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*Oct. 28.
*Dec. 1.

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

AND

CANADA STEAMSHIP LINES, LIMITED, AND ANOTHER (SUPPLIANTS)... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Navigation company—Wharf—"Slip" in bad condition—Accident in landing passengers—Inspection by government employee—Failure to make report—Liability of the Crown—Knowledge by the navigation company—Joint liability—Practice and procedure—Printing of appeal case—Failure to print exhibits in chronological order—No costs allowed for preparing and printing case—Rule 12, Supreme Court Act—Exchequer Court Act, s. 20c, as amended by 1917, c. 23, s. 2—Arts. 1106, 1117, 1118 C.C.

The respondents seek to recover from the Crown $65,744.61, being the amount of claims paid out by them for personal injury and loss of property sustained by passengers landing from the ss. *Richelieu* owing to the collapse of the landing slip on a government wharf at L'Anse Tadoussac on the 7th July, 1923. The wharf, built in 1910-12, had been but little used. Early in 1923 the Canada Steamship Lines applied to the Minister of Public Works to have it put in condition. The minister assented and estimates for the cost were sanctioned late in June or early in July, 1923. To the knowledge of the navigation company, no substantial repairs to, and no thorough inspection of, the wharf had been made. Without further notice to the government, the steamboat *Richelieu* began to use the wharf in the latter part of June. On the fourth trip, 4th July, amongst the passengers disembarked at the wharf was one Brunet, a government engineer, then on a trip of inspection for his department. Brunet, seeing the crowd disembarking, had some apprehension as to the safety of the slip and made, the next day, a casual and perfunctory examination of it. Before leaving Tadoussac that evening, Brunet, instead of

PRESENT:—Anglin C.J.C. and Duff, Mignault and Rinfret JJ. and Middleton J. *ad hoc*.

clearing up his suspicions by an immediate personal inspection, or at least promptly reporting his fears to the Department of Public Works at Quebec, or warning the officers of the steamship company of the probable danger of using the slip in its then condition, merely asked one Imbeau, not a permanent or regular employee of the government, to examine the slip and to report to the department at Quebec the result of his inspection. Imbeau's report as to the bad condition of the slip, dated 7th July, was not received at Quebec until the 9th of July.

Held, reversing the judgment of the Exchequer Court of Canada ([1926] Ex. C.R. 13), that the Crown was not under contractual obligation to the Canada Steamship Lines to provide at L'Anse Tadoussac a reasonably safe landing place for passengers, the $2,000 per annum accepted by the Crown "in payment of commutation of wharfage" not being the equivalent of a rental for the use of the government wharves between Quebec and Chicoutimi.

Held, also, that Brunet, in allowing continued use of the wharf and slip pending Imbeau's report and in failing to give warning to the steamship company, was guilty of negligence as an "officer or servant of the Crown while acting within the scope of his duties or employment upon a public work" (*The King* v. *Schrobounst* ([1925] S.C.R. 458); and his neglect entailed liability of the Crown for consequent injuries in person and property sustained by passengers in attempting to land on the slip.

Held, also, that the Canada Steamship Lines was also guilty of negligence, in using the wharf and slip, without making an inspection of their condition and without intimating its intention to use them to the government from which it had demanded repairs that its officers knew had not been made.

Held, therefore, that there was a "common offence or quasi-offence" of the steamship company and of the appellant resulting in a joint and several obligation on their part to persons who sustained consequential injury (art. 1106 C.C.), with the result that there must be an apportionment of responsibility between these co-debtors (art. 1117 C.C.) and that one of them, the steamship company, having paid the debt in full, can recover from the other only the share and portion (in this case one-third) for which, *inter se,* such other was liable (art. 1118 C.C.). With this right of recovery, subrogation has nothing to do.

Costs of preparing and printing the appeal case disallowed the appellant on account of flagrant disregard of rule 12 of this court requiring exhibits to be printed in chronological order.

APPEAL from the judgment of the Exchequer Court of Canada (1) maintaining a petition of right against the Crown with costs and referring the case to the registrar of the Exchequer Court to enquire and report upon the amount of damages sustained by the suppliants.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

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Léon Garneau K.C. for the appellant. The injuries to the persons mentioned in the petition of right did not result from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The Steamship company took possession of the wharf and operated the slip in question without previously notifying and warning the Crown of its intention so to do.

The Steamship company had applied to the Crown to have certain improvements made to such wharf and was aware that the Parliament of Canada had been asked to vote certain money appropriations for the purpose of carrying out such improvements, and before such appropriations were voted and available, the Steamship company proceeded, without warning to the Crown, to make use of such wharf and slip.

