1963
*June 4
Dec. 16

MICHAEL MAGDA .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Master and servant—Petition of right—Alleged brutal treatment by prison authorities—Liability for negligence of servants—Negligence must be shown—The Exchequer Court Act, R.S.C. 1927, c. 34—The Canadian Bill of Rights, 1960 (Can.), c. 44—The Crown Liability Act, 1952-53 (Can.), c. 30.

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Ritchie JJ.

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The appellant, a native of Roumania but who is now a Canadian citizen, was interned in Canada during the last war. By petition of right he claimed damages for "cruel and unusual treatment and punishment" accorded to him in the course of his internment during and for some time after the war. His broad petition was that all officers or servants of the Crown who were employed in jails and internment camps owed a duty to prisoners not to expose them to the kind of treatment and punishment to which he alleged he was subjected, and that the mere recitation of the manner in which he was treated constituted an allegation of breach of this duty and, therefore, negligence such as to create a liability against the Crown under s. 19(*c*) of the *Exchequer Court Act*, R.S.C. 1927, c. 34. The Exchequer Court answered in the negative the question of law as to whether a petition of right lie against the Crown on the assumption that the allegations of fact contained in the petition were true. The appellant appealed to this Court.

Held: The appeal should be dismissed.

There was a wide difference between general allegations of mistreatment such as those made here and an allegation that some servant or agent of the Crown had, while acting within the scope of his duties or employment, committed a tortious act of negligence under such circumstance as to draw upon himself a personal liability to the petitioner. Under s. 19(*c*) of the *Exchequer Court Act*, the liability of the Crown was limited to proof of allegations of the latter character. Negligence involves the causing of damage by a breach of that duty of care for others which the circumstances of the particular case demand. The allegations of fact contained in the petition of right could not be considered as disclosing tortious acts of negligence by officers or servants of the Crown. They were descriptive of disciplinary and regulatory measures deliberately taken by authorities responsible for the custody of the appellant while he was legally interned and were, therefore, not such as to create liability against the Crown under s. 19(*c*).

The *Canadian Bill of Rights*, 1960 (Can.), c. 44, like the *Crown Liability Act*, 1952-53 (Can.), c. 30, was not in force during that period and the pre-existing rights which are there recognized did not include the right to bring an action in tort against the Crown except as specifically provided by statute.

APPEAL from a judgment of the President of the Exchequer Court of Canada[1] dismissing a petition of right. Appeal dismissed.

G. A. Roy, Q.C., for the appellant.

Paul Ollivier, Q.C., for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the President of the Exchequer Court of Canada[1] rendered on February 20, 1953, whereby he determined in the

[1] [1953] Ex. C.R. 22, 2 D.L.R. 49.

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negative the following question of law set down for hearing before him pursuant to rule 149 of the General Rules and Orders of the Exchequer Court:

> Assuming the allegations of fact contained in the Petition of Right to be true, does a petition of right lie against the Respondent for any of the relief sought by the Suppliant in the said Petition?

The petitioner, who is now a Canadian citizen, was, at the time of the happening of the events complained of in his petition of right, a citizen of Roumania and his present very substantial claim for damages is founded upon what his counsel describes as the "cruel and unusual treatment and punishment" accorded to him in the course of his imprisonment and internment in Canada during and for some time after the last war.

The circumstances of the appellant's arrest, internment and imprisonment and the details of his alleged mistreatment are fully reviewed in the reasons for judgment of the learned President, but it is now admitted to have been wrongly alleged in the petition of right that the appellant's imprisonment and internment were illegal and the claim asserted in this appeal is limited to a series of complaints as to the treatment accorded to the appellant while he was legally confined by order of the Canadian Government. In the factum filed on behalf of the appellant these complaints are attributed to the negligence of "officers of the Crown". The relevant paragraph of the factum, which appears on pp. 6 and 7, reads as follows:

