Her Majesty, administration, management and control of property vested in Her Majesty, but has not, ordinarily, any jurisdiction over private property or rights (s. 7). It follows, from its status as an agent of Her Majesty, that, when it employs an officer, clerk or employee, as it is authorized to do by s. 4, the officer, clerk or employee becomes an officer of Her Majesty.[1] Nevertheless, in certain circumstances, claims for torts committed by such persons in the course of their employment may be enforced by actions brought by proceedings against the National Harbours Board. See s. 39, which reads as follows:

> 39.(1) Subject as hereinafter provided any claim against the Board arising out of any contract entered into in respect of its undertaking or any claim arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Board while acting within the scope of his duties or employment may be sued for and prosecuted by action, suit or other proceeding in any court having jurisdiction for like claims between subjects.

The language of s. 39 is to be compared with the language of s. 19(*c*) of the *Exchequer Court Act,* R.S.C. 1927,

[1] The defendant is a statutory corporation that has no existence except for the purposes of the *National Harbours Board Act*. By s. 3(2) it is, for all purposes of that Act, an agent of Her Majesty. It follows that, when it exercises the power conferred on it by s. 4 to employ officers, clerks and employees, it does so in its capacity as agent of Her Majesty, and the persons so employed therefore become officers, clerks or employees of Her Majesty. See *National Harbours Bd. v. Workmen's Compensation Com'n,* (1937) 63 Que. K.B. 388 (per Barclay J. at pages 391-2).

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c. 34, being the version of that Act in force when the *National Harbours Board Act* was enacted by c. 42 of the Statutes of 1936. Sec. 19(*c*) then read as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> * * *
>
> (*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.[2]

It had long been established that s. 19(*c*) made the Crown in right of Canada liable for the "negligence" of its officers or servants acting in the course of their employment notwithstanding that it was, in terms, a provision that dealt only with the jurisdiction of the Court.[3] Sec. 39, which, in terms, refers to a claim arising out of death or injury resulting from "negligence of any officer or servant of the Board while acting within the scope of his duties or employment", as has already been indicated, must be referring to such a claim based upon negligence of an officer or servant of Her Majesty who has been employed by the Board in its capacity as agent of Her Majesty because there cannot legally be anybody else who can be described as an "officer or servant of the Board". What s. 39 does, therefore, is to make such liability of Her Majesty, in the case of the negligence of that limited class of employees, enforceable by action brought against the Board in a court having jurisdiction between subjects.[4]

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[2] This paragraph was re-enacted in 1938 with the omission of the concluding words "upon any public work" by c. 28 of the statutes of that year.

[3] *The King v. Armstrong*, (1908) 40 S.C.R. 229; *The King v. Desrosiers*, (1909) 41 S C R. 71; *The King v. Murphy*, [1948] S.C.R. 357.

[4] From this point of view, in my opinion, s. 39, while not as explicit, has the same effect (i.e., the effect of making it possible to enforce a liability of Her Majesty by suing the statutory agent) as s. 4 of the *Canadian Broadcasting Act*, c. 24 of the Statutes of 1936, as amended by c. 51 of the Statutes of 1950, which read in part:

> "(2) The Corporation is for all purposes of this Act an agent of His Majesty and its powers under this Act may be exercised only as agent of His Majesty.
>
> (3) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Corporation on behalf of His Majesty, whether in its name or in the name of His Majesty, may be
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> (*a*) brought or taken against the Corporation . . . , or

Since the *National Harbours Board Act* was first enacted in 1936, Parliament has extended the liability of the Crown for torts by the enactment of the *Crown Liability Act* (c. 30 of the Statutes of 1952-3), s. 3(1) of which reads as follows:

> 3.(1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
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> (*a*) in respect of a tort committed by a servant of the Crown, or
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> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

These provisions must be read with s. 7(1), s. 8(1) and (2), and s. 23 of the *Crown Liability Act*, which read as follows:

