1943
*Oct. 21, 22.
1944
*Feb. 22.

HOCHELAGA SHIPPING & TOWING COMPANY LIMITED (SUPPLIANT).. APPELLANT;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Damages—Crown—Claim against the Crown for damage to vessel—Assessment of damages—Basis for assessment—Amount awarded—Disallowance of interest—Petition of Right on behalf of and for benefit of underwriters—Allowance for loss of profits during period for repairs.

In a previous judgment, [1940] S.C.R. 153, this Court held that the Crown was liable in damages to the suppliant by reason of the suppliant's vessel having struck a submerged portion of a jetty; but (by a majority) refused to allow the amount claimed, which was for a total loss of the vessel and its equipment, which occurred; the Court sustaining a finding at trial that after the collision the vessel's officers were negligent in not discovering sooner than they did the extent of the damage and in continuing the voyage; and being of opinion that the total loss would have been avoided had an attempt been made to return the vessel to the wharf or to beach it; and remitted the case for determination of the damages on the basis of the suppliant being entitled to all such damages as were directly and naturally attributable to the collision. The present appeal was by the suppliant from the subsequent determination of the damages.

Held: The trial Judge had, in assessing the damages in respect of the vessel itself, correctly appreciated and properly applied the directions of this Court; and had also properly disallowed interest on the amount awarded: the Crown is not liable to pay interest unless the statute or contract provides for it; but the amount awarded should be increased by allowance for loss of certain supplies; and also by allowance for loss of profits during the period which would have been required for repairs: the fact that the suppliant's petition of right was submitted on behalf of and for the benefit of underwriters (subrogated to the suppliant's rights) did not justify disallowance for such loss of profits; the underwriters stood in the place of the suppliant and were "entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss" (*Simpson* v. *Thomson*, 3 App. Cas. 279, at 284).

APPEAL by the suppliant from a judgment of Angers J. in the Exchequer Court of Canada.

The action had been brought by way of petition of right to recover damages against the Crown (in the right of the Dominion of Canada) for the loss of the suppliant's tow-boat *Ostrea* (which was equipped for salvage operations)

*PRESENT:—Rinfret, Kerwin, Hudson, Taschereau and Rand JJ.

1944

HOCHELAGA SHIPPING & TOWING CO. LTD. v. THE KING.

and its equipment and salvage equipment, resulting, so it was alleged, from its striking the submerged portion of the outward end of a jetty, the top portion of which outward end had been broken away by a storm. The facts as to the jetty and as to the accident now in question are discussed at length in a previous judgment of this Court reported in [1940] S.C.R. 153. That judgment was on an appeal and a cross-appeal from a previous judgment of Angers J. in the action (1). Angers J. had held that the jetty was a public work within the meaning of s. 19 (*c*) of the *Exchequer Court Act* (R.S.C. 1927, c. 34), that the *Ostrea* struck the aforesaid submerged portion of the jetty, that the collision was attributable to the negligence of officers or servants of the Crown while acting within the scope of their duties or employment upon a public work (within said s. 19 (*c*)), and that the Crown was liable in damages; and those holdings were sustained by the said judgment of this Court (2). But Angers J. had held that,

> after the accident, the master of the *Ostrea* was negligent in not taking the means of ascertaining the extent of the damage caused to his vessel by the collision, before proceeding to sea. Had he found that the vessel was leaking, as I think he should have, if he had made a proper inspection of the hull immediately after the impact, he would not or at least should not, assuming he had acted prudently, have proceeded on his voyage but should have brought back his vessel to the wharf. He would thus have avoided the loss of his ship and of her equipment.
>
> * * *
>
> I have no doubt that the extent of the damage caused to the ship by the collision would have been detected if a proper inspection had been made immediately after the collision.
>
> In the circumstances, I believe that the damage for which the respondent is responsible is limited to the cost of the repair of the vessel. Unfortunately there is no evidence in the record enabling me to determine the said cost. If the parties cannot agree on an amount, they will be at liberty to refer the matter to me and to adduce evidence for the purpose of establishing, as exactly as possible, what the repair of the vessel would have cost.

and by the formal judgment in the Exchequer Court, the relief had been limited to

> the damages to the vessel directly attributable to the collision with the obstruction in the vicinity of the pier as alleged, had such damages been ascertained immediately after the said collision, the amount thereof to be established by reference to the Court if the parties cannot agree.

In this Court, the Chief Justice and Davis J., dissenting on this question, would have allowed the suppliant the

(1) [1940] Ex. C.R. 199. (2) [1940] S.C.R. 153.

1944

HOCHELAGA SHIPPING & TOWING CO. LTD. v. THE KING.

amount of damages claimed in its appeal, but the majority of the Court (Rinfret, Crocket and Kerwin JJ.), the judgment of whom was written by Crocket J., were of opinion:

