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HER MAJESTY THE QUEEN, on the Information of the Deputy Attorney General of Canada, (*Plaintiff*) ..... APPELLANT;

AND

HILBOURNE LESLIE MURRAY and BURTON CONSTRUCTION COMPANY LIMITED (*Defendants*).... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Rights and powers—Member of the armed forces injured in motor vehicle accident—Action for loss of services—Whether Crown in right of Canada bound by provincial legislation restricting recovery —The Highway Traffic Act, R.S.M. 1954, c. 112, s. 99(1)—The Tortfeasors and Contributory Negligence Act, R.S.M. 1954, c. 266, s. 5.

B, a member of the Canadian armed forces, sustained personal injuries in a highway traffic accident in Manitoba, while being transported, as a guest without payment, in a motor vehicle owned by R. That vehicle was in collision with another motor vehicle owned by the respondent company and operated by its servant, the respondent M. The appellant instituted proceedings in the Exchequer Court against the respondents claiming damages to the full amount of the loss sustained by Her Majesty as a result of being deprived of B's services. The parties agreed that the collision resulted from the negligence of both R and M, and that the former was responsible for it to the extent of 75 per cent.

Section 99(1) of *The Highway Traffic Act,* R.S.M. 1954, c. 112, limits the liability of an owner or operator of a motor vehicle to a gratuitous passenger to cases of gross negligence or wilful and wanton misconduct on the part of the owner or operator. Section 5 of *The Tortfeasors and Contributory Negligence Act,* R.S.M. 1954, c. 266, provides that where no cause of action exists against the owner or operator of a motor vehicle by reason of the aforementioned enactment no damages or contribution or indemnity shall be recoverable from any person for the portion of the loss or damage caused by the negligence of such owner or operator; s. 9(2) of the same Act provides that the said Act applies to actions by and against the Crown, and that Her Majesty is bound thereby and has the benefit thereof.

There was no suggestion of gross negligence or of wilful or wanton misconduct on the part of R.

The question in issue was as to whether s. 5 of the latter Act is effective so as to limit the appellant's claim to 25 per cent of the damages sustained by Her Majesty because of the loss of B's services, or whether, notwithstanding that provision, there can be recovery of the total loss. The position taken by the appellant was that the Crown in the right of Canada cannot be bound by this provincial legislation because it was never intended to be made applicable to the appellant,

*PRESENT: Taschereau C.J. and Fauteux, Martland, Judson and Spence JJ.

and that, if it had been so intended, it would have been *ultra vires* of the Legislature of Manitoba. The President of the Exchequer Court decided the issue in favour of the respondents and from that decision the Crown appealed to this Court.

Held: The appeal should be dismissed.

The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that no other prerogative right may be extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law. In the present case the Manitoba Legislature was the legislative body which had the necessary jurisdiction to declare such limit.

This was not a case in which a provincial legislature had sought to "bind" the federal Crown, in the sense of imposing a liability upon it or of derogating from existing Crown prerogatives, privileges or rights. The situation was that as a result of s. 50 of the *Exchequer Court Act*, Parliament enabled the Crown, in the event of an injury to a member of the armed services, to enforce such rights as would be available to a master seeking compensation for loss of the services of his injured servant. What those rights may be can only be determined by the law in force at the time and the place when and where the injury to the servant occurred.

Gartland Steamship Co. and LaBlanc v. The Queen, [1960] S.C.R. 315, applied; *Gauthier v. The King* (1918), 56 S.C.R. 176, distinguished; *The King v. Richardson*, [1948] S.C.R. 57; *Nykorak v. Attorney General of Canada*, [1962] S.C.R. 331; *Attorney General of Canada v. Jackson*, [1946] S.C.R. 489; *The Queen v. Sylvain*, [1965] S.C.R. 164; *Toronto Transportation Commission v. The King*, [1949] S.C.R. 510, referred to.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], in an action for damages for loss of services of a Crown servant.