> 7 (1) Except as provided in section 8, and subject to section 23, the Exchequer Court of Canada has exclusive original jurisdiction to hear and determine every claim for damages under this Act.
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> * * *
>
> 8 (1) In this section "provincial court" with respect to any province in which a claim sought to be enforced under this Part arises, means the county or district court that would have jurisdiction if the claim were against a private person of full age and capacity, or, if there is no such county or district court in the province or the county or district court in the province does not have such jurisdiction, means the superior court of the province.
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> (2) Notwithstanding the *Exchequer Court Act*, a claim against the Crown for a sum not exceeding one thousand dollars arising out of any death or injury to the person or to property resulting from the negligence of a servant of the Crown while acting within the scope of his duties or employment may be heard and determined by the provincial court, and an appeal lies from the judgment of a provincial court given in any proceedings taken under this section as from a judgment in similar proceedings between subject and subject.

> (*b*) brought or taken by the Corporation, in the name of the Corporation in any court that would have jurisdiction if the Corporation were not an agent of His Majesty."

and the similar provisions inserted by c. 51 of 1950 in other Crown Corporation statutes See *Smith v. C.B.C.*, [1953] O.W.N. 212, where Judson J. held that s. 4 authorized actions against the statutory agent in tort. (See, however, the *obiter dicta* doubt expressed by the majority of the Court of Appeal in *Formea Chemicals Ltd. v. Polymer Corp.*, [1967] 1 O.R. 546 at 553.) Sec. 4 probably does not go as far as s. 10 of the *Canadian Commercial Corporation Act*, c. 4 of the Statutes of 1946, which provided that that corporation might sue or be sued in respect of any right or obligation acquired or incurred by it on behalf of His Majesty "as if the right or obligation had been acquired or incurred on its own behalf". Compare *Langlois v. Can. Commercial Corp.*, [1956] S.C.R. 954. Sec. 10 excluded the application of rules of substance applicable only to the Crown.

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23. Subsection (1) of section 7 and subsections (1) and (2) of section 8 do not apply to or in respect of actions, suits or other legal proceedings in respect of a cause of action coming within section 3 brought or taken in a court other than the Exchequer Court of Canada against an agency of the Crown in accordance with the provisions of any Act of Parliament that authorizes such actions, suits or other legal proceedings to be so brought or taken; but all the remaining provisions of this Act apply to and in respect of such actions, suits or other legal proceedings, subject to the following modifications:

(*a*) any such action, suit or other legal proceeding shall, for the purposes of this Act, be deemed to have been taken in a provincial court under Part II; and

(*b*) any money awarded to any person by a judgment in any such action, suit or other legal proceeding, or the interest thereon allowed by the Minister of Finance under section 18, may be paid out of any funds administered by that agency.[5]

These proceedings were launched against the Board itself in an Admiralty Registry of this court, and were not launched against the Crown by petition of right in the manner contemplated by the *Petition of Right Act*, R.S.C. 1952, c. 210. I was of opinion during the argument, and it was not seriously argued to the contrary, that the plaintiff may recover in these proceedings if, and only if, it brings itself within s. 39 of the *National Harbours Board Act*. If that view is correct, it follows that the plaintiff can only recover if it establishes that the collision in question resulted from "the negligence of any officer or servant of the Board while acting within the scope of his duties or employment". These words are, in effect, the same as those under consideration by the Supreme Court of Canada in *The King v. Anthony*,[6] where it was held that a person claiming against the Crown under the old s. 19(*c*) of the *Exchequer Court Act* had to show that he had a cause of action against the officer or servant of the Crown personally. Compare *Cleveland-Cliffs Steamship Co. v. The Queen*,[7] where the legal

[5] In my view, s. 23 of the *Crown Liability Act* is a statutory recognition that there are other statutory provisions under which the Crown's liability in tort may be enforced by actions brought against statutory agents While other provisions may be more explicit in some ways, they are less explicit than s. 39 of the *National Harbours Board Act* in others. This is one reason for the view that I have already expressed that s. 39 authorizes such an action. Compare *Baton Broadcasting Ltd. v. C.B.C.*, [1966] 2 O R. 169, and cases cited therein.

[6] [1946] S.C.R. 569.

[7] [1957] S.C R. 810.

position was being considered in circumstances of the same general character as those arising here.

