ATTORNEY-GENERAL OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

LESLIE C. JACKSON (DEFENDANT) ..... RESPONDENT.

1945
*May 3, 4.
*Nov. 8.

1946
*Feb. 5, 6.
*Mar. 29.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Crown—Master and servant—Automobile—Collision—Member of Armed Services injured while riding as gratuitous passenger—Crown's disbursements for wages and medical and hospital services—Action by Crown to recover same from owner and driver of motor car—Civil wrong, actionable by servant, prerequisite to right of master to recover expenses—Application of section 50 A Exchequer Court Act to proceedings in provincial courts—Its constitutionality—Exchequer Court Act, section 50 A, enacted Dom. 1943-44, c. 25, s. 1—Motor Vehicle Act (N.B.) 1934, c. 20, s. 52.

One D., a soldier on active service in the Canadian Army, being on leave of absence, was travelling to his home as a guest passenger with the respondent in the latter's motor car. A collision occurred and D. was severely injured. The Crown (Dominion) disbursed a sum of $1,855.24 for wages paid and medical and hospital services furnished through its Army organization during the period of incapacitation. The Attorney-General of Canada brought suit in the Supreme Court of New Brunswick to recover that amount from the respondent. Section 50 A of the *Exchequer Court Act* (enacted 1943-44, c. 25, s. 1) establishes a master-servant relationship between the Crown (Dominion) and a Canadian serviceman. Section 52 of the *Motor Vehicle Act* (N.B. 1934, c. 20) negatives any right of action against the owner or driver of a motor car for loss or damage resulting from injury to, or death of, a gratuitous passenger. The action was dismissed by the trial judge, and that judgment was affirmed by the appellate court.

Held that the appeal to this Court should be dismissed. The Crown, while bearing under section 50 A the relation of master towards a serviceman, has no direct or specific right of recovery against a third person for expenses incurred through injury caused by the latter to the serviceman: such right depends on whether the serviceman himself has any right of action arising from the act of the third person. Hence, where D., being a gratuitous passenger in the respondent's automobile at the time of his injury, could bring no action against the respondent, neither can the Crown.

Held also that the provisions of section 50 A applied not only to actions brought in the Exchequer Court of Canada, but also to proceedings brought in any provincial court.

Per Kellock J.:—The constitutional validity of section 50 A may be supported under section 91 (7) of the B.N.A. Act.

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

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APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division (1), affirming the judgment of the trial judge, Le Blanc J. and dismissing an action by the Crown (Dominion) to recover from the respondent, on the ground that he was a negligent driver of a motor car, amount of moneys paid to and on account of a Canadian serviceman injured while riding as a passenger.

F. P. Varcoe K.C. and *W. R. Jackett* for the appellant.

R. H. Allen, for the respondent at the hearing of the appeal.

A. B. Gilbert K.C. for the respondent at the re-hearing ordered by the Court.

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

RAND J.:—This action arises out of injuries to a member of the Canadian Army in New Brunswick. The soldier, named Dunham, was on leave and was travelling to his home as a guest passenger with the respondent in the latter's auto. A collision occurred and the injuries resulted.

The claim is for wages paid and medical and hospital services furnished by the Crown through its Army organization during the period of incapacitation. It is based on negligence in the respondent, the relation of master and servant between the Crown and the serviceman, and the rule enabling a master to recover damages against one who negligently or wilfully injures his servant. This relation is put first as actual and alternatively as constructive by virtue of s. 50A of the *Exchequer Court Act,* enacted by c. 25, s. 1, of the statute of Canada 1943-44, 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.

The *Motor Vehicle Act* of New Brunswick, c. 20 of the statutes of 1934, has negatived any right of action of the serviceman against the respondent by s. 52, in the following language:

(1) (1945) 18 M.P.R. 138; [1945] 2 D.L.R. 438.

52(1) Notwithstanding anything contained in Section 48, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for hire or gain, shall not be liable for any loss or damage resulting from bodily injury to or death of any person being carried in or upon or entering or getting on or alighting from such motor vehicle.

The Supreme Court of that province has held that the relation was not that of master and servant in fact and that s. 50A of the *Exchequer Court Act,* being included—as was assumed—in a group of sections headed "Rules for Adjudicating upon Claims," applied only to actions brought in that court.

