BETWEEN:

ACHILLE TREMBLAY .....SUPPLIANT,

AND

HIS MAJESTY THE KING.....RESPONDENT.

1943

May 18.
Dec. 23.

Crown—Petition of Right—Exchequer Court Act R.S.C. 1927, c. 34, s. 19 (c)—Collision at street intersection—Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53, ss. 2 and s. 36, ss. 7—Onus of proof of negligence in claims against the Crown under s. 19 (c) of Exchequer Court Act not displaced by provincial enactment—Applicability of provincial rule of the road governing conduct of driver of motor vehicle at intersections in claim against the Crown under s. 19 (c) of Exchequer Court Act—Liability of the Crown for negligence of servant in driving motor vehicle to be determined by law of negligence of the province, in which alleged negligence occurred, in force on June 24, 1938.

Suppliant seeks to recover damages from the Crown for injuries suffered by his minor son and expenses incurred by himself as the result of a collision at an intersection between a bicycle on which his son was riding and a truck owned by the Crown and driven, within the scope of his duties, by an enlisted soldier of the Royal Canadian Army Service Corps. The Court found that the proximate cause of the collision was the negligence of the driver of the truck and held the Crown responsible for such negligence.

Held: That under section 19 (c) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended, the onus of proof rests upon the suppliant in a Petition of Right, to show that there was negligence on the part of an officer or servant of the Crown and that Suppliant's loss or injury resulted from such negligence, notwithstanding any provincial enactment to the effect that the onus of proof shall be otherwise and that s. 53, ss. 2, of the Motor Vehicles Act, Revised Statutes of Quebec 1941, c. 142 has no application in such a claim.

2. That the driver of a vehicle on coming to an intersection must give right of way to a driver coming from his right, not only when the two vehicles are coming into the intersection at the same time, but also when the driver sees a vehicle coming towards the intersection from his right, even although he has himself reached the intersection first, where the vehicles are approaching the intersection so nearly at the same time and at such a rate of speed that if both proceed each without regard to the other, a collision is reasonably to be

1943

TREMBLAY v. THE KING.

apprehended. *Drapeau* v. *Boivin* (1933) 54 B.R. 133; *Anderson* v. *Guardian Insurance Company of Canada* (1933) 54 B.R. 407 at 410, approved.

3. That where a claim is made against the Crown under s. 19 (*c*) of the Exchequer Court Act, as amended in 1938, for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on June 24, 1938, the date upon which the amendment imposing liability for such negligence upon the Crown came into effect, except in so far as such provincial law is repugnant to the terms of the said section or seeks to impose a liability upon the Crown different from that imposed by the section itself. *The King* v. *Armstrong* (1908) 40 Can. S.C.R. 229 and *Gauthier* v. *The King* (1918) 56 Can. S.C.R. 176 at 180, followed and applied.

4. That the necessity of complying with the Quebec rule of the road governing the conduct of the driver of a vehicle at an intersection gives rise to duties of care on the part of such driver that he shall keep a proper lookout to his right on coming into and passing through the intersection and keep his vehicle under adequate control as to its speed so that he will be able to stop in time to allow a driver coming from his right to pass if his failure to do so would be likely to result in a collision and that these principles are as applicable in a claim against the Crown under s. 19 (*c*) of the Exchequer Court Act, as amended in 1938, as they would be in an ordinary action.

PETITION OF RIGHT by the Suppliant seeking damages against the Crown for injuries suffered by his son and expenses incurred by himself due to the alleged negligent operation of a motor vehicle owned by the Crown and driven by an enlisted soldier of the Royal Canadian Army Service Corps.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Quebec.

Joseph Bilodeau, K.C. for suppliant.

Fernand Choquette, K.C. for respondent.

