BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

THE MONTREAL TRANSPORTATION COMMISSION .....DEFENDANT.

1954
Nov. 24 & 25
1955
Feb. 25

Crown—Action to recover damages—Negligence—Civil Code of Quebec, Articles 1053, 1054 and 1056—Collision between R.C.A.F. ambulance and tramcar—Medical and hospital expenses incurred by the Crown on behalf of a serviceman—Pay and allowances paid by the Crown to serviceman during his incapacity—Right to recover under Article 1053 c.c.—Article 1056 c.c. limits right of action under Article 1053 to a certain category of persons under specified situations and conditions.

An R.C.A.F. ambulance while transporting one S., an airman, to a military hospital came into collision, at the corner of Bordeaux and Ontario streets in Montreal, with a tramcar owned by the defendant and

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operated by its employee. Alleging negligence on the part of defendant's employee the Crown, under Articles 1053 and 1054 of the Civil Code of Quebec, seeks to recover the loss of its ambulance; the medical and hospital expenses incurred on behalf of the injured serviceman; and the pay and allowances which it continued to give him during his incapacity. One of the defences is that the language of Article 1056 c.c. restricts the right of recovery under Article 1053 to the person bodily injured by the wrongful act of a third party. On the facts the Court found that both drivers were equally negligent and fixed their share of responsibility at fifty per cent.

Held: That the R.C.A.F. ambulance was an emergency vehicle within the meaning of By-law No. 1319 of the City of Montreal, para. 36: "Fire department apparatus, police patrol wagons, hospital ambulances and all authorized vehicles on their way to save life or prevent property loss."

2. That the words used in Article 1053 c.c. are not ambiguous and should not be given a meaning other than their ordinary meaning. The rule of legal construction applicable to all writings should be applied.

3. That Article 1053 c.c. gives a general right of action to all persons sustaining damage through the wrongful act of another person capable of discerning right from wrong. *Regent Taxi and Transport Co.* v. *Congrégation des Petits Frères de Marie* [1929] S.C.R. 650. Article 1056 c.c. does not give a general right; it limits the right of action under Article 1053 to a certain category of persons under specified situations and conditions. Thus persons entitled to a claim for damages under Article 1053 are *not* deprived of this right by Article 1056 when they are not related to the person fatally injured.

INFORMATION exhibited by the Deputy Attorney General of Canada to recover damages under Articles 1053 and 1054 of the Civil Code of Quebec.

The action was tried before the Honourable Mr. Justice Fournier at Montreal.

Jacques Vadboncoeur, Q.C. for plaintiff.

G. R. W. Owen, Q.C. and *A. S. Hyndman* for defendant.

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

FOURNIER J. now (February 25, 1955) delivered the following judgment:

This is an information exhibited by the plaintiff seeking damages from the defendant for loss sustained by the Crown as the result of a collision between an ambulance, the property of the plaintiff, driven by J. M. G. Nadeau, a member of the Royal Canadian Air Force, while acting within the

scope of his duties, and a tramcar owned by the defendant and operated by Gérard Latour, its employee, in the performance of the work for which he was employed.

The plaintiff alleges that the collision was due solely to the fault, negligence, imprudence and carelessness of the defendant's employee. The damages caused to the Crown as a result of the collision are the following: (*a*) the loss of its ambulance; (*b*) the expenses to which it was put for medical and hospital services to a member of its armed forces; (*c*) the loss of his services during a certain period.

The defendant denies responsibility for the collision and alleges that it was caused by the fault and negligence of the plaintiff's employee. Furthermore that the plaintiff has no right of action against the defendant to claim the cost of hospitalization and doctors nor the amount of pay and allowances paid to the airman V. Stang, who was injured as a result of the collision, because these damages are too remote and are not a direct consequence of the accident.

I will first consider the circumstances and facts of the case and then determine the question of responsibility, to wit, who was guilty of the fault or negligence which brought about the collision.

