

BETWEEN:

PATRICIA MARY MacDONALD.....SUPPLIANT;

1951  
Apr. 12 & 13  
June 14

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Crown—Petition of Right—Trespasser on government wharf—Onus on suppliant—Petition dismissed.*

Suppliant's husband, a taxi driver, drove his taxi on to a wharf owned by the respondent and maintained solely for the purpose of assembling and loading lumber into vessels. No motors were allowed on the wharf. Later his body and four other bodies and the taxi cab were located in deep water at the edge of the wharf. Suppliant seeks to recover damages from the respondent for the death of her husband.

*Held:* That the taxi driver was a trespasser on the wharf.

- 2. That even if the taxi driver had been an invitee or a licensee there was no evidence of any trap or hidden danger maintained on the wharf, or of anything to mislead him; and under the weather conditions prevailing at the time the taxi driver carried on at his peril.
- 3. That the onus is on suppliant to show that her husband's death was not due to his own miscalculation and such onus cannot be satisfied by conjecture.

PETITION OF RIGHT to recover compensation for the death of petitioner's husband alleged to have been caused by negligence of respondent.

The action was tried before the Honourable Mr. Justice Sidney Smith, Deputy Judge of the Court, at Vancouver.

*A. B. MacDonald and Kemp Edmunds* for suppliant.

*Dugald J. MacAlpine and K. E. Eaton* for respondent.

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

SIDNEY SMITH, D.J. now (June 14, 1951) delivered the following judgment:

The suppliant sues for compensation for the death of her husband who was drowned by his taxi being driven off the government wharf at Port Alberni on a stormy night of quite exceptional severity. I cannot but feel the greatest sympathy for the unfortunate widow and her four young children, thus deprived of their breadwinner; but I cannot find that the available evidence shows that the Crown is legally responsible.

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The suppliant's misfortune is that the course of events is almost entirely a matter of conjecture. It seems that on a Saturday night, late in November, 1949, the suppliant's husband, a taxi owner-driver, to whom I shall refer as "MacDonald", disappeared with his taxi. There seems to have been no clue to his fate until it occurred to someone on the following day that he may have driven off the wharf. Grappling and sounding at the edge of the wharf on Monday discovered the taxi in about thirty feet of water. It was raised and five bodies were recovered, three in the taxi, MacDonald's and another's alongside. Of the five occupants of the taxi we know the identity of MacDonald and of one other, a crew-member from a fishing boat that had been docked at the wharf on the Saturday night. We have no particulars of the other three, and know nothing of their movements. The watch of the deceased had stopped at twenty to eight, and I hold that that was the hour on Saturday night, 26th November, 1949, when the tragedy occurred.

There was no eye-witness of anything. I am told that the deceased was a sober man and a careful driver. I am not at all sure that such evidence was admissible; it is in effect character evidence in a civil case, which I have always regarded as irrelevant. But, being in, I accept it without hesitation. It is right to say that there was no suggestion here of drinking or of anything in the slightest degree improper.

I am asked to find that the wharf was defective and dangerous on several counts. That at once raises the question, not only of fact, but of whether the Crown owed any duty to MacDonald to have the wharf otherwise. A striking omission in the petition of right is the failure to allege either that MacDonald was an invitee or a licensee on the wharf. That seems to me to make the petition demurrable on its face, but I do not wish to decide the case on technical grounds. What is much more serious is the absence of any evidence to show that MacDonald had any right on the wharf. Only incidentally did any evidence come out as to how the Government ran the wharf, and as to how far the public were allowed to go there. It did appear that the wharf was used entirely for the assembly and loading of lumber into vessels. The fishing boats really had no business there and merely happened

to have been sent thither by the harbour-master to be out of harm's way during the severe storm on the Saturday night.

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The suppliant called the Government watchman on the wharf as her witness; and his evidence makes it clear that MacDonald was a trespasser on the wharf, and neither an invitee nor a licensee. The watchman testified that motors were not allowed on the wharf except in one special case, and that if he had seen the taxi he would have turned it back. There was a sign on the wharf "no admittance except on business". There were two entrances to the wharf, and the suppliant has argued that because only one entrance had this sign MacDonald was entitled to assume his right to enter at the other. I cannot accept this. A complete absence of signs would not have given him a right to enter where motors were not allowed.

The above I think is sufficient to decide this case, but it may be useful if I deal with the grounds on which suppliant says the Crown was at fault.