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

THE PRESIDENT now (December 23, 1943) delivered the following judgment:

In this Petition of Right the suppliant claims damages from the respondent in respect of injuries suffered by his minor son, Gerard Tremblay, and expenses incurred by himself as the result of a collision between a bicycle on which his son was riding and a truck owned by

the Crown and driven, within the scope of his duties, by Lance Corporal Alfred Lagacé, an enlisted soldier of the Royal Canadian Army Service Corps. The collision occurred shortly after 1 p.m. on Sunday, August 31, 1941, in the intersection of Second avenue and Eleventh street, at Limoilou, in the city of Quebec. Immediately before the collision the young boy, who was then not quite 10 years of age, was riding on his bicycle on Second avenue proceeding from north to south and the truck was travelling on Eleventh street from east to west. The collision occurred in the northwest corner of the intersection of the two streets. The truck had almost crossed the intersection when the bicycle collided with the rear right wheel of the truck. The young boy was thrown to the ground and suffered in addition to bruises a fracture of the skull.

It is contended on behalf of the suppliant that the accident was the result of negligence on the part of the driver of the truck in driving through the intersection at an excessive speed and failing "to protect his right". The respondent alleges that the driver did not enter the intersection until he had ascertained that the road was clear and sounded his horn, that he entered the intersection slowly and had crossed three-quarters of it when the young boy by faulty operation of his bicycle ran into the right rear wheel of the truck, and that the accident was due to the negligence of the young boy in that he was riding his bicycle at an excessive speed without having control of it by reason of defective brakes and that when he ran into the truck it had almost cleared the intersection. It was denied that the accident was in any way attributable to servants of the Crown or that they had been guilty of any fault.

Counsel for the suppliant contended as a matter of law that once it had been established that there had been a collision between the young boy on his bicycle and the truck driven by Lagacé, while acting within the scope of his duties, and proof had been given of the loss or injury sustained by the suppliant and his minor son as the result of the collision, there was a presumption of negligence on the part of the driver and the onus of proof of lack of negligence then lay on the respondent. In support of this contention he relied upon the provisions of section 53, subsection 2, of the Motor Vehicles Act, Revised Statutes of Quebec, 1941, chap. 142, which reads as follows:

1943

TREMBLAY v. THE KING.

Thorson J.

53. (2) Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

This statutory provision is an important exception to the general rule that in an action based upon negligence the burden of proof of negligence lies upon the plaintiff.

The suppliant in order to succeed against the respondent must bring his claim within the ambit of paragraph (*c*) of section 19 of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended, reading as follows:

(*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.

While it is established that the liability of the Crown under this statutory provision is to be determined by the law of negligence in force in the province in which the alleged negligence occurred, this rule is subject to the qualification that such provincial law shall apply only in so far as it is not repugnant to the statute by which the liability was imposed and does not seek to place a liability upon the Crown different from that imposed by Parliament. The liability of the Crown for the negligence of its officers and servants is entirely a statutory one and does not exist in law apart from the express terms of the statute by which it was imposed.

In petitions of right under section 19 (*c*) of the Exchequer Court Act, as amended, the onus of proof rests upon the suppliant not only to show that there was negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment but also that his loss or injury resulted from such negligence; this onus of proof cannot be displaced by any provincial enactment that the onus of proof shall be otherwise; consequently, such a provincial enactment as section 53, subsection 2, of the Motor Vehicles Act, Revised Statutes of Quebec, 1941, chap. 142, which provides that under certain circumstances the onus of proof of lack of negligence shall be upon the owner or driver of the motor vehicle has no application in a claim made under section 19 (*c*) of the Exchequer Court Act, as amended. The onus of proof of negligence in such a claim rests upon the suppliant notwithstanding any such provincial enactment.

The main contention of counsel for the suppliant was that the driver of the truck had been negligent in that he had failed "to protect his right". He relied upon subsection 7 of section 36 of the Motor Vehicles Act, Revised Statutes of Quebec 1941, chap. 142, and the interpretation placed upon it by the Court of King's Bench of Quebec in *Drapeau* v. *Boivin* (1).

