Pelletier (*Petitioner*) *v.* **The Queen** (*Respondent*)

Present: Walsh J.—Quebec, October 7, December 1, 1969.

Crown—Armed forces—Liability of Crown for tort of servant—Corporal forcibly evicting civilian from military premises—Petition of right against corporal and Crown —Discontinuance of proceedings against corporal—Proceedings against corporal commenced out of time—Whether action barred against Crown—Extent of Crown's liability for servant's tort—Necessity of malice and lack of reasonable and probable cause—National Defence Act, R.S.C. 1952, c. 184, secs. 215(1), 216—Crown Liability Act—S. of C. 1952-3, c. 30, s. 4(2).

In 1967 the corporal in charge of an armed forces club operated by the Department of National Defence in Quebec, forcibly evicted suppliant for improper behaviour. More than six months later suppliant by petition of right claimed damages for personal injuries against the corporal and the Crown, but later discontinued proceedings against the corporal.

Under s. 4(2) of the *Crown Liability Act* proceedings only lie against the Crown for its servant's tort if it would have given rise to a cause of action against the servant.

Held, dismissing the petition, the Crown was not liable because the corporal had not acted maliciously and without reasonable and probable cause, which s. 216 of the *National Defence Act* made essential to his liability.

Held also, the action against the Crown was not barred by s. 4(2) of the *Crown Liability Act* because the action against the corporal was not commenced within the six months' limitation period prescribed by s. 215(1) of the *National Defence Act.*

PETITION OF RIGHT.

C. Boucher for petitioner.

R. Cousineau for respondent.

WALSH J.: This is a petition of right brought by petitioner against the Crown claiming payment of the sum of $52,650 damages for bodily injuries resulting in partial permanent incapacity suffered by him on the night of April 28, 1967, when he was forcibly ejected from the Club Keable operated and managed by the Department of National Defence at the Valcartier Military Camp near Quebec City. The petitioner was there as a guest of a member of the armed forces and he alleges that one Charles Orvila Woodward, an employee of the Minister of National Defence in the execution of his functions at the place and time in question, attacked him, struck him, and finally threw him out so that he fell, suffering a fractured skull, lacerations of the left ear and other bodily injuries. He alleges that Woodward attacked him with unjustifiable brutality, malice, lack of experience and lack of skill for the functions he was carrying out on the evening in question.

Initially the said Woodward had also been named by petitioner as a co-respondent in the proceedings but on October 2, 1968, he desisted without costs from the proceedings against Woodward.

Respondent pleads that Corporal Woodward was on duty in the club on the night in question to see to the maintenance of order and discipline and that petitioner in a drunken state began bothering guests of the club and trying to sell lottery tickets to them contrary to club regulations, that Woodward then asked him to leave on three occasions but he refused to do so and twice attempted to strike Woodward, who then led him to the exit of the club holding him up because petitioner in his advanced state of intoxication had difficulty in standing. The plea states further that at the exit of the club Woodward let go of petitioner, who then lost his balance and fell, causing his injuries which were entirely due to his own fault, negligence and imprudence, and in no way due to the fault or negligence of respondent, and that the claim is moreover exaggerated, and unfounded in fact and in law.

At the opening of the hearing the parties through their respective attorneys admitted that the damages suffered by petitioner should be fixed at $7,500.

The liability of the respondent, if any, arises out of the provisions of the *Crown Liability Act*[1]. The following sections of that Statute are applicable:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown . . .
>
> 4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

At the conclusion of the hearing the respondent's learned attorney raised for the first time in argument the question of the applicability of sections 215 and 216 of the *National Defence Act*[2], which sections read as follows:

> 215. (1) No action, prosecution or other proceeding lies against any person for an act done in pursuance or execution or intended execution of this Act or any regulations, or of any military or departmental duty or authority, or in respect of any alleged neglect or default in the execution of this Act, regulations or such duty or authority, unless it is commenced within six months next after the act, neglect or default complained of, or, in the case of continuance of injury or damage, within six months after the ceasing thereof.
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> 216. No action or other proceeding lies against any officer or man in respect of anything done or omitted by him in the execution of his duty under the Code of Service Discipline, unless he acted, or omitted to act, maliciously and without reasonable and probable cause. 1950, c. 43, s. 216.

