1932
June 20.
Oct. 24.

BETWEEN:—

GEORGE MASON ..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Petition of right—Jurisdiction—Damages—Interference with navigation—Fisheries Act—Public work—Assumption of risk

At Livingstone's Cove, Nova Scotia, is a breakwater owned by the respondent, to provide a shelter for boats of shallow draught. In this cove suppliant had set a salmon trap net under licence from the Department of Marine and Fisheries. Dredging operations were being carried on in the vicinity of the breakwater by the Department of Public Works under the supervision and direction of one of its officers. The tug *A.*, hired by the respondent, whilst moving a loaded scow to the dumping grounds came into contact with the suppliant's net, seriously damaging the same. The present action is to recover the value, or cost of repairing the net and the loss of the use thereof for about one month.

Held, that where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment must be dealt with as the servant of the person to whom he is lent, although he remains the general servant of the person who lends him.

2. That the master and crew of the tug *A.*, the crew of the scow, and the master and crew of the dredge were servants of the Crown employed upon a public work within the meaning of section 19c of the Exchequer Court Act, and that this Court has jurisdiction to hear and entertain the present action.

3. That it cannot be implied from the fact that suppliant was earlier requested to move his net, which he did not do, that he therefore assumed the risk of damage to the net. Consent involves an express or implied agreement that the act may be rightfully done or danger rightfully caused, mere knowledge of the risk does not necessarily involve an agreement to accept the risk, it may be some evidence of an agreement, but nothing more.

4. That, on the evidence, the net in question was not an interference to navigation within the meaning of section 33 of the Fisheries Act (R.S., 1927, c. 73); that the master of the tug *A.*, was negligent in

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moving the scow as and when he did, and that the suppliant was entitled to damages for the injury caused to his net and damages for the loss of the use of his net.

PETITION OF RIGHT by Suppliant herein to recover from His Majesty the King damages suffered by him by reason of destruction of his salmon trap net and loss of use of same for a certain time due to the negligence of a servant of the Crown in the exercise of his duties.

The action was heard before the Honourable Mr. Justice Maclean, President of the Court at Saint John, N.B.

C. J. Burchell, K.C., and *R. Smith, K.C.*, for Suppliant.

H. McInnes, K.C., and *F. B. A. Chipman, K.C.*, for Respondent.

The facts and questions of law raised are set out in the reasons for judgment.

THE PRESIDENT, now (October 24, 1932), delivered the following judgment:

This is a Petition of Right, wherein the suppliant seeks to recover damages from the respondent for alleged damage caused, on or about June 28, 1930, to a salmon trap net which the suppliant, the owner, had set at Livingstone's Cove, Antigonish Co., N.S., under a licence issued by the Department of Marine and Fisheries under the authority of the Fisheries Act, R.S.C., 1927, Chap. 73, and also for damages for the loss of the use of the salmon net consequent upon the alleged injuries to the same.

At Livingstone's Cove there is a breakwater 376 feet long, owned by the Government of Canada; the coast line at this point was much exposed, particularly to north and northwest winds, and the breakwater was, I understand, constructed for the purpose of affording shelter for boats and craft of shallow draught, south of the breakwater. The water on the southern side of the breakwater being comparatively shallow, the Department of Public Works of Canada, at the time material here, was engaged in the dredging of a defined area immediately south of the breakwater, from the outer edge of the breakwater well into the shore line, and this area was to be dredged to secure a depth of 8 feet at low water, ordinary spring tides. Immediately south of the area proposed to be dredged the water was

also quite shallow while to the southwest, and for quite a distance, there was a depth of some 12 or 13 feet. While little evidence was given upon the point, it would appear, that the waters inside the outer end of the breakwater on the southerly side, would be frequented only by small boats, fishing boats and motor boats, and could hardly be said to constitute a main channel or fairway for shipping of any kind entering or leaving St. George's Bay. The same might also be said of the waters immediately north and east of the breakwater and towards the sea. Large loose rocks had been piled along this side of the breakwater as a protection to the same from storms, and besides, a considerable shoal or rock ledge projected from the shore line pretty well out to the end of the breakwater, and in close proximity to the location occupied by the suppliant's net.

