

BETWEEN:

THE CLEVELAND-CLIFFS STEAM-  
SHIP COMPANY and THE CLEVE-  
LAND-CLIFFS IRON COMPANY }

SUPLIANTS;

1956  
Jan. 25, 26  
& 27

Apr. 17

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

*Crown—Petition of Right—Crown Liability Act, 1 & 2 Eliz. II, c. 30, s. 3(1)(a)—Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(b), (c)—Crown not liable for damages resulting to ship grounded in channel—No duty on part of any officer of Crown to see that channel is safe for navigation.*

Suppliant Cleveland-Cliffs Iron Company seeks to recover from respondent damages suffered by the ship *Grand Island*, chartered to suppliant, allegedly caused by the negligence of respondent due to respondent's failure to indicate accurately the depth of water on a chart and in the *Great Lakes Pilot*, both of which are publications of the Canadian Hydrographic Service, in consequence of which the ship became grounded when approaching Little Current in the Province of Ontario.

*Held:* That the grounding of the ship was due to faulty navigation as it was outside the channel at the time of the grounding; that the ship should have depended on the range line and not on boundary buoys in navigating in such a narrow channel, and under the circumstances existing prior to approaching the channel and considering the size of the ship proper navigation would have been to stop dead and seriously consider how best to proceed instead of going even dead slow.

- 2. That there is no liability on the part of respondent since there was no officer of the Crown in any way in control of the channel or whose duty it was to see that the channel was safe for navigation.

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## PETITION OF RIGHT.

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The action was tried before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Toronto.

*Francis Gerity and P. B. C. Pepper* for the suppliants.

*Peter Wright, Q.C. and J. J. Mahoney* for the respondent.

HYNDMAN D.J. now (April 17, 1956) delivered the following judgment:

This petition is on behalf of the above suppliants, both having their principal place of business in the city of Cleveland in the State of Ohio, United States of America.

At the outset of the trial it was stated that the action concerns only the above Cleveland-Cliffs Iron Company, it having paid the damages claimed herein by the Cleveland-Cliffs Steamship Company, the latter not being concerned further with the action.

The allegations are as follows: The petitioners are incorporated under the laws of the States of Delaware and Ohio, United States of America. The steamship company is the owner of the steamship *Grand Island*, a ship of some 489 feet in length and 52 feet beam, the said steamship being registered at the port of Wilmington, State of Delaware aforesaid. The Cleveland-Cliffs Iron Company (hereinafter called the iron company) on or about the first day of January, 1951, entered into a charter party with the said Cleveland-Cliffs Steamship Company (hereinafter called the steamship company) for a term of five years, the provisions of the said charter party, amongst other things, providing that the charterer is to have full and complete control over the said steamship and to operate it and to make operating repairs and, in general, to exercise complete control over the said steamship during the term of the said charter party.

On or about the 6th of August, 1953, the said steamship departed from the port of Lorain, State of Ohio, at about 12:09 in the afternoon, bound from thence to the port of Little Current in the province of Ontario, laden with coal. The steamship was at all relevant times fully manned and in all respects seaworthy and fit for the voyage to be undertaken, and navigated by a competent master and officers, servants of the said iron company.

On the 7th of August in the said year 1953, the steamship, approaching the port of Little Current at about 2:58 in the afternoon of the said day, reduced speed just prior to entering the buoyed channel leading to the said port. The said steamship was proceeding from open water so as to enter the said port by means of the so-called "East-Entrance Channel". The said channel is shown on chart No. 2294, a publication of the Canadian Hydrographic Service, and more particularly described at page 282 of the *Great Lakes Pilot*, Volume 2, 7th Edition, issued by the said Service. It is alleged that on the 7th of August the steamship was steering the usual course to pass safely into the port of Little Current by means of the said channel, and that about 3:22 in the afternoon of the said day it became grounded and fast whilst in the fairway of the said channel and between the first and second set of buoys leading in from the open water and being approximately abreast of Gibbons Point. The master of the ship caused soundings to be taken which, it is alleged, gave a less depth of water than that indicated on the chart and publication referred to above, and caused the spot to be marked with a buoy. The ship was later freed from the ground with the assistance of the tug of one J. H. Dixon and proceeded to port in Little Current.

