HIS MAJESTY THE KING .... APPELLANT;

AND

ALFRED H. RICHARDSON AND JAMES HAROLD ADAMS .... } RESPONDENT.

*1947 April 30 May 1

1948 *Feb. 3

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Master and servant—Relationship between Crown and member of armed forces of Canada settled by statute—Crown entitled to action per quod servitium amisit—Measure of damages—Section 50A the Exchequer Court Act retroactive—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (c), 30 (d), 50A. The Militia Act, R.S.C. 1927, c. 132, ss. 48, 69. —The Ontario Highway Traffic Act, R.S.O., 1937, c. 288, s. 60(1).

Held: (Reversing the judgment appealed from). The relationship of master and servant between the Crown and a member of the armed forces of His Majesty in the right of Canada is definitely settled by section 50A of the *Exchequer Court Act* and entitles the Crown to bring an action *per quod servitium amisit* the same as any other master.

Held: the language of section 50A makes it clear that it applies to proceedings already commenced at the time it came into force.

On the measure of damages, the Court was of the unanimous opinion that the Crown's claim for disbursements for medical and hospital expenses was properly allowable.

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*PRESENT: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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As to the Crown's claim for pay and allowances:

Held: per Kerwin, Taschereau, Rand and Estey JJ. (Kellock J. dissenting in part) that this item was properly allowable as the fact of such payment was some evidence, and therefore sufficient evidence, of the value of the services that were lost to the Crown.

Held: per Kellock J. (dissenting). If amounts paid for wages have any revelance in an action such as this, it must be for whatever evidenciary value they have as to the value of the lost services which form the subject matter of the claim. It is for the plaintiff to prove the value of the services lost. Proof of payment of pay and allowances of the soldier without more is not sufficient to entitle the appellant to recover in respect of pay and allowances as such. The Crown may however recover the cost of the soldier's maintenance after his discharge from hospital and before his return to duty.

APPEAL from a judgment of the Exchequer Court of Canada, (1), dismissing an Information filed by the Attorney General of Canada on behalf of His Majesty the King against the respondents.

The Crown sought to recover as damages the pay and allowances, and medical and hospital expenses paid by it to, or on behalf of, 2nd Lt. John Howard MacDonald, an officer of His Majesty's Canadian Forces, following injuries sustained by him while a passenger in a motor car which was in collision with a motor car driven by the respondent Adams and owned by the respondent Richardson.

The material facts of the case and the questions in issue are stated in the judgment now reported.

F. P. Varcoe K.C. and *A. J. MacLeod* for the appellant.

John E. Crankshaw KC for the respondent.

The judgment of Kerwin and Taschereau, JJ., was delivered by

KERWIN J.: This is an appeal from a judgment of the Exchequer Court (1) dismissing an Information filed by the Attorney General of Canada on behalf of His Majesty the King against Alfred H. Richardson and James Harold Adams. Second Lieutenant John Howard MacDonald, a member of the Military Forces of His Majesty in right of Canada, was a passenger in a motor vehicle on a highway in the Province of Ontario, driven by one Swan, which motor vehicle came into collision with another driven by

(1) [1947] Ex.C.R. 55.

Adams and owned by Richardson, who was present in the car with Adams. MacDonald was injured and confined to hospital and while he was incapacitated the plaintiff continued to pay him his military pay and also paid for his medical and hospital treatment. The former amounted to $565.23 and the bills for the latter to $767, making a total of $1,332.23, and the Information asked that the defendants pay the plaintiff this amount, together with the costs of the action, on the ground that the accident was caused by reason of the negligence of the defendants and that as a result of the negligence, His Majesty sustained damages in respect of the said sum. It was also alleged that Richardson, as owner of the car driven by Adams, was liable for damages under subsection 1 of section 47 of the Ontario *Highway Traffic Act,* R.S.O. 1937, c. 288.

Since the proceedings were in the Exchequer Court and since the collision took place in the Province of Ontario, the trial judge quite properly proceeded to discuss the question of negligence in accordance with the laws of that province. He found that the collision was caused solely by Adams' negligence in failing to turn out to the right from the center of the highway so as to allow Swan's vehicle one-half of the road free in accordance with section 39 of the Ontario *Highway Traffic Act.* He also found that Richardson was the owner of the car driven by Adams, that he was present in the car at the time of the accident and had authorized Adams to operate it, and that by reason of subsection 1 of section 47 of the same Act he would be liable for damages. He dismissed the Information, however, on the ground that the services of members of the Naval, Military and Air Forces of His Majesty in right of Canada are so different from those in private employment that an action *per quod servitium amisit,* such as the present, could not succeed.

The action is based upon section 50A of the *Exchequer Court Act* as enacted by 7 George VI, chapter 25, which received the Royal Assent on July 24, 1943, and which reads as follows:—

50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and

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thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

On the appeal, three questions were raised by the respondents that may be dealt with immediately. It was said, first, that the Exchequer Court did not have jurisdiction to hear and determine the controversy under the only relevant enactment, section 30 (*d*) of the *Exchequer Court Act*, R.S.C. 1927, c. 39:—

> The Exchequer Court shall have and possess concurrent original jurisdiction in Canada.
>
> * * * * *
>
> (*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

In *Attorney General of Canada* v. *Jackson* (1), this Court decided that section 50A places the Crown in a recognized common law relation and that its rights are those arising from that relation under the rules of that law. The loss of services is the gist of the action *per quod* or, as it is put in Robert Marys's Case 2 (2):

> And therefore, if my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod*, viz. *per quod servitium*, etc. *amisit;* so that the original act is not the cause of his action, but the consequent upon it, viz. the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action.

