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GAUTHIER & COMPANY LIMITED (SUPPLIANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Negligence—Motor vehicles—Highways—Evidence—Crown—Collision between Crown's vehicle and another vehicle—Claim for damages against Crown—Crown's vehicle skidding across highway into path of other vehicle—Prima facie case of negligence—Onus of explanation—Nature of onus—Whether onus discharged in the circumstances—Res ipsa loquitur as against Crown.

A Bren gun carrier owned by the Crown and driven in the course of his duties by a member of the armed forces of Canada, while proceeding westerly on a highway in Ontario about 1.45 p.m. on January 11,

*PRESENT:—Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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1943, skidded so that its rear part was across the south side of the road in the path of the suppliant's motor ambulance which was proceeding easterly on its right side of the road; and a collision resulted. The suppliant's claim against the Crown for damages was dismissed by Thorson J., [1944] Ex. C.R. 17, who held that the suppliant had not established a case of negligence against the Crown. The suppliant appealed.

Held (Kerwin and Rand JJ. dissenting): The appeal should be allowed and the suppliant should have judgment for damages.

The driver of a vehicle meeting another vehicle on a highway has a duty under s. 39 (7) of the *Highway Traffic Act* (R.S.O. 1937, c. 288), and there is a similar duty at common law, to allow to the other vehicle one half of the road free; and a breach of that duty, occasioning damage, will establish a *prima facie* case of negligence against such driver, casting upon him the onus of explanation (the nature of this onus discussed). Such explanation should (in the words of Lord Dunedin in *Ballard* v. *North British Ry. Co.*, 60 Sc. L.R. 441, at 449) "show a way in which the accident may have occurred without negligence". Such a way was not, in the circumstances of this case, shown by the mere fact of the skidding (which, by itself, is a "neutral fact", equally consistent with negligence or no negligence) nor by the evidence (on proper inference from the facts established by evidence accepted by the trial judge). (The phrase *res ipsa loquitur* is applicable to a claim against the Crown under s. 19 (*c*) (as enacted by 2 Geo. VI, c. 28) of the *Exchequer Court Act*. The negligence spoken of in s. 19 (*c*) may be established by legitimate inference from facts proved by the application of the phrase).

Per Kerwin and Rand JJ., dissenting: The evidence did not justify a finding of negligence on the part of the driver of the carrier. Skidding on a slippery road cannot be taken *per se* as negligence on a driver's part. Even if the doctrine *res ipsa loquitur* applies to the Crown (which it was unnecessary to determine), the explanation by a witness (who considered that the skid had been caused by the left tread striking a smooth or icy patch on the road, though he could not find any), taken in the light of the circumstances, was sufficient to displace any onus resting upon the Crown.

APPEAL by the suppliant from the judgment of Thorson J., President of the Exchequer Court of Canada (1) dismissing its claim, made by way of petition of right, for damages caused by a collision between its motor ambulance and a Bren gun carrier owned by the Crown and driven in the course of his duties by a member of the armed forces of Canada.

Walter F. Schroeder K.C. for the appellant.

Robert Forsyth K.C. for the respondent.

(1) [1944] Ex. C.R. 17; [1944] 2 D.L.R. 273.

The judgment of Kerwin and Rand JJ., dissenting, was delivered by

KERWIN J.—This is an appeal by the suppliant from the dismissal by the Exchequer Court of his petition of right. The suppliant is the owner of a motor ambulance which, on January 11th, 1943, was being driven from Ottawa easterly towards Hawkesbury on Ontario Provincial Highway No. 17. About 1.45 o'clock in the afternoon a collision occurred between it and a Bren gun carrier, owned by the respondent and driven by Private D. G. Dunn. Originally it was claimed that Dunn had been guilty of negligence in not having the carrier under proper control and in driving at an excessive rate of speed. The suppliant's driver testified that as the vehicles approached each other, the carrier zigzagged in its course, and that it was travelling at an excessive rate of speed. The President of the Exchequer Court did not believe this and other evidence to the same effect and no attack was made before us on these findings.