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[1] S. of C. 1952-53, c. 30.
[2] R.S.C. 1952, c. 184.

He argued that with respect to section 215(1) the proceedings were only instituted on April 26, 1968, nearly a year after the incident in question and hence no action would lie against Corporal Woodward even if petitioner had not desisted from the proceedings against him and that therefore under the provisions of section 4(2) of the *Crown Liability Act* no proceedings could lie against it as a result of the actions of Corporal Woodward. In reply to this petitioner's attorney cited the case of *Montreal Tramways Co. v. McNeil*[3] to the effect that the plea of prescription could not now be raised since it had not been pleaded in the defence. An examination of the report of that judgment, however, indicates that the headnote on which counsel apparently relied is wrong, and the finding of the judgment was to the contrary. The fact that it was not too late to raise this issue, even in argument, is apparent from the provisions of Articles 2188, 2263 and 2267 of *Quebec Civil Code* which read as follows:

> 2188. The court cannot of its own motion supply the defence resulting from prescription, except in cases where the right of action is denied.
>
> 2263. Short limitations and prescriptions established by acts of parliament, follow the rules peculiar to them, as well as matters respecting the rights of the crown as in those respecting the rights of all others.
>
> 2267. In all the cases mentioned in article 2250, 2260, 2261 and 2262 the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired.[4]

It is clear that the right of action against Corporal Woodward himself was extinguished by prescription as a result of section 215(1) of the *National Defence Act* by the time these proceedings were brought and that the court of its own motion would have had to apply this prescription against him even if it had not been raised in argument. This conclusion is supported by the late Justice Mignault in his text book Le Droit Civil Canadien, Vol. 9, page 349, where he states:

> J'ajoute que, dans les cas où la loi dénie l'action, on ne peut se quereller sur le mode que le défendeur a pu choisir pour invoquer la prescription. Qu'il le fasse par défense en droit, ou par plaidoyer au mérite, ou même oralement à l'audition, l'effet est le même, puisque, même lorsqu'il a gardé le silence, il ne peut être condamné.

The question that has to be decided, however, is whether the provisions of section 4(2) of the *Crown Liability Act* would also result in this short prescription of six months being applied in favour of the Crown. In this connection attention should also be called to the provisions of section 31 of the *Exchequer Court Act* which reads as follows:

> 31. Subject to any Act of the Parliament of Canada, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceeding against the Crown in respect of a cause of action arising in such province.

Were it not for the provision of the *National Defence Act* the prescription for a claim for bodily injuries under the laws of the Province of Quebec, which would be applied in this case, is one year. (Article 2262 *Civil Code*).

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[3] (1916) 25 Que., K.B. 90.

[4] The Articles referred to deal with short prescriptions.

A close reading of section 4(2) of the *Crown Liability Act* indicates that in order for it to be held liable under the provisions of section 3(1)(*a*) for a tort committed by its servant, the act or omission complained of must have given rise to "a cause of action in tort" against that servant. It is to be noted that the words used are "cause of action" and not simply "action". Section 215(1) of the *National Defence Act* by its terms protects "any person", the definition of which in the *Interpretation Act*[5] would not extend to include the Crown and it is clear that section 215(1) is intended only to apply to the individual in question. I do not construe it, therefore, as being an Act of the Parliament of Canada relating to prescription in favour of the Crown within the meaning of section 31 of the *Exchequer Court Act* and while the action against Corporal Woodward would undoubtedly have been extinguished by this prescription even if he had remained a party to the case, I do not believe that it should be held that the "cause of action" against him ceased to exist. I therefore conclude that the present proceedings against the Crown are not extinguished by this prescription.