> that there was sufficient evidence to support the learned trial judge's finding that after the collision there was negligence on the part of the steamboat's officers in not discovering sooner than they did the extent of the damage caused to the vessel's hull in passing over the obstruction and that had they acted promptly and prudently in this regard, the vessel would not have continued its voyage for 3½ miles into the open bay.
>
> There can be little doubt that the total loss of the vessel and its equipment would have been avoided had an attempt been made either to return her to the wharf or to beach her at some nearby point. For this reason, though not convinced of the correctness of the statement appearing in His Lordship's reasons that the damage should be limited to the cost of the repair of the vessel, I concur in the terms of the formal judgment in so far as it declares that the suppliant is not entitled to compensation as for a total loss as claimed, but is entitled to recover the damages directly attributable to the collision. I would not, however, restrict the condemnation to damages to the vessel alone and would delete from the order the words "had such damages been ascertained immediately after the said collision", and leave the assessment open generally to such damages as are directly attributable to the collision. It is not at all clear upon the existing evidence that, had the extent of the damage to the steamer's hull been promptly discovered and the master brought her back to the dock or beached her at the nearest possible place, no further loss would have been sustained than the damages to the vessel itself, which were ascertainable immediately after her collision with the submerged obstruction.
>
> * * *
>
> For the above reasons I would dismiss the appeal with costs, allow the cross-appeal to the extent of varying the declaration of the formal judgment of the learned trial judge limiting the assessment of damages in the manner stated, and, failing an agreement between the parties, remit the case to the Exchequer Court for their determination on the basis of the suppliant being entitled to all such damages as are directly and naturally attributable to the collision. The suppliant, I think, is in the circumstances entitled to costs on its cross-appeal as well as on the appeal.

and by the formal judgment in this Court, the Crown's appeal was dismissed, the suppliant's cross-appeal was allowed, and the judgment of Angers J. was varied "by directing an assessment of damages in the manner stated in the reasons for judgment of Mr. Justice Crocket", and, failing agreement as to the amount, the case was remitted to the Exchequer Court for the determination of such damages.

The matter of assessment of damages, on the basis laid down by this Court, came before Angers J. By his judg-

ment (from which the present appeal is taken by the suppliant), he held: that the contention that it was impossible to bring back the *Ostrea* to the wharf or to beach her safely and that the loss of the vessel and her equipment was unavoidable, had been finally disposed of and was no longer at issue; and, on the evidence, that the *Ostrea* could have been brought back to the dock, securely, had someone on the vessel investigated carefully, immediately after the impact, to ascertain the extent of the damage, and in any case there was no difficulty in the way of beaching her on the west side of the breakwater, and further she could have been beached to the eastward, but, as there was a rocky bottom there, her hull would very likely suffer additional damage; that, with competent and prudent handling after the collision, the vessel, with her equipment, could have been saved; that if she had been brought back to the dock she probably would have sunk alongside the dock and would have had to be refloated; that it was reasonable to assume that the captain of a vessel, having two courses at his disposal, viz., taking her back to the dock or beaching her, would, the chances being equal, adopt the first one, thus avoiding the possibility of aggravating the damage in beaching the ship. He held that the suppliant should be allowed $3,000 for the cost of refloating and temporary repairs, $150 for a survey of the vessel, $500 for cost of repairing (a further allowance for taking her to a shipyard for repair would have been made had there been any evidence of such cost), $600 for the cost of salvaging the equipment, $60 for certain items of damage to the equipment (that, there being no amounts mentioned in connection with certain other items, nothing could be allowed therefor, the evidence was quite inadequate and unsatisfactory, and the burden of prooof was upon the suppliant; that much of the equipment would not have been damaged at all); that, as the petition was submitted on behalf and for the benefit of the underwriters, the question of loss of profits which the suppliant might have incurred need not be considered, as the underwriters had no interest in the profits, but had an amount been allowed, he would have been inclined to fix it at $400, representing the loss incurred during the period within which the repairs could have been properly effected. In the result, judgment was given for the suppliant for $4,310; without

1944

HOCHELAGA SHIPPING & TOWING CO. LTD. v. THE KING.

interest, as the Crown was not liable to pay interest except when provided for by statute or by contract. The suppliant was given the costs of the action.

The items referred to in the reasons for judgment in this Court *infra* as "supplies described as disbursements", as to loss of which no allowance was made in the judgment of Angers J., were: "coal, water, oil, waste, grease, dynamite, batteries, fuse, electric wires, food, lanterns, cutlery."

The suppliant appealed to this Court, alleging errors in the findings and holdings of Angers J., and asking for allowance of a largely increased amount.

W. C. Macdonald K.C. for the appellant.

F. D. Smith K.C. and *C. Stein* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—We think that in the assessment he made of the damages representing the loss of the *Ostrea* the learned trial Judge correctly appreciated and properly applied the directions contained in the judgment of this Court of the 9th of December, 1939 (1). We also agree with the learned Judge that no interest should be allowed on the amount awarded to the suppliant. The Crown is not liable to pay interest, unless the statute or contract provides for it; and such is not the case here.

It appears to us, however, that the suppliant is entitled to compensation for the loss of supplies described as disbursements. It is true that the evidence in respect of these disbursements was not altogether satisfactory; but, in our view, it establishes a loss to the value of at least $1,500, as a minimum.

Further, there is the question of the profits lost. The learned Judge said he felt inclined to fix them at $400, representing the loss incurred during a period of fifteen days within which repairs, in his opinion, could have been properly effected. He did not, however, allow the amount to the suppliant, on the ground that the petition was submitted on behalf of and for the benefit of the underwriters; and that the latter, according to him, had no interest in the profits. The judgment of this Court had already indicated that the appellant was entitled to the loss of profits while the *Ostrea* was undergoing repairs; and, moreover,

(1) [1940] S.C.R. 153.

with respect, in a case of this kind, the underwriters stand in the place of the suppliant and they are "entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss". (*Simpson* v. *Thomson* (1)). We are disposed to accept the amount mentioned by the learned Judge as representing the loss of profits, and we think that sum should be added to the award made.

In the result, the judgment appealed from should be modified and an additional sum of $1,900 added to the amount allowed to the suppliant. Otherwise the appeal should be dismissed. In view of the divided success, there should be no costs in this Court to either party.

Judgment below modified by allowing additional sum to appellant; otherwise appeal dismissed.

Solicitor for the appellant: *L. A. Lovett.*

Solicitor for the respondent: *C. J. Burchell.*