1964

June 8, 9, 10, 11, 12, 15, 16

Dec. 9

BETWEEN:

GEORGE LAHAM ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown—Petition of Right—Motor vehicle collision—Negligence—Apportionment of liability—Excessive speed—Failure to keep proper lookout—Motor vehicle on left side of highway center line—Removal of stop sign shortly before date of collision—Assessment of damages—Compensation for expense of operating suppliant's business during his incapacity—Damages for pain and suffering, inconvenience and loss of enjoyment of life—Damages for permanent incapacity—Apportionment of costs—Quebec Highway Code, S. of Q. 1959-60, c. 67, s. 41(1).

This action arises out of a collision between a motor vehicle owned and operated by the suppliant and one owned by the respondent and operated by one Robert Monier, a constable of the R.C.M.P. The collision occurred at about 8:00 p.m. on June 4, 1961 in the Province of Quebec at the intersection of Highway 11, running north and south between Hull and Masham Village and a section of Highway 11 leading to Wakefield, Quebec. The suppliant, who had been proceeding southwesterly on the Wakefield spur of Highway 11, had entered its intersection with the main section of Highway 11 without coming to a stop and had just turned to his left to proceed in a southerly direction toward Hull when his motor vehicle collided head-on with that of the respondent which had been proceeding northerly on the said main section of Highway 11 on its left side of the double white line marking the center line of the said Highway.

The evidence established that immediately prior to the collision both motor vehicles were travelling at about forty miles per hour, that there had been a stop sign so situated as to require vehicles approaching the main section Highway 11 along the Wakefield spur thereof to come to a stop before entering the intersection, that the operator of the respondent's motor vehicle had seen the sign many times before and had seen it in position on May 28 or 29, 1961, and that the sign was not there at the time of the collision but was replaced two or three weeks later.

In addition to claiming damages for the loss of his motor vehicle, the suppliant also claimed damages for personal injury, loss of personal effects, medical and hospital expenses and loss of income during his period of disability and expense incurred in paying his brother to manage and operate his restaurant business during his disability.

The respondent counterclaimed for damages for loss of her motor vehicle.

Held: That the suppliant was negligent in not looking to his left before entering the intersection and in not reducing his speed before doing so.

2. That the operator of the respondent's motor vehicle was negligent in driving his motor vehicle on the left side of the double white center line of the highway and for continuing to do so even after noticing the suppliant's omission to slow down on approaching the intersection.

3. That the responsibility for the collision is assessed as two-thirds against the respondent and one-third against the suppliant.

4. That the remuneration of $175 per week claimed to have been paid by the suppliant to his brother for managing the suppliant's restaurant during his period of disability is excessive and an amount of $100 per week for the period of twenty-three weeks will be allowed.

5. That compensation for pain and suffering, inconvenience and loss of enjoyment of life during the period of total incapacity and convalescence is assessed at $1,500.
6. That damages for permanent incapacity, although it is doubtful whether such was established, are assessed at $1,000.
7. That the costs, after taxation, are two-thirds recoverable by the suppliant on the petition of right and the cross demand, and one-third by the respondent in connection with both proceedings.

PETITION OF RIGHT to recover damages resulting from a collision.

The action was heard by the Honourable Mr. Justice Dumoulin at Ottawa.

L. Assaly, Q.C. for suppliant.

Paul Coderre and *Raymond Roger* for respondent.

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

DUMOULIN J. now (December 9, 1964) delivered the following judgment:

In his amended petition of right, filed June 2, 1964, one George Laham of the City of Ottawa, formerly a restaurant owner, claims from Her Majesty the Queen, in the right of Canada, consequently to an automobile collision between his motor car, a Ford Thunderbird, and a 1960 Pontiac vehicle owned and operated by the respondent, special damages in the sum of $9,216.55 and general damages amounting to $27,500, in all $36,716.55.

This accident occurred on or about June 4, 1961, at approximately 8:00 p.m., the suppliant then driving his vehicle in a southwesterly direction along the Wakefield road, towards the main section of highway 11, running south-north from the City of Hull to Masham Village, Province of Quebec.

The respondent's car was, at the material time, operated by Constable Robert Monier, a member of the Royal Canadian Mounted Police, then acting within the scope of his duties in respondent's employ. Constable Monier, heading towards Masham, was approaching a point on highway number 11, where it divides into a double section; one, leading in a northerly direction to the above mentioned village, the other swerving to the north-east in the direction of Wakefield.

