1946

Feb. 7, 8, 11, 12, 13 & 14

Mar. 18 & 19

Oct. 25

BETWEEN:

HIS MAJESTY THE KING on the Information of the Attorney General of Canada, } PLAINTIFF;

AND

TORONTO TRANSPORTATION COMMISSION ..... } DEFENDANT.

Crown—Claim by Crown—Damages—Negligence—Collision on highway—Clearance lights—Common law—Exchequer Court Act R.S.C. 1927 c. 34 s. 19 (c) and as amended by 1943; c. 25 s. 1 (50A)—Ontario Negligence Act R.S.O. 1937 c. 115.

Plaintiff seeks to recover damages from the defendant for injuries to a Bolingbroke aircraft as a result of a collision on highway between a street-car owned by the defendant and operated by its servant within the scope of his duties and a truck and trailer on which the

(1) (1935) 52 R.P.C. p. 171.

aircraft was loaded, all owned by the Crown. The truck and trailer formed part of a convoy of the Royal Canadian Air Force under the command of a member of His Majesty's Air Force and the truck was driven by a member of His Majesty's Air Force both acting within the scope of their duties. The Court found that the collision was caused by the combined negligence of the servants of the plaintiff and the defendant and the fault was in equal degree.

Held: That the costs of repairs forms the measure of damages and it does not matter that by reason of the repairs the plaintiff finds itself in possession of a better chattel than it previously had.

2. That the Crown at common law is not liable for the negligence of its servants and is therefore in the position of an innocent plaintiff whose harm has been caused by the concurrent acts of negligence of two tort feasors i.e. the defendant and its own servants.

3. That section 19 (*c*) of the Exchequer Court Act R.S.C. 1927, Chap. 34 as amended confers jurisdiction on the Court to hear and determine such claims and in addition creates a liability on the Crown for the negligence of its servants. The liability imposed is only within the limits of the jurisdiction conferred. The liability is therefore only in claims against the Crown and does not extend to actions by the Crown.

4. That section 50A widens the class of servant for whose negligence the Crown is liable under section 19 (c) but does not widen the liability beyond that imposed by section 19 (c).

5. That while the rights and liabilities of the parties are to be determined by the law of negligence in force in the Province of Ontario (in this case), no provincial enactment can reduce the rights or add to the liability of the Crown in right of the Dominion. Therefore the provisions as to contributory negligence in the Ontario Negligence Act R.S.O. 1930 Chap. 115 are not applicable because they would limit the right of the Crown to recover.

6. That the Crown is entitled to recover full amount of its damage from the defendant.

INFORMATION exhibited by the Attorney General of Canada to recover damages from the defendant for injury to an aircraft owned by the Crown alleged to have been caused by the negligence of the defendant.

The action was tried before the Honourable Mr. Justice O'Connor, at Ottawa.

Norman L. Mathews, K.C. and *Miss B. E. Lyons* for plaintiff.

A. H. Young, K.C. for defendant.

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

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O'CONNOR J., now (October 25, 1946) delivered the following judgment:

The Plaintiff claims damage for injury to a Bolingbroke aircraft involved in a collision with a street car owned by the defendant. The motors and main planes had been removed from the aircraft and the aircraft was loaded on a trailer drawn by a truck. The planes were placed along the side of the aircraft on the trailer. The truck and trailer formed part of a convoy of Royal Canadian Air Force vehicles travelling from Picton to London via Toronto. The convoy consisted of 1st and 2nd—two Ontario Provincial Police Cars, 3rd—Truck and Trailer loaded with a Bolingbroke aircraft, 4th—Truck and Trailer in question with a similar load; 5th—Station Wagon. The convoy was proceeding west on Kingston Road in the City of Toronto and the street car was proceeding east on the same road. The collision took place west of the intersection of Main Street and Kingston Road, at about 6.45 p.m., on the 22nd December, 1943. It was dark and the street lights were on. The visibility was clear and the road dry. Kingston Road, at the place of impact, is 46 feet in width and there are two sets of street car tracks on it.

After the head of the convoy passed the intersection, the truck and trailer No. 3 turned out to pass a car parked at the curb on the north side of Kingston Road. This vehicle No. 3 after passing the parked car, swung north and straightened out. The truck and trailer in question No. 4 followed the course of the preceding vehicle, passed the parked car, and the truck itself had straightened out, but the trailer was still at an angle slightly north-west to the street car tracks.

