1955

June 15 & 16

Nov. 10

BETWEEN:

HER MAJESTY THE QUEEN ..... PLAINTIFF;

AND

MALCOLM MacCAULEY AND NORMAN MacCAULEY ..... } DEFENDANTS.

Crown—Action to recover damages—Negligence—Accident to an employee of Canada—The Government Employees' Compensation Act, S. of C. 1947, c. 18, s. 9 (now R.S.C. 1952, c. 134, s. 8)—Right of action by employee against wrong-doer—Employee's election to claim under the Act—Subrogation of employee's rights to Her Majesty—Liability at common law of owner in possession of car for damages—Action per quod servitium amisit brought by the Crown—Meaning of words "in the course of employment"—Right of subrogation of the Crown depending on employees election under the Act—Claim allowed in part.

The action is to recover certain sums alleged to be due to the Crown under the Government Employees' Compensation Act, S. of C. 1947, c. 18, by reason of a motor car accident in which three of its employees were injured and certain hospital, medical and salary expenses were incurred, the employees having elected to claim compensation under the Act and the Crown being subrogated to their right of action "against the person against whom the action lies". The accident occurred between a car owned and driven by one S, a Crown employee, who, with two other employees as passengers, were on the way to their work, and a car owned by one of the defendants who at the time was in the car while his brother and co-defendant was driving it. On the facts the Court found that the negligence of the driver of the MacCauley car was the sole cause of the collision.

Held: That Malcolm MacCauley as owner in possession of the car is also liable at common law for the damages occasioned to the Crown employees. *The King* v. *Richardson and Adams* [1948] S.C.R. 57 at 81 referred to and followed.

2. That the Crown is entitled to bring an action *per quod servitium amisit* in respect of the loss of the services of its servants and employees. *Attorney-General of Canada* v. *Jackson* [1946] S.C.R. 489 at 497; *The King* v. *Richardson and Adams* [1948] S.C.R. 57 at 62 referred to and followed. Here the Crown is entitled to recover from the defendants the salary paid by it to its employee S during his liability.

3. That the accident did not occur "in the course of employment" of the three Crown employees. There was no duty of their part to travel by S' car to the hatchery. Their duty was to report for work at a specific time, and while they were entitled to free passage in S' car to and from the hatchery, there was no obligation upon them to use that car and none of them would have been discharged from employment had they reached the hatchery by means other than by the use of S' car. *St. Helen's Colliery Co. Ltd.* v. *Hewitson* [1924] A.C. 59 referred to and followed.

4. The Crown's right to subrogation does not depend on the disposition made of the employee's application by the Workmen's Compensation Board. This right of subrogation arises upon the employee's electing to claim compensation under the Act. Upon such election the Crown is entitled to bring such action against the wrong-doer as the employee could have taken.

INFORMATION exhibited by the Deputy Attorney General of Canada to recover damages under the Government Employees' Compensation Act, S. of C. 1947, c. 18 (now R.S.C. 1952, c. 124, s. 8).

The action was tried before the Honourable Mr. Justice Cameron at Saint John.

K. P. Lawton and *K. E. Eaton* for plaintiff.

S. Roy Kelly for defendant.

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

CAMERON J. now (November 10, 1955) delivered the following judgment:

Under the provisions of section 9 of the Government Employees' Compensation Act, chapter 18, of the Statutes of Canada, 1947 (now section 8 of chapter 134, R.S.C. 1952), when an accident has happened to an employee of Canada (as defined in the Act), such employee or his dependents, under the circumstances mentioned therein, may claim compensation under the Act or may bring action against persons responsible for such accident. If compensation is claimed, Her Majesty is subrogated to the rights of the employee and may maintain an action "against the person against whom the action lies". In this Information Her Majesty seeks to

1955

THE QUEEN v. MACCAULEY

Cameron J.

recover from the defendants certain sums, a part of which is said to be due Her Majesty under the above Act by reason of a motor accident in which three such "employees" received injuries and certain expenses were incurred, the said employees having elected to claim compensation under the Act. It is alleged that the three employees were injured because of the negligent operation of a motor car owned by the defendant Malcolm MacCauley and at the time operated by his brother and co-defendant, Norman MacCauley.

