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May 18

BETWEEN:

HIS MAJESTY THE KING, on the Information of the Deputy Attorney General of Canada .... PLAINTIFF;

AND

WILFRED LIGHTHEART ....DEFENDANT.

Crown—Negligence—Negligence Act, R.S.O. 1937, c. 115—The Highway Traffic Act, R.S.O. 1937, c. 288, ss. 39(15), 60(1)—Action for damages for injury to Crown's motor vehicle and for loss of services of member of reserve army due to negligence of defendant—Concurrent negligence of servant of Crown—Crown action not barred by Provincial Act.

The action was brought to recover damages for loss and injury sustained by the Crown as the result of a collision between a motor vehicle owned and driven by the defendant and a motor vehicle owned by the Crown and driven in the course of duty by a member of the armed forces of Canada. The Crown's vehicle was damaged

and a member of the reserve army was seriously injured, involving loss of his services and pay and allowances, hospitalization and medical expenses.

Held: That the defendant was negligent in driving his car on the highway in the dark without lights.

2. That the servant of the Crown was negligent in attempting to pass the vehicle in front of him without making sure that the road ahead of him was free from on-coming traffic.

3. That the Crown is able to take advantage of the Negligence Act of Ontario. *Toronto Transportation Commission* v. *The King* (1949) S.C.R. 510 followed.

4. 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. *The King* v. *Richardson* (1948) S.C.R. 57 followed.

5. That it is impossible to measure the value of the loss of services of a soldier of a reserve unit differently from those of a soldier of the regular army.

6. That the Crown's claim was not barred by section 60(1) of The Highway Traffic Act of Ontario.

INFORMATION to recover damages for loss and injury due to negligence of the defendant.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Guelph.

J. McNab and *S. Samuels* for plaintiff.

C. Grant K.C. for defendant.

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

On the conclusion of the trial (May 18, 1951) the President delivered the following judgment:

This action is for damages for loss and injury sustained by His Majesty as the result of a collision between a motor vehicle owned and driven by the defendant and a motor vehicle owned by His Majesty and driven in the course of duty by Sergeant-Major Harold Joseph Keating, a member of the armed forces of Canada.

The collision occurred a few miles south of the Town of Arthur in Ontario at about 7.30 p.m. on October 16, 1949. His Majesty's vehicle was one of two army jeeps that formed part of a convoy of army vehicles of the 11th Field Battery of the Royal Canadian Artillery, a reserve

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unit of the Canadian Army, that was travelling south on provincial highway No. 6 on its way back to its headquarters at Guelph after a fire practice field exercise at Meaford. The defendant's car was proceeding north. Sergeant-Major Keating was one of two dispatch riders whose duty was to patrol the convoy to see that the vehicles kept at the proper distance of approximately 100 feet from one another and to control traffic at intersections so that the convoy might safely cross. The convoy had stopped a few miles north of Arthur and the vehicles in it were ordered to turn on their lights as it was getting dark. After it had started again and passed through Arthur, Sergeant-Major Keating, who was then at the rear of the convoy, was proceeding in stages towards the front to be ready to control east and west traffic at the next cross-road. He had just pulled out from behind one of the vehicles in the convoy in order to pass vehicles in front of it when his jeep was struck by the defendant's car that had come from the south and was travelling north. The jeep was damaged and Warrant Officer Joseph Bernard Lamont, who was riding in it with Sergeant-Major Keating, was seriously injured involving loss of his services and pay and allowances, hospitalization and medical expenses.

The Crown's claim is for damages for the cost of repairing the army jeep, amounting to $313.95, loss of the services of Warrant Officer Lamont during the period of his incapacitation for which he was paid pay and allowances of $774.04 and his hospitalization and medical expenses amounting to $332.50, making a total of $1,420.49.