But, as determined in the *Jackson* case (1), if there is no wrong to the servant, the act is innocuous toward the master and it therefore became necessary as a step in the proceedings to prove the breach of a duty by the defendants towards MacDonald. In determining whether a particular act was negligent vis à vis a member of the Forces, the Crown is not limited to its rights at common law as distinguished from those under a provincial statute, and in connection with its claim of negligence against Adams may, therefore, rely upon the provisions of the Ontario *Highway Traffic Act*. So far as Richardson is concerned, it is sufficient that he was in the car with Adams and that

(1) [1946] S.C.R. 489.
(2) 9 Co. Rep. 110B; 77 E.R. 895 at 898-899.

(1) [1946] S.C.R. 489.

he had the right of control: *Samson* v. *Aitchison* (1). The only point of jurisdiction of the Exchequer Court raised by the respondents therefore fails.

The second contention on behalf of the respondents to be noticed at this time is that since the accident happened on June 29, 1941, before the Act of 7 George VI was assented to (July 24, 1943), and before the Information was filed (January 28, 1943), section 50A of the *Exchequer Court Act* does not apply. The relevant principle is set forth by Lord Reading in *Rex* v. *Southampton Income Tax Commissioners ex parte Singer* (2), where he says at p. 259:

> I cannot accept the contention of the applicant that an enactment can only take away vested rights of action for which legal proceedings have been commenced if there are in the enactment express words to that effect. There is no authority for this proposition, and I do not see why in principle it should be the law. But it is necessary that clear language should be used to make the retrospective effect applicable to proceedings commenced before the passing of the statute.

The decision of the Divisional Court upon this point was affirmed by the Court of Appeal although reversed on another point: (3). The language of section 50A makes it clear that it applies to proceedings already commenced at the time it came into force.

The last of the three contentions of the respondents referred to was that since, by subsection 1 of section 60 of the Ontario *Highway Traffic Act*, Lieutenant MacDonald was barred of any action for recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time the damages were sustained, the claim of the Crown was therefore barred. This argument was disposed of in *Norton* v. *Jason* (4).

It now becomes necessary to consider the ground upon which the trial judge dismissed the Information. In view of the definiteness of section 50A, it is unnecessary to consider the correctness of any of the decisions to which we were referred, which hold that at common law the relation of master and servant did not exist between the Crown and a member of the armed forces. The existence of that relationship being settled by statute, why should not the Crown be entitled to bring an action *per quod*, the same as any other master? The mere fact that Parliament has provided that in proceedings by His Majesty, a member

(1) [1912] A.C. 844.
(2) (1916) 2 K.B. 249.
(3) (1917) 1 K.B. 259.
(4) (1651) 82 E.R. 809.

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of the Forces should be deemed to be a servant of the Crown indicates to me that it contemplated the bringing of such an action. Although the services to be performed by a member of the Forces differ in kind from those expected from the servant of a private employer, that circumstance, in my opinion, affords no ground for denying to the Crown the benefits of a form of action established many years ago and constantly allowed ever since. It may be anomalous, as stated by Lord Porter and Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika* (1), but that it still persists cannot be gainsaid. Any opinion of these learned judges is entitled to the greatest respect but their observations as to the action not lying at the suit of the Crown are *obiter* and, with respect, I find myself unable to agree with them. On the particular point with which I am now dealing, the decision of McKinnon J. in *Attorney General* v. *Valle-Jones* (2), is not of assistance as there it was admitted, page 213:—"It is not denied that an action for loss of the services of a servant by the tortious act of a third party is available to the Crown as an employer as well as to a subject", but the dissenting opinions of Chief Justice Latham and Williams J., in *The Commonwealth* v. *Quince* (3), express the same conclusions as that at which I have arrived.

What are the damages to which the Crown is entitled? In this class of case the damages have always been more or less at large and I conceive that, granting the right to maintain the action, there is really no dispute that the medical and hospial expenses are properly allowable. There would appear to be a difference of opinion as to pay. On this point the decision in *Attorney General* v. *Valle-Jones* (2), is of importance and the opinion expressed in 52 L.Q.R. 5, that the conclusion reached in that case was obviously a desirable and reasonable one may, I think, in view of the eminence of the commentator be placed in the balance. In my opinion the problem was placed in its proper perspective by McKinnon J., and also by Chief Justice Latham in the *Quince* case (3) where he says, at p. 239:—

(1) [1917] A.C. 38.
(2) [1935] 2 K.B. 209.
(3) (1944) 68 C.L.R. 227.

The question which arises in relation to pay is whether it was reasonable to pay these moneys, for which no service was received, and whether they were so paid, that is, paid without services being rendered, in consequence of the defendants' tort.

The opinion of Williams J. was to the same effect. Rich J., one of the majority, expressed no opinion, while Stark J., at page 246, says:—

Assuming, however, that the Commonwealth can maintain this action, the damages for loss of service might I think include the moneys paid to the airman for a period from the date of the injury until his return to duty could no longer be reasonably contemplated and also for the hospital and medical expenses. The decision in the *Amerika* case (1) can be distinguished.

The third judge forming the majority, McTiernan J., was of a contrary opinion.

