

1951
Oct. 4 & 5
Dec. 12

BETWEEN:

FREDERICK JAMES WALSHSUPPLIANT;

AND

HIS MAJESTY THE KINGRESPONDENT.

Crown—Petition of Right—Damages—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Onus of proof on suppliant—Crown not responsible until statutory conditions of liability proved to have been present—Action dismissed.

Suppliant seeks to recover from respondent damages for injuries caused through the negligent operation of an army vehicle by one Sonmor who was employed in a civilian capacity in an army camp at Dawson Creek, British Columbia. Sonmor was employed on a 48 hour per week basis, his day's work ending at 5 p.m. He was supplied with a house, heat and light by the army but not provided with kitchen fuel, wood being used, and for the supply of which he was solely responsible. It was on a trip in search of fuel after working hours, in an army vehicle, lawfully borrowed for the purpose, that the accident occurred causing the suppliant's injuries. The Court found that Sonmor was engaged solely on his own business and the expedition was not in any way incidental to his employment.

Held: That the action must be dismissed since there is no evidence of any negligence of an officer or servant of the Crown while acting within the scope of his duties or employment as provided in s. 19(c) of the Exchequer Court Act.

PETITION OF RIGHT by suppliant seeking damages from the Crown for injuries allegedly caused by negligence of a servant of the Crown.

1951
 WALSH
 v.
 THE KING

The action was tried before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Edmonton.

W. Arthur McClellan for suppliant.

Herbert King and *K. E. Eaton* for respondent.

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

HYNDMAN D.J. now (December 12, 1951) delivered the following judgment:

By petition of right, Frederick James Walsh of Dawson Creek in the province of British Columbia, clerk, claims against His Majesty the King, in right of Canada, damages, general and special, caused by the negligence of Arnold Sonmor, alleged to be a civilian employee of His Majesty the King, in the Department of National Defence.

On the first day of September, 1950, the suppliant was the owner and driver of a Ford one ton truck, licence number C 17583, proceeding north on the Alaska highway, in said province of British Columbia. At about mile 23 on said highway, some 20 miles north of the village of Dawson Creek, at about 7.30 p.m. Pacific daylight saving time, the suppliant stopped and pulled to the right hand side of the said highway for the purpose of changing a deflated tire. A few minutes after so stopping, a National Defence vehicle, licence number M 988, driven by the said Arnold Sonmor, a civilian employee of His Majesty, afore-said, who was also proceeding north on the said highway, ran into the rear of the suppliant's vehicle, damaging the truck and severely injuring the suppliant. Visibility at the time was good and it is claimed that it was solely through Sonmor's negligence in not keeping a proper lookout that the said accident occurred.

The suppliant claims that he sustained the following personal injuries:

1. Shock and concussion;
2. Deep lacerations of the scalp;
3. Right ear almost totally severed;
4. Multiple bruises and contusions to the body, from head to feet, and
5. Injuries to cartilages of both knees.

1951
 WALSH
 v.
 THE KING
 Hyndman
 D.J.

It is claimed that the above injuries have left some permanent disability and have disfigured the suppliant. The suppliant's truck was also badly damaged. The special damages claimed are:

1. Physician's fee	\$ 100.00
2. Damage to truck and box	281.29
3. Dental work	26.00
4. Hospital expenses	176.00
5. Loss of earning for four months at \$189 per month	756.00
	\$1,339.29

The above item 2 of \$281.29 was, by amendment at trial, increased to \$318.18, thus increasing the total to \$1,376.18.

In answer to the claim, all the material allegations in the petition are denied, and, in the alternative, it is claimed that if the driver of His Majesty's car was negligent, the damage suffered by the suppliant was caused by the fault of the suppliant as well as by the said Sonmor, and the Contributory Negligence Act of British Columbia is pleaded.

The Crown further pleads that the said Arnold Sonmor was not, at the time of the collision, acting within the scope of his duties or employment as an officer or in the service of His Majesty, referred to in the petition of right.

