BETWEEN:

ERIC FRANCIS STEPHAN .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1956
May 30, 31, June 1
1957
Jan. 25

Crown—Petition of right—Damage to suppliant's vehicle through negligent driving of a Crown servant not "acting within the scope of his duties or employment"—Vehicle operated by driver without permission, authority or knowledge of his superior officers—Driver of vehicle not engaged in performance of the duties for which he was employed—Crown vehicle readily accessible to driver—No liability to suppliant.

Suppliant's truck was damaged through the admitted negligent driving of a Crown vehicle by one Maher. Maher was a recruiting sergeant and not a driver of any vehicle. The regular all-time driver of the Army vehicle was one Private Casey. On the occasion on which the suppliant's truck was damaged Maher was driving the Army vehicle involved in the accident for purposes of his own and contrary to orders which prohibited him driving an Army vehicle. Suppliant seeks to recover from the Crown the damages caused to his truck.

Held: That Maher in disobeying orders and assuming to drive the car was not acting within the scope of his duties or employment.

2. That the fact that Maher had ready though forbidden access to the Crown vehicle does not render the Crown liable to the suppliant.

PETITION OF RIGHT to recover damages from the Crown.

The action was tried before the Honourable Mr. Justice Dumoulin at Montreal.

Harold B. Lande, Q.C. and *Pierre A. Badeaux, Q.C.* for suppliant.

J. W. Long, Q.C. for respondent.

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

DUMOULIN J. now (January 25, 1957) delivered the following judgment:

This petition was tried at Montreal on the 30th of May 1956.

Suppliant, carrying on business in the city and district of Montreal, and elsewhere, under the registered name of Drummond Transit Company, prays for damages in the sum of $3,138.10 from Her Majesty the Queen, through

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the Department of National Defence, the sequel of a smash-up which occurred in the town of Beloeil on November 18, 1954, at about 9.40 that evening.

At this latter time and place, suppliant's regular driver, in charge of one of suppliant's numerous trucks, was directing this particular tractor and trailer unit, a 1949 White motor truck, bearing Quebec license No. L-15330 of 1954, from St. Hyacinthe to Montreal, in the wake of the respondent's station wagon license No. G-9303. This station wagon was driven by one William Harold Maher, a sergeant, then attached to the Army Service Corps and stationed at St. Hyacinthe in the capacity of recruiting sergeant.

Both vehicles were passing through the little town of Beloeil, when, and without any signal or warning, respondent's car left the road to its right hand side, where quite a few shops are located. In the permissible assumption that the road would remain free, the chauffeur of suppliant's truck, one Gaston Lachapelle, sped on. Unfortunately, the army wagon, as the truck came abreast of it—a matter of a very few seconds at the utmost—, left the right border or shoulder of the road, suddenly cut directly across route No. 9, and managed by a hair's breadth to enter a side lane adjoining. Lachapelle slammed on the brakes, but the fourteen to twenty thousand pounds of the loaded trailer pushed it forward in despite of all, thrusting the truck in a jack-knife angle with the front portion or tractor, thereby blocking both tracks of the road.

At the same moment, a local farmer, Adrien Senécal, happened to be driving his own truck eastwards to St. Hyacinthe, at a speed of 20 or 22 miles per hour. The negligible intervening distance separating Senécal's farm truck from respondent's, and a damp(humide) pavement, here again nullified all attempts at braking, with the ultimate result that the former vehicle crashed head on into the latter, inflicting heavy material damages to suppliant's property ($3,138.10).

The Department of National Defence car had come to a stop on St. Charles street, a lateral and secondary thoroughfare, some 70 feet distant from Laurier Boulevard, the point of collision, opposite the house of one Philippe Comtois. Heard as a witness, Comtois says that perceiving

the noise of the collision, he came out to inquire, noticed the army station wagon from which two persons, a man and a woman, were issuing. The darkness precluded any further identification of the couple who unconcernedly walked away. Later that night, Sergeant Maher and a female consort were found by a Provincial Police agent drinking in some nearby grill. Suppliant's chauffeur, Gaston Lachapelle, remained in the vicinity until midnight, but could not find Maher who, in the meantime, with his girl friend, had returned by taxi to St. Hyacinthe, after being refused room accommodation at two Beloeil hotels (*vide*: Cécile Guignard's statement).

