

HER MAJESTY THE QUEEN (*Re-* }
spondent) } APPELLANT;

1958
 *Mar. 3
 Apr. 22

AND

DAME ANTOINETTE HOULE (*Petitioner*), LOUIS-
 PHILIPPE LACROIX (*Third Party*), JOSEPH
 ALBERT ARCAND (*Third Party*) RESPONDENTS.

ALBERT JOSEPH ARCAND (*Third Party*) APPELLANT;

AND

HER MAJESTY THE QUEEN (*Respondent*), DAME
 ANTOINETTE HOULE (*Petitioner*), LOUIS-
 PHILIPPE LACROIX (*Third Party*) .. RESPONDENTS.

LOUIS-PHILIPPE LACROIX (*Third Party*) APPELLANT;

AND

HER MAJESTY THE QUEEN (*Respondent*), DAME
 ANTOINETTE HOULE (*Petitioner*), ALBERT
 JOSEPH ARCAND (*Third Party*) ... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Liability for death or injury resulting from negligence of Crown servant—Pensionable Crown employee killed—Effect of statutory provisions—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19(1)(c) (re-enacted by 1938, c. 28, s. 1), 50A (enacted by 1943-44, c. 25, s. 1)—The Pension Act, R.S.C. 1927, c. 38, ss. 18 (re-enacted by 1940-41, c. 23, s. 10), 69 (enacted by 1952, c. 47, s. 3)—The Pay and Allowance Regulations, para. 207(8).

There is nothing in s. 18 of the *Pension Act*, 1927, as amended, that precludes recovery by the dependants of a pensionable Crown servant injured by the negligence of a servant of the Crown. Section 18(1) clearly refers to a third person who has incurred a legal liability to pay damages for death or disability, and does not affect the liability of the Crown under ss. 19(1)(c) and 50A of the *Exchequer Court Act*, as amended. *The King v. Bender*, [1947] S.C.R. 172, applied; *Oakes v. The King*, [1951] Ex. C.R. 133, approved; *Meloche v. Le Roi*, [1948] Ex. C.R. 321, overruled. (This situation has been changed by an amendment made in 1952.)

Nor is there anything in para. 207 of the *Pay and Allowance Regulations* as in force in 1950 to preclude recovery under s. 19(1)(c) of the *Exchequer Court Act*, even when the deceased is killed in a privately-owned vehicle used on military business with proper authorization.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Fauteux and Judson JJ.

1958
 THE QUEEN
 v.
 HOULE *et al.*

Paragraph 207(8) applies only to regulate how the loss is to be borne as between the Crown and its servant who has been authorized to use his own vehicle on military business, and does not affect the liability of the Crown under s. 19(1)(c) of the *Exchequer Court Act*.

APPEALS from a judgment of Fournier J. of the Exchequer Court of Canada¹. Appeals dismissed.

B. Nantel, Q.C., for Her Majesty the Queen.

C. Cannon, Q.C., for Dame Antoinette Houle.

A. J. MacDonald, for Louis-Philippe Lacroix.

J. Deschenes, for Albert Joseph Arcand.

The judgment of the Court was delivered by

JUDSON J.:—The suppliant's husband, Sergeant-Major Kenny, a member of the armed forces, was killed in a motor car accident while travelling in the course of duty. The driver of the motor car, Lt. Arcand, was using his own car and was also travelling in the course of duty. He was properly authorized pursuant to the regulations to use his own car on military business and to carry Kenny as a passenger. The learned trial judge found that Kenny was killed as a result of the negligence of Arcand and the driver of an oncoming car. Arcand was a servant of the Crown as defined by s. 50A of the *Exchequer Court Act*, R.S.C. 1927, c. 34, enacted by 1943-44, c. 25, s. 1 (now R.S.C. 1952, c. 98, s. 50). Unless deprived of this remedy by other legislation, Kenny's dependants, therefore, had a claim against the Crown under s. 19(1)(c) of the *Exchequer Court Act*, 1927 (since repealed by s. 25(2) of the *Crown Liability Act*, 1952-53, c. 30), which, as re-enacted by 1938, c. 28, s. 1, read:

19. (1) The Exchequer Court shall also have exclusive 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.

Dame Houle-Kenny, both personally and as tutrix to her two children, filed a petition of right. She obtained a judgment for \$20,000 and the question now is whether her right to maintain these proceedings is affected either by the *Pension Act*, R.S.C. 1927, c. 38, now R.S.C. 1952, c. 207, or by s. 207(8) of the *Pay and Allowance Regulations* in force at the time of the accident. The problem of supposed

¹[1954] Ex. C.R. 457.

conflict between s. 19(1)(c) of the *Exchequer Court Act* and the provisions of the *Pension Act* is in this Court for the first time but it has arisen on two previous occasions in the *Exchequer Court*.

1958
THE QUEEN
v.
HOULE *et al.*
Judson J.

In *Meloche v. Le Roi*¹, Angers J. held that the dependants of a soldier killed in the course of duty had no claim against the Crown under ss. 19(1)(c) and 50A of the *Exchequer Court Act* since Parliament had created a special remedy by way of pension. In *Oakes v. The King*², Cameron J. stated that he would have reached the same conclusion but for the decision of this Court in *The King v. Bender*³, where it was held that a servant of the Crown who was entitled to compensation pursuant to the *Government Employees Compensation Act*, R.S.C. 1927, c. 30, for injuries received in the course of his duty was not precluded from pursuing a claim for damages against the Crown under s. 19(1)(c) of the *Exchequer Court Act*. The learned trial judge in the case at bar was also of the opinion that the case was governed by the *Bender* case. I am of the same opinion.

