BETWEEN:

GAUTHIER & COMPANY LIMITED.... SUPPLIANT,

AND

HIS MAJESTY THE KING..... RESPONDENT.

1943
Nov. 17.

1944
Jan. 12.

Crown—Petition of Right—Claim for damages under s. 19 (c) of Exchequer Court Act due to collision between a vehicle owned by suppliant and one owned by respondent and operated in the course of duty by a member of the armed forces of Canada—Skidding of vehicle on icy road raises no presumption of negligence on the part of the driver of the vehicle, is not of itself evidence of negligence on his part and is not to be considered apart from the circumstances that caused it—Maxim res ipsa loquitur does not apply on mere proof of the skidding of a vehicle on an icy road—Onus of proof in claims made under s. 19 (c) of Exchequer Court Act rests upon the suppliant to show that his loss or injury was the result of negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment.

Suppliant claims damages for loss resulting from collision between its motor ambulance and a Bren gun carrier owned by the Crown and driven in the course of duty by a member of the armed forces of Canada. The collision occurred on the Montreal Road and was due to the skidding of the carrier, as it was proceeding west, across the road and into the path of the motor ambulance as it was coming from the west. The Court found that the suppliant had not proved

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that the skidding was the result of negligence on the part of the driver of the carrier and that the suppliant was not entitled to the relief claimed.

Held: That where there has been a collision between motor vehicles due to the fact that one of them skidded on a slippery or icy road the fact of skidding should not be considered apart from the circumstances that caused it. Proof of the mere fact of such skidding raises no presumption of negligence on the part of the driver of the vehicle and it is not in itself evidence of negligence on his part. The court should look to the surrounding circumstances and draw from them such inference as may be reasonable, but no inference as to presence or absence of negligence is to be drawn from the mere fact of skidding in itself, for that fact is a neutral one. The same view should be taken of the mere fact that a motor car at the time of a collision was on what is commonly called the wrong side of the road. It cannot properly be considered apart from the circumstances that caused it to be there.

2. That the maxim *res ipsa loquitur* does not apply on the mere proof of the skidding of the motor vehicle on a slippery or icy road and, no *prima facie* case of negligence on the part of the driver of the vehicle being established thereby, no onus of proof is cast upon the respondent either to show that the collision was due to inevitable accident or that it was not due to negligence on the part of the driver.

3. That in claims made under section 19 (*c*) of the Exchequer Court Act the onus of proof rests upon the suppliant to show that his loss or injury was the result of negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment. Where the collision was caused by the skidding of the motor vehicle owned by the Crown suppliant must prove negligence in the operation of the vehicle on the part of its driver, that is, some breach of the duty of care, skill and judgment that might reasonably be expected from him. If the Court cannot draw a fair and reasonable inference of negligence from the circumstances surrounding the skidding and consequent collision it should not give effect to the suppliant's claim for damages.

PETITION OF RIGHT by suppliant herein to recover from the Crown damages for loss resulting from a collision between suppliant's vehicle and one owned by the Crown due to the alleged negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

W. F. Schroeder, K.C. and *J. L. Kemp* for suppliant.

Robert Forsyth, K.C. for respondent.

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

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THE PRESIDENT now (January 12, 1944) delivered the following judgment:

The suppliant claims damages from the respondent for loss resulting from a collision between its motor ambulance and a Bren gun carrier owned by the Crown and driven in the course of his duties by Private Douglas Dunn, a member of the armed forces of Canada.

The collision occurred at about 1.45 p.m. on January 11, 1942, on the Montreal Road, part of Ontario provincial highway No. 17, about a mile or so east of the village of Orleans.

The suppliant's motor ambulance was proceeding easterly on the south half of the road at about 25 miles per hour. The Bren gun carrier was travelling westerly on the north half of the road at from 10 to 12 miles per hour. As the carrier was on a slight curve, the rear end of it slid off to the driver's left and the carrier skidded across the road directly in the path of the suppliant's motor ambulance as it was coming from the west so that the driver of it was unable to stop in time to avoid running into the side of the carrier, as it came to a stop on the south half of the road.

The damage to the motor ambulance amounted to $409.94 for necessary repairs and in addition the suppliant was put to the expense of $100 for the use of another motor ambulance while the repairs were being made.

The roadway was well ploughed and was from 24 to 26 feet wide with a snow bank on each side of the ploughed portion. The surface was of hard-packed snow without ruts. Langlois, the driver of the suppliant's motor ambulance, said that the road was a little icy. Constable Harkness stated that a snow-packed surface was ordinarily slippery but that the road was in good winter condition and safe for driving. It had snowed a little and there had been some sleet, but this had not made the road dangerous. It would be fair to find that the road was slippery, but not dangerously so.