After discharging her cargo the ship sailed to Superior, U.S.A., and took on a cargo of iron ore. She then proceeded to Cleveland. On the voyage a leak was noticed in the starboard bow. After discharging this latter cargo she went into drydock, when it was discovered that certain plates were damaged. Repairs had to be made, costing \$30,961.83, which was paid by the iron company.

It is claimed as a result of the said grounding the sup-  
 pliants have suffered damages by reason of repairs having to be made to the said ship, amounting to the said sum of \$30,961.83, United States currency.

It was admitted by counsel for the defendant that, if a liability exists, the said sum of \$30,961.83 is correct.

It is claimed that the maintenance, inspection, and markings of the said channel leading to the port of Little Current are under the control of Her Majesty's Ministers of Public Works and Transport respectively, and in the discharge of these statutory duties, officers and servants of Her

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Majesty are charged with said maintenance, inspection and markings of the said channel, and further that the said Minister of Transport and officers and servants acting under him are charged with the duty of issuing notices of any danger of which mariners should be warned in respect to the information hereinbefore referred to, and that in the year 1952 officers and servants of Her Majesty issued and caused to be published *Great Lakes Pilot* (Volume 2, Lake Huron and Georgian Bay, 7th Edition, 1951), which said pilot directory at page 282, lines 23 and 24, indicated at least a depth of 20 feet in the East-Entrance Channel; chart No. 2294, issued and published by officers and servants of Her Majesty, corrected edition, indicates a limiting depth of 20 feet of the said channel leading to the port of Little Current and off Gibbons Point; and that those in charge of navigation of the said steamship were by official publications and charts invited to approach the port of Little Current, utilizing for that purpose the said channel in the belief that this approach to the said port could be safely navigated by a vessel drawing less than 20 feet of water, and that the said grounding and damage occurred by reason of the negligence of officers and servants of Her Majesty, acting within the scope of their duties and employment, and under the control and supervision of Her Majesty's Ministers.

The names and titles of such officers are not in evidence, although suppliant by inquiry failed to elicit them.

The claim is that the said officers and servants of Her Majesty were negligent in that they failed to inspect and maintain said channel in a like order and condition as advertised and published and that they suffered a less depth of water to exist at all relevant times in the said channel than the depth of water advertised to navigators as aforesaid and, alternatively, they permitted an obstruction to be occasioned and continued in the said channel, thereby creating a less depth of water than that advertised, and that they failed to issue another notice to mariners that the said channel had less depth than that advertised or of an obstruction being occasioned and continued in the said channel. It is, therefore, claimed that, having failed in their duty above mentioned, the navigators, acting upon

the said invitation, would be misled into approaching the said port of Little Current in the belief that they could do so safely in vessels drawing less than 20 feet of water.

The petitioners plead the provisions of the Crown Liability Act, 1 and 2 Elizabeth II, chapter 30, Statutes of Canada, specifically 3(1)(a), and also plead the provisions of the Exchequer Court Act, chapter 98, Revised Statutes of Canada 1952, and specifically section 18(1)(b), and that the said channel is a public work in the meaning of that Act.

There is no doubt, in my opinion, but that this channel was a public work into which the said ship had every right to navigate.

The said channel is 165 feet wide from the western to the eastern limit thereof. On Oak Island to the northward, there are range lights or light houses indicating the centre line of the channel. There are also buoys on the east side in the neighbourhood of Gibbons Point. I am satisfied the evidence discloses that these buoys were not exactly on the east limit of the channel, but I am also satisfied on the evidence of Mr. F. C. G. Smith, Chief Hydrographer in charge of hydrographic surveys, who was a naval officer with the British Admiralty and, I consider, experienced in navigation practices, that it is not safe to rely on buoys for the reason that, owing to the movement of water, they are apt to be changed from place to place and that, in this particular instance, the only safe course to adopt was to navigate on the range line. I agree with this for the reason that the channel was only 165 yards in width and that, owing to the presence off Gibbons Point, of a dredge occupying a considerable portion of the left half of the channel, there would necessarily be some risk with a ship such as this, being 489 feet long and 52 feet beam, and under the circumstances to navigate on the left or east half of the channel would require the utmost care and skill, the draught of the ship being 19½ feet.

