
1961
Feb. 23, 24
Oct. 3

BETWEEN:

ADOLFO LENDOIRO .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a)—Post Office Act, R.S.C. 1952, c. 212, s. 40 and regulations—Damages claimed for loss of letter due to failure of clerk to place in

suppliant's post office box—"Mishandling of anything deposited in a post office"—Issue determined by provisions of Post Office Act and not by those of Crown Liability Act—Crown not liable.

Suppliant brings his petition of right to recover from the Crown damages allegedly suffered by him due to the failure of a postal clerk in a post office known as Station H in Montreal, Quebec, to place in a box in that post office rented by suppliant a letter containing a cheque for $12,000 which had been mailed to him at that address from Caracas, Venezuela, as a result of which he was unable to complete arrangements for shipping a large number of prize cattle to Venezuela.

Suppliant relies on s. (3), s.-s. (1), para. (*a*) of the *Crown Liability Act*, S. of C. 1952-53, c. 30.

Respondent denies that suppliant suffered damages due to negligence of an employee and pleads s. 40 of the *Post Office Act*, R.S.C. 1952, c. 212 and the regulations made thereunder.

Held: That the suppliant is not entitled to any of the relief claimed in the petition of right.

2. That s. 40 of the *Post Office Act* vests in the Crown the power or authority to determine by regulation to what extent, if any, it will be liable for claims arising from the loss, delay or mishandling of anything deposited in a post office, and that in the absence of anything to the contrary contained in the Act itself or its regulations no liability exists.

3. That the word "mishandling" in s. 40 of the *Post Office Act* means *inter alia* to handle badly, improperly or wrongly and accurately describes the error which was made in not placing the letter addressed to suppliant in the proper box in the post office. *Lever Brothers Co. Ltd. et al. v. The Queen*, [1960] Ex. C.R. 61; [1961] S.C.R. 189, distinguished.

4. That the issue raised in the case is to be determined by s. 40 of the *Post Office Act* and not s. 3(1)(*a*) of the *Crown Liability Act*.

PETITION OF RIGHT seeking to recover damages from the Crown allegedly suffered through the tortious act of a servant of the Crown.

The action was tried before the Honourable Mr. Justice Kearney at Montreal.

Kalman S. Samuels and *Mrs. Stella Samuels* for suppliant.

Roger Tassé for respondent.

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

KEARNEY J. now (October 3, 1961) delivered the following judgment:

This is an action in tort by way of petition of right wherein it is claimed that, due to the fault, negligence, imprudence and lack of care or skill of employees and officials of the Post Office Department while in the performance of the work for which they were employed, the

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suppliant has suffered damages to the extent of $24,299.50. The said damages allegedly arose out of the failure of those engaged at the post office known as Station H, Montreal, P.Q., whereat the suppliant had leased Post Office Box 335, to locate and deliver to him an important letter containing a cheque for $12,000 and which had been mailed to him at his above-mentioned address from Caracas, Venezuela, and as a result he was unable to complete arrangements for shipping a large number of prize cattle and suffered damages to the extent claimed.

The suppliant relies on section 3, subsection (1), paragraph (*a*), of the *Crown Liability Act* (1-2 Elizabeth II), 1952-53, c. 30, which states:

> 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 in respect of a tort committed by a servant of the Crown.

The respondent denies that the suppliant suffered the damages claimed and alleges that such damages, if any, were not directly attributable to the fault of the respondent's servants; that, in any event, the relief sought by the petition of right is in respect of a claim arising from allegations of loss, delay or mishandling of something deposited in a post office; that neither the *Post Office Act,* R.S.C. 1952, c. 212, nor the regulations made thereunder contain any provision making Her Majesty liable for claims arising as aforesaid; that in consequence the suppliant's claim is barred by reason of section 40 of the said Act which reads as follows:

> Neither Her Majesty nor the Postmaster General is liable to any person for any claim arising from the loss, delay or mishandling of anything deposited in a post office, except as provided in this Act or the regulations.

The main facts of the case are as follows.

