1918
Nov. 20.

IN THE MATTER OF THE PETITION OF RIGHT OF

EDWARD COLEMAN,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Public work—Harbour of Victoria—Government scow—Fellow-servant.

The harbour of Victoria, B.C., which was a public harbour before British Columbia entered into Confederation, is a public work within the meaning of sec. 20 of the *Exchequer Court Act.*

The Crown is not liable for an accident happening on a Government scow in the harbour of Victoria, B.C., while engaged in work executed by the Government of Canada for the improvement of the harbour, where the negligence which caused the accident is the negligence of a fellow-servant of the suppliant.

Ryder v. The King, (1905), 36 Can. S.C.R. 462, followed; *Paul v. The King,* (1906), 38 Can. S.C.R. 126; *Montgomery v. The King,* (1915), 15 Can. Ex. 374; and *La Compagnie Generale Enterprises Publiques v. The King* (unreported),* distinguished.

PETITION OF RIGHT to recover damages for personal injuries while in the employment of the Government.

Tried before the Honourable Mr. Justice Audette, at Victoria, B.C., September 23, 1918.

R. C. Lowe and *J. P. Walls,* for suppliant.

E. Miller, for respondent.

AUDETTE, J. (November 20, 1918) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $5,000 as representing damages

* See 44 D.L.R. 459 (on appeal from 32 D.L.R. 506).

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alleged to have been suffered by him, as arising out of an accident which occurred while he was acting in the discharge of his duty in the employment of the Government of Canada.

On June 3, 1914, the Crown, through the Department of Public Works of Canada (Dredging Branch) was carrying on, in the harbour of Victoria, B.C., the work of rock-drilling for the purpose of improving the harbour. A part of the rock-drilling plant, used for such purposes, was a vessel or scow upon which was built a platform, with steam drills installed thereon. The scow was provided with four spuds, performing the same functions as spuds do on dredges. Upon this scow was also erected the structure which appears on the photograph, Exhibit No. 1; that is uprights joined at the top by a cross-beam, upon which was attached a traveller upon which ran a block and with ropes used, as occasion required, to lift up and let down the drills in the course of their operation. Below the cross-beam just mentioned there was a kind of truss-rod, which extended right across and passed through the uprights, being made fast to the same by a nut screwed or applied to the threaded end of the rod. Between the cross-beam and the rod there are two brackets, similar to Exhibit No. 2. The teat on the flat side part of this bracket ran into a hole, of the same size, underneath and in the wooden cross-beam, and was held in position, against its natural weight, by the rod above mentioned, which was maintained in the necessary tight position to hold the brackets, by means of the nuts above mentioned.

On the date in question the suppliant was working on a night shift. About midnight, while engaged at handle B, upon Exhibit No. 1, one of the

brackets fell upon his right hand, crushing the index finger. The three first phalanges of that finger were finally amputated, together with the head of the metacarpal bone at the base of that finger—the whole necessitating four surgical operations.

As a result of this accident the suppliant has lost time, and incurred medical expenses, suffered pain, and his earning capacity has been partially reduced for the rest of his life through the impaired function of his right hand. It is comforting to know from the evidence that the Crown has paid the suppliant his wages all through his illness and the time he lost, as well as all hospital and medical charges and expenses. The suppliant was continued in his employment after the accident, after having undergone these operations, and with this diminished capacity for work was given higher wages than before the accident. He only left off working for the Government when the works were closed down in 1917.

The harbour of Victoria was a public harbour long before British Columbia entered into Confederation, in 1871. As far back as 1860 the Legislature of Vancouver Island passed an Act for the purpose of borrowing and spending monies for the improvement of that harbour, and under sec. 108 of the *B. N. A. Act,* the harbour became the property of the Dominion Government.

The accident occurred in the harbour of Victoria on a *Government scow,* fitted with drilling appliances, while engaged in works executed by the Government for the improvement of the harbour.

From the above statement of facts it is manifest that this action is grounded on negligence and sounds in tort. In such a case there is no liability on the part of the Crown, unless it is made so liable by

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statute. The suppliant, to succeed, must, therefore, bring his case within the provisions of the statute prescribing a remedy against the Crown in respect of negligence by its officers or servants, *viz.*, the *Exchequer Court Act*, sec. 20, sub-sec. (c), as it stood at the time of the accident. To bring this case within such enactment the injury must, first, have occurred "on a public work"; and secondly, it must have resulted from the negligence of some "officer or servant of the Crown while acting within the scope of his duties or employment."