On the occasion in question, dredging operations were in progress, the dredge and scows in use being the property of the respondent. The tug boat *Amlah,* hired by the respondent, was in attendance upon the scows; the scows were about 75 feet in length and from 25 to 28 feet in width, and carried about 200 tons of dredged material which was conveyed to a dumping ground outside the breakwater. The *Amlah* was drawing about 9 feet aft and about 5 feet forwards. It was the general practice of the *Amlah,* at least at low tide, to approach the laden scows on a course southwest from the dredge bow on, and having made fast a line to the scow she would move astern; this practice was owing, as I understand it, to the shallow water within and in close proximity to the area being dredged. The master of the tug testified that on the occasion in question, when he started with a laden scow to the dumping grounds, the tide though low was strong, setting down northeast past the outer end of the breakwater, the wind was about southwest blowing quite a breeze with a choppy sea, and in pulling the scow out beyond the end of the breakwater and in a southwesterly direction, the current and wind forced the scow down in a northeasterly direction towards the suppliant's net with which it collided and seriously damaged. McEachern, an experienced seaman, testifying on behalf of the suppliant, stated that he had witnessed the movement of the tug and tow at the time in question; he stated that the weather was fine with a nice breeze from the south-

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west with "just a wind chop," which I understand to mean that while there was a choppy sea there was nothing unusual about it. He further stated that the scow drifted northeastwardly, after being pulled out from inside the breakwater, and that both tug and tow came in contact with the suppliant's net; that usually the tug backed out in a westerly direction and in such a movement there would be no danger of tug or tow colliding with the net; and that there was ample sea room for both tug and tow to emerge from inside the breakwater towards the southwest where there was about 12 feet of water, and that had this been done they would not have drifted upon the fishing net as they did. That the scow,—which was without motive or governing power—or the tug, or both, came in contact with and seriously damaged the suppliant's salmon net is quite clear, and does not call for any discussion.

The respondent's case is that the net was an unlawful hindrance to navigation; that the tug and tow was navigated with caution and without negligence; and that in the circumstances everything reasonably to be expected of the master of the tug in towing the scow from the scene of dredging operations out to the dumping grounds, was done. The suppliant contends that the net was lawfully set and was not a hindrance to navigation; that the tug was negligently navigated; that the tug and tow should have departed from inside the breakwater on a more southerly or southwesterly course, as had been done frequently before, which would have avoided contact with the suppliant's net; and that in view of the tide and wind conditions, if as described by the respondent's witnesses, the scow should not have been moved until more favourable conditions prevailed.

It was agreed between counsel, that the breakwater in question was owned by the Crown in the right of the Dominion of Canada; that the dredging operations were being carried on by the Department of Public Works of the Dominion of Canada, under the supervision and direction of an officer of that Department; and that the tug *Amlah,* its officers and crew, was under hire to the Department of Public Works, and under the orders and direction of the captain of the scow. The weight of authority and legal principle is to the effect that, in a case of this kind,

we have only to consider in whose employment the tug and its crew were at the time when the acts complained of occurred. When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him. See Cockburn C.J. in *Rourke* v. *White Moss Colliery Co.* (1), and Bowen L.J., in *Donovan* v. *Laing, Wharton and Down Construction Syndicate* (2). Therefore, I think, no difficulty arises upon this aspect of the case.

I entertain no doubt as to the jurisdiction of the Court to entertain this Petition. The Exchequer Court Act, R.S.C., 1927, Chap. 34, s. 19 (*c*) is as follows:—

> The Exchequer Court of Canada shall also have original jurisdiction to hear and determine the following matters:—
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

There cannot I think be any doubt, but that the master and crew of the tug *Amlah,* the crew of the scow, and the master and crew of the dredge were servants of the Crown employed upon a public work. The case of *Schrobounst* v. *The King* (3), is I think conclusive upon the point.

Sec. 33 of the Fisheries Act, Chap. 73, R.S.C., 1927, provides:

> Seines, nets or other fishing apparatus shall not be set or used in such manner or in such place as to obstruct the navigation of boats and vessels, and, no boats or vessels shall destroy or wantonly injure in any way seines, nets or other fishing apparatus lawfully set.

Sec. 35 provides:

> One-third of the width of any river or stream and not less than two-thirds of the width of the main channel at low tide, in every tidal stream shall be always left open, and no kind of net or other fishing apparatus or any material of any kind shall be used or placed therein.

The suppliant's net was licensed to be set, as it had been in the eight preceding years, "off Government wharf at Livingstone's Cove, Leader running North." It seems to me, upon the evidence, that the suppliant's net was not an interference with navigation. I do not think that in the true and practical sense of the term, or within the meaning

(1) (1877) 2 C.P.D. 205, 209. (2) (1893) 1 Q.B. 629, at pp. 633, 634.
(3) (1925) Ex. C.R. 167; (1925) S.C.R. 458.

