
1946

May 6, 7, & 8.

Oct. 2.

BETWEEN:

WILLIAM BRAUN .....SUPPLIANT;

AND

HIS MAJESTY THE KING, ...RESPONDENT.

Crown—Petition of Right—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)—Collision at intersection—Within the scope of duties or employment—Servant's frolic—Re-entry on master's business.

Suppliant seeks to recover damages from the Crown for injuries suffered as a result of a collision at an intersection between a bicycle on which he was riding and a truck owned by the Crown and driven by a member of the military forces of His Majesty in the right of Canada. The driver of the truck was instructed to take garbage from the Trade School to a dump and return. The instruction did not define or fix the route to be followed. After leaving the dump instead of returning to the Trade School he drove in the opposite direction to a

(1) (1944) Ex. C.R. 1 at 12.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

brewer's warehouse where some empty beer bottles were turned in and the refund divided among the members of the party. On the return journey to the Trade School the collision occurred. The Court found the sole cause of the collision was the negligence of the driver of the truck and held the Crown responsible for such negligence.

Held: That while the servant started on the respondent's business he deviated from the course on some business of his own and he did something so contrary to and inconsistent with the respondent's business that it had no connection with it and the servant was then on a frolic of his own.

2. That at the time of the collision the servant's frolic had ended and he had again entered upon the respondent's business. *Merritt* v. *Hepenstal* (1895) 25 S.C.R. 150; *West and West* v. *Macdonald's Consolidated Ltd. and Malcolm* (1931) 2 W.W.R. 657; *Battistoni* v. *Thomas* (1932) S.C.R. 144.

PETITION OF RIGHT by the suppliant seeking damages against the Crown for injuries suffered by himself due to the alleged negligent operation of a motor vehicle owned by the Crown and driven by a member of His Majesty's military forces.

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

O. M. Walsh, K.C. and *Donald O. Cannon* for suppliant.

E. D. Hickey and *W. E. Green* for respondent.

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

O'CONNOR J., now (October 2, 1946) delivered the following judgment:

In this Petition of Right the Suppliant claims damages from the Respondent in the respect of injuries suffered by the Suppliant as a result of a collision between a bicycle on which the Suppliant was riding and a truck owned by the Crown, and driven by a servant of the Crown.

The Suppliant in order to succeed against the Respondent must bring his claim within the ambit of paragraph (*c*) section 19 of the Exchequer Court Act as amended, reading as follows:—

Every claim against the Crown arising out of any death or injury to the person or property resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

The collision occurred about 3 p.m., on the first day of June, 1944, at the south-east corner of Sherman Avenue and Biggar Avenue, in the City of Hamilton, in the Province of Ontario. Immediately before the collision the Suppliant was riding on his bicycle parallel with and a few feet westerly from the easterly curb of Sherman Avenue in a northerly direction on Sherman Avenue. The truck driven by Tidey was also travelling north on Sherman Avenue. As the Suppliant reached the intersection of the southerly side of Biggar Avenue with the easterly side of Sherman Avenue, and the truck had overtaken and partly passed the Suppliant, the truck turned to the right into Biggar Avenue. The collision occurred at the south-east corner of the intersection of the two streets. The body of the truck struck the Suppliant, and he was dragged or carried approximately 15 feet on Biggar Avenue.

Tidey's evidence was that when the truck was 125 feet back from the corner, Munro had told him to turn to the right. Both Tidey and Munro swore that the turn was a normal one. The turn was described by Mrs. Dagg and Mrs. Kennedy, witnesses for the Suppliant, who were standing at the north-east corner, as "a very quick turn", and "the truck turned fast as if on an impulse—as if the driver had made up his mind late". Based on the evidence of Mrs. Dagg and Mrs. Kennedy, which I accept and the evidence of the Suppliant as to how the collision occurred, which I also accept, I find that the truck overtook and partly passed the Suppliant as both the truck and the Suppliant reached the intersection, and that the truck turned suddenly to the right. The result, of course, was that while the front of the truck cut across ahead of the Suppliant, the right side of the body of the truck struck the Suppliant. I do not accept the evidence of Tidey as to how the accident occurred. I find that the collision was caused solely by the negligence of the driver Tidey.

