1949

*Mar. 2, 3, 4
*June 2

TORONTO TRANSPORTATION COMMISSION (Defendant)..... APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (Plaintiff)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown, claim by—Damages—Negligence—Common Law—Exchequer Court Act, R.S.C., 1927, c. 34, s. 50A—Ontario Negligence Act, R.S.O., 1937, c. 115.

This action arose out of a collision on the Kingston Road in the city of Toronto on December 22, 1943 between a street car of the appellant and a truck and trailer on the latter of which was loaded a Bolingbroke aircraft, and which formed part of a convoy of Royal Canadian Air Force vehicles. As a result of the damage sustained by the aircraft the Attorney General of Canada on behalf of His Majesty exhibited an information against the appellant in the Exchequer Court claiming the damage had been caused by the latter's negligence.

The trial judge found that both parties were equally at fault, but held that the Crown was not responsible for the negligence of its servants and gave judgment for the Crown in the full amount of its claim together with costs of the action.

Held: That the trial judge's allotment of blame, in equal proportions to the servants of each party, was correct.

Held: Also, reversing the judgment of the Exchequer Court, that while 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 appellant's servants alone caused the damage, yet since the Crown is able to take advantage of the Ontario *Negligence* Act, R.S.O., 1937, c. 115, it is therefore entitled to one half of its damages.

APPEAL from a judgment of the Exchequer Court of Canada, O'Connor J. (1), awarding damages to the Crown (Dominion) for injury to an aircraft owned by the Crown occasioned by the negligence of the servants of the (defendant) appellant.

The material facts of the case and the questions in issue are stated in the judgment now reported.

I. S. Fairty, K.C. and *A. H. Young,* K.C. for the appellant.

N. L. Matthews, K.C. and *W. R. Jackett* for the respondent.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Estey JJ.

[1946] Ex. C.R. 604.

The judgment of the Chief Justice, Kerwin and Estey, JJ. was delivered by:

KERWIN, J—A Bolingbroke aircraft owned by His Majesty in the right of Canada had sustained damage at Picton and it was sent thence to London, via Toronto, all in the Province of Ontario, for repairs. The motors and main planes were removed from the aircraft, which was loaded on a trailer drawn by a truck with the planes set along the side of the aircraft on the trailer. The truck and trailer formed part of a convoy of Royal Canadian Air Force vehicles. On December 22, 1943, at about 6.45 p.m., while the convoy was on the Kingston Road, in the City of Toronto, a collision occurred between the aircraft on the trailer and a street car owned and operated by Toronto Transportation Commission, causing further damage to the aircraft. The Attorney General of Canada on behalf of His Majesty exhibited an information against the Commission in the Exchequer Court, claiming that this further damage had been caused by the negligence of the Commission's operator of the street car and asking that the amount of it be paid by the Commission.

The trial judge found (1) that the trailer containing the aircraft and the truck to which it was attached were stationary at the time of the collision and that the street car, having come to a stop on a signal of the Ontario Provincial Police who were leading the convoy, started up again and was in motion at the time of the collision. He held that the street car operator was negligent in failing to remain stationary until the entire convoy had passed. However, he held further that W/O Vodden of the R.C.A.F., who was in charge of the convoy, was negligent in taking the convoy, at night, through the City of Toronto on a main east and west highway of the Province of Ontario, in view of the width of the load on the trailer and the absence of lights to mark the outer edges of the load. He also held that Sergt. Taggert of the R.C.A.F. was negligent in the performance of his duties in two respects, i.e., in failing to properly supervise the passing of the convoy and in halting the convoy when the truck and trailer in question were in a certain position. He found these two officers or servants

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of the Crown, on the one hand, and the operator of the street car, on the other, to be equally at fault. He fixed the damages at $14,702.71 but, holding that the Crown was not responsible for the negligence of its officers or servants, gave judgment against the Commission for the full amount, together with the costs of the action.

From that judgment the Commission appeals to this Court. It submits that the accident was caused entirely by the negligence of the Crown's servants. It alleges that the amount fixed as damages is unwarranted; and, finally, that in any event it should be held liable for only one-half of the proper amount of damages on the footing that the Ontario *Negligence Act, R.S.O.* 1937, chapter 115, applies to the Crown. The respondent, seeking to uphold the judgment in its favour, submits that the accident was caused entirely by the negligence of the street car operator but contends that even if Vodden and Taggert, or either of them, are held to be negligent in any degree, such negligence cannot operate to defeat the claim of the Crown for the full amount of the damages fixed in the Exchequer Court.