Subsection 7 of section 36 of the Motor Vehicles Act, so far as relevant here, reads as follows:

36. (7) At bifurcations and at crossings of public highways, the driver of a vehicle on one of the roads shall give the right of way to the driver of a vehicle coming to his right on the other road.

The subsection was carefully considered by the Court of King's Bench of Quebec in *Drapeau* v. *Boivin* (*supra*), where the judgment of the Superior Court of that province was confirmed. Galipeault J. in the course of his opinion held that if effect was to be given to the law the driver of a vehicle could not enter an intersection with his vehicle,

Avant de s'être assuré qu'il ne venait pas sur la rue Caron, à sa droite, de voiture, à proximité de la sienne, et avant de s'être rendu compte qu'une collision n'était ni probable, ni possible.

And went on to say:

Pour se rendre ainsi compte de la situation, le conducteur doit regarder à sa droite avant de s'engager dans le croisement des chemins: si la vue lui est cachée, il doit user d'une précaution plus grande et arreter son véhicule, si nécessaire.

The effect of this decision is that the driver of a vehicle on coming to an intersection must give right of way to a driver coming from his right not only when the two vehicles are coming into the intersection at the same time but also when the driver sees a vehicle coming towards the intersection from his right, even although he has himself reached the intersection first. Indeed as was held in *Todasko* v. *Bourgie* (1) the fact that at the moment of impact the vehicle coming from the left had cleared the greater part of the intersection does not by itself absolve the driver of it from blame. The rule thus laid down must be qualified by the dictates of common sense, as was pointed out by Hall J. in *Anderson* v. *Guardian Insurance Co. of Canada* (2), where he adopted the statement made by Masten J.A. in *Hanley* v. *Hayes* (3) where the Ontario Appellate Division was dealing with a similar statute:

(1) (1933) 54 B.R. 133.
(1) (1933) 71 C.S. 442 at 443. (2) (1933) 54 B.R. 407 at 410.
(3) (1924) 55 O.L.R. 361 at 366.

1943

TREMBLAY v. THE KING.

Thorson J.

Our statute is intended to apply only where the travellers or vehicles upon the intersecting streets approach the crossing so nearly at the same time and at such rate of speed that if both proceed, each without regard to the other, a collision is reasonably to be apprehended.

If the traveller holding the servient position comes to a crossing and finds no one approaching the crossing on the cross-street within such a distance as to indicate danger of interference or collision, he is under no obligation to stop or to wait, but may proceed to use such crossing as a matter of right.

This statement of the law must, I think, be regarded as the law of the province of Quebec governing the conduct of drivers of vehicles at street intersections. It definitely and, in my opinion, properly rejects the view that the right of way at an intersection belongs to the driver of a vehicle who enters it first.

The purpose of the subsection is plain and clear, namely, to prescribe a rule of the road at intersections, the observance of which will lessen the number of collisions at intersections if not eliminate them altogether. As Duff C.J. said in *Swartz* v. *Wills* (1), where the Supreme Court of Canada had before it for consideration a statute similar to the one now under review:

I can perceive no ambiguity or obscurity in this language. The driver approaching an intercommunicating highway is to keep a lookout for drivers approaching upon the right upon that highway and to make way for them. If everybody does this a collision is not only improbable, it is hardly possible.

The adoption of the contrary view that the driver of the vehicle who first enters an intersection has the right of way even as against a driver approaching the intersection from his right would, in my opinion, not only be a distortion of the language of the subsection but would defeat the purpose of the rule of the road in that it would tend to lead to an increase, rather than a decrease, in the number of collisions at intersections by inviting an increase of speed on the part of drivers of vehicles approaching an intersection and a competition between them in order to enter the intersection first and thus acquire the right of way as against the driver of the other vehicle.

This Court should, in my judgment, apply the rule of the road, as interpreted in *Drapeau* v. *Boivin* (*supra*) to the situation in this case, so far as it is permissible to do so.