The accident in question occurred between 7:30 and 8 o'clock on the morning of October 7, 1952, on the Loch Lomond Road near the city of Saint John, province of New Brunswick. On that morning one Ronald Smith, a permanent employee of the Department of Fisheries (Canada) and employed at the Saint John Hatchery about five miles east of Saint John, was driving to the hatchery when his car was in collision with the MacCauley car on the Loch Lomond Road. With him in the car were two temporary employees of the Department of Fisheries, namely, Edward J. Laughlin, a carpenter, and Eldon C. Paisley, a labourer, both of whom were employed temporarily on special work at the hatchery. They also resided in Saint John and by pre-arrangement had been picked up by Smith for the purpose of being conveyed to the hatchery.

All three employees were injured in the collision. Smith was unable to perform any of his duties from the date of the accident to March 15, 1953, during which period he received from Her Majesty salaries totalling $937.93. The Crown seeks to recover that amount on the ground that it was deprived of Smith's services for that period and that the salary so paid represents the amount of the damage and loss sustained thereby. All three employees applied to the Workmen's Compensation Board of the province of New Brunswick for compensation, that Board being the authority appointed by section 3 of the Government Employees' Compensation Act, 1947 (hereinafter referred to as "the Act"), to determine the right to and the amount of such compensation.

On October 15, 1952, the claims were disallowed by the Board, but on the 17th of October they were reopened and allowed. In the result, while the Board paid Smith nothing

1955

THE QUEEN v. MACCAULEY

Cameron J.

in respect of his salary, it paid his medical and hospital expenses amounting to $376.50. It paid Laughlin compensation of $150, covering the period from the date of the accident to November 17, 1952, when he was again able to work, and also paid $203 for his medical and hospital expenses. Similarly, it paid Paisley $315.37 as compensation to November 26, 1952 (when he was able to return to work) and disbursed $102 for his medical and hospital expenses. There is no dispute as to the amounts that were so paid either for salary, compensation or for medical and hospital expenses. The Crown seeks to recover the last five items, aggregating $1,146.87, under the provisions of section 9 of the Act.

The first question to be determined is this—whose negligence caused or contributed to the accident? For the Crown it is alleged that Norman MacCauley as driver and Malcolm MacCauley as the owner in control of the vehicle were solely responsible for the collision and that their negligence consisted in travelling at an excessive and unreasonable rate of speed, in crossing to the left side of the travelled portion of the road, in failing to keep a proper lookout, and in operating the motor car without due regard to the rights of others on the highway. The defendants denied all negligence on their part and alleged that Smith alone was negligent, or at least that his negligence contributed to the collision. In argument the only ground of negligence attributed to Smith was his excessive speed.

[Here the learned Judge reviews the evidence and continues]:

On the whole of the evidence, I am convinced that the cars came into collision when the MacCauley car was well over on the south half of the road, if not completely so. Whether it reached that position because of the situation which I have suggested in the last preceding paragraph or whether MacCauley deliberately intended to cross to the south side in order to pass the Dalling truck is of minor importance. In the former case, Norman MacCauley had created the emergency by reason of his failure to keep a proper lookout and by his inattention to traffic and by his excessive speed under the circumstances. In the latter case, which in the light of Smith's evidence I think is more probable, MacCauley's actions were contrary to section

1955

THE QUEEN v. MACCAULEY

Cameron J.

42(2)(*a*) of the Motor Vehicle Act. In either situation the driver of the MacCauley car was negligent and that negligence I must find was the sole cause of the collision.

I find not a tittle of evidence to suggest that Smith was negligent in any manner whatsoever or that anything he did caused or contributed to the accident. On the contrary, Smith did everything possible to give way to the MacCauley car which, had it been under proper control, could have passed safely. I am satisfied on the whole of the evidence that Norman MacCauley did not observe the Smith car until it was very near him and that he then suddenly turned his car further to the left to avoid an emergency which he himself had created, by crossing to the south side of the road.

The damage to the two cars as shown by the photographs filed amply bears out the evidence of Smith as to the manner in which the accident occurred. These photographs were taken by a police officer who arrived shortly after the accident but after all eye-witnesses had left the scene; some attempt was made on behalf of the defendants to establish that the cars had been moved after the collision and before the photographs were taken; both MacCauleys insist that such was the case. But on the whole of the evidence, I am satisfied that the photographs clearly show the position of the cars as they were when they came to rest after the collision. It is shown that the cars were so damaged that they could not be moved without the aid of a wrecking truck. None of the witnesses who saw the accident observed anyone moving the cars and the wrecking truck arrived shortly after the photographs were taken.

It may be noted here that as a result of the said collision, Norman MacCauley was charged with reckless driving under section 285(6) of the Criminal Code, was convicted by the Magistrate and fined $50 and costs.