As has been stated, the convoy was in charge of W/O Vodden. When it started from Picton it consisted of an Ontario Provincial Police car, a truck and trailer containing another aircraft, the truck and trailer that subsequently figured in the accident, and a station wagon. At Oshawa a conference was held and it was decided to proceed, notwithstanding the lateness of the hour on a winter day, but another Ontario Provincial Police car joined the procession, which proceeded on its way to Toronto. When it entered the limits of that city, it consisted of (1) a police car driven by Constable Robertson, (2) a second police car driven by Constable Hefferon who was accompanied by Sergt. Taggert, (3) a truck with trailer containing an aircraft, (4) the truck and trailer in question, driven by LAC/Jones who was accompanied by LAC/Novak, (5) a station wagon driven by LAC/Shipp, who was accompanied by W./O Vodden. Each truck and trailer had the proper vehicle lights, which were lighted; each trailer was very long and had a load nineteen feet in width; each trailer was equipped with proper clearance lights but had no lights to mark the outer edges of the aircraft; each aircraft carried a large checkerboard on the engine mounts and a red

flag at the outer edges of the centre section. These boards and flags would give warning of the size of the load in the daytime but were useless at the time of the accident.

The convoy proceeded westerly along the Kingston Road in Toronto where there are two sets of street car tracks. An automobile was parked near the northwest corner of the Kingston Road and Main Street and in order to pass it, it was found necessary for the two trucks and trailers to veer towards the south. The evidence as to what subsequently happened is extremely contradictory. It is admitted that a street car proceeding easterly on the southerly set of tracks stopped,—whether as a result of the police orders or because the operator saw the convoy is immaterial although there appears to be no reason for doubting the evidence of the Police and Crown witnesses. The first and second cars went beyond the street car, and the truck and trailer next in line passed the street car safely. The operator, Smith, says he did not move his street car, and in that he is confirmed by another Commission employee who happened to be returning home on the street car and by an independent witness on the sidewalk on the south side of the Kingston Road. This is denied by several witnesses for the Crown who say the street car started up and ran into the aircraft on the trailer attached to No. 4 vehicle. On this conflicting evidence, the trial judge found that the operator did start the street car, and with this finding I agree. Not only should not such a finding be not disturbed but it appears to be consistent with the evidence that, after the accident, quantities of sand were found on the tracks, which apparently could not have been there except as a result of the street car having been started, particularly when Smith testified that he did not use any sand at any time. I also agree that no assistance may be found in the evidence of experts called by each side, one of whom expressed an opinion that the street car was in motion and the other that the truck and trailer were moving at the time of the impact. The operator Smith was, therefore, guilty of negligence in starting the street car before the entire convoy had passed, and this was the cause of the occurrence.

However, bearing in mind that it was about 6.45 p.m. on December 22 that the convoy was proceeding on a main highway in the City of Toronto, W/O Vodden was negligent

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in not having clearance lights on the outside limits of the load; the clearance lights on the trailer would be a snare and a delusion, and the red flag was useless. Sergt. Taggert was negligent, as found by the trial judge, because, instead of getting out of the police car and going back to the trucks and trailers, where he would have been able to direct the No. 4 vehicle to proceed, he remained in the police car and attempted to supervise the passing of the two trucks and trailers from that position. I agree that the damage was also caused by the combined negligence of these two and Smith and that the negligence of none may be said to be subsequent to that of another, and that the trial judge's allotment of blame, in equal proportions to the servants of each pary, was correct.