The highway had been well ploughed and it was between twenty-four and twenty-six feet wide with a snow bank on each side of the ploughed portion. The surface consisted of hard packed snow without ruts. It was in good winter condition and safe for driving. It had snowed a little that day and there had been some sleet but, while the road was slippery, it was not dangerously so.

Dunn had been sent out with the carrier on what is known as a track test, that is, a run to test the caterpillar treads on the carrier. He had gone from the proving grounds on highway 17 easterly as far as Cumberland. The weather had been fine but it had started to snow a little and sleet and Dunn, therefore, obeyed the standing order in such circumstances that he should return to the proving grounds. He accordingly started off from Cumberland and travelled westerly, with the right hand tread of the carrier on the ploughed shoulder and slightly higher than the left. Dunn had driven trucks for a number of years and had driven Bren gun carriers for some months. Both he and Staff-Sergeant Hall testified that having the

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right tread on an encrustation of snow on the north side of the highway permitted one to have the carrier under greater control.

Dunn saw the motor ambulance approaching some distance away and knew the two vehicles would meet at a certain slight curve in the road. He kept on his regular course, considering that that was the proper thing to do, but when he was about eight or ten feet east of the apex of the curve, the carrier slid southwesterly from the north to the south side of the road so that when it came to a stop it was across the south half of the road facing north, with its rear end in the snow bank on the south side of the road. The motor ambulance was not able to avoid running into it and hence the damage.

There was a gradual slope on what must be emphasized has been found to be, and is, a slight curve in the road. Much has been made of Dunn's cross-examination as to why he kept on the same course and on this point I can do no better than extract the following from the reasons for judgment of the learned President:—

> As Dunn was taking this bend the outside of the right track of the carrier was on the right shoulder of the road with the left track slightly down on the road because of the slope of the road to the south. On his cross-examination Dunn stated that this would be likely to throw him into a skid as he came around the curve but he continued to drive on the same course he had been following. From this statement counsel for the suppliant strongly contended that it was negligent on the part of the driver to continue to drive in this manner. Indeed, this was the only specific ground of negligence that was strongly urged against the driver. The evidence on this must, however, be looked at as a whole. Dunn stated that he did not expect to skid at all. He was staying on his course and driving as he did because he knew that if he tried to pull out of his course it would be likely to cause him to skid. If he had lowered the right track of his carrier to the same level as his left the carrier would have been in the middle of the road.

With this I entirely agree and, like the learned President, can find no negligence on the part of Dunn.

Mr. Schroeder argued that the carrier, proceeding westerly, had no right on the south half of the road and that the driver of the ambulance, as to whom there was no suggestion of negligence, could rely upon the carrier not being found where it was not to be expected. It may be that in certain cases (some of which have actually come before the courts), if nothing more was in the record, the evidence might

be sufficient for the court to find on the balance of probabilities that the driver of a vehicle was negligent. But that is not this case. We know that it was the skid that caused the carrier to leave the north side of the road and go to the south. Motoring in wintertime in our climate is subject to many vicissitudes, and skidding on a slippery road cannot be taken *per se* as negligence on the part of a driver. A skid "by itself is neutral. It may or may not be due to negligence": *per* Lord Greene in *Laurie* v. *Raglan Building Co. Limited* (1). We were referred to the decision of the Ontario Court of Appeal in *McIntosh* v. *Bell* (2), and to the decision of this Court in *Claxton* v. *Grandy* (3), approving of the former. In my view, the surrounding circumstances in each of these cases were entirely different from that presented to the Court in the present appeal.

