

1933  
 Nov. 27, 28  
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 June 8.

BETWEEN:  
 ROSE MOSCOVITZ AND ANNA } SUPPLIANTS;  
 MOSCOVITZ ..... }  
 AND  
 HIS MAJESTY THE KING..... RESPONDENT.

*Crown—Responsibility—Petition of Right—Public Work—Jurisdiction—Damages.*

One K, an enlisted soldier in the Canadian Army Service Corps, engaged as a transport driver, stationed at Kingston, drove a motor truck, loaded with supplies, from Kingston and delivered the same to the Royal Air Force at Trenton. Whilst returning to Kingston, the motor truck driven by K., negligently collided with a motor truck in which M. was a passenger, causing his death. Suppliants are the widow and step-mother of M.

*Held:* That K. was engaged in a public work and was acting within the scope of his duties as a servant of the Crown, at the time of the accident. *Schrobounst v. The King* (1925) Ex. C.R. 167 and *Dubois v. The King* (1934) Ex. C.R. followed.

PETITION OF RIGHT by the suppliants claiming damages against the Crown for the death of Himan Moscovitz, caused through the negligent operation of a motor truck driven by a servant of the Crown while engaged on a public work.

The action was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*B. C. Donnan, K.C.*, and *N. Borins* for the suppliants.

*C. A. Payne, K.C.*, for the respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (June 8, 1934) delivered the following judgment:

This is a petition of right wherein damages are sought to be recovered against the Crown on account of the death of one Himan Moscovitz, whose death ensued from a collision between a motor truck in which he was a passenger, and a motor truck being driven by one Kelly, an enlisted soldier—a private in rank—in a detachment of the Canadian Army Service Corps, stationed just outside the City of Kingston, Ont.; it will be convenient to refer to this Military Station as of Kingston. The suppliant, Rose Moscovitz, of the age of forty-one years, is the widow of the deceased and executrix of his will, while the other suppliant, Anna Moscovitz, is the step-mother of the deceased, with whom she lived until his death. The deceased left no children.

Kelly's duties were described by one witness as that of a driver of a mechanical transport vehicle. On the occasion in question here Kelly was driving a motor truck, the property of the Crown, by which certain military stores were being forwarded from the Canadian Army Service at Kingston to a detachment of the Royal Air Force Airport at Trenton, Ont., some distance west; this motor truck was kept in a garage in Kingston, which, I assume, was either owned or rented by the Crown. After having delivered the truck load of stores at the Trenton Airport, and while returning to Kingston, the motor truck driven by Kelly collided with the other motor truck in question, which was proceeding in the opposite direction, resulting in the fatality mentioned. It is not necessary to say much regarding the issue of negligence, on the part of Kelly. The accident, I find, did occur owing to the negligence of Kelly, and nothing to the contrary was seriously put forward; in fact no evidence at all was produced by the Crown. I accept fully the evidence of Nathan Greenberg and Samuel Greenberg in describing the causes immediately leading to the collision of the two motor trucks, and which caused the fatal injury to the deceased. That the accident occurred owing to the negligent driving of Kelly, is not, I think, subject to serious doubt.

The chief defences raised are (1) That Private Kelly was not a servant of the Crown; (2) that he was not en-

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gaged on a public work; and (3) that the Trenton Airport, and the Barracks at Kingston occupied by the Canadian Army Service Corps, were not public works. Other defences raised were that the Fatal Accidents Act of Ontario did not here apply, and that the suppliant, Anna Moscovitz, the step-mother of the deceased, was not entitled to recover damages. I might at once state that the liability of the Crown in this case, if any, can only arise under the Exchequer Court Act, and not under any provincial statute. The question as to whom may properly bring a petition here, is, I think, to be determined by the relevant statutes of the Province of Ontario. It appears to me that both suppliants are properly before the court.

As to the contention that Kelly was not engaged upon a public work I propose to say but a few words. Just recently I rendered judgment in a somewhat similar case, *Dubois v. The King*, not yet reported, but to which I would refer, and there I discussed, at some length, what in my opinion constitutes a "public work" within the meaning of the Exchequer Court Act, and I cannot usefully add anything to what I there said. I am of the opinion that on the occasion in question Kelly was engaged upon a public work, the transporting of military stores belonging to the Crown, from one point to another, from one public service to another, by a motor truck belonging to the Crown. I am of the opinion also that Kelly was acting within the scope of his duties as a servant of the Crown at the time of the accident. This case, in my opinion, falls within the principle of the *Schrobounst* case (1).