The street car owned and operated by the defendant was east bound on the south set of street car tracks on Kingston Road, and the street car and port side of the centre section of the fuselage on the trailer No. 4 came in collision. At the time of the impact both the truck and trailer were north of centre line of Kingston Road, but the port side of the centre section of the aircraft protruded one or two feet south of the centre line, and at a height of five or six feet from the ground.

The fire-wall on the port side of the centre section came in contact with the left front vestibule window of the street car and then the fire-wall, being flexible, slipped past each upright post between the windows, commencing at No. 1 on Exhibit "G", breaking each window in turn until it came to rest about half way down the street car, protruding in one of the windows with the rear spar of the centre section jammed against the street car.

Both the plaintiff and the defendant contend that the vehicle owned by it had stopped and that the vehicle owned by the other was in motion and ran into its vehicle.

The evidence of the witnesses for the plaintiff, who were present at the collision, is in direct conflict with the evidence of the witnesses given on behalf of the defendant.

In addition expert evidence was given on behalf of each party. On behalf of the defendant, Harold Pollard, Esq., a consulting engineer with great experience and fully qualified, gave a well reasoned and carefully considered opinion, based on an examination of the centre section of the aircraft, and of the street car and of the evidence he heard, that the street car had been stationary and the truck had been in motion at the time of the collision.

Wing Commander Beale of the Royal Canadian Air Force, a graduate in aeronautical engineering from the University of Toronto, and well qualified to give evidence because of his experience and training, gave an equally well reasoned and carefully considered opinion that the street car was in motion and the aircraft was stationary at the time of the collision.

Both opinions were logical and reasonable, but after listening to them both, I found that one completely offset the other and left me no alternative but to decide the question on the evidence of the witnesses who were present at the time of the collision.

I find that the truck and trailer were stationary at the time of the collision, and that the street car having come to a stop on the signal of the Ontario Provincial Police, who were leading the convoy, started up again, and was in motion at the time of the collision. I hold that the driver of the street car was negligent in failing to remain stationary until the entire convoy had passed. Having been ordered

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to stop by the police, and he knew and he saw the reason for the order, he should have remained there. He started forward when he knew that the entire convoy had not passed. As he moved forward he saw the clearance lights on the truck and trailer No. 4 fifty feet in length, the headlights on the truck No. 4 and the headlights of the station wagon No. 5 both signalling by turning their lights on and off, and sounding their horns, so he knew that part of the convoy was still to pass.

It was admitted that the defendant was the owner of the street car and that the operator, Mr. Smith, was a servant of the defendant acting within the scope of his employment at the time of the accident.

The centre section of the aircraft was approximately nineteen feet in width and the trailer was seven feet in width, so that the centre section extended out six feet on each side of the trailer at a height of five to six feet above the ground. It must have been quite clear at Oshawa, where a conference was held with the police, that if it proceeded, the convoy would reach the City of Toronto after dark. The danger of taking this convoy through the streets of the City of Toronto at night was obvious. It was quite customary for convoys carrying aircraft to use this route and they had been doing so for several years. L.A.C. Jones, who was in the truck in question, said that he had been over the route once or twice a week for several years, but the trips were made in daylight and he had never been over the route at night, and on the other trips the convoys had been transporting Harvard aircraft, which were very much narrower than Bolingbroke aircraft. From the evidence given by the witnesses for the plaintiff, it is clear that they were attempting to transport two very wide aircraft at night through the streets of a large city and doing something that L.A.C. Jones described as not being customary but "an unusual occasion".

The trucks and trailers, of the plaintiff, Nos. 3 and 4, were properly equipped with clearing lights and each aircraft carried checker boards on the engine mounts and red flags at the outside edges of the centre sections. The checker boards and the red flags would convey warning during the day when they could be seen, but were perfectly

useless for that purpose on a dark night. As the operator of the street car approached the point of collision, he would be facing into the headlights of the truck in question and to some extent of the station wagon which was drawn up behind the truck and trailer, which would make it impossible for him to see the overhanging port edge of the centre section. While the clearance lights on the truck and trailer would be clearly visible to him, they would indicate the extreme left of the danger to be apprehended, but not only were they of no value, but they would mislead the operator of the street car or any other traffic coming from the opposite direction into believing that they did indicate the extreme left of the danger, whereas the centre section protruded out six feet from these clearance lights at a height of five or six feet above the ground.

If a truck and trailer loaded with aircraft of this size and forming part of a convoy is to be moved at night, proper precautions must be taken to notify those using the road of the danger to be apprehended. The proper precaution clearly would have been to have placed clearance lights on the outside edges of both the port and starboard side of the centre section of each aircraft. The arrangement of the clearance lights upon the truck and trailer was calculated to mislead the driver of approaching vehicles, and this was particularly dangerous when the port side of the centre section was south of the centre line of Kingston Road.