Accordingly, I find that the three employees would have had a right of action against Norman MacCauley for the damages they sustained. I think that his co-defendant is also liable as owner in control of the vehicle which caused the damage. It is admitted that he was in law the owner. There was at that time no provision in the statutory law of

New Brunswick by which the owner of a motor car was made liable for damage occasioned by it to others, when the vehicle was operated by someone other than the owner.

Malcolm MacCauley had no driver's license. He allowed his brother Norman to drive the vehicle from time to time. Both defendants on the date in question had employment in Saint John and while Norman MacCauley stated that on that morning Malcolm had not asked him to drive, it was clear that he was expected to drive and had the full consent of the owner to drive. Malcolm sat throughout in the front seat with the driver and I have no doubt that under the circumstances he was in such a position as to be able to exercise full control in the sense that he had the authority to direct how the vehicle should be used or whether it should be used at all. As owner he had a duty to control the driver. On the authority of the decision in *The King* v. *Richardson and Adams* (1), and the cases therein referred to, I find that Malcolm MacCauley as owner in possession was also liable at common law for the damages occasioned to the three Government employees.

As noted at the outset, the Crown's claim is based on two different grounds. That which relates to the payment by the Crown to Smith of his salary during the time of his inability to perform any services ($937.93) is an action *per quod servitium amisit.* In *Attorney-General of Canada* v. *Jackson* (2), Kellock J. stated:

> A convenient statement of the action *per quod* is to be found in Blackburn and George on Torts, 1944 ed., p. 181, namely,
>
> > If A deprives B of his servant's services by a *tort* committed against the servant, B may sue A. In such a case B must prove (i) that A's actions are a tort against the servant; (ii) that B has thereby lost his servant's services.

That the Crown is entitled to bring an action *per quod* in respect of the loss of the services of its servants and employees was stated by Kerwin J. (now C.J.C.) in the case of *The King* v. *Richardson and Adams* (3) at page 62:

> Although the services to be performed by a member of the Forces differ in kind from those expected from the servant of a private employer, that circumstance, in my opinion, affords no ground for denying to the Crown the benefits of a form of action established many years ago and constantly allowed ever since. It may be anomalous, as stated by Lord Porter and Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika,*

(1) [1948] S.C.R. 57 at 81. (2) [1946] S.C.R. 489 at 497.
(3) [1948] S.C.R. 57 at 62.

1955

THE QUEEN v. MACCAULEY

Cameron J.

(1917) A.C. 38, but that it still persists cannot be gainsaid. Any opinion of these learned judges is entitled to the greatest respect but their observations as to the action not lying at the suit of the Crown are *obiter* and, with respect, I find myself unable to agree with them. On the particular point with which I am now dealing, the decision of McKinnon J. in *Attorney General* v. *Valle-Jones,* (1935) 2 K.B. 209, is not of assistance as there it was admitted, page 213:—"It is not denied that an action for loss of the services of a servant by the tortious act of a third party is available to the Crown as an employer as well as to a subject", but the dissenting opinions of Chief Justice Latham and Williams J., in *The Commonwealth* v. *Quince,* (1944) 68 C.L.R. 227, express the same conclusions as that at which I have arrived.

In the same case, at page 63, he said also in referring to the right of recovery of pay to a soldier:

> Under section 48 of the *Militia Act,* R.S.C. 1927, c. 132, a soldier is entitled to his pay and although his right may not be enforceable by action in the Courts, the fact that he received his pay is some evidence (and therefore sufficient evidence) of the value of his services that were lost by the Crown. I am content to decide the matter on that basis.

It is clear, also, that Smith's salary would have been recoverable in an action by him against the defendants. In the *Jackson* case (*supra*), Rand J. said at page 493:

> The *injuria* to the master is, then, a loss of service arising from an act which is an actionable wrong against the servant: and its effect is to permit the master to recover damages to a large extent the same as those in a proper case recoverable by the servant.
>
> This view is indirectly supported by the reasoning in *Attorney-General* v. *Valle-Jones,* [1935] 2 K.B. 209, where it is said that if the wages and expenses had not been paid by the Crown they could have been recovered from the defendant by the injured serviceman.

For these reasons I think the Crown is entitled to recover from the defendants the first item of its claim, namely, $937.93, being the salary paid by it to Smith during his disability.