Counsel for the respondent pointed out that subsection 7 of section 36 of the Motor Vehicles Act refers only to

(1) (1935) S.C.R 628 at 629.

the right of way as between vehicles at intersections, that the definition of "motor vehicle" in subsection 1 of section 2 of the Act makes it clear that a bicycle is not included in such term and that there is no definition in the Act of the term "vehicle". I understood him to contend that since the subsection does not refer to bicycles it does not apply to the facts of this case. I cannot agree with this view. The fact that the term "motor vehicle" is defined and it is clear from such definition that a bicycle is excluded from its meaning and that the term "vehicle" is not defined at all leads to the conclusion that the latter term is of general application to all vehicles, whether motor or otherwise, and consequently does include a bicycle. But even if this were not so, it is clear that the minor son of the applicant had a perfect right to ride his bicycle on Second avenue. Pedestrians have as much right to the use of the streets as have the drivers of vehicles, motor or otherwise: it is entirely erroneous to assume that motor vehicles have any superior rights. The use of the streets belongs equally to pedestrians and the drivers of vehicles. This statement of equal rights of user of streets and highways as between pedestrians and others is laid down in a number of Quebec cases such as *Nish Yashan* v. *Burton* (1); *Gagnon* v. *Robitaille* (2) and *Becker* v. *Goodman* (3). It follows that a person riding a bicycle on the street has a right of user of the street equal to that of a pedestrian or the driver of any other vehicle.

The necessity of complying with the Quebec rule of the road that governs the conduct of the driver of a vehicle at an intersection, namely, that he shall give the right of way to the driver of a vehicle coming from his right, gives rise to certain duties of care on the part of the driver of the servient vehicle, the one coming from the left, namely, that he shall keep a proper lookout to his right on coming into and passing through the intersection and also that he shall keep his vehicle under adequate control as to its speed, so that he will be able to stop in time to allow the driver of the dominant vehicle, the one coming from the right, to pass if his failure to do so would be likely to result in a collision. It cannot seriously be argued that such a driver would owe lesser or different duties of care to a young boy

(1) (1931) 37 R.L. (N.S.) 115. (2) (1909) 16 R.L. (N.S.) 235.
(3) (1931) 51 B.R. 159.

1943

TREMBLAY v. THE KING.

Thorson J.

approaching an intersection on his right on a bicycle than he would owe to the driver of a motor vehicle coming in the same direction. While the statutory rule of the road may specifically refer only to vehicles at intersections and be silent on the subject of bicycles the duties of care arising from the necessity of complying with such rule of the road enure to the benefit of pedestrians and persons on bicycles as well as to the drivers of motor vehicles.

The principles thus stated would, I think, clearly apply in an ordinary action between subject and subject, but whether they are as fully applicable in a claim against the Crown made under section 19 (*c*) of the Exchequer Court Act, as amended, requires consideration. While it is the rule that the liability of the Crown for the negligence of its officers or servants under this section is to be determined by the law of negligence in force in the province where the alleged negligence occurred, this rule is, as already stated, subject to qualification. One qualification has already been mentioned, namely, that the provincial law is inapplicable in so far as it is repugnant to the terms of the statute by which the liability of the Crown was imposed or seeks to impose a liability different from that imposed by Parliament. There is still a further qualification, namely, that the provincial law of negligence that is to be applied is the law that was in force at the time the liability of the Crown was first imposed. This qualification of the rule was enunciated by the Supreme Court of Canada in *The King* v. *Armstrong* (1). In that case Davies J. disposed of two questions that had been controversial; at page 248 he said:

> I think our previous decisions have settled, as far as we are concerned, the construction of the clause (*c*) of the 16th section of the "Exchequer Court Act", and determined that it not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist;

and went on to say:

> And also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed.