I do not find it necessary to decide the first of these questions. As to the second, it may be remarked that the amendment is embodied in an Act which contains nothing to indicate inclusion within the fasciculus mentioned; one could just as easily place it under the heading which immediately precedes s. 51 of the *Exchequer Court Act,* "Effect of payment on judgment". Its matter is foreign to rules for computing damages and its terms and purposes are clear. It might have been enacted as a separate statute and in that case it could hardly be contended that its wide provision did not apply to such a proceeding as the present: and I see no difference in the form which has been given to it.

But while the Crown, under the amendment, bears the relation of master toward the serviceman, the fact that the latter has no right of action arising from the act of the respondent puts, I think, an end to the controversy. The rule by which the master claims against a third person is an exception to the broad principle that one party to a contract cannot complain of negligence toward a co-contractor that interferes with the latter's performance of the contract: *Cattle* v. *Stockton Waterworks Co.* (1). It applies whether the servant is at the time acting for the master or is engaged in his own affairs. There is no suggestion in the early cases that damages in loss of wages and medical and hospital expenses where those were actually suffered or incurred could not be recovered by the servant, and such claims are a commonplace today. Nor is it suggested that the master's right is independent of conduct or action by the servant which defeats the claim on his own part. What English

(1) (1875) L.R. 10 Q.B. 453.

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authority there is tends to the contrary: *Williams* v. *Holland* (1); *Chaplin* v. *Hawes* (2). In *Alton* v. *Midland R. Co.* (3), Willes J. uses this language which is not within the criticism that has been made of the judgment in that case:

> It must be admitted by the defendants that a long series of authorities has established that a master may sue for loss of services caused by a pure wrong, a trespass, to his servant, as by beating him. *On the other hand, it is indisputable that no such action has ever been sustained in a case in which the injury to the servant was not actionable in respect of the civil wrong,* but only in respect of a duty arising out of and founded upon a contract with the servant.

Although it is the contrast between a civil wrong and the breach of a contractual duty that is being pointed here, nevertheless a civil wrong actionable by the servant seems to be indicated as a prerequisite to the right of the master. In *Admiralty Commissioners* v. *S.S. Amerika* (4) Lord Sumner says:

> They are two separate causes of action in two different persons in respect of the same act.

The act here, in relation to the servant, is not in law culpable and unless we import into the right given to the master the conception of an independent duty running to him in addition to the duty to the servant—an introduction which, in view of our ignorance of the principle underlying the rule and the comparative modernity of the concept of duty in negligence, I think wholly unwarranted—we must conclude that it is the quality of the act vis-à-vis the servant which determines its significance for purpose of liability to the master. The notion of an act at once innocent and culpable would here be an innovation whatever the theory behind the liability; and I should say that if there is no wrong to the servant the act is innocuous toward the master.

This qualification of the rule has been applied in Ontario where the claim was asserted by a parent for injury to his child, a right based on the same theory of deprivation of service: *McKittrick* v. *Byers* (5). The United States authorities are uniform in the same view: Beach on Contributory Negligence, 3rd ed., p. 189. In these cases

(1) (1833) 172 E.R. 1129.
(2) (1828) 172 E.R. 543.
(3) (1865) 19 C.B. (N.S.) 213.
(4) [1917] A.C. 38, at 55.
(5) [1926] 1 D.L.R. 342.

the cause of action of the master was held to be dependent upon a right in the servant and to be defeated by the contributory negligence of the latter.

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. The case was of parent and child and there was no question of the existence of a cause of action in the daughter; but the fact that the point is raised would seem rather to assume the necessity of a right in the servant to support that of the master.

The *injuria* to the master is, then, a loss of service arising from an act which is an actionable wrong against the servant: and its effect is to permit the master to recover damages to a large extent the same as those in a proper case recoverable by the servant.

This view is indirectly supported by the reasoning in *Attorney-General* v. *Valle-Jones* (2), where it is said that if the wages and expenses had not been paid by the Crown they could have been recovered from the defendant by the injured serviceman. Conversely, if not recoverable directly by the servant, the law should not be circumvented through indirect but substantial recovery by the master.

As Dunham, then, could bring no action against the respondent, neither can the Crown. The amendment, s. 50A, 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. The fact that jurisdiction over the civil right of the servant affects what might otherwise be a right in the Dominion Crown is immaterial. The Crown's right is of the same nature as that of a private person: it can arise here only from a wrong to the servant over which the jurisdiction of the province is exclusive.

Mr. Varcoe advanced the further contention that in any event the act of Jackson was a wrong against the Crown within the principle of *Donoghue* v. *Stevenson* (3). There it was held by the House of Lords that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by the members

(1) (1651) 82 E.R. 809.
(2) [1935] 2 K.B. 209.
(3) [1932] A.C. 562.