It was alleged in the petition of right that as the Bren gun carrier (described in the petition as a tank) was proceeding in a westerly direction along the highway it began to zig-zag on the highway for approximately one hundred feet when it regained its own or the north side of the highway, but that when it was a short distance from the ambu-

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lance it again commenced to zig-zag and suddenly and without warning crossed the centre line of the highway to the southern side thereof and came into violent collision with the motor ambulance of the suppliant. The suppliant alleged that the collision was the result of negligence on the part of Private Dunn and gave particulars of the negligence alleged.

At the trial the suppliant sought to establish two specific particulars of negligence on the part of the driver, namely, that he did not have his vehicle under control and that he was driving at an excessive rate of speed. Findings of fact are required in respect of these two matters in view of the contradictory nature of the evidence.

[The learned President here considers the evidence and finds that the driver of the carrier had his vehicle under complete control and was driving it on a steady course until it suddenly skidded and that prior to the skidding the carrier was travelling at from 10 to 12 miles per hour.]

The suppliant has not succeeded in establishing either lack of control by the driver prior to the skidding or excessive speed on his part. Indeed, if the carrier had been behaving in the manner described by Langlois and travelling at the speed he ascribed to it, there might well be some question as to whether Langlois had not himself been negligent in continuing to drive as he did. The fact is that both vehicles were driving on their own respective sides of the road, when the carrier skidded across the road in the path of the oncoming motor ambulance so that it could not avoid crashing into the side of the carrier. After the impact the carrier was crossways on the south half of the road with its back end close to the snow bank on the south side of the road.

Counsel for the suppliant in his argument did not base the suppliant's claim on any specific ground of negligence on the part of the driver of the carrier, with the exception of certain statements made by him on his cross-examination, to which reference will be made later. His main contention was that there was a rule of the road that where the driver of a vehicle meets another vehicle he shall turn out to the right from the centre of the road and allow the vehicle so met one-half of the road free; that the driver of the carrier had broken this rule of the road in that immediately before the collision the carrier had skidded across the road so that

it was on the south half of it, on which the motor ambulance was properly travelling; that, consequently, a *prima facie* case of negligence on the part of the driver of the carrier had been established; that the onus lay on the respondent to explain the cause of the collision and show that it was the result of inevitable accident; and that since this onus had not been discharged the suppliant was entitled to succeed. He also relied upon the maxim *res ipsa loquitur*.

I cannot accept the view that the mere presence of the carrier on what is commonly termed the wrong side of the road is necessarily evidence of negligence on the part of its driver. That is not enough, in my opinion, to establish a *prima facie* case of negligence against him. It may frequently happen that driving on the wrong side of the road is a prudent and careful thing to do. Everything depends upon the surrounding circumstances. The mere presence of the carrier on the wrong side of the road, moreover, was not the direct cause of the accident, for if the driver of the motor ambulance had seen it there in sufficient time he could have turned to his left and his failure to do so would have been negligence on his part. It is much more important to consider what happened when both vehicles were in motion and approaching one another. Each was driving properly on its right side of the road when suddenly the carrier skidded across the road in the path of the oncoming motor ambulance. The skidding of the carrier is, therefore, more important than its mere presence on the wrong side of the road. Indeed, the two facts are inseparable. It was the skidding that brought the carrier to the wrong side of the road. If the carrier had not skidded, there would have been no collision. It was the sudden skidding of the carrier into the path of the oncoming motor ambulance that was the direct cause of the collision between the two vehicles. Of this there can, I think, be no doubt. It is important, therefore, to consider whether the skidding of the carrier was the result of negligence on the part of its driver. It is on this issue that the whole case depends.

The question of skidding of motor vehicles on slippery or icy roads has presented considerable difficulty to the courts and there has been some difference of opinion as to what inference, if any, should be drawn from the mere fact

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of such skidding. The subject was considered by the Nova Scotia Supreme Court (*in banco*) in *Bijeau* v. *Gammon* (1). In that case, Hall J., at page 201, said:

> The fact that defendant's car skidded does not of itself raise a presumption of negligence.

This statement is in accord with general judicial opinion on the matter and presents no difficulty. But Hall J. later, at page 203, said:

> The fact that Gammon's car skidded (in the absence of a plea of inevitable accident), is some evidence that his rate of speed, though reasonable and proper under ordinary conditions, was too great under the condition that prevailed and *ipso facto* he was in some degree negligent.

