
1946

Sept. 10
Nov. 28.
Dec. 20.

BETWEEN:

HIS MAJESTY THE KING,.....PLAINTIFF;

AND

ALFRED H. RICHARDSON and JAMES HAROLD ADAMS,..... } DEFENDANTS.

Crown—Action to recover damages suffered by the Crown through loss of services of a member of the military forces and medical and hospital expenses incurred due to negligence of defendants dismissed—Action by Crown not prescribed by the Ontario Highway Traffic Act, R.S.O. 1937, c. 288, s. 60 (1)—Law of Province of Ontario applicable when accident occurs in that province though negligent parties domiciled in Province of Quebec.

The action is one to recover from defendants, both of whom are domiciled in the Province of Quebec, damages suffered by the Crown by way of pay and allowances paid to and medical and hospital expenses paid for a member of the military forces of Canada, who was injured and

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rendered temporarily incapable of service while a passenger in a car which was in collision, in the Province of Ontario, with a car driven by the defendant Adams and owned by defendant Richardson.

The Court found that the collision was caused solely by the negligence of the defendant Adams.

Held: That the rights and liabilities of the parties are determined by the law of the Province of Ontario.

2 That the prescription established by the Ontario Highway Traffic Act, R.S.O. 1937, c. 288, s. 60 (1) is not applicable to the Crown in right of Canada.

3. That the damages suffered by the Crown are not the natural consequence of the negligence which caused the accident and are not damages suffered from the loss of services of a servant.

4 That the action per quod servitium amisit does not lie. *Attorney-General* v. *Valle-Jones* (1935) 2 K.B. 209 not followed; *Admiralty Commissioners* v. *S.S. Amerika* (1917) A.C. 51 applied.

INFORMATION exhibited by the Attorney-General of Canada to recover from defendants damages suffered by the Crown due to the alleged negligence of defendants.

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

A. Angers, K.C. for plaintiff.

J. E. Crankshaw, K.C. for defendants.

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

O'CONNOR J. now (December 20, 1946) delivered the following judgment:

By an Information dated 28th January, 1943, the Attorney-General on behalf of His Majesty, informed the Court as follows:—

On the 29th day of June, 1941, on No. 2 highway of the Province of Ontario, between Brockville and Prescott, both in the Province of Ontario, a collision took place between a motor vehicle going east on the highway and operated by one Swan, and in which Lieutenant John Howard MacDonald was a passenger, and a motor vehicle going west on the highway driven by the defendant James Harold Adams, and owned by the defendant Alfred H.

Richardson, who was a passenger in the said vehicle, as the result of which Lieutenant MacDonald suffered personal injuries and was confined to hospital. At all times material John Howard MacDonald was a member of the military forces of His Majesty in right of Canada.

The plaintiff continued to pay Lieutenant MacDonald his pay and allowance, and also paid for the medical and hospital treatment for the said MacDonald.

Paragraph 7 of the Information alleges that, "as a result of the negligence aforesaid of the defendant, His Majesty has sustained damage in respect of pay and allowance and hospital expenses of the said Lieutenant MacDonald as follows . . ." The particulars of the expenses are then set out and show $767. These particulars show that the medical and hospital services were not rendered by the Royal Canadian Army Medical Corps but by a public hospital and by physicians in private practice. MacDonald was entitled to hospital and medical services under the conditions of his service in the military forces of the plaintiff. It can, therefore, be assumed that when the plaintiff was informed of the position, it authorized the continuance of these services and assumed liability therefor and subsequently paid the accounts. The pay and allowance are also set out at $613.08, making a total claim of $1,380.08. Counsel for the plaintiff abandoned the sum of $40.35 included in the pay and allowance during the trial and this reduced the amount of the claim to $1,339.73. Counsel for the defendants at the trial agreed that the plaintiff had paid these amounts.

No claim for loss of service is expressly set out in the Information. Section 50A of the Exchequer Court Act deems a member of the military forces of His Majesty to be a servant of the Crown for the purpose of determining liability in an action by the Crown. The Information discloses that Lieutenant MacDonald was a member of the military forces of His Majesty and alleges that by reason of the negligence of the defendants he was injured and confined to hospital for approximately three months and was incapacitated for a further six weeks. The plaintiff would, therefore, lose his services during these periods. Paragraph 7 sets out the particulars of the plaintiff's

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special damages, consisting of wages paid to Lieutenant MacDonald and payment by the plaintiff for his medical and hospital services during such period.

The evidence shows that he performed no service during that period.