The petition alleges that "as the two motor vehicles were about to pass each other, the said Robert Monier

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drove his motor vehicle over the central line of the said highway and collided with the motor vehicle being operated by this suppliant" (petition, para. 2). George Laham ascribes the cause of this smashup to the negligence of the R.C.M.P. constable in that, among other shortcomings, he was going at an excessive rate of speed; failed to afford to the other vehicle at his right half of the roadway or the right of way to which it was entitled and, having the last clear chance to avoid the collision, could have done so by the exercise of reasonable care. To this, respondent replies partly by directing similar allegations of fault against the suppliant who, allegedly, would also have driven at an excessive rate of speed under the prevailing circumstances, without paying proper attention to the traffic in general, and, more particularly, to Robert Monier's car.

Apart from the total loss of his automobile, the suppliant suffered severe personal injuries as did three passengers seated in his car: Miss Elaine Nesrallah, since become Mrs. George Laham, her sister Sandra Nesrallah, then aged 19, and a brother, George Nesrallah, 26 years old.

A cross-demand, joined to the statement of defence, claims from George Laham, for the preceding reasons, damages in the sum of $3,000, subsequently reduced to $1,378.03.

The petitioner's attorneys moved for and obtained an order that the trial of this action should proceed jointly with that of another petition bearing number A-714 of the records of this Court, instituted against Her Majesty the Queen by George Nesrallah, Elaine Nesrallah and Sandra Nesrallah, all of the city of Ottawa, the latter claimant duly represented by Philip Nesrallah, named curator to her property by a judgment of the Superior Court of the District of Hull, Province of Quebec, dated June 2, 1962, pursuant to art. 348 of the Civil Code.

The evidence relative to the crash will then obtain in both petitions, the compensation for physical injuries constituting the sole difference.

The bare facts of the accident itself, reported by oral evidence, remain practically uncontradicted. It is admitted, for instance, that the civilian car had a speed of approximately 40 miles an hour when it swerved to its left in order to align itself on the section of highway number 11 leading south towards Hull. Constable Monier similarly appraises the speed of his vehicle, saying that at a distance of some

1,600 or 1,500 feet from the intersection of the two roads, he noticed an opening in the white center line beyond which he proceeded straight ahead on the Hull to Masham road.

This witness, whose testimony impressed the Court by its complete reliability, readily agrees that George Laham's automobile was travelling on its right side of the road whilst his own kept to the left of the double white center line. He adds that Laham did not appear to be driving in any erratic fashion.

His explanation of this unfortunate incident is that no later than the 28th or 29th of May previous, while on the Wakefield road, he had noticed a stop sign some 25 feet or so before the intersection point, and expected it still would be there, obliging Laham to make a full stop. Strange to say, this stop signal, as Monier found out shortly after the collision, had disappeared, but was replaced within the two or three weeks following. I must say that the suppression of so necessary an indication at a particularly dangerous spot on a highly travelled road remains unaccountable.

"When I first saw the Laham car", continues Monier, "I was approximately 400 feet south of the intersection and 30 feet south of the break in the double white center line. At the same time, Laham's car seemed approximately at 100 feet or less from the junction, very close to the spot where the stop sign stood until then."

This fact, however fantastic it may seem, was certified by the local Wakefield constable, Henri Gervais, whose statement I noted. "On the 26th of May, 1961," testified this road policeman, "I served a ticket on a truck driver in the employ of the Quebec Department of Roads, attached to the Aylmer section. He had failed to make a stop opposite the signpost after I had delivered that infraction notice, the stop sign disappeared." Objection was taken and allowed to conversation between the witness and a third party, but Gervais went on to say that some time afterwards the post was put back.

So strange an occurrence goes a long way to excuse, if not legally justify, Constable Monier whose veracity remained unimpeachable throughout, in assuming this cautioning post stood where he had many times noticed it before.

Constable Monier, on his section of road, had no stop sign to defer to, only an indication of an intersection 500 feet ahead.

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The witness marks, on exhibit R-3(f), with an "L" the position of Laham's car when first detected and by an "M" the situation of his own car.

The evidence reveals that the conductor of the civilian car was interested in watching the traffic only to his right, observing a row of automobiles going south on the Masham to Hull road where a stop placard is posted. He completely omitted looking to his left, an imperative precaution under the circumstances, as he intended making a right angle turn to the left from where he should have expected a heavy oncoming traffic. Moreover, quite aware of the dangerous conditions of those roads, over which he had frequently travelled, George Laham, in my opinion, should have reduced the speed of his car before engaging it in the convergence of those two highways. A glance at left surely would not have transcended the dictates of elementary prudence, as prescribed by s. 41 (1) of the *Quebec Highway Code* (Statutes of Quebec, 1959-60, 8-9 Elizabeth II, c. 67), next cited:

> 41. 1. Any speed or imprudent action which might endanger safety, life or property is prohibited on all the roads of the province.