The suppliant is in the business of buying and selling cattle and previous to September 1958 had made shipments of Canadian cattle to purchasers in Caracas, Venezuela, including one J. M. Garcia, from whom the suppliant had a pending order for about 40 head of cattle which he was about to ship via the *S/S Romney,* due to leave Montreal on September 18. During the month of August the suppliant was in Europe and during his absence Alejandro Mujica, on the recommendation of Mr. Garcia, wrote to the

suppliant at Burnside Farms, Howick, Quebec, under date of August 14 (Ex. 6), informing him that his firm wished to import from Canada 100 Holstein cows of first class quality, to arrive in Venezuela from October 15 onwards, and asking for price quotations thereon. The above-mentioned letter remained unanswered until the suppliant's return, at the end of August, and on September 4 the suppliant immediately contacted Mr. Mujica by long distance telephone. During the telephone conversation Mr. Mujica agreed to purchase from the suppliant, on behalf of himself and his partner, one G. Hernandez, thirty Holstein cows at a price of $600 each. The suppliant requested Mr. Mujica to make a part-payment of $12,000 and to deposit it to the suppliant's order at the Royal Bank of Canada, which Mr. Mujica agreed to do.

As appears by Exhibit 4, which forms the basis of the present claim, on September 10 Mr. Mujica wrote the suppliant from Caracas, stating that, instead of placing $12,000 to the order of the suppliant in the Royal Bank of Canada, his associate, Mr. Hernandez, preferred to make a cheque drawn against The Chemical Corn Exchange Bank of New York to the suppliant's order for $12,000 (U.S. funds). Mr. Mujica posted the letter and cheque by ordinary mail addressed to Adolfo Lendoiro Seaone, Box 335 Station H, Montreal, Canada, as indicated on the envelope (Ex. 3). There appears on its face a line striking out the address and the word "Removed" written in black ink was added alongside it. Written in red ink by the sender is the word "Urgente", the Spanish equivalent of "Urgent", and stamped on the reverse side of the envelope are the words "Recherche—Directory 1212". There is no postmark on the envelope to indicate the date on which it was received at Station H, but it bears postmarks indicating that it was sent from Station H on September 17, 1958 to the Toronto Undeliverable Mail Office or Dead Letter Office, as it is more commonly called, where it was received on September 18. Exhibit 3 does not bear any return address, but the Dead Letter Office in Toronto returned it to the original sender, Mr. Hernandez, in Caracas, about two months later.

As later appears, the suppliant had occasion to go to Caracas in October and December 1958. At the time of his first visit, Exhibit 3 containing the original of Exhibit 4

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had not yet been returned to Mr. Hernandez; but, on that occasion, he gave the suppliant a copy of Exhibit 4, and on his second visit in December he obtained Exhibit 3 from Mr. Hernandez.

The suppliant's evidence shows that in August 1958 he expected to complete a sale with prospective buyers other than Messrs. Mujica and Hernandez for about 80 head of cattle for shipment to Caracas and had reserved a like number of stalls for the September 18 sailing of the *S/S Romney*. He procured a firm order from Mr. Garcia for 40 head of cattle, which he shipped by the *S/S Romney*, but the balance of the expected order did not materialize, and according to the suppliant, he would have been able to include the shipment of 40 head of cattle purchased by Mr. Mujica, but not having received the $12,000 cheque, he cancelled his reservations on the remaining available stalls and lost a profit of $12,000 on the Mujica sale, which he otherwise would have made.

In his original petition the appellant limited his claim to the sum of $12,000 above-mentioned. But due to the occurrences hereunder described, by amendment the amount was increased by an additional $12,299.50.

