GEORGE ALEXANDER MORRISON (SUPPLIANT) ..... APPELLANT; 1939 * Nov. 20, 21

AND 1940 * March 4. * April 30.

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Negligence—Petition of Right for damages—Suppliant struck by motorcycle driven by R.C.M.P. constable on driveway of Federal District Commission—Negligence of an "officer or servant of the Crown while acting within the scope of his duties or employment upon a public work" within s. 19 (c) of Exchequer Court Act, R.S.C., 1927, c. 34 (as it stood in 1936).

The accident in question occurred on August 23, 1936, on a driveway in the city of Ottawa, constructed and maintained by the Federal District Commission, a body created by c. 55 of the Statutes of Canada, 1927. The cost of construction of the driveway was defrayed out of moneys voted by Parliament for the purpose and the driveway is maintained out of such moneys. A part of the driveway passed through land used by the City of Ottawa for an agricultural exhibition and it was the practice of the Exhibition Association to obtain permission from the Commission to place barriers across the driveway at the east and west limits of the exhibition grounds for the purpose of preventing the public from gaining access to those grounds through from the Driveway; and such barriers were there on the day of the accident. On the first day of exhibition week, G., a R.C.M.P. constable (who had been engaged as traffic officer on the Driveway in the previous year during exhibition week, when the same part of it had been closed to the public) was driving his motorcycle on the Driveway in discharge of his duty of patrolling it for the purposes (*inter alia*) of enforcing traffic regulations and protecting the Commission's property. When, driving westerly, he reached the eastern limits of the exhibition grounds he received a signal to pass through the open gate of the barrier and proceeded on his way. In approaching the western limits of the grounds, on rounding a curve, he found his vision impaired by the sun, and when he became aware of the barrier there erected, though he

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ. Rinfret J. was not present on the re-hearing as to the amount of damages on April 30, 1940, the re-hearing being, by consent, before four Judges.

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immediately applied his brakes (which were in perfect order), he did not succeed in stopping until he had passed through and some few feet beyond the gate, which appellant, gatekeeper, was in the act of opening to allow G. to pass. Appellant was struck by the motorcycle and injured, and sued the Crown for damages.

Held: (1) G. was negligent in not immediately bringing his motorcycle under control when he found his vision affected by the sun. Appellant was not guilty of contributory negligence.

(2) G. at the time of the accident was an "officer or servant of the Crown" and "acting within the scope of his duties or employment upon" a "public work," within the meaning of s. 19 (*c*) (as it then stood) of the *Exchequer Court Act*, R.S.C., 1927, c. 34. Conceding that he was not engaged in traffic control when in the part of the Driveway within the ambit of the exhibition grounds (though even there he was charged with protecting Crown property—shrubs, trees, etc., on the Driveway border), yet even when passing through those grounds (to resume his duty as traffic officer beyond them) he was acting within the scope of his duty as traffic officer upon the Driveway (*The King* v. *Schrobounst*, [1925] S.C.R. 458, the authority of which has been recognized in *The King* v. *Mason*, [1933] S.C.R. 332, *The King* v. *Dubois*, [1935] S.C.R. 378, *The King* v. *Moscovitz*, [1935] S.C.R. 404, and *Salmo Investments Ltd.* v. *The King*, [1940] S.C.R. 263).

Judgment of Maclean J., [1938] Ex. C.R. 311, dismissing appellant's petition of right, reversed.

APPEAL by the suppliant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing his petition of right, in which he asked damages for personal injuries suffered when, on August 23, 1936, he was struck by a motorcycle driven by a constable of the Royal Canadian Mounted Police on a Driveway constructed and maintained by the Federal District Commission in the city of Ottawa. The suppliant (appellant) alleged that the accident was caused by negligence of the said constable and that the latter was at the time of the accident an "officer or servant of the Crown" acting "within the scope of his duties or employment upon" a "public work" within the meaning of s. 19 (*c*) of the *Exchequer Court Act*, R.S.C., 1927, c. 34 (as it stood at the time of the accident). The material facts of the case are sufficiently stated in the reasons for judgment in this Court now reported. The appeal to this Court was allowed and judgment given to the suppliant for damages (fixed, on a re-hearing as to the amount on April 30, 1940, at $9,500) with costs throughout.