Reliance was also placed on *res ipsa loquitur,* a doctrine which has been much overworked: *The Sisters of St. Joseph of the Diocese of London* v. *Fleming* (4). It is true that Dunn could not explain the skid. He had kept his course and, while he was not asked whether he had passed other curves or bends, another witness, Constable Harkness, testified that there were "a lot of curves" on the highway, and I agree with the President that it is proper to assume that Dunn negotiated them safely. He had been travelling at fifteen miles per hour while making his test from the proving grounds to Cumberland but on the return journey, because of the change in the weather, he put the carrier into third gear and reduced his speed to ten to twelve miles per hour. The change of gear gave him a little more power and he was thus able to travel more slowly and keep the carrier under better control. Hall considered that the skid had been caused by the left tread striking a smooth or icy patch on the road, although he could not find any. It is unnecessary to determine whether the doctrine applies to the Crown because, even if it did, Hall's explanation is sufficient to displace any onus resting upon the respondent.

The appeal should be dismissed with costs.

(1) [1942] 1 K.B. 152, at 154; [1941] 3 All E.R. 332, at 336.
(2) [1932] O.R. 179.
(3) [1934] 4 D.L.R. 257.
(4) [1938] S.C.R. 172 at 177.

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The judgment of the majority of the Court (Taschereau, Kellock and Estey JJ.) was delivered by

KELLOCK J.—This is an appeal from a judgment of the learned President of the Exchequer Court dismissing a claim by the appellant for damages to a motor vehicle occasioned by the negligence, as it was alleged, of an officer or servant of the Crown. The damages claimed are the result of a collision between a motor ambulance of the appellant and a Bren gun carrier, driven by one Private Dunn, a member of the armed forces of Canada. The collision occurred at about 1.45 p.m. on January 11th, 1943, on Ontario Provincial Highway No. 17. The appellant's ambulance was proceeding easterly while the Bren gun carrier was proceeding in the opposite direction. Each of the vehicles, until immediately prior to the collision, was on its proper side of the road. The ambulance was proceeding at about 25 miles, and the carrier at from 10 to 12 miles, per hour. At or about the place of the collision, the road curves to the south, when one is facing west, and as the carrier was on this curve, the rear end of it slid off to the driver's left, placing it directly in the path of the ambulance, giving the driver of the latter no opportunity of avoiding a collision. The ambulance ran into the left side of the carrier.

Among the particulars of negligence alleged by the appellant against the driver of the carrier, were the following:

1. Failing to have control of the said tank or if he had such control, failing to exercise it.
2. Operating the said tank without regard to the safety of the petitioner's motor vehicle or the operator thereof or the passengers therein or of other persons using the said highway.
3. Failing to turn out to the right of the centre line of highway so as to allow the motor vehicle of the petitioner one-half of the said highway free, and crossing from the north to the south half of the said highway when very close to the motor vehicle of the petitioner, thus making an accident inevitable.

4. Travelling at an excessive rate of speed having regard to the condition of the highway and to other circumstances then and there existing.

The learned trial judge absolved the appellant's driver of all negligence. He held that it was for the appellant to establish negligence on the part of the driver of the carrier which, in his Lordship's opinion, the appellant failed to do. He refused to apply *res ipsa loquitur*.

The evidence adduced on behalf of the appellant established the facts of the accident already set forth, including the fact that when the vehicles were approximately 50 feet from each other, the carrier "zig-zagged" and came over or slid over to the south side of the road directly in the path of the ambulance, giving the latter no opportunity to avoid the collision. Evidence as to the damage sustained by the ambulance was, of course, also given.

In my opinion, the appellant had, on this evidence, established a *prima facie* case of negligence as against the respondent. The duty cast upon drivers of vehicles meeting each other upon a highway, is set out in section 39, subsection 7, of *The Highway Traffi Act,* R.S.O. 1937, chapter 288, which provides that

> where a person travelling or being upon a highway in charge of a vehicle meets another vehicle, he shall turn out to the right from the centre of the road, allowing to the vehicle so met one-half of the road free.

In *Baldwin* v. *Bell* (1) Lamont J., in delivering the judgment of himself and Rinfret J. (as he then was), said:

> The non-observance by an automobile driver of the precautions prescribed or duties imposed by the legislature is usually *prima facie* evidence of negligence.