I am satisfied that in 1951, when the soundings were taken in and about the channel (Exhibit B), from the evidence of Raymond Paul Rowe, a Bachelor of Engineering, graduate of McGill University, who took the soundings, that the soundings on the said chart at that time were 18.9 to 20 feet in the channel at or near the locus in question, and adjoining the channel. There is no definite or

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satisfactory evidence that an obstruction existed in the right half of the said channel beyond the claim that the steamer went aground at this point. No investigation seems to have been made to establish whether or not any rocks or silt existed there.

After the grounding of the ship, the witness Kenneth Lowrie, holder of a master's certificate and a first class pilot's licence, and who had been sailing for about nineteen years, and who had sailed in and out of the port of Little Current probably twenty-five times, took soundings, and I quote the following from his testimony:

MR. GERITY: Q. Well then will you look at this, which is Exhibit 14, Mr. Lowrie, and read off those soundings which you took and where they were with relation to the structure of the vessel?

A. On the starboard bow about abreast of the pilot house, of the lower pilot house, I got 18 feet. About 24 feet aft of that was 18·6; another 24 feet 18·6.

And up to the middle of the ship—amidship which is about No. 7 hatch was 19 feet.

From there on around the ship on the starboard side and around the stern I got 21 to 22 feet 6 inches.

At the port side it was 22·5—22 and 22·6.

The rest of the way until I got right to the bow and right at the stem was 20 feet; and right over the stem here 19 feet, as I recall.

HIS LORDSHIP: The port side would be the left side of the ship?

MR. GERITY: This is the ship, my lord. (Indicating).

MR. GERITY: Q. What was the greatest depth you could find?

A. 22 feet 6 inches.

Q. Whereabouts was that?

A. That was along the port side—around about aft there and around it. (Indicating).

Q. And where was the least depth found?

A. On the starboard of the pilot house.

Q. And what was that?

A. 18 feet.

Q. Now Mr. Lowrie following the duty you did to take the soundings, did you report to the Master?

A. I did.

Q. And what did you then do, following that?

A. Well following that I sent one man around to take soundings of the ship to be sure we were not taking water.

On the chart of soundings dated November 20, 1951, in the channel, directly opposite Gibbons Point, and where the ship went aground, at the very bow of the ship, the soundings are 18·9 feet, 19·9, 2·17, 2·13, 19·3, 21·8, 20·8, 19·8. Immediately to the east side of the channel at the bow of the ship the soundings were 14·5, 17·7, 19·5, 14·9, 14·5, 14·9, 14·8, and other soundings are about 15 feet, running along to the south.

The evidence is that, while the said soundings were those existing in 1951, in 1953 at the time of the occurrence complained of, the level of the water had risen by  $3\frac{1}{2}$  feet, the result being that the soundings in the channel as shown on the 1951 plan should be increased by  $3\frac{1}{2}$  feet. If the sounding abreast of the pilot house was 18, and about 24 feet aft of the pilot house was 18.6 and a further 24 feet aft of that, 18.6 feet, all on the starboard side, according to the evidence of Mr. Smith, taking into consideration the increased depth of water since 1951 it would reasonably follow that the ship was off the centre line and the east limit of the channel and finished on the bank on the east side and, therefore, outside the channel. To my mind, this seems the only logical conclusion to be drawn from the soundings both in the channel and to the right of it. As said above, a ship 489 feet long and 52 feet beam, in order to navigate in the limited area of the east side of the channel, would require the utmost care in proceeding, and the presence in the western side of the channel of the dredge above mentioned necessitated that the ship should keep to the right-hand side of the centre or range line.