The Steamship company, its officers, employees and servants, before beginning to use such wharf, failed to examine the slip thereof and failed to notify the Crown of its possible dangerous condition.

The Steamship company caused such slip to be overloaded.

If the accident complained of was due to the wharf and slip in question not being in a proper state of repair, there was no duty on the Crown or on any Minister of the Crown to keep same in repair for the failure of which a petition of right lies against the Crown.

The facts complained of do not constitute a ground of relief by way of petition of right against the Crown in virtue of the provisions of the Exchequer Court Act.

The suppliants have no recourse against the Crown *ex contractu.*

The passengers injured in the accident complained of had no recourse in damages against the Crown.

The suppliants could not be subrogated in the alleged claims of the injured passengers and such subrogations are null and void.

The petition of right was founded on such subrogations and no amendment should have been granted allowing suppliants to change the nature of their petition and to sue on a new basis of action which was outlawed and prescribed.

J. A. Mann K.C. and *W. J. Chipman K.C.* for the respondents. Even had there been no duty on the part of the government engineers and their assistants and foremen to carefully examine the structure prior to the spring of 1923, an onerous duty was thrown upon them immediately that it became known that heavy traffic was about to use the wharf, but they all failed in the performance of a duty palpably necessary to be performed.

The Crown was under contract to supply the Steamship company with a safe landing for its passengers. The necessary, immediate and foreseeable consequence of the failure to fulfil this obligation would be injury to those who used the defective slip and consequent liability of the Steamship company to its passengers.

Under section 19 of the Exchequer Court Act, liability for breach of contract is not the only liability. The subject may seek relief "in respect of any matter which might in England be the subject of a suit or action against the Crown." It is submitted that in England there may be an action against the Crown for tort in the circumstances of this case and that the prerogative of the Crown does not apply where the Crown has undertaken duties of a managing nature which are not political but which are normally left to private enterprise. If there is an action for tort, the responsibility will be determined according to the law of the province in which the cause of action arises.

The Crown is liable under section 20c of the Exchequer Court Act. This is an express statutory liability accepted by the Crown for the particular case of quasi-delict by an employee in the course of his employment. The liability once accepted, the provincial law becomes applicable. It is submitted that the facts in this case show a series of negligences by public servants engaged in public work which were directly responsible for the accident upon which this case is founded. That the expression "on any public work" has not a geographical but a functional significance is settled by the case of *The King* v. *Schrobounst* (1).

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The judgment of the court was delivered by

ANGLIN C.J.C.—This action arises out of claims for personal injury and loss of property sustained by passengers landing from the ss. *Richelieu,* owned and operated by the respondent Canada Steamship Lines, Ltd., owing to the collapse of the landing slip on the government wharf at L'Anse Tadoussac on the 7th of July, 1923. These claims were settled by the respondent Canada Steamship Lines and its insurers (and co-respondents), the Travellers' Insurance Co., and the amounts paid out by them, respectively, they seek to recover from the Crown by petition of right.

The learned trial judge held the Crown liable to indemnify the respondents on the ground that it had undertaken a contractual obligation to Canada Steamship Lines to make reasonably safe and sufficient provision for the landing of passengers from its steamboats, *inter alia,* at L'Anse Tadoussac wharf.

Two main questions arise on this appeal: (*a*) whether there was breach of a contractual obligation owed by the Crown (appellant) to the respondent Canada Steamship Lines in regard to the wharf at L'Anse Tadoussac entailing liability for consequential damages to that company; and, alternately, (*b*) whether the injuries suffered by the passengers from the *Richelieu*

resulted from the neglect of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work

so as to entail liability of the Crown under s. 20 (*c*) of the Exchequer Court Act, as amended in 1917 (c. 23, s. 2).

In the event of liability under s. 20 (*c*) being affirmed, a further question emerges, namely, (*c*) whether there was also negligence of the respondent Canada Steamship Lines in connection with its use of the L'Anse Tadoussac wharf sufficient to bring this case within the purview of arts. 1106 and 1118 C.C. Another phase of the appeal has to do with the efficacy of subrogations taken by the respondent, The Travellers' Insurance Co., when making payments under its insurance contract with its co-respondent.

