Fredericton 1967 June 15-17

BETWEEN:

HER MAJESTY THE QUEEN, on the Information of the Deputy Attorney General of Canada ..... PLAINTIFF;

AND

ALVIN C. DEWITT ..... DEFENDANT.

*Crown—Injuries to soldiers—Collision with horses on highway—Whether escape of horses from pasture negligence.*

Two members of the Armed Forces driving in a car on a country road in New Brunswick at night suffered injuries when the car struck two of defendant's horses which, while not of a jumping breed or known to jump a fence, had jumped the fence around their pasture though it had successfully served to keep horses inside for some 16 years and the pasture was supervised by a tenant of defendant.

*Held,* dismissing the action, defendant did not fail to take reasonable care to prevent his horses from straying on the highway *Fleming v. Atkinson* [1959] S.C.R. 513, applied.

ACTION for damages.

*H. A. Newman* for plaintiff.

*James D. Harper* for defendant.

THURLOW J.:—In this action the Crown seeks to recover damages resulting from loss of the services of Private William Totten and Private Lorway A. York, both members of the Armed Forces who were injured at or near Rear Maugerville in the Province of New Brunswick in the early hours of July 5, 1963, when a 1962 Comet Sedan owned and operated by Totten and in which York was a passenger collided on Highway No. 10 with two mares owned by the defendant. The action is based on alleged negligence on the part of the defendant in failing to take reasonable care to prevent his horses from straying on the highway. The amount of the damages sustained by the Crown as a result of the collision has been agreed at the sum of $1,453.22.

The highway in question runs between Fredericton and Minto, a distance of about 28 miles. It had been repaved in 1962 and at the point where the collision occurred it had a two-lane paved surface 22½ feet wide and 5 foot shoulders on either side giving it a total surface width of some 32 feet. There were very few buildings along this road and traffic on it was variously characterized as "light" with a

"fair" number of cars passing over it each day, and again as "quite a bit" and as including trucks. A considerable portion of the land fronting on this highway is an unfenced game preserve, the habitat of moose and bear and other game animals common in the province. Between this game preserve and the locality of the collision is a distance of 3½ miles wooded on both sides of the road until the defendant's pasture is reached. At the point where the collision occurred and for some 600 yards therefrom in the direction of Minto the road was straight and flat with nothing to interfere with a driver's view. The night was clear and the surface of the road was dry when the collision occurred.

The defendant's horses (four in all) had been pastured for about 6 weeks in a rectangular field of some 25 acres bounded on three sides by forest and on the remaining side by the highway where it had a frontage of from 16 to 18 chains. The pasture was surrounded by a three-strand barbed wire fence for most of its perimeter but had a four-strand barbed wire fence at one corner separating from the enclosure a small parcel of the defendant's land adjoining the highway on which a dwelling house stood. There were no other buildings on the defendant's land. The fence was from 3½ to 4 feet high. It had been repaired each spring, including that of 1963, and had been maintained in repair during the pasturing seasons. In it were 3 gates. The first of these was a large truck gate on the highway side which was fastened when closed by a knotted and wired chain about a foot from the top and another about a foot from the bottom. The next was a permanently closed gate in a portion of the fence separating the pasture from the yard of the dwelling house. This gate was 4 feet high and in addition had a strand of barbed wire 6 to 8 inches above it put there for the purpose of keeping the horses from rubbing against the gate. The third gate was a small one in the other portion of the fence separating the pasture from the dwelling house yard. It was used to gain access to a spring in the pasture which provided water for the dwelling. This gate was secured in the daytime by a leather strap fastened to the post and looped over a metal projection of the gate. At night a wire was added passing around the post and through the gate. A man named Thomas Corrier and his family occupied the dwelling house, rent free, under an arrangement by which he was to keep an eye

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on the horses. What was expected of him was that he report any injury a horse might sustain in the pasture, prevent molestation of the horses and either repair any damage to the fence (if of a very minor character) or report it to the defendant. The defendant himself lived at St. Mary's 7 miles from the pasture and visited it at irregular intervals sometimes more than once in a week and sometimes less frequently. He had owned the pasture for 16 years and in that time no horse had to his knowledge ever gotten loose and strayed on the highway from it.