I confess that I find it a little difficult to understand this statement. If it is, as I think, a finding of fact that the particular skidding was due to excessive speed under the conditions that prevailed and that under the circumstances of the case, it was due to negligence, no exception can be taken to it, but if it is a statement of law that the fact of skidding is itself some evidence of negligence I must, with respect, disagree. I cannot accept the view that the mere fact of a motor vehicle skidding on a slippery or icy road should in itself be regarded as evidence of negligence on the part of its driver. It is a matter of common knowledge that motor vehicles frequently do skid on slippery or icy roads even where there has been no negligence on the part of the driver. Moreover, the statement made by Hall J., if it is to be regarded as one of law, is, in my opinion, contrary to the weight of judicial authority. The question came before the English Court of Appeal in *Wing* v. *London General Omnibus Company* (2). In that case the only evidence adduced at the trial was that a motor omnibus belonging to the defendant, in which the plaintiff was a passenger, skidded upon a road, the surface of which was greasy from rain, and ran into an electric light standard and the plaintiff was in consequence injured. The defendant called no witnesses except as to quantum of damages. At the end of the plaintiff's case counsel for the defendant submitted that there was no evidence either of negligence or of nuisance to go to the jury and the trial judge gave partial effect to that contention by withdrawing from the jury the question of negligence in the driving or

(1) (1940) 15 M.P.R. 198. (2) (1909) 2 K.B. 652.

management of the car. The Court of Appeal held that he had been right in so doing. While this case has been the subject of some criticism it must be taken as deciding that the fact that a heavy vehicle has skidded on a greasy road will not alone suffice to establish negligence on the part of its driver. The fact that motor vehicles frequently skid on greasy roads without negligence on the part of the driver was clearly recognized in that case. In my opinion, the proper view to take of the fact of skidding by itself was stated with accuracy and precision by Lord Greene M.R. in *Laurie* v. *Raglan Building Company, Limited* (1), where he described such a fact as a neutral fact. He was dealing with an argument advanced before the Court that assuming a *prima facie* case of negligence had been established, the fact that a heavily loaded lorry had skidded was sufficient to displace the *prima facie* case. With this argument he disagreed. At page 154, he said:

> In my opinion, that is not a sound proposition. The skid by itself is neutral. It may or may not be due to negligence.

It may be noted that on the facts of the case he held not only that a *prima facie* case of negligence had been established, which was not displaced by the neutral fact of skidding, but that the skid itself under the circumstances of the case was due to negligence on the part of the driver.

Where there has been a collision between motor vehicles due to the fact that one of them skidded on a slippery or icy road the face of skidding should not be considered apart from the circumstances that caused it. Proof of the mere fact of such skidding raises no presumption of negligence on the part of the driver of the vehicle and it is not in itself evidence of negligence on his part. The Court should look at the surrounding circumstances and draw from them such inference as may be reasonable, but no inference as to the presence or absence of negligence is to be drawn from the mere fact of skidding in itself, for that fact is a neutral one.

The same view should be taken of the mere fact that a motor car at the time of a collision was on what is commonly called the wrong side of the road. It cannot properly be considered apart from the circumstances that caused it to be there.

(1) (1942) 1 K.B. 152.

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I cannot, therefore, accept the contention that a *prima facie* case of negligence on the part of the driver of the carrier was established by proof either of its mere presence on the wrong side of the road or of the fact that it suddenly skidded into the path of the suppliant's motor ambulance.

There may be cases where, on proof of facts which in themselves do not establish any actual breach of a duty to take care, the law will assume that the burden of proving negligence has been discharged and the respondent will have to meet a *prima facie* case through the operation of the maxim *res ipsa loquitur*. Counsel for the suppliant contended that the maxim should be applied in this case. It is applied in a variety of classes of cases, as was pointed out by Duff C.J. in *United Motor Service, Inc.* v. *Hutson et al* (1) where, after dealing with the kind of cases where the maxim is most frequently applied, he went on to say:

> The phrase *res ipsa loquitur* is, however, used in connection with another class of cases, where by force of a specific rule of law, if certain facts are established then the defendant is liable unless he proves that the occurrence out of which the damage has arisen falls within the category of inevitable accident.

He gave as an example of such class of cases the rule of law in admiralty cases that when a ship in motion runs into a ship at anchor there is *prima facie* evidence of negligence on the part of the ship in motion and the onus is cast upon her to show that the collision was due to inevitable accident —vide *The Merchant Prince* (2). In cases of that sort, as Duff C.J. points out, there is an onus cast upon the defendant because "there is a presumption of law established, the defendant is liable". There is no such rule of law applicable in the present case and it does not come within the category of cases thus described.