I have given the evidence and circumstances surrounding the case my best consideration and, without in any way impugning the honesty of the several witnesses for the suppliants, I am nevertheless convinced that they were mistaken as to the location of the ship when it grounded. The narrow limits of the channel rendered it very easy to make a mistake, and called for the utmost care in navigation of the ship, especially in view of the fact that the space between the centre line and the eastern limit was only  $82\frac{1}{2}$  feet, in which portion of the channel the ship was being navigated. I am greatly impressed with the fact that in 1951 soundings in the channel showed 20 feet but in 1953 the general level of the water was  $3\frac{1}{2}$  feet higher and, therefore, the depth of the water in the channel opposite Gibbons Point was at least 22 feet. The soundings taken by the mate, as stated in his evidence, lead to the conclusion that the ship must have been outside the channel. The presence of the dredge off Gibbons Point to my mind is largely responsible for the unfortunate grounding of the suppliants' ship. A good deal was said as to the distances between the dredge and the ship and the ship and the buoys, but in my

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opinion there was much room for inaccuracy. I am of the view that the only safe method of navigation in such a narrow channel was to depend on the range line and not on boundary buoys, as said above, which obviously must be more or less subject to change of position. It seems to me that, under the circumstances existing prior to his approaching Gibbons point, considering the size of the ship, the proper procedure was to stop dead and seriously consider how best to continue, instead of going even dead slow.

Assuming, however, that the ship was in the channel as alleged, the further question arises as to liability of the Crown.

As said above, there is no evidence in my opinion of any particular officer or servant of the Crown being in control or supervision of the channel who could be charged with negligence in failing to sweep the channel and remove any possible obstructions.

The claim, if any, arises under section 18(c) of the Exchequer Court Act, which is as follows:

(c) Every claim against the Crown arising out of any death or injury to person or property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

In *The King v. Anthony* (1) at page 571 Rand J. said:

I think it must be taken that what paragraph (c) does is to create a liability against the Crown through negligence under the rule of *respondeat superior*, and not to impose duties on the Crown in favour of subjects: *The King v. Dubois*, [1935] S.C.R. 378, at 394 and 398; *Salmo Investments Ltd. v. The King*, [1940] S.C.R. 263, at 272 and 273. It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.

In *The King v. Hochelaga Shipping and Towing Company Limited* (2), at page 170 Davis J. said:

I agree with the view taken by the learned trial judge on the evidence, that is, that in the restoration and changes made in the jetty, there was negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon the public work.

It was there found on the facts that certain officers of the Crown were charged with the duty, the work was under the control of one T. J. Locke, resident district engineer of

(1) [1945-46] S.C.R. 569.

(2) [1940] S.C.R. 153.



the Department of Public Works at Halifax, and the supervision of Duncan H. MacDonald, his assistant district engineer. The above case is, therefore, distinguishable from the present one in that certain officers named were in control of the public work, and were negligent in their duties, whereas in the present case no officer has been named who was in any way in control of the channel, or whose duty it was to see that the channel was safe for navigation.

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In *The Hamburg American Packet Company v. The King* (1), the headnote is as follows:

There is no law in Canada under which the Crown is liable in damages for the mere non-repair of a public work, or for failure to use in its repair money voted by Parliament for the purposes of such public work.

2. In such case whether the repair should be made or the money expended is within the discretion of the Governor in Council or of the Minister of the Crown under whose charge the work is; and for the exercise of that discretion he and they are responsible to Parliament alone, and such discretion cannot be reviewed by the courts.

*Semble*:—Although the channel of a river may be considered a public work under the management, charge and direction of the Minister of Public Works during the time that he is engaged in improving the navigation of such channel under the authority of section 7 of *The Public Works Act* (R.S.C. c. 36), it does not follow that once the Minister has expended public money for such purpose the Crown is for all time bound to keep such channel clear and safe for navigation, or that for any failure to do so it must answer in damages.

Although the last-mentioned case was decided as far back as 1901, and various acts have since been amended, I am nevertheless of the opinion that the principle remains the same, and no fundamental change in the statute, as bearing on the point in question, has taken place.

In *Ginn v. The King* (2), at page 211 the President said:

To succeed in their claims the suppliants must prove not only that the injuries suffered by the suppliant resulted from the negligence of an officer or servant of the Crown but also that such negligence occurred while the officer or servant was acting within the scope of his duties or employment. The onus of proof of these matters lies on the suppliants. The onus is not a light one.

For the above reasons, I find that the claim has not been established against the Crown, and, therefore, the action must be dismissed with costs.

*Judgment accordingly.*

(1) (1901) 7 Can. Ex. C.R. 150.

(2) [1950] Ex. C.R. 208.