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

AND

HOCHELAGA SHIPPING & TOWING COMPANY LTD. (SUPPLIANT) ..... RESPONDENT.

1939

* May 1.
* Dec. 9.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Negligence—Construction of jetty by Dominion Government—Upper portion of it destroyed by storm and lower portion remaining under water entirely submerged—Vessel striking such portion—Damages not immediately ascertained—Subsequent sinking of vessel—Responsibility of the Crown—Whether damages limited to damages at the time of the collision.

The Dominion Government undertook, in 1931, the construction of a jetty, projecting at right angles to the large Dominion Government breakwater at Port Morien, Nova Scotia. Before the jetty was completed, about 50 feet of the upper portion of the outward end broke away during a storm in 1932, thus leaving the lower portion of the outer cribwork and its rock ballast remaining in position but entirely submerged. Some two years later, in September, 1934, the towboat *Ostrea,* the property of the suppliant, equipped for wrecking and salvage operations, became a total loss at sea as a result of having struck the submerged portion of the jetty which, the suppliant alleged, had been left without any buoy or other warning to indicate its presence there. It was established by the evidence that the master of the *Ostrea,* considering the collision as slight, did not ascertain immediately the extent of the damage caused to his vessel. The *Ostrea* continued on her way to

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1939

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

her salvage work; but after proceeding for about 25 minutes, a distance of 3½ miles, she appeared to be filling with water, and, a few minutes after all the men on board left her in lifeboats, she sank with all her furnishings and salvage equipment. The underwriters, being advised that the ship should be written as a total loss, paid the suppliant the sum of $20,016. The suppliant then submitted a petition of right on behalf of and for the benefit of the group of underwriters who were subrogated to the rights of the suppliant in respect of the loss. The Exchequer Court of Canada, Angers J., held that, in the restoration and changes made in the jetty, there had been negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon a public work; but he limited the relief to "the damages to the vessel directly attributable to the collision * * * , had such damages been ascertained immediately after the said collision." The respondent appealed and the suppliant cross-appealed.

Held, affirming the judgment of the Exchequer Court of Canada and dismissing the appeal to this Court, that, upon the facts of the case, the submerged cribwork, which was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation, and in leaving that obstruction without providing any such warning, the officials and servants of the Crown in charge of these works were chargeable with negligence for which the Crown is responsible by force of section 19 (*c*) of the *Exchequer Court Act;* but

Held, varying the judgment of the Exchequer Court of Canada and allowing the cross-appeal, that the amount of damages should not be restricted to those mentioned in that judgment.

Per Rinfret, Crocket and Kerwin JJ.: After the collision there has been negligence on the part of the ship's officers in not having discovered sooner than they did the extent of the damages; and 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. But the suppliant, although not entitled to damages as a total loss, should recover more than the cost of the repair of the vessel as allowed by the trial judge, and should be granted any other damages directly attributable to the collision.

Per The Chief Justice and Davis J.—The respondent is entitled to recover the total amount of damages claimed in the appeal.

Per the Chief Justice: The onus resting upon the Crown, to shew that the loss of the vessel did not follow in the ordinary course as the "natural and reasonable" result of running upon the obstruction under water, has not been discharged; the Crown has not established such negligence of officers in charge of the ship as constituting *novus actus interveniens. Canadian Pacific Ry. Co.* v. *Kelvin Shipbuilding Co.* (138 L.T. 369) ref.

Per Davis J.—The appellant would be subjected to a diminution of damages only it it be proved that those in charge of the vessel were guilty of negligence (as opposed to mere error of judgment) amounting to a *novus actus interveniens* which would have caused the extra damage; and there was no conclusive evidence that the vessel could have been saved from total destruction even if the leak in her had been discovered immediately after the collision.

APPEAL and CROSS-APPEAL from the judgment of the Exchequer Court of Canada, Angers J., which had maintained in part the petition of right presented by the suppliant to recover damages from the Crown.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

Charles J. Burchell K.C. and *Charles Stein* for the appellant.

W. C. MacDonald K.C. for the respondent.

THE CHIEF JUSTICE—I agree with the learned trial judge that the submerged cribwork which, after the superstructure of the jetty had been carried away, was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation; and that in leaving this obstruction without providing any such warning the officials concerned are chargeable with negligence for which the Crown is responsible by force of section 19 (*c*) of the *Exchequer Court Act*.

