HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT;

AND

LEONARD MURPHY (SUPPLIANT) . . . . . RESPONDENT.

1947
*Dec. 9, 10
1948
*April 13

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Negligence—Petition of Right—Collision on highway between civilian automobile and blacked-out army transport—Exchequer Court Act, 1927, R.S.C., c. 34, s. 19 (c) amended by 1938, S. of C., c. 28—Highway Traffic Act, R.S.O. 1937, s. 10, ss. 1 and 2—Negligence Act, R.S.O. 1937, c. 115—Militia Act, R.S.C., 1927, c. 132, s. 42.

On the night of Sept. 16, 1943, the suppliant's automobile, proceeding west on Ontario Highway 17 some four miles from Petawawa Military Camp, turned out to pass another car travelling in the same direction and almost immediately collided head-on with a blacked-out field army transport. The transport formed part of a convoy of blacked-out army vehicles engaged in night manoeuvres. The convoy was headed by a motor cycle and station wagon, both fully lighted with regulation lights, followed by a number of blacked-out army transports; a further group of blacked-out vehicles followed at an interval of some 150 yards; a third group, lead by the transport involved in the collision, brought up the rear at a further interval of some 300 yards.

This transport was driven by Lieutenant James Coyle, a member of the military forces of His Majesty in the right of Canada, acting within the scope of his duties. As a result of the accident the suppliant's car was badly damaged, the driver severely injured and the other occupant killed. The transport was slightly damaged.

In an action against the Crown under sec. 19(c) of the *Exchequer Court Act,* the trial judge found there was negligence on the part of both drivers—Coyle in driving the vehicle without lights when he was so far out of his proper position in the convoy; the driver of the suppliant's car in attempting to pass another vehicle going in the same direction without ascertaining the travelled portion of the highway, in front of and to the left of the vehicle to be passed, was safely free from approaching traffic. He apportioned the degree of fault as seventy per cent on the part of the Crown's driver and thirty per cent on the part of the suppliant's driver.

Held: affirming the judgment of the Exchequer ourt of Canada [1946] Ex. C.R. 589 (Kellock and Locke JJ. dissenting)—That the accident was caused by the negligence of both drivers and in the degree designated by the trial judge.

Held: also, that the Ontario *Negligence Act* applied and that the Crown's liability under section 19 (c) of the *Exchequer Court Act* is not confined to cases where the negligent act of the Crown's officer or servant is the sole cause of the injury.

*PRESENT:—Rinfret C.J. and Kerwin, Kellock, Estey and Locke JJ.

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Per the Chief Justice, Kerwin and Estey JJ.: The effect of the trial judge's finding that Coyle was negligent in driving the vehicle without lights when he was so far out of his proper position in the convoy, cannot be dissipated by saying that Coyle could not change the lighting equipment of the transport driven by him.

Per Kellock and Locke JJ. (dissenting): Where damage ensues to a person by the act of another person who is acting in the pursuance of lawful orders the wrongful act, if any, occasioning the damage is not the act done in obedience to orders, but negligence in the giving of the order itself. *Reney* v. *Magistrates* [1892] A.C. 264; *The Mystery* [1902] P. 115; *Hodgkinson* v. *Fernie* 2 C.B.N.S. 415. On the law thus stated, applied to the case at bar, it cannot be considered that there was any negligence on the part of Coyle either causing or contributing to the accident in question.

APPEAL by the Crown and cross-appeal by the suppliant from the judgment of The Exchequer Court of Canada, O'Connor J. (1), maintaining in part suppliant's claim, made by way of Petition of Right, for damages caused by the alleged negligence of a member of the military forces of His Majesty in right of Canada acting within the scope of his duties. The trial judge found negligence on the part of both drivers and apportioned the degree of fault as seventy per cent to respondent's driver and thirty per cent to the suppliant's driver, and assessed the amount of damages proved accordingly.