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of the Fisheries Act, the area occupied by the net was in navigable waters, or in the fairway of shipping, or that less than two-thirds of the main channel being a tidal stream was at low tide obstructed by the suppliant's net. If the main channel was in any substantial way obstructed by the suppliant's net, or if it was in any way a public nuisance or a real hindrance to navigation there should, I think, have been some evidence of it. But even if, in a technical sense, the waters occupied by the net were navigable that did not relieve the tug from the exercise of caution and good seamanship while in that vicinity, particularly as the master had knowledge of the exact location of the net, and by experience he should have known precisely what was required to be done to avoid contact with the net. Therefore, I think, just because of these facts that more than ordinary caution and skill, but of course, not an unreasonable amount of caution and skill, was required of the master of the tug and those in charge of the conduct of the public work. I might also add that I do not think the suppliant suffers in any way by reason of the fact that one end of the leader, a rope 100 fathoms long, was attached to the breakwater as it had been every fishing season since 1926. I do not think this adds anything to the respondent's case. As was urged by Mr. Smith, that was not a factor causing the casualty which befell the net; the same thing would presumably have happened had the same end of the leader been attached to a rock or a pole in the water immediately adjacent the breakwater. Neither do I think that the net was set quite in the direction off the breakwater as described by the master of the tug. I think it was set in a north northwest direction from the breakwater as described by McEachern, and not reasonably in the path of the tug or tow in moving out from the south side of the breakwater.

The important point for determination is whether or not the damage to the net was caused by negligence on the part of the master of the tug, or possibly the person in charge of the dredge, and with this aspect of the case I shall next deal. The master of the tug, according to his evidence, believed, that when the tow was about to commence on the occasion in question, conditions were unfavourable and that what did occur was more or less imminent. This is to

be inferred from the following questions put to the master by Mr. Burchell and his answers thereto:—

Q. You did not suggest to the captain that it was a little dangerous with the tide running as it was?—A. He was on the bridge; I did not mention it to him.

Q. But it was dangerous?—A. Yes, dangerous at any time.

Q. With the tide running north?—A. Yes.

Q. And there was danger of running into the net?—A. It could not be any other way.

Q. With the tide changing the other way it is different?—A. It is not nearly so bad at high water. At high water I had no bother.

Q. Or at slack water?—A. At slack water either but you could not go with the scow.

Q. But at high water you go alongside of it and tow her?—A. Yes and steer the boat south and southwest.

* * * * *

Q. Did you think it was dangerous to go at that time?—A. It was often dangerous to go out.

Q. But at this particular time did you think it dangerous to go out with the tide the way it was?—A. Yes, I did, with a leader and twine leading off the northwest corner of the breakwater.

Q. But sometimes it would not be dangerous, for instance at high water?—A. No, sir.

Q. But at that time you thought it was dangerous?—A. Yes, and more times besides that.

Q. But at this time you did not suggest to the Captain that he wait for half an hour or so?—A. I never suggested it; I obeyed his orders when he blew for me; I was under his orders.

From the evidence of the master of the tug which I have just quoted, it will be seen that the tide was low which had the effect of reducing the capacity of the tug to control the tow particularly when towing stern first and when not alongside the scow, and that a strong current was flowing accompanied by a considerable breeze; and the master of the tug elsewhere testified that when he started the tow, a strong current was setting down northeast past the outer end of the breakwater, with a strong southwest wind and choppy sea, and this, together with the fact that the tug and tow were moving slowly until they got headway, brought the tug and tow in collision with the leader of the net with the consequence stated. Now, if the facts be as described by the master of the tug, then he should not, in my opinion, have ventured or have been required by the captain of the dredge to commence the tow until conditions of wind, tide and current had become more favourable, or until the tide had materially changed, when, as the master testified he would not have encountered any diffi-

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culty. For that reason I do not think the charge of negligent navigation has been repelled. Aware of the location of the net, the unfavourable conditions of wind, current and tide, the imminence of collision with the net, I cannot avoid the conclusion that the tow should not have commenced when it did, but should have been delayed until a material change in the tide had taken place. In any event, when it was found that the tug and tow were likely to drift upon the net, the scow at least should have anchored, and she was equipped with anchors, and a crew of two were aboard; and it was not contended that this could not have been done or would not have been effective. I am rather disposed to think that conditions were not quite so unfavourable as described by the master of the tug; I do not think they were very unusual or occasioned any real difficulty in handling the tow. I am unable to appreciate just why the tug and tow could not emerge from behind the breakwater upon such a course as would compensate for the counteracting forces of wind and current, and had this been done, and I believe it might have been done, the accident would have been avoided. Upon this aspect of the case, I therefore think the accident was attributable to the negligence of the servants of the respondent.