The only question presenting any difficulty is whether the onus resting upon the Crown to shew that the loss of the vessel did not follow in the ordinary course as the result of running upon this obstruction has been discharged.

The principle applicable can, I think, be taken from the judgment of Lord Haldane in *Canadian Pacific Railway Co.* v. *Kelvin Shipping Co. Ltd.* (1):

> The question is whether, after the original fault which started matters, there has been a *novus actus interveniens* which was the direct cause of the final damage.

He adds:

> When a collision takes place by the fault of the defending ship in an action for damages, the damage is recoverable if it is the natural and reasonable result of the negligent act, and it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the situation which the offending ship had created.

And later he says:

> It follows that the burden lies on the negligent ship to show by clear evidence that the subsequent damage arose from negligence or great want of skill on the part of those on board the vessel damaged.

(1) (1927) 138 L.T. 369 at 370.

1939

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

Duff C.J.

This is not, of course, a case of collision between two ships, but I can see no reason for thinking that the principle is not applicable. It is true also that there was not in the case before us any emergency: the matter of the vessel was not confronted with a difficult choice between course of action all attended with peril; but I have, nevertheless, come to the conclusion, although the question is a difficult one, that the Crown has not in this case established such negligence as constituted *novus actus interveniens*.

As Lord Wright said in *Caswell* v. *Powell* (1):

> Negligence is the breach of that duty to take care which the law requires either in regard to another's person or his property, or where contributory negligence is concerned, of a man's own person or property. The degree of want of care which constitutes negligence must vary with the circumstances * * * It is not a matter of uniform standard. It may vary according to the circumstances from place to place, from man to man, from time to time. It may vary even in the case of the same man.

I attach importance to a consideration to which, with the greatest possible respect, as it appears to me, the learned trial judge did not give the weight I think it deserves. The learned judge found that the work, presenting, as Captain Williams says, the appearance of a new wharf, but with the sunken cribwork projecting from it without a sign of its presence, constituted a trap. The master of the *Ostrea* had not the slightest reason to suspect the presence of any obstruction, natural or artificial, as he passed within a few feet of the end of the wharf. He had every reason for complete confidence in the assumption that he had plenty of water and for acting on that assumption. When he and the mate and the engineer realized that the vessel had struck something, it did not, it seems clear, occur to them that they had run upon an obstruction solidly in place in the bed of the harbour; or that the ship had suffered such damage as to make it unsafe or risky to proceed to their destination. The impact seemed so light that the engineer, as he says, "thought she rubbed up against the breakwater."

The captain says:

> Q. Now as to this bump; was it a serious bump?
> A. No. We experience worse than that every day. I did not think it anything out of the way but enough to roll her a bit.

(1) (1939) 3 A.E.R. 722 at 737.

The engineer says:

Q. One of the witnesses said they got bumps like that every day?

A. I have hit against scows and other things when docking and the bump would be 75 per cent harder than that.

Q. So that this was not a hard bump?

A. No, sir, the ship seemed to run on something and listed to starboard.

Q. Could you tell that it struck forward?

A. Yes, from her listing and the fact that I felt no bump aft.

Q. Bumps of this kind happen daily?

A. But this was not exactly a bump. Maybe in the after end I would not hear the sound like they would, but I remember the vessel running up on something and her listing to starboard.

I cannot help thinking that, had they suspected the existence of the tangled mass of logs and rocks against which they had run,—had they realized the character of the obstruction with the risks involved in running against it,—the attention of the master and his officers would have been at once aroused to the practical possibility of substantial damage and that they would have proceeded more energetically in ascertaining the effects of the impact.

I do not think the authors of the original wrong can escape responsibility for the failure on the part of the officers of the vessel to appreciate instantly the serious nature of what had occurred and for any lack of energy in their investigation. I am inclined to think that the language of Lord Sumner in the *Paludina* (1) (referring to the facts in the *City of Lincoln* (2)) may not unfairly be adapted to the circumstances with which we are concerned: "The hand of the original wrongdoer was still heavy on" them, and their own management of the vessel " was not the sole human agency determining" the loss of the vessel.

I am disposed to think that the original wrongdoing which created the trap is chargeable, not only with leading the *Ostrea* into danger, but also with lulling her officers into a false confidence in the innocuousness of the blow they had received by concealing from them the character of the obstruction they had encountered. In these circumstances, although, as I have said, I have found the question a difficult one, I am with respect unable to agree that the Crown has shown " by clear evidence " that the loss

(1) [1927] A.C. 27. (2) (1889) 15 P.D. 15.