It was usual for the *S/S Romney* to take 12 to 15 days to reach Venezuela. During the last week of September, the suppliant flew to Caracas because he "had to go to Venezuela to receive this cattle", which he had shipped to M. Garcia. Before leaving Montreal for Caracas, the suppliant, if I correctly understand his evidence on the point—which is not clear—, had taken a verbal option through M. Tough of the March Shipping Company on shipping space for cattle on the next sailing on the *S/S Romney*; but, due to the loss of the $12,000 cheque and the uncertainty of being able to effect a sale to M. Mujica of 100 head of cattle, the suppliant gave up the above-mentioned option before leaving for Caracas. During his stay in Caracas, the suppliant completed a sale of 107 head of cattle to Messrs. Mujica and Hernandez at a price of $600 each. On his return to Montreal, on October 10, he endeavoured to procure shipping accommodation on the next sailing of the *S/S Romney* only to find that she was fully booked throughout the balance of the year. Other companies shipping from Montreal were likewise booked up. The best

he could arrange was to procure accommodation on a ship leaving from New York in November. The cost of doing so was considerably in excess of what he would have had to pay if he had shipped from Montreal. The 107 head of cattle arrived in poor condition and the purchasers, consequently, refused to pay the full sale price thereon; and, in addition, the suppliant allegedly suffered additional damage through loss of goodwill, the whole totalling $24,299.50—as appears by a statement of damages filed as Exhibit 14 and which he attributes to his failure to receive in proper time the $12,000 cheque contained in Exhibit 3.

The evidence shows that as soon as the suppliant became aware that the letter containing the cheque had left Caracas on September 10 he made unavailing inquiries at Station H, and he was advised by the Director of Postal Service for the district of Montreal that no trace of it could be found.

Mr. Elzéar Therrien, who was in charge of Postal Station H in Montreal in 1958, testified that it was difficult for him to understand why the letter in question was not deposited in Box 335 as it should have been. On being questioned about the markings on the envelope he said he could not be sure when the letter arrived at Station H. But he explained why it was sent to the Toronto Undeliverable or Dead Letter Office on the 17th of September. There are three undeliverable mail offices in Canada: one located in Vancouver, and its function is to trace undeliverable mail originating in the East or Far East; the Montreal office deals with undeliverable letters originating from Europe; and the Toronto office deals with those sent from South America, whence Ex. 3 (and its contents) was returned to the sender in Caracas. No attempt was made to explain the reason which likely motivated the clerk, whoever he was, to strike off the address and inscribe the word "Removed" on the envelope. I might here state, as I observed during the hearing, that Box 335 was rented in the name of Adolfo Lendoiro and the letter in question was addressed to Adolfo Lendoiro Seaone; hence, it is possible that the clerk focused his attention on the last name, and finding on inquiry that nobody named Seaone was, at that time, the lessee of a post office box, had presumed that he

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had changed his address. As those familiar with the customs and practices of Spanish-speaking countries are aware, a man is described not only by his Christian name or names followed by his surname, but after the surname the maiden name of his mother is added. When he was sworn as a witness, the suppliant gave "Seaone" as his last name, while in his action he describes himself in the Canadian fashion as Adolfo Lendoiro. He is also thus described in letters in the record sent to his addresses in Howick (Ex. 6) and in Montreal (Exs. 9 and 17), and I do not think it is unreasonable to infer that the Latin American fashion in which he was described on Exhibit 3 served to confuse the clerk who first dealt with the letter.

It is true that two letters (Exs. 1 and 2) which were addressed: Adolfo Lendoiro Seaone, Station H, Box 335, Montreal, were there delivered to him, but they are postmarked "October 13" and "December 13, 1958" respectively, which is subsequent to the frequent occasions on which the suppliant alerted those in charge of Postal Station H by complaining that an important letter was missing.

Even supposing it could be said that the suppliant, in some measure, contributed to its own misfortune, would it follow that the servant of the Crown, and particularly the clerk in question, was blameless? As counsel for the suppliant observed, regardless of what prompted the clerk to deal with Exhibit 3 in the manner in which he did, it was a mistake for him not to place it in Box 335; and with this statement I am in full accord, more particularly as this error is admitted by Mr. Therrien, who, at the time, was in charge of Station H.

This leads to the important issue of whether by reason of s. 40 of the *Post Office Act* s. 3(1)(*c*) of the *Crown Liability Act* has any applicability in the present case.