The accident took place on October 19, 1949, at about 7 p.m., at the intersection of Bordeaux and Ontario streets, in the city of Montreal. The plaintiff's ambulance was proceeding from south to north on Bordeaux street and the defendant's tramcar was travelling from west to east on Ontario street. At the point of the intersection, that part of Bordeaux street which is south of Ontario street is sixty-four feet six inches in width and that part of the same street north of Ontario street is thirty-one feet seven inches wide and is a one-way street. Ontario street at the same point has a width of thirty-six feet six inches. The centre line of Bordeaux street south is in line with the east side of the pavement of Bordeaux street north. On Exhibit B appears a "Stop" sign in the centre of Bordeaux street at the intersection, but at the time of the collision the "Stop" sign was on the southeast corner of Bordeaux street. The actual point of the collision was a short distance north of the centre of the intersection. The ambulance had practically crossed the tramcar tracks prior to being struck by the tramcar. The latter hit the rear left side of the ambulance and

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toppled it over on the north sidewalk of Ontario street near the northeast corner of Bordeaux street. The impact damaged the ambulance to such an extent that it was impracticable to have it repaired. A passenger in the ambulance, Victor Stang, a member of the Royal Canadian Air Force, was seriously injured in the accident. These facts are supported by uncontradicted evidence.

The evidence for the plaintiff shows that early in the evening on the day of the collision Victor Stang was a passenger on a motorcycle operated by another air force man, when it skidded on a street in St. Lambert. He fell to the pavement, was knocked unconscious and, according to Dr. Flint's testimony, suffered injuries. An ambulance of the Air Force stationed at St. Hubert was called to drive the victim to Queen Mary Hospital in Montreal. When the ambulance arrived, the victim, still unconscious or in a dazed condition, was placed in the ambulance on a stretcher. The ambulance crossed Jacques Cartier Bridge and proceeded on Bordeaux street in a northerly direction at a speed of 35 to 40 miles an hour. All the lights were on and specially the red cross light on the front top of the vehicle. The driver and a companion seated with him stated that the siren was being sounded continuously while on the bridge and Bordeaux street up to the moment of the impact. This statement is supported by witness Bergeron who was a passenger in the tramcar, by witness Lagacé who was standing on the corner at his taxi stand and, to a certain degree, by three other witnesses. As he approached the intersection he brought his speed down to 10 or 15 miles an hour. He is corroborated on this point by other witnesses. He looked to his left but he did not see the tramcar; he then looked to his right and saw some automobiles stopped on the east side of Ontario street to let him pass. He proceeded, without stopping, to cross the intersection. As he passed the safety zone, he veered a little to his left to continue on Bordeaux street north and most of the ambulance was across the tramcar tracks when it was struck on its rear left fender. It was thrown over and fell on its right side on the sidewalk on the northeast corner of the intersection.

The driver had been called to drive to the hospital an air force man who had been in an accident. Though he was not told about the condition of this party, he saw that he

was unconscious or dazed and thought it was an emergency case. That is why he did not stop at the intersection.

The principal witness for the defendant was Gérard Latour, who was operating the tramcar at the time of the accident. He had stopped at the corner of Dorion street and then continued on to its next stop at the corner of Delorimier street. There is no stop at Bordeaux street. He was driving at about twenty miles an hour. This seems to have been the speed; most of the witnesses mentioned this figure. He thought he heard the sound of a siren in the distance, but he is not sure he heard it. As he reached the intersection, he saw, at a distance of 100 to 120 feet, the ambulance proceeding north on Bordeaux street at a speed of about 45 miles an hour. He applied his brakes and put the tramcar in reverse. As he reached the centre of the intersection, the ambulance tried to pass in front of the tramcar, veering slightly to the left. The ambulance was at a partial left angle when the tramcar struck its rear left side. Very little damage was done to the tramcar. He states that the driver of the ambulance did not slow down at the intersection, but maintained or increased his speed to pass in front of the tramcar. When he was asked directly if he had sounded his bell, he answered yes. When I inquired why he had not stated this fact in his evidence, he said this is done automatically and he had forgot to mention it.

He knew this intersection very well. He was always careful when he reached this point, because many strangers travel north from Jacques Cartier bridge on Bordeaux street.

Mr. Claude Danis, who was standing behind the motorman in the tramcar, says that it was being driven at about 20 miles an hour. Just before the intersection he heard the sounding of a siren, he looked to his left, saw, at a distance of 60 to 75 feet, the ambulance, with all its lights on, proceeding at 40 to 50 miles an hour. The tramcar continued at its same speed and the motorman applied his brakes at the very last moment preceding the collision. The tramcar stopped before having crossed the length of the intersection.