The real question in this case is whether the servant, Tidey, was at the time of the collision acting within the scope of his duties or employment.

Tidey was a member of the military forces of the Respondent, and situated at the Trade School at the City of Hamiliton. He qualified as a driver of trucks in August, 1943, and at the time in question was employed as a driver.

1946

WILLIAM BRAUN v. THE KING.

O'Connor J.

On the morning of the first of June he was given a work ticket, which set out the work which he was to do for the day. This work ticket, together with all the other work tickets issued during that month, was destroyed at the end of the month, in accordance with the usual practice of the Trade School.

Private Tidey's evidence as to his instructions (which I accept) was as follows:—That he was to drive a truck from the Trade School and pick up a garbage fatigue party and to drive them around the camp while they collected the garbage and then to take the wet garbage to the dump, (which lies north-west of the Trade School) and then on to take the dry garbage to the incinerator (which in turn lies north-west of the dump) and then to return to the Trade School. The instructions did not define or fix the route which he was to take.

He started out and picked up the garbage detail, consisting of three privates. He drove the detail around the camp while they collected garbage. He then drove the truck to the dump and then to the incinerator, and then back to the camp (Trade School).

After dinner this work was resumed. They drove around the camp picking up the remainder of the garbage and then drove to the dump and then to the incinerator. A number of empty beer bottles had been collected in the garbage that day. The same detail of men, other than the driver, had been collecting garbage on preceding days, and had accumulated a number of empty beer bottles which they had stored in a wagon covered by a tarpaulin. The beer bottles which had been accumulated, and the beer bottles collected on the day in question, were put on the truck. After the truck left the incinerator, marked "I" in blue on Exhibit 1 (a map of the City of Hamilton) the truck proceeded south-west down Plymouth Street to the intersections of Plymouth and Burlington Streets and Gage Avenue. From this point the truck to return to the Trade School (marked "X" on Exhibit 1) could proceed either east on Burlington Street, then south on Kenilworth Avenue and thence east a short distance to the Trade School, or it could have proceeded south on Gage Avenue to Beach Road, and thence easterly on Beach Road to Kenilworth Avenue, and thence east to the Trade School.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

Instead of taking either of these alternative routes, the driver drove the truck directly west on Burlington Street to Sherman Avenue, and thence south on Sherman Avenue to the intersection of Princess Street where a brewery warehouse was located, (marked with a red dot surrounded by a blue circle on Exhibit 1). Privates Heath and Munro, two of the men on the detail, took the bottles into the warehouse and obtained a refund of $3.00, and this sum was divided among the three members of the garbage detail, and the driver of the truck—each receiving 75c. The driver, Tidey, swore that he knew nothing about the beer bottles being on the truck, or the purpose in driving the truck to the brewery warehouse, and that he drove the truck to the brewery warehouse because Private Reece told him to do so. He stated that he was surprised when Privates Heath and Munro came out of the warehouse and handed him 75c. Again I do not accept his evidence. He knew what his orders were, and he stated that he knew that when they were in front of the brewery warehouse, they were, what he termed, "out of bounds".

After leaving the brewery warehouse Tidey drove the truck west to First Street for the purpose of turning around, and then came back to Sherman Avenue and on entering Sherman Avenue, turned north with the intention and for the purpose of returning to the Trade School. Tidey intended to drive straight north on Sherman Avenue to Burlington Street, and then east on Burlington Street, and this would have taken him back to the corner of Plymouth and Burlington Streets.