C. R. O. Munro, Q.C., for the plaintiff, appellant.

V. Simonsen, for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The appellant instituted proceedings in the Exchequer Court against the respondents claiming damages to the full amount of the loss sustained by Her Majesty as a result of being deprived of the services of one Robert James Briggs, a member of the Canadian armed forces. He sustained personal injuries in a highway traffic accident in the Province of Manitoba, while being transported, as a guest without payment, in a motor vehicle owned by one Reykdal. That vehicle was in collision with

[1] [1965] 2 Ex. C.R. 663.

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another motor vehicle owned by the respondent company and operated by its servant, the respondent Murray. It is agreed that the collision resulted from the negligence of both Reykdal and Murray, and that the former was responsible for it to the extent of 75 per cent.

Section 99(1) of *The Highway Traffic Act* of Manitoba, R.S.M. 1954, c. 112, provides that:

> 99. (1) No person transported by the owner or operator of a motor vehicle as his guest without payment for the transportation shall have a cause of action for damages against the owner or operator for injury, death, or loss, in case of accident, unless the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle and unless the gross negligence or wilful and wanton misconduct contributed to the injury, death, or loss for which the action is brought.

Sections 5 and 9(2) of *The Tortfeasors and Contributory Negligence Act*, R.S.M. 1954, c. 266, provide:

> 5. Where no cause of action exists against the owner or operator of a motor vehicle by reason of section 99 of The Highway Traffic Act no damages or contribution or indemnity shall be recoverable from any person for the portion of the loss or damage caused by the negligence of such owner or operator and the portion of the loss or damage so caused by the negligence of such owner or operator shall be determined although such owner or operator is not a party to the action.
>
> 9. (2) This Act applies to actions by and against the Crown, and Her Majesty is bound thereby and has the benefit thereof.

There is no suggestion of gross negligence or of wilful or wanton misconduct on the part of Reykdal.

The question in issue is as to whether s. 5 of the latter Act is effective so as to limit the appellant's claim to 25 per cent of the damages sustained by Her Majesty because of the loss of Briggs' services, or whether, notwithstanding that provision, there can be recovery of the total loss.

The position taken by the appellant is that the Crown in the right of Canada cannot be bound by this provincial legislation because it was never intended to be made applicable to the appellant, and that, if it had been so intended, it would have been *ultra vires* of the Legislature of Manitoba.

The learned President decided the issue in favour of the respondents and from that decision the present appeal is brought. His position is stated in his reasons for judgment as follows:

> It follows that, as long as the Sovereign relies upon Her common law status as a person to take advantage of a cause of action available to

persons generally in the province, and not upon some special right conferred on Her by Parliament, She must take the cause of action as She finds it when Her claim arises and, if the legislature of the province has changed the general rules applicable as between common subjects, the Sovereign must accept the cause of action as so changed whether the change favours Her claim or is adverse to it.

To put the matter in other terms, I have reached the conclusion that this case should be decided against the view put forward by the Attorney General, and in favour of that put forward by the defendant, because I am of opinion that, under our constitution, when the Sovereign in right of Canada relies upon a right in tort against a common person, She must, in the absence of some special prerogative or statutory right to the contrary, base Herself upon the general law in the province where the claim arises governing similar rights between common persons.

In *The King v. Richardson*[1], this Court decided that the relationship of master and servant between the Crown and a member of the armed forces was settled by the provision which is now s. 50 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, which provides that:

> 50. For the purpose of determining liability in any action or other proceeding by or against Her Majesty, a person who was at any time since the 24th day of June, 1938, a member of the naval, army or air forces of Her Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

The constitutional validity of this section was challenged in *Nykorak v. Attorney General of Canada*[2], and the provision was declared by this Court to be valid.

These cases do not go further than to hold that Parliament has properly declared the existence of a certain legal relationship between the Crown and members of the armed forces for the purpose of determining liability in an action by or against Her Majesty. Section 50 does not purport to establish what shall be the consequences of the relationship in any such action.

In *Attorney General of Canada v. Jackson*[3], it was held, in a case where a member of the armed services had been injured while travelling as a guest passenger in a motor vehicle, that the Crown could not recover damages from the driver of that vehicle because a provision of the *Motor Vehicle Act* of New Brunswick declared that the owner or driver of a motor vehicle not operated in the business of carrying passengers for hire or gain should not be liable for loss or damage sustained by a person being carried in such

[1] [1948] S.C.R. 57, [1948] 2 D.L.R. 305.
[2] [1962] S.C.R. 331, 33 D.L.R. (2d) 373.
[3] [1946] S.C.R. 489, [1946] 2 D.L.R. 481.