(1) [1938] Ex. C.R. 311.

A. W. Beament K.C. and *R. A. Hughes* for the appellant.

A. Lemieux K.C. (*W. R. Jackett* with him on said re-hearing as to amount of damages) for the respondent.

The judgment of the Chief Justice and Rinfret, Davis and Kerwin JJ. was delivered by

THE CHIEF JUSTICE—The first question concerns the application of section 19 (*c*) of the *Exchequer Court Act* and that question subdivides itself into two branches: (*a*) whether the Driveway between Confederation Park and Hog's Back is a "public work" within the meaning of that enactment; and (*b*) if so, whether Constable Glencross was an "officer or servant of the Crown acting within the scope of his duties or employment upon" that "public work" when the acts of negligence with which he is charged occurred.

The Driveway was constructed and is maintained by the Federal District Commission, a body created by chapter 55 of the Statutes of Canada, 1927. The cost of construction was defrayed out of moneys voted by Parliament for the purpose and the Driveway is maintained out of such moneys and it is not seriously open to question that the Driveway is a "public work" within the meaning of section 19 (*c*) of the *Exchequer Court Act*. It is argued, however, on behalf of the Crown that this enactment has no application in the present case because Glencross, assuming he was chargeable with negligence in the acts complained of, was not at the time an "officer or servant of the Crown acting within the scope of his duties or employment upon" a "public work."

A brief statement of the facts is necessary.

The Driveway between Confederation Park and Hog's Back follows the bank of the Rideau Canal through a tract of land, which, in 1904, was leased by the Crown to the City of Ottawa at a rental of one dollar a year to be used solely for the purposes of an Agricultural Exhibition (with the right to resume possession of any part of the tract on notice). It was not until the year 1927 that the part of the Driveway passing through this tract was constructed. The Commission decided shortly after the construction of this part of the Driveway not to erect a barrier fencing

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off the Driveway from the Exhibition Grounds proper, but it has been entirely controlled along with the rest of the Driveway by the Commission and the Commission's exclusive right of possession has not been disputed. Traffic over it has been governed by the traffic by-laws of the Commission and it has been the practice, during the week of the Exhibition, for the Exhibition Association to obtain permission from the Commission to place barriers across the Driveway at the east and west limits of the Exhibition Grounds for the purpose of preventing the public from gaining access to those grounds through from the Driveway.

The duty of patrolling the Driveway for the purposes (*inter alia*) of enforcing traffic regulations and protecting the property of the Commission is discharged by constables belonging to a motorcycle squad of the R.C.M.P. and, on the day when the appellant was injured (August 23rd, 1936, the first day of the week of the Exhibition), one Glencross was assigned to this duty and came on duty shortly before four o'clock in the afternoon. Proceeding southerly and westerly from Confederation Park, he arrived at the eastern boundary of the Exhibition Grounds where the Exhibition Association had (as usual during the week of the Exhibition) erected a barrier. There he received a signal from the attendant to pass through the open gate and then proceeded westerly towards the western limit of the Exhibition Grounds at a speed which he estimated at between 23 and 25 miles per hour.

At the westerly limit also the Association had, as usual, placed a barrier with the permission of the Commission and a gate which was 12 feet wide and 8 feet high; and it was there that the appellant was stationed as gatekeeper. His duties were to exclude the public from entering the Exhibition Grounds through the gate but to allow the employees of the Hydro-Electric Corporation and the motorcycle squad patrolmen to pass freely in both directions. The predecessor of Glencross had several times that day passed through this gate in the execution of his duty of patrolling the Driveway.