Under section 48 of the *Militia Act,* R.S.C. 1927, c. 132, a soldier is entitled to his pay and although his right may not be enforceable by action in the Courts, the fact that he received his pay is some evidence (and therefore sufficient evidence) of the value of his services that were lost by the Crown. I am content to decide the matter on that basis. Many of the cases cited to us on this branch are not in point but certainly there is no case to which we were referred, or that I have been able to find, that decides anything to the contrary. *Flemington* v. *Smithers* (2), 2 Car. & P. 292; 172 E.R. 131; may be deemed to be of some slight assistance. The action was by a father for loss of his son's services. Apparently the only defence was that there was no negligence in the defendant's servant and it is with reference to the contention of counsel for the plaintiff that mere loss of service ought not to be the measure of damages that Chief Justice Abbott's charge to the jury is reported:—

With regard to the amount of damages, I should tell you, that this action is brought to recover such sum as you (the Jury) may think the plaintiff entitled to for the loss of the services of his son. You ought, therefore, if you find for the plaintiff, to find for such reasonable sum as to you appears proper for the loss the plaintiff has sustained in being deprived of the assistance of his son, and also the expense he must have been put to by his being out of his place, and also some small compensation for his mother going to visit him as she did. But beyond those things, it appears to me, that you ought not to go in your estimate of damages.

(1) (1917) A.C. 38.

(2) (1826) 2 C. & P. 292; 172 E.R. 131.

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This extract does show, however, that the matter of damages is at large. The mere difficulty of assessing damages does not free a court of its duty.

The appeal should be allowed and judgment entered for the Crown for $1,332.23 with costs throughout.

RAND J.:—I agree that section 50 (*a*) of the *Exchequer Court Act* assented to by the Governor General on July 24, 1943 must be taken to apply to these proceedings: *Rex* v. *Southampton Income Tax Com., Ex parte Singer* (1). What remain are the damages.

The items of medical attention and hospital services are appropriate, in the circumstances, to an action *per quod*; and as furnished, they lend themselves to estimation by ordinary methods; but for services lost while the officer was incapacitated, the question is not free from difficulty. Damages ordinarily repair injury to economic interests in which the loss is measurable in monetary units. Other interests, however, by their nature, are incapable of being so measured. In temporary pain, suffering, insult, no attempt is or can be made to estimate their ultimate effect upon the economic life of the claimant; and damages in money furnish a subjective satisfaction only.

A similar embarrassment is presented here. The injury is to the executive government. It consists of the deprivation of the service of a person engaged in the guardianship and protection of the country's entire life, including its social and political institutions. It is impossible to measure in monetary units the value of national liberty or the maintenance of social order and well-being; and it was that fact that led O'Connor J. to hold that damages for such deprivation could not be recovered. I agree that such a consideration is pertinent to the question whether at common law the relation of Crown and soldier is that of master and servant for the purposes of a *per quod* action; but because of the statute, that question does not arise here. But I see no distinction in principle between the deprivation of such services and the deprivation of the use of property that could not be given commercial employment; and as the allowance for the latter is well settled,

(1) (1917) 1 K.B. 259.

The Greta Holme (1), it would seem to follow that, generally, lawful objects and purposes which the services of men or the use of things are designed to achieve are interests, the wrongful and injurious affection of which must be answered in damages.

This is confirmed by the law laid down in the case of vessels of war. In *Admiralty Commissioners* v. *S.S. Chekiang* (2) and *Admiralty Commissioners* v. *S.S. Susquehanna* (3), the House of Lords had to consider the question of damages for deprivation of the use of such vessels during repairs necessitated by collision. The House, on the principle of *The Greta Holme* (1) held them to be recoverable. It also brought itself measurably nearer commitment to standards to be applied in determining the amount; and the basis used by the Registrar, interest on the then capital value of the vessel, ascertained by a depreciation of the original cost, and pay and allowances of officers and crew, was found to be not objectionable in law. But it was clearly indicated that no hard and fast rule could be laid down and that the consideration of all the circumstances must support any standard in any case adopted.

It follows then that the loss of the services of the officer here is an injury to the Crown for which it is entitled, under the rule of master and servant, to recover against the wrongdoer.

Now, it would be impossible to measure that loss in terms of accumulated minutiae of inconvenience, and any rule applied must be somewhat arbitrary. The consideration is not irrelevant that if the injured person was paid only for actual service, he could recover for the time lost on the basis, having regard to all likely contingencies, of his remuneration. Where, as here, by the reasonable and invariable practice, remuneration continues regardless of incapacity, whether time lost could be excluded from any claim made by him need not be considered because it has not in fact been included: and the recovery by the master would apparently exhaust the item: *Osborn* v. *Gillett* (4). As in the case of the war vessel, therefore, I see no reason why, prima facie at least, the value to the Crown of the services lost, to the benefit of which, in the circumstances, and without more, the Crown was at all times exclusively

(1) [1897] A.C. 596.
(2) [1926] A.C. 637.
(3) [1926] A.C. 655.
(4) (1873) L.R. 8 Ex. 88.

entitled, should not be measured by the remuneration; and on that basis, there is nothing here to qualify its ordinary application, the estimate of the services lost by reason of the accident at the probable rate.

I would, therefore, allow the appeal and direct judgment against the respondents for the sum of $1,332.23 with costs throughout.

KELLOCK J.:—The first question which arises is as to whether or not Section 50A of the *Exchequer Court Act*, 7 Geo. V, cap. 25, which received royal assent on July 24, 1943, applies in the case at bar, the accident having occurred on the 29th of June, 1941, and the Information of the Attorney General of Canada having been filed on the 28th of January, 1943, prior to the coming into force of the amending statute.

The section reads as follows:

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

In my opinion by the plain wording of the statute it was intended to have a retrospective operation to June 24, 1938. It is objected on behalf of the respondents that, in any event, it should not be held to apply to proceedings taken before its passing. The only result of giving effect to such a consideration would be that the appellant would be entitled to discontinue the action and commence a new one, there being no limitation period intervening in the meantime. I do not think however that the objection is well taken as I think that the intention of the staute is that it is to be applied by the courts in all circumstances which have arisen since the date it mentions, to which it is relevant. In view of the express language of the statute I do not think resort to any authority is necessary but if authority be needed it is to be found in *Attorney General* v. *Theobald* (1).