This statement was approved by Fitzpatrick C.J. in *Gauthier* v. *The King* (2) where he said:

> Although this was a case under section 16 (*c*) of the "Exchequer Court Act" by which a particular liability was for the first time imposed upon the Crown, the same principle, as I have said, must apply to all cases and the liability in each be ascertained according to the laws in force in the province at the time when the Crown first became liable in

(1) (1908) 40 Can. S.C.R. 229. (2) (1918) 56 Can. S.C.R. 176 at 180.

respect of such cause of action as is sued on. In other words, the local Legislature cannot subsequently vary the liability of the Dominion Crown, or at any rate, cannot add to its burden.

The principle underlying the qualification thus laid down is that when liability was imposed upon the Crown by Parliament there was no law by which such liability could be determined except that which was in force in the several provinces and it was liability in accordance with such provincial law that was imposed. The liability of the Crown having been imposed by Parliament in the light of the existing provincial law, it follows that such liability cannot be altered by a subsequent provincial enactment. Only Parliament itself can alter the nature or extent of the liability which it has imposed.

In view of this qualification of the general rule an important question of law arises. To what extent, if at all, do the provisions of The Motor Vehicles Act, to which reference has been made, apply in the present case? It does not follow from the decisions of the Supreme Court of Canada that have just been cited that the provincial law that should be applied in this case is the law of negligence that was in force in the province of Quebec in 1887, when the Crown was first made liable for the negligence of its officers and servants by section 16 (*c*) of the Exchequer Court Act of 1887. Indeed, Fitzpatrick C.J. in *Gauthier* v. *The King* (*Supra*) at p. 179 makes it clear that it is not always the laws in force at the time of the passing of the Exchequer Court Act to which regard must be had. He said:

> It may be well to clear up at once an obvious error in the suggestion that it is always the laws in force at the time of the passing of the "Exchequer Court Act" to which regard must be had. The error has probably arisen from judicial decisions upon clause (*c*) of section 16 (now sec. 20) of that Act, by which it was determined that it imposed a liability upon the Crown which did not previously exist. The Crown, however, was of course liable in many cases, as of contract for instance, before the passing of the "Exchequer Court Act". *Thomas* v. *The Queen* (1). The principle is the same however, viz., that the liability is such as existed under the laws in force in the province at the time when the Crown became liable.

It is, therefore, necessary to ascertain when the Crown first became liable for negligence of the kind alleged by the suppliant in this case. The history of section 19 (*c*) of the Exchequer Court Act was reviewed by the Supreme

(1) (1874) L.R. 10 Q.B. 31.

1943

TREMBLAY v. THE KING.

Thorson J.

Court of Canada in *The King* v. *Dubois* (1) and by this Court in *McArthur* v. *The King* (2) and need not be dealt with in detail here.

By section 16, paragraph (*c*), of the Exchequer Court Act as enacted in 1887, this Court was given exclusive and original jurisdiction to hear and determine:

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

The liability for negligence imposed upon the Crown under this section was a very narrow one. In order to bring his claim within the statute a suppliant had to prove that the injury of which he complained had occurred actually "on" a public work. If it happened "off" the public work itself, he had no remedy even if the negligence which caused his injury had arisen "on" a public work. This was definitely settled by the Supreme Court of Canada in *Paul* v. *The King* (3) which was followed in a long line of cases. Under the section as thus first enacted it is clear that no liability was imposed upon the Crown for negligence of the kind alleged in the present petition.

In 1917 paragraph (*c*) of section 16, which had now become section 20, was repealed and the following substituted therefor:

> (*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 upon any public work;

Under the section as thus amended it was no longer necessary for a suppliant to prove either that his injury had happened actually "on" a public work or that the negligence which caused it had arisen "on" a public work. It did not matter where the injury happened or where the negligence arose so long as the suppliant could prove 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, if such duties or employment were "upon any public work". In *The King* v. *Schrobounst* (4), the words "upon any public work" were held to be descriptive of the kind of duties or employment rather than their physical locality. It was not necessary for a suppliant to

(1) (1935) S.C.R. 378.
(2) (1943) Ex. C.R. 77.
(3) (1906) 38 Can. S.C.R. 126.
(4) (1925) S.C.R. 458.