This was said with relation to the predecessor of the statutory provision above referred to. I refer also to *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* (2).

The driver of a vehicle meeting another vehicle on a highway is entitled to rely on the performance by the approaching vehicle of the duty cast upon it by the statute

(1) [1933] S.C.R. 1 at 12.

(2) [1923] 1 K.B. 539 at 548.

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referred to, and is in his turn bound by a similar duty. A breach of this duty occasioning damage will establish a *prima facie* case of negligence on the part of the driver of the offending vehicle, casting upon the latter the onus of explanation. I shall return later to the nature of this onus. Apart from the existence of the duty imposed by statute, there would appear to be a similar duty at common law. *Chaplin* v. *Hawes* (1); Beven, 4th Edition, 138, 139 and 686; Gibb, "Collisions on Land", 4th Edition, 118. The mere fact of an accident taking place on a highway may not give rise to any inference of negligence on the part of the operator of either vehicle concerned, but whether or not in any particular case that will be so, is dependant upon the circumstances. *Halliwell* v. *Venables* (2); *McGowan* v. *Stott* (3); *Ellor* v. *Selfridge* (4). Apart from the statute applicable in the case at bar, I am of opinion that the principle of the cases just referred to applies in the present instance, the carrier being, in the words of Lord Greene in *Laurie* v. *Raglan Building Co. Ltd.* (5), "in a position where it has [had] no right to be" at the time it met the appellant's ambulance. This fact resulting in the damage to the appellant's vehicle, amounts *prima facie* to negligence on the part of the operator of the carrier. Counsel for the respondent at the trial would appear to have acted upon the view which I have above expressed, as evidence was called in defence. In my opinion, he was right in so doing.

Before considering this evidence, it will be convenient to consider the nature of the onus resting upon the respondent at the conclusion of the appellant's case. I refer first to the judgment of Duff C.J., in *United Motors* v. *Hutson* (6). After referring to the judgment of Erle C.J. in *Scott* v. *London & St. Katherine Docks Co.* (7), his Lordship proceeded:

> Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff.

(1) (1828) 3 C. & P. 554.
(2) (1930) 99 L.J., K.B. 353.
(3) (1923) 99 L.J., K.B. 357.
(4) (1930) 46 T.L.R. 236.
(5) [1941] 3 All E.R. 332, [1942] 1 K.B. 152.
(6) [1937] S.C.R. 294, at 296 *et seq.*
(7) (1865) 3 H. & C. 596, at 601.

He cited the judgment of Lord Halsbury in *Wakelin's* case (1). He then referred to a second class of cases to which the phrase *res ipsa loquitur* is applied, where by force of a specific rule of law, if certain facts are established, the defendant is liable unless he prove that the occurrence out of which the damage has arisen falls within the category of inevitable accident. Such a case is illustrated by *The Merchant Prince* (2) and cases where there is a statutory onus such as that in question in *Winnipeg Electric Co.* v. *Geel* (3). I do not know of any authority which would bring the facts of the case at bar within this second class. In my opinion, the case falls within the first class. The explanation called for on the part of the defendant in this kind of case has been dealt with in a number of authorities, notably in the oft cited judgment of Lord Dunedin in *Ballard* v. *North British Railway Co.* (4):

> I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence, but what is the next step? I think that if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion. For example, in *Scott v. The London and St. Katherine Docks Co.* (5), a case where a bag of flour fell on a man who was passing along a quay in front of a warehouse, it would not have been sufficient to say that the flour bag might have fallen from a passing balloon.

After referring to the judgment of Erle, C.J., in that case, Lord Dunedin proceeded:

> I take notice of the word "explanation". It is not in absence of "proof" by the defendant that there is reasonable evidence of want of care.