> The officers of the Crown . . . were negligent during the incarceration of the Appellant in Halifax and during his internment, because they acted as follows:
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> (*a*) They did not inform the Appellant of the motives for his arrest and of his detention. This is alleged in paragraph 41 of the Amended Declaration;
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> (*b*) They did not allow the Appellant, for a period of three months, to write letters, and more particularly did not allow him to write to the Rumanian Consul in Montreal, and once they did allow him to write, they did not transmit his letter with due haste. This is alleged in paragraph 39 of the Amended Declaration;
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> (*c*) They did not advise the Appellant that he could have his case referred to and dealt with by a Board under the terms of Article 25 of Order in Council P.C. 2385 of April 4, 1941. This is alleged in paragraph 41 of the Amended Declaration;
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> (*d*) The Appellant was made to do forced labour, was put in solitary confinement, and put on bread and water, without mattress, for a period of six months. This is alleged in paragraph 35 of the Appellant's Amended Petition;

(e) The Appellant's rations were reduced to a cup of tea and a piece of bread at breakfast, a soup and piece of bread for lunch, and a cup of tea and a piece of bread in the evening. This is alleged in paragraph 36 of the Appellant's Amended Petition;

(f) The Appellant, while interned, was not granted the privileges of the Red Cross, while other enemy prisoners were. This is alleged in paragraph 53 of the Appellant's Amended Petition;

(g) The Appellant was not granted the privileges granted to other enemy prisoners. He could not write to his family, was not given similar medical care and was locked in a cell. This is alleged in paragraph 55 of the Appellant's Amended Petition.

It is to be observed with respect to sub-paras. (a) and (c) above that the complaints therein alleged are related to the arrest and continued incarceration of the appellant and in this regard it is to be observed that the complaints in question are preceded in the factum filed on behalf of the appellant by the following:

The incarceration of the Appellant in Halifax on December 14, 1940, was legal under the terms of Order in Council P.C. 4751. The continued incarceration of the Appellant in Halifax, after the rendering of Order in Council P.C. 2385 on April 4, 1941, was also legal, because the right of the Appellant under the said Order in Council to have his case reviewed was only permissive and not imperative. The internment of the Appellant under Regulation 21 of the Defence of Canada Regulations was legal as the Appellant was a Rumanian citizen.

The remaining matters complained of in sub-paras. (b), (d), (e), (f) and (g) are set out in the petition of right as part of the narrative of the appellant's experiences while in legal custody in Canada and although in his arguments before this Court appellant's counsel attributed all these complaints to the negligence of officers of the Crown, it is noteworthy that the only plea contained in the petition upon which reliance is placed as an allegation of such negligence is that contained in para. 74 which reads as follows:

L'incarcération et l'internement du requérant, tel que décrit ci-dessus, sont dus à la faute et/ou la négligence d'employés, de fonctionnaires, d'officiers et/ou de serviteurs de la Couronne, pendant qu'ils étaient dans l'exercice de leurs fonctions ou de leur emploi.

It is argued that because the words "tel que décrit ci-dessus" have been inserted in this paragraph it is to be construed as an allegation that all the matters complained of in the earlier paragraphs of the petition were occasioned by the fault and/or negligence of employees, officials, officers and/or servants of the Crown while acting within

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the scope of their employment, and that this constitutes an allegation sufficient to give rise to liability against the Crown.

It is settled law "that there cannot be an action in tort against the Crown unless it is founded upon a statute". See *The King v. Paradis & Farley Inc.*[1], *per* Taschereau J. as he then was; and the only such statutory provision existing at the time when the events complained of are alleged to have occurred was that contained in para. 19 (c) of the *Exchequer Court Act,* R.S.C. 1927, c. 34, as amended by 1938 (Can.), c. 28 which reads as follows:

> The Exchequer Court shall have exclusive original jurisdiction to hear and determine the following matters:
>
> (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The nature of the liability thus created against the Crown is explained in the reasons for judgment of Rand J. speaking for the majority of this Court in *The King v. Anthony*[2], where he said:

> I think it must be taken that what paragraph (c) does is to create a liability against the Crown through negligence under the rule of *respondeat superior,* and not to impose duties on the Crown in favour of subjects: *The King v. Dubois* (2); *Salmo Investments Ltd. v. The King* (3). It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.
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> If the liability is placed merely on the negligent failure to carry out a duty to the Crown and not on a violation of a duty to the injured person, then there will be imposed on the Crown a greater responsibility in relation to a servant than rests on a private citizen. But the words "while acting" which envisage positive conduct of the servant taken in conjunction with the consideration just mentioned clearly exclude, in my opinion, such an interpretation.