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of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. Obviously the act of the manufacturer is specifically directed towards the consumer. If there were no consumer there would be no act, and it was not difficult to hold that, since a failure to observe care in that act might reasonably result in injury to the consumer, a duty toward the consumer to use care arose. But in the act with which we are dealing, only Dunham was in contemplation of the respondent. Conveying him to his home was a matter of fact to which the Crown was a stranger. Duty is annexed to prudent foresight of consequences in matter of fact and although we perhaps cannot say that a legal circumstance can never be a link in that fact, to apply the principle here would be to charge a person with a prevision of contractual relations with third parties, which *Cattle* v. *Stockton Waterworks* (1) decided cannot be done.

The claim thus failing because of a fatal defect in the cause of action, I do not find it necessary to consider the interesting constitutional questions bearing upon the legislative fields of the Dominion and the Province that were so thoroughly canvassed on the re-argument.

I would dismiss the appeal with costs.

KELLOCK J.:—This is an appeal by the plaintiff in an action brought in the Supreme Court of New Brunswick, King's Bench Division, for damages alleged to have been sustained by the Crown arising out of an injury to one Dunham, a member of the Veterans' Guard of Canada, on the 31st of October, 1940, the damages claimed being payments made by the Crown while Dunham was incapacitated. This soldier, a passenger in a motor vehicle owned and driven by the respondent, was injured when it came into collision with another motor vehicle occasioned, as it was alleged, by the negligence of the respondent. The trial judge found the respondent guilty of negligence, and this finding has not been interfered with by the Appeal Division. The trial judge, however, dismissed the action on the ground that the order in council under which payments had been made by the Crown had not been proven. The Appeal Division (2) did not proceed upon this ground but on the

(1) (1875) L.R. 10 Q.B. 453. (2) [1945] 2 D.L.R. 438.

ground that the action did not lie. Baxter C.J., who delivered the judgment of the Court, held that the relationship of master and servant, essential for the maintenance of such an action, did not obtain as between Dunham and the Crown. It was held also that s. 50A of the *Exchequer Court Act,* enacted by c. 25 of the statutes of Canada 1943-44, is not applicable to an action in a provincial court, and that in any event the claim was barred by virtue of s. 52 of the New Brunswick *Motor Vehicle Act,* c. 20 of the 1934 statutes, Dunham being a gratuitous passenger in the respondent's car at the time of the accident.

On this appeal the Crown contends that:

(1) the relationship of master and servant as between Dunham and the Crown did subsist at common law and that the point is now, in any event, concluded by s. 50A of the *Exchequer Court Act;*

(2) that section is not limited to proceedings in the Exchequer Court of Canada;

(3) section 52 of the *Motor Vehicle Act* does not affect the right of action of the appellant;

(4) the damages were properly proven.

It will be convenient to examine the second ground of appeal.

Sections 47 to 50A, inclusive, of R.S.C. 1927, c. 34, entitled "An Act Respecting the Exchequer Court of Canada", constitute a fasciculus of sections under the heading "Rules for Adjudicating upon Claims". Section 50A was no doubt passed, partly at least, as a result of the decision of the Exchequer Court of Canada in *McArthur* v. *The King* (1). That was the case of an action against the Crown under s. 19 (*c*) of the Act but the new section is made to apply to an action by, as well as against, His Majesty. The judgment below proceeds upon the footing that this group of sections is governed by the above heading and is confined to claims in the Exchequer Court of Canada.

Where the language of a section is ambiguous, the title and the headings of the statute in which it is found may be resorted to to restrain or extend its meaning as best suits the intention of the statute, but neither the title nor the

(1) [1943] Ex. C.R. 77.

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headings may be used to control the meaning of enacting words in themselves clear and unambiguous: *The "Cairnbahn"* (1); *Fletcher* v. *Birkenhead Corporation* (2).

Section 50A taken by itself is not ambiguous. I think it is not to be applied only to proceedings in the Exchequer Court of Canada. It is not expressly limited as are ss. 47, 48 and 50. Section 49 is not limited in terms and there appears to be no reason why its terms should not apply to the subject-matter of proceedings taken by the Crown in a provincial court.

Section 50A does not depend for its constitutional validity, in my opinion, upon s. 101 of the *British North America Act*. It may be supported under s. 91(7). In *Grand Trunk Railway Co.* v. *Attorney General of Canada* (3), Lord Dunedin at p. 68 said:

> It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation.