I now turn to the question of damages. The evidence warrants the finding that the cost of repairing the centre section of the aircraft would exceed the price of a new one installed. New parts were obtained at a cost of $12,734.46 and to this the trial judge added the estimate made by the witnesses Lewis and Patterson of the cost to the plaintiff of making the necessary repairs and installing the centre section, $2,310.00. These sums total $15,044.46, which the trial judge considered to be the amount of the damages suffered by the Crown as a result of the accident. The appellant suggests that the trial judge misunderstood its arguments when he said:—"Counsel for the Respondent (the Commission) contended that as a new centre section had been placed in the aircraft, the value of the aircraft would be increased and that the Defendant should not be compelled to pay the full value of a new centre section." In its factum it contends that certain evidence relied upon by it and contained in two reports indicates that the aircraft had received extensive damage at Picton and was in need of substantial repair and overhauling before the street car collision, and that an allowance should have been made for this . I have examined the record in the light of this submission and while it is true that damage to the airplane had occurred at Picton, it was not to those parts damaged by the street car. The trial judge made a just estimate of this damage and no error can be found in his allowance of $14,702.71, being the amount claimed by the respondent

less an allowance subsequently made by it for the salvage of the nacelle, and which is slightly less than the amount that would otherwise have been fixed.

I am unable to agree, however, that on these findings the Crown is entitled to recover the full amount of $14,702.71. The Crown is plaintiff in an action based upon the negligence of the defendant's servant. The defendant does not make a claim against the Crown but in resisting the action sets up the negligence of the Crown's servants which equally caused the damage. There is no question that if, when the doctrine of contributory negligence was in full flower, one subject sued another for damage in these circumstances the plaintiff could not recover because he failed to prove that the defendant caused the damage. 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. The cases that decide that at common law the Crown is not responsible for the negligence of its servants are not in point as there claims were advanced against the Crown. Nor are such cases as *Black* v. *The Queen* (1), where a claim on a surety bond otherwise recoverable by the Crown was held not to be defeated by laches of its officers. 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. In Admiralty, the Commissioners for Executing the Office of the Lord High Admiral of the United Kingdom, as plaintiffs, have been held to be entitled only to one-half of their damages when their officers, as well as the defendant, were held to be at fault. *The Chinkiang* (2), *The Hero* (3).

The Crown is able to take advantage of the Ontario *Negligence Act* and is therefore entitled to one-half of the damages. The appeal should be allowed with costs. In lieu of the judgment *a quo* there should be substituted a judgment for the Crown for $7,351.35 with costs of the action.

KELLOCK J.—This appeal is from a judgment of the Exchequer Court (4) in favour of the respondent with

(1) (1899) 29 S.C.R. 693.
(2) [1908] A.C. 251.
(3) [1912] A.C. 300.
(4) [1946] Ex. C.R. 604.

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respect to damage to an aircraft being carried on a transport trailer while in collision with a street car of the appellant. The learned trial judge, while holding that there had been negligence in equal degree on the part of the servants of both the parties which contributed to the accident, came to the conclusion that the respondent was entitled to recover in full on the ground that the Crown was not affected by the negligence of its servants.

The transport trailer in question was the fourth vehicle of a convoy of five vehicles which was proceeding west on the Kingston road in the City of Toronto on December 22, 1943, the convoy being led by two Ontario provincial police cars, the third vehicle being another transport trailer, also loaded with a Bolingbroke aircraft similar to that on the transport in question and the rear being brought up by an Air Force station wagon carrying a driver and the Air Force officer in charge of the convoy. This convoy had passed the intersection of Main Street and the Kingston Road and by reason of the fact that each aircraft overhung its transport trailer by some five or six feet on each side and also by reason of the fact that there was an automobile parked on the north side of the Kingston Road west of Main Street, the convoy had swung out well into, or south of the centre of the street, for the purpose of passing the parked automobile. The appellant's street car being observed approaching by both provincial policemen, the police cars proceeded west on the southerly set of tracks signalling by flashing their headlights for the street car to stop. It is common ground that the street car did in fact stop. Where it stopped, and why it stopped, were, however, in controversy at the trial.

The contention of the appellant was that while thus at a standstill the street car had been run into by the aircraft, but the learned trial judge found against this. He found that the transport trailer here in question, while standing, had been run into by the street car, accepting the evidence of the respondent, that after the convoy had passed the parked car, but before the two transport trailers with their overhanging loads had returned to the north side of the street, they had been stopped when the approaching street car was sighted. After the street car had been stopped

a signal was given by the Air Force sergeant riding in the second police car for the number three vehicle to proceed and it thereupon passed the street car in safety. According to the finding of the learned trial judge, the street car then started up and ran down the number four vehicle. The evidence on behalf of those in charge of that vehicle, and the Air Force officer in the station wagon, who was in charge of the convoy, was that the lights on both the two last mentioned vehicles were turned off and on and the horns were sounded to call the attention of the street car operator to the presence of the overhanging load of the aircraft in the path of the street car, but without effect. The learned trial judge further found as a fact that the operator had started forward when he knew that the entire convoy had not passed and that he saw the clearance lights on the number four vehicle and the headlights on both that vehicle and the station wagon being turned on and off.