1939

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

Duff C.J.

of the ship "arose," to repeat Lord Haldane's words, "from negligence or great want of skill on the part of those on board."

The appeal should be dismissed and the cross-appeal allowed with costs throughout.

The judgment of Rinfret, Crocket and Kerwin JJ. was delivered by

CROCKET J.—During the years 1931, 1932 and 1933, the Federal Department of Public Works constructed a jetty as an addition to an old Government breakwater at Port Morien, a village on the north shore of Cow Bay, in Cape Breton, the added jetty running west from and at right angles to the old breakwater and forming with the original breakwater a small harbour protected from the sea on the east and south sides. The new structure consisted of a framework of cribbed logs fastened together by heavy bolts and ballasted with stones and rocks of various sizes from 10 to as much as 150 to 200 pounds. It was protected on either side by planking and tapered from a width of 26 ft. at the bottom to 16 ft. at the top. A length of 105 ft. of the jetty was completed in the year 1931 and a block or crib partially constructed for its extension by another 105 ft. during the year 1932. The framework of the last crib had been constructed on the shore to a height of 6 or 7 ft., including a ballast floor, in the latter part of 1931, when, the appropriation having been exhausted, the work was suspended. It had proceeded under the control of T. J. Locke, resident district engineer of the department of Public Works at Halifax, and the supervision of Duncan H. McDonald, his assistant district engineer, who had acted as inspecting engineer of the Department of Public Works in Cape Breton for a number of years. In May, 1932, a further appropriation having been granted, Henry T. Munro was notified by Locke of his appointment as foreman for the continuation of the work and the operations were resumed under his immediate control and the supervision of McDonald in July. The partially constructed crib after having been reinforced by the addition of more logs was towed to the end of the completed jetty, ballasted and sunk in its proper position. It was then raised to its proper height by further cribbing

and ballasting. In the month of September, while this work was in progress and before the ballasting had been completed, the top portion of the outer end of the crib for a distance of about 50 ft. was swept away by a violent storm and the wooden framework driven on a reef. The work on the extension of course ceased beyond the employment of two or three men to clear up the floating wreckage. Though McDonald went to Port Morien shortly afterwards and conferred with Munro on the situation, no further work was done on the extension until the late summer of 1933, the 1932 appropriation having been exhausted. In the meantime a report seems to have been made to the district engineer's office of a further examination of the situation made by McDonald in July, recommending that the jetty be squared off and sheeted at the point from which the upper framework had been torn away by the storm—approximately 155 ft. out from the old breakwater—and this crib framework utilized in the construction of a return L running about 50 ft. northerly towards the shore. A further appropriation of $2,000 had been placed at the disposal of the Resident Engineer's office for this work. A new foreman (John Martel) was appointed and carried the job on to final completion in October, 1933, under the direction and supervision of assistant engineer McDonald. No effort, however, was made to clear away the submerged portion of the damaged crib beyond the sawing off of a few projecting logs, which could be seen a few feet below the water line and which could be reached by a five-foot cross-cut saw at the point where the 50-foot section broke away. Martel said he did not go down to the bottom because there was ballast there covering the lower logs. No diver was employed by the department for the purpose of examining this submerged obstruction, but in December, 1934, after the loss of the steam tug *Ostrea,* hereinafter referred to, a diver named Hennessy examined it at the instigation no doubt of the suppliant company. According to his evidence as given on the trial as a witness for the suppliant, the submerged obstruction consisted of a mass of rock and round logs tangled into one another and extending perhaps 3 fathoms out from the head of the jetty, and rose at its centre to within 5½ feet of midwater level, as measured by his assist-

1939

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

Crocket J.

ing tender. The tender confirmed this evidence as to the depth of water above the obstruction at this point and produced a record showing that beyond the obstruction, 18 feet out from the jetty, the water depth was 11½ feet. No attempt was ever made to chart, buoy or mark this obstruction in any way.