One of the two horses involved in the collision was a two-year old mare which the defendant had intended to train for sulky racing. The other was a brood mare which the defendant had owned for 8 years. Neither horse had been kept in this pasture before the spring of 1963. Though capable of jumping about 4 feet neither horse was known to have any predisposition to jump fences and none of the four horses in the pasture was of a breed used for jumping. These horses had not previously been on the highway except when led from the van which brought them there to the pasture gate. It is I think to be inferred that in the time they had been in the pasture they would have become accustomed to the ordinary noises of traffic on the highway.

On the evening of July 4, 1963 Corrier, who had been living in the dwelling for more than a year went to a drive-in theatre and returned between 12.30 and 1.00 a.m. Before going he checked the small gate to see that it was secured and wired and after returning from the theatre he went to bed. He was awakened by his wife at 2.25 a.m. and on going outside the house saw two of the horses near the door of the house and the other two on the culvert of the driveway leading from the highway to the house. He went at once to the small gate, had some difficulty in removing the wire fastening, opened the gate and drove the two horses which he had seen near the door back into the pasture. But he did not have time to go after the other two when a car which he had seen at a distance of 600 yards in the direction of Minto approached and the horses started running in the direction of Fredericton. Corrier heard them galloping on the shoulder of the road then on the pavement and then he heard the sound of an impact. The car came to a stop, according to Corrier, some 200 yards beyond the

driveway and on its proper side of the pavement which was the opposite side from that on which the pasture lay. Both horses were killed, both Totten who was the driver of the car and York his passenger were injured and Totten's car was damaged. An inspection of the fence the following morning revealed no break in or damage to it or to the gates save that the strand of wire above the permanently closed gate was broken. One of the horses not involved in the collision had a cut in a hind leg.

I should say at this point that I observed nothing about the demeanour of Corrier which would lead me to discredit his testimony that the small gate was closed and fastened when he found the horses outside the enclosure immediately prior to the accident. Though invited by counsel for the Crown to find that the gate had been open and that the horses strayed out of the pasture I see on the evidence no valid reason for so holding. On the contrary I think the evidence points to the conclusion that the horses for some unknown reason jumped the fence not improbably through having been scared by some unusual noise or event. In this connection I discount and disregard the defendant's suggestion that a bear in the neighbourhood might have caused them to jump the fence not because a bear might not frighten them but because there is no evidence of a bear having been in the neighbourhood that night.

As I see it the first question to be determined is whether the defendant failed in his duty to users of the highway to take reasonable care to prevent his horses from straying on the highway. To my mind this is a case of escaping animals as distinguished from a case such as *Fleming v. Atkinson*[1] where the cattle were allowed to stray on the highway to feed but in the light of the principle which appears to me to have been established by that judgment the distinction is merely one of fact, the problem remaining the same, that is to say, the application of the ordinary rules of negligence to a different set of facts. The duty of reasonable care which an owner of property owes to users of a highway to prevent domestic animals not known to be dangerous from straying on to the highway, as propounded by Judson J. in *Fleming v. Atkinson,* is not in my opinion an absolute duty to keep them off the highway at the

[1] [1959] S.C.R. 513

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owner's peril. What appears to me to be required is the exercise of reasonable care to prevent them straying where their presence may create danger to users of the highway. What is reasonable care will depend on all the circumstances including particularly the nature of the highway and the amount and nature of the traffic on it.

Here the highway was a newly repaved road carrying automobile and truck traffic through largely wooded country between a small mining town and the City of Fredericton. This traffic was not heavy in volume but it was fast moving and this to my mind demanded of the defendant a high standard of care to keep his horses from straying on it.

In my view, however, he met the required standard. The fence around his pasture had successfully served to keep horses in it for some sixteen years. None of the four horses pastured there on the occasion in question was of a jumping breed or had been known to jump a fence. In addition the defendant had a man living in the dwelling as a tenant whose function was to keep an eye on these horses, no doubt principally for the protection of the horses but nevertheless serving, as the events of the night proved, to ensure that if the horses should get out of the pasture they would be speedily returned to it. As I see it only the fortuitously sudden and rapid arrival on the scene of the Totten car intervened to prevent Corrier from returning the other two horses to the pasture immediately after the first two had been driven into it. In short, in my view, the defendant had taken reasonable care to keep his horses off the highway by providing what had served for a long time as an adequate fence for that purpose. He had moreover no reason to expect that the horses would jump the fence but at the same time he had present on the scene a man, who as events proved, would serve not only to keep him advised of the need for repairs to his fence as such need arose, but would act to get his horses back in their pasture when by an unexpected mischance they jumped the fence and got out.