The broad contention made on behalf of the appellant is that all officers or servants of the Crown who were employed in jails and internment camps such as those in which he was interned and incarcerated, owed a duty to the prisoners in their charge not to expose them to the kind of treatment and punishment to which the appellant alleges that he was subjected, and that the mere recitation of the manner in which he was treated, coupled with

[1] [1942] S.C.R. 10 at 13, 1 D.L.R. 161.
[2] [1946] S.C.R. 569 at 571, 3 D.L.R. 577.

the wording of para. 74 of the petition, constitutes an allegation of a breach of this duty and therefore of negligence such as to create a liability against the Crown under the *Exchequer Court Act*.

There appears to me, however, to be a wide difference between general allegations of mistreatment and unfairness suffered by a prisoner while confined by order of the Canadian Government and an allegation that some servant or agent of the Crown has, while acting within the scope of his duties or employment, committed a tortious act of negligence under such circumstances as to draw upon himself a personal liability to the petitioner. Under the provisions of s. 19 (c) of the *Exchequer Court Act*, the liability of the Crown is, in my opinion, limited to proof of allegations of the latter character.

It is to be observed also that the claim which is alleged to be put forward by para. 74 of the petition is not confined to "negligence" but is based upon an allegation of "*faute et/ou la négligence*" of officers and servants of the Crown. As the learned President of the Exchequer Court has pointed out, "negligence" is only one segment of the broad field of "faute" which is envisaged by the provisions of art. 1053 of the Quebec *Civil Code*, the English version of which reads as follows:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

In this regard, in *Canadian National Railways Co. v. Lepage*[1], *Rinfret J.* (as he then was) had occasion to say:

> The respondent's case is rested on fault consisting not in any positive act or imprudence, but in the neglect of the company and its employees (art. 1053 C.C.).
>
> * * *
>
> It is a familiar principle that neglect may, in law, be considered a fault only if it corresponds with a duty to act.

In the course of his reasons for judgment, the learned President has traced the history and development of the specific and independent tort of negligence and I have nothing to add to his analysis of the subject.

In essence, negligence involves the causing of damage by a breach of that duty of care for others which the

[1] [1927] S.C.R. 575 at 578, 3 D.L.R. 1030, 34 C.R.C. 300.

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circumstances of the particular case demand. It is lack of due care which gives rise to liability for negligence and a very real distinction exists between inadvertently causing injury through an unreasonable failure to guard against foreseeable danger to others and deliberately carrying out a course of conduct designed to control persons in legal custody by subjecting them to disciplinary action.

I agree with the learned President of the Exchequer Court that the allegation of fact contained in the petition of right cannot be considered as disclosing tortious acts of negligence by officers or servants of the Crown. They are descriptive of disciplinary and regulatory measures deliberately taken by authorities responsible for the custody of the appellant while he was legally imprisoned and incarcerated and are therefore not such as to create liability against the Crown under s. 19 (c) of the *Exchequer Court Act*.

As to the argument of appellant's counsel based on *The Canadian Bill of Rights*, 1960 (Can.), c. 44, it is only necessary to say that that statute, like *The Crown Liability Act*, 1952-53 (Can.), c. 30, was not in force during the period referred to in the petition of right and that the pre-existing rights which it recognizes do not include the right to bring an action in tort against the Crown except as specifically provided by statute.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Georges A. Roy and Jean-Paul Deschatelets, Montreal.

Solicitor for the respondent: Paul Ollivier, Ottawa.