(*a*) In determining that the Crown was under a contractual obligation to the Canada Steamship Lines to provide at L'Anse Tadoussac a reasonably safe landing place for passengers from that company's steamboats, the learned

trial judge treated acceptance by the Crown from the company of a sum of $2,000 per annum for the use of the Government wharves between Quebec and Chicoutimi as implying such an obligation. But, with respect, the learned judge's attention does not seem to have been directed to the significance of the fact that by the Order in Council of the 27th of February, 1917, which provided for the annual payment of this amount of $2,000, it is stated to have been agreed upon with Canada Steamship Lines, Ltd. " as commutation of wharfage," i.e., of wharfage tolls, and in the departmental letter of the 22nd of May, 1923, acknowledging the company's cheque for $2,000 for the season of 1923, it is also said to be " in payment of commutation of wharfage." This payment was, therefore, in no sense accepted as the equivalent of a rental for the wharves or for their use by the company, but was, as appears by the earlier Order in Council of the 12th of December, 1906, merely a convenient method of collecting the wharfage tolls imposed by statute for the use of the government wharves indicated, which are undoubtedly " public works." No contract, express or implied, is created with the Crown because an individual pays statutory tolls for the use of a public work and the commutation of such tolls for a lump sum does not imply any relations other than those which would ensue upon payment of the appropriate tolls on each occasion when the public work was used. *The Queen* v. *McFarlan* (1); *The Queen* v. *McLeod* (2). We are, therefore, of the opinion that the judgment of the Exchequer Court cannot be maintained on the ground on which it was put by the learned trial judge.

(*b*) The government wharf at L'Anse Tadoussac was built during the years 1910-1912. It appears to have been but little used, except by small schooners and local craft, until 1923, only an occasional call having been made at it by the steamboats of Canada Steamship Lines, Ltd., prior to that year. That company's steamboats usually moored at the other government wharf at L'Anse à l'eau. There had never been a wharfinger in charge of the L'Anse Tadoussac wharf. So far as appears no substantial repairs to, and no thorough inspection of, the L'Anse Tadoussac

(1) (1882) 7 Can. S.C.R. 216. (2) (1883) 8 Can. S.C.R. 1.

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wharf had been made from the time of its completion in 1912 until the 6th of July, 1923, the day preceding the collapse of the slip, and there is room for doubt whether the inspection then made was at all complete or thorough.

The wharf was equipped with a slip, or *cale-mobile,* which was intended to provide for convenience of landing at different tides. It was raised or lowered, when required, by men of the crews of the vessels using the wharf and was often left, we are told, for long periods with its lower end submerged in the sea, or so submerged at high tide and exposed at low tide to the air—conditions said to be most favourable to rapid deterioration of the spruce timbers or beams which formed its lateral supports. By means of chains, attached to iron bands, or eyes, through which the outer or lower ends of these lateral timbers ($11\frac{1}{2}$ inches by $5\frac{1}{8}$ inches) were inserted, and passed over pulleys, the slip was raised or lowered by the use of winches placed upon the wharf.

Early in 1923 Canada Steamship Lines, Ltd., applied to the Minister of Public Works to have this wharf put in condition for use by its steamboat *Richelieu* which it was then about to place on the Saguenay route. The draft of this steamer was too great to permit of its berthing at L'Anse à l'eau wharf and rock conditions precluded further dredging there. The work required to make the L'Anse Tadoussac wharf suitable included dredging, the extension of the face of the wharf and some general repairs. The Minister assented to the company's request, subject to estimates for the cost of the work being sanctioned by parliament. These estimates appear to have been passed late in June or early in July, 1923—the precise date is not given. Meantime, however, sufficient dredging had been done to enable the *Richelieu* to effect a landing and, without further notice to the government, that steamer began to use the wharf in the latter part of June. She had made landings at it on four trips prior to the date on which the slip collapsed.

On the fourth trip, i.e., on the evening of the 4th of July, when a large number of passengers disembarked at Tadoussac, there was amongst them one Brunet, a government engineer, who was then on a trip of inspection for his department. Brunet remarked the crowd disembark-

ing and says that this aroused apprehension in his mind ("*peur*") as to the safety of the slip, although he subsequently suggests that his doubts were rather as to the sufficiency of the chains and hoisting apparatus to sustain the weight. He made a casual and perfunctory examination of the wharf on the 5th of July and left Tadoussac on that evening. His inspection apparently did not include any examination of the slip except as to the winches and pulleys used in raising and lowering it, which he had been told were defective. Before leaving Tadoussac he called on one Imbeau, who, it is said, was engaged as a foreman by the Department of Public Works whenever government work was done at Tadoussac, but was not a permanent or regular employee of the department. Brunet requested Imbeau to examine the slip because, he says, he had reasons for apprehension. Imbeau was told to report to the department at Quebec the result of his inspection. Imbeau was not in the government's pay when requested to make this inspection, nor does it appear that he was remunerated by the government for making it.