The material facts of the case and the questions at issue are stated in the preceding head note and in the reasons for judgment which follow:

J. Douglas Watt K.C. and *J. C. Osborne* for the appellant.

A. E. Maloney for the respondents.

The judgment of the Chief Justice and of Kerwin and Estey JJ. was delivered by:

KERWIN J.:—The petition of right for which a fiat was granted is for a claim against the Crown arising out of injuries to property resulting from the negligence of Lieutenant Coyle, an officer or servant of the Crown, while acting within the scope of his duties or employment and is based upon section 19 (*c*) of the *Exchequer Court Act* as

(1) [1946] Ex. C.R. 589.

enacted by chapter 28 of the Statutes of 1938. It is advisable to reproduce section 50A of the *Exchequer Court Act* as enacted by chapter 25 of the Statutes of 1943:—

50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

It is admitted that Coyle was a lieutenant of the Royal Canadian Army and therefore a member of the military forces of His Majesty in right of Canada and that, at the time of the occurrence, he was acting within the scope of his duties or employment. Coyle being the Crown's servant, the decisions which proceed on the ground that certain individuals concerned were not servants are not in point but the question to be determined is whether the damages to the suppliant's car resulted from Coyle's negligence, because the fiat was granted, and the trial conducted, only on the basis of a claim that the damages were so suffered.

A syllabus for the 39th Officers' Re-enforcement Training was filed for the week ending September 18, 1943, from which it appears that on the night in question, the training to be carried out was night driving from 6.30 p.m. to 9 p.m. As a member of the 39th Re-enforcement Officers' quota, Lieutenant Coyle was driving a field army transport forming part of a convoy, proceeding easterly on Highway No. 17, in the Province of Ontario. With him, as an instructor, was Gunner Gould. The army transport had blacked-out lights, that is, the right-hand headlight was completely covered with a disk while the left-hand one had a horizontal slit in the disk about 6 inches long and $\frac{1}{4}$ inch wide, with a small hood above the slit to throw the light downwards on to the road. The only other light on the front of the transport was a pencil light on each of the front fenders. These lights were clearly not in conformity with subsections 1 and 2 of section 10 of the Ontario *Highway Traffic Act,* R.S.O. 1937, chapter 288, which, for the purposes of this case, it is admitted by the appellant, apply to the Crown.

What is contended is that Coyle was under orders to take part in a convoy and that he could not have refused,

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without serious results to himself, to go in this particular transport on Highway 17 at the relevant time, and that, therefore, there could be no personal negligence on his part.

When the occasion arises, it will be necessary to examine that argument in the light of the well-known fundamental constitutional principle in our law that, generally speaking, a soldier cannot escape from civil liabilities. In the present case, however, the trial judge has found that Coyle was negligent "in driving the vehicle without lights when he was so far out of his proper position in the convoy." The effect of that finding cannot be dissipated by saying that Coyle could not change the lighting equipment of the transport driven by him. Nor is it necessary to pursue the inquiry whether, even if an infraction of the Ontario statutory provisions referred to may not be negligence in itself, those provisions are evidence of the standard of care to be exercised under the circumstances. Although the evidence is that in every convoy such as the one with which we are concerned, there is an "accordion" or "concertina" effect brought about by changes in speed on the part of the lead vehicle which produces gaps, the distance between Coyle's transport and the preceding vehicle in the convoy was certainly at least 900 feet, as found by the trial judge. Coyle admits that the usual interval ranged from 35 feet to 25 yards and that no orders had been given as to the distance to be kept between the different vehicles of the convoy. My view is that the trial judge properly found that there was negligence on the part of Coyle, knowing the poor lighting of the transport, to permit his machine to be 900 feet in the rear of the preceding one. While Gunner Gould was present to instruct Coyle generally as to night driving, there is no evidence that Gould gave any directions to Coyle to fall so far behind. I am therefore unable to disagree with the finding of the trial judge that the accident was caused by the negligence of Coyle and the driver of the suppliant's car and in the degrees designated by him.