In September, 1934, the suppliant's steam tug, the *Ostrea,* equipped for wrecking and salvage operations, was working on the wrecks of two steamers some few miles apart in Cow Bay and occasionally came into Port Morien, docking at the new Government wharf there to land some of the material salvaged, though it appeared she took most of it to Louisburg. She came in during the afternoon of September 21st and docked at the new Government wharf behind the new jetty, headed south. There were a large number of fishing boats anchored behind her, which necessitated some manoeuvreing in backing out from the dock early next morning and heading for the bay. The *Ostrea,* which was a boat of composite construction having a steel frame and wooden shell, was 70 or 80 ft. long with a beam of 18 or 20 ft. and a draft of 4 ft. 3 in. at the stem, gradually increasing to 7 ft. at the stern. According to the evidence of her master (Williams), who was at the wheel with his mate (King) beside him, the tug cleared the end of the new jetty by 5 or 6 ft., but in doing so experienced a little roll and a few bumps, which caused her to list over a bit. He had no knowledge of the existence of the submerged obstruction. The mate remarked that they had struck something and Williams sent him down to the chief engineer to see if there were any leaks or if anything was wrong below. King returned to the bridge and reported to the captain that the engineer had said No. Williams remained at the wheel until he passed a buoy marking the submerged remains of the outer end of the old breakwater, which he said was 30 yards away on the port side when, everything now being clear and the tug headed for the open bay, he gave the wheel to King and went to lie down in his berth. In about 25 minutes King told him he could hardly steer her. Williams jumped up immediately and saw that the boat was down by the bow. The engine was reversed and all

hands got into a life-boat and when they had pulled away about 100 yards the steamer went down about 3½ miles out from the jetty.

The *Ostrea* was insured with several marine underwriters and the suppliant thereafter filed a petition in the Exchequer Court on behalf of and for the benefit of these underwriters, who were subrogated to its rights in respect of the said losses, praying that the Crown be condemned to pay the sum of $22,016.50 and such further and other sums as the court might deem meet.

In its petition the suppliant alleged that the loss of the steamship with her equipment resulted from the negligence of officers or servants of the Crown while acting within the scope of their duties or employment upon a public work and that the said negligence consisted in not replacing the top part of the outer end of the jetty nor removing the said under portion and allowing the said under portion to remain and continue up to the time of the collision in a submerged, dangerous and unsafe condition, wholly uncharted, unbuoyed and unmarked and so as to constitute a menace to those lawfully engaged in the navigation of navigable waters. The petition further alleged that the value of the tug and her equipment at the time of their loss was $10,000 and the value of the salvage equipment $9,016.50 and that the suppliant sustained additional loss and damage of $3,000.

In its statement of defence the Crown denied that the jetty was built by officers or servants of the Crown, acting within the scope of their duties or employment or otherwise or at all, and that the said under portion was left in a dangerous condition as alleged in the petition. The defence also denied that the tug while rounding the jetty came into collision with the said obstruction and alleged contributory negligence upon the part of the officers and crew of the tug.

The petition came on for trial before Mr. Justice Angers at Halifax in June, 1937. His Lordship held that the case was governed by s. 19 (*c*) of the *Exchequer Court Act;* that the jetty was a public work within the meaning of that section; that the *Ostrea* struck the submerged under portion of its outer end and that the collision was attributable to the negligence of officers or servants of the Crown,

1939

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

Crocket J.

i.e., the district engineer and assistant district engineer, under whose supervision the construction of the jetty and its reparation after the top part of the outer end thereof had been partially washed away were effected, acting within the scope of their duties or employment upon a public work.

Dealing with the contention of the respondent that the Crown was not bound to keep in repair any public work and that it could not be held liable for injuries resulting from the unsafe condition thereof, the learned judge, while assenting to this submission and stating that s. 19 (*c*) seemed to exclude the case in which the injury was the result of non-repair or non-feasance, added that in some cases non-repair or non-feasance may constitute a hazard or, in other words, create what is called a trap and bring about a condition which renders an accident almost unavoidable. "This," he said, "is what happened in the present case."

His Lordship found, however, 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 the vessel by the collision before proceeding to sea. In this connection he said:

> 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.

He therefore held that the damage for which the respondent was liable should be limited to the cost of the repair of the vessel. As unfortunately there was no evidence in the record enabling him to determine this cost, he suggested that if the parties could not agree on the amount they should have liberty to refer the matter to him and to adduce evidence for the purpose of establishing as exactly as possible what the repair of the vessel would have cost.

The formal judgment declared that the suppliant was not entitled to the entire relief sought by the petition but that he was entitled to recover the damages to the vessel directly attributable to the collision had such damages been ascertained immediately after the said collision and

that the amount thereof be established by reference to the court if the parties could not agree, and that the respondent pay to the suppliant its costs of the action.