The position here is similar to the position in *The King* v. *Demers* (1). There the servants of the Crown (Defendant) operated a truck and scraper on the highway with the scraper extending 10″ beyond the left side of the truck. The truck had two headlights and a light at the back of the truck. A red lantern was hung on the left side of the truck. Lamont, J., at page 488, said:—

> With the two headlights shining in his face it would be difficult, in my opinion, for the driver of the automobile (the plaintiff coming from the opposite direction) to see any reflection on the scraper from the light behind the truck, and, in any case, the existence of the red light on the left side of the truck indicated the extreme left of the danger to be apprehended, whereas the danger which caused the accident was the extension of the scraper beyond the red light. In my opinion there was abundant evidence to justify the finding that the accident was due to

(1) (1935) S.C.R. 485.

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the common fault of the driver of the automobile in driving at the rate of speed at which he was going and a failure on the part of the operator of the truck in not having the scraper sufficiently and properly lighted. If the truck and scraper are to be operated at night, proper precautions must be taken to notify those using the road of the danger to be apprehended. The red flag, which was attached to the scraper might convey warning during the day when it could be seen, but it was perfectly useless for that purpose on a dark night.

And Duff, C.J., at page 486, said:—

> I agree with the learned trial judge that the arrangements of the lights upon the vehicle that Bolduc, the servant of the Roads Department, was driving, when the mishap occurred in which the husband of the respondent lost his life, was calculated to mislead the drivers of automobiles met on the road; and that the servants of the Roads Department were guilty of actionable negligence in proceeding along the road in such circumstances.

W/O Bowden, who was in charge of the convoy, held the conference with the police officials at Oshawa, and decided to proceed. He knew that it would be night by the time the convoy reached the City of Toronto. Each trailer had a load 19 feet in width, the outer edges of which were not marked by lights and the clearance lights on the trucks and trailers were six feet back from these edges. He took this convoy in this condition at night into the City of Toronto, on the main east and west highway of the Province of Ontario. He was negligent in doing so in such circumstances.

Sergeant Taggert rode in the second police car. When obstacles were reached he halted the convoy and then guided each vehicle past the obstacle. On this occasion when the convoy was passing the motor vehicle parked on the north side of the street and the street car was approaching, instead of getting out of the car and placing himself in a position where he had control of the situation, he continued in the police car looking back and directing the convoy with signals. He stopped the convoy and then the police car stopped the street car. Sergeant Taggert then signalled No. 3 vehicle to come ahead. The police car continued west until it reached a point one hundred feet west of the street car and at that moment the collision between the street car and vehicle No. 4 occurred. Constable Hefferman, who was driving No. 2 police car, stated that

Sergeant Taggert told him that there had been a collision. The police car stopped and Sergeant Taggert went back. If Sergeant Taggert had got out of the police car after passing the car parked on the north side, and before reaching the street car, he would not have halted the convoy until he had made sure that no part of the load on either trailer extended over the centre line of the street, or if the port edge did extend over the centre, he would have moved the vehicle until the port edge was on the north side of the centre line. Instead of this he continued in the police car and from that position he stated that he could not see the second truck and trailer. When he stopped the convoy the port edge of the aircraft extended south of the centre line of the highway one or two feet and at a height of five or six feet above the ground. Sergeant Taggert was negligent in the circumstances in failing to properly supervise the passing of the convoy and in halting the convoy when the second vehicle was in that position.

Both W/O Bowden and Sergeant Taggert were acting within the scope of their employment. They were members of the Air Force of His Majesty the King in the right of Canada, and are by virtue of section 50 (*a*) of the Exchequer Court Act, 1927, R.S.C., chap. 34, deemed to be servants of the plaintiff.

I find that the injury to the aircraft was caused by the negligence of the operator of the street car, the servant of the defendant, and by the negligence of W/O Bowden and Sergeant Taggert, the servants of the plaintiff. The combined negligence of both caused the damage.

After the truck and trailer stopped and the street car started forward, neither the operator of the street car, nor the servants of the plaintiff could, by ordinary care, have avoided the consequences of the negligence of the other.

I am not satisfied by the evidence that the negligence of the servants of the plaintiff, or the servant of the defendant was clearly subsequent to and severable from the act of the other so as not to be substantially contemporaneous therewith.

