1947

May 30
August 20

BETWEEN:

MEYER GOOTSON, ... SUPPLIANT;

AND

HIS MAJESTY THE KING, ... RESPONDENT.

Crown—Action for damages resulting from alleged negligence of servant of Crown acting within scope of duties or employment—Servant of Crown driving motor vehicle lawfully when overtaken with sudden illness causing him to lose control of vehicle—No negligence on part of superior officers—Action dismissed.

Suppliant was injured by being struck by a motor car operated by one Joyes, a servant of the Crown, acting within the scope of his duties or employment at the time, who immediately prior to the accident

(1) (1879) 4 S.C.R. 529.

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was driving the vehicle at a reasonable rate of speed and under control. Joyes suddenly became unconscious and fell down on the floor of the car. The car, without guidance, ran over a sidewalk and injured the suppliant. The Court found that there was no negligence on the part of Joyes in operating the car nor was there negligence on the part of his superior officers in permitting Joyes to drive a motor vehicle.

Held: That this action must be dismissed since the driver of the car by reason of the seizure was rendered incapable of appreciating the duty to take care and was unable to discharge that duty; the action being founded on negligence it is necessary in order to create liability for an act, not wilful or intentional, to show not only that it is negligent but also that it was the conscious act of the defendant's volition.

PETITION OF RIGHT by suppliant to recover damages from the Crown for injuries suffered by suppliant because of the alleged negligence of an officer or employee of the Crown acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice O'Connor at London.

M. Lerner for suppliant.

Alex Fergusson for respondent.

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

O'CONNOR J. now (August 20, 1947) delivered the following judgment:

In a Petition of Right the suppliant claims damages from the respondent in respect of injuries suffered by him incurred when a motor vehicle owned and driven by Chester Joyes alleged by the suppliant to be a servant of the Crown and while acting within the scope of his duties or employment, crushed the suppliant against a building in the City of London, in the Province of Ontario.

The respondent denies that Chester Joyes was operating the motor vehicle within the scope of his duties or employment and alleges that the said Joyes was suddenly taken ill and as a result of such illness the motor car went out of control and struck the suppliant. The respondent pleads that in the circumstances this was a result from an inevitable accident and not from any negligence on the part of any person involved therein.

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On the 18th January, 1946, Joyes was employed as an investigator by the Department of Veterans Affairs in "F" district with Headquarters at London, Ontario. He was paid monthly and he was allowed 9c per mile for the first 4,000 miles in any one fiscal year and then 8c per mile for the use of his own car. He reported with the other investigator every Saturday morning at the office of the Department of Veterans Affairs in Queen's Park and each received his instructions for the following week. He would be given a letter or a form on each case that he was instructed to investigate. He would then call on the veterans and make an investigation in accordance with his instructions and make a report in writing to the Chief Investigator, which would be turned in on the following Saturday morning at which time he would be given his assignment for the following week. Mr. Williams, Chief Investigator, stated that the investigators were not under close supervision but each was on his own. Mr. Ernest Chesham in charge of the General Division at London, stated that when Joyes went out he was on his own and would be allowed a certain amount of latitude. Each investigator was allotted a certain area. Joyes was given an area outside of London itself, described as west of No. 4 highway. Exhibit "B" shows a list of the cities, towns and villages in "F" district and in the third column the initials "C.J." show those that were allotted to Joyes.

On the 23rd of March, 1946, when Joyes was reporting and receiving instructions on Saturday morning, he was observed to spin around once or twice and fall down. Dr. Rogers, the District Medical Officer of the Department of Veterans Affairs for "F" district was called. He saw Joyes on that occasion and saw him again on Monday, March 25th, 1946. He made a memorandum for his file (Exhibit 7) which is as follows:—

343 Richmond Street,
London, March 25th, 1946.

Memo for file.

Re: Joyes, Chester—A-34004.

The above named who was discharged from the Army on January 11th, 1946 and was taken on the Investigation Division of this Department on January 18th, 1946 had an epileptiform seizure on the morning ot March 23rd on the Third Floor here at 343 Richmond Street. The period of confusion following the seizure cleared well in an hour. He had over 5 years' service in the Army. There is no history of any

seizures either in the Army or previously. He tells me that he never appeared on sick parade, and that he has driven a car for the last 20 years and did considerable driving, motorcycles and cars, in the Army. He was doing considerable investigating work in the Army. He did everything from investigating A.W.L.'s to murder charges. The only history of illness appears to have been diphtheria in childhood and appendectomy in 1935. There is no history of any injuries. It is expected he will be driving his own car while doing investigation work for this Department.