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vehicle. This Court held that the Crown, as master, could not claim damages for injury to the servant where the latter had no right of action himself. The servant had no cause of action because of the effect of the provincial statute.

It was decided, in *The Queen v. Sylvain*[1], that, the common law action *per quod servitium amisit* not existing in the civil law, the Crown could not succeed in a claim under art. 1053 of the *Civil Code* for injuries sustained by members of the armed forces in a collision, in the Province of Quebec, between a military vehicle and that of the respondent, driven by his son.

In each of these cases the liability of a defendant to the Crown, in its capacity of master, was determined on the basis of the law of the province in which the injuries were sustained.

The applicability of provincial legislation to the federal Crown in a damage claim based upon negligence was also considered by this Court in *Toronto Transportation Commission v. The King*[2]. As a result of a collision between a street car and a Royal Canadian Air Force truck, an aircraft, loaded on the truck, was damaged. The trial judge found both drivers to be negligent and apportioned the responsibility equally between them. It was held by this Court that while, if the common law alone were applicable, the Crown's claim would fail, because it failed to prove that the negligence of the street car driver alone caused the damage, the Crown could take advantage of the Ontario *Negligence Act*, R.S.O. 1937, c. 115, and could, pursuant to that statute, recover one-half of its damages.

Kerwin J. (as he then was), delivering the judgment of the majority of the Court, said, at p. 515:

> The Crown coming into Court could claim only on the basis of the law applicable as between subject and subject unless something different in the general law relating to the matter is made applicable to the Crown. ....Here, if the common law alone were applicable, the Crown would have no claim by reason of the fact that it failed to prove that the negligence of the Commission's servants caused the damage.....
>
> The Crown is able to take advantage of the Ontario *Negligence Act* and is therefore entitled to one-half of the damages.

This was, of course, a case in which the Crown took advantage of a statutory provision which was in its favour.

[1] [1965] S.C.R. 164, 52 D.L.R. (2d) 607.
[2] [1949] S.C.R. 510.

The right of a defendant, in an action by the Crown, to take advantage of a statute limiting the extent of liability was, however, considered by this Court in *Gartland Steamship Co. and LaBlanc v. The Queen*[1], in which the Crown claimed in respect of damage caused to its bridge by negligence in the operation of the appellant's vessel. One of the issues involved was as to whether the appellant could limit its liability to pay damages in accordance with ss. 649 and 651 of the *Canada Shipping Act*, 1934 (Can.), c. 44. The respondent contended that these sections could not be relied upon as against Her Majesty because the statute did not specifically apply to the Crown.

Locke J., who, while he dissented on the apportionment of responsibility, delivered the unanimous opinion of the Court on this issue, said, at p. 345:

> The effect of the sections of the *Canada Shipping Act,* however, are to declare and limit the extent of the liability of ship owners in accidents occurring without their own fault and privity. It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law.

In my opinion this proposition of law is applicable to the circumstances of the present case, and the fact that, in the *Gartland* case, the statute in question was a federal enactment, while in the present case it is provincial, does not affect the position. The words "limit of the liability effectively declared by law" at the end of the statement must mean, in a federal state, effectively declared by that legislative body which has jurisdiction to declare such limit.

The Manitoba Legislature has created, in favour of the owner and the driver of a motor vehicle in that province, the right, in the event that injury is caused by that motor vehicle to a gratuitous passenger in another vehicle, the driver of which is not legally responsible to such passenger because of s. 99(1) of *The Highway Traffic Act,* to have their legal responsibility to pay damages limited to that portion of the loss or damage caused by the negligence of the driver of that motor vehicle. That right is a civil right

[1] [1960] S.C.R. 315.