It must, therefore, be kept in mind when considering the case under s. 39 of the *National Harbours Board Act* that the plaintiff can only succeed if it has pleaded, and established, facts that would have entitled it to judgment against a servant of the Crown employed by the National Harbours Board if the action had been brought against such servant. (It must, of course, also be a cause of action based on things done by that servant in the course of his employment under the *National Harbours Board Act*.)

I do not, therefore, have to consider, as far as s. 39 is concerned, the very difficult question as to whether the Crown would be liable on the facts of this case under s. 3(1)(*b*) of the *Crown Liability Act* for "breach of duty attaching to the ownership, occupation, possession or control of property".

It should also be noted before going into the facts that the case was tried on the basis that, if the plaintiff is otherwise successful, there is to be a reference as to the *quantum* of damages.

The allegations in the statement of claim that bear on the question of liability read as follows:

> 1. The Plaintiff, of Piraeus, Greece, is the owner of the deep sea merchant vessel, M.S. *Procyon*, of 10,996 gross tonnage, 6,019 net tonnage, approximately 518 feet in length, and 66 feet in breadth, powered by Doxford diesel engines and registered at the Port of Piraeus, Greece.
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> * * *
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> 3. After dark on November 13th, 1962, the said ship with a duly licensed British Columbia pilot on board, and with a good lookout being kept on board, during her approach to the Burrard Terminals wharf on the north shore of Vancouver Harbour, was struck at the stern by an unlighted steel mooring buoy, which was out of its charted position.
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> 4. The said striking caused damage to the said ship's propeller and her side plates in the way of the aft peak tank.
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> 5. The said striking was occasioned by the negligence of the Defendant, its servants or agents, in the administration, management or control of the said Harbour, in that the Defendant, its servants or agents, knew the said buoy was out of its charted position but in breach of its duty to the Plaintiff failed to notify the said pilot or any person on board the said ship of the fact that the said buoy was out of its charted position, or that it was encumbering the approaches to the said wharf.
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> 6. The Plaintiff claims damages against the Defendant as provided by Section 39 of The National Harbours Board Act R.S.C.

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1952 Chapter 187, for injury to the Plaintiff's property resulting from the negligence of an officer, officers, servant, or servants of the Defendant while acting within the scope of his or their duties or employment.

7. In the alternative, if the said Defendant, its servants or agents were not aware of the said buoy being out of its charted position and encumbering the said approaches, the Defendant, its servants or agents should have known and the Plaintiff says that such lack of knowledge amounted to a failure to properly administer, manage and control the said Harbour, and the Defendant is liable to the Plaintiff by reason of the said failure.

8. Further particulars of the negligence of the Defendant, its servants or agents are as follows:

(a) Failure to replace the said buoy in its stated position after knowledge was received by the Defendant, its servants or agents of its shifting;

(b) Failure to see that the British Columbia Pilotage Authority and the District Marine Agent were notified of the hazard to navigation from the said buoy being out of position and as to its location in the said Harbour;

(c) Failure to see that Notices to Mariners were issued with respect to the said hazard and its location;

(d) Failure to remedy the existence of the hidden danger to navigation by causing the lighting of the said buoy;

(e) Permitting a continuing nuisance in the said Harbour, namely a drifting unmarked buoy, in waters known to be utilized by foreign vessels

* * *

10. The Plaintiff says and will allege at the trial of this action that the said striking and all resultant damages and losses consequent thereon were such that in the ordinary course of things would not have happened under proper administration, management and control of the said Harbour by the Defendant.

It is obvious, as it seems to me, that, having regard to what I have said about a cause of action under s. 39 of the *National Harbours Board Act*, references to the negligence of the defendant, and to the defendant's acts and omissions, are irrelevant and should, as far as s. 39 is concerned, be ignored.[8] On the same basis, it would seem that paragraph 10, which has to do solely with the statutory functions of the defendant, should be ignored as far as a claim based on s. 39 is concerned.