Viewing the matter as I think a jury would and as I think it should be viewed I am unable to reach the conclusion that in the circumstances the defendant failed to take

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reasonable care to prevent his horses from straying on the highway and I therefore conclude that he was not guilty of the negligence alleged against him.

It follows from this finding that the action must fail but I should not part with the case without expressing my view of the evidence of Totten as to how the collision occurred.

Totten and York who were both stationed at Camp Gagetown had attended a dance at Minto and were returning to Camp Gagetown *via* Fredericton when the accident occurred. Totten had had a pint of beer between 6.30 and 7.15 in the evening before leaving Camp Gagetown, he had had a quart of beer at a legion hall in Minto somewhat before 9.30, when he went to the dance, and he had had a pint of beer about a half hour after arriving at the dance. The collision occurred at about 2.30 a.m. the following morning. An attempt was made to show that Totten had had more liquor during the course of the evening and that his ability to drive was impaired at the time of the collision but this was not substantiated and both the attempt to establish it and the method by which such attempt was made in my view were entirely unwarranted. I am satisfied that Totten's ability to drive was not impaired by alcohol.

Totten's account of how the collision occurred was that as he was driving towards Frederiction at 50 to 60 miles per hour he noticed two brown objects at a distance of 400 to 600 feet ahead, one on either side of the road, that on the left being a little nearer than the other, that he thereupon looked at York, who was on the front seat, and observed that he was asleep, that he then looked up again and when he did he saw four eyes like headlights reflecting the light of his car's headlights. He was unable to estimate how far these eyes were away from him at that moment but he immediately applied his brakes and at the time grabbed York by the hair and pulled York's head down to his lap as a precaution. Totten was also unable to say how far ahead the objects were when he first realized they were horses but he said that when still a good hundred feet ahead they bolted from the shoulders to the centre of the highway and that the last impression he had of them before the impact was of two rumps. He had kept his brakes on from the time when he observed the four eyes but was unable to

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avoid the collision. In the impact his head struck something probably the windshield, which broke and he sustained cuts and was unable to see because of glass in his eyes. Totten also said that when he first observed the brown objects at a distance of 400 to 600 feet ahead he neither braked nor took his foot from the accelerator, that the objects did not look like trees and were too big to be persons and that they were not moving, that they might have been cars but did not look like cars, he had never seen anything like them before but that the highway was open and they were off it (which I take to mean they were off the pavement) and he was proceeding through, that there was no reason why he should stop and that it did not occur to him to slow down. He said further that if he had known what they were he would have slowed down and could have stopped without hitting either of them.

Private Totten's evidence was given in a manner which I regard as exemplary. He stood erect throughout a lengthy examination and cross-examination and gave his answers promptly and with apparent candour. He impressed me as one who was honestly endeavouring to recall and describe details of an event which occurred nearly four years ago and which happened quickly and caused him injuries which in my view would not be likely to improve his ability to describe what happened. He was closely and rigourously cross-examined but was in my opinion not shaken on any important point. I therefore regard his evidence as worthy of belief but subject to the caution that I think he is mistaken on some points. In particular I think he is mistaken in thinking that he saw brown objects on both sides of the pavement and I prefer on this point the evidence of Corrier that both horses were on the same side of the road as the car approached. This seems to me to be more consistent with the car having struck both horses in their rear and stayed throughout on its own side of the highway.

On either view of the matter, however, it appears to me that Totten was negligent when he saw these objects some 400 to 600 feet ahead in not slowing down until he had ascertained what they were and in taking his eyes off the road ahead and looking at York for 2 to 3 seconds at that juncture when it was important for him to keep his eyes on the road because of the possible hazard which these unidentified and strange objects, which had not been there

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when he passed that way the previous evening, presented. Had he slowed down and kept his eyes on the road and on the objects he would not have approached them so quickly and he could have seen earlier the magnitude of the hazard which they presented. The chances of scaring the horses as well would probably have been lessened. It is also clear on his own statement that had he slowed down he could have avoided hitting either of them. I find therefore that he was negligent in these respects and that such negligence was the cause of the collision.

The presence of the horses on the highway was in my opinion a contributing cause of the collision because Totten did not in fact know that the objects were horses, which might react as they did, until it was too late for him to avoid colliding with them. However, as I have reached the conclusion that their presence on the highway was not due to negligence on the part of the defendant the fact that their presence was in the circumstances a contributing cause of the collision has no effect on the result of the action.

There will therefore be judgment for the defendant with costs.