BETWEEN: 1948

ROMEO MALBOUF.....SUPPLIANT; Apr. 26, 27 July 24

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Negligence—Master and servant—No liability of master for negligent acts of servant when servant not on master's business.

Held: That where a servant does not start upon his master's business and is in no way in the course of following it the master is not liable for damages caused by the servant's negligence during such period.

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PETITION OF RIGHT by suppliant claiming damages for injuries suffered and allegedly caused by negligence of a servant of the Crown in the course of his duties or employment.

The action was tried before the Honourable Mr. Justice O'Connor at Ottawa.

Hyman Soloway for suppliant.

Michael E. Anka for respondent.

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

O'CONNOR J. now (July 24, 1948) delivered the following judgment:

The suppliant claims damages from the respondent for loss which resulted when his 1937 Plymouth Sedan which was parked on the west side of Duke Street, in the City of Ottawa, south of the intersection of Lloyd Street, was struck by a motor ambulance owned by the respondent and driven by Frank Knox, a servant of the Crown, and which was proceeding south on Duke Street. The collision occurred about 9.40 p.m. on the 23rd of September, 1947. The suppliant's vehicle was damaged beyond repair.

There are two issues—the first, negligence and the second, whether at the time of the accident the driver, Frank Knox, was acting within the scope of his duties or employment.

The driver, Frank Knox, was at the time of the accident and had been for two years employed by the Department of Veterans Affairs and had been driving this particular ambulance for one year. His evidence may be summarized as follows: Each day at 8.45 a.m. he got the ambulance at the garage and drove to the Veterans' pavilion to pick up the patients who were to be taken to the Aylmer Building. That during the remainder of the day he had certain routine duties to perform at fixed times, such as taking new patients from the Aylmer Building to the various hospitals and calling at hospitals and bringing patients to the Aylmer Building. He also had to call for and deliver files and X-ray films during the day. His headquarters were at the Aylmer Building, and he received

his instructions from Mr. Fraser and Mr. McCorkell each day as to his duties that were not routine. As an example he would receive instructions from Mr. McCorkell to pick up patients at various points in the City and take them to a hospital or to meet patients on incoming trains, etc. He also stated that twice a month he delivered magazines to the various hospitals, but that he did not make a special trip for that purpose, but he only took them if he happened to be making a trip to that hospital. He stated that his day finished normally at 4.45 p.m. when he would then return the ambulance to the garage at Kent and Somerset Streets and leave it there.

He stated that on the 22nd of September, the day before the accident, he found a bundle of magazines marked, "Hull Sanitarium" on Mr. Fraser's desk and he took them downstairs, intending to deliver them, but that he was called out on some special duty so that he did not deliver the magazines. At 4.30 p.m. on the 23rd of September he had what he termed a "spare" and he decided that he would then take the magazines to the Hull Sanitarium, and he did so via the Inter-Provincial bridge and arrived there a little after 5 p.m. He stated the Sister in charge was busy so that he just put the magazines at the top of the stairs and then started back. When he reached the railroad tracks about one-quarter of a mile from Hull he stopped for the first track, then proceeded across it and then stopped for the second track. When he stopped, the engine stalled and in endeavouring to start it the starter locked. He tried to rock the vehicle in order to free the starter but because of the weight of the vehicle he was unable to do so: That although this was on one of the main highways only one or two cars passed and they refused to help him. Finally, about 7 p.m. two men came up and helped him and he then drove them to a beer parlour in Hull: That he overlooked the time but eventually he decided to leave: The man at the next table in the beer parlour asked for a lift and he gave him one.

That while he was proceeding south on Duke Street there were two cars proceeding north on Duke Street, one behind the other and that as he was approaching the first car, the car in the rear turned out to overtake and pass the preceding car. That to avoid a collision he turned the

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ambulance to the right and that he then saw the parked car of the suppliant for the first time, but that it was too late to avoid hitting it. After the collision he stopped the ambulance about one and a half blocks away and the man with him opened the door and that was the last he saw of him.