The question is whether or not this man might be continued in the Service of our Investigation Division and in such case whether or not he might be permitted to drive a car.

The history leading up to this seizure was that after some roast beef on Friday, which he thinks was probably not good, he did not feel very comfortable and this discomfort continued the next morning. After going home from here following the seizure, he says he vomited up what appeared to be the meal of the previous evening and has since felt very well.

I have asked this man to go out to Westminster Hospital on Wednesday afternoon and hope that he can be seen by Dr. Stuart Fisher for his further advice.

S. O. ROGERS, M.B.
SOR/P Medical Assistant to D.A.

Would suggest admission to Dr. Turnbull's Clinic for a short period of observation.

STUART M. FISHER

29/3/46.

Dr. Rogers' evidence confirmed what he had already set out in this memorandum. He stated in his evidence, in addition, that at the time he had thought of seizure, both epileptic and otherwise and he had looked at every possible form of seizure. He stated and this is also set out in the memorandum, that there was no history of any previous attacks and no record of any sickness during Joyes' five years in the Army.

He said that in his opinion the seizure might have been caused by the circumstances outlined by Joyes, but he questioned this to a degree that was at least sufficient to warrant him sending Joyes to the hospital. He stated that persons suffering from seizures are very reluctant to admit them, and it is most difficult to get their true story. He further stated that in the circumstances the first attack was no warning of the second attack. Dr. Rogers stated that subsequent to the accident Joyes had given him a detailed description from the cramp to the final bump. He stated that the story did not jibe with the eye-witnesses,

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but he thought that his story was possible. He agreed that there was great similarity in Joyes' story of both attacks.

Joyes was admitted to Westminster Hospital of the Department of Veterans Affairs on the 1st April, 1946. The case history (Exhibit 8) states under Admission Note:

Provisional Diagnosis: Psychoneurosis.

Under the heading of "Complaints" there is this entry:—

Says he feels all right now. He has a rash on his arm which itches which comes from an infected bite. He also has an infected hair follicle on shafts penis. Says that 10 days ago he had cramps high up in abdomen associated with some diarrhoea for a period of about 20 hours. He vomited and felt better. Said he was eating out the night before and the meat did not taste right and an hour or so after the cramps started. It was evidently suggested by Dr. S. O. Rogers that he see Dr. Fisher and he did so for a check up on March 30 and was sent to Westminster hospital with the label of psychoneurosis.

He was given a physical examination and the results apparently did not disclose anything. The history (Exhibit 8) states that "Neurological Examination is negative", and the report of C. A. Bright, M.D., stated, "I see no obvious psychiatric disability". There was also a urinalysis, and a blood serology was made.

Joyes remained in hospital from the 1st to the 17th of April, 1946 and was then discharged.

Dr. Rogers stated that, when he received Dr. Turnbull's report (Exhibit 9) which he stated was negative as to findings of epilepsy or whatever caused the attack, he advised Mr. Williams, the Chief Investigator, that Joyes could go back on the job. Williams, in his evidence, stated that he asked if Joyes were to be permitted to go on with his work and was told that he could assign him work.

There was no evidence to show whether or not Dr. Turnbull had a copy of Dr. Rogers' memorandum (Exhibit 7) at the time he prepared the report (Exhibit 9). He had, of course, the case history sheet (Exhibit 8) as shown by his notation thereon. In his evidence Dr. Turnbull said the fact that there was no record of illness or even of Joyes being on sick parade during six years in the Army, would make it exceptional for the seizure to have been an epileptic fit.

Joyes then continued to work as an investigator.

The facts as to the collision between the motor vehicle and the suppliant were proven beyond any doubt by a number of witnesses.

At 12.04 noon on the 13th June, 1946, Joyes drove north on Egerton street in London at 15 m.p.h. Police Constable Fickling stated that the weather was clear, visibility was good and the pavement dry. Joyes was seen to fall sideways and disappear. The car continuing at the same speed, appeared to wobble and crossed the road mounting the curb at the north-west corner of Egerton and Grafton streets. It crossed the sidewalk on the east side of Egerton street and proceeded at a north-east angle across a lawn and through a hedge and mounted a step at the entrance to a store. Mrs. Poad, one of the witnesses, stated that from the time Joyes fell sideways, she saw no signs of the car having been guided or of the brakes having been applied. The car travelled in this way from the right hand side of Egerton street across to the curb of the north-west corner of Egerton and Grafton streets and then according to the police measurements, it travelled to the point of impact which was 102 feet north of the north curb line on Grafton street and 24 feet west of the west curb on Egerton street. At that instant the suppliant was entering the store with one foot on the cement step. The car struck him and pinned his leg between the bumper and the store.