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I fix the degree of fault as follows:—

Servants of the plaintiff 50%.

Servant of the defendant 50%.

The collision resulted in damage to the centre section. The evidence showed that the cost of repairing the same would exceed the cost of a new centre section, plus the cost of installation. Central Aircraft of London repaired aircraft for the plaintiff on a cost plus basis, but a separate account was not kept of the cost of the repairs made, which were occasioned solely by this collision. The evidence of the witnesses, Messrs. Lewis and Patterson, was that it required 9928½ man hours to make all the repairs required to the aircraft and that they estimated that 1375 hours of this were required to repair the damage done in this collision. They estimated the cost of labour and overhead, without profit of any kind, was $1.68 per hour. The evidence before me has satisfied me that the estimated costs of the repairs have been arrived at on a proper basis. I fix the sum of $2,310.00 as the cost to the plaintiff of making the repairs necessary and installing the centre section.

New parts for the aircraft were used and I accept the evidence of Norman Armand as to the cost, F.O.B., factory of these items:—

Centre section	$12,279 50
Bulkhead	137 50
Support frame	53 46
Flap	264 00
	$12,734 46

I am satisfied that the total cost of repairs and parts was $15,044.46, and that this damage was the direct result of this accident.

Counsel for the defendant contended that as a new centre section had been placed in the aircraft, the value of the aircraft would be increased and that the defendant should not be compelled to pay the full value of a new centre section.

I think the law is correctly set out in the *4th ed., Gibbs' Collision on Land,* pages 203-4, as follows:—

> Where the accident directly causes damage to a chattel, the true measure of damages is the difference between the market value before and after the accident . . ., but where the chattel can be repaired such difference is equivalent to the cost of repairs . . . But where the damage can be fully repaired nothing will be allowed in name of depreciation . . . in the usual case the cost of repairs forms the measure of damages and it does not matter that by reason of the repairs the plaintiff finds himself in possession of a better chattel than he previously had. (The Pactolus) (1856) Swa. 173.

The plaintiff claimed the sum of $15,662.05 in the Information, but reduced this amount at the trial by $959.34, the salvage of the Nacelle structure, leaving a balance claimed of $14,702.71. The cost of repairs and replacements exceed this amount slightly, so I fix the plaintiff's damage at the amount claimed of $14,702.71.

At common law the Crown is not liable for the negligence of its servants. Therefore, it is in the position of an innocent plaintiff whose damage has been caused by the concurrent acts of negligence of two tort feasors, i.e., the defendant and its own servants. It could proceed against either one or against both.

The only statutory enactment that alters this position is 19 (*c*) of the Exchequer Court Act, R.S.C., 1927, chap. 34, as amended:—

> 19. 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.

This section not only conferred jurisdiction upon this Court, but it created a liability on the Crown for the negligence of its servants. The liability imposed is, however, within the limits of the jurisdiction conferred, i.e., to claims against the Crown, which in turn under section 37 may be prosecuted by a petition of right or referred to this Court by the head of a department. This liability imposed cannot be extended beyond its express limits. The liability imposed would not, therefore, extend to an action taken by the Crown against a subject.

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Section 50 (*a*) provides:—

> 50 (*a*). 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.

While this section enlarges the class of servants, it does not extend the liability beyond that imposed by 19 (*c*). The liability mentioned in section 50 (*a*) in actions against the Crown is clearly the liability under 19 (*c*). But the liability in this section in actions by the Crown would, of course, be the liability of the defendant, not the liability of the Crown.

While the rights and liabilities of the parties are to be determined by the law of negligence in force in the Province of Ontario (in this case) it is clear that no provincial enactment can reduce the rights or add to the liability of the Crown, in the right of the Dominion. Therefore, the provisions as to contributory negligence in the Ontario Negligence Act, R.S.O., 1937, chap. 115, are not applicable because they would limit the right of the Crown to recover.

No statutory enactment, except that passed by Parliament, can do so. And the only statutory enactment passed by Parliament is S. 19 (*c*), and for the reason which I have already set out, it does not, in my opinion, impose a liability in an action, such as this, taken by the Crown.

I reach the conclusion that the Crown is entitled to recover the full amount of its damage from the defendant.

Assuming the correctness of my conclusion, I feel bound to add that the result is most inequitable.

But in my opinion the liability does not extend beyond the express limits of section 19 (*c*), and any change in the extension of liability must be made by Parliament.

There will be judgment for the plaintiff against the defendant in the sum of $14,702.71, and the costs of the action.

Judgment accordingly.