That being so, it is unnecessary for the respondent in this case to show that the collision was the result of inevitable accident, even although such a plea appears in the statement of defence. The onus of establishing such a defence, which is not an easy one to discharge, rests upon the defendant only when a *prima facie* case of negligence has been made against him by the operation of some rule of law. That is not the case here and the respondent need not establish affirmatively either that the skidding was due to inevitable accident or that there was absence of negligence on the part of the driver of the carrier.

(1) (1937) S.C.R. 294 at 297. (2) (1892) P. 179.

The suppliant must, therefore, prove negligence in the operation of the carrier on the part of its driver unless the case falls within the kind of cases in which the maxim is most frequently applied. The principle was stated by Erle C. J. in *Scott* v. *London and St. Katherine Docks Company* (1) as follows:

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

From this statement of principle it would appear that the *prima facie* case of negligence established by the maxim, where it applies in such classes of cases, may be displaced by a reasonable explanation of the way in which the accident may have happened without any negligence on the part of the defendant, even although there is no proof that it did actually happen in the way suggested. This is the view expressed by Lord Dunedin in *Ballard* v. *North British Railway Company* (2), where he said:

> 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.

This statement was quoted with approval by Scrutton L.J. in *Langham* v. *Governors of Wellingborough School* (1).

The meaning of the maxim was explained by Kennedy L.J. in *Russell* v. *London & South-Western Railway Company* (2), as follows:

> The meaning, as I understand, of that phrase * * * is this, that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence. The *res* speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectured, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is, some want of care under the circumstances.

(1) (1865) 3 H. & C. 596 at 601.
(2) (1923) S.C. 43 at 54.

(1) (1932) 101 L.J. K.B. 513 at 516.
(2) (1908) 24 T.L.R. 548 at 551.

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and later:

> It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of thinks which is complained of.

In the light of these statements as to the circumstances under which the maxim comes into operation I cannot accept the contention that the maxim should apply on mere proof of the skidding of the carrier for if the skidding of a motor vehicle on a slippery or icy road is a matter of common occurrence and may happen without negligence on the part of its driver, and, if the fact of such skidding is a neutral one from which in itself no inference of negligence is to be drawn, then it cannot be said that the fact of such skidding is "eloquent of negligence" nor is it a matter of reasonable argument that negligence was the probable cause of it. The fact of such skidding being a neutral one it follows that it can by itself have no legal consequences. Proof of it cannot, therefore, operate in such manner as to shift the onus of proof from the suppliant or impose any onus of proof upon the respondent. In my view the maxim *res ipsa loquitur* has no application in such a case as this.

It may be well to bear in mind the caution expressed by Davis J. in *The Sisters of St. Joseph of the Diocese of London* v. *Fleming* (1) in the following terms:

> It is unfortunate that the maxim *res ipsa loquitur*, which serves satisfactorily when applied to certain cases in which the cause of the accident is known, has become a much over-worked instrument in our courts in recent years and has been extended to apply to a great many different sets of facts and circumstances to which the rule, when correctly stated and confined, has little or no application. The rule is a special case within the broader doctrine that courts act and are entitled to act upon the weight of the balance of probabilities.

There is no need for the application of the maxim to the facts of the present case. All of the circumstances surrounding the skidding are before the Court and it is for the Court to determine whether the circumstances are such that an inference of negligence on the part of the driver of the carrier should be drawn or not.

In claims made under section 19 (*c*) of the Exchequer Court Act, R.S.C. 1927, chap. 24, as amended, the onus of proof rests upon the suppliant to show that his loss or injury was the result of negligence on the part of an officer

(1) (1938) S.C.R. 172 at 177.

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or servant of the Crown while acting within the scope of his duties or employment. If he fails to discharge this onus he is not entitled by law to any of the relief sought by him in his petition. In a motor vehicle collision case he cannot escape from the onus that rests upon him by mere proof that the collision was caused by the skidding on a slippery or icy road of a motor vehicle driven by a servant of the Crown, nor can the proof of such a fact cast upon the respondent any onus of proof that the collision or skidding was due to inevitable accident or was not due to negligence on the part of the driver. The suppliant must prove negligence in the operation of the vehicle on the part of its driver, that is, some breach of the duty of care, skill and judgment that might reasonably be expected from him. If the Court cannot draw a fair and reasonable inference of negligence from all the circumstances surrounding the skidding and consequent collision, it should not give effect to the suppliant's claim for damages for he has not brought his claim within the terms of section 19 (*c*) of the Exchequer Court Act, and apart from the terms of this section no liability for negligence is imposed upon the Crown.