It was argued that the Ontario *Negligence Act*, R.S.O. 1937, c. 115, providing for the apportionment of damages where plaintiff and defendant are both negligent, did not apply and that, therefore, since the driver of the suppliant's car was found to be contributorily negligent, there could

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be no recovery. This Court has already dealt with a similar argument in connection with an occurrence in the Province of Quebec: *The King* v. *Laperrière* (1). Mr. Justice Estey and I decided that Crown liability under section 19 (*c*) of the *Exchequer Court Act* is not confined to cases where the negligent act of the Crown's officer or servant is the sole cause of the injury. Mr. Justice Rand stated that he found it unnecessary to consider the argument but expressed a similar view. The same reasoning applies to a petition of right based upon an occurrence in the Province of Ontario. Prior to June 24, 1938, (the date mentioned in section 50A of the *Exchequer Court Act*) even if Coyle were an officer or servant of the Crown, a petition of right for an occurrence such as is here complained of, could not have succeeded since the negligence was not committed during Coyle's presence on a public work: *The King* v. *Dubois* (2); *The King* v. *Moscovitz* (3). At that date the *Negligence Act* of Ontario was in force. *The King* v. *Toronto Transportation Commission* (4), referred to by counsel for the appellant, was a case of an Information exhibited by the Attorney General of Canada to recover damages.

The appeal should be dismissed with costs and the cross-appeal without costs.

The judgment of Kellock and Locke JJ. was delivered by:

KELLOCK J.:—This appeal arises out of a collision which occurred on Highway 17 near Petawawa, Ontario, at approximately 9.30 p.m., September 16, 1943. An automobile owned by the suppliant being driven westerly turned out to pass another motor car travelling in the same direction, driven by a Captain Callender, and almost immediately collided head-on with a field army transport which formed part of an army convoy proceeding in the opposite direction. As a result of the accident the suppliant's automobile was badly damaged, the driver was severely injured, and the only other occupant killed.

The convoy was led by a motor cycle and an army jeep, both with bright lights. These vehicles were followed by nine field army transports and another vehicle described

(1) [1946] S.C.R. 415.
(2) [1935] S.C.R. 378.
(3) [1935] S.C.R. 404.
(4) [1946] Ex. C.R. 604.

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as a 30 hundred weight, with the rear being brought up by another jeep with normal lights and, some witnesses say, another motor cycle, also lighted. All of the field army transports and the 30 hundred weight vehicle had what is described as blacked out lights, namely, the right-hand head-light of each was completely covered by a disk, while the left-hand one had a horizontal slit in its disk about 6" long and $\frac{1}{4}$" wide—the slit having above it a small hood which threw the light downwards on to the road. On each of the front fenders there was what is described as a pencil light, which is self-explanatory, and on the back of each there was a transmission light which enabled the driver behind to see the vehicle in front. When the accident took place the visibility was good, although the moon was under clouds.

The convoy had become broken up into three segments. The first segment consisting of the lighted vehicles in front with a number of the transports was separated from the second by an interval of approximately 150 yards, while the second, consisting of the remainder of the transports, save one, was separated by some 300 yards from the remaining vehicles in the convoy led by the ninth transport. According to the various witnesses, when instructions as to the distance to be kept between vehicles in a convoy are given the distance varies from 35 feet to 30 yards, but on the night in question no instructions had been given as to any definite interval, each driver being told merely to keep in sight of the rear light of the vehicle in front. According to the driver of the transport involved in the accident, who was taking instruction in night driving, this was standard in his experience.