It was argued on behalf of the Crown, that an enlisted soldier in the permanent military forces of Canada, regardless of his duties, was not a servant of the Crown. I was referred to the case of *Larose v. The King* (2). In that case the suppliant, working in a nearby field, was wounded by a stray bullet from a rifle range where members of the militia, or members of a rifle association, were engaged in target practice. It was there held that a rifle range was not a public work, and that the injury to the suppliant was not the result of the negligence of any

(1) (1925) Ex. C.R. p. 167.  
 (1925) S.C.R. p. 58.

(2) (1900) 6 Ex. C.R. 425 and  
 (1901) 31 S.C.R. 206.

officer or servant of the Crown, while acting within the scope of his employment. The facts of that case would seem to me to be inapplicable here. On appeal to the Supreme Court of Canada, Taschereau, J., who delivered the judgment of the court, said: "Then I do not see that the words that 'any officer or servant of the Crown' can be held to include the officers or men of the militia." I cannot feel confident just what was meant by this observation. By sec. 76 of the Militia Act, Chap. 41 R.S.C., 1886, Her Majesty was empowered to sanction the organization of rifle associations, and of associations for purposes of drill, to be composed of Militia officers, or men on the Militia Rolls, and of independent companies of infantry composed of professors, masters or pupils of universities, schools or other public institutions, or of persons engaged in or about the same, under such regulations as were from time to time approved by Her Majesty; but such associations or companies, it was provided, should not be provided with any clothing or allowance therefor. I think that Taschereau J. was of the opinion in that case, that the "officers or men of the militia" were not "officers or servants of the Crown," upon the ground that at the time material there, the "officers or men of the militia" were acting as members of a voluntary rifle association, and were not under any obligation as to service in such rifle associations, and were not under the pay of the Crown as such. Burbidge J., the trial Judge, was of the opinion that the rifle range was not a public work within the meaning of the term as used in the Exchequer Court Act, particularly when one had to consider a rifle range with reference to the special provisions of the Militia Act relating thereto. I do not therefore think that Taschereau, J. intended to say that "any officer or servant of the Crown," did not include one enlisted in one of the permanent military services of Canada maintained by the Crown, and whose assigned duties were comparable to those of Kelly in this case. Furthermore, the Militia Act provided that the owners of private property should be compensated for any damage that accrued to their respective properties from the use of any such rifle range and Burbidge J. held, by implication I assume, that this did not extend to personal injuries.

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Private Kelly was engaged in the Canadian Army Service Corps, as a transport driver, and such were his duties, and it was while acting within the scope of such duties the accident here occurred. On the occasion in question Kelly was, I think, a servant of the Crown, performing a public work. The fact that Kelly was an enlisted soldier, or in a soldier's uniform, would not seem to me to affect the question as to whether or not he was a servant of the Crown, on a public work, on the occasion in question. If Kelly were the driver, in uniform, of a locomotive hauling a car load of military stores, from Kingston to Trenton, on a Government owned line of railway devoted to military purposes entirely, it is improbable that if any person were negligently killed while Kelly was proceeding with his train along the rails, that a claim for damages could successfully be resisted. In point of fact there is no distinction between a locomotive and a freight car, and a motor truck, except that the former is propelled along a bed of steel, the other upon an ordinary highway, which after all is the same thing. I know of no principle or authority for the proposition that an enlisted member of the Permanent Military Forces of Canada is not a servant of the Crown, for some purposes at least. I think Kelly was a servant of the Crown in the sense intended by the Exchequer Court Act. I therefore think that the Crown is liable in damages to the suppliant.

As a result of the accident in question the deceased, Himan Moscovitz, suffered serious personal injuries, by reason whereof he was on the date of the accident, November 8, 1932, admitted as a patient in the Belleville General Hospital, at the City of Belleville, Ont., and was there confined as a patient until December 14, 1932, when he died as a result of such injuries. The suppliants claim damages on account of the death of Himan Moscovitz who was their sole means of support and maintenance, and in her capacity as executrix of the will of her deceased husband, the first named suppliant claims further damages. The particulars of the damages claimed by the first named suppliant in her capacity as executrix, relate to medical, hospital and nursing services, funeral expenses, and pecuniary loss incurred in connection with certain material on hand in the business of her deceased husband at the time

of his death, as will more clearly appear hereafter. The suppliants also claim certain damages on account of expenses incurred by them for transportation and maintenance in connection with their attendance upon the deceased while in the hospital at Belleville.

