

1900
 May 7.

IN THE MATTER OF THE PETITION OF RIGHT OF
 JOHN J. McHUGHSUPPLIANT ;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Public work—Bridge—Injury to person—Maintenance—Minister of Public Works—R. S. C. c. 36—50-51 Vict. c. 16, s. 16c. (c).

There is nothing in *The Public Works Act* (R. S. C. c. 36) in relation to the maintenance and repair, by the Minister of Public Works, of bridges belonging to the Dominion Government, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under sub-sec. (c) of sec. 16 of *The Exchequer Court Act*.

PETITION OF RIGHT for damages for an injury to the person alleged to have been caused by the negligence of an officer or servant of the Crown on a public work of Canada.

The material facts of the case are stated in the reasons for judgment.

The case came on for trial before the JUDGE OF THE EXCHEQUER COURT at Calgary, N.W.T., on the 25th, 26th and 27th days of September, 1899.

March 13th, 1900.

The case was argued at Ottawa, this day.

J. A. Lougheed, Q.C. for the suppliant: The evidence shows that the bridge was in a bad state of repair. There is no disputing this fact; it appears both by the evidence of the suppliant and the Crown. It is almost unnecessary to review the oral evidence because the exhibits filed show that the bridge was in a most unsafe state. The accident happened within fifteen days after Superintendent Saunders' report as to the

unsafe character of the bridge. The Mayor of McLeod wired to the Chief Engineer shortly before the accident. The evidence taken orally and the exhibits themselves irresistably show that the bridge was unsafe for traffic. The disrepair of the bridge was the proximate cause of the accident. The suppliant had been drinking, but was able to take care of himself. It in no way contributed to the accident. We must bring ourselves within clause (c) of sec. 16 of *The Exchequer Court Act*.

The Minister of Public Works is as much an officer or servant of the Crown as any subordinate officer of the department. Under *The Public Works Act* (1) the minister has the charge, management and direction of, *inter alia*, the "roads and bridges now belonging to Canada." (Sec. 7.) The minister is thus not only a constitutional adviser of the Crown in his political capacity, but under the enactment I have cited he is also a ministerial officer or servant of the Crown. There is nothing in the law preventing him from being regarded as holding the dual capacity. Parliament has simply seen fit to constitute one of the constitutional advisers of the Crown, an officer or servant of the Crown for certain specific purposes. Sec. 3 of *The Public Works Act* creates the department; sec. 4 provides a deputy minister and a secretary of the department; sec. 5 fixes the duties of the chief engineer and the chief architect. Clearly clause (c) of sec. 16 includes negligences on the part of such an officer or servant as the Minister of Public Works is under these enactments.

[*By the Court.*—Suppose you concede that the minister is an officer or servant of the Crown, what particular duty had he here in respect of which he was negligent?

(1) R. S. C. c. 36.

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Section 9 of *The Public Works Act* provides that he must keep the bridges in repair. Sec. 10 compels him to make repairs on bridges and other public works whenever the necessity of the public service demands it. He has not to wait under this section for parliamentary appropriations for such a purpose. The negligence on the part of the minister consisted in this that he had no one there to look after this bridge. There was negligence in not making repairs promptly, when the minister had knowledge of the unsafe condition of the bridge.

(Cites *The City of Quebec v. The Queen* (1); *Attorney-General of the Straits Settlement v. Wemyss* (2); *Farnell v. Bowman* (3); *The Queen v. Williams* (4).)

The statutes upon which these cases are decided do not materially differ from the provisions of *The Exchequer Court Act* in question.

(Cites *City of Quebec v. The Queen* (5); *Lancaster Co. v. Parnaby* (6); *Mersey Docks v. Gibbs* (7); *Coe v. Wise* (8); *White v. Hindley* (9); *Elliott on Roads* (10); *Leprohon v. The Queen* (11).

In this case it is needless to say that we are considering a public highway. There is an obligation upon the Crown's servants to keep it in repair. They invited the public to use that bridge and they were bound to see that it was in a reasonably safe condition. They failed to do so, and they are liable in this action. As to contributory negligence, I would cite *Pollock on Torts* (12). The test is what was the proximate cause of the accident. It was the unsafe condi-

(1) 2 Ex. C. R. 270.

(2) 13 Ap. Cas. 192.

(3) 12 App. Cas. 643.

(4) 9 App. Cas. 418.

(5) 24 S. C. R. at p. 429.

(6) 11 A. & E. 223.

(7) L. R. 1 H. L. 93.

(8) L. R. 1 Q. B. 721.

(9) L. R. 10 Q. B. 219.