When the tramcar had stopped at the corner of Dorion street, a taxi was at its rear. The driver, Gabriel Falcon, tried to pass it on its run from Dorion street to Bordeaux

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street. He was driving his taxi at 15 to 20 miles an hour on the right side of the tramcar, at a distance of 10 to 15 feet from the car's front door. He saw the ambulance near the safety zone and heard its siren. He heard the crash and turned to his right on Bordeaux street.

This résumé of the evidence deals with the most important facts brought before the Court as to how the collision happened.

I am satisfied that the intersection where the collision took place is a dangerous spot on account of the dense traffic and the large number of strangers following this route to reach their destination in Montreal and that the motorman was well aware of this fact.

Knowing this, he nevertheless operated the tramcar at a speed of 20 miles an hour at this intersection, which in my view is excessive and unreasonable under the circumstances, even if he had the right of way. I am also convinced that he heard the sounding of the siren. His testimony on this point is revealing: "J'ai cru entendre la sirène au loin, mais je ne le crois pas." If he thought he heard the siren his first duty was to slow down to a speed at which he could have stopped within a short distance, should he be faced with an emergency. Most of the witnesses stated that they heard the siren at one time or another, even those who were passengers in the tramcar.

I am also satisfied that he put on his brakes only at the last moment. One witness (Bergeron) said that the brakes were not applied at all and another witness (Danis) said they were applied just before the impact.

As to the ringing of his bell, nobody heard it and he himself forgot to mention it till he was pressed by a direct reminder.

On the other hand, I am of the opinion that the ambulance was an emergency vehicle within the meaning of by-law 1319 of the City of Montreal. Paragraph 36 of said by-law is thus worded:

> 36. Fire Department apparatus, police patrol wagons, hospital ambulances and all authorized vehicles on their way to save life or prevent property loss.

This ambulance was used by the Royal Canadian Air Force to take care of such cases as accidents to members of its personnel. They are on call for the meeting of emergency and the transportation of the victims to civilian or Veterans' Affairs hospitals. In the present instance, the call for the services of this ambulance was made at the request of Dr. Flint who had examined Victor Stang. The driver received the order to proceed to the place of the accident and drive the victim to the hospital. As a matter of fact, ambulances are seldom called for minor cases; they are called when a person in authority thinks it is necessary. This driver, who is an experienced man, saw the condition of Stang and made up his mind that it was an emergency case. This is not surprising seeing he had just received a hurried call to drive this airman to the hospital. I cannot see on what grounds I could rule that this ambulance was not an emergency vehicle within the meaning of the aforesaid by-law.

Having decided this point, it follows therefore that he was not obligated to stop before crossing Ontario street or to give right of way to the tramcar. He had the right of way and could pass on stop signs. But this did not relieve him of the ordinary duty to take care. It remains consequently to determine whether he did act at all times in a careful manner.

He knew this intersection and also knew that Bordeaux street, north of Ontario street, was not in line with the south part of Bordeaux street on which he was driving. He had to turn left to continue north. Notwithstanding this knowledge, in my opinion, he did not decrease his speed before arriving at the intersection, which he should have done. Furthermore, he first looked to his left and did not see the tramcar coming. This is understandable, because his view, at the moment he looked, was blocked by the buildings. He then looked to his right and saw that the traffic had stopped to give him right of way. He should have looked again to his left then he would have seen the tramcar coming, would have slowed down and would have perhaps avoided the collision.

Both drivers, in my opinion at one time or another were imprudent and careless. The motorman by driving at an excessive speed at a dangerous intersection after hearing the

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sound of a siren, by applying his brakes only at the last moment and by not sounding his bell prior to or when reaching the intersection. The driver of the ambulance should have exercised a better lookout and slowed down before the intersection. In other words, though the drivers of these two vehicles were not bound to the usual traffic rules, they were not relieved from the ordinary duty to take care and they failed to use the care a prudent person would have used under similar circumstances.

I am, therefore, of the view that there was "faute commune" and that the two drivers are equally to blame for the collision; I deem it fair and reasonable to fix their share of responsibility at fifty per cent each.

Having arrived at this conclusion, the question to be determined is whether the plaintiff is entitled to recover the damages claimed. These damages come under three headings: the loss of its ambulance, the reimbursement of the monies paid for medical and hospitalization services for L.A.C. Victor Stang and the reimbursement of the pay and allowances paid to him during the period he was incapacitated and under treatment.

The question of the damages to the ambulance does not present any difficulty. The ambulance was damaged as a result of the collision. The collision was due partly to the fault and negligence of the defendant's employee. To the extent of its responsibility, the defendant is liable for the damages caused.

