

1934

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1935

*May 13

HIS MAJESTY THE KING (RESPONDENT)

AND

ROSE MOSCOVITZ AND ANNA MOSCOVITZ (SUPPLIANTS).....

APPELLANT;

RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Liability of, for negligence of its servant “while acting within the scope of his duties or employment upon any public work” (Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c))—Collision through negligent driving of Crown’s motor truck by soldier in Canadian Army Service Corps on returning from delivering military stores to Airport of Royal Air Force.

The suppliants claimed damages from the Crown by reason of the death of M., who was fatally injured when a motor truck in which he was riding collided with a motor truck of the Crown, driven (negligently, as found at trial) by K., a private in the Canadian Army Service Corps. K’s duties were those “of driver of a mechanical transport vehicle,” and he had driven the truck from its garage (which served as a depot for such vehicles) at Kingston, with military stores which were being sent by the Canadian Army Service at Kingston to a detachment of the Royal Air Force airport at Trenton. The stores had been delivered and the truck was returning to Kingston when the accident happened.

Held: The negligence of K. was not “negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work” within s. 19 (c) of the *Exchequer Court Act* (R.S.C. 1927, c. 34), so as to make the Crown liable. While the airport at Trenton, as well as the garage at Kingston, might well fall within the description “public work” (*The King v. Dubois*, ante, p. 378), and while the duties of the officer or servant, in the execution of which the negligence occurs, may be so connected with the public work (in or in relation to the construction, repair, maintenance, working or care of it) as to bring negligence in their performance, elsewhere than on the public work, within the scope of the enactment (*The King v. Dubois supra*), there was in the present case no such connection between the duties or employment in which K. was engaged at the time of the collision, and either the garage at

*PRESENT: Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ. (Rinfret J., through illness, did not take part in the judgment).

Kingston or the Trenton airport, as to bring his negligence within the scope of the words quoted. "Public work" in the enactment cannot be read as the equivalent of public service (*The King v. Dubois, supra*).

Judgment of Maclean J., President of the Exchequer Court of Canada, [1934] Ex. C.R. 188, reversed.

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APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), in favour of the suppliants, who, by petition of right, had claimed damages from the Crown for the death of one Himan Moscovitz, who died from injuries received in a collision of motor trucks. The suppliant Rose Muscovitz was the widow of the deceased and was executrix of his estate. The suppliant Anna Moscovitz was step-mother of the deceased.

The deceased's death ensued from a collision between a motor truck in which he was a passenger, and a motor truck, the property of the Crown, driven on the occasion in question by Private Kelly, a soldier in a detachment of the Canadian Army Service Corps, stationed just outside the city of Kingston, Ont. Kelly's duties were those "of driver of a mechanical transport vehicle." The truck he was driving on the occasion in question was, when not in use, ordinarily stored in a garage at Kingston, which garage was owned or rented by the Crown and was occupied by the Royal Canadian Army Service Corps, and served as a depot for mechanical transport vehicles.

The truck, driven by Kelly, had been carrying certain military stores, sent by the Canadian Army Service at Kingston to a detachment of the Royal Air Force airport at Trenton, Ont. The stores had been delivered at Trenton, and the truck was on its return to Kingston, when the collision occurred. The trial judge found that the accident was owing to the negligent driving of Kelly.

The trial judge held that on the occasion in question Kelly was engaged upon a public work (within the meaning of the *Exchequer Court Act*), the transporting of military stores belonging to the Crown, from one point to another, from one public service to another, by a motor truck belonging to the Crown; also that Kelly was acting within the scope of his duties as a servant of the Crown at the time of the accident; and that the Crown was liable in damages to the suppliants.

(1) [1934] Ex. C.R. 188.

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— By the judgment of the Supreme Court of Canada, now reported, the appeal was allowed and the petition of right dismissed.