On reaching Biggar Avenue, Private Munro, who was sitting beside him told him to turn east on Biggar Avenue, which he did and the collision occurred at that intersection. Munro stated that from the intersection of Sherman Avenue and Biggar Avenue, the shortest and the most direct route to the Trade School was east on Biggar. An examination of the map, Exhibit 1, shows that this is so.

It is quite clear, therefore, from the evidence that the turn east on to Biggar Avenue was made for the purpose of taking the shortest and the most direct route back to the Trade School.

The Respondent contends that Tidey was on a frolic of his own at the time of the collision, and was not then acting within the scope of his duties or employment.

The master is responsible for the consequences of his servant's negligent act while the servant is on his master's business. It is quite clear that when the servant does not start upon his master's business and is in no way in the course of following it, the master is not liable. *Storey* v. *Ashton* (1).

In this case the servant started on the Respondent's business but deviated from the course on some business of his own. Deviations or detours are always a question of degree, but here Tidey in turning west to go to the brewery warehouse in order to obtain a refund on the empty beer bottles, did something so contrary to and so inconsistent with the Respondent's business that it had no connection with it whatever. I hold that Tidey was then on a frolic of his own.

The difficulty, however, in this case is the same difficulty expressed by Lamont, J., in *Battistoni* v. *Thomas* (2):—

> The difficulty, however, is to determine when the master's employment has ended and the servant's frolic has begun, or, as in this case, to determine when the servant's frolic ended and he again entered upon his master's business.

In this case the work for the day was over and all that remained to be done was to return the truck to the Trade School. The route from the incinerator to the Trade School had not been defined or fixed. Tidey could, therefore, return on the route he had taken before, or any other alternative route.

The question is whether or not Tidey can be said to have re-entered upon the Respondent's business before he reached a point on any of the alternative routes between the incinerator and the Trade School.

This question of when the servant's frolic ended and when he again entered upon his master's business has been discussed in a number of cases.

In *Merritt* v. *Hepenstal* (3):—Gorman, a tradesman's teamster, sent out to deliver parcels went home to his supper before completing the delivery. After supper he

(1) (1869) L.R. 4 Q.B. 476.
(2) (1932) S.C.R. 144 at 147.
(3) (1895) 25 S.C.R. 150.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

started out to finish his work and on the way ran over a child. The Supreme Court of Canada affirmed the decision of the Supreme Court of New Brunswick, that from the moment Gorman started to complete the business in which he had been engaged, he was in his master's employ just as if he had returned to the master's store and made a fresh start. The Chief Justice, Sir Henry Strong, at page 153 said:—

> Another point argued was that Gorman was not in the employ of the defendant when the accident happened. That he was in such employ at the time, there can, in our opinion, be no doubt. *Whatman* v. *Pearson*, (1868) L.R. 3 C.P. 422, was a stronger case than the one before us and I do not think the learned counsel has been successful in his attempt to distinguish it from the present. Although Gorman had for a time abandoned his master's business, he had resumed it when he started out to deliver the remaining parcel just as much as if he had returned to the store and made a fresh start.

In *Battistoni* v. *Thomas* (*supra*), the truck driver was employed to deliver a load of milk from his home on a farm *south* of the City of Vancouver to a dairy in the *southern part* of the City and then to return from the dairy to his home. After he had unloaded the milk at the dairy, instead of going south and returning to the farm, he drove north into the City to the Dominion Hotel, picked up a companion and then drove for a number of hours in Vancouver and eventually drove out to the home of one Smith. Not finding Smith at home he drove his companion back to the Dominion Hotel with the intention of then proceeding back to the farm. The Plaintiff contended that from the time he left the Smith home he was on his master's business, because he was then proceeding with the intention of returning to the farm, and that the drive to the Dominion Hotel was merely a deviation *en route*. The Supreme Court of Canada, affirming the judgment of the Court of Appeal of the Province of British Columbia, held that the servant's frolic did not end until he reached the Dominion Hotel. Lamont, J., in delivering the unanimous judgment of the Court, at page 148 said:—

> In our opinion this frolic cannot be said to have ended until they returned to the Dominion Hotel from whence they started.