The evidence established Maher's culpable negligence to such an overwhelming degree that, on the facts of the accident itself, no proof was tendered in defence and advisedly so. It will therefore suffice to note that this was a repetition of the age worn and classic (in its legal connotation) joy-ride case, giving rise to the corollary legal queries: was the driver of the respondent's car at the time of the accident "in the employ of and on the business of respondent" according to paragraph 16 of the petition, or, negatively, should I decide, in keeping with paragraphs 27 and 29 of the answer to petition, that:

Para. 27— . . . on the said date Sgt. W. H. Maher did appropriate the use of the said vehicle for his own purposes and without permission, without authority and without the knowledge of his superiors.

Para. 29—That on the evening of the said 18th of November, 1954, the said Sgt. Maher was not engaged in the performance of the duties for which he was employed.

Let us now review the evidence on this crucial issue.

William Harold Maher, who appeared especially concerned in hushing the "romantic" tangle of his perilous escapade, and in the course of his endeavours got bogged in a mire of contradictions, had this to declare as to his official status:

He was recruiting sergeant for one of the Army teams, a more or less roving unit, composed of Major Bell, the witness, holding sergeant's rank, Corporal Baker and driver Casey. This small group usually left Montreal on Monday morning for St. Hyacinthe, its recruiting base covering some Eastern Townships sections, returning to Montreal Friday night. The evening of November 18, however, Major Bell was away from St. Hyacinthe, so Corporal Casey, the regular army driver, his day's work done and according to routine orders, handed over the keys of the station wagon to Sergeant Maher, the next in rank during Major Bell's absence. Otherwise, these keys would have been delivered to the commanding officer.

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Around 7.30, that fateful evening, Maher met Cécile Guignard at the Ottawa Hotel, in St. Hyacinthe. This girl told him she intended to meet other girls "de petites amies" at Beloeil, whereupon Maher replied that he would bring her there, since he had work to do in that direction "par là-bas". (The italicized portion is from my notes of Cécile Guignard's evidence).

To continue now with the sergeant's testimony he says:

In 1954, I was engaged in recruiting. *Beloeil village was then in our recruiting area, but not at that time on our visiting curriculum or schedule.* Major Bell, Corporal Baker, Pte. Casey and myself composed our recruiting team.

Casey was the appointed driver of the team's station wagon. On the night of the 18th of November, 1954, I had no right to drive the Government's car. When off duty, I was allowed to wear civilian clothes. That night, at the material time, I was wearing civilian apparel.

Prior to my posting to my particular team, as I learned upon joining it, I was told that the Beloeil area had been dropped off the list as unproductive and another spot substituted instead. I always adhered to the visiting list closely.

Maher repeats *he "had no authority to drive that car on that particular night", although previously acknowledging he had driven, some time before, another military car.* The witness goes on to explain that "to the best of my knowledge, on the night of November 18 Major Bell was in Montreal. *I was not then in command of the team.* I am just a non-commissioned officer and had received particular and definite orders from Major Bell. *Casey, in the absence of the commanding officer, gave me the keys of the car for a receipt. Had Major Bell been present, Casey would have handed the keys to him as commanding officer."*

At this point, attorney for suppliant put the following question to the witness:

Q. That night, were you on recruiting duty?

A. As far as I was concerned, yes Sir.

This man was asked by the Court how it could be so, seeing that, on his own admissions, Beloeil village "was not at that time on the visiting curriculum or schedule"; that "Beloeil area had been dropped off the list as unproductive and another spot substituted instead". Maher replied that he was looking for a Reserve Unit Force in some undivulged section of the Beloeil-McMasterville region, *winding up his long story with this positive statement: "No orders to that effect (viz. for recruiting duties in the Beloeil-McMasterville sector) had been given to me by my commanding officer, Major Bell, nor by any one exercising authority over me."*

Due account had of this man's frequently dubious statements, I must nevertheless retain as probable that:

1—Private Casey, and not he, was the regular army driver.