F. P. Varcoe K.C. and *C. A. Payne K.C.* for the appellant.

B. C. Donnan, K.C. and *N. Borins* for the respondent.

The judgment of Duff C.J. and Cannon, Crocket and Hughes JJ. (Rinfret J., through illness, not taking part in the judgment) was delivered by

DUFF C.J.—The learned President of the Exchequer Court has held that the Crown is responsible under section 19 (c) of the *Exchequer Court Act* (R.S.C. 1927, ch. 34) for the consequences of the negligence of Private Kelly in driving a motor truck, the property of the Crown, in the exercise of his functions as a private in the Canadian Army Service Corps. This negligence, it has been found, was the cause of the death of the deceased Himan Moscovitz in respect of which his widow and his stepmother, the respondents, claim compensation under Lord Campbell's Act.

The learned President says:

I am of the opinion that on the occasion in question Kelly was engaged upon a public work, the transporting of military stores belonging to the Crown from one point to another, from one public service to another, by a motor truck belonging to the Crown. I am of the opinion also that Kelly was acting within the scope of his duties as a servant of the Crown at the time of the accident.

Kelly's duties were those "of driver of a mechanical, transport vehicle." In pursuance of those duties, on the 8th of November, 1932, he drove a truck from the garage at Kingston to the airport at Trenton for the delivery there of military supplies for the use of the "personnel of the airport." Kelly was not in any way attached to the airport, had no connection with the Air Force, and was not subject to the orders or instructions of any Air officer at the airport.

The stores in the truck were in charge of Private Batty who had been detailed for that purpose. Batty's truck was accompanied by another engaged on the same service in charge of Corporal Cherry. After unloading at Trenton, the trucks did not return to Kingston direct but proceeded to Belleville, where, as he explained, Corporal Cherry "had business." At Belleville they stopped for an hour and a half or two hours, leaving, about seven o'clock in the evening, on their return to Kingston. It was on this stage of their journey that the collision occurred in which the deceased Himan Moscovitz unhappily lost his life.

The question of substance on the appeal is whether or not the negligence of Kelly, in the language of section 19 (c), is negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work

or, in the French version,

negligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public.

It will be clear, from what has been said in the judgment in *The King v. Dubois* (1), that the airport at Trenton, as well as the garage at Kingston, may well fall within the description "public work" or "chantier public," in the meaning of this enactment.

The precise point for determination is whether or not Kelly, in driving a truck belonging to the Army Service Corps, was in the sense of the enactment "acting within the scope of his duties or employment upon" such "public work"; or "dans" the "chantier public" in question.

The phrases "public work" and "chantier public" contemplate, as has been fully explained in *Dubois'* case (1), not public services, but physical things. Nevertheless, the phrase "upon any public work," "dans tout chantier public," has received a liberal construction in the decisions of this court in *The King v. Schrobounst* (2) and *The King v. Mason* (3). It is not essential that the act of negligence should be committed by the negligent officer or servant during his presence on the public work. The duties of the officer or servant, in the execution of which the negligence occurs, may be so connected with the public work (in or in relation to the construction, repair, maintenance, working or care of it) as to bring negligence in their performance elsewhere within the scope of the statute. The ground upon which such a construction may be supported has been explained in the judgment in *Dubois'* case (1).

I cannot find here any such connection between the duties or employment in which Kelly was engaged at the time of the collision, and either the garage at Kingston which served as a depot for mechanical transport vehicles, or the Trenton airport, as to bring Kelly's negligence within the scope of the words quoted. Kelly was, in truth, simply the driver of an automobile the property of the Crown un-

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(1) Ante, p. 378.

(2) [1925] Can. S.C.R. 458.

(3) [1933] Can. S.C.R. 332.

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der the control of the Army Service Corps; an automobile used generally, it may be assumed, for the purposes of military transport. If you interpret "public work," "chantier public," as the learned President has done, as embracing a public service of that kind, then the case, of course, falls within the statute. I have given my reasons in the *Dubois* case (1) for the conclusion that the phrase cannot receive such an extended interpretation. Such a public service is not, as explained in that judgment, for the purpose in hand, differentiated by any substantial distinction from any other public service; and to read "public work," "chantier public," as the equivalent of public service, is, for the reasons there given, plainly inadmissible.

The appeal should be allowed and the action dismissed. I assume the Crown will not ask for costs.

Appeal allowed.

Solicitor for the appellant: *Chas. A. Payne.*

Solicitor for the respondents: *B. C. Donnan.*
