1952

Sept. 24

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May 15

BETWEEN:

THE WAWANESA MUTUAL INSURANCE COMPANY ..... } SUPPLIANT;

AND

HER MAJESTY THE QUEEN..... RESPONDENT.

Crown—Petition of Right—Action by insurance company to recover amount paid to its insured—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Civil Code of Quebec, Arts 1155, 1156, 2584—Right of insurance company to transfer of rights of its insured against persons responsible for his loss.

The suppliant insured G. against certain perils in connection with his automobile including loss or damage by collision with $300 deductible. G. suffered a loss as the result of a collision between his taxi and a motorcycle driven in the course of his employment by a member of the Canadian Army due to the latter's negligence. The amount of the damage to G's taxi came to $721.41 of which the suppliant paid him $421.21 leaving him to pay the balance of $300 himself. By a petition of right G. successfully claimed this amount from the Crown, together with other damages, and the suppliant now brings this petition to recover the amount of $421.21 which it paid to G. under its policy.

Held: That when an insurance company has, pursuant to its policy of insurance, paid its insured part of the loss suffered by him as the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment so that it has become entitled under Article 2584 of the Civil Code of Quebec to a transfer of his rights against the person who caused his loss to the extent of the amount paid it may file a petition of right against the Crown in its own name and recover the part of the loss which it has paid.

Petition of Right by an insurance company to recover the amount paid its insured for loss suffered by him as the result of a collision between his taxi and a motorcycle driven in the course of his employment by a member of the Canadian Army.

The action was tried before the President of the Court at Montreal.

R. Hodge for suppliant.

R. Ouimet Q.C. for respondent.

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

THE PRESIDENT now (May 15, 1953) delivered the following judgment:

The facts in this case are simple. On July 16, 1949, one Bernard Giborski suffered a loss as the result of a collision between his taxi driven by himself and a motorcycle driven

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in the course of his employment by Corporal H. Barnes, a member of His late Majesty's Canadian military forces. The collision occurred on Decarie Boulevard in Montreal, a short distance north of Dupuis Street. By a policy of insurance, dated November 4, 1948, the suppliant had insured the said Giborski against certain perils in connection with his automobile, including loss or damage by collision in an amount not exceeding $1,000 with the sum payable by the insured in respect of each separate claim being $300. The amount of the damage to Giborski's taxi came to $721.21 and pursuant to its policy the suppliant paid him the sum of $421.21, leaving him to pay the balance of $300 himself. By a petition of right filed in this Court on January 11, 1950, the said Giborski claimed damages from the Crown in the sum of $460, alleging that $300 of this amount represented the deductible portion of the damage to his taxi that he was obliged to pay, "the difference being paid by his assurers," and $160 his loss of revenue for a period of sixteen days pending repair of his taxi. The claim was made under section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, chapter 34, on the ground that the loss resulted from the negligence of Corporal Barnes while acting within the scope of his duties. The claim came on for trial before me at Montreal and on December 6, 1950, I delivered judgment in favour of the said Giborski for $460 and costs and dismissed the Crown's counterclaim with costs. Subsequently, on January 30, 1951, the said Giborski acknowledged receipt from the Crown of the amount of the judgment in his favour in full settlement of his claims or rights in connection with the accident. Subsequently, on June 26, 1951, he acknowledged receipt from the suppliant of $421.21 in full settlement of his claims under the policy and assigned to it "all his rights against any and all persons responsible for the said accident, the whole up to the amount of four hundred and twenty one dollars and twenty one cents ($421.21)" and on the same date he signed a further acknowledgment and release in which he subrogated the suppliant into "all my rights and recourses against any and all persons responsible for the accident that occurred on July 16, 1949, and more especially against His Majesty the King represented by the Dominion of Canada, the whole up to the amount of $421.21." Then,

on September 6, 1951, the suppliant filed the present petition of right seeking to recover from the Crown the amount of $421.21, which it had paid to Giborski under its policy and in respect of which it had obtained an assignment and subrogation from him.

There is no dispute as to the facts. The sole issue in the case is a legal one, namely, whether, under the circumstances, a petition of right lies against the Crown in favour of the suppliant for recovery of the amount of the loss which it paid to Giborski under its insurance policy.

While the amount of the claim is not large it involves a principle of general public importance and raises a question that is not free from difficulty.

It cannot, strictly speaking, be said that the suppliant suffered any loss as the result of negligence on the part of an officer or servant of the Crown, within the meaning of section 19(*c*) of the Exchequer Court Act, for its loss arose out of its contract of insurance and would have been the same even if the collision against which it had insured Giborski had happened without any negligence. In this view of section 19(*c*) an insurance company could not come within its ambit merely by showing that it had paid its insured the amount of his loss resulting from the negligence of an officer or servant of the Crown.