The evidence discloses that the suppliant parked his car on the right hand side of the road, the left hind wheel being about 9 feet from the edge of the gravel portion of the road, leaving 26 feet to the other side. In the centre gravel had been accumulated and there were well marked tracks on either side of such gravel, used by cars coming and going. I find that there was plenty of room for cars to pass each other, either coming or going, if properly and carefully driven. About 530 feet south of the parked car there was a curve at the crown of an up-hill grade, and a straight road from the top of the curve to the suppliant's car. Sonmor was driving at the rate of about 30 miles per hour, and just as he rounded the curve the sun caught him in the eyes and he was unable to see just where he was, but kept on going, all the time blinded by the sun, until he collided with the suppliant's car. The left side of the suppliant's car was smashed, suppliant thrown to the ground, knocked unconscious, and was cut, bruised and bleeding.

In my opinion, there was clearly negligence on the part of Sonmor in proceeding 500 feet or more, unable to see just where he was on the road, and when he realized this situation, it was his duty to stop as soon as possible, and he had plenty of time in which to realize this, as a prudent and reasonable man should. His proceeding on as he did, in my opinion, was pure negligence. That he was going at an unreasonable rate under the circumstances at the time of the collision, is evidenced by the fact that his car was 187 feet further on from the point of the accident, and if the driver, Sonmor, was acting in the course of his duties and employment, I would not hesitate to give judgment for the suppliant against the Crown. I do not consider that there was any contributory negligence on the part of the suppliant, as he was reasonably close to the shoulder of the road, with plenty of space left for cars to pass going in the same direction.

1951
 WALSH
 v.
 THE KING
 Hyndman
 D.J.

However, the difficulty in the claim is that on the evidence, Sonmor, was not acting within the course of his duties or employment, but was on a purely personal journey.

The facts are that Sonmor was employed in a civilian capacity in the army camp at Dawson Creek, on a forty-eight hour per week basis, his hours of work ending about 5.00 p.m. He testified that on the day in question, he locked his shop at 5.45 p.m.

Under the arrangements with him, as apparently with other civilian employees, a house, heat, and light were found for him by the army, but no provision made for kitchen fuel, for which wood was used, and for the supply of which he himself was solely responsible.

It was on a trip with his three sons to secure this kitchen wood that he was engaged at the time—clearly after his working hours—and had borrowed the army car for the purpose, in a lawful way. His employer was in no way responsible for providing, or securing this fuel for him. The evidence is undoubted that he was engaged solely on his own business and not on duty when the accident occurred. Nor can I see that under the terms of his contract it was in any way incidental to his employment: instead of going for this wood himself he might well have purchased it from some one else.

1951
 WALSH
 v.
 THE KING
 Hyndman
 D.J.

This being the position of affairs, on the authorities, his claim against the Crown must fail, and the action be dismissed.

The claim is made under section 19(c) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended, and reads:

19. The Exchequer Court shall also 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.

There are many decisions on this point, a recent one being that of the president of this Court, *Ginn et al. v. The King*, (1) in which he said:

To succeed in their claims the suppliants must prove not only that the injuries suffered by the suppliant Robert John Ginn resulted from the negligence of an officer or servant of the Crown but also that such negligence occurred while the officer or servant was acting within the scope of his duties or employment. The onus of proof of these matters lies on the suppliants. The onus is not a light one.

The president cites the case of *The King v. Moreau*, (2), in which Rinfret, C.J., said:

Deuxièmement, toujours en vertu de l'article 19(c), il ne suffisait pas à l'intimé de prouver la négligence d'un officier ou d'un serviteur de la Couronne, mais il fallait, en plus, qu'il prouvât que cet officier ou ce serviteur négligent, agissait dans les limites de ses devoirs ou de ses fonctions.

Other decisions I might mention are, *Hewitt v. Bonvin* (3); *Gibson v. British Columbia District Telegraph and Delivery Company Limited*, (4); *McKay v. Drysdale*, (5); *Rawn and Strath v. The King*, (6).

There will therefore be judgment dismissing the suppliant's claim with costs.

Judgment accordingly.

(1) (1950) Ex. C.R. 208 at 211.

(2) (1950) S.C.R. 18.

(3) (1940) 1 K.B. 188.

(4) (1936) 3 W.W.R. 241.

(5) (1921) 2 W.W.R. 592.

(6) (1948) 4 D.L.R. 412.