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The business of the deceased at the time of his death is described in the petition as that of a leather goods manufacturer. He purchased and tanned hides which he converted into laces, whips, belting laces, and things of that sort, which he marketed himself, as I understand it. At the time of his death there was on hand a certain quantity of hides, one-half of which had been tanned and finished, and the balance was in a raw state, and it was alleged that had these been finished and converted into manufactured articles, their value would have been in excess of \$6,000, but this was not clearly established. The cost of these hides in the raw state was said to be in excess of \$1,500. In consequence of the death of Moscovitz, it is claimed this stock of raw and finished hides had comparatively little value, and had to be sacrificed. A claim is made by the executrix for \$1,500, on account of pecuniary loss, in this connection. The deceased left also an unencumbered dwelling house worth \$1,500.

It appears from the evidence that the deceased paid weekly to his widow the sum of \$15, but according to her testimony this appears to have been largely on account of housekeeping expenses. I rather apprehend that the whole of what she thus received from her deceased husband was intended to be expended on this account, but probably that is not of importance. The other suppliant, Anna Moscovitz, the step-mother—whose age is sixty years—received from the deceased the sum of \$5 weekly, on account of her maintenance it was stated. The step-mother lived with the deceased ever since the death of her husband, and so far as I know he maintained her. I perhaps should state that the deceased Himan Moscovitz inherited from his father the business which he was carrying on prior to his death. The widow testified that her husband earned yearly from his business the net sum of about \$1,500 but there is no evidence from books of account, or bank accounts, in support of this; she also testified that her deceased husband confided to her in his lifetime all the

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details of his business, and I think there is no doubt but that she knew intimately the details of the business, and, in fact, in her husband's frequent absences from business, she carried on certain parts of the business, such as the buying of hides.

Now as to the quantum of damages to be allowed. Evidence was given by an actuary of a Canadian insurance company in which he stated, that according to the Canadian Actuarial Tables, the expectancy of life of the deceased,—who at the time of his death was forty-six years of age—was some twenty-five years. The deceased was in good health at the time of his injury. I do not think that up to this point evidence of this nature is objectionable. Based upon net earnings of \$1,500 per year and upon the assumption that the deceased was in good health at the time of his death, the actuary stated his earning power for the period would be roughly \$25,000. But this is not a reliable mode of ascertaining damages in actions for personal injury. See *Rowley v. London & N.W. Ry. Co.* (1) and *Jones v. Tersigni* (2). The rule seems to be that one must not attempt to give damages to the full amount of a perfect compensation for pecuniary injury, but a reasonable view of the case must be taken so that there may be given, what in all the circumstances, is a fair compensation. I have concluded to allow on account of pecuniary loss suffered by the suppliants the sum of \$6,000 to be apportioned as follows: To the first named suppliant the sum of \$4,000 and to the second named suppliant the sum of \$2,000. In respect of the suppliants' claim for expenses incurred in travelling to and from Belleville, and for their maintenance while there, I think the same must be disallowed. While it was a natural and consoling duty to perform, still no services were there rendered by them, that is to say, all the services rendered the injured man were by medical men, hospital attendants and nurses, for which a separate amount is being claimed by the executrix. I fear that claim is not well founded and must be disallowed. Then as to such expenses as were incurred in connection with medical, hospital and nursing services. This should be allowed, but not to include funeral expenses, and the amount under this head will be

(1) (1873) 8 L.R. Exch. 221.

(2) (1930) 38 O.W.N. p. 315.

fixed upon the settlement of the minutes of judgment. And lastly, as to the claim by the executrix for pecuniary loss in consequence of the inability of Himan Moscovitz to finish processing the stock of hides on hand, and to manufacture marketable goods from the same, as was his custom. I am in doubt as to the validity of such a claim, particularly for any possible claim arising after the death of Moscovitz. If any pecuniary loss could be established in the period between the occurrence of his injury and his death, that might constitute a fair claim by his estate. However, I am making no definite decision as to this particular claim for the moment, and I shall be prepared to hear any submission by counsel thereon, upon the settlement of the minutes of judgment.

The suppliants will have their costs of the petition.

*Judgment accordingly.*

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