1957

*June 4, 5
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THE CLEVELAND-CLIFFS STEAMSHIP COMPANY AND THE CLEVELAND-CLIFFS IRON COMPANY (*Suppliants*) ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Liability—Negligence—Necessity for showing cause of action against particular servant of Crown—The Crown Liability Act, 1952-53 (Can.), c. 30, ss. 3(1), 4(2).

A ship grounded when approaching a port and her owners and charterers filed a petition of right claiming damages for negligence in buoying and charting the channel. The trial judge dismissed the action on the grounds that (1) the grounding occurred outside the limits of the channel; and (2) even if the grounding was inside the limits of the channel, there was no liability in law on the Crown. The suppliants appealed.

Held: The appeal must be dismissed.

Per Kerwin C.J.: The trial judge's finding of fact was not supported by the evidence and it should be held that the grounding was within the channel. Nevertheless, the suppliants were not entitled to succeed, since it was essential, under ss. 3(1) and 4(2) of the *Crown Liability Act*, for them to show that they would have a cause of action in tort against some servant of the Crown, and this had not been done. There was no duty owing to the suppliants on the part of the Dominion Hydrographer to take soundings in the channel and in the circumstances of this case it was impossible to see any duty to the suppliants resting upon any other servant of the Crown, the breach of which duty could form the basis of a cause of action against him. *Grossman et al. v. The King*, [1952] 1 S.C.R. 571, distinguished.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Abbott JJ.

Per Rand J.: The trial judge's finding that the vessel had gone beyond the channel was correct. Even assuming that one of the buoys was outside the channel, there was nothing to show when or how it got there; nor had any circumstances been shown that could possibly lead to a cause of action against any servant of the Crown. The primary duty of Crown servants was to the Crown and there could be no personal liability unless there was established some *de facto* relation of reliance and responsibility as between a third person and the Crown servant. *Grossman et al. v. The King, supra,* explained. There was admittedly no duty owing by the Crown itself which had been violated.

Per Locke, Cartwright and Abbott JJ.: The trial judge's finding that the grounding took place outside the channel was correct on the evidence and it was therefore unnecessary to consider the questions of law as to the liability of the Crown.

APPEAL by the plaintiffs from the judgment of Hyndman, Deputy Judge, in the Exchequer Court of Canada (1). Appeal dismissed.

F. O. Gerity and *Hugh W. Rowan,* for the suppliants, appellants.

Peter Wright, Q.C., and *P. M. Troop,* for the respondent.

THE CHIEF JUSTICE:—On August 7, 1953, the SS. "Grand Island" grounded as she was approaching the Port of Little Current on Manitoulin Island by way of the East Entrance Channel, and for the damages suffered thereby, her owners and charterers asserted a claim by petition of right against the Crown. The petition came on for trial before Hyndman D.J., who declared that the suppliants were not entitled to the relief sought and ordered that Her Majesty the Queen recover her costs from them. The learned trial judge decided: (1) The grounding occurred outside the limits of the East Entrance Channel; (2) even if it were inside those limits, there was no liability in law on the Crown. If he be correct on the first point, it is admitted that the appellants must fail and the question of fact may, therefore, be considered first. [The judgement here sets out a review of the evidence and proceeds:]

My conclusion on all the evidence is that the "Grand Island" grounded in the East Entrance Channel.

(1) [1956] Ex. C.R. 255.

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However, even with that finding, the appellants are unable to succeed. The learned trial judge suggested that the claim, if any, arose under s. 18(1)(*c*) of the *Exchequer Court Act*, R.S.C. 1952, c. 98:

> 18. (1) The Exchequer Court also has 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.