The evidence of the material facts I have endeavoured to outline is undisputed and I think fully justifies the conclusion of the learned trial judge, not only that the *Ostrea* struck the submerged and invisible obstruction in turning around the end of the jetty, but that its collision therewith was attributable to such negligence on the part of officers and servants of the Crown, while acting within the scope of their duties or employment upon a public work as rendered the Crown responsible therefor under the provisions of s. 19 (*c*) of the Exchequer Court Act. It was not a case of mere non-repair or non-feasance, but of the actual creation of a hidden menace to navigation by a Department of the Government through its fully authorized officers and servants in the construction of a public work.

I am of opinion also 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

1939

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

Crocket J.

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. This phase of the case was not satisfactorily investigated on either side, though one of the witnesses, Waterhouse, supervisor of masters and mates for the Department of Transport at Halifax, did express it as his opinion that if the boat had been run to the nearest shore or returned to the dock she might fill up, but would not have sunk. Many other considerations might well enter into the assessment of the damages, which would have resulted from the collision, had the damaged steamer not proceeded on her voyage and an attempt been made either to manoeuvre her back to the dock or to beach her at the nearest possible place. For instance, assuming that the steamer had been safely brought back to the dock, it would seem to be almost certain that she could not have been prevented from filling up and, though not entirely disappearing, from settling on the bed of the water basin within the L. The consequent flooding of her engine and other machinery and the general depreciation of the steamer by such flooding and settling could scarcely be said not to be directly attributable to the collision, not to speak of the expense of raising and refloating her, or possible damage to the loose wrecking and salvage equipment, most of which, it seems, was kept in the alleged water-tight forward bulkhead. Or, assuming that the steamer had been beached on the nearest available shore, it could scarcely be that such a course would not have entailed considerable additional damage. In either event the owner would be entitled to recover the cost of restoring the vessel to as good a condition as she was in before the collision and if that were impossible to an allowance for such depreciation as may have occurred by reason of her having been completely flooded or further damaged by the attempt made to minimize the loss, and also for any loss proved to have resulted directly from the enforced suspension of its operations during the time required to make the necessary repairs. In this connection I may refer to Dr. Lushing-

ton's exposition of the rule applicable in a case where a ship is partially damaged. In "*H.M.S. Inflexible*," (1),

"When a ship is partially damaged," he said,

> the principle is clear, *restitutio in integrum;* the application often difficult. First, then, as to consequential damages, an expression the precise meaning of which has not, to my knowledge, been defined by any authority, nor do I mean to attempt it. In the present case, regard being had to the particular circumstances, *restitutio in integrum* is the amount of loss sustained, and that amount consists of the expense of repair and a just compensation for the non-employment of the ship whilst under repair; and that just compensation must again consist of the expense of detention and amount of profit lost. Such, I apprehend, are the general principles which a judge at *Nisi Prius* would lay down for the direction of a jury in a case in which it was their duty to assess the damage.

Of course in a case such as this, where a steamship has been so damaged by running over a hidden obstruction and rendered so leaky that upon proceeding 3½ miles to sea she suddenly sank and became a total loss, and where the trial judge has found that the original damage was caused by the negligence of the respondent in the creation of the obstruction, but that the steamship's officers were guilty of negligence in proceeding to sea without ascertaining the extent of the damage to her hull, and could have avoided a total loss by returning to the dock, and therefore held that the suppliant was entitled only to the cost of the repairs, which might have been necessary had the steamer in fact returned to the dock, it is difficult to determine with any degree of certainty the condition of her hull immediately after the collision or what the cost of repairing that condition would be. The existence of such difficulty, however, does not relieve the respondent from liability to compensate the ship's owner for such damage as can fairly and reasonably be held to be really attributable to the ship's striking the submerged obstruction. It matters not whether the whole of such damage was ascertainable before or after the master's negligent failure to discover the extent of the injury to the ship's hull, so long as it was suffered as a direct and natural consequence of the collision. The effect of the latter negligence was simply to relieve the Crown of liability for the ship's foundering in the open sea and thus becom-

(1) (1857) 1 Swabey 200, at 204.

1939

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

Crocket J.

ing a total loss, which the respondent would otherwise have had to make good. The fact that the ship did founder in the open sea after so short a run from the site of the collision nevertheless shews the serious nature of the injury caused to her, and it seems to me should have a material bearing, not only on the question of the probable cost of repairing her if the master had made an attempt to get her back to the dock or to beach her after the collision and the lapse of a reasonable time in which he might have ascertained the extent of the damage done to her hull, but also upon the question of depreciation, the length of time which would probably be required for necessary repairs and her consequent enforced idleness, and other items of damage, which would probably have followed as the direct and natural consequence of the collision.