On the 4th of July Imbeau had noticed a plank broken in the slip and repaired it, he says, gratuitously. He seems to have then seen enough of the condition of the slip to realize that it needed repair and should be carefully inspected. He confirms what Brunet says as to the instructions given him on the 5th of July, adding that he had advised Brunet "*au commencement*" that the slip should be inspected "*comme il faut pour voir s'il avait du mal lui aussi.*" He made an inspection of the slip on the 6th and wrote out a report on the wharf and slip in the evening which he dated the 7th, because it could not be mailed until the following morning. That report reads as follows:—

Tadoussac, 7 juillet, 1923.

Monsieur A. G. Sabourin,
Ingénieur de district.

Monsieur,—Vous trouverez ci-inclus un croquis des châssis de la shed du quai de L'anse Tadoussac. M. Brunet est venu ici cette semaine et il m'a demandé de bien vouloir lui envoyer ces mesures-là pour faire faire des passes en fer pour portéger les vitres et il m'a demandé aussi de regarder dans le quai si les lambourdes étaient pourries et je n'ai pas pu y aller; il aurait enlevé les pavés.

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J'ai visité le slip et j'ai trouvé qu'il était bien dangereux, le bois parait bien magané. Je vous envois les mesures et si vous préférez en faire faire un autre avant qu'il arrive quelque accident, pour moi je le trouve bien dangereux.

Longueur 36 pds, largeur 8 pds et 10 pouces.

Bien à vous,

(Signé) ARMAND IMBEAU.

This report was not received at Quebec until the 9th of July. Notwithstanding the terms in which he reported, Imbeau insists that he did not regard the slip as in a dangerous condition even after his inspection of the 6th, adding

Si j'avais eu vu le slip bien dangereux, j'aurais pas attendu les ordres de barrer le slip, je l'aurais barré de moi-même; mais je n'ai pas fait demander à monsieur Sabourin qu'il était bien dangereux, le slip et l'appareil. Mais si je l'avais considéré bien dangereux, je l'aurais barré de suite.

He says that when he stated in his report "je le trouve bien dangereux," he had reference to the hoisting apparatus and the winches:—

Q. * * * Vous lui avez dit: je le trouve bien dangereux. Vous lui avez dit ça dans votre lettre?

R. Oui, que je le trouve bien dangereux, en voulant parler de l'appareil de montage et des winches, qu'il était bien dangereux.

It would seem that Imbeau was either incompetent or careless or that his testimony is not dependable. He either made an inadequate examination, or could not appreciate the conditions disclosed. Any sufficient examination must have revealed the imminent danger of collapse of the slip due to the rottenness of the lateral supporting timbers. Brunet vouches for Imbeau's capacity; and I incline to accept his opinion on that point. Was he merely careless, or did he perceive the danger, although now unwilling to admit having done so?

The cause of the collapse was undoubtedly the breaking off of the lateral timbers or beams where they entered the iron eyes and on subsequent examination they were found by numerous witnesses to be very badly decayed, only the outside shell having the appearance of firm wood—"*le dedans (qui) était tout pourri.*" Towards the close of his examination, however, in answer to a question by the trial judge, Imbeau stated that he had examined the lateral timbers at the places where they broke and that while, on looking at the outside, decay was not apparent, on pick-

ing into the wood with a knife it was found rotten inside —that in his opinion at the time it was "magané," but not so much decayed as it appeared to be after it was broken. He adds:—

mais je voyais qu'il fallait qu'il fut renouvellé, le slip, en cas d'accidents, parce que je trouvais qu'il pouvait venir à manquer, d'une fois à l'autre.

Had Imbeau been in the employment of the government, when he inspected the slip on the 6th of July, his failure either to bar access to the slip or, if he had not authority to do that, to advise the department by telegram of the imminent danger, or at least to warn the responsible officers of Canada Steamship Lines against making further use of the slip until it had been put in a safe condition would have amounted to neglect

of an officer or servant of the Crown while acting in the scope of his duties or employment upon a public work.

The evidence, however, does not sufficiently establish that Imbeau was an officer or servant of the Crown within the meaning of s. 20 (*c*) of the Exchequer Court Act.

The case of Brunet is quite different. He was undoubtedly an officer or servant of the Crown. He came to Tadoussac in the discharge of his duties or employment. He saw the use that was being made of the slip which afterwards collapsed and immediately realized that its condition was dubious and had reason, as he says, to "fear" for its safety. He was told by Imbeau that there should be an inspection "*comme il faut*" of the slip because it might be "*endommagé*"—to see if it were not also in bad condition. Instead of clearing up his suspicions by an immediate personal inspection, or at least promptly reporting his fears to Quebec, or warning the officers of the steamship company of the probable danger of using the slip in its then condition, he contented himself with asking Imbeau to make an inspection and to report the result in writing to Quebec. In taking the risk of allowing the continued use of the wharf pending such report and in failing to give any warning to the officers of the steamship company Brunet was in my opinion guilty of a dereliction of duty amounting to negligence on his part as an

officer or servant of the Crown while acting within the scope of his duties or employment upon a public work (*The King* v. *Schrobounst* (1)),

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and his neglect entailed liability of the Crown for the consequent injuries in person and property sustained by the passengers in attempting to land on the slip on the 7th of July.