2—Maher had no authority nor permission to use the car.

3—When using it, in violation of orders, on November 18, he was not "on the business of the respondent" nor on any recruiting duty, but merely engaged on a pursuit of his own.

Other and more trustworthy witnesses were called, among whom was Colonel Alfred Crowe, Assistant Judge Advocate General, also a member of the Quebec Bar.

Colonel Crowe states that in November 1954 Sergeant Maher was on the Army roll, assigned to the Montreal manning depot, recruiting section. He also files exhibits A and B, duly certified under his signature as "true extracts of Canadian Army regulations applicable to drivers of the Canadian Army; these regulations made pursuant to section 13 of the National Defence Act were in force in November 1954 and are still in force".

Exhibit A, an extract from Instructions for R.C.A.S.C. Supplies & Transport, provides for driver testing. From the 3rd paragraph's second line on, I read: *"The driver will be issued with the Manual for Drivers* (Wheeled) *and a D.N.D. Driver's Permit* (C.A.F.B. 1691). The qualifications obtained will also be entered in the driver's Individual Training Record and his Soldier's Service Book, CAB2 (Pt.1)."

Exhibit B, an extract from Canadian Army Manual For Drivers, in its article 4, paragraphs (*a*) and (*b*), is more explicit still:

4. *Qualifications and Authority for Operating Military Vehicles.*

(*a*) *Driver's Tests and Permits.*

All drivers of military vehicles must be tested and qualified in accordance with existing instructions (Part D of the Manual for S. & F. Canada) *and must at all times be in possession of a current Driver's Permit, duly authorized and signed by the issuing officer. You are not permitted to operate vehicles which are not included in your classification.*

(*b*) *Authority for Driving a Vehicle.*

No military vehicle will be operated outside the bounds of the garage, workshop or vehicle compound unless the driver is in

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possession of a Transport Work Ticket, properly completed and signed by the despatching officer or his delegated representative. The Transport Work Ticket is important. In addition to providing a means for recording vehicle operating data, *it is your official authority for operating a military vehicle.*

Private Casey, but not Sgt. Maher, was, at the material time, the holder of the requisite Transport Work Ticket. After a lapse of twelve months such "Work Tickets", testifies Colonel Crowe, are handed in, destroyed, and new ones issued; this procedure gives the explanation for driver Casey's 1954 "Work Ticket" not being available on May 31, 1956.

These written extracts, while falling in the category of *res inter alios acta*, and not binding upon third parties, admissibly corroborate respondent's plea (arts. 26 to 30 inclusive) that at the critical moment Maher *"was not engaged in the performance of the duties for which he was employed"* (Answer to petition, art. 29).

The next witness was Lt. Colonel Joseph-Albert Lefebvre, who, through all of November 1954, served in the capacity of Assistant Adjutant General, Manning and Supplies, Quebec Command, with headquarters in Montreal. Before, on and after November 18, 1954, Sgt. William Harold Maher was a member of Col. Lefebvre's command, subject to his ultimate authority, and under Major Bell's immediate orders at St. Hyacinthe.

This witness positively asserts that:

Maher n'avait absolument pas le droit de conduire les véhicules militaires. Il n'était pas attaché à l'armée en tant que chauffeur, mais en qualité de 'sous-officier recruteur' sur l'équipe de St-Hyacinthe. Le chauffeur de cette équipe, de cette section, était le soldat Casey. L'officier en charge a l'entière responsabilité de son équipe.

Le centre d'attache de cette section de recrutement était à St-Hyacinthe, *mais, les soirs, elle rayonne dans les villages environnants, tels que Belœil,* St-Hilaire, Otterburn Park, se rendant aux manèges locaux.

Il existait une directive écrite envoyée à chaque commandant, dont le Major Bell, interdisant l'utilisation des véhicules militaires pour fins personnelles. Il est à ma connaissance personnelle le Major Bell a reçu ces directives.

Colonel Lefebvre files exhibit C, a circular instructional letter from Headquarters, dated April 18, 1954, for distribution to officers in charge of recruiting teams and entitled "Misuse of D.N.D. vehicles".