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.

DAVIS J.—In 1931, the Dominion Government undertook the construction of a jetty, projecting at right angles to the large Dominion Government breakwater at Port Morien in the province of Nova Scotia, for the better protection of numerous small fishing boats which were accustomed to find shelter in the safe anchorage of the bay at that point. There was no harbour at Port Morien except that which was afforded by the breakwater. This jetty or extension to the breakwater was in a location which exposed it to the full force of the Atlantic storms. The proposed jetty was to be about 210 feet long, with a width of 26 feet at the bottom and of 16 to 17 feet at the top, and 12 or 13 feet in height. The method of construction was cribwork made of logs and timber, with stones running in weight as high as 150 and 200 pounds

being used as ballast. Before the jetty was completed, about 50 feet of the upper portion of the outward end broke away during a storm on September 9th, 1932. This left the lower portion of the outer cribwork and its rock ballast remaining in position but entirely submerged. The inner portion of the jetty, about 50 feet in length, was not damaged; it withstood the storm because the ballasting of that portion had been completed.

Some two years later, on September 22nd, 1934, the tow-boat *Ostrea* became a total loss at sea; the suppliant claims as a result of having struck the submerged portion of the jetty that had been left undisturbed and without any buoy or other warning to indicate its presence there. The *Ostrea* was a boat used for salvage operations, some 70 or 80 feet in length and between 18 and 20 feet wide. Her draught was about 7 feet. She was of composite construction—a wooden covering with a steel frame.

In this action in the Exchequer Court, on a petition of right to recover for the loss of the ship and its equipment, no negligence was alleged against the Crown prior to the date of the storm and we are therefore not called upon to enquire into the method of construction of the jetty. Mr. Burchell, in his clear and forceful argument on behalf of the Crown, contended that there was no obligation upon the Crown to rebuild the damaged portion of the structure, or to remove the cribwork and ballast that remained submerged, or to place any buoy or other warning sign at the place. It may be that the Crown was under no such obligation, but it is unnecessary to express any opinion on that point. What actually happened was this: At the time of the storm in September, 1932, the appropriation of $3,000 for the work had become exhausted and the government engineers decided that in any event it was too late in the season to do any further work that year. On July 20th of the next year the district engineer of the Department of Public Works and his assistant visited the site and decided that the submerged portion was not suitable as a foundation for new cribwork, and abandoned it. They decided to saw off the logs that were sticking out at low water and these were cut down to the ballast. The end of the jetty which had not been washed away was squared off and spiled in order to support and

1939

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

Davis J.

strengthen it. The cribwork that had been washed ashore was used to make an L at what had become the end of the jetty. This work was done under the instructions of the district engineer of the department of Public Works. Two thousand dollars appears to have been appropriated in that year, 1933, to do the work that was then undertaken, and it was completed at the end of October, 1933. The jetty then "looked as if it were a new wharf that had just been built"; but immediately outside the apparent end of the jetty there remained the submerged cribwork of tangled logs and rocks, wholly invisible and unmarked.

No more work appears to have been done up to September 21st, 1934, when the towboat *Ostrea* arrived at Port Morien and was berthed inside the jetty. She had come to Port Morien as a base for salvage operations on the wreck of the steamer *Watford,* which had gone ashore on the coast a few miles distant from the harbour, during the same storm that had carried away the outer end of the jetty. In the early morning of September 22nd, 1934, the *Ostrea* left her berth in good condition to take up her salvage work in Morien Bay. While on her way out, and at a distance of 5 or 6 feet from the apparent outer end of the jetty, the suppliant contends she came into collision with the submerged outer portion of the jetty that had been abandoned and as a result subsequently sank and became a total loss. The trial judge was satisfied that the *Ostrea* struck the submerged rock or cribwork, and the evidence amply justifies that finding of fact. With the tide conditions at the time of the collision, the submerged cribwork at its highest point was covered with only 5½ feet of water. The collision caused the *Ostrea* to spring a leak, though that fact did not become at once apparent to those on board. She continued on her way to her salvage work but after proceeding for about twenty-five minutes, a distance of three and a half miles, it became apparent to those on board that she was filling with water. They could do nothing at that time to save her and were obliged to get into the life-boats to save themselves. A few minutes after they left her, the *Ostrea* with her furnishings and salvage equipment, sank. Subsequently the underwriters had their representative locate the wreck.