The impact occurred about 25 feet from the beginning of the double white line pointing north towards Masham, marked by the letter "A" on photo exhibit R-3(d). Visibility was clear, some rain had fallen in the afternoon and a heavy downpour started around 8:30 p.m.

Exhibit S-2, a diagram precisely depicting the locality of the accident and positions of the cars, drawn by R.C.M.P. Sergeant Reginald K. Hayman, who reached the spot soon after the collision, reveals that the rear of Laham's damaged Thunderbird stood at 4 feet 5 inches to its right of the dividing line and situates the front of respondent's vehicle at a distance of 3 feet 8 inches and its rear at 3 feet 6 inches to the left of the separation line.

On that very day, June 4, a provincial highway patrolman, Maurice Lepage, had investigated, jointly with Constable Monier, no less than ten accidents along the Hull-Maniwaki road.

A Wakefield garage owner, Mr. Thomas Broom, who towed Laham's automobile to his repair shop, expressed some surprise at noticing the disappearance of a stop post close to the intersection line. Asked whether a speed of 35 to 40 miles per hour at this particular intersecting point was prudent or not, he replied thus: "I would say that it

would be a little fast. I usually take it at about 20 miles an hour. I am rather cautious and would expect what is coming out to my right." I am inclined to think that the expression "a little fast" is an understatement under the circumstances.

On the other hand, the driver of the respondent's car was undeniably following the wrong side of the speed lanes, proceeding, as Monier readily admitted, at his left. His understandable yet unfortunate assumption that the stop signal had not been removed impelled him to go straight on, even after noticing the civilian car's omission of slowing down, which constituted a second error on his part.

Both drivers are at fault for the reasons above. Their respective responsibility, however, differs in its quantum and the Court would assess two-thirds against the respondent, and one-third against George Laham.

Suppliant's claim for his motor vehicle amounts to $2,627.60, a sum undisputed by respondent; 2/3 of this, $1,751.73, are granted.

The Crown's vehicle also became a complete wreck entailing a loss of $1,378.03, of which 1/3, $459.34, is allowed pursuant to the cross-demand.

This, of course, disposes of only one aspect of the case as the suppliant suffered serious bodily injuries minutely detailed in para. 7 of the petition. The principal hurts inflicted were to the chest, the right wrist and right knee, as diagnosed at the Ottawa Civic Hospital, where Laham was brought late in the evening of June 4.

Dr. Ross Craig, an Ottawa surgeon, found at the X-ray examination, an injury to the right leg with a fracture of the knee cap or patella. On June 5, a plaster cast was applied to the wounded limb but, on June 21, the patella had to be excised.

Considerable pain developed in Laham's chest due to pressure at the time of the accident. Massive doses of penicillin were administered, inducing severe skin rash (allergy) for a period of ten days. General anaesthesia was necessary for the removal of the patella, an operation lasting $1\frac{1}{2}$ hours. Sedatives relieved the pain in the chest. After the operation a full cast, from groin to ankle, was applied during a fortnight, then physiotherapy was resorted to. For two months following his release from hospital, July 13, Laham could not move without the help of crutches.

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He was totally disabled until September 13 and partly up to March 29, 1962. Laham resumed work on November 11, 1961, still suffering from a 5° lack of extensibility in his right knee and 3/4 of an inch shrinkage of the left thigh. Physiotherapy cured this defect, but a minimal shrinkage of the left thigh persists. Dr. Craig is of opinion that the leg will never resume normality and the absence of the knee cap would, for instance, possibly prevent this man from working 14 hours a day as previously. This physician expects Laham might have to change his mode of livelihood. The injury to the big muscles of the left leg does not hinder Laham's normal walk.

Exhibit S-5 purports to list the out-of-pocket expenses, or special damages, sought by George Laham, of which the most expensive item is a bill for hospitalization at the Ottawa Civic Hospital from June 4 to July 13, $889.20.

The other claims on Exhibit S-5 include a bill for $5 from Dr. David Conrad Geggie who first saw Laham, in a state of shock, immediately after the accident, when all the victims were brought for emergency treatment at the Gatineau Memorial Hospital in Wakefield; other bills for professional services are those of Dr. Craig, $275; of Dr. James Leach, $107; of Dr. W. A. Blair, $40; of Mrs. H. Brottman, for physiotherapy, $100; and those of Drs. Howard A. Barends, $25, and Abelson, a skin specialist, $200.