In rebuttal, the witness has this to add:

A St-Hyacinthe, les véhicules militaires, si je me souviens bien, *étaient toujours rentrés dans l'Arsenal. Les clés étaient alors données à l'officier et, s'il était absent, au sergent. Le major Bell ne possédait pas le droit de désigner le conducteur du véhicule militaire, ni celui de le conduire lui-même. Le garage principal, en l'espèce celui de Montréal, désignait seul les chauffeurs militaires, les répartissait entre les différentes équipes ou sections; les quartiers généraux leur délivrant alors leurs 'standing orders' qui les autorisaient à conduire. Maher n'avait pas, que je sache, de 'standing orders' de conduire.*

I deem it difficult not to accept so direct an asseveration that: (a) Maher had no right whatever to drive the military vehicle; (b) his army status was not that of driver but of a non-commissioned recruiting officer, and (c) Pte. Casey alone was the duly appointed chauffeur attached to the St. Hyacinthe team.

I had rather expected to hear driver Casey, of whom no further mention was made; and particularly Major Bell, present at the trial and ordered to leave the room while Maher testified. No evidence on their part was forthcoming; no reasons volunteered for such omissions.

At this stage of the case, a significant appraisal, underscoring respondent's view of the problem, appears in the suppliant's factum, dated June 27, 1956. For instance, at page 11 of this written argument, we read the following:

> From the foregoing (to wit, a survey of the evidence) we can arrive at certain general conclusions.
>
> E. The night of the accident Maher was out recruiting, *but was doing so in disobedience of certain of the rules and regulations of his unit.*

Under the circumstances known, it is safe to think that Maher's pursuits at the crucial hour defy all assimilation to "the business of the respondent". So far, there were no "rules and regulations to disobey". Then if any were broken it could only be those concerning an unauthorized, hence an unlawful use of the D.N.D. car by anyone but the regularly appointed driver.

On page 12, we find that (fourth paragraph):

> However, under both systems of law the jurisprudence is uniform *that mere disobedience by an employee of orders given by his master . . .*

Again, it should be borne in mind that, in the present case, "the mere disobedience by an employee of orders given by his master" could only relate to the assumption, on recruiting sergeant Maher's part, of driver Casey's non-transferable duties.

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Any lingering doubt about the exact meaning intended by such expressions as "in disobedience of certain of the rules and regulations of his unit" (p. 11) and ". . . disobedience by an employee of orders given by his master" (p. 12) should be dispelled by the last sentence of page 17 and the first on page 18:

> *Page 17—Although Maher was forbidden to drive the car,* there was no one present to prevent him from doing so or to see that he observed (p. 18) this rule. Even the Major in charge of the unit was away from his duties, in Montreal, leaving in charge *the man who was the first to break the rules.*

Suppliant's interpretation is climaxed in a last quotation, beginning at the ninth line of page 22.

> When Maher drove the truck that night he drove it in a twofold capacity. *He was Sgt. Maher taking it on a personal frolic in disobedience of orders.* He was also the "commanding officer" pro tem whose duty it was to see that the car was driven prudently and carefully and according to law.

Without any attempt at rebutting this Dr. Jekyll and Mr. Hyde theory, I will simply note the suppliant's opinion that Sgt. Maher was taking the car *"on a personal frolic in disobedience of orders".*

On November 15, 1954, three days before the unfortunate incident, an "Act respecting the Liability of the Crown for Torts and Civil Salvage", 1-2 Elizabeth II, c. 30, came into force (*Canada Gazette* Vol. 88, p. 3796; Extra, November 8, 1954), s. 3, ss. (2) of which reads:

> (2) The Crown is liable for the damage sustained by any person by reason of a motor vehicle, owned by the Crown upon a highway, for which the Crown would be liable if it were a private person of full age and capacity.

Section 7, ss. (1) proceeds to empower the Exchequer Court of Canada with "exclusive original jurisdiction to hear and determine every claim for damages under this Act".