Reference may also be made to *The Kite* (6); *Langham* v. *Governors of Wellingborough School* (7); *The Mulbera* (8); *Canadian Pacific Railway* v. *Pyne* (9), *per* Duff J., as he then was, delivering the judgment of the Privy Council; *Hunter* v. *Wright* (10); *Kearney* v. *London, Brighton etc., Ry. Co.* (11).

(1) *Wakelin* v. *London & South Western Ry. Co.*, (1886) 12 App. Cas. 41, at 44, 45.
(2) [1892] P. 179.
(3) [1932] A.C. 690.
(4) (1923) 60 Sc. L.R. 441, at 449.
(5) (1865) 3 H. & C. 596.
(6) [1933] P. 154.
(7) (1932) 101 L.J., K.B. 513.
(8) [1937] P. 82, at 91.
(9) (1919) 48 D.L.R. 243, at 246.
(10) [1938] 2 All E.R. 621.
(11) (1870) L.R. 5 Q.B. 411, at 413; (1871) 6 Q.B. 759.

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Turning to the evidence adduced in defence, it was established that the presence of the carrier on the south side of the road at the time of the collision was due to a skid, the rear end of the carrier going around to the driver's left, taking the whole vehicle across the road so that, at the time it was run into by the ambulance on its left side, it was across the south half of the highway. Skidding of a vehicle on a highway by itself is a "neutral fact", equally consistent with negligence or no negligence. The case *Pacific Stages Ltd.* v. *Jones* (1) is an illustration of skidding which was not due to any negligence of the operator. I do not think the *decision* in *Claxton* v. *Grandy* (2) is inconsistent with this view. Accordingly, for the respondent in the circumstances of this case to go no farther than to show that the accident was occasioned by the skidding of the carrier, was not to show "a way in which the accident may have occurred without negligence", in the language of Lord Dunedin in *Ballard's case* (3).

There were but three witnesses called for the respondent. The relevant parts of the evidence of Staff Sergeant Hall are as follows:

Q. What would make it slide? You did not see it slide?

A. No, I did not see it slide.

Q. Your statement could only be an opinion? I am curious to know?

A. The only thing I could attribute it to was that the left track must have struck a frozen spot somewhere on the road which caused the carrier to lose its grip.

Q. Would that be a likely thing to happen if the road were uneven in its composition; that is, some parts more frozen than others or more slippery than others?

A. Not unless he hit a bare spot, it would not, because with the road packed *ordinarily* he could run that vehicle wide open on any curve with no fear of skidding, but if they should strike a spot in the road that was icy enough or frozen enough the vehicle would slide, certainly.

Not only was there no evidence of any such spot on the highway, but the same witness established affirmatively that there was no such condition.

Q. You do not know, as a matter of fact, that there was such a spot there?

A. Actually I do not know, no, sir.

Q. You did not make any investigation to ascertain if there was?

A. I looked over the road pretty well.

(1) [1928] S.C.R. 92.

(2) [1934] 4 D.L.R. 257.

(3) (1923) 60 Sc. L.R. 441, at 449.

Q. You did not see any such spot?
A. No.

So far as the operator of the carrier is concerned, he gave the following evidence:

Q. What explanation can you give of why your car should slide to the left?

A. Well, as I said that day, I could not give any—the reason for causing it.

Q. There must have been some cause?

A. I could see no reason for it to happen whatever. It happened so quickly. I seen nothing ahead of me to cause it or I could not see what caused it after.

These answers were made to questions put by the learned trial judge as well as the further answer a little later on:

Q. You cannot give me any other explanation of how your car suddenly slid off your side of the road—the back end of it slid off to your left?

A. No, sir, I cannot.

I do not know what the trial judge had in mind in his use of the word "other" unless it were that the fact that the carrier was on the curve at the time, which his Lordship had just then been discussing with the witness, was a contributing factor. The third witness made no contribution with regard to this matter.

However, notwithstanding that part of the evidence of the witnesses for the respondent referred to above, if, on all the evidence, a reasonable explanation of the cause of the skidding appears, consistent with absence of negligence on the part of Dunn, the respondent is, of course, entitled to the benefit of it.