It is quite clear from the judgment that the frolic ended at the Dominion Hotel and at that point the driver again entered upon the master's business. Therefore, to re-enter

1946

WILLIAM BRAUN
v.
THE KING

O'Connor J.

upon the service of the master, it was not necessary for the driver to go south to the dairy, or to reach a point on the route between the dairy and the farm.

Once the driver started to return home from the Dominion Hotel, although he was still some distance north of the dairy and also north of the route between the dairy and the farm, he was then on his master's business.

In *West and West* v. *Macdonald's Consolidated Limited and Malcolm* (1), the truck driver completed his deliveries and drove to his home for lunch. He then went to a service station where he made certain repairs to the truck, in accordance with his instructions and with his usual practice, and then he drove home in the truck to his supper. After supper he should have driven the truck to the garage and left it there for the night. He started out to do this, but with the intention before putting it away in the garage of calling for a lady friend. He then drove with his friend as a passenger, from her place of residence to the garage and *en route* the accident happened. Ford, J., after reviewing the decisions in the deviation cases, held that the driver was at all time on his master's business and that this was a mere detour or deviation that would not relieve the master of liability. He also held that, if the action of the driver in going to call for his lady friend was an independent journey or a frolic of his own, the driver had re-entered upon the work he was employed to perform when he started back to the garage by the shortest route from the home of his friend.

It is clear from the *Merritt* v. *Hepenstal* (*supra*) case, that it was not necessary for the servant to either go back to the store or to get back to a point on the route from which he had departed on his own business, and from *Battistoni* v. *Thomas* (*supra*), that it was not necessary for the driver to go back to the dairy, or to reach any point on the route between the dairy and the farm. In *West and West* v. *Macdonald's Consolidated Limited and Malcolm* (*supra*), it was not necessary for the driver to go back to his home, or to the service station, or to reach a point on the route between the garage and his home.

I find that Tidey turned abruptly east at the intersection of Sherman and Biggar Avenues with the intention and

(1) (1931) 2 W.W.R., 657.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

for the purpose of taking the truck back to the Trade School by the shortest and most direct route, and was engaged in so doing at the time of the collision. I come to the conclusion that while Tidey had for a time abandoned the Respondent's business, he had at the time of the collision, re-entered upon the work he was to perform, and that he was then acting within the scope of his duties or employment.

There remains only the question of quantum of damages.

The Suppliant suffered severe injuries. He was in hospital for three months, and then was at home for approximately two and one-half months.

He was very badly burned on an area of one and one-half square feet on his thighs, and during the time he was in hospital he underwent two major operations for skin grafting during which time one and one-half square feet of skin was taken from his abdomen and grafted to the burned area.

Prior to the collision he was employed as a watchman or guard at one of the plants and he has been able to resume that occupation. He suffered shock and the medical evidence of both the Suppliant and the Respondent showed that immediately prior to the trial of this action he was still suffering from a lack of confidence. While the result of the skin grafting operations was described as nearly perfect, the evidence showed that the grafted skin was not as good as the normal skin, but was much more subject to chafing and infection. The compound fracture of the lower end of the tibia, involving the joint of the ankle, was successfully joined and there will be no permanent disability from this.

Prior to the collision the Suppliant had some kidney trouble, and during his period in hospital it was necessary to remove this kidney. It may well be that either from a blow during the collision or from the burns received, or from lying in bed so long, this condition was aggravated to the extent that necessitated the removal of the kidney.

The medical evidence, however, before me leaves me in doubt as to this and as the onus is on the Suppliant, he had not discharged it.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

I award the Suppliant general damages in the sum of $3,000.00. The Suppliant has also proved special damages in the sum of $1,720.16 for hospital, medical expenses and for the loss of wages for twenty-five weeks, and is entitled to receive this amount. The Suppliant is also entitled to costs.

Judgment accordingly.