(10) Pp. 444-7.

(11) 4 Ex. C. R. 100.

(12) Pp. 434 and 438, and cases cited.

tion of the bridge. (Cites *Ridley v. Lambe* (1); *Beven on Negligence* (2).

As to damages the suppliant is entitled to compensation for the loss of the sale of his horses, the loss he sustained by being prevented from going about his business for three months, and the permanent injury to his shoulder. (Cites *Queen v. Williams* (3).

E L. Newcombe, Q.C.—The exhibits have no effect in view of the oral evidence. Superintendent Saunder's report only embodies his judgment concerning the condition of the bridge at the time it was made. The oral evidence shows that his judgment of the condition of the bridge at the time of the accident was that the bridge was safe. The bridge was not dangerous for horsemen. The suppliant has exaggerated the condition of the bridge. There was no negligence in reference to the maintenance of the bridge. It was the policy of the Government to rely upon the sense of the community as to making repairs. The fact that complaints were made so soon after repairs had been done shows that the Government might very well pursue such a policy with respect to this particular bridge. Mr. Bright, the engineer employed to make the repairs, says that in any event he could not have got the material to repair the bridge under a week. This shows that there was no negligence at all in making the repairs.

[*By the Court.*—If this bridge was not repaired it was not because there was no money available to repair it.]

No, but it might have been that if this bridge had been repaired some other bridge would have had to suffer, because there was not sufficient money to repair all the bridges requiring repair in the North-West

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(1) 10 U. C. Q. B. 354.

(2) Vol. I. p. 176.

(3) 9 App. Cas. 357 ; 5 Q. B. D. 78.

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Territories. So you see it would involve your lordship's reviewing the discretion of the minister, if you were to hold that there was negligence in not repairing this bridge.

Secondly, I submit the accident was due to McHugh's contributory negligence. He was familiar with the condition of the bridge, having already crossed the bridge four times before on the day of the accident. He admits he knew it was dangerous. It was contributory negligence for him to cross there as he did after night. Kellock, a disinterested witness, says that he told McHugh between 9.30 and 11 o'clock that night, that if he undertook to ride home in the condition he was in that night he would break his neck. McHugh was not in that state that his instinct of self-preservation would be as acute as it would be in a man not in liquor. The statement of the witness Kellock is therefore of very great probative effect in this case. (Cites *Ency. Laws, Eng.* (1); *Falsom v. Underhill* (2); *Wilson v. Charlestown* (3); *Beach on Contributory Negligence* (4). McHugh should have got off and led his horse over the bridge. *Illinois Railway Co v. Craigen* (5); *Strahan v. Chicago Railway Co.* (6).)

The suppliant did not fall on the bridge but at a wash-out, over which the Government had no control. It is impossible from McHugh's evidence to say where he fell.

Thirdly, as to the permanent injury to the suppliant's shoulder, that must be held to be attributable to the defendant's own conduct. He went about when he should have laid up. Dr. Kennedy who first

(1) Vol. 9 p. 97.

(2) 36 Vt. 591.

(3) 8 Allen 138.

(4) 2nd ed. 327, 329.

(5) 71 Ill. 184.

(6) 31 Am. & Eng. Ry. Cas.
pp. 54, 58.

attended him was not called. He calls Dr. Rouleau who came to see him some weeks afterwards. Dr. Rouleau found the bones not articulating, which implies the absence of reasonable care after the accident. (Cites *York v. Canada Atlantic S. S. Co.* (1).) Dr. Rouleau says there is no permanent injury to the leg but to the shoulder, and his shoulder might be remedied even now according to the evidence of the medical experts. What did McHugh do immediately after the accident? Kellock says he helped him out of a bar two or three days after the accident the worse of liquor, early in the morning.

I submit, first, there is no negligence, secondly the accident was caused by contributory negligence; thirdly, there is no evidence upon which to find that he fell on the bridge, the weight of evidence being that he fell off the bridge altogether; fourthly, no evidence that the accident caused any permanent injury to McHugh.

As to the law upon the point whether there was a servant or officer of the Crown negligent within the scope of his duty, I would refer to the recent judgment of this court, *Davies v. The Queen* (2) as very pertinent to this case. (Cites *City of Québec v. The Queen* (3).)

As to the minister being an officer of the Crown sec. 4 of R. S. C. c. 36, makes the deputy the "chief officer" of the department. In no statute are the ministers of the Crown described as public officers. In R. S. C. c. 4 they are called public "functionaries." (See *Todd's Parliamentary Government in England*, vol. 1, 2nd ed. p. 499; *Gidley v. Lord Palmerston* (4); *McBeath v. Haldimund* (5); *Hearne's Parliamentary*

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(1) 22 Can. S. C. R. 167.