In the court below the learned trial judge rejected the appellant's claim on the ground that the services of an officer in the armed forces in time of war are of such a

(1) (1890) 24 Q.B.D. 557.

nature that they do not support an action *per quod servitium amisit* and that the value of such services cannot be ascertained in money and therefore their loss cannot be the subject of an action for damages.

As pointed out by Lord Sumner in *Admiralty Commissioners* v. *The Amerika* (1), the action here in question is an anomaly. Section 50A above, "does not purport to create a direct and specific right in the Crown; it places the Crown in a recognized common law relation only, and its rights are those arising from that relation under the rules of that law;" *Attorney General* v. *Jackson* (2) at 493. It is important therefore to ascertain the extent of those rights. They are not to be extended beyond what the authorities have marked out. I turn therefore to a consideration of the authorities.

In *Flemington* v. *Smithers* (3), the plaintiff's son, who was in fact his servant, engaged in delivering parcels in the business of his father, was injured by the negligence of the defendant's servant. As a result of the accident he was taken to hospital where he was supplied by his mother with necessaries not there provided. Abbott C.J., instructed the jury with regard to the amount of damages that they should find for such reasonable sum as appeared to them proper for the loss the plaintiff had sustained in being deprived of the assistance of the son and also the expense he must have been put to "by the son being out of his place" and also "some small compensation for his mother going to visit him as she did."

In *Hodsoll* v. *Stallebrass* (4), 113 E.R., 429, the plaintiff brought action for damages sustained by reason of a dog owned by the defendant having bitten the plaintiff's servant whereby the latter was unable to continue for the time being to perform services for the plaintiff. The action was for the loss of the future services of the servant and for the expense sustained by the plaintiff in endeavouring to cure the servant and it was alleged that the plaintiff, under the apprenticeship articles in question, was obliged to continue to maintain the servant. The only objection to the action raised by way of defence was that it was contended that no damages could be recovered subsequent to action brought but this objection was overruled.

(1) [1917] A.C. 38 at 60.
(2) [1946] S.C.R. 489.
(3) (1826) 2 C.P. 292; 172 E.R. 131.
(4) (1840) 11 A. & E. 301; 11 E.R. 429.

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In *Martinez* v. *Gerber* (1), the action was brought in respect of an injury to the servant of the plaintiffs who was thereby disabled from continuing to serve and a substitute was engaged. On a motion in arrest of judgment it was argued that the declaration was defective in failing to state that the injured servant was employed at a yearly salary or that the plaintiffs were bound to pay or did pay him any salary. It was held that it was sufficient to allege that the injured servant was still the servant of the plaintiffs and that there was no necessity to state that he was hired at any wages or salary. In a reporter's note it is stated that

the damage would be the same whether the services of the disabled servant were gratuitous or paid for, supposing the masters to be obliged to hire another, or to do the work themselves, or to leave it undone. The allegation that Goss (the injured servant) was and still is the plaintiffs' servant, shows that whilst paying Gassiot, (the substitute) they were entitled to the services of Goss.

In *The Amerika* (2), the Admiralty sought to recover the capitalized value of certain pensions payable to relatives of seamen who were drowned when one of His Majesty's submarines was run into and sunk by the respondent ship. It was held that the claim failed on two grounds, only one of which requires mention here, namely, that the pensions were voluntarily paid. In the view of Lord Parker, however, even if the pensions and allowances had been contractual they could not have been recovered as they would constitute deferred payment for services already rendered and have no connection with any future services of which the Admiralty had been deprived. Lord Sumner pointed out that the damages recoverable in this form of action must be measured by the value of the services lost and not by the incidents of remuneration under the terms of the contract of employment. At page 61 he said,

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.

We have also been referred to the decision of the High Court of Australia in *The Commonwealth* v. *Quince* (3). In that case, in which there was no statute similar to Section 50A of the *Exchequer Court Act*, it was the view of the

(1) (1841) 3 M. & G. 87 at 89.
(2) [1917] A.C. 38.
(3) (1944) 68 C.L.R. 227.

majority that as between an airman and the Commonwealth of Australia there was no master and servant relationship and that accordingly an action *per quod* would not lie. Only one member of the majority dealt with the matter of damages assuming that such a relationship did exist, namely, Starke, J., and it was his view (page 247) that assuming that the Crown was entitled to the services of its airman, it was a natural and reasonable result of the defendant's act that the Crown should attempt to cure its servant and maintain him in its service for a reasonable period, giving him, without obligation to do so, pay and allowances and that therefore pay and allowances would form an item of damage as well as hospital and medical expenses. Latham, C.J., who dissented, was of a similar view as to this point, see p. 239.

Section 50A, in my opinion, precludes inquiry as to the existence in the case at bar of the relationship of master and servant as between the appellant and the injured soldier and that relationship must be taken as existing. The sole inquiry is as to the damages proved. The authorities all show that the damages recoverable in this form of action fall under two heads, (*a*) the value of the future services of the injured servant which have been or will be lost to the master, and (*b*) expenses incurred by the master in connection with the cure of the servant, such as for hospital and medical services, etc.

The claim in the instant case is for pay *and allowances* actually disbursed and hospital and medical expenses. Recovery in the case of the latter is supported by such decisions as *Dixon* v. *Bell* (1) and *Flemington* v. *Smithers* (2), *supra,* and the appeal should be allowed to the extent of $767 claimed in respect of these items.