This principle applies equally to the present question, namely, the relationship between a soldier and the Crown. I assume that there is no other question which would render the provisions of the section inapplicable at the time of the occurrence here in question to the relations between Dunham and the Crown.

Coming to the third question, s. 52 of the *Motor Vehicle Act* reads as follows:

> 52(1) Notwithstanding anything contained in Section 48, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for hire or gain, shall not be liable for any loss or damage resulting from bodily injury to or death of any person being carried in or upon or entering or getting on or alighting from such motor vehicle.

Mr. Varcoe contends that the cause of action arising in favour of a master who loses the services of his servant through injury to the servant caused by the wrongful act of a third person is independent of any cause of action which may enure to the servant himself. He argues that an act, causing loss to the master through injury to the servant, may be wrongful *quo ad* the master and therefore actionable, even although, by reason of the existence of a

(1) [1914] P. 25, at 30 and 38.
(2) [1907] 1 K.B. 205, at 214 and 218.
(3) [1907] A.C. 65.

statutory provision which disentitles the servant to sue but which does not affect the quality of the act, the servant himself has no remedy. Put another way, he says that if the injury to the servant is "justifiable", neither the master nor the servant has any cause of action but a provision which merely bars proceedings by the servant does not affect the cause of action vested in the master. He submits that the statutory provision here in question is of the latter character and does not purport to affect the quality of the act.

Mr. Varcoe referred to the judgment of Lord Blackburn in *Darley Main Colliery Co.* v. *Mitchell* (1) where in referring to the action "per quod" he said at p. 142:

* * * but no amount of damage would give the master an action if the beating were justifiable.

Mr. Varcoe argues that "justifiable" is to be interpreted as "innocent" (*Machado* v. *Fontes* (2)) and as by reason of s. 37 of the *Motor Vehicle Act* negligence in the operation of a motor vehicle on a highway is made the subject of a penalty, the conduct of the respondent is not innocent.

It is important to keep in mind that the cause of action here in question is an anomalous one, having arisen at a time when the relationship of master and servant was based on status and that it is illogical in a society based on contractual obligation: *per* Lord Parker in *The "Amerika"*, (3) at p. 45 and *per* Lord Sumner in the same case at pp. 54 and 60. In the words of Lord Sumner at 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.

The cause of action, therefore, is not to be extended beyond limits already marked out, however logical it might be to do so.

A convenient statement of the action *per quod* is to be found in Blackburn and George on Torts, 1944 ed., p. 181, namely:

If A deprives B of his servant's services by a *tort* committed against the servant, B may sue A. In such a case B must prove (i) that A's actions are a tort against the servant; (ii) that B has thereby lost his servant's services.

(1) (1886) 11 App. Cas. 127.
(2) [1897] 2 Q.B. 231.
(3) [1917] A.C. 38.

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Accordingly, if the defendant's conduct does not constitute a *tort against the servant,* the master has no cause of action.

The provisions of sub-section (1) of section 52 of the Act eliminate any duty to take care civilly as between persons in the relative positions of the respondent and Dunham. That being so there is no negligence on the part of the respondent. There is therefore no *tort* which Dunham can rely on and there is no authority to which we have been referred or which I have been able to find establishing a right on the part of a master to sue in such circumstances. The fact that the respondent's conduct may render him liable to a penalty is not enough.

The action for seduction referred to by Lord Sumner in the case last cited (3) as the most artificial aspect of the action *per quod* is again itself anomalous in that the woman has no right of action: Salmond on Torts, 10th ed., pp. 356 and 361. In the case of a parent and child however, the parent's right to sue for damages for injury to the child was always affected at common law by contributory negligence on the part of the child: *Blais* v. *Yachuk* (1); *Hall* v. *Hollander* (2); *Williams* v. *Holland* (3); *McKittrick* v. *Byers* (4). I can find no authority showing that in the case of a true master and servant relation, the result was not the same. Unless therefore there be a wrong of which the servant can complain, with the single exception of seduction, referred to above, the master has no cause of action and in the case at bar there is no such wrong.

It is not necessary to deal with the other points argued. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitors for the respondent: *Allen & Allen.*

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(1) [1946] S.C.R. 1, at 18.
(2) (1825) 4 B. & C. 660.
(3) (1833) 6 Car. & P. 23.
(4) (1926) 58 O.L.R. 158.