Robert W. Huson, W.O. in charge of the mobile equipment section at St. Hubert in October and November 1949, who examined the ambulance after the collision, declared that it was beyond economical repair. The estimated value of the ambulance was $836 prior to the event. The witness estimated the salvage worth at about $400, which would leave the loss sustained by the Crown at $436 plus $71 for the towing of the ambulance back to the section and for the cost of bringing an interim and permanent replacement. This would make a total of $507 for the loss of the ambulance.

In the collision, attributable to a certain degree to the fault and negligence of the defendant's employee, airman Victor Stang, who was being transported in the plaintiff's

ambulance, sustained serious injury. His injuries necessitated hospitalization and medical treatment. As a consequence, he was, during a certain period, unable to perform his duties as a member of the armed forces of Canada. For the hospital and medical services required the plaintiff had to pay a sum of $6,865.30 and had also to pay to Victor Stang during his period of disability a sum of $4,070.43 for pay and allowances.

The defendant alleges that the plaintiff is not entitled to recover the amount claimed for hospital and medical expenses, nor the amount claimed in connection with the incapacity of Stang for the loss of his services, because the damages are too remote and are not a direct consequence of the collision. Furthermore, it is alleged that there is no "lien de droit" between the plaintiff and the defendant and that, even if a right of action existed, it was prescribed and time-barred.

As to the allegation of prescription, section 32 of the Exchequer Court Act, R.S.C. 1927, chap. 34, in my opinion disposes of the matter. It reads as follows:

32. The laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province.

At the hearing, counsel for the defendant admitted that the law of prescription applies to proceedings against the Crown, but not to proceedings of the Crown against the subject, and that the defendant's allegation of prescription was unfounded in law.

Now there remains the question whether the plaintiff had a right of action to claim damages from the defendant for the loss sustained by the Crown owing to the expenses to which it was put and to its having been deprived of the services of a member of the Canadian Air Force.

The plaintiff's claim is based on Articles 1053 and 1054 of the Civil Code of the Province of Quebec. These articles, in French and in English, read thus:

1053. Toute personne capable de discerner le bien du mal est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par son imprudence, négligence ou inhabilité.

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Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

1054. Elle est responsable non seulement du dommage qu'elle cause par sa faute, mais encore de celui causé par la faute des personnes sous son contrôle.

He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control.

It having been admitted and established that the drivers of the two vehicles were employees of the parties and were acting within the scope of their respective duties at the time of the collision, Article 1054 need not be dealt with.

The terms of Article 1053 are very clear and sweeping. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another (others, mankind, etc.), or, in French, "autrui", which word is defined in every dictionary that I have consulted by the words "les autres—le prochain". In ordinary language it is understood that the word "another" means "everybody—anybody"; and, according to the rules of interpretation, the words that present no ambiguity should be given their ordinary and generally admitted meaning. The same applies to the principle of fault or tort: he who is guilty of fault causing damage to another is responsible of the consequences. The principle enunciated in this article is the basis of the civil law of delicts and quasi-delicts. The article makes every person guilty of the fault responsible and gives a right of action to the victims of the damage resulting from the wrongful act. To deny the right of action, some other article of the Code must have the effect of restricting the terms of Article 1053. Unless these terms are otherwise restricted they should be adhered to.

In my mind the words of the article are not ambiguous and should not be given a meaning other than their ordinary meaning. The rule of legal construction applicable to all writings should be applied. In *Beal's Cardinal Rules of Legal Interpretation,* 3rd ed., p. 80, *in fine,* it is said.

> . . ., the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.

This rule has received constant application. As aforesaid, standing alone the words of Article 1053 give a right of action to every person who suffers injury directly attributable to the fault of another.

The same principle is dealt with in a similar manner in *Traité de Droit civil du Québec par André Nadeau,* vol. 8, p. 547:

635. *Sens du mot 'autrui' de cet article.* La détermination des personnes à qui appartient une action en indemnité à la suite d'un accident mortel est faite expressément à l'art. 1056 C. civ. (v. supra, nos 568 et 594 et s.). Dans les autres cas, il faut s'en rapporter au texte de l'art. 1053 qui, dans sa très grande généralité, décrète une responsabilité pour tout dommage fautivement causé à "autrui". Quel peut bien être le sens de ce mot? A le prendre dans son sens ordinaire,—et on ne voit pas bien pourquoi on le prendrait dans un autre sens,—le mot "autrui" désigne toute personne lésée par la faute. Il devrait donc y avoir en principe autant d'indemnités distinctes qu'il y a de personnes lésées. C'est déjà ce qu'enseignait Langelier en 1903, sans aucune hésitation.