But the weight of judicial opinion is against this limited view of the ambit of the section. That is clearly so in cases where the insurance company and the insured are joined as suppliants as in *Yukon Southern Air Transport Ltd. et al* v. *The King* (1). There the suppliants claimed the sum of $49,260.48 as the amount of the loss alleged to have been the result of negligence on the part of an officer or servant of the Crown. The loss arose from a collision between two aeroplanes, one belonging to the Crown and the other to the suppliant Yukon Southern Air Transport Limited whereby the latter was damaged, and the suppliant Phoenix Insurance Company Limited was added as a suppliant because it had paid its co-suppliant part of its loss pursuant to a policy of insurance. Angers J. held that the principle of subrogation applied and gave judgment in favour of the suppliants for $18,525.17, of which $13,000 was to be paid to the suppliant insurance company, being

(1) [1942] Ex. C.R. 181.

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the amount it had paid under its policy, and the balance to the other suppliant.

I followed this case in *Megarity and London Guarantee & Accident Company Limited* v. *The King* (June 10, 1944, unreported) but with some doubt. There I said:

> I find some difficulty in seeing on what grounds the suppliant insurance company can have a petition of right against the Crown. Its claim is not based on negligence but on a contract made with the insured. I shall, however, in this case follow the *Yukon Southern Air Transport* case, although I do so with doubt, and reserve the right to reconsider the whole question if it should arise again in a subsequent case.

There is now no ground for any such doubt in view of the decision of the Supreme Court of Canada in *The King* v. *Snell et al* (1). In that case a petition of right was filed for damages by reason of the death of Bertram Snell who was working in the course of his employment as a servant of one Dives in British Columbia. The death was caused by the negligence of a member of the Canadian military forces while acting within the scope of his duties. Prior to lodging the petition the widow had been awarded compensation for herself and her son by the Workmen's Compensation Board of British Columbia under the Workmen's Compensation Act, R.S.B.C. 1936, chapter 312. By section 11 of this Act the Board was subrogated to the claims of the widow and her son. The widow then filed her petition of right under section 19(*c*) of the Exchequer Court Act and the Board joined as a co-suppliant on the ground of its subrogation and also on an equitable assignment in writing from the widow. This Court granted the relief sought (2) and its judgment was confirmed on an appeal to the Supreme Court of Canada. There it was contended on behalf of the Crown, *inter alia*, that the provisions of the British Columbia Workmen's Compensation Act were not applicable to the Crown and that the suppliant Board could not acquire any right of action against the Crown by subrogation under it. This contention was rejected by the Supreme Court of Canada.

It was thus recognized that a person who had not suffered any direct injury as the result of the negligence of an officer or servant of the Crown within the meaning of section 19(*c*) of the Exchequer Court Act could nevertheless have a claim under the section through being subro-

(1) [1947] S.C.R. 219. (2) [1945] Ex. C.R. 250.

gated to the rights of a person who had been so injured. It is true that in the *Snell* case (*supra*) the subrogation was pursuant to a statute but there does not seem to be any valid reason for thinking that the situation would be otherwise in the case of a subrogation pursuant to or inherent in a contract.

While it was settled in the *Snell* case (*supra*) that a person who had been subrogated by statute to the rights of an injured person might validly join with such person as a co-suppliant in a claim under section 19(*c*) the question whether the subrogated person could bring action in his own name was not decided. Estey J., speaking for Taschereau J. as well as for himself, expressed the view that since both the subrogated person and the injured person were parties to the action it was unnecessary to determine some of the issues raised if the action had been brought in the name of the Board only. Kellock J. was of a similar view. But after the decision in that case the right of a subrogated Workmen's Compensation Board to file a petition of right against the Crown in its own name was recognized in this Court by Angers J. in *The Workmen's Compensation Board of the Province of Saskatchewan* v. *The King* (1). There the suppliant sought by a petition of right to recover from the Crown the sum of $8,715.92, being the capitalization of the compensation which it was liable to pay to one Mary Belanger, the widow of Joseph Belanger and their children, under the Workmen's Compensation (Accident Fund) Act (R.S.S. 1940, Chapter 303) as the result of the death of Joseph Belanger. It was alleged that the death was the result of the negligence of a member of His Majesty's Canadian Air Force, that the widow and her children became entitled to compensation under the Act referred to and that the Board was subrogated to the rights of the widow and children to claim damages on account of the death. Argument was made of the question of law whether the Board had the right to bring the petition and Angers J. held that it had.