prove that the duties or employment were actually "on" a public work so long as he could show that they were related to or connected with a public work. While the liability of the Crown was substantially enlarged by the amendment of 1917 it did not extend to the negligence of an officer or servant of the Crown while driving a motor vehicle even although he was doing so while acting within the scope of his duties or employment. In *The King* v. *Dubois* (1) it was held by the Supreme Court of Canada, reversing the judgment of the Exchequer Court, that a radio interference motor car was not a "public work" within the meaning of the section and that consequently the Crown was not liable for the negligence of the driver of it even if he was acting within the scope of his employment, since such employment was not employment "upon any public work". The judgment of the Supreme Court of Canada in *The King* v. *Moscovitz* (2), where the Exchequer Court was also reversed, was to a similar effect. "Public work" in the amendment of 1917 had the same meaning as it had in the section as it was first enacted in 1887; a motor vehicle was not a "public work" within such meaning; and the driving of a motor vehicle in itself was not employment "upon a public work". Consequently, where the driving of the motor vehicle was not related to or connected with a "public work", the Crown was not liable for the negligence of the driver, even although he was an officer or servant of the Crown and acting within the scope of his duties or employment.

After these decisions showing the narrow limits of the liability of the Crown for negligence and, no doubt, in consequence of them, the section was further amended in 1938 by deleting from it altogether the words "upon any public work". Thereby liability was imposed upon the Crown for the negligence of its officers or servants regardless of whether their duties or employment had anything to do with "any public work" or not. Not only was the field of liability greatly enlarged but liability was imposed upon the Crown for the first time for negligence in many kinds of duties or employment where there had, previous to the 1938 amendment, been no liability at all.

It was, I think, clearly established by the Supreme Court of Canada in *The King* v. *Dubois* (*supra*) and *The King* v.

(1) (1935) S.C.R. 378. (2) (1935) S.C.R. 404.

1943

TREMBLAY v. THE KING.

Thorson J.

Moscovitz (*supra*) that the section, even as amended in 1917, had imposed no liability upon the Crown for the negligence of its officer or servant while driving a motor vehicle even although he was acting within the scope of his duties or employment in so doing, where the driving of such vehicle was not in any way related to or connected with a public work. It is equally clear, in my opinion, that liability for such negligence was first imposed upon the Crown by the amendment of section 19 (*c*) of the Exchequer Court Act that was made in 1938; it follows from the principles enunciated by the Supreme Court of Canada in *The King* v. *Armstrong* (*supra*) and *Gauthier* v. *The King* (*supra*) that in claims against the Crown made under section 19 (*c*) of the Exchequer Court Act, as amended in 1938, where the claim is for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on the 24th day of June, 1938, when the amendment by which liability for such negligence was first imposed upon the Crown came into effect, except in so far as such provincial law is repugnant to the terms of the said section or seeks to impose a liability upon the Crown different from that imposed by the section itself. In *Gauthier* v. *The King* (*supra*) Fitzpatrick C.J. pointed out, at page 182:

> Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government.

It follows that the provisions of The Motor Vehicles Act to which reference has been made, since they were in force prior to 1938, are as applicable in a claim against the Crown made under section 19 (*c*) of the Exchequer Court Act, as amended in 1938, as they would be in an ordinary action between subject and subject.

It also follows that the principles already stated as to the duties of care that arise from the necessity of complying with subsection 7 of section 36 of the Motor Vehicles Act are fully applicable in the present case.

The only questions that remain for consideration in determining liability are questions of fact, the first being whether Lance Corporal Lagacé, the driver of the truck, kept a proper lookout to his right as he entered and crossed Second avenue, and the second whether he had his car under adequate control in the matter of speed as he was crossing the intersection.