As Captain Callender proceeded west he observed the leading vehicles approaching but before he actually met the convoy he stopped, momentarily, to give some instructions to a soldier in charge of a jeep parked on the north side of the road and then proceeded on his way at about the time when the third vehicle of the convoy was passing him. He had lowered his lights when he first observed the convoy and when all the vehicles but those in the third segment, of which he was not then aware, had passed him, he raised his lights again and observed what he described as the silhouette of other vehicles approaching and recognized that

these were additional vehicles of the convoy. He could see the pencil lights of the leading transport and knew what it was. He does not recall seeing any other lights. Accordingly he slowed down to about 35 miles per hour and again lowered his lights. He was not able to keep the transport in view all the time from the time he first observed it but, as he says, he knew it was there. Another witness who was riding with him explains that there was a depression in the road in front of them in which the lights of the army transport were lost sight of for a time. Captain Callender says that he was not over two car lengths away from the transport when he saw a pair of headlights flashing up beside him and the collision took place. He says that the suppliant's vehicle passed him at from 15 to 20 miles an hour faster than he himself was travelling.

The learned trial judge found the driver of the suppliant's vehicle negligent in attempting to pass another vehicle going in the same direction without first ascertaining that the highway in front of and to the left of the vehicle to be passed was safely free from approaching traffic and that he turned out so fast while travelling at such a high rate of speed he did not, in the language of one of the witnesses, get a true picture of the road ahead of him. The learned trial judge also found the driver of the appellant's vehicle negligent in driving without lights when he was so far out of his proper position in the convoy.

The question for decision on this appeal is, in my opinion correctly stated by the respondent in his factum to be whether or not there is any evidence to support the finding of the learned trial judge that the driver of the army vehicle was negligent. According to the respondent's submission this negligence is said to have consisted in (*a*) that Lieutenant Coyle, the driver of the transport, was inexperienced in night driving; (*b*) the army vehicle itself was about 690 yards behind the vehicles in the convoy immediately proceeding it; and (*c*) the vehicle was being driven with blacked out lights.

With respect to (*a*) it is quite true that Lieutenant Coyle was an inexperienced driver. He was in fact on the night in question taking instruction in night driving from Gould, a gunner in the artillery, who was sitting beside him, having had two previous lessons only. Inexperienced as he was,

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however, he was not unlawfully on the highway but was there in the course of his military duty and his inexperience cannot be described as negligence.

With respect to (*b*) the learned trial judge has found that the vehicle operated by Coyle was 300 yards behind the vehicle in front. This unquestionably did present a potentially dangerous situation to travellers on the highway as the warning of the presence of the convoy on the road given by the lighted vehicles in front would be lost by such a gap. While there is some evidence that the gap was much greater than 300 yards, the learned trial judge has accepted the evidence of Captain Callender on this point and there is other evidence to support it. The question arising under this alleged head of negligence is as to whether the existence of this gap has been shown to have been due to any negligence on the part of Coyle

As already mentioned, he was driving under the instructions of Gould and the only evidence as to the reason for the existence of this gap is that in every convoy, from its very nature, such a result takes place. While the suppliant alleged in his petition of right, as a ground of negligence that Coyle was not driving the army vehicle in a proper position in the convoy, no evidence was given to establish that the gap was due to any negligence of Coyle. In fact in his factum the respondent recognizes that such a result inheres in every convoy. He says:

> It is pointed out in the evidence that in every Army convoy there is an accordion or concertina effect which seems to be brought about by a change in the speed of the first or leading vehicle. This accounts for the variation in the distance or difference in the length of the intervals between the various vehicles in the convoy.
>
> This doubtless also accounts for the fact that on the night in question the convoy appears to have broken up into three segments made up as follows:

The mere existence of the gap in itself cannot therefore, in my opinion, be taken as evidence of negligence on the part of the driver.

If the creation of this gap then was not due to any personal negligence on the part of Coyle, and the onus was upon the respondent to establish such negligence if it existed, was it negligence on the part of Coyle to have continued on in the absence of lights on his vehicle complying with the requirements of provincial law? With

his manner of driving itself there is no complaint and there could not be. Not only did he keep well over to the right hand side of the road, but in encountering vehicles going in the opposite direction he reduced his speed to ten miles an hour, no doubt in order to give such traffic as much time as possible to see his transport. The evidence of Coyle was that in keeping on he was acting in accordance with military orders not to stop but to stay in the convoy and he was also, at the time, driving under the immediate instructions of Gunner Gould who sat beside him and was in charge of the vehicle. The question for decision then becomes one as to whether or not the presence of the particular vehicle on the highway without the equipment as to lights required by the provincial law can, in these circumstances, be said to be negligence on the part of Coyle. It is to be remembered that, owing to the structure of the vehicle, the lights could not be altered in any way by any act of one in the vehicle itself.