In my view, an examination of all the evidence establishes that the skidding of the carrier was due to a combination of factors: (1) the condition of the surface of the road due to the sleet which was falling, (2) the elevation of the right side of the carrier by reason of the slope in the road from north to south due to the banking of the curve, (3) the turning of the carrier to the left off the soft crust of the shoulder on to the hard-packed snow of the more travelled part of the road, and (4) the carrier's speed in the circumstances.

On the day in question, the carrier was engaged in a road test for the purpose of observing wear in the materials of its moving tracks. The driver was under instructions

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from Sergeant Hall to return to his headquarters and take the carrier off the road in the event of certain weather conditions developing. According to Hall, "it was beginning to sleet and snow, and I told the lads if the road became dangerous they were to report to the proving ground and leave the vehicle. This condition came up."

A little later he said:

Q. Are these vehicles particularly dangerous on the highway when there has been sleet falling?

A. Yes, there is a danger of skidding.

Q. But there is less danger, you have told me, than there is in the case of a truck or motor car?

A. Well, where there is soft snow, there is.

Q. And where there is hard-packed snow there is still less danger of skidding than in the case of a truck or motor car?

A. Yes, sir.

Q. Unless the wheel were suddenly turned or unless there was a frozen bump on the road which this tank hit, you cannot account for the sudden movement from the north to the south side?

A. I cannot, sir.

Q. But the suddenly turning of the wheel might account for it?

A. Not on a hard-packed road. On sleet it will be apt to, yes.

Q. And you say there was sleet at this time?

A. It was sleeting.

THE PRESIDENT: If there was sleet the skid might happen as the result of either turning or hitting a frozen part?

WITNESS: That is right, sir.

According to Dunn, it had begun to sleet for some 15 or 20 minutes before the accident and he was a little "leary" of the highway. At first, he denied having turned the wheel of the carrier at all, although at the time of the skid, he "was commencing to take the bend in the road", that is, as he explained, he was within 8 or 10 feet of the sharp point of the curve when the skid took place. Subsequently, he admitted what was obvious, that he had already begun to turn his wheel before the carrier skidded. For some distance east of the curve, he had been travelling with the right track of the carrier in the snow crust on the north shoulder of the road. The evidence shows that this was a good surface on which to travel. According to Hall, however, the carrier left this shoulder and at the time *it started to slide,* it "was about a foot from the incrustation". It then skidded about 25 feet in a southwesterly direction. The learned trial judge makes a specific finding in accordance with this evidence, which

was based upon Hall's observation of the tracks of the carrier. Dunn, however, denied that his course had varied from the shoulder at any time prior to the skid. The fact that he did change course is an important factor, as the hard-packed snow on the road proper, with the sleet on it, would not afford the grip which the soft crust of the shoulder had done.

Dunn describes the slope of the road on the curve from north to south, and its effect on the carrier, as follows:

Q. Your right track was up on the shoulder?
A. Yes.
Q. And would that be likely to throw you into a skid as you came around the curve?
A. It would.

By the President:

Q. Would it?
A. Yes.
Q. Why would it in the snow?
A. My left track was down—
Q. Your right was up on the shoulder?
A. Yes.

By Mr. Shroeder:

Q. Was your right track away up on the shoulder higher than your left track?
A. Slightly.
Q. And coming around a curve in that manner would be likely to cause you to skid, you have told me?
A. Yes.
Q. And you knew that as you saw this automobile approaching this sharp curve—you do not admit it is a sharp curve—you knew that?
A. Yes.

He is then questioned as to whether or not with this knowledge he had tried to change his position on the road, and he said that what he meant when he made the above answers was that he would skid "if I tried to pull out of it", that is, I presume, if he tried to change his position on the road. As already pointed out, he had changed his course. He also gave the following evidence:

Q. And continued toward this sharp curve in a manner which was more likely to cause you to skid?
A. *At that far back I could not see the road was higher at that point until I came onto it.*
Q. It had been all the way?
A. There was a shoulder.