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created by statute enacted by the legislative body which had the necessary jurisdiction. This legislation did not affect any previously existing right of the Crown in the right of Canada created by competent federal legislation. Nor did it affect any prerogative right of the Crown. The appellant would have had no right of recovery at all had it not been for s. 50 of the *Exchequer Court Act*. But, as has already been noted, that section did not create a right of recovery. It merely established a relationship from which certain results might flow.

To put the matter in another way, this is not a case in which a provincial legislature has sought to "bind" the federal Crown, in the sense of imposing a liability upon it or of derogating from existing Crown prerogatives, privileges or rights. The situation is that as a result of s. 50 of the *Exchequer Court Act*, Parliament enabled the Crown, in the event of an injury to a member of the armed services, to enforce such rights as would be available to a master seeking compensation for loss of the services of his injured servant. What those rights may be can only be determined by the law in force at the time and the place when and where the injury to the servant occurred.

The appellant placed reliance upon the decision of this Court in *Gauthier v. The King*[1], which was given careful consideration by the learned President. In that case, the federal government agreed to purchase from the appellant certain fishing rights, the price to be settled by arbitration. Each party selected an arbitrator, and those two chose a third, but, before proceedings were taken, the government revoked the submission and declared its intention to abandon the purchase. Section 5 of the Ontario *Arbitration Act*, R.S.O. 1914, c. 65, made a submission to arbitration irrevocable except by leave of the Court. Section 3 provided that the Act should apply to an arbitration to which His Majesty was a party. The question in issue was as to whether the government could revoke the submission and pay damages for breach of the agreement to arbitrate or whether the Crown was bound by the arbitration award, which had been made, after the withdrawal of the government appointed arbitrator, by other arbitrators. It was held in this Court that s. 5 did not apply to a submission by the Crown in the right of Canada.

[1] (1918), 56 S.C.R. 176.

In my opinion that case is not analogous to the present one. The *Gauthier* case was one in which it was sought to impose a contractual liability upon the federal Crown by virtue of a provincial statute which had changed the common law with respect to the revocation of a submission to arbitration. Anglin J., who delivered the reasons accepted by the majority of the Court, drew a distinction between cases falling within s. 19 (now 17) of the *Exchequer Court Act* and those falling within s. 20 (now 18) of that Act. Section 19 gave to the Exchequer Court jurisdiction to deal with liabilities (*in posse*) of the Crown already existing. With regard to those, he said, there was no ground for holding that the Crown had renounced prerogative privileges theretofore enjoyed and submitted its rights to be disposed of according to the law in like cases applicable as between subject and subject.

The claim in issue, being one of contract, was within s. 19, and the law to be applied, the cause of action having arisen in Ontario, was the common law, except as modified by a statute binding upon the federal Crown. He regarded the common law right to revoke the authority of an arbitrator as being a privilege of the Crown, which could not be taken away or abridged by provincial legislation.

On the other hand, he recognized that s. 20 of the Act had created and imposed new liabilities on the Crown, and that the authorities had decided that in cases falling within that section the Crown's liability would be determined according to the existing general law applicable as between subject and subject. The reason for this was that "No other law than that applicable between subject and subject was indicated in the 'Exchequer Court Act' as that by which these newly created liabilities should be determined." (See p. 191.)

It may be noted that it was s. 20 which imposed a liability upon the Crown in respect of injury caused by the negligence of a servant of the Crown.

The present case deals with a claim in negligence by the Crown against a subject. It could arise only because of the master and servant relationship deemed to exist between the Crown and members of the armed services by virtue of s. 50 of the *Exchequer Court Act*. In my view that section likewise did not indicate that the legal consequences

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ensuing from that legislation would be determined by any law other than the provincial law applicable between subject and subject.

For that reason, even if the decision reached on the facts of the *Gauthier* case be accepted (as to which, as the learned President points out, some question is raised by the later decision of the Privy Council in *Dominion Building Corporation v. The King*[1], respecting the application of a provincial statute to a contract made by the federal Crown), it does not assist the appellant in this case.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: E. A. Driedger, Ottawa.

Solicitors for the defendants, respondents: Scarth, Honeyman, Scarth & Simonsen, Winnipeg.

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[1] [1933] A.C. 533 at pp. 548-49.