Mr. Watt, for the appellant, was content to argue the appeal on the basis that the appellant was subject to the provisions as to lights in R.S.O., 1937, *cap.* 288, section 10, (1), (2). This assumes not only that the legislation extends to the Crown, although not expressly named, but also that provincial legislation could place such an obligation upon the Crown in the right of the Dominion. Parliament has exclusive legislative jurisdiction with respect to "Militia, Military and Naval Service and Defence" and by section 42 of the *Militia Act,* the arms and equipment of the Canadian forces "shall be of such pattern and design as are from time to time prescribed and shall be issued under regulations". To admit the application to an army vehicle of the legislation here in question involves the proposition that such vehicle, issued under section 42, must also comply with the legislation of possibly nine other jurisdictions. I am unable to adopt such a view. This does not mean that the law of negligence is of no application in the case of an army vehicle.

The foundation of liability on the part of the Crown under the provisions of Section 19(*c*) of the *Exchequer Court Act* is the existence of personal negligence shown by the suppliant to have existed on the part of some officer

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or servant of the Crown; *The King* v. *Anthony* (1). An analogous situation exists in England in the case of claims for loss occasioned, for instance, by reason of negligence in the navigation of a King's ship. In such cases the action is brought against the person on the King's ship whose personal negligence was the cause of the damage; *Nicholson* v. *Mouncey* (2). While the Crown is not liable, it does in practice pay the amount of any judgment obtained in such circumstances. It is essential, however, that the plaintiff sue the person actually responsible for the negligent navigation at the particular time; *Adams* v. *Naylor* (3), per Viscount Simon at pages 549-550; per Lord Thankerton at page 551; and per Lord Simonds at page 553.

In my opinion the placing of a convoy such as that here in question on a highway at night without taking reasonable means to protect the travelling public therefrom, might well be construed as negligence on the part of the servant or servants of the Crown who were responsible for this particular convoy being put on the highway or the officer in charge of the convoy. That, however, is a matter with which Coyle cannot be charged and is not the cause of action upon which the present petition of right is founded.

As has been already stated, Lieutenant Coyle was at the time subject to military discipline and obligated by statute to obey any lawful command of his superiors and it was while acting in pursuance of orders that he was on the highway with this particular vehicle and was engaged pursuant to his orders in an endeavour to keep up with the vehicle ahead.

It is not without relevance to observe that an ordinary citizen, acting under orders given by another having statutory authority to do so is not liable for the consequences of an act which, if committed apart from such orders, would entail responsibility in negligence.

In *Reney* v. *Magistrates* (4), the action was brought by a ship owner for damage sustained by the ship for negligence on the part of the respondent's harbour-master in

(1) [1946] S.C.R. 569 at 571.
(2) (1812) 15 East 384.
(3) [1946] A.C. 543.
(4) [1892] A.C. 264.

giving orders in connection with the docking of the ship which the ship's master was bound to obey. Lord Halsbury, L.C., said at page 269:

> The Solicitor-General said that the direction to come on was negligently obeyed, because they came on under a port helm. What was the thing which was being done? If it was what anybody might suppose, from the harbour-master's statements and directions, was intended to be done, I do not see any negligence.

And at page 270:

> Of course, no one supposes that this is a case of wilfully running against an obstruction; but to say that the harbour-master's authority is limited, or that a person is at liberty to disregard the orders of the harbour-master (who has by law power to give orders) because that person may have the idea in his mind that the harbour-master is making a mistake, would be, to my mind, a most dangerous principle to establish. A double authority would probably in many cases be fatal. Those who have the power to give orders have the right to consider that they will be obeyed. It would, to my mind, be a very strong thing to say that a particular direction of the harbour-master, in reference to what a vessel shall do, and who is within his right in giving it, should be disobeyed.