Mr. McInnis strongly pressed the view that inasmuch as the captain of the dredge had at one time requested the suppliant to move his net to another location to avoid the possibility of a collision with the tug or tow, and to which request the suppliant apparently replied that there was sufficient sea room for the tug to perform its services to the scow and that he had a right to retain his net where it was set, that there followed the implication that the suppliant was assuming all the risk of an occurrence of that nature. I do not think that the statements made by the suppliant in this connection implied an assumption by him of the risk of damage to the net by the tug. Consent involves an express or implied agreement that the act may be rightfully done or the danger rightfully caused. Mere knowledge of the risk does not necessarily involve an agreement to accept the risk, it may be some evidence of an agreement, but nothing more. Upon the facts disclosed, I do not think it can be inferred that the suppliant agreed to accept the risk in the sense that he exempted the re-

spondent from his duty not to create the danger and that he agreed to take the chance of an accident. See Lindley, L.J., in *Yarmouth* v. *France* (1); *Thomas* v. *Quartermaine* (2), and *Smith* v. *Baker* (3).

The next point to be considered is one by no means free of difficulties. The suppliant also claims damages for the loss of the use of his net during the month of July. The rule as to the recovery of damages, the consequences of tortious acts, is not so clearly marked as in the cases of contract. It is settled law, I think, that if one injures the property of another, damages may be recovered, not only for the amount which it may be necessary to spend in repairs, but also damages—not merely nominal damages—for the loss of the use of the property injured during the period, that the repairing may occupy, even if he cannot prove that he is out of pocket a definite sum of money owing to the wrong he has sustained, provided of course that such loss is the natural and direct result of the wrongful injury done to the property. I would refer to the well known cases of *The Greta Holme* (4), *The Argentino* (5), and *The Mediana* (6). The respondent claims that the damages are too remote and he relies on the case of *The Anselma De Larrinaga* (7). The general rule is that damages which are uncertain, contingent and speculative in their nature, cannot be made a basis of recovery; but this rule against the recovery of uncertain damages is, I think, directed against uncertainty as to the cause rather than as to the extent or measure. In the case of *The Anselma de Larrinaga* the plaintiffs' trawler was sunk in consequence of a collision between it and the defendants' steamship, the latter vessel being held alone to blame. Upon reference being made to the Registrar for assessment of damages, he held that in addition to the value of the trawler, the plaintiffs were entitled to recover a sum in respect of fishing until a new trawler was delivered. Upon appeal from the Registrar, the President of the Probate Division held that a claim by the plaintiffs for loss of fishing till they secured a new vessel to replace the one that was sunk was not maintain-

(1) (1887) 19 Q.B.D. 647, at p. 660.
(2) (1887) Q.B.D. 685 at p. 696.
(3) (1891) A.C. 325.
(4) (1897) A.C. 596 at p. 597.
(5) (1889) 14 A.C. 519.
(6) (1900) A.C. 113.
(7) (1912-13) 29 T.L.R. 587.

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able. The learned President in his judgment referred to the case of *The Columbus* (1) which, so far as we are here concerned, was a claim by the master of a fishing smack which was sunk in collision with *The Columbus,* for wages which he would have earned as master of the smack, and also for a claim of the average profits he would have received as owner had the fishing voyage not been terminated by the collision. Upon a Reference for the assessment of damages for the loss of the fishing smack, and for the additional claim which I have just mentioned, the latter was rejected, and upon a review of the Registrar's Report, Dr. Lushington declined to disturb the same and held that where compensation is awarded by the Court of Admiralty to the full value of the vessel as for a total loss, the plaintiff was not entitled to recover anything in the nature of a demurrage for the loss of the employment of his vessel, or his own earnings, or freight, and he distinguished the case from that where there was only a partial loss. In the case of *The Clarence* (2) Dr. Lushington stated:

> It does not follow as a matter of necessity, that anything is due for the detention of a vessel while under repairs. Under some circumstances, undoubtedly such a consequence will follow, as for example where a fishing voyage is lost or where the vessel would have been beneficially employed.