La Cour suprême, dans l'aff. *Regent Taxi,* a décidé, par un jugement majoritaire que l'art. 1053 C. civ. confère un droit d'action à toute personne directement lésée par la faute d'un tiers et qu'on ne saurait limiter le droit à une réparation à la "victime immédiate" de la faute, c'est-à-dire à "la partie, contre qui le délit ou le quasi-délit a été commis."

De la sorte, on se trouvait à juger que l'art. 1056 ne pouvait justifier une interprétation étroite de l'art. 1053, cet art. 1056 ne couvrant spécifiquement que le cas où la victime décède en conséquence de la faute, avec les dommages qui en résultent pour les personnes mentionnées.

But in this case as in the case of *Regent Taxi & Transport Company* v. *Congrégation des Petits Frères de Marie* (1) it is contended that the right of action under Art. 1053 C.C. should be restricted to the person bodily injured by the wrongful act of the defendant. It is argued that this restriction would be the logical result of having Art. 1056 in the Civil Code:

1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

.....

In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.

In support of the contention that Articles 1053 and 1056 of the Civil Code should be read together, the case of *Quebec Railway Light Heat & Power Co.* v. *Vandry* (2)

(1) [1929] S.C.R. 650. (2) [1920] A.C. 662.

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was quoted, wherein the following rule of interpretation was laid down (see the headnote, p. 663):

> The Civil Code of Quebec should be interpreted in the first instance solely according to the words used, the Code, or at least cognate articles, being read as a whole forming a complete scheme. It is only if the meaning is not plain that light should be sought from exterior sources, such as decisions in Quebec earlier than the code, or the exposition of similar articles of the Code Napoléon.

Taking for granted that the two articles are to be read together, it is argued that Article 1056 C.C. applies not only to the cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, but read with Article 1053 C.C. it applies to all cases of responsibility in matters of bodily injuries. From the above it is concluded that the right of action in Article 1056 being clearly limited to the consort, ascendant and descendant relations of the person bodily injured, the same meaning should be given to the terms of Article 1053.

In my view, Article 1053 of the Civil Code gives a general right of action to all persons who have sustained damage when the damage was caused by the wrongful act of another person capable of discerning right from wrong. To enforce this right of action a liability is imposed on the responsible party. Article 1056 does not give a general right of action; it limits this right to the consort or ascendant or descendant relations of an injured person, by the commission of an offence or quasi-offence, who dies in consequence without having obtained indemnity or satisfaction. The death of the injured person gives birth to this right of action to a limited category of persons. The effect of this article is to limit the right of action under Article 1053 C.C. when the injured person dies. Were it to exclude from Article 1053 all cases of liability for bodily injury except to the immediate victim, it would in as clear and explicit words as used in Article 1053 state that such was the law. I am of the opinion that a general right of action as plainly expressed as that provided for in Article 1053 C.C. cannot be restricted by the mere creation of a special right to a certain category of persons under specified situations and conditions. I believe Article 1056 C.C. has the effect of depriving persons not related to the deceased of a right to claim damages arising out of injuries causing death to which they would have been otherwise entitled.

The leading case to which reference was made before the Court is *Regent Taxi & Transport Company* v. *Congrégation des Petits Frères de Marie* (*supra*).

In that case the plaintiff, a religious community, sued the defendant to recover damages sustained by the community as the result of one of its members being injured while travelling in an omnibus belonging to the defendant. The action was brought more than a year later, but within two years. The claim consisted of a certain amount for expenses incurred by the community in medical and hospital care, an amount for clothing and an amount for damages due to the loss of services of the injured brother. The responsibility for the accident having been established, the trial judge assessed the plaintiff's damages at $4,000, of which $2,236.90 was allowed for out-of-pocket expenses and the balance on account of the claim for other damages. This decision was affirmed by the Court of Appeal.

It was held by the Supreme Court of Canada (affirming in part the decision of the Court of King's Bench (1)) that:

> The respondent (plaintiff) has a right of action against the appellant (defendant) but that it is entitled to recover only the sum of $2,236.90 for the expenses incurred by it as a result of the injuries sustained by the member of the community (Mignault and Rinfret JJ. dissenting).