The balance of the Crown's claim is based on the provisions of the Government Employees' Compensation Act, 1947. Section 9 thereof is as follows:

> 9. (1) Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to an action against some person other than Her Majesty the employee or his dependants if entitled to compensation under this Act may claim compensation or may bring such action.
>
> (2) If an action is brought and less is recovered and collected than the amount of the compensation to which the employee or his dependants are entitled under this Act the difference between the amount recovered and collected and the amount of such compensation shall be payable as compensation to such employee or his dependants.

(3) If the employee or his dependants elect to claim compensation under this Act Her Majesty shall be subrogated to the rights of the employee or his dependants and may maintain an action in his or their names or in the name of Her Majesty against the person against whom the action lies and any sum recovered shall be paid into the Consolidated Revenue Fund of Canada.

(4) Notice of the election shall be given within three months after the happening of the accident, or in case it results in death, within three months after the death, or within such longer period either before or after the expiration of such three months as may be allowed by the board, officers or authority having power to determine the right to and the amount of the compensation under this Act.

This claim is resisted on two grounds, the first of which is that the accident which gave rise to the right of action by the employee and to which right the Crown is subrogated upon the election of the employee to claim compensation under the Act, must have been one happening "in the course of his employment". It is submitted that on the facts of this case it arose otherwise than in the course of employment, namely, on the way to work.

The evidence on this point is given by K. G. Shillington, the superintendent of the fish hatchery. He said that Smith at the time of the accident was a permanent full-time employee of the Department of Fisheries, holding the position of Hatchery Assistant. Paisley, a carpenter, and Laughlin, a labourer, were temporary employees then engaged for the particular job of building a fence at the hatchery; they were employed by Shillington through the Unemployment Insurance Office. As they lived in Saint John, it was necessary to provide some means of transportation to the hatchery. Shillington therefore arranged that Smith, who also lived in Saint John, and who drove to and from his work each day, should drive them to and from the hatchery, Smith to be paid mileage out of authorized Government funds. If that arrangement had not been entered into, other plans to bring them to work would have been necessary, such as Shillington himself driving them in and out. Shillington considered that it was essential that they should be so transported.

When hiring Laughlin and Paisley, Shillington arranged with them that they should receive pay and also transportation from Saint John to the hatchery and return without cost to them. Shillington stated also that it was customary to provide such transportation for all carpenters doing

1955

THE QUEEN v. MACCAULEY

Cameron J.

similar work at the hatchery. The work day for both Laughlin and Paisley started at 8 a.m. and their pay commenced at that time. There was no bus or railway service from Saint John which could have brought them to the hatchery in time to start work at 8 o'clock. Both men were paid by the hour.

Section 3 of the Act provides for the payment of compensation to an employee who is caused personal injury by accident *arising out of and in the course of his employment.* Section 9, however, alone contains the provisions by which an injured employee is given the right to elect whether he will claim compensation or bring an action; if he elects to claim compensation, the Crown is subrogated to his rights and may bring action against the responsible persons either in the name of the employee or in the name of Her Majesty. The opening words of section 9(1)—(*supra*)—clearly refer to an accident which happens to an employee *in the course of his employment.* In my opinion, therefore, the question here is whether the accident occurred "in the course of employment" of the three employees, all of whom applied for compensation.

The principles to be applied in deciding whether an accident occurred "in the course of the employment" are stated in the following paragraphs in Halsbury, Second Edition, Volume 34:

1161. The words "in the course of the employment" means in the course of the work which the workman is employed to do and what is incidental to it. They do not mean during the currency of the engagement. . . .

1163. In general, the employment begins as soon as the workman has reached the place where he is employed, or the means of access thereto, and continues until he again reaches the same point at the end of his work.

1164. If, on his way to or from his work, the workman proceeds by a permitted route over his employer's premises, or over other premises which he would have no right to traverse but for his employment, the employment continues while he is so doing, but while he is going to or from his work by a route which is open to him as a member of the public or by reason of some right or permission not connected with his employers, he is not within the statutory protection.

1165. A workman who is engaged in performing the duty owed to his employer under the terms of his employment is in the course of the employment whether he is on his employer's premises, in the public streets, or elsewhere. A workman, however, who has a right, by the terms of his employment, to the use of certain facilities, but is under no duty to avail himself of them, is not entitled to the statutory protection while so doing.

1955

THE QUEEN v. MACCAULEY

Cameron J.