As to pay *and allowances* the question arises as to whether such items fall within either category of damage. I have been unable to find in the authorities, apart from *Bradford* v. *Webster* (3), and *Attorney General* v. *Valle-Jones* (4), with which I shall deal, any support for a contention that wages as such are a recoverable head of

(1) (1816) 1 Stark. 287; 171 E.R. 475.
(2) (1826) 2 C.P. 292; 172 E.R. 131.
(3) (1920) 2 K.B. 135.
(4) (1935) 2 K.B. 209.

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damage, and if they are not recoverable when paid under the terms of a contract, (per Lord Sumner, *supra,*) they cannot be recovered as such if paid voluntarily.

In *Webster's* case (1) a municipal corporation recovered as damages wages paid to a constable who had been injured by the negligence of the defendant, and also an amount in respect of pension. The case was decided by A. T. Lawrence, J. who held in accordance with the view later expressed by Latham, C.J., and Rich, J., in *Quince's* case (2), that it was reasonable to continue to pay the constable his wages for a period subsequent to the accident in order to ascertain whether he might not recover sufficiently to resume duty; that the corporation was bound to make the payments by the terms of the contract of employment and that it accordingly was entitled to recover.

In *Valle-Jones'* case (3), MacKinnon, J., allowed recovery by the Crown of the pay and allowances, not on the ground of expense but as evidence of the value of services lost. At p. 216 he said:

> It is well settled that when by the tort of a third party a master has lost the services of his servant he can recover damages in respect of that loss of service. The amount of his damages is, of course, dependent upon the facts of the particular case. If he has got a substitute to do the work of the servant, his damages may be the extra cost to which he has been put over and above the payment he makes to the servant who is incapacitated. If he has put an end temporarily to the contract of service of the injured servant and pays him nothing, his damages would be the amount, if any, that he has to pay to the substitute. The payment, if any, that he makes to the substitute may of course be equal to, more than or less than the wage of the injured servant. On the other hand, where he does not employ a substitute, if he continues to pay the wages to the injured servant, he clearly loses any benefit arising from that payment, because he is getting nothing in return for it. In that case, therefore, his damages are, prima facie, the amount of the wages that he has thus paid for nothing. This case is of that last mentioned class, and the damages claimed on behalf of His Majesty are the amount of the wages paid to these men during their incapacity. 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. So much for the claim in respect of wages.

The later discussion of the learned judge with respect to the reasonableness of the action on the part of the Crown in paying the wages was in reference to the argu-

(1) (1920) 2 K.B. 135.
(2) (1944) 68 C.L.R. 227.
(3) (1935) 2 K.B. 209.

ment for the defence that recovery could not be had because the wages had been a mere voluntary payment.

In my opinion the decision in *Webster's* case (1) should not be followed as it is not supported by any earlier authority. However logical it might be to treat the payment of wages to an injured servant during convalescence as just as reasonable an expense as that for hospitalization and medical care, there is no warrant in the earlier cases for so doing and as it is doubtful upon what principle the action was originally based (per Lord Sumner in *The Amerika* case (2) at p. 54) it is not permissible to proceed beyond the limits determined by the actual decisions. If therefore, amounts paid for wages have any relevance in an action such as this, it must be for whatever evidenciary value they have as to the value of lost services. In the case at bar there is no other evidence as to the value of the services which form the subject matter of the claim.

In a case of this character it is for the plaintiff to prove the value of the services lost. In Blackstone, Vol. 3, p. 142, the following occurs:

> The master also, as a recompense for his immediate loss, may maintain an action of trespass, *vi et armis;* in which he must allege and prove the special damage he has sustained by the beating of his servant *per quod servitium amisit*: and then the jury will make him a proportionable pecuniary satisfaction.

I find myself unable to accept the view that proof of payment of the pay and allowances of the soldier here in question, without more is sufficient.

In the case of an ordinary servant, if the master be able to substitute another servant, his loss, assuming the substituted servant renders service equal in value to that of the injured servant, may be the additional amount, if any, the master has to pay to the substitute over and above what he pays the injured servant. In such a case the amount paid to the injured servant is only an item in an account. If no substitute is hired and the master performs as well as he can the duties of the injured servant, the damage, if any, is the value by which the services of the injured servant exceeded the value of the efforts of the master himself. If the master did not hire a substitute and did not attempt himself to fill the shoes of the injured servant the loss would be the value to the master of the services

(1) (1920) 2 K.B. 135. (2) [1917] A.C. 38.

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unperformed but the amount continued to be paid to the injured servant would not constitute any part of the damage and would have no relation to it.

In *Webster's* case (1) in the course of his consideration of the claim in respect of pension, the learned trial judge said at p. 144:

> The cost of the services to the plaintiff Corporation was pay, plus the plaintiff's contribution to the pension fund. No ground has been suggested for holding that the services were not worth that which was paid for them. If this be so the services which were lost were worth pay, plus right to pension.

MacKinnon, J., in the passage from his judgment already quoted, appears to take a similar view.