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Q. But you had no reason to believe that that part was any different?
A. No.
Q. You did not know whether it was or not.
THE PRESIDENT: Coming to the curve, does the road slope?
WITNESS: There is a slight slope of the road to the south.

By Mr. Shroeder:

Q. There was more of a slope and even a greater distance between the right track and the left track at the curve than at the point before the curve?
A. I do not know how to describe that.
Q. The road is banked to the south here, you notice on exhibit 4, and if you continued with your right track on the shoulder and the left track on the road the right track at the curve would be elevated even higher than the left track before you came to the curve?
A. Yes.

He had thus turned the carrier to the left off the soft shoulder where it had a footing, on to the hard-packed snow with its covering of sleet. This, together with the elevation of the right track by reason of the construction of the road at the curve, would, as he knew, be likely to cause this heavy vehicle of eight tons to skid to its left, and that is what happened. Dunn said he had not observed the banking of the road at the curve and did not expect to skid, but in my view, he ought to have anticipated the elevation of the curve which is a very common construction, and to have taken all proper measures to proceed around the curve safely: *The "City of Peking"* (1). It is evident on his own evidence that had he realized the presence of the slope on the curve, he would have gone even more slowly than he did. I would adopt the language of Sir Wilfrid Greene, M.R., in *Laurie* v. *Raglan Building Co. Ltd.* (2):

> If roads are in such a condition that a motor car cannot safely proceed at all, it is the duty of the driver to stop. If the roads are in such a condition that it is not safe to go at more than a foot pace, his duty is to proceed at a foot pace.

See also *McIntosh* v. *Bell* (3), cited in *Claxton* v. *Grandy supra.* In the circumstances, I do not think the operator of the carrier is to be acquitted of negligence. The respondent has not shown "a way in which the accident may have occurred without negligence". In reaching this conclusion on the evidence, I am differing from the learned trial judge

(1) (1888) 14 App. Cas. 40, at 44.
(2) [1941] 3 All E.R. 332, at 336; [1942] 1 K.B. 152, at 154-155.
(3) [1932] O.R. 179, at 186.

only as to the proper inference to be drawn from the facts as established by the evidence accepted by him. *Dominion Trust Co.* v. *New York Life Insurance Co.* (1), *per* Lord Dunedin at 258.

It was contended on behalf of the respondent that *res ipsa loquitur* is not applicable to a claim against the Crown under section 19 (*c*) of the *Exchequer Court Act*. I am unable to accept this contention. The meaning of the phrase has been variously expressed, but it simply means that from certain proved facts, an inference of negligence arises. Such inference is justified as an inference "of fact legitimately arising out of the facts established by the evidence." *Per* Duff J., as he then was, in *Shawinigan Carbide Co.* v. *Doucet* (2). I am unable to see in principle why the negligence spoken of in paragraph (*c*) of section 19 of the *Exchequer Court Act*, as enacted by 2 George VI, chapter 28, section 1, may not be established by legitimate inference from facts proved by the application of the phrase *res ipsa loquitur*. If there must be evidence of negligence under the section, this is the evidence. There is no authoritative decision to the contrary and it has been decided in *Yukon Southern Air Transport Limited* v. *The King* (3) that the phrase is applicable under the section. A similar view was expressed by Maclean J., in *Sincennes-McNaughton Lines Ltd.* v. *The King* (4).

I would, therefore, allow the appeal and direct the entry of judgment in favour of the appellant for the sum of $509.94, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *MacCraken, Fleming, Schroeder & Burnett.*

Solicitor for the respondent: *R. Forsyth.*

(1) [1919] A.C. 254.
(2) (1909) 42 Can. S.C.R. 281, at 304.
(3) [1942] Ex. C.R. 181.
(4) [1926] Ex. C.R. 150, at 158.