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[8] As an agent through whom Her Majesty maintains or administers property, the National Harbours Board is not itself liable by reason of a failure to keep the property safe (*Sanitary Commrs of Gibraltar v. Orfila*, (1890) 15 App. Cas. 400) unless, and to the extent that, there is special legislation providing for claims against the Crown being enforced by action against the Board as a nominated party See *Gilbert Côté et al. v. National Harbours Bd.*, [1959] Rev. Leg. 438, where this principle was applied to the defendant by the Superior Court of Quebec.

I turn now to the facts.

There is no dispute between the parties concerning the collision itself. At approximately 6:44 p.m. on November 13, 1962, the plaintiff's vessel, Motor Ship *Procyon,* suffered damage in Vancouver Harbour from collision with a mooring buoy (hereinafter referred to as "the buoy") belonging to the defendant, which was not in its position as indicated on charts as published by the Canadian Hydrographic Service.

That part of the buoy which was visible above the water when it was in its charted position was cylindrical in shape, 8 feet in diameter, and 3 feet, 6 inches, to 4 feet out of the water. It was painted white on the top and on the sides to within 6 inches from the water line, the 6 inches above the water being painted red. It was made of metal and was anchored, by a 2½ inch chain, 112 feet long, to two concrete "anchor rocks", each of which weighed 12 tons. When the buoy was in 9 fathoms of water, a large part of the chain would lie on the bottom of the harbour.

In 1959, this buoy was placed by the defendant in a part of the harbour (where there were 9 fathoms of water) that had previously been set aside as an area for mooring vessels, as a buoy to which barges could be moored. At that time, there was published in a Department of Transport publication called "Notice to Mariners" (No. 18 of 1959) a notice reading as follows:

> BRITISH COLUMBIA
>
> (66) Vancouver Harbour—Off Moodyville—Mooring buoy established.
>
> A red mooring buoy, for use of scows only, has been established in Vancouver Harbour, off Moodyville, in position Latitude 49°18'02"N., Longitude 123°03'36"W.
>
> N. to M. No. 18 (66) 18-2-59.
>
> Authority: District Marine Agent, Department of Transport, Victoria, Canadian Hydrographic Service charts: Nos. 3418 and 3433. Departmental File: No. 7992-41.

The buoy remained in the position so advertised, which was shown on the published charts, until October 13, 1962, when there was a violent storm in the harbour, popularly known as "Hurricane Freda". Following that storm, a survey of the harbour by the Marine Superintendent J. H. Smith, an officer on the defendant's staff, showed that the buoy (sometimes called "the westerly Moodyville buoy")

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"had been dragged out of position", and he so reported to his superior, Captain W. A. Dobie, the Harbour Master. As located just after the storm, the buoy was less than 1,000 feet from its charted position and was not, in the opinion of the Marine Superintendent, who gave evidence in this Court, in its then position, a hazard to navigation. Nevertheless, he anticipated that, in accordance with the ordinary routine of the harbour, the Harbour Master, upon receiving his report, would advise the District Marine Agent of the Department of Transport at Victoria so that mariners would be advised of the changed position of the buoy and steps would be taken to have it moved back to its charted position. In fact, neither the District Marine Agent nor the British Columbia Pilotage Authority were notified, and no steps were taken to have mariners notified of the change in the buoy's position by notices, by radio, or otherwise. Furthermore, the buoy was not, in fact, moved back to its charted position during the period between Hurricane Freda and the collision in question. No explanation was given for these facts and I can only assume that there was a breakdown in ordinary routine.

Nothing is known of any further change in the situation of the buoy until November 12, 1962 when, according to the log of certain officials of the defendant in a post known as the "Signal Bridge", they were informed at 0030 hours (i.e. 12:30 a.m.) by a ship known as the *Colleen L* that twenty-four sections of logs were "adrift E. Moodyville", and that the "West Buoy" (i.e., the buoy in question) had been "caught" and "dragged" to "appro. 200 ft. S.E. Anglo. Can. Mill". The Marine Superintendent, according to his testimony, remembers having been telephoned early that morning concerning the buoy, but does not remember what he was told. He does remember, however, that the information was not such as to indicate that the buoy was, in his judgment a hazard or that any emergency action was required. If, in fact, the buoy was in a position approximately 200 feet from the Anglo-Canadian Mill, it would seem clear that it must have been completely removed from shipping channels and in such shallow water that it was inconceivable that it could be moved anywhere else accidentally. In any event, no action was taken at that time to inform mariners of the position of the buoy, or otherwise to guard against it being a hazard to navigation.