The suppliant stated that he had just finished some work at a house at 60 Duke Street and came out to his car which was parked in front of this house and had just got into it when he heard a siren sound. He decided to wait and he lit a cigarette and sat there. He heard a crash similar to that caused by a collision between two vehicles, turned around and saw the light of a vehicle which was about to strike the rear end of his car. He threw himself down and there was an impact and his car was driven 75 feet. He saw an ambulance continue south down Duke Street zigzagging across the road. He then got out and walked back to the intersection of Duke and Lloyd Streets where he saw another motor vehicle in the intersection which had been struck. He told of a conversation with the occupants which I hold is not admissible and which I reject. He stated that after he heard the siren he remained seated in the car and that there was not much traffic going (north on Duke Street) to Hull and that he did not see two cars travelling north at that time. His evidence was:

Q. Well did you see any cars coming towards you and cut out into the centre of the road?

A. No.

Three officials of the Department were called. Mr. Churchward said that certain magazines were received by him from time to time and he instructed Mr. Fraser, his assistant, to have Frank Knox deliver them: That never, at any time, were any of these magazines sent to the Hull Sanitarium, and that the magazines that were delivered to the other hospitals were never delivered on a special trip, but only when the ambulance happened to be going to that particular hospital.

Mr. Fraser, the District Transport Officer, said that Frank Knox was employed as a driver and worked directly under him and received all his instructions from him, with the exception of the instructions which were given by Mr. McCorkell as to picking up certain patients: That the only

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magazines that were ever delivered were those that were received through Mr. Churchward, and that none of these magazines were ever for the Hull Sanitarium. He stated that he had not instructed Frank Knox to deliver any magazines to the Hull Sanitarium.

Miss Doran, a receptionist at the Hull Sanitarium, said that she was on duty in September, 1947, from one to three and six to nine p.m., and that she had never received magazines from the Department of Veterans' Affairs while on duty, nor to her knowledge had any magazines been received at any time from the Department of Veterans' Affairs.

Mr. McCorkell said that he gave instructions each day to Frank Knox to pick up the various patients, but that he had never instructed Frank Knox at any time to deliver any magazines to any hospital.

The suppliant's evidence as to what happened at the time of the collision is in direct conflict with the evidence given by Frank Knox. I accept the evidence of the suppliant.

I find that Frank Knox was driving at an excessive rate of speed. The suppliant's vehicle was struck so violently that it was driven 75 feet from the place where it was parked. I find that Frank Knox did not have the vehicle under control and that he was not keeping a proper lookout. The injuries to the motor vehicle of the suppliant resulted from the negligence of Frank Knox.

The evidence given by Mr. Churchward and Mr. Fraser is at variance in certain respects with the evidence given by Frank Knox. I accept the evidence of Mr. Churchward and Mr. Fraser.

I find that the driver, Frank Knox, did not start out on the respondent's business when he left the Aylmer Building, but solely for his own purposes, and undertaken without the knowledge or consent of the respondent. He was not, therefore, at the time of the collision acting within the scope of his duties or employment. If he had started on the respondent's business and had deviated from the course on some business of his own, then the respondent might have been held liable because deviations are always a question of degree.

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But when the servant does not start upon his master's business and is in no way in the course of following it, the master is not liable.

In *Mitchell* v. *Crassweller* (1), Jervis, C.J., said:

I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be *in the employ* of his master at the time of committing the grievance.

In *Joel* v. *Morison* (2), Parke, B., said:

The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.

In *Storey* v. *Ashton* (3), Cockburn, C.J., said:

I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment.

Nor can it be said that when the driver left the beer parlour with the intentions of taking the ambulance to the garage that he re-entered upon the work he was employed to perform. Because not having started out on the respondent's business, his frolic would not end until he returned the ambulance to the Aylmer Building or to the garage.

The result is, much as the loss to the suppliant is to be regretted, that the suppliant, in my opinion, is not for the reasons I have given, entitled to the relief sought against this respondent. If it had been necessary to compute the damages of the suppliant I would have assessed them at $800.00. The suppliant's claim will, therefore, be dismissed, but under the circumstances, without costs.

Judgment accordingly.

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(1) (1853) 13 C.B.R., 235 at 245.
(2) (1834) 6 Car. & P. 501 at 503.
(3) (1869) L.R. 4 Q.B. 476 at 479-480.