Even if motor-cars had been allowed on the wharf, I do not think any case of invitation could be made out. The purpose of MacDonald, I assume, was to pick up the crew-member aforesaid (which he did just after 7.30 p.m.) and to take him up-town. MacDonald therefore was on the wharf on his own business and for his own private profit. He had no connection with the Crown which had no interest in his presence. The fishing boats were not at the wharf on Crown business; they were sent there for their own safety. Even if members of the crew could be expected to go ashore, it could not be expected that they would bring taxis on the wharf, even if this had not been forbidden. However it is probably immaterial whether MacDonald, if not trespassing, would have been an invitee or a licensee; the difference only goes to the diligence required of the owner in discovering traps and hidden dangers.

Here I do not think there was anything like a trap. A trap is a hidden danger in something that on its face seems safe, so that a mistaken sense of security is induced. Here where all was dark and obscure by driving rain, it cannot be said that anything appeared safe; and I think a taxi carried on under such conditions at its peril. It is not

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shown that there was anything to mislead the driver. The only attempt to show anything misleading was made by the witness Helmersen who said that when on the wharf, at the inquest, a number of days after this tragedy, he noticed that lumber was piled near and at least eight feet over the edge of the wharf, at right angles, with gaps that would easily admit a car, so that it could create the illusion that there was a passageway. I cannot regard evidence of the state of the wharf at this later date as of any value; and there is none as to its state on the Saturday. But even if it had been proved that the lumber was piled so on Saturday too, I do not think this would mean much. It was, on that particular wharf, a perfectly natural and legitimate way to pile lumber, and the fact that a newcomer could deceive himself into drawing a false inference from the piles, would not make the method culpable.

The next complaint was of the absence of a timber (known as a bull rail) at the edge of the wharf to act as a sort of bulwark. This is usual on wharves, but there was evidence that it was not usual on wharves such as this one. Apart from this evidence, I cannot regard the absence of this timber as constituting a trap. The idea that motor-cars are entitled to proceed on wharves at night, depending on such timbers to save them from driving into the sea, does not appeal to me. Certainly the absence of such a timber was not hidden, but was obvious to anyone who had his way properly lighted; and the taxi had only itself to blame for going where its lights did not suffice.

The next complaint is made that the wharf itself was not lighted. There were only two navigation lights and a small light in the cabin of the watchman on the wharf, none of which apparently illuminated the wharf at all. I cannot see that there was any obligation to have any lights; an obligation which, if it existed at all, would be the same the whole night through. It is not shown that the Crown had any reason to expect anyone to come there on its business at night, and any danger from want of lights was an open and obvious danger. The very absence of lights was an indication to the public that they were not wanted there.

Next it is complained that the watchman was so shut up in his quarters that he could not see and warn those

who came on the wharf. The answer to this is that he had no such function; he was there to look after the Crown's property.

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As I have said, I think MacDonald was a trespasser. Even if he were a licensee or invitee, I think the evidence fails to make out any case for the suppliant. The situation is much like that in *Wakelin v. L. & S.W. Ry. Co.* (1), where it was held that a deceased man's dependants made out no case by showing that the man had been found dead at a railway crossing. Lord Halsbury asked

. . . Is there anything to show that the train ran over the man rather than that the man ran against the train?

Here, equally, there is nothing to show that MacDonald's death was not due entirely to his own miscalculation. The onus is on the suppliant, and it cannot be satisfied by conjecture.

The case of *Whitehead v. Corporation of the City of North Vancouver* (2), has been referred to; but I do not think it helps me. The case turned on the verdict of a jury, and a jury sometimes makes findings on pretty flimsy evidence. But the case is distinguishable in several ways from the present. There the deceased man was clearly an invitee; for the defendant was catering to the motor-driving public, and the service it offered was one that required motor-cars to drive to the edge of the wharf and thence on board the ferries; so that the deceased's having driven to the edge and over did not require the same degree of explanation that it does here.

I cannot do otherwise than dismiss the petition. As I have said, I do so with regret. I make no order as to costs. Indeed I hope that it may be possible for the Crown to pay at least the disbursements of the suppliant. I feel that I myself added to these disbursements, perhaps unnecessarily, by ordering a transcript for my greater certainty when considering the evidence.

*Judgment accordingly.*

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(1) (1886) 12 A.C. 41.

(2) (1937) 53 B.C.R. 512.