In *St. Helen's Colliery Co. Ltd.* v. *Hewitson* (1), a miner was injured while travelling to work on a train, not owned by the employers, but specially provided for their workmen, upon which he had a right to travel by the terms of his employment. It was held that while so travelling he was not in the course of his employment, as he had no duty to his employers to travel by the train. In that case, Lord Renbury said at page 95:

> A man is not in the course of his employment unless the facts are such that it is in the course of his employment and in performance of a duty under his contract of service that he is found in the place where the accident occurs. If there is only a right and there is no obligation binding on the man in the matter of his employment, there is no liability.

In a footnote (*b*) to paragraph 1165 of Halsbury, volume 34, it is stated at page 829:

> As a result of the decision in *St. Helen's Colliery Co. Ltd.* v. *Hewitson* (*supra*), it is now settled that the test to be applied in such cases is that of duty on the part of the workman to use the conveyance or other convenience provided, and not, as was formerly held, the obligation upon the employer to provide it. "The test of duty . . . is the accepted basis on which these questions ought to be dealt with." (*Newton* v. *Guest, Keen and Nettlefolds, Ltd.* (1926) 135 L.T. 386, 387.

Reference may also be made to *Taylor* v. *McAlpine & Sons* (2) and *M'Pherson* v. *Reid, M'Farlane & Co.* (3), in both of which cases workmen travelling by train with tickets provided by or through the employer, were held not to be in the course of their employments.

Reference may also be made to the judgment of Urquhart J. in *Bowers et al.* v. *Hollinger et al.* (4), the headnote of which in part is as follows:

> Where an employer provides free transportation of his employees to his plant (in this case by bus) when the time spent in transit is not paid for and the employees are under no obligation to use this means of transport, an injury received by employees on the way to or from work (due to a collision of the bus and another vehicle) cannot be said to arise in the course of their employment.

In the instant case I am unable to reach the conclusion that there was any duty on the part of the employees to travel by Smith's car to the hatchery. Their duty was to report for work at the time specified, and while arrangements had been made for the convenience of Laughlin and Paisley by which they were entitled to free passage in

(1) [1924] A.C. 59.
(2) (1924) 130 L.T. 793.
(3) [1926] S.C. 359.
(4) [1946] 4 D.L.R. 186.

1955

THE QUEEN v. MACCAULEY

Cameron J.

Smith's car to and from the hatchery, there was no obligation upon them to use that car. They received no compensation until they commenced to work at the hatchery itself. It is true that there was no convenient public transportation by railway or bus which would permit them to reach the hatchery at 8 o'clock, but a public road ran from Saint John to the hatchery and it was possible for all three of the employees to reach the place of employment in any other way open to them, such as by walking, on bicycle, by taxi or by any other conveyance. It was not a term of their employment that Smith's car must be used and certainly none of them would have been discharged from employment had they reached the hatchery by means other than by the use of Smith's car.

Reference may be made to *Gaskell* v. *St. Helen's Colliery Co. Ltd.* (1). In that case a miner had been injured while using pithead baths, as he had been instructed to do; there being no evidence that it was a term of his employment that he should use the baths, or that he was subject to dismissal if he did not, the claim failed. In my view, therefore, it cannot be said that the accident occurred while the employees were in the course of their employment and it follows that the Crown's claim on this point must be disallowed.

As a matter of interest only, it may be noted that under section 9(1) of the National Insurance (Industrial Injuries) Act, 1946, of the United Kingdom, provision is now made for cases similar to the instant one. In cases arising thereunder it would appear that in an accident arising under the same set of circumstances as in this case, it could be found to have occurred "in the course of the employment".

One other defence on this matter may be mentioned briefly, although strictly speaking it may not be necessary to refer thereto in view of my conclusions as above stated. Counsel for the defendants took the point that as the Workmen's Compensation Board had at first refused the applications for compensation, it had no right under the circumstances of this case to re-open and later make orders allowing them. Reference was made to *The King* v. *The Workmen's Compensation Board of New Brunswick* (2). In my opinion, this defence cannot be supported for a number of

(1) (1934) 150 L.T. 506. (2) 8 M.P.R. 25.

1955

THE QUEEN v. MACCAULEY

Cameron J.

reasons. The only one that need be stated is that the Crown's right to subrogation does not depend on the disposition made of the employee's application by the Board. The right of subrogation in favour of the Crown arises upon the employee's electing to claim compensation under the Act (section 9 (3)). Upon such election the Crown is entitled to bring such action against the wrong-doers as the employee could have taken.

Accordingly, there will be judgment for the plaintiff against each of the defendants for the sum of $937.93, together with the taxed costs of the proceedings.

Judgment accordingly.