He took soundings and recommended to the underwriters that owing to the exceptional condition of the coast and the cost necessary to raise the ship, she be written off as a total loss. The underwriters paid the suppliant the sum of $20,016, made up as follows: $8,000 for the hull; $9,016 for the salvage equipment; and $3,000 for the disbursements. The suppliant then submitted a petition of right on behalf of and for the benefit of the group of underwriters who were subrogated to the rights of the suppliant in respect of the loss.

The case made against the Crown is that having undertaken and completed the restoration and change in the structure, leaving the impression upon those using the waters at the point that the end of the jetty was as it appeared above water, it was negligence on the part of the officers or servants of the Crown not to have either removed the submerged rocks and cribwork, or, placed a buoy or some warning of their existence and danger; in other words that it was not, as contended by the Crown, a case of nonfeasance but was in fact a case of misfeasance. That was the view of the evidence accepted by the learned trial judge and I think it was right. The Crown undertook the repair and reconstruction of the structure and did it in such a manner as to create a condition dangerous to those using the waters beside it. While in one sense the acts complained of might be regarded as an omission, in substance the result of the acts of those in charge of the work of restoration of the jetty constituted misfeasence.

The claim in question was put forward under sec. 19 (*c*) of the *Exchequer Court Act*, R.S.C., ch. 34, which is as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> (*a*) * * *
>
> (*b*) * * *
>
> (*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 upon any public work.

That the submerged portion of the jetty was part of a public work is really not disputed. The appellant's factum admits that it is obvious " that the submerged portion of

1939

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

Davis J.

the cribwork would still be of some value as a breakwater to protect the inner harbour, which was the purpose for which the jetty or extension to the L of the breakwater was originally built." What is contended for by the Crown is that the Exchequer Court had no jurisdiction because there could be no duty on the Crown to remove the submerged pile of ballast; consequently no duty on any officers or servants of the Crown to remove it and a fortiori no negligence on the part of officers or servants of the Crown in not removing it. But I agree with the view taken by the learned trial judge on the evidence, that is, that in the restoration and changes made in the jetty, there was negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon the public work.

The learned trial judge declined to declare the suppliant entitled to relief to the extent of the total loss of the ship and its equipment. He limited the relief to (I now quote from the formal judgment)

> 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 escertained immediately after the said collision,

and directed that the amount of the damages so awarded should be established by a reference if the parties cannot agree. In his written reasons for judgment the learned trial judge on this branch of the case put his conclusion this way:

> I am of opinion, however, 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.

The learned judge then proceeds to refer to some of the evidence, and concludes:

> 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.

The limitation put by the trial judge upon the relief sought is such that it might only amount to a few dollars.

If the fact that the ship had sprung a leak in striking this submerged rock or cribwork had been immediately known to the master of the ship and he had at once beached the boat, if this were practicable, the cost of repairing the hull might well have been a small sum. The judgment limits recovery to "the damages to the vessel" directly attributable to the collision, "had such damages been ascertained immediately after the collision."

With the greatest respect I find myself unable on a review of the evidence to agree with the trial judge's conclusion on this branch of the case. Nothing is easier, in this sort of case, after all the facts and circumstances are known, than to suggest that if something else had been done than that which was done, the consequences might not have been what they were. But that is hindsight. The test is, what should a reasonable man under the circumstances have done? Did he exercise reasonable judgment on the facts as he knew them at the time? Now this little towboat, the *Ostrea,* equipped for and engaged in salvage work along the Atlantic coast, is not to be thought of in terms of a large passenger steamship running in a regular channel. If a ship of that sort strikes something in the course of its regular route, it immediately arouses anxiety of a grave concern, and the duty of the master is very plain. But this towboat, in the very nature of its operations, was, according to the evidence, constantly bumping up against different obstructions. It was nothing unusual. No one on board seems to have had the slightest fear that what had happened would cause the boat to spring a leak and sink. I quote from the evidence of the master:

> In crossing the end of that wharf the L was very close but we did not hit, but right past the end of that I struck something in the water; there was a little roll, but it was not bad, not much of a knock, but the mate asked me what I thought was there. The mate was on the bridge alongside of me. He said "We struck something," and I said "Yes." She listed over a bit, there were a few bumps, so I sent the mate down to the engine room to see if the engineer had heard it and to ascertain if any damage was done, if the ship was taking any water; I never thought any more about it.