Glencross, cycling westerly on the Driveway, found, as he rounded a curve between two and three hundred feet

east of this barrier and gate, that the sun was shining directly in his eyes and his vision was naturally impaired thereby. It was, indeed, only when he had reached a point about fifty or sixty feet from the barrier that he became aware, as he says, that the roadway was barricaded. He immediately applied his brakes (which were in perfect order) but did not succeed in stopping his motorcycle until he had passed through the gate, which the appellant was then in the act of opening (in order to allow him to pass), and some few feet beyond it. The appellant received a severe blow and suffered permanent injuries.

The Crown contends that Glencross was not acting within the scope of "his duties or employment upon a public work" while proceeding along the Driveway within the limits of the Exhibition Grounds.

It may be conceded that Glencross was not engaged in traffic patrol when in the part of the Driveway within the ambit of the Exhibition Grounds. But when one takes account of the facts, this does not appear to be relevant. Even within the Exhibition Grounds he was admittedly charged with the duty of protecting the property of the Crown,—the shrubs, trees, flowers and bushes on the border of the Driveway. Moreover, the duty of Glencross as traffic officer required him to patrol the Driveway between Confederation Park and Hog's Back. He was conveying himself in a motorcycle which he had in his possession as such traffic officer to enable him to perform his functions as such officer. When he arrived at the easterly limit of the Exhibition Grounds it was his duty to go along the Driveway to the westerly gate in order to resume his duty as traffic officer when he arrived there. Even passing through the Exhibition Grounds he was, under the decision in *The King* v. *Schrobounst* (1), acting within the scope of his duty as traffic officer upon the Driveway. In that case it was held by this Court that the driver of a bus employed by the Crown to take workmen engaged on the Welland Canal from their homes to the Canal was acting in his "duties or employment upon" a "public work" (the Welland Canal) while so engaged. The case is indistinguishable; and its authority has been recognized

(1) [1925] S.C.R. 458.

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in *The King* v. *Mason* (1); *The King* v. *Dubois* (2); *The King* v. *Moscovitz* (3), and *Salmo Investments Ltd.* v. *The King* (4).

There remains the issue of the negligence of Glencross. He had been engaged as traffic officer on the Driveway in the previous year during the week of the Exhibition when the same part of the Driveway had been closed to the public; and he had, a minute or two before, passed the eastern limit of the grounds where there was a barrier across the Driveway and an attendant on guard.

I wish to avoid harsh language, but it does seem plain that a traffic officer of Glencross's experience, when, in approaching the western entrance, he found his vision affected by the sun, as he says it was, ought to have realized the necessity of bringing his motorcycle instantly under control in the interests of the safety of others as well as of himself.

As to contributory negligence, it was, as I have said, part of the duty of Morrison to let the traffic officers through his gate, and the constable relieved by Glencross had passed through more than once that same day. He had every reason to suppose that a constable on duty as traffic officer would be acquainted with the practice which had been in force in other years and with which the traffic officer engaged throughout the day had been to his knowledge familiar.

[The judgment here deals with the amount of damages. The damages were subsequently, on a re-hearing as to the amount on April 30, 1940, fixed at $9,500, for which amount judgment was directed, with costs throughout].

The appeal will be allowed and there will be judgment for the amount [of damages, fixed later, as aforesaid, at $9,500], with costs throughout.

CROCKET J.—I agree that this appeal should be allowed and judgment entered in favour of the suppliant for [the amount of damages. The damages were subsequently fixed, on a re-hearing as to the amount on April 30, 1940, at $9,500] with costs throughout.

(1) [1933] S.C.R. 332.
(2) [1935] S.C.R. 378.
(3) [1935] S.C.R. 404.
(4) [1940] S.C.R. 263.

I think the evidence clearly proves that the suppliant's injuries were solely caused by the negligence of a servant of the Crown while acting in the scope of his duties or employment upon a public work within the meaning of s. 19 of the *Exchequer Court Act*, [reference to the amount of damages, which amount was later fixed as aforesaid].

Appeal allowed with costs.

Solicitors for the appellant: *Hughes & Laishley.*

Solicitor for the respondent: *Auguste Lemieux.*