The relevant section of the *Pension Act* in force at the time of the accident (re-enacted by 1940-41, c. 23, s. 10; now s. 20) was as follows:

18. (1) Where a death or disability for which pension is payable is caused under circumstances creating a legal liability upon some person to pay damages therefor, if any amount is recovered and collected in respect of such liability by or on behalf of the person to or on behalf of whom such pension may be paid, the Commission, for the purpose of determining the amount of pension to be awarded shall take into consideration any amount so recovered and collected in the manner hereinafter set out.

(2) In any such case the Commission may require such person or anyone acting on his behalf as a condition to the payment of any pension, to take all or any steps which it deems necessary to enforce such liability and for such purpose shall agree to indemnify such person or anyone acting on his behalf from all or any costs incurred in connection therewith.

Who is the person referred to in s. 18(1) who has incurred a legal liability to pay damages for the death or disability? That person is clearly a third party wrongdoer and not the Crown. The Crown is not inviting or requiring proceedings to be taken against itself for the purpose of taking the recovery into account in fixing the amount of the pension.

¹[1948] Ex. C.R. 321, [1948] 4 D.L.R. 828.

²[1951] Ex. C.R. 133, [1951] 3 D.L.R. 442.

³[1947] S.C.R. 172, [1947] 2 D.L.R. 161.

1958
THE QUEEN
v.
HOULE et al.
Judson J.

The submission of the Crown and of Arcand, on this appeal, is that because the section does not contemplate proceedings against the Crown, it follows that a claimant for a pension cannot have a remedy under ss. 19(1)(c) and 50A of the *Exchequer Court Act*. It seems to me that the fallacy in this submission is the same as the one pointed out in the *Bender* case with regard to the interaction of the *Government Employees Compensation Act* and the remedy under the *Exchequer Court Act*, namely, that the section does not deal with and leaves untouched the remedy under the *Exchequer Court Act*. The section is confined entirely in its operation to what may be done about recovery from a third party wrongdoer when a person seeks a pension.

The obvious conclusion is that when the *Exchequer Court Act* was amended in 1943 by the addition of s. 50A, which made a member of the armed forces a servant of the Crown, the effect of the amendment on s. 18 of the *Pension Act*, which resulted to a certain extent in a duplication of remedies, was overlooked. The omission was dealt with by legislation in 1952 (after the date of the accident in question here) which provided that in cases where a pension was payable, there should be no other remedy against the Crown or a servant of the Crown (1952, c. 47, s. 3, enacting a new s. 69 of the Act). Similar legislation had already been enacted to deal with the result in the *Bender* case (1947, c. 18, s. 9).

I turn now to para. 207 of the *Pay and Allowance Regulations* in force at the time of the accident. The first seven subparagraphs deal with the cases in which an officer or soldier may be authorized to use his own vehicle on military business and the allowances which may be made for this use. Then the last subparagraph provides:

(8) The Crown does not assume any liability or responsibility for any accident, injury or damage to any persons or property whatsoever which may occur while a private motor car or private motor cycle is being used by an officer or soldier, nor will any compensation be payable for, or in respect of, any wear and tear of the said private motor car or motor cycle or its equipment: Provided that nothing in this sub-paragraph shall be construed as limiting any right of the officer or soldier to pension, medical treatment or hospitalization.

The appellants submit that this regulation is a bar to any remedy under s. 19(1)(c) of the *Exchequer Court Act*. According to this submission the suppliant would have a remedy if her husband had been killed in a military vehicle

but not, as in this case, where he was killed in a privately-owned vehicle, even though its use on military business had been properly authorized by the regulations.

1958
THE QUEEN
v.
HOULE *et al.*
Judson J.

The apparent scope of the subparagraph is broad but the opinion of the learned trial judge was that, in the context in which it appears, it applies only to regulate how the loss is to be borne as between the Crown and its servant who has been authorized to use his own vehicle on military business, and it does not affect the liability of the Crown under s. 19(1)(c) of the *Exchequer Court Act*. I agree with this opinion. There is, according to this interpretation, no conflict between the regulation under consideration and the *Exchequer Court Act*. If there had been, it is difficult to see how a right clearly given by one Act could be whittled away by a regulation made under another and unrelated Act.

The working of the subparagraph is illustrated by the actual conduct of this case. The Crown joined Lt. Arcand and Louis-Philippe Lacroix as third parties in the proceedings and claimed over, not only against Lacroix but also against its servant Arcand. The judgment of the Court was that the suppliant was entitled to recover against the Crown the sum of \$20,000 and that the Crown was entitled to recover 30 per cent. of this against Arcand and 70 per cent. against Lacroix. Merely by authorizing the use of the car and paying for it, the Crown, as between it and Arcand, did not accept responsibility for the consequences of negligent driving. That is the effect and meaning of the subsection as found by the learned trial judge.

There was ample evidence on which the learned trial judge found negligence against Arcand and Lacroix and his finding cannot be disturbed. Nor would I interfere with his division of the blame. I would dismiss all three appeals with costs.

Appeals dismissed with costs.

Attorneys for the suppliant: Taschereau, Cannon & Frémont, Quebec.

Attorney for Her Majesty the Queen: Paul Trepanier, Montreal.

Attorneys for Albert Joseph Arcand: Letourneau, Quinlan, Forest, Deschenes & Emery, Montreal.

Attorney for Louis-Philippe Lacroix: Archibald J. MacDonald, Montreal.
