Thomas Francis MacLean *Appellant;*

and

Her Majesty The Queen *Respondent.*

1972: March 9; 1972: May 1.

Present: Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Vicarious liability—Prison inmate sustaining injuries in accident—Required to work in position of peril—Supervisor acting in course of employment —Quantum of damages—Crown Liability Act, 1952-53 (Can.), c. 30, ss. 3(1)(a), 4(2).

The appellant, while a prison inmate, was transferred to the prison farm and was instructed to report to the dairy barn where bales of straw were being stored in the loft. He was detailed by a field man in the Penitentiaries Service to assist in the operation by directing the sales as they came from a conveyor in the direction of three other inmates who were piling the bales in an area set aside for straw bales. While engaged in the work he had been assigned to do appellant fell some 15 feet from where he was working at the time to a concrete floor and sustained serious injuries which resulted in him being totally and permanently crippled for life.

The appellant's case was that he was put to work in a dangerous and unsafe place without any protective device, and while standing on a platform was struck by a bale of straw from the conveyor and was thrown or slipped from the platform to the floor below. The appellant's petition of right was dismissed in the Exchequer Court and an appeal was then brought to this Court.

Held: The appeal should be allowed.

The liability imposed upon the Crown under ss. 3(1)(*a*) and 4(2) of the *Crown Liability Act,* 1952-53 (Can.), c. 30, is vicarious. For the Crown to be liable to a prison inmate it must be established that an officer of the penitentiary, acting in the course of his employment, did something which a reasonable man in his position would not have done thereby creating a foreseeable risk of harm to the inmate and drawing upon himself a personal liability to the suppliant.

Here there was no doubt that the appellant was required to work in a position of peril and the whole situation amounted to a condition far below the standard of care required of the penitentiary authorities in the circumstances. There was also no doubt that the field man was acting in the course of his employment in assigning the appellant to work where he was at the time of the accident.

In assessing damages at $50,000, the trial judge failed to take all the relevant circumstances into account. The damages should be increased to $75,000.

APPEAL from a judgment of Gibson J., in the Exchequer Court of Canada, dismissing a petition of right claiming damages for personal injuries. Appeal allowed.

J. F. O'Sullivan, Q.C., and *A. H. Adam,* for the appellant.

J. A. Scollin, Q.C., and *S. M. Froomkin,* for the respondent.

The judgment of the Court was delivered by

HALL J.—This is an appeal from a judgment of Gibson J. in the Exchequer Court in which he dismissed appellant's petition of right claiming damages for injuries sustained in an accident which occurred on August 19, 1966, while the appellant was serving a two-year sentence of imprisonment in the penitentiary at Stony Mountain, Manitoba. The appellant had been an inmate at the penitentiary following his conviction at Winnipeg on August 10, 1965.

The appellant was 43 years of age at the time he was injured and 47 at the time of the trial. He had been working in the machine shop of the penitentiary and at his request was transferred to the prison farm which is outside the prison proper. He was put to work first in the garden, then to washing windows, and after a further period in the garden he was instructed to report to the dairy barn where bales of straw were being stored in the loft. The bales were carried from the ground to a window in the loft some 30 feet above ground level by a power conveyor. At the material time appellant was under the supervision of one John MacIvor, described as a field man in the Peni-

tentiaries Service, and he was detailed by MacIvor to assist in the operation by directing the bales as they came from the conveyor in the direction of three other inmates who were piling the bales in an area set aside for straw bales. Other areas of the loft were for the storage of hay bales, a quantity of which had previously been stored there.

The base of the window through which the bales were being carried by the conveyor was some 15 feet above the floor which was of concrete. Bales of hay had been stacked to within inches of the base of the window. There was a small platform 6 feet by 5 feet just inside the window and level with the base. There was a quantity of loose hay or straw on the top of the stacked bales at the window and some on the platform as well.

While engaged in the work he had been assigned to do appellant fell from where he was working at the time to the concrete floor and sustained serious injuries which have resulted in him being totally and permanently crippled for life.

The appellant's case is that he was put to work in a dangerous and unsafe place without any protective device, and while standing on the platform was struck by a bale of straw from the conveyor and was thrown or slipped from the platform to the floor below.

There was some conflict in the evidence as to whether appellant was standing on the platform or on the bales immediately below the platform. In my view his exact position prior to falling is not decisive because it is clear that in either position he was actually working in a situation of potential danger.

The trial judge found that "The sole and only cause of this accident was the failure of the suppliant to take care for his own safety." With respect, this finding was not warranted by the evidence. There was virtually no contradictory testimony, the one instance being different versions of a conversation between appellant and MacIvor as to using the platform. The accident did not, however, happen when MacIvor was

present, and MacIvor in his evidence, relating to the use of the platform, said:

Q. No. You didn't give any specific instructions to MacLean about not using the platform?

A. No, I did not, sir.

Q. You hadn't told him "Don't use the platform"?

A. No, sir.

and as to the footing on which appellant was directed to work, MacIvor's answers were:

Q. You are a man who has had a farming background and farming experience, yes?

A. Yes.

Q. You know from your experience, Mr. MacIvor, that when you get up on top of a stack or on top of a stack of bales anybody who has been on a farm, the footing is somewhat uneven and there are openings, I mean, it is a loosely-knit sort of a foundation, isn't it?

A. That is correct.

Q. And the footing on the straw is slippery, isn't it?

A. Yes, it is slippery.

Q. So that so far as the footing on bales of hay, it is not a solid foundation like a floor, is it?

A. No, sir.

Q. And it is much less satisfactory in terms of a firm grip of footing than an ordinary floor, isn't it?

A. You started out to ask a question about straw and now you mention hay.

Q. I will limit it to straw.

A. Straw, yes it is.

Q. It is not a good footing, is it, straw?

A. It is slippery and spongy under foot.

Q. It is spongy under foot and slippery and it would not be as good a footing, for instance, as that platform which is solid wood, would it?