With respect to the applicability of section 216 of *The National Defence Act* to the present proceedings against the Crown, I believe that the situation is quite different. This section uses the terms "No action or other proceeding lies against... officer or man". Here again, this section would not apply directly in favour of the Crown but it appears to deal with the concept "cause of action" within the meaning of section 4(2) of the *Crown Liability Act,* so that if no action could by virtue of this section be successfully maintained against Corporal Woodward the provisions of section 216 would therefore also operate in favour of the Crown.

By virtue of section 216 the proceedings could not have been maintained against Corporal Woodward even if he had been sued directly and within the proper delay, "unless he acted or omitted to act maliciously and without reasonable and probable cause". It is this standard which we therefore have to apply in determining whether any "cause of action" lay against him, and hence against the Crown, rather than the more stringent provisions of the Quebec Civil Code which would otherwise be applicable, holding him liable for damage caused by his fault "whether by positive act, imprudence, neglect or want of skill"[6].

[His Lordship reviewed the testimony of witnesses.]

While there are minor conflicts in the versions of the various witnesses, as is to be expected, they are in substantial agreement on the main points. It is evident that petitioner had had far too much to drink and was in an advanced state of intoxication. Moreover he was bothering the patrons of the club by attempting to sell them raffle tickets which was not permitted in the club and was being very insistent about it. Corporal Woodward had the responsibility of enforcing discipline and the club regulations and was amply justified in evicting petitioner, using such force as was necessary. I do not accept the argument of petitioner's counsel that he should have

[5] R.S.C. 1952 c. 158, s. 35 (22).
[6] Article 1053, Quebec Civil Code.

called for the Provost Corps, as it was necessary for him to take personal action at the time when petitioner refused to leave and attempted to strike or push him, and the situation was not serious enough to require a call for help from the Provost Corps.

The main question to decide is whether in evicting petitioner he did not use more force than was necessary under the circumstances. It is not clear just how petitioner suffered such serious injuries but it seems likely that what may have happened is that Corporal Woodward gave one side of the heavy swinging doors a hard push to open them while holding petitioner with the other hand and then shoved him through the opening, at which time his head may have been it by the heavy door as it started to swing closed again. In any event there is no doubt that petitioner suffered serious head injuries and in view of his advanced state of intoxication, so that admittedly he was staggering and falling, it should have been possible to evict him without causing these injuries. On the other hand petitioner had pushed or attempted to strike Corporal Woodward and was still struggling and resisting eviction, and was no doubt somewhat difficult to handle.

If we apply the provisions of section 216 of *The National Defence Act,* which, as previously indicated, I consider to be applicable in the present case, then Corporal Woodward would only be held liable if he acted "maliciously and without reasonable and probable cause".

In the circumstances of the present case while Corporal Woodward may have been somewhat angry at the time I would not consider that he acted maliciously, and he certainly did not act without reasonable or probable cause. On the basis of my finding that if no action lies against him then no action lies against defendant, the action should therefore be dismissed, but as this defence was only raised in argument, without costs.

In the event that this judgment should not be sustained on appeal with respect to the applicability of section 216 of *The National Defence Act* and that it therefore became necessary to determine whether Corporal Woodward was guilty of "imprudence, neglect or want of skill" within the meaning of Art. 1053 of the *Quebec Civil Code* my finding would be different. I believe that Corporal Woodward was guilty of imprudence and want of skill in the manner in which he evicted petitioner and that if he had done so more carefully petitioner would not have suffered the injuries he did. I would find, however, that petitioner was to a large extent the author of his own injuries and hence there should be a finding of contributory negligence. I say this not on the basis that petitioner's misconduct justified his eviction, as this in itself might not be sufficient to justify a finding of contributory negligence at the actual instant of eviction, but because he continued to struggle, pushing or attempting to strike Corporal Woodward when he was asked to leave, and was apparently still struggling

when they reached the door through which Corporal Woodward pushed him. But for these struggles he could no doubt have been conducted outside the door without suffering any injuries. I would therefore, in the event that it became necessary to determine the amount of damages divide them by attributing two-thirds to petitioner's own negligence and one-third to the negligence of Corporal Woodward, and in this event award judgment in favour of plaintiff against defendant for $2,500 and costs.