The onus of proving the loss was on the claimant. In so far as freight is concerned, the decision in *The Columbus* was modified by the decision in the case of *The Racine* (3) where it was held that when a ship is chartered, this is sufficient evidence that her owner will, subject to contingencies, incur a loss in respect of any freight to be paid under the charter after the date of the collision. In that case damages for the loss of profit on a charter concluded but not entered upon were allowed. On the other hand in *The Risoluto* (4) a collision occurred on the fishing banks off Newfoundland between two ships, one of which was a French fishing vessel which was acquitted of any blame for the collision, and the owners claimed damages, for demurrage of their vessel from the date of collision to the date of her return to the fishing grounds, and such damages were allowed. Evidence was taken from other vessels fishing in the place where, but for the collision, the injured

(1) (1847-50) 3 W. Rob. 158.
(2) (1847-50) 3 W. Rob. 283.
(3) (1906) P. 273.
(4) (1883) 8 P. 109.

fishing vessel would have fished, as to the catch made by them. Roscoe on Measure of Damages at page 44 refers to an English case in which the fishing continued throughout the year, and where the owners of a lost fishing vessel with reasonable promptitude obtained a new vessel, and damages in respect of the loss of prospective fishing were allowed until the date when the new vessel took the place of a lost trawler. In another case, he stated, a trawler went out fishing for a period of about two months and was sunk by collision at the beginning of the second month, and damages were allowed based on the actual catch to the date of the collision and the prospective catch until the vessel should have completed the two months fishing. These cases are not to be found in the Law Reports. In *Rheinhardt* v. *The Cape Breton* (1), a fishing vessel was so much injured in a collision with the defendant ship that she was prevented from continuing her trip to the fishing grounds, and Drysdale, J., held that the proper measure of damages was the estimated value of the prospective catch of fish by the injured vessel had she been permitted to prosecute her fishing voyage.

It will be seen therefore that there is an apparent conflict of judicial opinion as to the principle to be applied in respect of damages for the loss of the use of a ship, or a fishing net, or in respect of prospective profits in such cases. I think the suppliant is entitled to damages for the loss of the use of his net and I rest my decision upon the law as stated by Lord Herschell in the House of Lords in *The Argentino*, which I think is the true rule of law to be applied in this case. He said:

> I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision.

The judgment in *The Mediana*, supra, lays down the principle that the mere taking away from a shipowner of his vessel for a longer or shorter time in consequence of a collision is ground for the award of general damages when such owner could not prove any special loss as of freight or

(1) (1916) 15 Ex. C.R. 98.

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of profits. The suppliant's claim for damages for the loss of the use of his net is, I think, in the nature of general damages and the quantification of such damages are to be determined as they would be by a jury. I do not think it unreasonable or speculative to say that had the suppliant had the use of his net during the month of July, the best fishing month of the season it is said, his net would have impounded some salmon, but it would be absurd to speculate as to the number. His catch for that season, in quantity and therefore in value, was much below that of the preceding year or the year following, and during that fishing season others engaged in that form of fishing at Livingstone's Cove we were told did well, which I take to mean that their catch of salmon was of the average in quantity. I think the evidence shows with reasonable certainty that the suppliant may reasonably be supposed to have suffered some damage, or a loss of some profits, on account of the loss of the use of his net.

Now, as to the quantum of damages to be awarded under each head. Upon the evidence, it seems to me, the injury to the net was a case of partial loss and not a total loss, notwithstanding the suppliant pleads in his Petition that the net became a total loss. The net was rendered absolutely useless as a fishing instrument, but it was not beyond repair though portions of it, or its accessories, were entirely lost. The suppliant gave very convincing evidence as to the cost of repairing the net and he put it at over $1,000, though that amount only is claimed. It seems that Mr. Harris, the chief fishery officer for Antigonish county, suggested to the suppliant very early after the accident, that the value of the net, or the cost of repairing the net,—it is not clear which—was $800 to which apparently the suppliant at the time made no objection, but no safe deduction can, I think, be made from this evidence. While Mr. Harris gave evidence at the trial, still no questions were put to him by either side upon this point. The suppliant's evidence upon the cost of the repairs to the net is of such a nature that it cannot be disregarded, and it was not in any way controverted. I think there is nothing to do but to fix the cost of restoring the net at $1,000. In regard to the claim for general damages for the loss of the use of the net for one month, I have concluded, after taking into con-

sideration every contingency inherent in the use to which the net would have been put had it not been injured, to fix the same at $500. In concluding I perhaps should say that there is no evidence which would go to show that the suppliant could have minimized the damages by replacing the injured net earlier than he did. About one month after the accident he hired or borrowed a net but there is no evidence as to the terms on which this was done.

The suppliant will therefore have judgment for $1,500 and he will have his costs of the action.

Judgment accordingly.