It is submitted on behalf of the appellant that s. 3(1)(*c*) of the *Crown Liability Act* which came into force on November 15, 1953, if it did not completely supersede the exculpatory provisions of the *Post Office Act* which have been on the statute books for many years, at least placed decided limitations on the effect to be given to such provisions. It need hardly be said that the two Acts must be read together.

In this connection, counsel for the suppliant submitted that s. 3(1)(*a*) of the *Crown Liability Act* lays down the general rule that liability attaches to the Crown in the same manner as it does to ordinary citizens in respect of a tort committed by one of its servants, except in certain instances specifically mentioned in Act. Thus, for example, s. 3(4) states that notwithstanding s. 3(1) the liability of the Crown is limited by reason of certain provisions of the *Shipping Act*; similarly, s. 4(1) provides that no proceedings lie against the Crown if the claimant is entitled to a pension or compensation payable out of the Consolidated Revenue Fund; section 4(3) exempts the Crown from liability for damages sustained by any person, caused by a tort committed by a servant of the Crown while driving a motor vehicle on a highway, unless the driver of the motor vehicle or his personal representative is liable for the damages so sustained.

Counsel for the suppliant concluded from the foregoing that the *Post Office Act* was inapplicable because no mention is made of it among the foregoing exceptions. Assuming for a moment such to be the case, the following quotation from *Barker v. Edgar*[1] is found in Craies on *Statute Law,* 4th ed., p. 321:

> When the Legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.

Although it is true that the *Post Office Act* is not mentioned by name in the *Crown Liability Act,* I think it is referred to by implication in the provisions of subsection (6) of section 3, which reads, in part, as follows:

> Nothing in this section makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if this section had not been passed, would have been exercisable by virtue of the prerogative of the Crown, *or any power or authority conferred on the Crown by any statute,* . . . . (emphasis supplied)

I think the statutory provisions of section 40 of the *Post Office Act,* which was enacted in its present form by S. of C. 1940, c. 57, clearly vest in the Crown the power or authority to determine by regulation to what extent, if any, it will be liable for claims arising from the loss, delay or mishandling of anything deposited in a post office—and

[1] [1898] A.C. 748 at 754.

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that in the absence of anything to the contrary contained either in the Act itself or its regulations, no liability exists. The official guide of the Canadian Postal Service, 1961 (Ex. B) and the testimony of Elzéar Therrien indicate that no indemnity is made payable in connection with post office handling of ordinary mail; that the maximum indemnity to be paid on even a registered letter is $100 within Canada; that the amount payable in respect of claims relating to foreign mail, which is determined by treaty, varies; and, in the case of Canadian-Venezuelan treaty, it is limited to $3.75 per letter.

It was stated on behalf of the suppliant that his was not a claim arising from loss, delay or mishandling of the letter in question by servants of the Crown, as contemplated in the *Post Office Act,* but arose because they were guilty of tort of a much more serious character and which amounted to gross negligence on their part and with respect to which s. 3(1)(*a*) of the *Crown Liability Act* was intended to apply to the exclusion of s. 40 of the *Post Office Act.*

In this connection, counsel for the suppliant cited *Lever Brothers Company Limited et al.* and *Her Majesty the Queen*[1] confirming the judgment of Thurlow J.[2] which, in my opinion, is readily distinguishable from the present case because it was one in which the facts clearly indicated that the *Post Office Act* was inapplicable and because the facts in this case show the reverse to be true. In the *Lever* case a package of jewellery which was subject to duty had been transferred by the Canada Post Office into the custody and control of the Customs Postal Branch and while there was stolen by some employee or employees of such Branch during working hours and in the course of his or their employment. Thurlow J., who rendered the judgment in this Court, found that, under the circumstances, the Crown was liable for the loss; that neither s. 23(1) of the *Customs Act,* R.S.C. 1952, c. 58, nor s. 40 of the *Post Office Act,* R.S.C., 1952, c. 212 are applicable. As there is no suggestion that the *Customs Act* has any bearing on the present case, it can be disregarded. Speaking of the non-applicability of