This seems to reverse the onus and to throw upon a defendant the obligation of showing that the value of the services was less than the wages paid. It may be that this is the correct view in the case of an ordinary servant engaged in commercial pursuits but I find myself unable to apply it in the present case without evidence of something more than mere payment. It may well be that in particular instances, by reason of any work upon which a soldier may be engaged at the time of his injury, a value can, upon proper evidence, be put upon his services. One may, however, conceive cases in which, by reason of misconduct, for instance, a particular individual may be, at times, a liability to the Crown rather than the producer of valuable service. I do not think that a soldier's pay as provided for by statute is based upon the value of the service performed. Further the amount of the allowances made to a soldier vary with his status as a married or an unmarried man and the number of his children. In the case of two soldiers engaged in identical duties, the value of their service would vary with the amount of the pay and allowances paid to each, if pay and allowances may be taken as evidence of that value. I cannot accept such a contention. In my opinion it was incumbent upon the appellant to establish by evidence the value of the lost services, beyond the mere payment of the items claimed. When such evidence is adduced the jury, according to the authorities, award "a proportionate pecuniary satisfaction". I think there-

(1) (1920) 2 K.B. 135.

fore that the evidence is insufficient to entitle the appellant to recover in respect to pay *and allowances* as such.

There is however, in my opinion, a basis upon which the Crown is entitled to recover the cost of maintenance of its soldier during the period it is attempting to restore him to service, but this would not include maintenance of dependents. As already pointed out, the claim in *Hodsoll* v. *Stallebrass* (1), included the expense of maintenance of the servant which fell upon the master under the apprenticeship articles. This was regarded as a proper head of claim and has never been questioned. I think therefore that it warrants recovery in the case at bar of the actual expense incurred by the Crown in the maintenance of the injured soldier during the period claimed, namely, June 29, 1941, to November 9, 1941. This will not include any maintenance already covered by the hospital account but will include any amount paid to the soldier after his discharge from hospital and before his return to duty for maintenance or its equivalent, as distinct from maintenance of dependents. For the purpose of ascertaining the proper amount to be awarded under this head I would refer the proceedings to the court below.

I would therefore allow the appeal to the extent indicated with costs in the court below. As success is divided there should be no costs in this court.

ESTEY J.:—The Attorney General of Canada asks damages for the loss of services of 2nd/Lt. MacDonald, a member of the armed services, during the period the latter was incapacitated and absent from duty because of an injury suffered June 29, 1941. On that date 2nd/Lt. MacDonald was injured when an automobile in which he was a passenger collided with an automobile driven by respondent Adams and owned by respondent Richardson.

The learned trial Judge in the Exchequer Court (1) found "the collision was caused solely by the negligence of the Defendant Adams." No exception is taken to this finding of fact nor is it questioned that as a result of the injury 2nd/Lt. MacDonald received medical and hospital treatment from appellant at a cost of $767, and the amount paid to him as pay during his incapacity in the sum of

(1) (1840) 11 A. & E. 301; 11 E. .R. 429.

(1) [1947] Ex. C.R. 55.

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$565.23, a total of $1,332.23. Judgment is asked for this total amount as damages in this an action *per quod servitium amisit.*

The learned trial Judge stated:

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.

and concluded:

* * * 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.

The learned trial Judge accordingly dismissed the action and this appeal is taken from his judgment.

The master's action for loss of services, technically known as *per quod servitium amisit,* is separate and distinct and in addition to that which the injured servant has against the same wrongdoer. It is, however, essential that the relationship of master and servant exists and that if for his injury the servant has no action for the recovery of damages, the master cannot recover: *Attorney General of Canada* v. *Jackson* (1).

There is no question but that 2nd/Lt. MacDonald had an action against both respondents for the injury he suffered as a consequence of respondent Adams' negligence.

In Canada, for the purpose of determining liability in actions by or against His Majesty, Parliament has enacted that a member of the military, naval or air forces shall be deemed to be a servant of the Crown. This was enacted by inserting section 50A into the *Exchequer Court Act* (1943 S. of C., c. 25, s. 1):

50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

In view of the contentions of respondents it is important to observe that the language of section 50A is wide and inclusive and enacted without qualification. Moreover, it was enacted in 1943 immediately after the decision in *McArthur* v. *The King* (2), holding that a member of the

(1) [1946] S.C.R. 489. (2) [1943] Ex. C.R. 77.

armed forces was not "an officer or servant of the Crown" within the meaning of section 19 (c) of the *Exchequer Court Act* (1927 R.S.C., c. 34).

Section 69 of The *Militia Act* (1927 R.S.C., c. 132) adopts "The Army Act for the time being in force in Great Britain" in so far as it is not inconsistent with its provisions or the regulations made thereunder. It may therefore be observed that in England in 1935 the Attorney General brought an action against a party whose negligent conduct injured two members of the Royal Air Force and recovered for hospitalization, service pay and rations: *Attorney General* v. *Valle-Jones* (1). That the action *per quod servitium amisit* was available to His Majesty at common law was not questioned in the *Valle-Jones* case.

The Parliament of Canada in enacting section 50A overruled the *McArthur* decision and in effect enacted the principle of the *Valle-Jones* decision. In the United States the *Valle-Jones* case was followed in *United States* v. *Standard Oil Co.* (2).

In *Commonwealth of Australia* v. *Quince* (3), the majority of the learned Judges of the High Court of Australia held the Crown could not recover under circumstances raising identical issues as in the case at bar and the *Valle-Jones* case. No such enactment as 50A obtained in Australia which determines in favour of the Crown the issues in Canada upon which the majority of the learned Judges in the *Quince* case decided the relation of master and servant did not exist between the Crown and members of the armed services.

The observation of Lord Sumner, quoted by the learned trial Judge, as well as his own observation above set out, that the nature and incidents of the service in the armed forces of his Majesty are different from that which obtains in the ordinary relationship of master and servant are well founded. Indeed, Parliament appears to have recognized that fact in providing that "for the purpose of determining liability" a member of the armed forces "shall be deemed" to be a servant of the Crown. It is this statutory provision which for the purpose specified creates the relationship and makes the action *per quod* available to his Majesty.