In many motor vehicle collision cases where the collision was caused by one of the vehicles skidding on a slippery or icy road it has been an easy matter for the court to draw a fair and reasonable inference from the circumstances of the case that the skidding was due to negligence on the part of the driver of the skidding vehicle, for great care is required of the driver of a motor vehicle when the road is slippery or icy. Most frequently, perhaps, excessive speed, having regard to the condition of the road, has been found to be the cause of the skidding. This Court had no difficulty in drawing such an inference recently in the case of *Huston et al* v. *The King* (unreported). In that case an army truck had skidded down an incline on a curve in the road into the suppliant's car which had come to a stop on its right side of the road with its right wheels off the pavement. I held that the army truck was being driven at too great a rate of speed, having regard to the icy condition of the road and the nature of the curve, and that the driver of the truck was attempting to make the turn to his left down the incline at too great a rate of speed, having regard to the icy condition of the

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road, and that this was the cause of the skidding. The road was in a very bad condition and the driver had been travelling at an average of 30 miles per hour until shortly before the collision when this speed had been somewhat but not greatly reduced. In that case speed in excess of what was reasonable under the circumstances constituted negligent operation of the vehicle and was the cause of the skidding and the collision with the suppliant's car. But each case stands on its own facts and the determination by the Court as to whether there has been negligence or not must depend upon the circumstances of the case before it.

That being so, the Court must consider whether an inference should be drawn from the circumstances of the present case that the skidding of the carrier was the result of negligence on the part of its driver. If such an inference cannot fairly and reasonably be drawn, the suppliant's claim cannot be allowed.

The carrier had been doing what was called a track test on the Montreal road. It is equipped at the rear with caterpillar treads on each side. Each set of treads is called a track. There were various kinds of metal in the treads and the purpose of the track test was to see which metals in the treads would stand the most wear. The test could not be carried on at the proving ground, south of the Montreal road and west of Orleans, for a smooth road was required for the purpose and the Montreal road was the smoothest road near the proving round that was available. The track test involved no manoeuvring of the carrier on the road but only a steady run to see how the various kinds of metal in the treads would stand up under the wear and tear of running on the road.

Private Dunn had been sent out on this track test and had taken his carrier as far as Cumberland, about 10 miles east of the proving ground. The drivers of carriers on such tests were under orders to report back to the proving ground with their carriers if the road should become dangerous through sleet or snow. The day had been clear but shortly before the collision it started to snow and sleet. Dunn stated there had been a kind of rain and sleet. This had not shown any effect on the road but he was afraid that it would make the road slippery. He decided to discontinue the road test and report back to the proving ground and he was on his way back to the proving ground when the collision occurred.

Dunn was an experienced driver. He had been driving carriers for about 3 months of which 6 weeks had been on winter roads. Prior to his enlistment he had been a truck driver on the highways since 1928.

[The learned President here considers the evidence and finds that there is no justification for assuming that under the circumstances the rate of speed of the driver of the carrier was unreasonable, and that there is no credible evidence of lack of control of the carrier on the part of the driver up to the moment that it began to skid, and can see no negligence on the part of the driver in continuing to drive as he had safely been doing.]

Private Dunn was unable to give any explanation as to the cause of the skid. He said that he could see no reason for it to happen; it happened so quickly; he saw nothing ahead of him to cause it and afterwards he could not see what had caused it. Staff Sergeant Hall said that the only thing he could attribute the slide to was that the left track of the carrier must have struck a frozen spot somewhere on the road, but he did not see any such spot. This could easily have been the cause of the skidding; it would be a reasonable explanation of how it might have occurred and would be sufficient to displace the effect of the maxim *res ipsa loquitur* if it were applicable leaving the suppliant with the onus of proof of negligence still upon him.

Both Private Dunn and Staff Sergeant Hall gave their evidence in a frank and straightforward manner and I accept their statements.

After the most careful consideration which I have been able to give to the evidence in this case I have come to the conclusion that it would not be reasonable or fair, having regard to all the circumstances, to find that the skidding of the carrier or the collision that resulted from it was due to any negligence on the part of Private Dunn and I am unable to make any such finding. He was under a duty to bring the carrier back to the proving ground and was doing his best to do so.

The result is that, much as the loss to the suppliant is to be regretted, the suppliant has failed to bring its claim within the ambit of section 19 (*c*) of the Exchequer Court Act, as amended, and is, therefore, not entitled to any of the relief sought by the petition of right herein. The suppliant's claim will, therefore, be dismissed with costs.

Judgment accordingly.