In the reports there will be found a number of cases which were instituted in this Court and which involved the interpretation of the term *"public work"* in the enactment in question; and it is desirable to consider some of them in respect of their bearing upon the case at bar. Most of these cases were carried on appeal to the Supreme Court of Canada. In two of them, *Paul v. The King*[1] and *Montgomery v. The King*,[2] there was a similarity in fact to this case to the extent that the injury happened on a vessel employed in navigation improvement works, and in each it was sought to establish that the vessel was a "public work" within the meaning of the enactment last mentioned. This contention was not sustained by the Courts; but I venture to entertain the view that not only are there controlling facts in the case before me that distinguish it from those to which I refer, and that a judgment for the suppliant in this case would, but for other considerations which are hereafter stated, be fully in harmony with decisions which I must follow because the language used by some of the judges of

[1] 38 Can. S.C.R. 126.
[2] 15 Can. Ex. 374.

the Supreme Court warrant a finding here that the *locus in quo* was a public work within the meaning of sec. 20 (c) of the *Exchequer Court Act*.

In support of this view I would cite the language of Burbidge, J., in *Leprohon v. The Queen*.[1] At p. 108 he says: "I think that the expression '*public* "*work*' occurring in the 16th section (now sec. 20) "must be taken to include not only railways and "canals and other undertakings which in older coun- "tries are usually left to private enterprises; but "also all other 'public works' mentioned in the *Pub- "lic Works Act* and other Acts in which that term "is defined." The *Public Works Act* mentioned by the learned Judge was R.S.C. 1886, c. 36, and is now to be found in R.S.C. 1906, c. 39, and apparently also sec. 2 of the *Expropriation Act*. By sec. 3 (c) of the *Public Works Act* it is declared that "public work" or "public works" means and includes any work or property under the control of the Minister.

Now, bearing this definition in mind, and remembering that the *Exchequer Court Act* provides a remedy for any one injured on a public work as the result of negligence by an officer or servant of the Crown, it will be apprehended that the case is one to which must be applied the rule of statutory construction which declares that as all Legislatures "are presumed to proceed with a knowledge of ex- "isting laws, they may properly be deemed to legis- "late with general provisions of such a nature in "view." *Sutherland's Statutory Construction*, by Lewis.[2]

If this is the rule of construction to be followed, and I think it is, then the harbour of Victoria, where-

[1] (1894), 4 Can. Ex. 100.
[2] Vol. 11, sec. 355, p. 681, and sec. 447, p. 852.

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in the accident happened, being "property under the control of the Minister," must be held to be a public work, and if the other requirements of sec. 20 (c) of the *Exchequer Court Act* have been satisfied by the suppliant's proof, then he has made out a clear case against the Crown.

In the case of *Paul v. The King*[1] it was held that a Government steam tug and a scow, its tow, which caused a collision, while engaged in improving the ship channel of the St. Lawrence, was not a public work, and that the suppliant must therefore fail since the accident did not occur on a public work.

Sir Louis Davies, J. (now Chief Justice), commenting upon this expression "public work", in the *Paul case, ubi supra,* said, at p. 131: "To hold the "Crown liable in this case of collision for injuries to "the suppliant's steamer arising out of the collision, "we would be obliged to construe the words of the "section so as to embrace injuries caused by the "negligence of the Crown's officials *not as limited* by "the statute 'on any public work,' but in the carry-"ing on of any operations for the improvement of "the navigation of *public harbours* or rivers. In "other words, we would be obliged to hold that all "operations for the dredging of *these harbours* or "rivers or the improvement of navigation, and all "analogous operations carried on by the Govern-"ment were either in themselves public works, which "needs, I think, only to be stated to refute the argu-"ment, or to hold that the instruments by or through "which the operations were carried on were such "public works.

"If we were to uphold the latter contention I "would find great difficulty in acceding to the dis-

[1] 38 Can. S.C.R. 126.

"tinction drawn by Burbidge, J., between the dredge "which dug up the mud while so engaged and the "tug which carried it to the dumping ground while "so engaged. Both dredge and tug are alike en- "gaged in one operation, one in excavating the ma- "terial and the other in carrying it away.