It was also held (Mignault and Rinfret JJ. dissenting) that:

> The plaintiff was within the purview of the word "another" ("autrui") as used in article 1053 C.C., and therefore entitled to maintain this action. Article 1053 C.C. confers on every person, who suffers injury directly attributable to the fault of a third person as its legal cause, the right to recover from the latter the damages sustained. The suggestion that the right of recovery under that article should be restricted to the "immediate victim" of the tort involves a departure from the golden rule of legal interpretation (Beal. Legal Interpretation, 3rd ed., p. 80) by refusing to the word "another" ("autrui") in article 1053 C.C. its ordinary meaning; and such interpretation would be highly dangerous and would result in the rejection of meritorious claims. Moreover, it is not necessary so to restrict the scope of article 1053 C.C. in order to give full operation to the terms of article 1056 C.C., as nothing in this latter article suggests an intent to narrow the scope of article 1053 C.C., save "where the person injured . . . dies in consequence" and the claim is for "damages occasioned by such death."

It was further held that the action was not prescribed.

This case went to the Privy Council and the appeal was allowed solely on the grounds that the action was prescribed.

(1) (1928) Q.O.R. 46 K.B. 96.

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Reference was also made to two other cases: *Le Procureur Général du Canada* v. *La Cité de Hull,* 1948, No. 8337, Superior Court, District of Hull, and *The King* v. *Richardson and Adams* (1).

The facts in the former case are as follows: A constable of the defendant corporation had by wrongful act injured a member of the armed forces of Canada who was hospitalized, was treated for his injuries and was paid his pay and allowance during his absence on acount of illness. The Crown claimed the amounts paid for medical and hospital services and for pay and allowance. The learned trial judge (Honourable Duranleau) having found the defendant responsible for the damages claimed, proceeded to award the amount claimed by the plaintiff.

The same year, in the latter case, which is similar to the preceding one, the Supreme Court of Canada reversed the judgment rendered by O'Connor J. (Exchequer Court of Canada). The trial judge had dismissed the information 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 headnote in the Supreme Court reports reads in part thus:

> An action *per quod* is properly brought by the Crown in the Exchequer Court under section 30 (*d*) of the Exchequer Court Act. It is entitled to recover the medical and hospital expenses incurred on behalf of the injured serviceman and (Kellock J. dissenting) the pay which the Crown continued to give the serviceman during his incapacity. Such pay, being merely one item in the total of pay, allowance and maintenance, to which the serviceman is entitled, is evidence of the value of his services of which the Crown has been deprived.

This decision was referred to and followed in *The King* v. *Lightheart* (2). In that case the President held that when the Crown has lost the services of a member of its armed forces it may bring an action *per quod servitium amisit* in the same way as any other master and that the amount of pay to which the member of the armed forces is entitled is evidence of the value of his services.

(1) [1948] S.C.R. 57. (2) [1952] Ex. C.R. 12.

In his comments he also stated that it is a settled practice of this Court that the plaintiff who succeeds in an action for damages based on negligence is entitled to his costs irrespective of the fact that his claim may have been reduced by reason of concurrent negligence on his part.

In my view, these decisions and the rules therein enunciated should apply to this action, wherein the Crown seeks relief for the loss sustained owing to the expense to which it was put and to having been deprived of the services of one of the members of its armed forces. The loss thus sustained resulted in part from the fault and negligence of the defendant's employee while performing the work for which he was employed.

Having found that there was "faute commune ou contributoire" and having fixed the responsibility at fifty per cent for each party, I now find that the plaintiff is entitled to recover half of the damages, the amount of which was established at the trial.

It is impossible to measure the value of the services of the injured airman, but I believe that the amount of pay he received during his incapacity, pursuant to the pay and allowance regulations, is evidence of his services. I find that the sum of $4,070.43, being the amount of pay and allowance he received, is well established. It is also in evidence that the Crown paid $6,865.30 for hospital and medical services. The damage to the ambulance was $436 plus $71 disbursed to replace the demolished vehicle. These amounts add up to a total of $11,442.73.

In the result there will be judgment in favour of the plaintiff for fifty per cent of his claim, established at $11,442.73, namely, $5,721.37.

There will, therefore, be judgment that the plaintiff is entitled to recover the sum of $5,721.37 and costs, to be taxed in the usual way.

Judgment accordingly.