The witnesses stated that they ran over and released the suppliant. He was removed subsequently to the hospital and his leg was amputated 4 inches below the body. After four months in hospital, he returned home and at the time of the trial the stump had not healed but was still running, and he was still taking treatments. His medical and hospital expenses to the date of the trial were $3,419.25.

Charles Skeggs, one of the eye-witnesses said that he opened the door of the car and found Joyes and thought he was dead until he felt his pulse. His face was bluish red as if he were unable to breathe. He thought that Joyes had taken a fit. Mrs. Poad said that Joyes' entire body was on the floor of the car with his head near the right hand door and that she watched the men take Joyes out of the car and his face was purple and he was foaming at the mouth, and seemed to have a bump on his forehead. He said, "What happened", and then lapsed back into

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unconsciousness. Constable Fickling said that when he arrived at 12.13 noon both the suppliant and Joyes were lying on the lawn. Joyes was unconscious and was still unconscious when the ambulance took him away 10 minutes after the constable arrived.

Joyes was then taken to the Victoria hospital at London and examined. The report of the Superintendent, L. J. Crozier, M.D., (Exhibit 10 dated June 13, 1946) states in part:—

> Patient was driving car yesterday when he took a severe pain in the stomach causing him to hit curb, knocked him against side of car and patient was knocked unconscious. Brought to hospital after he regained conscious. Took dose of salts yesterday morning. Never had cramps like this before. Past history negative . . . Diagnosis: Traumatic Asphyxia. He was treated medicinally and discharged from hospital on June 16th, 1946. Man's statement attached.

On the 15th June, 1946, Joyes prepared a travelling expense account showing the mileage and meals for the 11th, 12th and 13th June, 1946, totalling $33.81. This account (Exhibit C) purports to show that he left London at 8.15 a.m., and arrived Lucan 9.00 a.m., and Exeter 10.30 a.m., and left there at 11.00 a.m., and reached London at 12.15 p.m. The total mileage for the day was 75 miles including 3 miles in London on arrival at 12.15 p.m.

On the back of Exhibit C is a list showing the numbers, names, certain categories of the veterans who had been interviewed and the date on which each had been investigated. Attached to Exhibit C and made part of it is Joyes' Travelling Expense Account, dated 8th June, 1946.

Joyes said that on the 13th June, 1946, he was employed by the Department of Veterans Affairs as an investigator and was using his car in that work. He stated that he was on his way from his home to the Department of Veterans Affairs' office to pick up some paper in connection with a case that he was investigating. On cross-examination he stated that he had gone from Lucan to Exeter to London and after lunch in the downtown area of London, had dropped off at his home.

John Williams, the Chief Investigator, produced the files of three veterans listed on the back of Exhibit C. The first was A. 58374—Maslen, R. A., shown by Joyes as having been investigated on 12th June, 1946. Williams stated that this case had not been referred to the Investi-

gation Department until 14th June, 1946, so that no report could possibly have been asked for before that date.

Joyes' account (Exhibit C) showed that he had investigated R. 52264—Bell, L. T., on the 13th June, 1946. This file produced by Williams showed that an investigation had been made by another investigator on July 10th, 1946, and that no report had been received from Joyes.

Joyes' account showed that he had investigated R. 169539—Baynes, J. M., on the 13th June, 1946. The file produced by Williams showed that Joyes himself had investigated J. M. Baynes on June 5th, 1946, and Joyes had reported on June 7th, 1946. Williams stated that no further investigation had ever been asked for. On the back of the Travelling Expense Account, dated 8th June, 1946, part of Exhibit C, on the sixth line from the bottom, the name of J. M. Baynes appears and opposite this is the 5th June, 1946, which shows that Joyes had already charged his travelling expenses for this investigation.

A cheque was issued to Joyes by the Department dated 21st June, 1946 for $33.81 in payment of the travelling expenses claimed under Exhibit C.

The evidence showed that following the accident Joyes had neither been dismissed nor had he resigned from the position. He just did not return to work.