"But even if we could find reasons to justify such "a distinction, which I frankly say I cannot. * * *

"I think a careful and reasonable construction of "the clause 16 (now 20) (c) must lead to the con- "clusion that the public works mentioned in it and "'on' which the injuries complained of must hap- "pen are *public works* of some definite area, as dis- "tinct from those operations undertaken by the "Government for the improvement of navigation or "analogous purposes, not confined to any definite "area of physical work or structure."

And Idington, J., in the same case, p. 134, said: "We were referred to the interpretation given the "words 'public works' in the *Public Works Act*. If "the meaning given there could be used here then "this appellant's right, if otherwise entitled to suc- "ceed, would be clear."

And Duff, J., in the case of *The King v. Lefrançois*,[1] said: "Having regard to the previous decis- "ions of this Court, the phrase 'on a public work' "in sec. 20, sub-sec. (c) of the *Exchequer Court Act* "must, I think, be read as descriptive of the locality "in which the death or injury giving rise to the "claim in question occurs. The effect of these de- "cisions seems to be that no such claim is within the "enactment unless 'the death or injury' of which it is "the subject happened at a place which is *within* "*the area* of something which falls within the de-

[1] (1908), 40 Can. S.C.R. 431 at 436.

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"scription 'public work.' *Paul v. The King*[1] and "the cases therein cited."

Again, Sir Charles Fitzpatrick, C.J., in *Chamberlin v. The King*,[2] said: "In a long series of decis-"ions this Court has held that the phrase '*on a pub-"lic work*' in sec. 20, sub-sec. (c) of the *Exchequer "Court Act*, must be read, to borrow the language "of Mr. Justice Duff in *The King v. Lefrancois*,[3] " '*as descriptive of the locality in which the death "or injury giving rise to the claim in question oc-"curs*,' and that to succeed the suppliant must come "within the strict words of the statute. Taschereau, "J., in *Larose v. The King*.[4]—See *Paul v. The "King*."[1]

See also *Olmstead v. The King*,[5] *Hamburg American Packet Co. v. The King*,[6] *Macdonald v. The King*,[7] and *Piggott v. The King*.[8]

In the case of *Montgomery v. The King*,[9] Sir Walter Cassels, J., held, following the views expressed by the Judges of the Supreme Court of Canada in the case of *Paul v. The King, ubi supra*, that a dredge belonging to the Dominion Government is not a "public work" within the meaning of sec. 20 (c) of the *Exchequer Court Act*.

In the recent case of *La Compagnie Générale d'Entreprises Publiques v. The King* (unreported),* decided by the Supreme Court of Canada, wherein the question of the construction of the terms *on a public work* was discussed, where a scow that was

[1] 38 Can. S.C.R. 126.
[2] (1909), 42 Can. S.C.R. 350.
[3] 40 Can. S.C.R. 431.
[4] (1901), 31 Can. S.C.R. 206.
[5] (1916), 30 D.L.R. 345; 53 Can. S.C.R. 450.
[6] (1902), 33 Can. S.C.R. 252.
[7] (1906), 10 Can. Ex. 394.
[8] (1916), 32 D.L.R. 461, 53 Can. S.C.R. 626.
[9] 15 Can. Ex. 374.
* See 44 D.L.R. 459 (on appeal from 32 D.L.R. 506).

moored at a Government wharf, Idington, J., said: "In this case it is hardly possible, unless we give "the meaning to the word *on* or *upon* and insist that "the scow in question could not be said to be *on a* "*public work* unless it was on top of the very spot "in the wharf under and with which the appellants' "men were engaged."

In other words, if the scow had been on the wharf it would have been found that the scow was on a public work. The scow was then in the harbour of Quebec, but the question of the harbour being a *public work* was not raised in that case. In the present case the plant in question was in Victoria harbour, *on a public work*, within the meaning of the statute and the decision above referred to.

Anglin, J., in the same case, said: "It does not "seem to me to involve any undue straining of the "language of the statute to hold that it covers a "claim for injury to property—so employed. 'Pub- "lic work' may, and I think should, be read as mean- "ing not merely some building or other erection or "structure belonging to the public, but any opera- "tions undertaken by or on behalf of the Govern- "ment in constructing, repairing or maintaining "public property. In this sense the appellants' scow "was on a public work when it was injured."