Three additional claims, one for ambulance transport, $20, a second for drugs, $22.50, a third from Parkway Taxi for transportation to the physiotherapist's offices, $54.75, and one for loss of personal effects, $182.80, complete the list on Exhibit S-5, with the exception of $5,175 sought for loss of income, business and salary.

Before apportionment of this claim, I would say that one of the dermatologists, Dr. James Leach, testified he periodically saw Laham every sixth week since the accident, the last visit on April 30, 1964, when signs of skin irritability were still present. The claimant himself insists on a decided persistence of this inconvenience, stating that "after my daily shower I itch terribly and this extends to the rectum". Dr. Leach recommended discontinuing the daily showers. Finally, Laham describes his actual condition in the following words: "I am capable of working hard but my persisting state of nervousness and irritability

prevents me from accomplishing things", whatever meaning that may convey.

The medical bills reach a total of $752, of which $501.33 are allowed; hospitalization costs at the Ottawa Civic, from June 4 to July 13, $889.20, of which $592.80 are granted. Three other items, Parkway Taxi, Gauvreau Ambulance and drugs, amount to $97.25 of which $64.83 are allowed. A claim for $182.80, loss of personal effects, went undisputed, entitling the suppliant to $121.87.

The final demand, under the heading of special damages, is for $5,175, comprising a weekly salary of $175, for 23 weeks, to a brother, Fred Laham, who replaced the petitioner during invalidity, and $1,150, the total supplementary wages paid for overtime to two waitresses.

In 1963, Laham became a sales representative, gaining an income of $1,600 only in the year he undertook this new occupation. He testifies that for the years 1961 and 1962, his annual earnings were no less than $12,000. At all events, in 1962 the restaurant enterprise went into bankruptcy due allegedly to an attempt of considerably enlarging the business by the purchase of the "goodwill and key" of a neighbouring store. The cross-examination of the claimant produced the information that the operating expenses connected with the restaurant absorbed 60 to 65% of the gross receipts, leaving a net profit of 35 to 40%. This does not quite tally with a preceding statement that the monthly gross income ran close to $4,000, 35% of which leaves a net monthly profit of some $1,400 and an overall annual net revenue of $16,800, considerably beyond Laham's assertion of a $12,000 income.

The supposed remuneration to Fred Laham of $175 a week is inadmissible and I cannot bring myself to believe that so excessive a rate of pay ever obtained. If it did, a fact I more than doubt, it might explain why the restaurant business failed a few months later. A weekly salary of $100 is fully sufficient, or $2,300 for 23 weeks, which are granted plus $1,150 for the two servant girls, a total of $3,450 of which $\frac{2}{3}$, or $2,300, will be allowed.

We now reach the matter of general damages in a total of $27,500 made up as follows:

(a) for pain and suffering	$7,500.00
(b) for inconvenience and loss of enjoyment of life during total incapacity and convalescence	10,000.00

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(c) for permanent incapacity 10,000.00

The injuries sustained induced acute pain and suffering over a period of possibly eight weeks. A decreasing degree of inconvenience and the alleged persistence of itching to this day also seem reasonably proved. To the above claim, I would join that for inconvenience and loss of enjoyment of life during total incapacity and convalescence, as it is more or less a repetition of pain and suffering. An allotment of $1,500 appears equitable of which $\frac{2}{3}$, or $1,000, are allowed.

Lastly, it is doubtful whether any permanent incapacity was established. Laham's walk is normal, his left leg causes no pain nor does it labour under any disability. He has long since resumed a regular working schedule, and the only lingering discomfort would be the bouts of itchiness. However, to eliminate, in the largest measure possible, all doubts on this score, I would allow an additional amount of $1,000, $\frac{2}{3}$ of which are $667.

The overall recapitulation of the compensation extended to the petitioner, on a ratio of $\frac{2}{3}$ of the separate indemnities accorded, adds up to a total of $6,999.56, from which a sum of $459.34, allowed to the respondent on her cross-demand, must be deducted, reducing the damages due the suppliant to the total of $6,540.22.

The same ratio must apply in the matter of costs after taxation, $\frac{2}{3}$ recoverable by suppliant on the petition of right and the cross-demand; $\frac{1}{3}$ by respondent in connection with both proceedings.

Judgment accordingly.