And on cross-examination:

> Q. Now as to this bump; was it a serious bump?
>
> A. No. We experience worse than that every day. I did not think it anything out of the way but enough to roll her a bit.

1939

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

Davis J.

The mate testified that he felt a "bump," and I take the following from his cross-examination on this point:

Q. Did you make any investigation of your own in regard to this bump?

A. No, sir, I just went by the Captain's orders.

Q. Was this bump any different to bumps which you experience every day?

A. No, sir, not to me.

* * *

Q. This was not then an extraordinary hard bump or anything of that nature?

A. No.

Q. And there was nothing to indicate that it was something serious?

A. No.

Q. Or put you on your guard in any way?

A. No.

The engineer, when asked for his version of the accident, stated:

For a short time as we were going ahead the boat lurched over to starboard; I thought she rubbed up against the breakwater. She hit some obstruction anyway.

On cross-examination:

Q. Was it unusual to feel a bump of the type you felt that morning?

A. Yes, it was, while on that boat.

Q. One of the witnesses said you got bumps like that every day?

A. I have hit against scows and other things when docking and the bump would be 75 per cent harder than that.

Q. So that this was not a hard bump?

A. No, sir, the ship seemed to run on something and listed to starboard.

Q. Could you tell that it struck forward?

A. Yes, from her listing and the fact that I felt no bump aft.

Q. Bumps of this kind happen daily?

A. But this was not exactly a bump. Maybe in the after end I would not hear the sound like they would, but I remember the vessel running up on something and her listing to starboard.

It did not occur to the engineer, apparently, that any investigation should have been made by him at the time to see if the boat was taking water. The master of the ship certainly did not suspect that any appreciable injury was done to his boat, and in sending his mate down to the engine room and ascertaining from him that no damage had apparently been done, he did what, under all the circumstances, can be said to have been all that could be reasonably expected of him. There is no doubt, in the light of what we now know, that it would have been

prudent for the master to have caused a more careful examination to be made at the time, but whether his conduct was reasonable or not must be tested by what he knew or suspected at the time. Two experts were called for the Crown and testified as to what they thought the proper thing for the master of the ship to have done but Patterson, who is Superintendent of the Halifax Ship Yards, was a ship builder and as such would know and appreciate the serious effect that even a somewhat light bump might have on a boat of composite construction such as the *Ostrea,* and Captain Waterhouse, now Supervisor and Examiner of Masters and Mates for the Department of Transport for Eastern Canada, had been a master of large vessels and his experience had been limited to them. A small towboat like the *Ostrea,* by its very construction and use, is adapted for and subject to a good deal of "bumping" in its work of salvage along the coast.

The appellant is entitled to a diminution of damages only if it be proved that those in charge of the respondent's vessel were guilty of negligence (as opposed to mere error of judgment) amounting to a *novus actus interveniens* which caused the extra damage. *The Pensher* (1); *The Metagama* (2); *The Genua* (3). The question is whether the suppliant was guilty of such negligence after the collision as would make that negligence the direct cause of the final damage. There is no conclusive evidence that the *Ostrea* could have been saved from total destruction even if the leak in her had been discovered immediately after the collision, and it may be that she did not begin to leak until after she had proceeded a short distance on her way. The evidence is that a ship of the construction of the *Ostrea* would sink much more quickly than an ordinary boat. Capt. Waterhouse, who gave it as his opinion that if soundings had been taken immediately after the collision and the *Ostrea* found to have been leaking, she should have been run to the nearest shore water or returned to the wharf and put in a position where, if she did fill up, she would not sink, admitted on cross-examination that he had never been in Port Morien; whereas Munroe, a resident of Port Morien, stated that the coast line at Port Morien was rugged and rough all the way along.

(1) (1857) Swab. 211, at 213. (2) [1928] S.C. (H.L.) 21.
(3) (1936) 2 All E.R. 798.

1939

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

Davis J.

Counsel for the appellant did not ask before us for the full amount claimed, $20,016, but for $19,666.50 (taking off $350 in view of the evidence as to the value of the provisions, stores, etc., lost).

I would dismiss the Crown's appeal with costs and would allow the cross-appeal to the extent of $19,666.50, with costs of the action and of the cross-appeal.

Appeal dismissed and cross-appeal allowed with costs.

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

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