The *locus in quo* of the accident having been within the boundaries of the harbour of Victoria, the accident happened on a public work "of some definite area," as Sir Louis Davies phrases it; or, again, it happened at a "place which is within the area of something which falls within the description of a 'public work'," to employ the language of Duff, J., above quoted. Again, it is a case to which the lan-

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guage of Anglin, J., in the unreported case above referred to applies with peculiar significance.

This would, in my opinion, have sufficed to support a finding that the Crown was liable, had it not been that the doctrine of "common employment" or "fellow servant" was raised as a defence. I have already expressed my view (*Conrod v. The King*[1]) of the interpretation of sec. 20 (c) of the *Exchequer Court Act,* regarding it as embodying the plain intention of Parliament that the Crown would not be heard to invoke anything extraneous to the statute or excuse itself from liability by setting up defences at common law inconsistent with the liability sought to be created by the enactment, were not such an interpretation negatived by the decision of the Supreme Court in the case of *Ryder v. The King.*[2]. See also *Jones v. C. P. R.,*[3] *Hosking et al v. Le Roi* (No. 2),[4] *Lees v. Dunkerley Brothers,*[5] *Hall v. Johnson,*[6] *Ruegg's Employers' Liability,*[7] *Smith v. Baker,*[8] *Brooks v. Rhine Fakkema,*[9] *The Canada Woollen Mills, Ltd. v. Traplin,*[10] *Ainslie Mining & Ry. Co. v. McDougall.*[11]

That case is authority for the right of the Crown to raise the defence of common employment to a petition of right seeking damages under the last-mentioned enactment for the negligence of a servant of the Crown. I am bound by that case, and can do nothing but apply it here, unless the facts show that

[1] (1913), 14 Can. Ex. 472, 482.
[2] (1905), 36 Can. S.C.R. 462.
[3] (1913), 13 D.L.R. 900.
[4] (1903), 34 Can. S.C.R. 244.
[5] [1911] A.C. 5.
[6] (1865), 3 H. & C. 589, 159 E.R. 662.
[7] 125 *et seq.*
[8] [1891] A.C. 325.
[9] (1910), 44 Can. S.C.R. 412.
[10] (1904), 35 Can. S.C.R. 424.
[11] (1909), 42 Can. S.C.R. 420.

the negligence was not secondary or derivative, but primarily that of the Crown in having a defective machinery in use.

The term "negligence", as used in connection with a case of this kind, has been defined as "the absence of that amount of care which each man, in this our social state, owes his fellows." The doctrine of common employment has been characterized as: "Every "risk which an employment still involves after a "master has done all he is bound to do for securing "the safety of his servants is assumed, as a matter "of law, by each of those servants." 54 Can. L.J. 282-283.

The plant or machinery in question herein cannot be said to be defective. It is not as perfected and as much improved as it might be; but the Crown or an employer is not bound to have the most perfected piece of machinery or the best appliances with the latest improvements.[1] It is true a similar bracket had fallen on a previous occasion and that, while this system of construction obtains in the building of railway coaches, yet railway coaches are not subjected to such violent vibration as the plant in question. The most that can be said with respect to the plant is that as it was not as good as it might be, and as the Crown's servant had been put on his enquiry from previous accident—more care and precaution had to be used in attending to it. The first accident had necessarily—*res ipsa loquitur*—brought the matter to the attention of the authorized officer, the inspector, or any one acting for him, that more diligence and care were thereafter necessary in the working of that plant. The inspector had to see to it oftener

[1] *Wamboldt v. Halifax & South Western R. Co.* (1918), 40 D.L.R. 517; *The Toronto Power Co., Ltd. v. Paskwan*, 22 D.L.R. 340, [1915] A.C. 734.

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than he did or direct some one to watch these nuts and thus prevent any further accident.

I. therefore, find that the accident was not caused by defective plant, but for want of proper care and prudence in properly attending to it.

Therefore, the negligence which caused the accident is the negligence of a fellow-servant of the suppliant, and he is thereby barred from recovery under the case of *Ryder v. The King* (*supra*).

The suppliant is not entitled to the relief sought by his petition of right and the action must be dismissed.

Petition dismissed.

Solicitor for suppliant: *J. P. Walls.*

Solicitors for respondent: *MacKay & Miller.*