November 12, the day on which the *Colleen L* reported that the buoy was near the Anglo-Canadian Mill, was, according to Marine Superintendent Smith, a holiday, and nothing was done about the buoy that day. The following day, a patrol boat operated by the defendant, and in charge of Marine Foreman J. B. Smith, went to check on the buoy and found it about 9:00 a.m. that day, November 13, about 400 feet, and not just 200 feet, from the Anglo-Canadian Mill, but still out of harm's way as far as shipping was concerned. (I am inclined to the view that when found by J. B. Smith, the buoy was in the position where it was seen by the *Colleen L.*) So located, it would be in 7 to 8 fathoms of water according to the charts put in evidence. At 3:00 p.m. that afternoon, J. B. Smith again checked the buoy and found it in the same position, which he described as being in a line between the West Indies Dock and the Anglo-Canadian "stiff line", or "standing boom". He so reported to the Marine Superintendent who again concluded that no emergency action was required.

It is common ground that, when the collision occurred at 6:40 p.m. that evening, the buoy was then on the other side of the "stiff line" from where J. B. Smith saw it at 3:00 p.m., and was in a position where it was a hazard to navigation in that it was in waters through which vessels docking at the busy Burrard Terminals Wharf would pass. If J. B. Smith's evidence as to where he saw the buoy at 3:00 p.m. is accepted, and I do accept it, it follows that some time between 3:00 p.m. and 6:40 p.m. that day, the buoy again shifted its position, or it was shifted, this time apparently at least 1,000 feet.

While the buoy was in that position, the *Procyon,* while approaching the Burrard Terminals Wharf in charge of a pilot and without a tug, cleared the end of the Anglo-Canadian "stiff line" to which reference has already been made. At that point her engines were cut. Subsequently, as part of a manoeuvre which had the effect of causing her stern to move to port, her engines were put at dead slow ahead. Immediately thereafter, as her stern moved to port, her propeller came into contact with the buoy with resultant damage, which is the subject matter of this action.[9]

[9] No evidence was given about the damage to "her side plates in the way of the aft peak tank" referred to in the Statement of Claim.

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The pilot did not see the buoy. A lookout had been posted on the bow, but there is no evidence as to whether he, or any other person on board, saw the buoy. If any such person did see the buoy, he did not report it to the pilot.

At the time of the collision, it was dark and overcast. The evidence as to visibility is not very helpful. After the accident, the buoy was quite visible from the Burrard Terminals Wharf. There is no evidence of anybody who actually tried to see the buoy in the position where it was at the time of the accident from the angle at which the *Procyon* was approaching it. The pilot says that it would have been difficult to see it from that angle because of the absence of light from the shore that they were approaching. The Marine Superintendent says that visibility on the water was good in the circumstances then existing. The Marine Foreman says that when in its charted position, the buoy could be seen on a dark night at a distance of 50 feet to 100 feet. In the circumstances, I have found it very difficult to form an opinion as to whether the lookout on the *Procyon* should have seen the buoy (which, as I conceive the accident, must have passed just off the port of the vessel), being probably a dirty white circular object 8 feet in diameter and about 3 feet, 6 inches out of the water. This is a question on which I would have found the assistance of an assessor, or the evidence of a neutral navigator, of assistance. The same remark applies to the problem of deciding whether, had the pilot seen the buoy himself, or been advised of its presence, he would have, or should have, handled the vessel in such a way as to avoid the collision.