The defendants deny that they were negligent and allege that the collision was caused solely by the negligence of Swan, the driver of the vehicle in which MacDonald was a passenger. The defendants further allege that in any event the plaintiff has no right of action or in the alternative that such action is prescribed and that in any event is not entitled to recover such amounts.

The collision occurred in the Province of Ontario and the defendants are domiciled in the Province of Quebec. Because the action has been taken in the Exchequer Court of Canada, and because the collision took place in the Province of Ontario, I am of the opinion that the rights and liabilities of the parties are to be determined by the laws of the Province of Ontario, and not by the laws of the Province of Quebec.

The evidence of the witnesses called by the plaintiff was that the vehicle driven by Swan going east was well south of the centre line of the highway and that the defendants' car going west crossed the centre line and the front left hand fender came in contact with the left side of the vehicle driven by Swan, just at the left door.

The evidence of the witness called by the defendants was that the impact took place exactly on the white line marking the centre of the highway, and the left front wheels of both cars came into collision at that point.

While there is a conflict in the evidence, it is clear that even on the defendants' evidence the defendant Adams was negligent in driving on the white line when meeting another vehicle going in the opposite direction. But I accept Lieutenant MacDonald's evidence, and I find the point of impact was south of the centre line of the highway and the collision was caused solely by the negligence of the defendant Adams in failing to turn out to the right from the centre of the highway so as to allow to Swan's vehicle one-half the road free in accordance with section 39 of the Ontario Highway Traffic Act, R.S.O. 1937, chap. 288.

The defendant Richardson was the owner of the vehicle, and was riding in it at the time of the accident, and had authorized defendant Adams to operate the vehicle, and is by reason of section 47, subsection (1) of the Ontario Highway Traffic Act (*supra*) liable for such damage.

The question to be determined is whether the plaintiff can bring an action *per quod servitium amisit* in these circumstances, and whether the plaintiff is entitled to recover the damages claimed, consisting of the pay and allowance and medical and hospital expenses.

In *Attorney-General* v. *Jackson* (1), it was held that if the servant has no right of action, the master has no right of action. That situation does not arise here because Lieutenant MacDonald had a right of action.

Nor does the fact that Lieutenant MacDonald's action has been barred by section 60 (1) of the Ontario Highway Act (*supra*) bar the plaintiff's action. The bar of the Statute of Limitations against the servant cannot be raised against the master; *Norton* v. *Jason* (2); and in addition to the well established rule of interpretation that His Majesty is not affected by a statute unless expressly mentioned or referred to by necessary implication; *2nd., Ed., 31 Halsbury, 523,* no provincial enactment can limit the right of the Crown in right of Canada.

The right of action and these damages were considered by MacKinnon, J., in *Attorney-General* v. *Valle-Jones* (3), in which the same claim was made by the Crown and in which it was held that the Crown was entitled to maintain a claim against the defendant for loss of service of the men by the tortious act of the defendant, and to recover the amount of the wages and rations of the men during their incapacity and of the expenses of their hospital treatment.

This decision was considered by the High Court of Australia in *The Commonwealth* v. *Quince* (4), and three out of the five members of the Court approved the ruling as to damages of MacKinnon, J. The fourth member of the Court stated that he thought it better to express no opinion as to the correctness of these rulings, and the fifth member did not approve the ruling.

(1) (1946) S C.R. 489
(2) (1653) 82 E R. 809.
(3) (1935) 2 K B.D 209
(4) (1943) 68 C L.R. 227.

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In respect to the claim for wages MacKinnon, J., stated page 217:—

There is no evidence to show that while these men were in fact being paid during their incapacity any extra men were recruited to take their place, or that any payment was made to any other person for doing their work. Therefore, prima facie, damage has been suffered to the extent of the wages thus paid to them for nothing.

And as regards medical expenses and hospital treatment:—

As regards medical expenses and hospital treatment, the claim for damages for these expenses is even more simple. It is put on the grounds that the Crown having in fact expended the amount claimed under this head ought to be compensated for these expenses by the person responsible for the negligence which rendered them necessary

And at page 220 MacKinnon, J., said:—

These sums of money, unless it can be said that they were unreasonably, because unnecessarily and only voluntarily incurred, are clearly damages to the master in consequence, and only in consequence, of the loss of the services of the servant.

With great respect I am unable to agree with that decision. In my opinion these payments are not the natural consequences of the tort, and the plaintiff is not, therefore, entitled to recover these amounts.