Dr. Wilcox, London, was called on behalf of the suppliant. He stated that "epileptiform seizure" was a good word to apply to the attack as he had heard it described. In his opinion the attack could not have come from food poisoning and the attack served as a warning of epilepsy. He stated that there appeared to be confusion in the provisional diagnosis as shown on the case history sheet, (Exhibit 8) that is psychoneurosis. He further stated that there were four routine examinations which should have been made so as to exclude epilepsy first and that as these examinations had not been made the possibility of epilepsy had not been ruled out. Referring to the statements of the witnesses that after the accident Joyes was frothing at the mouth, he stated that this was characteristic of a post epileptic state.

While the case history sheet (Exhibit 8) states that Joyes saw Dr. Fisher, this was not so according to the

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evidence. Nor was it known where the provisional diagnosis of "psychoneurosis" came from.

Both Dr. Rogers and Dr. Turnbull spoke of there being no record of Joyes having been ill during his 5-6 years in the Army. I am not clear as to whether they based this information on the official records or whether it was something that Joyes told them. In any event it was quite clear from their evidence that they believed it to be so.

The suppliant must show that his injury resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. The Petition of Right claims damages against the Crown arising out of the injury to the suppliant resulting from the negligence of Chester Joyes, a servant of the Crown while acting within the scope of his duties or employment. The Petition of Right sets out the particulars of the negligence of the said Chester Joyes, in part, as follows:—

(*a*) Driving said motor vehicle on that part of the street provided for pedestrians;

(*b*) Allowing said motor car to go out of control;

(*c*) Permitting said motor car to operate on a highway with no supervision of a driver and therefore, run amuck on the street.

It is, therefore, the negligence of Joyes on which the claim is based.

The negligence of the servant is not attributable nor imputed to the Crown because of the maxim "The King can do no wrong". But under Section 19 (*c*) of the Exchequer Court Act, chap., 28 of the 1938 Statutes, a liability is imposed against the Crown for the negligence of its servant while acting within the scope of his duties or employment. The liability under Section 19 (*c*) was defined by Rand, J., in *The King* v. *Anthony* (1); as:—

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,* (1935) S.C.R. 378 at 394 and 398; *Salmo Investments Ltd.* v. *The King,* (1940) S C.R. 263, at 272 and 273. 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.

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

(1) (1946) S.C.R. 569 at 571-2.

"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.

Was Joyes at the time of the accident a servant of the Crown acting within the scope of his duties or employment? The evidence establishes that he was a servant of the Crown on the 13th June, 1946.

The evidence that at the time of the accident he was acting within the scope of his duties or employment consists of Joyes' statement that after he reached London he got his lunch in a downtown area of London and after having dropped out to his home, he drove towards the office of the Department in order to pick up some "paper he required in connection with an investigation".

Williams' evidence was that Joyes had completed his investigation of Baynes on the 5th June, 1946, and had made his report on 7th June, 1946. The inference to be drawn from Williams' evidence was that there was no need of Joyce calling on Baynes again and that he had not done so. While that may well be true, the difficulty is that Williams did not give evidence as to his instructions to Joyes for the week in question. In addition the evidence showed that once he received his instructions, there was no supervision and that he was "on his own" that is, he could come and go as he saw fit. In addition if he should not have called on Baynes again either his travelling expense account was not checked in any way or it was in order for him to call again if he desired to do so. There is before me Joyes' statement and there is no positive evidence that refutes it. The latitude given the investigators leaves the respondent in a position where it is difficult to refute Joyes' statement.

I accept Joyes' statement and I hold that Joyes was at the time of the accident acting within the scope of his employment.

The next question is whether the injuries suffered by the suppliant resulted from the negligence of Joyes. I agree with the contention of counsel for the suppliant that on the facts that have been proven, the doctrine of *res ipsa loquitur* is applicable; certainly from the proved facts an inference of negligence of Joyes arises. The evidence called by the suppliant, however, shows con-

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clusively that immediately prior to the accident Joyes was driving at a very reasonable rate of speed 15 m.p.h., and the motor vehicle was under control. He suddenly became unconscious and fell down on the floor of the car and the car, left without any guidance, ran over the west sidewalk and injured the suppliant. Joyes was still unconscious when he was taken away in the ambulance.

The law applicable in those circumstances is laid down in *Slattery* v. *Haley* (1). The judgment of the Court of Appeal is summarized in the head note as follows:—

> The use of the highway was lawful, and the only ground of liability was negligence—failure to discharge the duty of taking care. The sudden illness which overtook the defendant excused his failure to discharge that duty. The thing which caused the injury was something which he could not control.
>
> To create liability for an act which is not wilful and intentional, but merely negligent, it must be shewn to have been the conscious act of the defendant's volition.