[1] [1961] S.C.R. 189. [2] [1960] Ex. C.R. 61.

s. 40 of the *Post Office Act,* Ritchie J. delivering the judgment of the Supreme Court of Canada at page 193 observed:

> It was pointed out by counsel for the appellant that by s. 2(1)(*c*) of the same Act the words "deposit at a post office" are defined as meaning "to leave in a post office or with a person authorized by the Postmaster General to receive mailable matter" and that s. 2(2) provides that "an article shall be deemed to be in the course of post from the time it is deposited at a post office until it is delivered". . . . .
>
> In my view, at the time of the loss the diamonds in question were neither "deposited in a post office" nor "in the course of mail" and, accordingly, I agree with the learned trial judge that the provisions of s. 40 of the Post Office Act have no application to the present case.

In the present case there is incontrovertible proof that Exhibit 3 was left in Station H, a post office within the meaning of s. 2(1)(*i*), which states:

> 2. (1) In this Act,
>
> (i) "post office" includes any building, room, vehicle, letter box or other receptacle or place authorized by the Postmaster General for the deposit, receipt, sortation, handling or despatch of mail;

In the *Lever Brothers* case, it was unnecessary to determine, and the Court did not determine, what the outcome would have been had the package of jewellery been in the custody and under the control of the Post Office Department; and I do not think it is necessary for me to consider what the consequences might have been in the present case had Exhibit 3 and its contents been stolen by one of the postal clerks while it was lodged at Station H.

In my opinion, there is no comparison between the innocent mistake made by a postal clerk and the deliberate conversion to his own use by a customs employee of a package containing diamonds. In the *Lever* case the Court was concerned with a criminal act, while I consider that in the instant case the damages arose from duties attaching to the sorting of mail wherein clerical mistakes are almost bound to occur, much as occupational ailments are apt to afflict those engaged in certain exposed types of work.

Emilien Corbeil, district director of postal service for the Montreal postal district, who was called on behalf of the suppliant, stated that claims for loss of undelivered mail are made through his office and that the missing items consist of anything from a letter lost in the ordinary post to insured parcels. He testified that in his own district alone

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he receives an average of 50,000 to 60,000 complaints a year (Corbeil, p. 134). Elzéar Therrien (*supra*) stated that at Station H there are 14 clerks and two officers and that the average number of letters handled by the clerks per day are seventy-five to one hundred bags, of which three to four thousand letters are destined for the post office boxes in Station H, of which Box 335 is the last one. Mr. Corbeil (p. 35) stated that, although the Canadian Post Office system, in comparison with other countries, rates high, it is usual for two mistakes such as happened in the present case to arise in respect of each one thousand letters sorted.

It was submitted that, apart from the mistake which the sorting clerk made in respect of Exhibit 3 (on which, it should be recalled, the sender had omitted to place a return address), the fact that the postmaster was unable to trace it to the Dead Letter Office in Toronto, whence it was only returned to Caracas some time in November, constituted further acts of gross negligence on the part of servants of the Crown. In my opinion, in addition to the reasons above-mentioned these acts which followed the sorting clerk's original error may be disregarded, as they bear no direct relation to the damages claimed.

The suppliant raised the point that the word "mishandling" does not aptly describe the sorting clerk's error. Although it may mean maltreating or handling roughly, it also means to handle badly, improperly or wrongly (see *Shorter Oxford Dictionary,* 3rd ed., p. 1260; Webster's *New International Dictionary,* 2nd ed., p. 1569). And in my opinion it would be difficult to find any word which would more aptly and accurately describe the error which the sorting clerk made in failing to lodge Exhibit 3 in P.O. Box 335. For the above reasons, I consider that the provisions of s. 40 of the *Post Office Act,* and not s. 3(1)(*a*) of the *Crown Liability Act,* should be made to govern in the present case.

Because of the conclusion I have reached, I find it unnecessary to deal with any of the subsidiary issues raised in the case.

The petition of right will be, consequently, dismissed with costs.

Judgment accordingly.