In an earlier case, namely, *The Western Insurance Co.* v. *The King* (2) the suppliant brought a petition of right to recover the amount which it had paid to the owner of a scow which had been sunk as the result of alleged negli-

(1) [1947] Ex. C.R. 262.

(2) (1909) 12 Ex. C.R. 289.

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gence on the part of an officer or servant of the Crown on a public work. The suppliant claimed that it was subrogated to the rights of the owner of the scow. Cassels J. dismissed the petition on the ground that the suppliant had failed to prove a case of negligence but the right of the suppliant to bring the action does not appear to have been questioned.

On the other hand, I was advised by counsel for the respondent that in *The Wawanesa Mutual Insurance Company* v. *The King* (March 17, 1950, unreported) Angers J. dismissed the suppliant's claim on the ground that the fact that it had paid the loss suffered by its insured as the result of the negligence of an officer or servant of the Crown and was subrogated to his rights did not give it a status to bring a petition of right against the Crown, but there is no record in the file of any reasons for the decision.

In my opinion, the decision in the Saskatchewan *Workmen's Compensation Board* case (*supra*) was a sound one.

Moreover, in Quebec an insurance company that has paid its insured his loss has the benefit of Article 2584 of the Civil Code which provides:

> 2584. The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused.

While this Article appears in the portion of the Code dealing with the subject of fire insurance it has been applied in cases of accident insurance. Under it an insurance company that has paid its insurer his loss as the result of the negligence of a third party, being entitled to a transfer of his rights against the third party, can sue such third party. Of this there is no doubt.

That being so, I see no valid reason for assuming that a petition of right would not lie against the Crown in favour of an insurance company which had paid its insured the amount of his loss resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. In the recent case of *The Queen* v. *Cowper et al* (1) I held that a claim to compensation for land taken under the Expropriation Act may validly be assigned, without the acquiescence of the Crown, and that when notice of the assignment has been duly given

(1) [1953] Ex. C.R. 107.

to the Crown the assignee is the person entitled to recover the compensation. It was my view that there was no sound reason why the Crown should have any right to question the assignment if it was valid as between the parties to it and due notice of it had been given to the Crown. The same reasoning is applicable where an insurance company which has paid its insured the amount of his loss has become entitled under Article 2584 to a transfer of his rights against the person who caused the loss. If such person was an officer or servant of the Crown and acting within the scope of his duties or employment there does not seem to be any sound reason for saying that the Crown is not answerable in damages to the insurance company to which the rights of the injured person have lawfully been transferred. It cannot make any difference to the Crown as a matter of public policy whether it is answerable to the person actually injured or to an insurance company which has become entitled by law to a transfer of his rights.

There is greater difficulty in a case such as this one where the insurance company did not pay the whole amount of the loss sustained by its insured but only part of it. Does a payment by an insurance company of part of the loss sustained by its insured give it a right under Article 2584 to a transfer of part of his rights against the wrongdoer and enable it to sue him in its own name for the amount which it has paid? A first reading of the Article suggests a negative answer. It speaks of the insurer paying a "loss", not "part of a loss", and of being entitled to a transfer of the "rights", not "part of the rights", of the insured and the argument may well be advanced that the rights of the insured against the wrongdoer are indivisible and not capable of partial transfer and, conversely, that the liability of the wrongdoer to the person whom he has injured is indivisible and that he ought not to be harassed more than once for the same cause: *nemo debet bis vexari pro una et eadem causa.*

The leading decision on the subject in Quebec is that of the Judicial Committee of the Privy Council in *The Quebec Fire Assurance Company* v. *Molson and St. Louis* (1). In that case the parish church of Boucherville had been largely destroyed by a fire occasioned by the negli-

(1) (1851) 7 Moore P.C. 286; 1 L.C.R. 222.

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gence of the respondent's servants. It had been insured against fire by the appellant. On payment by it of part of the amount of the loss the *curé* and one of the *marguilliers-en-charge* transferred to it the right to sue and claim from the respondents the amount which it had paid. It was held that this constituted a valid subrogation of the debt due to the insurers in right of the *fabrique* according to the French law prevailing in Lower Canada. I need not here deal with all the issues in this case but only with one of them. The question was raised whether the plaintiffs who sued as being subrogated to a part of the claim for damages, namely, so much as they were bound to pay and paid on the policy, could sue without joining the *fabrique,* as co-plaintiffs. To this Mr. Baron Parke made the following answer, at page 319:

> It seems to be reasonable that the Defendants, the *quasi* debtors, should not be liable to a double action by reason of the adoption of the equitable principle, that the assurers have a right to be subrogated. The Defendants, therefore, must have a remedy to prevent that injustice. In *Touillier, "Droit Civil"*, tit. 3, Art. 120, it is said, that the debtor has a right to require all to be united. But it appears to us to be clear that this defence is not available under the plea of "Not guilty", or the denial of the truth of all the matters alleged.