Middleton, J., at page 99 said:—

> I think that it may now be regarded as settled law that to create liability for an act which is not wilful and intentional but merely negligent it must be shewn to have been the conscious act of the defendant's volition. He must have done that which he ought not to have done, or omitted that which he ought to have done, as a conscious being. Failing this the occurrence is "a mere accident", "a pure accident", or, as it is often, but not accurately, put "an inevitable accident."

This statement of the law was agreed with in the recent case of *Buckley and The Toronto Transportation Commission* v. *Smith Transport Limited* (2).

It is clear from the facts in this case that Joyes was incapable by reason of the seizure, of appreciating the duty to take care and unable to discharge it.

The inference of negligence arising from the proven facts has, therefore, been rebutted and the onus is then on the suppliant to show that the injuries resulted from the negligence of some servant of the respondent while acting within the scope of his employment. That negligence could only be that Joyes was driving with the knowledge of the possibility of an attack of unconsciousness. Or that some other servant of the Crown with the knowledge of such possibility of an attack, permitted Joyes to drive in the service of the respondent.

(1) (1922) 52 O.L.R. 95. (2) (1946) O.R. 798 at 805.

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While that negligence has not been pleaded, I am of the opinion that these questions should be dealt with:—

First as to Joyes. There is no evidence of any attack prior to the 23rd March, 1946. When that attack took place he was instructed by Dr. Rogers to report to Westminster hospital. Joyes was not compelled to do so but he knew that he would not be allowed to drive his car again in the work of the Department until the medical officers of the Department advised the Chief Investigator that it was in order for him to do so. After all the examinations and tests and 16 days in hospital, he was discharged from hospital. It is perfectly clear that he would know the reason for these tests and for the hospitalization. Dr. Rogers got the report from Dr. Turnbull (Exhibit 9) and he advised Williams that Joyes could go back on the job, and Williams in turn advised Joyes who commenced his duties. Joyes knew that he was able to resume his work because the medical officers had advised Williams that it was in order for him to drive a car. Knowing the examinations and the hospitalization he had undergone and that the medical advice had been that he could drive again, it is clear that Joyes was not driving with the knowledge of a possibility of an attack of unconsciousness. While I so find, I point out that I do so only on the evidence that was given before me at this trial.

Did any servant of the respondent, having knowledge of the possibility of Joyes having an attack of unconsciousness, permit Joyes to drive in the service of the respondent?

Undoubtedly Williams had notice and warning of the attack of March 23rd, and he subsequently permitted Joyes to drive in the service of the respondent. The evidence is quite clear that before he did so he obtained the opinions of the medical advisers of the Department that it was all right for Joyes to drive. There is no doubt that he knew that Joyes was in hospital for 16 days and that he was tested for the express purpose of finding out whether another attack was a possibility. Williams did not permit Joyes to drive until he had received the advice of the medical officers. On those facts he took proper

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and reasonable precautions and in view of the medical opinions which he received, he did not have a knowledge of the possibility of Joyes having an attack of unconsciousness when he permitted Joyes to resume his work and drive a car in the service of the respondent.

Next as to Dr. Rogers and Dr. Turnbull. The contention of the suppliant is that knowing that the first attack in March might have been caused by epilepsy, the proper tests were not made to eliminate the knowledge of the possibility of a recurrence. So they had this knowledge at the time they advised Williams that it was in order for Joyes to resume driving.

In my opinion they were not negligent.

Dr. Wilcox may be quite correct in his opinion of what should have been done. But it is clear that these medical officers had a different opinion. And it is only a matter of opinion. The medical authorities at the second hospital (Victoria) did not make these tests. And it must be kept in mind that Dr. Wilcox formed his opinion after the second attack. He knew then that, after the attack, Joyes was foaming at the mouth, which Dr. Wilcox stated was characteristic of post-epileptic state. He also knew that Joyes told the Victoria hospital that he had never had a previous attack, and that this was untrue. But that was not known at the time of the first attack.

Even if they had been negligent and I find they were not, I am inclined to the opinion that a claim based on that negligence would still be rejected on the principle of remoteness both as to liability and damages.

The result is that, much as the injury to the suppliant is to be regretted, the suppliant is not entitled to the relief against this respondent, sought by the Petition of Right. The claim will, therefore, be dismissed but under the circumstances, without costs.

Judgment accordingly.