On the first question the evidence of Sergeant Paul Henri Mercier is striking. He was sitting in the cab of the truck to the right of Lagacé. His evidence was that the bicycle could not be seen before the truck entered the intersection but that he did see it coming when the truck was in the centre of the intersection. When he first saw the bicycle it was at least from 40 to 50 feet away from the truck and travelling very fast; the young boy was crying out; the bicycle appeared to be out of control; the boy's feet were not on the pedals; the handle-bars were wobbling, and the bicycle was zig-zagging as it was coming along. He did not make any remark until they had almost crossed the street when he heard a noise behind and called to the driver to stop. The bicycle had run into the truck somewhere about its right rear wheel, the truck having by this time almost crossed the intersection. Sergeant Mercier admitted that it would have been possible to see the boy sooner than he did if he had looked in that direction.

Lance Corporal Lagacé, the driver of the truck, did not see the young boy on the bicycle at all until just before the collision when Sergeant Mercier spoke to him. He looked in the direction that Mercier had turned and just saw the accident like a passing shadow. He said that the accident was unavoidable and sought to justify this contention by explaining that being almost three-quarters of the way across Second avenue he had then gone too far and that even if he had seen the boy and stopped the accident would have happened anyway.

Lagacé said that he had looked to his right before crossing Second avenue, that he saw nothing there except some children a distance away playing under the trees and on the street and sidewalk and that there were no cars or bicycles on the avenue. There is no doubt in my mind that Lagacé did not look to his right at all as he was crossing Second avenue until Mercier called out to him when he was three-quarters of the way across. He did not see the young boy on the bicycle at all until then, but he

1943

TREMBLAY v. THE KING.

Thorson J.

could have seen him as soon as Mercier did if he had looked to his right as he should have done. Had he done so he could not have failed to see him coming fast on his bicycle to the intersection. If Sergeant Mercier could have seen him before the truck was half way across Second avenue if he had looked in that direction so could Lagacé if he had looked. The evidence is conclusive, in my opinion, that Lance Corporal Lagacé did not keep a proper lookout towards his right as he should have done as he was entering and crossing Second avenue, and I so find. If he had kept such a lookout for vehicles coming from the north he would have seen the young boy coming fast on his bicycle into the intersection and would have known that a collision was imminent unless he either cleared the intersection so that the young boy could pass behind his truck or stopped so that he could pass in front of it. There was clearly a breach of the duty to keep a proper lookout on the part of Lagacé.

On the question of speed I find that the truck was travelling at a rate of speed greater than was reasonable under the circumstances, apart entirely from the statutory provision contained in the Motor Vehicles Act that the rate of speed in crossing intersections in cities should not exceed twenty miles per hour. Mercier says that the driver slowed up at each cross-street and that after slowing up at Second avenue and sounding his horn he crossed Second avenue at about 12 miles per hour and stopped about 8 to 10 feet after the impact. Lagacé says that he was going about 15 miles per hour when he got to the corner of Second avenue, that he slowed up and that when he was half way across Second avenue he was going about 8 to 10 miles per hour, that he put on his brakes as soon as he heard the bicycle strike the truck and came to a stop in 8 or 10 feet, which is considerably less than the length of the truck. I do not believe the evidence of Mercier and Lagacé as to the speed of the truck or the space in which it was stopped after the collision. I accept the evidence on these points given by the two Parent brothers, who were walking north on Second avenue just before the collision and saw the truck pass immediately before the accident and come to a stop afterwards. Neither of these boys knew the suppliant or his minor son until after the accident and I see no reason for not accepting their evidence,

although George Henri Parent was somewhat confused in marking on the plan, exhibit 1A, his position on the street at the time of the collision. He said that the truck was going at a speed of 20 to 25 miles per hour and came to a stop about 60 to 75 feet from the place of the accident. Fernand Parent said that the truck came to a stop about 70 feet from the scene of the accident and he placed its speed as it was crossing Second avenue at from 25 to 30 miles per hour. In my view this evidence is much more consistent with what happened than is the evidence of Lagacé and Mercier. Having regard to the distance which the truck travelled after the collision, which I find to be from 60 to 75 feet, I have no difficulty in finding that the truck was travelling across Second avenue at a rate of speed in excess of 25 miles per hour and that such rate, under the circumstances, was excessive. Lagacé not only failed to keep a proper lookout to his right but also failed in his duty to keep his truck under adequate control in that he was travelling at a rate of speed across Second avenue that would have made it difficult, if not impossible, for him to stop in time to avoid the collision even if he had seen the young boy on the bicycle coming from his right as soon as he should have done.

