

IN THE MATTER OF THE PETITION OF RIGHT OF

1905
 Oct. 4.
 —

THE BRITISH & FOREIGN
 MARINE INSURANCE COM-
 PANY AND JOHN CONLON AND
 THOMAS CONLON } SUPPLIANTS ;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Collision with entrance pier to canal—Negligence in construction—Liability of Crown.

One of the entrance piers to a Government canal was so constructed that a substructure of masonry rested on crib-work. The base of the pier was set back three feet from the edge of the crib-work, which left a step or projection under water between the masonry and the side of the crib-work. It was necessary for vessels to enter the canal with great care, at this point, owing to the eddies and currents that existed there. The proper course, however, for vessels to steer was marked by buoys. A vessel on entering the canal touched another pier than the one in question, and then, taking a sheer and getting out of control, swung over and came in collision with this pier.

Held, that upon the facts proved the accident was caused by the vessel being caught in a current or eddy and so carried against the pier.

2. That as there was no negligence by any officer or servant of the Crown as to the location and the method of construction of this pier, the Crown was not liable for damages arising out of the collision.

PETITION OF RIGHT for damages arising from injury to property on a public work.

The facts are stated in the reasons for judgment.

June 7th, 1905.

W. M. German, K.C., for the suppliants, contended that it was owing to the imperfect construction of the entrance pier upon which the ship struck that the accident occurred. Had the crib-work not extended under water three feet in front of the superstructure

the ship would not have collided with it. The Government engineers admit that the work is dangerous to navigation as it stands, and this fact shows that it was negligently constructed. The ship was properly navigated but was carried by the current against the pier. The crown is liable for damages.

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E. L. Newcombe, K.C. There is no evidence that the construction of the pier was faulty. The engineer who built it, now deceased, built it according to the best of his judgment, and was not negligent in its construction. There is evidence that vessels not only struck this pier but that they struck the north pier also. The whole cause of the trouble was the eddies or currents there, which forced the ship against the pier. The pilot was not misled by anything done by the servants of the Crown, his ship simply got beyond his control. The Crown by this work made navigation at this dangerous point easier and safer. The pier was built according to the engineer's plans, and there is no case against the Crown founded on negligence.

Mr. German replied.

THE JUDGE OF THE EXCHEQUER COURT now (October 4th, 1905) delivered judgment.

The petition is brought to recover damages for injuries to the steamship *Erin* and her cargo occasioned by coming in collision with one of the entrance piers of Farran's Point Canal. This canal is a public work of Canada, and the claim is made under clause (c) of the 16th section of *The Exchequer Court Act* (1), which provides that the court shall have exclusive original jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting

(1) 50-51 Vict. c. 16.

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from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The entrance to Farran's Point Canal is at times a matter of difficulty owing to the currents and eddies that exist there, and it is necessary for vessels to make the entrance with great care. On the occasion of the accident to the *Erin*, which happened on the 22nd of August, 1903, the vessel first touched the north pier, and then taking a sheer and getting out of control swung over and came in collision with the south entrance pier. It is alleged for those in charge of the *Erin* that this happened without any fault on their part, or on the part of the vessel, and I take that to be the fact, although there can, I think, be no doubt that by the exercise of greater skill and care than was exercised on this occasion, the vessel might have made the entrance in safety. That is being done daily, although it is also true that a number of accidents have occurred at this place. But taking the view of those who were in charge of the *Erin* the accident was occasioned by the vessel being caught in the current or eddy and carried against the pier. That was the cause of the accident, and with respect to that no negligence is attributed or attributable to any officer or servant of the Crown. The alleged negligence of which the suppliants complain has to do with the extent of the injuries that resulted from the collision, and not with the collision itself, or the causes that led to its happening. The pier, upon the substructure of which the *Erin* struck, is built of masonry resting on crib-work. The top of the crib-work is ordinarily two feet under water, though it has at times when the water was low been a few inches above water. As long as it is under water the crib-work is not subject to decay; and it will last, it is said, as long as the masonry that rests upon

it. That is the reason and occasion for having the upper part of the crib work below instead of above the level of the water. Then in the form of construction adopted in building this pier, the base of the pier was set back three feet from the edge or side of the crib-work. That left a step or projection under water between the masonry and the side of the crib-work, and it was upon this projection that the *Erin* struck. The engineers who were examined differed somewhat as to whether or not this was a proper form of construction for such a pier. But the better view, I think, was that the base of the wall should not be built flush with the side of the crib-work, but that it should be set back a foot or two according to the circumstances of each case. That, it seems, is a reasonable precaution to take having regard to the strength and durability of the work as a whole. Whether having adopted that form of construction something more ought to have been done to lessen the extent of injuries which a vessel in collision with the pier would be likely to receive is another question to which reference will be made later. But with the form of construction adopted in building this pier it is obvious that in any case of collision with it the vessel is likely to receive greater injury, and the public work less injury, than would probably occur if the base of the masonry or concrete wall were built flush with the side or edge of the crib-work. The crib-work, and not the wall built upon it, will in general receive the blow, and in that way the wall is protected. On the other hand the vessel strikes below and not above her water line, and is more likely to be injured, and in case of injury is exposed to greater damages than where the wall and crib-work are flush with each other.

The entrance pier in question was constructed under the direction of the late Mr. Rubidge in accordance

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with plans prepared by him, and the suppliants contend that in adopting for this pier the form of construction mentioned he was guilty of such negligence as entitled the suppliants to recover damages under the statute to which reference has been made. With that conclusion I am not able to agree. Mr. Rubidge had had great experience in work of this kind, and while it appears that his views were adopted and carried out, it is a matter of common knowledge that as Superintending Engineer of the work, he was under the direction of the Chief Engineer and of the Minister of the Department of Railways and Canals, who must, I think, be taken to have shared with him the responsibility of adopting the form of construction now complained of. That would not, perhaps, relieve Mr. Rubidge of the charge of negligence, if there really were any negligence in the matter, but it suggests caution on the part of one who is not an engineer in coming to a conclusion that a mode of construction adopted in building a public work which must have met with the approval of more than one engineer of great experience and skill was a negligent and improper mode of construction. A similar mode of constructing piers has been adopted at other places on some of the Canadian canals and elsewhere, and without, so far as appears, giving any occasion for complaint on the part of those who use the canals. The real difficulty at Farran's Point is the existence of the currents and eddies that are found there. But there is no reason to believe that the nature and extent of these currents could have been foreseen when the plans for the work there were made. After their existence was noticed steps were taken to buoy the course that vessels making the entrance should follow, and what was possible in that way has been done to make such entrance safe. It is thought by Mr. Rhéaume, who is

now in charge of the work, that something might be done to get rid of the currents that are found so troublesome, but the work necessary for that cannot, it appears, be done without the consent of the Government of the United States; and the matter is in abeyance.

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The evidence of Mr. Marceau and others suggests that in the meantime something might be done to lessen the probability of injury or the extent of the injury in case of collision by placing wale pieces on the face of the masonry flush with the outside of the crib-work. It is however a question for the Minister of the Department and the Government to decide as to whether any such precautionary measures should be taken or not. The absence of such means for minimizing the injury to which a vessel coming in contact with the pier is liable, does not, it seems to me, make the Crown liable for damages sustained by the vessel. There is no common law liability on the part of the Crown. It is liable only in the cases mentioned in the statute that has been cited.

There will be judgment for the respondent and a declaration that the suppliant is not entitled to any portion of the relief sought by their petition.

Judgment accordingly.

Solicitors for suppliant: *German & Pettit.*

Solicitor for respondent: *E. L. Newcombe.*