This could not be, as the Revised Statutes of 1952 did not come into force until September 15, 1953, and as of that date the clause was repealed (s. 25, subs. 3(*a*) of the *Crown Liability Act*, 1-2 Eliz. II, c. 30, which Act was assented to on May 14, 1953, and was therefore in force on and after that date). At the trial reliance was placed by the appellants upon: (1) s. 19(*b*) of the *Exchequer Court Act*, R.S.C. 1927, c. 34; (2) para. (*a*) of subs. (1) of s. 3 of the *Crown Liability Act*, as qualified by subs. (2) of s. 4. The claim under (1) was abandoned and we need therefore consider only (2). The relevant provisions of the *Crown Liability Act* are 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
>
> (*a*) in respect of a tort committed by a servant of the Crown, . . .
>
> 4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

Parliament has thus set forth in legislative form what had been held by this Court in *The King v. Anthony; The King v. Thompson* (1), decided under s. 19(*c*) of the *Exchequer Court Act*, R.S.C. 1927, as amended. The result is therefore the same as if liability had been based upon s. 19(*c*) of the *Exchequer Court Act*, R.S.C. 1927, c. 34, which, as amended, was in the same terms as s. 18(1)(*c*) of the *Exchequer Court Act*, R.S.C. 1952, c. 98, referred to by the trial judge.

(1) [1946] S.C.R. 569, [1946] 3 D.L.R. 577.

Under the relevant terms of the *Crown Liability Act* the appellants must show that they would have a cause of action in tort against some servant of the Crown and this has not been done. It is true that in answer to a request from the solicitors for the appellants the Deputy Minister of Transport declined to name the officers of the Crown charged with the inspection and maintenance of the channel or the installation and maintenance of buoys to indicate the channel and with the issuance of notices to mariners, but, by consent, Frank C. G. Smith, the Dominion Hydrographer, was examined for discovery and no application was made under the Rules of the Exchequer Court for the examination of any other officer. In view of the appellants' contention that they were at least entitled to a new trial so that they might take the necessary steps for that purpose or in order to secure the names of anyone against whom, within the meaning of the *Crown Liability Act*, the appellants could show that they would have a cause of action in tort, I have considered the matter anxiously and have come to the conclusion that that relief should not be granted on any terms. There was no duty owing to the appellants on the part of the Dominion Hydrographer to take soundings in the East Entrance 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* (1), is distinguishable as there Nicholas, the airport maintenance foreman, was held to owe a duty to Grossman.

The appeal should be dismissed with costs.

RAND J. [after reviewing the evidence]:—It appears clear to me, as it did to Hyndman J., that, whatever the position of the buoy, the vessel had gone beyond the channel and into the shallow water.

It was no excuse that the drill boat was near the centre of the channel; that boat could have been moved to allow the vessel to keep to the range line as it did the next day. The master was aware of the current which made it necessary, once the boat had entered the channel, to

(1) [1952] 1 S.C.R. 571, [1952] 2 D.L.R. 241.

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keep a certain speed for control: and with a beam of 52 feet leaving only 56 feet on each side when on the centre-line, and a length of 486 feet, a deviation to an extent only guessed at ran an obvious and unnecessary risk which eventuated in its own probability.

Assuming that the centre red buoy was outside the easterly channel line, there is nothing to show when or how it reached that position. 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* (1) 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

(1) [1952] 1 S.C.R. 571, [1952] 2 D.L.R. 241.

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. It is not contended that a claim lies based on a duty owing by the Crown, and admittedly there is no such duty.

I am therefore in agreement with the findings of fact and view of the law of the Court below and the appeal must be dismissed with costs.

The judgment of Locke and Abbott JJ. was delivered by

LOCKE J. [after reviewing the evidence]:—No attempt was made to impeach the accuracy of the soundings taken by Rowe in 1951. To supplement the evidence of the witness Smith, it may be said that if 3.2 feet be added to the figures shown in the dredged channel opposite the place where the ship admittedly grounded, the depth of water would have varied from 23 to 34 feet, so that grounding was impossible unless, indeed, there had been, unknown to anyone, some physical upheaval of the bed of the channel, which no one suggests.

The learned trial judge accepted the evidence of the witness Smith and came to the conclusion that the stranding was outside the dredged channel. My examination of the evidence leads me to the same conclusion and for the same reasons.

In these circumstances, it is unnecessary to consider the grounds upon which liability on the part of the Crown is suggested since the case fails on the facts.

I would dismiss this appeal with costs.

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CARTWRIGHT J.:—After a careful consideration of all the evidence I find myself unable to say that the learned trial judge erred in his finding of fact that the vessel grounded outside the limits of the channel, and I therefore agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the suppliants, appellants: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

Solicitor for the respondent: F. P. Varcoe, Ottawa.