Appellant attacks the finding of negligence on the part of the operator of the street car but, in my opinion, it is not entitled to succeed in this respect. The evidence of the motorman at the trial was to the effect that he had not stopped as the result of any signal from the police but because he had seen the overhanging load of the number three vehicle and he did not think there was sufficient clearance for the street car. He said that after the number three transport went past he was in the act of releasing his brakes preparatory to starting up again when he noticed number four transport and thereupon, and before his car had made any movement, he put on the emergency brake to hold it in its then position as it was on a slight grade.

This evidence, as already mentioned, was not accepted by the learned trial judge and, in my opinion, with respect, on adequate grounds. The learned trial judge, however, points out that the clearance lights on the left hand side of the number four vehicle would tend to deceive the motorman into thinking that they indicated the most southerly point in the highway occupied by that vehicle and that the operator of the street car would be facing its headlights and to some extent the lights of the station wagon, which would make it impossible for him to see the overhanging portion of the load and he was of opinion that this situation was

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calculated to mislead the street car operator. He was also of opinion that the checker-board, mounted upon the load itself, and the red flag at the extreme southerly point of projection of the load, were both useless on a dark night. No reliance is, however, placed by counsel for the appellant upon any deception in this respect on the part of the motorman. I think no other position could be taken consistently with the evidence of the motorman who does not make any such suggestion. His evidence is that he saw the vehicles in question and remained stationary.

In a report made by him to the appellant on the day in question, and subsequent to the accident, he said that as he was proceeding east he noticed a transport truck coming west with some object extending over on to the east bound track; that he immediately applied his emergency brake and stopped the car; that it proved to be an aeroplane loaded on a flat trailer attached to a transport truck and that at the time that danger became apparent to him the other vehicle was some thirty feet distant. At the trial he said that as number three vehicle passed him he had turned his head to the left and the Air Force officer in charge of the convoy in the station wagon said that he saw this and that the operator continued to look to his left following with his eyes the other aircraft right up to the time of the collision.

In view of the findings of the learned trial judge, it would appear that if the motorman, as he says, saw the number four vehicle with its overhanging load, he was negligent in proceeding. If he did not see it he was negligent in failing to do so and the explanation of his having failed to see it may well lie in the fact that his attention was attracted by the number three vehicle and that he started forward without seeing that his path was clear as the Air Force witness deposes.

With respect to the respondent, the learned trial judge found that it was negligent to have taken such a convoy into the city after dark with the clearance lights on the left hand side by the transport trailer, as already described, but with no warning light on the southerly end of the overhanging load, with the result that east bound traffic might well be misled into thinking that the clearance lights marked the southerly limit of the number three vehicle and its load.

He held further that the Air Force sergeant riding in the second police car was negligent in halting the convoy without making sure that no part of the load on either transport trailer was south of the centre line of the street and in failing properly to supervise the passing of the street car by both transport trailers. This he should have done in the learned judge's view, by getting out of the automobile and placing himself in a position in the street where he could have controlled the situation. Instead of doing that he had ridden on the running board of the second police car and had signalled the number three transport to follow, intending, as he said after having seen it safely pass the street car, to have gone back on foot and brought number four vehicle through.

The respondent contends that the finding as to negligence on the part of its servants was not negligence contributing to the accident and that, in any event, the respondent is not affected by any negligence on the part of the Air Force personnel.

With respect to the position of the clearance lights on the number four vehicle and the absence of any light on the southerly end of the overhanging load, I think the proper conclusion is that this is not a factor which contributed to the accident in view of the evidence of the appellant's motorman quite apart from the position taken by counsel for the appellant.