Two other difficult questions of a similar character cause me difficulty. First, should the Marine Superintendent Smith, having learned, during the day on November 12, that the buoy had shifted its position once, if not twice, from the position where it was after Hurricane Freda, have anticipated, as a reasonable probability, that it might get shifted again, and this time into a position where it would be a hazard to navigation, and have taken suitable steps at least to warn mariners of its potential danger, if not to have caused it to be removed from the area? Secondly, if the pilot on the *Procyon* had been advised that the buoy was in the position where it was at 3:00 p.m. on that day,

and that it had been moved there by 24 sections of logs that were adrift, would that warning have caused him to handle his vessel in some way that would have avoided the accident?

I should say that it is quite clear from Marine Superintendent Smith's evidence that he conceived it to be his duty, if he had had reason to apprehend that the buoy was in a position where it was a danger to shipping, to take steps to warn mariners (by advising the pilotage authority, etc., and by radio) and to have the buoy moved out of such position.

If I find the answers to all the questions of fact in favour of the plaintiff, there still remains the question of law as to whether any officer or servant of the Board is himself legally liable to the plaintiff so as to bring into operation s. 39 of the *National Harbours Board Act*.

I propose to come to a conclusion on each of the questions of fact to which I have referred. Before doing so, I should refer to certain other questions that do not cause me equal concern. Counsel for the plaintiff put his case alternatively on certain omissions that he attributed to Captain Dobie, the Harbour Master, but these had to do with Captain Dobie's alleged responsibility for a failure to have mariners notified of the new location of the buoy after Hurricane Freda, and for the buoy not having been put back in its charted position at that time, and, in my view, any such failure cannot be regarded as the cause of the collision that occurred at a different location a month later. I take the same view of any omission by Marine Superintendent Smith to take action after the telephone message to him at 0030 hours on November 12. Assuming, for the sake of argument, that he should have caused an investigation into the situation on November 12, I cannot find that any such investigation should have resulted in any action that would not have been just as timely, as far as the collision in question is concerned, if taken after the investigations that, in fact, took place on November 13.

The only possible fault of any officer or servant of the Board that might conceivably be regarded as the cause of the collision complained of is, in my view, Marine Super-

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intendent Smith's failure to take some action on November 13, when it was established that the buoy had moved a substantial distance from where it was after Hurricane Freda, and that it was located at a place where it was not a hazard to shipping. According to his own testimony, if the buoy had been in a position where it was a hazard to shipping, he should have warned mariners and taken steps to have it removed. However, it was not in such a position. What concerns me is whether, knowing that it had been displaced for a second time, he should have anticipated that this might happen again and have notified shipping of this possibility or taken steps to have it removed. As far as I can tell on the evidence before me, the two known causes of the previous displacements—Hurricane Freda and twenty-four sections of logs being adrift—were sufficiently unusual that it would not have occurred to a reasonably alert and intelligent employee in the Marine Superintendent's position that it was a probability that a further displacement would occur again in the immediate future. Indeed, as far as I can tell, there would have been no more justification for warning mariners of the possibility of this particular buoy becoming a hazard to shipping than there would have been for warning them that any other object in the harbour might be moved by some unforeseen agency so as to become a hazard to shipping. I am confirmed in this conclusion, which I have reached on negative considerations, by the fact that no witness or counsel for either side was able to suggest what force had moved this cumbersome object into the navigation channel between 3:00 p.m. and 6:40 p.m. on November 12, 1962. With reference to the question whether the Marine Superintendent should have taken any steps that he did not take to have the buoy replaced where it belonged, all that I know from the evidence is that it was in fact replaced in its charted position immediately after the collision. As far as I know, this was done as a result of the various responsible officers having done all that could reasonably be expected of them to achieve this result. There is no evidence from which I can conclude that there was anything that Marine Superintendent Smith could have done that would have resulted in the buoy having been replaced

in its allotted position before the collision occurred. Certainly, no such action was suggested to him during his long and thorough cross-examination.