Thus in that case it was decided that an insurance company which had paid only a part of the loss suffered by the insured was subrogated to the rights of the insured and could maintain action in its own name against the person responsible for the loss for the part of the loss which it had paid.

The case which I have just referred to led to the adoption of Article 2584 of the Code and the Codifiers in their 7th report (Article 117, page 256) gave this explanation of it:

> Article 117 is based upon the authority of the doctrine held by the Courts in the case of the Quebec Fire Insurance and Molson and others. It would seem that the right of the insurer who pays is rather a right to obtain a transfer from the insured of his claim for damages, than a right of subrogation properly so called; for the insurer pays his own debt, which arises from the contract and is entirely a distinct thing from the claim of the insured, against a third party, for a contingency arising from a totally different cause. The article is submitted in accordance with this view.

Article 2584 was interpreted by the Court of King's Bench in Quebec in a comparatively recent case, namely, *Henry Morgan and Co. Ltd.* v. *North British and Mercantile Insurance Co. Ltd.* (1). In that case several insurance

(1) (1940) 69 B.R. 511.

companies had insured the Imperial Tobacco Company against fire. There was a fire loss amounting in the total to $8,649.74, of which the share of the North British and Mercantile Insurance Company came to $2,298.35. It paid this amount to its insured and obtained a transfer from it to that extent of its rights against Henry Morgan and Company Limited whose workmen had negligently caused the fire and succeeded in an action in the Superior Court of Quebec, obtaining a judgment for $2,383.65 which was made up of the sum of $2,298.35 which it had paid its insured and $85.30 which was its share of adjustment fees and expenses. On an appeal to the Court of King's Bench the amount of the award in the Superior Court was reduced to $2,298.35, the view of the majority of the Court being that the insurer could not have any greater right than his insured had and that since the adjustment fees and expenses had not caused the insured any loss the insurance company could not recover any portion of them. While that was the specific issue in the appeal the illuminating judgment of Rivard J., with whom Sir Matthias Tellier J. and St. Germain J. agreed, establishes several important propositions. One of these is that when several companies insure a property against fire the company that pays the amount of its indebtedness to the insured may bring an action against the author of the damage without joining the other insurance companies in the action. Another principle is that the insurer, as transferee of the rights of the insured, has a right of recourse against the wrongdoer but only such right as the insured had and within the limits of the transfer.

Thus in Quebec an insurance company which has paid its insured only a part of his loss is entitled to the benefit of Article 2584 and may bring an action against the wrongdoer in its own name for the portion of the loss which it has paid. If the provincial law permits this I see no reason why an insurance company, under similar circumstances, should not be entitled to file a petition of right against the Crown where the wrongdoer was its officer or servant and acting within the scope of his duties or employment.

Since the right of an insurance company is not, properly speaking, a right of subrogation but only a right to a transfer of rights it is not necessary to consider Article 1155 defining conventional subrogation or Article 1156 dealing

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with subrogation by operation of law. Nor does it matter that the transfer of rights was not made at the same time as the payment of the loss. Indeed, as I read Article 2584, the insurance company that comes within its benefits has a statutory right to a transfer of its insured's rights and it matters not when or, indeed, whether the transfer is made.

It should be noted that Giborski could have sued for the full amount of his loss and no deduction could have been made from the amount of his award for the portion of his loss which he received from the suppliant: *vide Herbert* v. *Rose* (1). But the fact that he sued for only that portion of his loss that he had to bear himself should not, in the absence of strong reason to the contrary, operate as a bar against the insurance company's claim for the portion of the loss which it paid or as a release of the Crown from its responsibility for such portion. Moreover, the Crown was informed in Giborski's petition of right that part of his loss had been paid by his insurance company. It could then have ascertained the name of the insurance company, if necessary by an examination of Giborski for discovery, and taken steps to have it joined as a co-suppliant, but it made no such attempt and it should not now be heard to complain of multiplicity of actions. It should have paid the suppliant's claim on the demand for payment being made.

In view of the decisions I have referred to I have come to the conclusion that the suppliant is entitled to succeed. In my judgment, they support the opinion that when an insurance company has, pursuant to its policy of insurance, paid its insured part of the loss suffered by him as the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment so that it has become entitled under Article 2584 of the Civil Code of Quebec to a transfer of his rights against the person who caused his loss to the extent of the amount paid it may file a petition of right against the Crown in its own name and recover the part of the loss which it has paid.

There will, therefore, be judgment in favour of the suppliant that it is entitled to the sum of $421.21 and costs.

Judgment accordingly

(1) (1935) 58 B.R. 459.