(1) [1935] 2 K.B. 209.
(2) (1945) 60 F. Supp. 807.
(3) (1944) 68 C.L.R 227.

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The respondents submit that even if the relationship of master and servant is established, as it is by the statute, the damages claimed are indirect and remote and therefore not recoverable. The two items of damages claimed are (1) medical and hospital treatment $767; (2) pay $565.23.

In support of their submission respondents quote Anglin, C.J. in *Regent Taxi & Transport Co.* v. *Congregation des Petits Frères de Marie* (1), where at p. 663 he states:

As to what is "indirect" damage not recoverable, see 43 Rev. Crit. de Leg. (1914), pp. 229 and seq. and S. 1911, 1,545. It is damage of which the fault (fait) of the defendant has been merely the occasion, not the cause.

The learned Chief Justice, with whom Mr. Justice Smith concurred, after making this statement with respect to indirect damages, was of the opinion, in that action under the Quebec Civil Code and similar in character to that at bar, that the plaintiff should recover damages covering medical treatment and attention as well as general damages for loss of services. The majority of the learned Judges under the facts of that case allowed only damages for medical care and attention. This judgment was upon other grounds reversed in the Privy Council (2).

The military authorities were under an obligation to provide medical care and hospitalization to 2nd/Lt. MacDonald. Invariably the cases have allowed for these disbursements where they have been incurred by the master, and I do not think it was suggested that if this action existed on behalf of the Crown that this item should not be allowed. In principle they are a direct consequence of the negligence of the respondent Adams, who should reimburse the master for his expenditure in providing same.

The appellant has supported his claim of $565.23 for loss of services by evidence only as to the fact of service, the injured officer's rank and the actual disbursements as pay made to him during his absence because of injury suffered.

In *Admiralty Commissioners* v. *S.S. Amerika* (1), His Majesty's submarine B 2 was sunk in Dover Strait by the negligence of the *"Amerika"* and all of the crew of the B 2 except one officer, were drowned. The Admiralty Com-

(1) [1929] S.C.R. 650.
(2) [1932] A.C. 295.

(1) [1917] A.C. 38.

missioners took action against the owners of the "*Amerika*" when the latter admitted negligence and agreed to pay 95 per cent of the damages as assessed. The items claimed by the Admiralty Commissioners included that of £5,140 being the capitalized amount of pensions and grants to the relatives of the men drowned. This item was disallowed. In the House of Lords all of the learned lords followed the rule of *Baker* v. *Bolton* (1), that in a civil court the death of a human being cannot be complained of as an injury and disallowed the item upon that basis. Lord Sumner, because it had been so argued, also dealt with the case as if the action had been brought by a master for the loss of a servant's services. At the outset he pointed out at p. 51 that:

> 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 * * *

At the conclusion of his judgment he stated at p. 61:

> In any case the contract would have been a contract with the deceased man, and the damages 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.

Lord Sumner is throughout dealing with the possibility of a claim for loss of service on the part of a master whose servant's death has been caused by the wrongful act of another. In such a case the contract for the personal services, and thereby the essential relationship of master and servant, has been terminated by the death of the servant, while in the case at bar the contract continues. This distinction was clearly expressed by Mr. Justice Gwynne in *Monaghan* v. *Horn* (2). His remarks were subsequently approved by Sir Gorell Barnes, P. in *Clark* v. *London General Omnibus Co. Ltd.* (3). Lord Sumner, after pointing out that the action *per quod servitium amisit* is an anomaly in the common law, continues to deal throughout

(1) (1808) 1 Camp. 493.
(2) (1882) 7 S.C.R. 409 at 460.
(3) (1906) 2 K.B. 648 at 662.

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his judgment with the possibility of damages being allowed to the master for loss of services after the event of the servant's death. He refers to *Monaghan* v. *Horn, supra,* and the explanation given by Mr. Justice Gwynne, and continues at p. 55:

> For my own part I think it is sound in this sense, that whether or not it be the theory on which those who introduced these causes of action would have justified them, as indeed we may be sure it is not, it at any rate provides, though somewhat imperfectly, an intelligible basis for the existing rule sufficient to prevent your Lordships from interfering with long-standing decisions on the plea that they are insensible or arbitrary.

The statements of Lord Sumner in the *"Amerika"*, when read in relation to the problem he was there discussing, do not negative the conclusion which appears to be justified by the authorities that the payment of wages to an injured servant is some evidence of the value of that servant's services to his master.

In *Flemington* v. *Smithers* (1), the father sued for loss of his son's services. Evidence was adduced to the effect that the son received one half the parcel money as wages from his father. Abbott, C.J., in summing up stated:

> * * * this action is brought to recover such sum as you (the Jury) may think the plaintiff entitled to for the loss of services of his son. You ought, therefore, if you find for the plaintiff, to find for such reasonable sum as to you appears proper for the loss the plaintiff has sustained in being deprived of the assistance of his son, and also the expense he must have been put to by his being out of his place, and also some small compensation for his mother going to visit him as she did.

Damages for loss of services were recovered in *Martinez* v. *Gerber* (2); *Attorney General* v. *Valle-Jones* (3); *United States* v. *Standard Oil Co.* (4). In these cases evidence was accepted as to the wages paid to the servant or a substitute, and in some, judgment was given for the amount paid. It is not suggested that the amount paid is to be accepted as equivalent to the value of the loss of services. It may or may not be. These authorities, however, do support what appears to be found in reason and principle, that in the ordinary case payment to the servant by way of remuneration is some evidence of the value of the

(1) (1826) 2 C. & P. 292; 172 E.R. 131.
(2) (1841) 3 M. & G. 87; 133 E.R. 1069.
(3) (1935) 2 K.B. 209.
(4) (1945) 60 F. Sup. 807.

services he rendered. The weight or effect of that evidence will vary and each case must be determined upon its own facts.