Whether this text is intended to supersede paragraph (*c*) of ss. (1) of s. 18 (R.S.C., 1952, c. 98) in submitting all similar claims to the pertinent provincial laws, I do not feel called upon to decide. Taking the view, as I feel bound to do, that the "culprit" here, though a servant of the Crown (s. 50, c. 98), did not cause the "injury" to property,

"While acting within the scope of his duties or employment" [Exchequer Court Act, 18 (1)(c)], nor "in the performance of the work for which he was employed" [Civil Code, art. 1054 (7)], should s. 3 (2) of c. 30 above refer the matter to the provincial law, in both hypotheses the conclusion is identical: no *lien de droit*, hence no vicarious responsibility was convincingly established between suppliant and respondent.

Of the seventeen decisions or so discussed in the factum, most, if not all, relate to regularly hired and appointed chauffeurs, or to individuals for the time being, duly entrusted with permission to drive (le préposé occasionnel).

The present set of facts points in an opposite direction: Maher was a recruiting sergeant and that only; Pte. Casey, was the "all time" driver and he alone. Should this interpretation prove accurate, Maher, in disobeying orders and assuming to drive the car was no more *"within the scope of his duties or employment"* than would a bank janitor when surreptitiously making use of the bank's automobile.

Lord Dunedin imparted to this distinction a very apt wording in the case of *Plump v. Cobden Flour Mills Company* (1), a wording which met with the former Chief Justice Rinfret's unmitigated approval. I quote (p. 67):

> . . . *there are prohibitions which limit the sphere of employment,* and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery and compensation. *A transgression of the former class carries with it the result that the man has gone outside the sphere.*

An exhaustive study of the question will be found in the matter of *Curley v. Osmond Latreille* (2) where the late Justices Anglin and Mignault conducted a thorough sifting of vicarious responsibility (l'action oblique) in its many complexities. The relevant facts are given thus on page 131:

> The respondent's chauffeur (a relation Maher was devoid of), while using his master's automobile for purposes of his own in violation of instructions and driving the car at excessive speed, killed the appellant's son. *The negligence of the chauffeur was admitted;* there was no evidence of want of care on the respondent's part in engaging him and some evidence was adduced that the master had exercised reasonable supervision.
>
> *Held,* Brodeur J. dissenting, that the master was not liable, as, *at the time of the accident, the chauffeur was not "in the performance of the work for which he was employed".* (Art. 1054 C.C.).

(1) [1914] A.C. 62.

(2) [1920] S.C.R. 131 *et seq.*

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At page 178, Mr. Justice Mignault, who had devoted to this question great consideration in the 5th volume of his authoritative treatise (published in 1901), is reported as having said:

Il ne s'agit pas ici d'un cas d'abus, par le serviteur, des fonctions que son maître lui a confiées, mais d'un acte accompli entièrement en dehors de ces fonctions, et pendant qu'avec des copains semblables à lui, il se donnait le luxe d'un "joy-ride" . . .

Thirteen years later, this doctrine met with the continued approval of the Supreme Court of Canada, in re *Moreau v. Labelle* (1), holding that:

. . . the appellant was not liable, *for, at the time of the accident, the appellant's nephew was not "in the performance of the work" which had been entrusted to him.* (Art. 1054 C.C.).

In interpreting the meaning of the last paragraph of article 1054 C.C., it would be an error in law to assimilate to an offence committed by a servant or workman "in the performance of the work for which they are employed" *a similar offence committed "during the period"* of that *work.* Plump v. Cobden (op. cit.).

A closing word: I feel in duty bound to remark that we are confronted here with a particularly unfortunate happening, where a party, victimized through the heedless act of a servant of the Crown, having ready (if forbidden) access to the Crown's vehicle, will nevertheless remain uncompensated.

And again, why were not Major Bell (present at the hearing) and Casey summoned as witnesses?

However I must take judicial notice of the evidence adduced before me.

For the reasons stated there will be a declaration that the suppliant is not entitled to the relief sought and that the respondent is entitled to its costs of the action should it deem fit to claim them.

Judgment accordingly.

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(1) [1933] S.C.R. 201 at 202.