In *Admiralty Commissioners* v. *SS. Amerika* (1), one of His Majesty's submarines was run into and sunk by the Steamship Amerika, and the crew of the submarine was drowned. In an action of damage by collision brought by the Admiralty Commissioners against the owner of the steamship, the plaintiff claimed as an item of damage the capitalized amount of the pensions payable by them to the relatives of the deceased men. It was held that the claim failed; first, that in a civil court the death of a human being could not be complained of as an injury, and, secondly, on the ground of remoteness, the pensions being voluntary payments in the nature of compassionate allowances. In the judgment of Lord Sumner, page 61, it was stated:—

The collision was the causa sine qua non; the consequent drowning of the men was the occasion of the bounty; but the causa causans of the payment was the voluntary act of the Crown Had the present action been brought upon a contract it might well be the case that these payments would have been within the contemplation of the contracting parties, but they are not the natural consequences of the tort which is sued for. Nor would it have assisted the appellants' case if they could have established that the making of these compassionate allowances by the Crown was in the nature of a contractual obligation. In any case the contract would have been a contract with the deceased man, and the damages

(1) (1917) A C. 38.

must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment. Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy (Bradburn v. Great Western Ry. Co. (1874) L.R. 10 Ex. 1), and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured, so conversely a master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead.

The comment on this decision in *Clerk & Lindsell on Torts 9th Ed., page 145* is:—

"The defendant's negligence was the occasion, but not the cause of the damage."

The opinion of MacKinnon, J., in the *Valle-Jones case* (*supra*) clearly runs counter to the opinions expressed in the *Amerika case.*

In *Gahan Law of Damages, page 94* note (*h*) states:—

(*h*) Att. Gen. v. Valle-Jones, (1935) 2 K.B. 209. MacKinnon, J., appears to have accepted the argument for the Crown that as the Crown had paid expenses which otherwise the injured men would have borne and which they could have recovered from the defendant, the Crown was entitled to recover them. The general rule of English law is that nobody can make himself the creditor of another by paying that other's debt against his will or without his consent: Johnston v. R.M.S.P. Co. (1867), L.R. 3 C.P. 38, 43, where the qualifications on the general rule are set out.

The payment of wages and expenses caused the plaintiff damage but it was not, in my opinion, damage from the loss of the services of the servant.

Actions for loss of service are of great antiquity and had their origin in a state of society when service as a rule was not of contract but of status and the servant was originally at any rate regarded as the chattel of the master. As Lord Sumner pointed out in the *Amerika case* (*supra*) p. 60:—

Indeed what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status.

In these proceedings the plaintiff seeks to extend the action per quod to the loss of the services, for a short time, of an officer in His Majesty's forces serving his country in time of war.

Under section 50A for the purpose of determining liability in any action by the Crown, a member of the forces is deemed to be a servant of the Crown.

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But that does not alter either the nature or the incidents of the service of the officer.

The services which an officer renders are public services for the defence of his country. They are on an entirely different plane from those that arise under any relationship of master and servant. They are of such a nature that they do not support an action *per quod servitium amisit.*

What the master loses by reason of the tort is the then future services of the servant and that which he must be compensated for is the value of that which he has lost.

In private service the costs of the services, for example pay and free hospital and medical services, could be taken into consideration in estimating the value of the services lost, because in private service the incidents of remuneration are at least prima facie evidence of the value of the service. The value of that service, and conversely the loss, can be ascertained in money. That may also be true of civilians in public service.

But that cannot be done in the case of an officer in His Majesty's forces. The engagement between an officer and His Majesty is not an economic matter at all. The pay and allowance are not the consideration for the services in any sense. They are granted to assist the member to give the service. If they were not made, the service would be rendered just the same.

The value of the services of an officer in His Majesty's forces serving his country in time of war cannot be ascertained in money and conversely the loss of such services cannot be ascertained in money.

Lord Sumner in the *Amerika case* (*supra*) said at page 51:—

> No claim has been made and no evidence has been given relating to damage sustained by the appellants in losing the further services of those who were drowned, and so different both in its nature and its incidents is the service of the seamen of His Majesty's Navy from the service of those who are in private employment that it may be questioned whether in any case an action per quod servitium amisit could have been brought at all.

This difficulty was also pointed out by McTiernan, J., in *The Commonwealth* v. *Quince* (*supra*), when he said, page 251:—

> The value of the services lost to a master because of injury done to his servant may be measured by the remuneration which is given in return for such services. But a soldier's pay is not a criterion of the

value of his services. This consideration further shows the great difficulty of extending the action per quod servitium amisit to the loss of the services of a member of the defence forces.

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So different both in its nature and its incidents is the service of members of the naval, military and air forces of His Majesty in right of Canada from the service of those who are in private employment, that an action *per quod servitium amisit* cannot, in my opinion, be brought at all.

For these reasons, the plaintiff's action must, therefore, be dismissed with costs.

Judgment accordingly.