The plaintiff's claim is based on negligence on the part of the defendant, several particulars of which are alleged in the statement of claim. It is necessary to deal only with the allegations that are supported by the evidence. The most important allegation of negligence is that at the time of the accident and immediately prior thereto the defendant was driving without lights, although it was dark and after dusk. I am satisfied from the evidence as a whole that this allegation is well founded and I so find. The defendant said that his lights were on, that he had stopped at Alma for gas and had turned his lights on there, that they were in good shape, that when he saw the convoy he dimmed his lights but did not put them out

and that they were both on immediately prior to the collision but that after the collision he had turned them off. Russell O'Neil, who was in the front seat of the defendant's car beside him, gave evidence to the same effect. I do not accept these statements but prefer the evidence on this point given by the witnesses for the plaintiff. Officer Cadet Vernon H. Porter, who was in charge of the lead vehicle of the convoy, said that he saw a car approaching from the south. It was then 200 feet away. He dimmed the lights of his vehicle and the lights of the approaching car went out. They were out as the car passed his vehicle. It was dark at the time and impossible to see ahead without lights. Mr. Porter's evidence is confirmed by other witnesses. Warrant Officer Lamont, who was sitting in the jeep beside Sergeant-Major Keating, got a glimpse of the defendant's car just before it struck the jeep and he was positive that its head lights were out. Sergeant-Major Keating stated that he pulled out from behind one of the vehicles in the convoy to proceed to the front and that when he had straightened out he saw a car coming directly in front of him with no lights on. It was then about 30 or 40 feet away and he swung his jeep sharply to the left in order to try to avoid it. He was certain that the oncoming car had no lights on and said that if its lights had been on he would have seen it and would not have attempted to pass the vehicles in the convoy that were ahead of him. After the collision Sergeant-Major Keating questioned the defendant why he did not have his lights on and the defendant asserted that they were on, whereas they were not. I have no hesitation in preferring the evidence of Sergeant-Major Keating that the lights on the defendant's car were out to that of the defendant that they were on. There is confirmation of Sergeant-Major Keating's evidence in the statements of Sergeant-Major Jack Radcliffe. He went to the defendant's car after the collision and saw that its lights were out. He asked the defendant why he was driving without lights and the defendant said that they were on but they were not. Sergeant-Major Radcliffe then reached into the car and turned on the light switch. The lights then went on except the right front light which had been broken in the collision. There is, in my opinion, no doubt that the

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defendant was driving his car in the dark without any lights and that this was the main cause of the collision and its resultant damage.

Under these circumstances it is not necessary to deal at any length with the other allegations of negligence. It was said that the defendant was not in a fit condition to drive a car by reason of the consumption of an excessive amount of alcohol. Sergeant-Major Keating said that after the defendant got out of his car he smelt liquor on his breath, and Sergeant-Major Radcliffe went even further. He said that the defendant was drunk. His evidence was that the defendant smelt of liquor, that his speech was thick and that he staggered when he was talking to him. There were full and empty bottles of beer in the car. As further evidence of the defendant's condition, Sergeant-Major Radcliffe referred to the defendant's insistence that his lights were on when they were off and said that he did not believe that the defendant realized what had happened; he kept laughing as if it were a great joke. I am not required to find whether the defendant was drunk or not. There is no doubt that he had been drinking earlier in the day, and probably he drank more than he said he did. It may well be that this affected his judgment and that when he first saw the convoy he put his lights out instead of dimming them, but, whatever may have been the cause, the fact is that he was driving his car on the highway in the dark without lights. This was negligent.

While I have no hesitation in finding negligence on his part, I have had more difficulty in determining whether there was concurrent negligence on the part of Sergeant-Major Keating, but I have come to the conclusion that he was not wholly free from blame. His evidence was that after the convoy had passed the junction of highways No. 6 and No. 9 he fell in behind the last vehicle in the convoy and then proceeded towards its head gradually passing the vehicles ahead of him. He had got about half way up the convoy when he had to pull in between two vehicles in it to let two north-bound vehicles pass. He then pulled out from behind one of the vehicles to proceed to the front and when his jeep had straightened out on the highway and he had travelled about 22 feet alongside the vehicle from behind which he had pulled out he

saw the oncoming car about 30 or 40 feet ahead of him and dangerously close. It appeared to be travelling towards the centre of the road and the vehicle beside which he was travelling. He then swung his jeep sharply. to the left in order to avoid a collision. He was so close to the vehicle on his right that he had only the alternatives of a head-on collision or a sharp swerve to his left. While he was making this swerve the right front fender of the defendant's car struck the right rear wheel of the jeep and swung it half-way around so that when it came to a stop it was on the shoulder east of the pavement and pointing south with all four wheels off the pavement. The defendant's car came to a stop 50 to 75 feet farther north. It was also all off the pavement and facing north.