(3) 2 Ex. C. R. 269-270.

(2) 2 Ex. C. R. 344.

(4) 3 B. & P. 236.

(5) 1 T. R. 172.

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Government (1) lays down a proposition which does not appear to be supported by authority.

There is no statute requiring the Government to repair this bridge. The minister as well as the Government may let a public work go into disrepair if they see fit. My learned friend's argument would prevent them ever doing this without being guilty of negligence. (Cites *Beven on Negligence* (2). Section 27 of *The Public Works Act* renders an officer of the Crown criminally liable for injury to person or property on a public work through his negligence. Why should not the minister be made also liable if my learned friend's argument is to prevail?

Section 16 of *The Exchequer Court Act* does not intend to impose any greater liability on the Crown than a municipality at common law is charged with in respect to a highway. (*Beven on Negligence*, 360.) A corporation is exempt from liability for nonfeasance unless by statute. That was the Common Law of Canada at the time of the passing of *The Exchequer Court Act*. I submit that *The Exchequer Court Act* should not be held to give a remedy where a municipal corporation would not be liable at common law. *Beven on Negligence* (3); *Maxwell on Statutes* (4); *Hardcastle on Statutes* (5); *Taylor v. Newman* (6); *Gaunt v. Fynney* (7); *Mayor of Colchester v. Brooke* (8); *Baron de Bode Case* (9); *Wallace v. Assiniboia* (10); *Beven on Negligence* 445; *The Queen v. Ely* (11); *King v. Darby* (12).)

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| (1) P. 101. | (7) L. R. 8 Ch. App. 8. |
| (2) [1895] A. C. p. 439. | (8) 7 Q. B. 361. |
| (3) P. 371. | (9) 8 Q. B. 233. |
| (4) Chapters 2 & 3 and p. 95,
2nd ed. | (10) Man. Rep. 89; p. 1; [1895]
A. C. p. 444. |
| (5) 2nd ed. p. 77 & 102. | (11) 15 Q. B. 840. |
| (6) 4 B. & S. 89. | (12) 3 B. & A. p. 147. |

Mr. Loughheed in reply cites *The Queen v. Williams* (1); *Pollock on Torts* (2).

THE JUDGE OF THE EXCHEQUER COURT now (May 7th, 1900), delivered judgment.

The suppliant's petition is brought to recover damages for personal injuries that he suffered by falling from his horse while crossing the bridge over the Old Man's River, at McLeod, in the North-West Territories. It is alleged that the bridge was out of repair and that the horse, having put his foot into a hole in the bridge, stumbled and fell with and upon the suppliant, causing him very serious injury. There are issues of fact as to whether or not the bridge was out of repair; and that the fall took place on the bridge, or because of its condition, is denied. The Crown also relies upon the defence of contributory negligence on the part of the suppliant. I do not find it necessary to determine any of these issues. There is no evidence that the injury resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, so as to bring the case within clause (c) of the 16th section of *The Exchequer Court Act*. It was contended for the suppliant that the Minister of Public Works is an "officer or servant of the Crown" within the meaning of that provision; and that under *The Public Works Act* (3) it was his duty to keep this bridge in repair; and that for his negligence in that respect the Crown is liable. It was not suggested, of course, that the minister was under any duty himself from time to time to inspect the bridge and to see that it was repaired, if repairs were needed; but that he should have taken care that there was some one charged with that duty. It is not for

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(1) 9 H. L. 418.

(2) P. 437.

(3) R. S. C. c. 36.

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me, I think, to express any opinion as to whether the minister ought or ought not under the circumstances existing in this case to have appointed, or to have recommended the appointment of, an overseer or caretaker for this bridge. That was, it seems to me, a matter within his own discretion which is not to be reviewed in this court, and for the proper exercise of which he is answerable to Parliament alone.

There is no duty on the Crown, or any minister of the Crown, to keep a public work, such as this bridge was, in repair for the failure of which a petition of right will lie against the Crown at the suit of one injured by reason of non-repair. In such a case the suppliant cannot recover against the Crown unless the case falls within the terms of the provision of *The Exchequer Court Act* to which reference has been made. This case is not, I think, within the statute.

There will be judgment that the suppliant is not entitled to any portion of the relief sought by his petition.

Judgment accordingly.

Solicitors for suppliant: *O'Gara, Wylde & Osler.*

Solicitor for respondent: *E. L. Newcombe.*