In The Mystery (1), the plaintiff's vessel was entering the defendant's dock under directions of the dock-master. At the same time, another official of the dock company gave an order to another ship to execute a certain manoeuvre, as a result of which it came into collision with the first vessel, causing it damage. An action was accordingly brought by the owners of the damaged ship against the owners of the second ship and in consequence of a defence setting up that the manoeuvre had been executed under compulsion of orders given by the servant of the dock company, the company was added as a defendant. It was held by a Divisional Court that there was no negligence on the part of the owners of the defendant ship. Gorell Barnes J. at page 121 approved of the principle laid down by Dr. Lushington in *The Bilbao* (2), that "no one should be chargeable with the act of another who is not an agent of his own choice."

In *Hodgkinson v. Fernie* (3), the plaintiff brought action against the defendant for damages to a ship of the former arising from a collision with a ship owned by the latter. Both ships had been hired by the Imperial Government and were in tow of different warships in the course of a voyage conveying troops in the Black Sea, and both were

(1) [1902] P. 115.
(2) Lush. 149 at 153.
(3) (1857) 2 C.B.N.S. 415.

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acting in pursuance of orders of the respective captains of the warships. The case was tried by Chief Justice Cockburn and a jury and in the course of his charge the learned trial judge said at page 420:

> The first question, therefore, for you, is, whether the master of the Courier had orders from the commander of the Fury not to let go her anchor, but to hold on by her hawser. Whether that order was right or wrong in point of judgment and seamanship is a matter which, if the order was one that the master of the Courier was bound to obey, it is clear it was not a matter for him to form any judgment about. His duty was, to obey orders, and not to take upon himself to criticize them, and to act upon his own judgment as to their propriety and expediency. There would be an end to all subordination, military or naval, if the officer subordinate in command were to take upon himself to decide upon the merits of the order, before he obeyed it.

And at page 422:

> If, therefore, the defendants in this case, in doing that which they did, and from which damage is said to have resulted to the plaintiff, were acting in obedience to orders given to them by an authority which they were bound to obey, I take upon myself to tell you,—subject to correction hereafter if wrong,—that the defendants are not responsible.

This view of the law was approved on a motion for a new trial.

Accordingly, where damage ensues to a person by the act of a person who is acting in pursuance of lawful orders the wrongful act, if any, occasioning the damage is not the act done in obedience to the orders, but negligence in the giving of the order itself.

On the law thus stated applied to the case at bar, it cannot be considered that there was any negligence on the part of Coyle either causing or contributing to the accident in question. He was in no way responsible for the structure of his vehicle and he was where he was as the result of orders of his superiors, which by statute he was bound to obey. Nor do I think that Coyle is to be fixed with negligence from any other point of view. He was, in my opinion, entitled to assume that his superiors were fully familiar with the proper precautions necessary to be taken to protect the travelling public and would see they were taken.

Were nothing more to be said, it would be necessary, in my opinion, to allow the appeal and dismiss the petition. I would not do so, however, without first giving the respondent an opportunity to obtain the consent of the

Crown to an amendment so as to permit the setting up, if he be so advised, of what in my opinion, as already indicated, may have been the real negligence which was the cause of his damage. Should the Crown so consent, and the necessary amendments be made, the appeal should be allowed and the case referred back to the court below for the taking of further evidence and the giving of the appropriate judgment. Failing the consent of the Crown the appeal should be allowed and the action dismissed with costs, if demanded. Without such consent the court is powerless to permit the proceedings to be amended; *Hansen* v. *The King* (1).

Appeal dismissed with costs and cross-appeal without costs.

Solicitors for the appellant: *Gowling, McTavish, Watt, Osborne & Henderson.*

Solicitor for the respondent: *James A. Maloney.*