While there is no doubt that Sergeant-Major Keating did all that was possible to avoid the collision once that it was imminent it is also clear from his cross-examination that all the vehicles in the convoy ahead of him had their bright lights on and would, to that extent, light up the road ahead. The vehicles were travelling about 100 feet or 100 yards apart and the lights would show up about 150 to 200 feet. Section 39(15) of The Highway Traffic Act of Ontario, R.S.O. 1937, Chap. 288, provides:

39. (15) No person in charge of a vehicle shall pass, or attempt to pass, another vehicle going in the same direction on a highway, unless and until the travelled portion of the highway in front of, and to the left of the vehicle to be passed is safely free from approaching traffic.

Under all the circumstances, I have come to the conclusion that Sergeant-Major Keating did not satisfy this requirement of the law. He was, I think, too close to the vehicle ahead of him and made too sharp a turn to pull out from behind it. This did not give him the chance which he should have had of making sure that the portion of the highway in front of and to the left of the vehicles he was intending to pass was safely free from approaching traffic. If he had been farther behind and had started to pull out at a less sharp angle he would, I think, with the aid of the lights of the convoy vehicles ahead of him have been able to see the oncoming car even without its lights sooner than he did and could then have pulled back in safety behind the vehicle from which he had pulled out. This view is supported by the evidence of the defendant that the jeep was 10 or 15 feet behind one of the vehicles

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when it turned out on the highway. The defendant said that he then swung to his left to avoid hitting the jeep since he could not turn to his right because the jeep had swerved to its left. Russell O'Neill confirmed this evidence. He said that the defendant's car was about 60 feet away when the jeep pulled out from the vehicle in front of it. It was about 15 feet behind that vehicle. I, therefore, find that Sergeant-Major Keating failed to make sure that the road ahead of him was free from oncoming traffic.

On the evidence I find that the defendant was 75 per cent to blame for the collision and Sergeant-Major Keating 25 per cent.

It is established by the judgment of the Supreme Court of Canada in *Toronto Transportation Commission* v. *The King* (1) that the Crown is able to take advantage of the Negligence Act of Ontario, R.S.O. 1937, Chap. 115, and that it should, therefore, be entitled to the percentage of damage found by the Court to be attributable to the other party. I, therefore, find that the plaintiff is entitled to 75 per cent of the proved damages.

There is no dispute as to the damage to the jeep. The cost of repairing it was proved by Warrant Officer John E. Kerr to amount to $313.95.

It is also established that the Crown paid Warrant Officer Lamont the sum of $774.04 by way of pay and allowances during the period of his incapacitation. This amount was paid pursuant to the pay and allowance regulations applicable to members of reserve units. Counsel for the defendant sought to draw a distinction between the services of a member of a reserve unit and those of the members of the regular army, but I am unable to draw any such distinction. It is established by the judgment of the Supreme Court of Canada in *The King* v. *Richardson* (2) 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, although he cannot bring an action for it, is evidence of the value of his services. This was the view of Kerwin J., speaking also for Taschereau J. Rand J., in a characteristic judgment, recognized that it

(1) (1949) S.C.R. 510. (2) (1948) S.C.R. 57.

was impossible to measure in monetary units the value of national liberty or the maintenance of social order and well being. He could 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 entitled should not be measured by the remuneration. The reasons for judgment of Estey J. support this view. Counsel for the defendant sought to establish that there was a difference between members of the regular army and members of reserve units but I am unable to see any such difference in principle. It is, in my judgment, impossible to measure the value of the loss of services of a soldier of a reserve unit differently from those of a soldier of the regular army, and I find the claim of $774.04 for loss of services, being the amount of pay and allowances paid, is well established.

The Crown also claims the sum of $332.50 for hospitalization and medical expenses. This amount, although not proved by counsel for the plaintiff, was generously and properly admitted by counsel for the defendant.

It was alleged in the statement of defence that the plaintiff's claim was barred by reason of Section 60(1) of The Highway Traffic Act, R.S.O. 1937, Chap. 288. This was not argued by counsel for the defendant. The contention is not allowed by the judgment of the Supreme Court of Canada in *The King* v. *Richardson* (*supra*).

In the result there will be judgment in favour of the plaintiff for 75 per cent of the plaintiff's claim, established at $1,420.49, amounting to $1,062.48.

It is settled by the 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 the part of the defendant or his servant.

There will, therefore, be judgment for the plaintiff for $1,062.48 and costs to be taxed in the usual way.

Judgment accordingly.