A. No, sir.

Q. And a man who works, any man who has worked on top of straw, it is difficult to kind of keep your balance and keep a firm footing, especially if you are doing any lifting work, isn't it? Where you have to move about and move another force like a bale, it is difficult, isn't it?

A. It is bad to balance.

Q. It is a hard thing to do to stand on top of a stack of straw bales and try and move other bales that weigh 35 or 40 pounds, isn't it?

A. Yes, sir.

Q. It is hard because the footing is bad, isn't it?

A. That is correct.

It is unfortunate that exhibit 3 (2nd Series) shown at p. 130 of the Appeal Case cannot be reproduced here. It portrays the scene in a manner that leaves me in no doubt at all as to the position of peril in which the appellant was required to work. The unguarded platform, the loose hay or straw on the platform and on the pile of bales beneath the window, the fact that the bales sloped outwards towards the void 15 feet above the concrete floor all depict a scene of potential danger that must have been obvious to MacIvor when he placed appellant there to catch and deflect the heavy bales as they fell from the conveyor. The whole situation amounts to a condition far below the standard of care required of the penitentiary authorities in the circumstances.

The responsibility of the Crown towards inmates of penal institutions was correctly stated by Cattanach J. in *Timm v. The Queen*[1], at p. 178, as follows:

Section 3(1)(*a*) of the *Crown Liability Act* S.C. 1952-53, c. 30 provides as follows:

> "3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, . . ."

and section 4(2) provides,

> "4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative."

[1] [1965] 1 Ex. C.R. 174.

The liability imposed upon the Crown under this Act is vicarious. *Vide The King v. Anthony and Thompson*, [1946] S.C.R. 569. For the Crown to be liable the suppliant must establish that an officer of the penitentiary, acting in the course of his employment, as I find the guard in this instance was acting, did something which a reasonable man in his position would not have done thereby creating a foreseeable risk of harm to an inmate and drew upon himself a personal liability to the suppliant.

The duty that the prison authorities owe to the suppliant is to take reasonable care for his safety as a person in their custody and it is only if the prison employees failed to do so that the Crown may be held liable, *vide Ellis v. Home Office*, [1953] 2 All E.R. 149.

There is no doubt here but that MacIvor was acting in the course of his employment in assigning appellant to work where he was put at the time of the accident.

The appeal on the question of liability should accordingly be allowed.

The question of quantum is more difficult. The appellant is a cripple for life. He has a partial paralysis of both arms and legs caused by an incomplete spinal cord lesion at the level of cervical vertebrae C6-7. The trial judge described his condition as follows:

> The suppliant requires assistance getting into bed and dressing, has difficulty eating and must in effect eat with his hands. He is incontinent of urine and requires a condom drain and leg bag. His bowel movements are controlled by enemas which are administered at the Deer Lodge Hospital Winnipeg, twice a week. The suppliant comes there for that purpose and also to get bathed and shaved.
>
> The suppliant lives in a small room in a boarding and rooming house. He has no friends or associates except one person and his wife who visit him on some regular basis. He has no recreation except listening to a radio part time. He has no interests or hobbies. In short, he has been severely physically and mentally injured.
>
> The prognosis is that there will be no further improvement in his condition.

His sole source of revenue is a $105 a month "burnt-out" Canadian Army pension.

It is conceded that if appellant gets a substantial award he will lose his "burnt-out" Canadian Armed Services pension.

In addition to the injury to the spinal cord, appellant sustained severe injuries to his chest, including the fracture of several ribs that induced an acute illness which threatened his life for a time. This injury to the chest has left him with a tendency to recurrent chest infections which require antibiotics and special treatment. His life expectancy at the time of the trial was said to be about 28 years. It cannot be assumed that he will live that long, but while he lives will require nursing and other care on a daily basis.

The trial judge assessed damages at $50,000 saying only:

He is 47 years of age. His life, to date, has had little direction or purpose. He has held a number of jobs, essentially as a labourer, and has spent a considerable part of his life in prison.

On this evidence, I assess the suppliant's damages at $50,000.

The amount awarded is substantial but it is urged was not sufficient in the circumstances. Is it so inordinately low that it cannot stand or did the trial judge overlook some revelant elements in making his award (see *Proctor v. Dyck*[2], at p. 251)? It is true that since 1949 appellant has spent some 7 years in prison and he had another year to serve when he was injured. The care which this man requires will cost a substantial amount each week. There was no evidence adduced on the point but the Court can take notice of the fact that such care as this man requires and will require for the rest of his life costs considerable. Notwithstanding that he has been sentenced to prison on several occasions, he did work from time to time and he will sustain some loss

[2] [1953] 1 S.C.R. 244.

of income, but because of his wayward past that is difficult to estimate. He was not always what he has been from 1949 to 1966. As a teenager he volunteered for service in World War II and served overseas from May 1941 until October 1945. It is by reason of this service that he received the burnt-out pension and care at Deer Lodge Military Hospital, Winnipeg, where he is given an enema, bathed and shaved twice a week. He is entitled to compensation for pain and suffering, permanent disabilities and for loss of amenities of life. I have to conclude that the learned judge failed to take all the relevant circumstances into account in fixing the award at $50,000. I would increase the damages to $75,000.

The appellant should accordingly have judgment for the sum of $75,000 with costs here and in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellant: Walsh, Micay and Co., Winnipeg.

Solicitor for the respondent: Donald S. Maxwell, Ottawa.