Moreover, in this case the evidence establishes that throughout the period in question 2nd/Lt. MacDonald was on active service and received his pay. Under The *Militia Act* the officer on active service receives rations, shelter, pay and allowances. He receives allowances for clothing and other items and his pay is intended to provide to the officer personal essentials and perquisites not otherwise provided. In other words, the Crown here asks reimbursement for a part of its maintenance cost during the period 2nd/Lt. MacDonald was absent from duty. Such appears to have been included as a proper item in determining loss of services and in my opinion should be allowed in this case.

The respondents submit that the appellant has no right of action, because any action that 2nd/Lt. MacDonald, as the injured servant had, was extinguished before this action was commenced by virtue of the provisions of section 60 (1) of the Ontario *Highway Traffic Act,* R.S.O. 1937, c. 288. They cite in support of this contention *Attorney General* v. *Jackson* (1). In that case the servant, by virtue of the statutory provisions, never did have a claim against the party who caused his injuries; while here the servant has an action but which, under the provisions of section 60 (1) of the Ontario *Highway Traffic Act,* he cannot maintain "after the expiration of twelve months from the time the damages were sustained." That provision does not bar the master's action. This distinction is particularly noted in the *Jackson* case, where it is stated at p. 493:

> The case of *Norton* v. *Jason* (1), cited by Mr. Varcoe, decides only that the bar of the Statute of Limitations against the servant cannot be raised against the master.

Moreover, this statutory provision enacted by the province does not specifically mention His Majesty and therefore would not be effective against His Majesty in the right of the province and much less against His Majesty in the right of the Dominion. The extinguish-

(1) [1946] S.C.R. 489.

(1) (1651) 82 E.R. 809.

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ment of 2nd/Lt. MacDonald's action by the provisions of section 60 (1), *supra,* is not a bar to this action brought on behalf of His Majesty.

The respondents submit that section 50A is not retroactive and not applicable to this action commenced prior to its enactment. This section specifically provides that "a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight" a member of the armed services "shall be deemed to have been at such time a servant of the Crown." The language clearly indicates that Parliament intended to establish the relationship retroactive as of June 24, 1938. It is as stated in Maxwell on Interpretation of Statutes, 9th ed., p. 230:

> Whenever the intention is clear that the Act should have a retrospective operation, it must unquestionably be so construed.

The clarity of the language makes such a construction necessary in this case. Parliament had amended section 19 (*c*) of the *Exchequer Court Act* in 1938, which had been assented to and become effective as of the 24th of June, 1938. As that amendment dealt with claims against the Crown arising out of death or injury to persons or property, it was apparently deemed desirable to make this amendment effective as of the same date.

The further contention that section 50A is applicable only in determining liability as between the Crown and the injured servant is not tenable. The express words of the section are "for the purpose of determining liability in any action or other proceeding by or against His Majesty * * *" These words do not restrict the application of the section to an action or proceeding between His Majesty and a member of the armed services, but is expressly made applicable to any action or proceeding by or against His Majesty.

This action was brought under section 30 (*d*) of the *Exchequer Court Act.* It was submitted on behalf of the respondents that under this section 30 (*d*) the Exchequer Court had no jurisdiction to entertain the action because as against both defendants it was founded upon the statutory provisions of the Ontario *Highway Traffic Act,* R.S.O. 1937, c. 288. Quite apart from the statutory pro-

visions, the finding of negligence on the part of respondent Adams was sufficient at common law to support the judgment against him. Then upon the facts of this case the judgment against respondent Richardson is also well founded in the common law. The evidence establishes that respondent Richardson owned and was riding in the automobile at the time of the accident; that he, himself had driven it from Montreal to Prescott; that his friend Adams and others accompanied him and Adams had driven from Prescott to the point of the accident. Adams was driving the automobile but Richardson's evidence indicates that he retained control in the sense that he had the authority to direct how it should be used or whether it should be used at all. His own evidence discloses that he was observing the course of the automobile. He deposed that as the appellant's automobile approached them he "figured there was enough clearance."

In *Samson* v. *Aitchison* (1), Lord Atkinson states that the learned trial Judge laid down with perfect accuracy the law upon this question in the following passage:

> 'I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shewn by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver, 'Do this,' or 'Don't do that.' The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver.'

Richardson had given the steering wheel to Adams but in all other respects he remained in possession and control of the automobile and, under all the circumstances as pleaded and contended by the appellant, must be held liable to the appellant. (See also *Pratt* v. *Patrick* (2)).

Neither can respondents' submission that section 50A should be read as an adjunct to section 19 (*c*) of the Exchequer Court Act be maintained. It seems obvious that section 50A must be read in relation to all of the sections of the Exchequer Court Act and, moreover, is

(1) [1912] A.C. 844 at 849. (2) [1924] 1 K.B. 488.

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applicable not only to actions brought in the Exchequer Court, but also to actions in other courts. *Attorney General* v. *Jackson* (2).

The appeal should be allowed and judgment entered in favour of the appellant (plaintiff) for medical and hospital treatment $767, and pay $565.23, or a total of $1,332.23, with costs throughout.

Appeal allowed with costs throughout.

Solicitor for the appellant, *Auguste Angers.*

Solicitors for the respondents, *Asselin, Crankshaw, Gingras & Trudel.*