My conclusion with regard to the question whether a warning of the possibility of the buoy getting into a position where it would be a hazard to navigation would have enabled the ship to avoid the collision is based on the view that no mariner can possibly think that he is entitled to take a ship across a busy harbour such as Vancouver Harbour at night on the assumption that there will be no object on the water of which he must take account. I cannot accept it that any harbour administration must be taken to guarantee such a clear passage any more than any road authority can or does guarantee that there will be no obstructions or hazards to automobile traffic on a highway. As it seems to me, and what evidence there is on the point supports this conclusion, any ship operating in a harbour, no matter what the visibility, must have whatever lookouts are necessary to detect hazards to navigation and must be so navigated as to be able to avoid such hazards when they are detected. If I am correct in that view, as it seems to me, if the pilot had been warned that the buoy might possibly be moved into the proposed path of his ship, he would have put it in the same position in his mind as other possible hazards concerning which he would have to rely on the normal lookouts which would be posted having regard to the visibility and other circumstances. Unassisted by an assessor or by expert evidence, it seems to me to be obvious that a ship is not entitled to navigate in a harbour without keeping a lookout for what is in its path.

Similarly, I have reached the conclusion that the buoy should have been seen by the lookout and was not seen because a proper lookout was not being kept, or, it was seen by the lookout who failed to advise the pilot of its existence. As I conceive the way in which the collision occurred, the buoy must have passed immediately to the port side of the ship and have been much less than 100 feet from a lookout on the bow. If that is so, I cannot imagine that any sort of lookout that would have been of any use to the navigation of the ship could have failed to see an object of the size and

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colouring of the buoy. I am therefore of the view that the lookout was at fault in not having advised the pilot of the buoy hard on the port side.[10]

Had the pilot been advised of the buoy passing close to port, he, as a reasonably prudent pilot, would have realized the danger of a manoeuvre that would result in the stern of the vessel swinging to port and would not have carried out the manoeuvre. In my view, therefore, the cause of the collision was the fault of the ship in leaving the pilot in ignorance of the presence of the buoy. Even if there had been a fault on the part of the harbour personnel in allowing the buoy to be there or in not giving some notice to the pilot concerning the buoy, the effective cause of the collision, in my view, was the failure of the lookout to see the buoy, which he should have seen, and warn the pilot of its presence.

Having regard to my findings of fact, it is unnecessary to reach a conclusion on the very difficult question as to whether Marine Superintendent Smith, or any other member of the defendant's staff, owed any duty to the ship that would give rise to a personal liability by such employee to the ship for a failure to perform one of the duties of his position as an employee of the defendant. If I had to reach a final conclusion on this question, I should have to consider whether the evidence in this case supports a finding of duty such as was made in *Grossman v. The King*.[11] My present view is that there is a difference in principle between the relation of an employee in a harbour to a ship navigating in a harbour, which has a responsibility to take care for its own safe navigation, and the relation of an airport manager to a person being invited to land an aircraft on a runway on which there is a hazard that cannot be seen from the air. I have in mind, of course, the judgment of Kerwin C.J., in *Cleveland-Cliffs Steamship Co. v. The Queen*, where he said:[12]

> There was no duty owing to the appellants on the part of the Dominion Hydrographer to take soundings in the East Entrance

[10] No reference was made in the evidence to the possibility of there having been a lookout at one or more stations on the port side. I should have thought that there should have been such lookouts who should have seen the buoy during the period that this 518 foot vessel must have been passing within a few feet of it while it was moving at a speed of about one knot.

[11] [1952] 1 S.C.R. 571.

[12] [1957] S.C.R. at p. 813.

> Channel and in the circumstances of this case, I am unable to envisage any possible duty to the appellants resting upon any other servant of the Crown, the breach of which could form the basis of a cause of action against him. The case of *Grossman et al. v. The King*, (1952) 1 S.C.R. 571, is distinguishable as there Nicholas, the airport maintenance foreman, was held to owe a duty to Grossman.

and the judgment of Rand J. in the same case where he said:[13]