There is, I think, no doubt that the young boy was driving his bicycle on the right side of Second avenue. He says so in his evidence although he admits having told Major Coote sometime before the trial that he did not know on what side of the road he was. The evidence shows clearly that the collision occurred near the north-west corner of the intersection. The young boy must, therefore, have been riding on his right side of the road as he was coming from the north. He said that he had his hands on the handle-bars and his feet on the pedals but that he does not remember the collision at all. There is nothing strange in this. He did not see the truck coming. Evidence was given on behalf of the respondent of defective brakes on the bicycle, but these were checked after the bicycle had been repaired after the accident. Evidence was given by George Henri Parent that the young boy was travelling at 15 to 20 miles per hour as he was coming south, but it is a matter of common knowledge that estimates of the speed of approaching vehicles are not as reliable as those of the speed of passing ones. I reject the contention made on behalf of the respondent that the

1943

TREMBLAY v. THE KING.

Thorson J.

accident was due to negligence on the part of the young boy. If he was coming towards the intersection at the rate of speed stated by George Henri Parent it would have been evident to Lagacé if he had looked to his right that a collision was likely at the intersection if he did not bring his truck to a stop. If the bicycle was out of the young boy's control it was all the more incumbent upon the driver of the truck to avoid the collision since he was under a duty to give right of way to vehicles coming from his right and he did not owe a lesser duty to a young boy on a bicycle than he would have owed to the driver of a vehicle, particularly if the bicycle was out of control and the young boy was apparently in danger.

I find that the proximate cause of the collision was the negligence of Lance Corporal Lagacé, the driver of the truck, in failing to keep a proper lookout to his right as he entered and crossed Second avenue and in driving through the intersection at an excessive rate of speed. If he had looked to his right as he should have done he could not have failed to see the young boy coming to the intersection on his bicycle and if he had kept the truck under proper control in the matter of speed as he was crossing the intersection he could have stopped in time to allow the boy on the bicycle to pass. His failure to live up to the duties of care that lay upon him was the cause of the injury sustained by the suppliant and his minor son and was negligence on his part.

For this negligence the respondent is responsible, since it is clear that Lagacé while driving the truck was acting within the scope of his employment, and, being a member of the military forces of His Majesty in the right of Canada, is, by virtue of the amendment of the Exchequer Court Act, Statutes of Canada, 1943, chap. 25, deemed to be a servant of the Crown. Since this amendment the decision of this Court in *McArthur* v. *The King* (1) is no longer applicable in such a case as this.

There remains only the question of quantum of damages. The young boy suffered bruises and a fractured skull. He was only semi-conscious following the accident and suffered severely from shock. At the trial he appeared to be fully recovered. He is doing well in his classes at school and his only complaint was that if he played or ran hard he

(1) (1943) Ex. C.R. 77.

became dizzy. The medical evidence, however, was that while the fracture of the skull had knit in a normal way and although such a fracture is less dangerous in young people than in the case of others, nevertheless, there was a partial permanent incapacity which was placed at 5 per cent. I award damages of $600 in respect of the injury sustained by the minor son of the suppliant. The suppliant was duly appointed tutor for his minor son after a family council and the taking of the usual oath and authorized to claim damages for him. He is therefore entitled to receive the sum of $600 for his minor son, Gerard Tremblay, which he will hold for him in accordance with the law of the province of Quebec applicable to such matters. The suppliant has also proved special damages amounting to $105.95 for hospital and medical expenses and the cost of repairing the bicycle and is entitled to receive this amount in his own right. The suppliant is also entitled to costs.

Judgment accordingly.