It should have been evident however that the undertaking of conducting such a convoy through busy streets in a city such as Toronto, was one which called for the exercise of the utmost care on the part of those in charge, particularly when the undertaking was to be carried out at night. It is apparent that in the course of its progress from Picton this convoy had, even in daylight, been guided through "tight spots" by an officer on foot and in close contact with each transport trailer as it manoeuvred through. In fact the driver of the number four vehicle said that it was usual and necessary to have someone ahead in a position to guide him through difficult places. Sergeant Taggert himself intended, after having guided number three vehicle through, to go back on foot for the purpose of guiding number four. The question is whether it was negligence on the part of those in charge of the convoy to assume that there would be no

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movement on the part of east bound traffic until the whole convoy had gone through, or whether precaution should have been taken to see that such movement did not take place on the part of some inadvertent person, such as the street car operator, who evidently was unaware that there was more than one aircraft in the convoy. In my opinion it is not placing the duty too high to say that such a precaution should have been taken and that its failure was negligence contributing to the accident and that was the view of the learned trial judge. I therefore think the finding of negligence on the part of those in charge of the convoy in this respect must be affirmed.

With respect to the contention that the Crown in such a case as this may recover the full amount of its damage if a defendant is at all negligent, no authority has been cited in support. The cases referred to by counsel for the Crown were all cases where the Crown was a defendant. It seems to me that when the Crown brings an action at common law, it accepts the common law applicable to such a claim. This is illustrated by analogy in my view in *The Chinkiang* (1), where, in cross actions between the Admiralty as owners of a naval vessel, and the owners of a merchant ship, both ships were held to blame and Admiralty recovered a moiety of its damage. The result thus arrived at seems to me to have been rested upon the basis of the law as administered in Admiralty in collision cases, and the Crown, in bringing a claim in the Admiralty Court was subject to the law so administered. The rule in Admiralty is stated by Dr. Lushington in *The Milan* (2), as follows:

* * * that by the law of the Admiralty, as it is called, if the owner of one ship bring an action against the owner of another ship for damage by collision, and both ships be found to blame, the party proceeding recovers only a moiety of his damage; if there is a cross-action, the damages are divided, each party recovering half his own loss.

In *China Merchants' Steam Navigation Co.* v. *Bignold* (3), a case involving cross-suits in connection with a collision between a merchant ship and a King's ship in which both were held to blame, Sir R. P. Collier in delivering the judgment of the Judicial Committee said, at 517:

That being so, the ordinary rule of the Admiralty Court applies; and therefore * * * the damages should be divided between the parties according to the Admiralty rule, which is that each party shall obtain from the other half of the damage which he has suffered.

(1) [1908] A.C. 251.
(2) (1861) 1 Lush. 388 at 398.
(3) (1882) 7 A.C. 512.

As stated in Chitty on *Prerogatives of the Crown,* page 245, the King "may maintain the usual common law actions * * * And though the King chuse a common law action, he may, by virtue of the prerogative we have just noticed, commence it in any court". In a common law action based on the negligence of the defendant, the plaintiff may not recover if the injury has been contributed to by the negligence of his own servant; *William* v. *Holland* (1). Where, therefore, the Crown brings such an action I think that by analogy to the rule applied in the case of a proceeding in Admiralty, the action is subject to the common law rule, and it is clear, by reason of section 50A of the *Exchequer Court Act,* that the members of the Air Force here in question are to be considered as servants of the Crown for the purpose of this proceeding. While the section does not create any direct or specific right in the Crown, it places the Crown in recognized common law relationship and its rights are those arising from that relation under the rules of that law; *Attorney-General* v. *Jackson* (2), per Rand J. at 493.

On this basis the result in the case at bar, in view of the finding of negligence on the part of servants of the respondent would be that the Crown's claim would be dismissed. It is well settled, however, that the Crown may take the benefit of a statute and, applying the provisions of the Ontario *Negligence Act,* the Crown should recover one moiety of its claim. As to the quantum, I think the trial judge has correctly dealt with the Crown's claim.

The appeal should therefore be allowed to the extent indicated. I think the appellant should have its costs in this court and the respondent should have its costs in the court below.

Appeal allowed and amount of recovery reduced to $7,351.35 with costs in favour of appellant in this Court and costs in favour of respondent in the Court below.

Solicitor for the appellant: *Irving S. Fairty.*

Solicitor for the respondent: *Norman L. Mathews.*

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(1) (1883) 6 C. & P. 23.

(2) [1946] S.C.R. 489.