(c) But if there was neglect on the part of the government engineer Brunet in failing to take immediate action for the protection of passengers who he knew would make use of the slip for landing in the immediate future, how should the conduct of the steamship company in imperilling the lives and limbs of its passengers by sending them ashore in crowds over such a slip be regarded? The steamship company's officers knew better than the servants of the Crown for what number of passengers landing facilities would be required at Tadoussac. In landing the passengers the steamboat officers might have restricted the number allowed simultaneously on the slip or they might have landed them by gangway directly on the wharf. Those officers were familiar with the history of the wharf and knew of its practical disuse for over ten years. They knew, or had abundant means of knowing, that the alternate submersion and exposure of the supporting timbers of the slip would leave them in a doubtful state of preservation. The sight of the disembarking crowd on the evening of the 4th of July should have awakened in the minds of those in charge of that operation, had they given any thought to the safety of the landing, the same fear with which the spectacle inspired Brunet—fear for the safety of the slip—suspicion of its capacity to withstand the strain to which it was being subjected. With knowledge that nothing had been done in the way of repairs, without making any inspection of the condition of this almost derelict wharf, without any inquiry as to whether inspection of it had been made by government officers, without even intimating its intention to do so to the government from which it had demanded repairs, that its officers knew had not been made, and would not be made until parliament should provide money therefor, the steamship company proceeded to use the wharf and slip as if assured that they were in good repair and arranged for the landing of passengers, not one by one, or two by two, but in droves—as many as 35 being on the gangway together when the slip collapsed. If Brunet was negligent,

this conduct of the steamship company's officers savours of recklessness.

It seems to follow that we have here a case of "common offence or quasi-offence" of the respondent company and of the appellant resulting in a joint and several obligation on their part to persons who have sustained consequential injury (art. 1106 C.C.), with the result that there must be an apportionment of responsibility between these co-debtors (art. 1117 C.C.) and that one of them, the steamship company, having paid the debt in full (for this purpose the two respondents are identified, the insurance company claiming through and having no other or greater rights than its insured) can recover from the other only the share and portion for which, *inter se*, the other was liable (art. 1118 C.C.). With this right of recovery—and it is the respondents' only right in this action—subrogation has nothing to do. Indeed the limitation of art. 1118 C.C. is imposed

> even though he (the claiming co-debtor) be specially subrogated in the rights of the creditor.

The apportionment of responsibility presents some difficulty; it can at best be approximate. Giving to all the circumstances such effect as careful consideration suggests they are entitled to receive, justice will probably be done as nearly as possible if the resultant damages be borne in the proportion of two-thirds and one-third—two-thirds by Canada Steamship Lines, Ltd., and one-third by the Crown.

If the Crown is now prepared to admit that the total recoverable claims of injured persons paid by the suppliants amounted to the sum of $65,744.61, as finally asserted by them at the trial, the reference directed in the judgment of the Exchequer Court will be unnecessary, and judgment may be entered at once in favour of the suppliants for one-third of that amount. Otherwise the judgment will merely declare the rights of the parties and direct the registrar of the Exchequer Court to proceed to enquire and report as to the total amount which should be made the subject of apportionment.

As to the right of the Insurance Company to share in the suppliants' recovery and, if that right exist, to what

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extent, we are not in a position to pronounce judgment. The two companies are joint suppliants. There is no issue between them on the record and they were not separately represented. Unless they can agree upon their respective rights *inter se* as to the monies to be paid by the Crown, upon the total amount due by it being finally ascertained the appellant may pay the same into court to the joint credit of the suppliants; and the Crown will thereupon be fully discharged from liability to each of them. Either suppliant may thereupon proceed, as it may be advised, to obtain payment out to it of its proper share of the money so to be deposited in court.

The appellant will have its costs of the appeal from the respondents, except those of preparing and printing the appeal case, which are disallowed on account of the flagrant disregard of rule 12 requiring exhibits to be printed in chronological order.

Appeal allowed in part with costs.

Solicitor for the appellant: *Léon Garneau.*

Solicitor for the respondents: *J. A. Mann.*