> Nor have there been shown any circumstances that could possibly lead to a cause of action against any servant of the Crown. The administration of navigation aids depends on the action by Parliament in voting money. But apart from that, the conditions under which a Crown servant can be held personally liable to a third person for failure to act in the course of duty to the Crown require that there be intended to be created, as a deduction from the facts, a direct relation between the servant and the third person. The primary duty of the Crown servants is to the Crown; and the circumstances in which the servant can, at the same time, come under a duty to a third person are extremely rare. The rule laid down in *Grossman v. The King*, [1952] 1 S.C.R. 571, is, as I interpret it, this: that the servant from the nature of his specific duty, a duty immediately related to action of the third person, is chargeable with knowledge that the latter, in his own conduct, is justifiably relying on the performance by the servant of that duty, and that the servant is chargeable with accepting the obligation toward the third person. In other words, between them a *de facto* relation of reliance and responsibility is contemplated. There are no such circumstances here. The government administration, as disclosed by the evidence, is of a general character, unrelated directly and immediately to any particular navigational work in these waters and with no acceptance by any of the public servants concerned of obligation toward the third person, nor any immediate reliance on the performance of individual duty related to the latter's use of a public work. Buoys are not warranted fixtures for navigation. Nothing has been shown of neglect in their original placement or of failure to discover their change of position. The "sweeping" and other work suggested to be done in the channel assumes a duty on the Crown, not on a servant. The placement and maintenance in position of these buoys is work under direction of a general character. As a public accommodation, their maintenance is, in relation to the individual servant, attended to only in the aspect of the duty to the employer. So far as the evidence shows, the direction and responsibility do not go beyond the departmental offices. The situation is not, then, one in which a personal liability is engaged by a Crown servant; and there being no basis for the claim against a servant, a prerequisite to a claim under s. 18(*c*) of the *Exchequer Court Act* against the Crown, the action on this ground must fail.

Before leaving this aspect of the case, I might take the liberty of referring to the difficulties in which a claimant against the Crown can be led by the existence in the *National Harbours Board Act* of s. 39, which authorizes

[13] Pp. 814-15

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a limited class of claims in tort against the Crown to be enforced by actions brought against a statutory agent. As already indicated, had the claim been based on some breach by the Crown of duty attaching to ownership or occupation of the harbour, this action was not properly framed to enforce the claim. Instead of being instituted by writ issued out of a District Registry on the Admiralty side, and alleging breach of duty by the statutory agent, the proceeding to enforce such a claim should have been instituted by petition of right filed in the Registry at Ottawa under the *Petition of Right Act,* and should have alleged breach of duty by Her Majesty. Having regard to my findings of fact, I do not think any such claim is fairly arguable. Had the facts been different, I should have been concerned about the fact that there would have been a possible injustice attributable to what might arguably be regarded as procedural irregularities. The proceeding is in the Exchequer Court of Canada, which has jurisdiction, and the defence was conducted by the Deputy Attorney General of Canada who, by the *Department of Justice Act,* R.S.C. 1952, c. 71, would have the conduct of the defence, whichever form the action took. The irregularities are, from a procedural point of view, grave, but I should have been prepared to consider, if the facts had been different, a motion to reconstitute the proceedings in the hope that a means might be found of deciding the case on the merits. Obviously, any such motion, if it were not made until after trial, would have to take into account any possibility that the Crown had been deprived of an opportunity to make a full defence.[14]

The defendant, in addition to its defence on the merits, relies on s. 11(2) of the Statute of Limitations, R.S.C. 1960, c. 370, which reads as follows:

> (2) Where no time is specially limited for bringing any action in the Act or law relating to the particular case, no action shall be brought against any person for any act done in pursuance or execution, or intended execution, of any Act of the Legislature, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, unless

[14] Compare *Hunt v. The Queen* [1967] 1 Ex. C.R. 101, and *North Shipping and Transportation Ltd. v. National Harbours Bd. (1967)*, per Noël J. (unreported).

> the action be commenced within twelve months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within twelve months next after the ceasing thereof.

This may well be a defence to an action on the Admiralty side of this Court against the person on whose act, neglect or default the claim was based. Compare *Algoma Central and Hudson Bay Ry. Co. v. Manitoba Pool Elevators.*[15] It does not seem to have any application where the claim is one against the Crown in respect of the negligence of a servant even if it is being pursued by way of an action against a defendant nominated by a statutory provision such as s. 39 of the *National Harbours Board Act.*

The action is dismissed with costs.

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[15] [1964] Ex C R. 505.