
BETWEEN:

LEONARD MURPHY.....SUPPLIANT;

AND

HIS MAJESTY THE KING,.....RESPONDENT.

1946
Jan. 8
Aug. 30

Crown—Petition of Right—Exchequer Court Act, R.S.C. 1927, C. 34, s. 19 (c)—Collision on Highway—Negligence—Negligence Act of Ontario, R.S.O. 1937, C. 115.

Suppliant seeks to recover damages from the Crown for injury to his motor vehicle suffered as a result of a collision on a highway in the Province of Ontario between his motor vehicle driven by a constable of the Ontario Provincial Police and a Field Army Tractor owned by the Crown and driven by a member of His Majesty's Military Forces while acting within the scope of his duties. The Field Army Tractor was the ninth vehicle in a convoy travelling east on Ontario highway No. 17. The convoy was headed by a motorcycle and a

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station wagon both fully lighted and followed by a number of army vehicles with lights blacked out. These vehicles were thirty-five to forty feet apart except the ninth vehicle which was out of place and was nine hundred feet behind the eighth vehicle. The suppliant's vehicle travelling west passed the eighth vehicle in the convoy and attempted to overtake and pass a preceding vehicle with the result that it collided head on with vehicle No. 9.

Held: That the driver of the respondent's vehicle was negligent in driving the vehicle without lights when he was as far out of his proper position in the convoy.

2. That the driver of the suppliant's vehicle was negligent in attempting to overtake and pass another preceding vehicle without first ascertaining that the highway in front of, and to the left of, such vehicle was safely free from approaching traffic.

3. That the damage was occasioned by the negligence of both drivers and the negligence of each was not clearly subsequent to or severable from the act of the other, but was substantially contemporaneous therewith. The degree of fault was apportioned as follows: Driver of the respondent's vehicle 70%—Driver of the suppliant's vehicle 30%.

4. That the liability of the Crown under s. 19 (*c*) is to be determined by the law of negligence of the province in which such negligence occurred that was in force in such province alleged on June 24, 1938. *Tremblay* v. *The King* (1944) Ex. C.R. 1 at 12 followed and applied.

5. That the provisions of the Negligence Act of Ontario, R.S.O. 1937, C. 115 are therefore applicable.

PETITION OF RIGHT by Suppliant claiming damages against the Crown for injury to his motor vehicle alleged to have been caused by the negligence of a member of His Majesty's Military Forces while acting within the scope of his duties or employment.

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

J. A. Maloney for the Suppliant.

R. Forsyth, K.C. and *H. C. Kingstone* for the Respondent.

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

O'CONNOR J., now (August 30, 1946) delivered the following judgment:

The Suppliant claims damages resulting from a collision between a Field Army Tractor (6 tons) owned by the Respondent, and a sedan owned by the Suppliant. The

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collision took place on highway 17 about 4 miles west of Petawawa Military Camp at 9.30 p.m., on the 16th of September, 1943. The highway was dry and the night was clear. At the point of collision the highway is 22 feet in width, almost level and straight for a distance of three-quarters of a mile.

The Suppliant's vehicle had been hired by the police in order to answer a call. Constable Renaud drove the vehicle west on the highway. He was accompanied by Chief of Police, Espey. A station wagon driven by Captain Callendar, accompanied by Sergeant Harland, was also proceeding west ahead of the Suppliant's vehicle.

The Respondent's vehicle was the ninth vehicle in a convoy travelling east on highway 17. The convoy was headed by a motorcycle and a station wagon, both fully lighted, and these were followed by a number of army vehicles with lights blacked out. The black-out consisted of one headlight blocked completely and the other headlight was covered except for a slit 6" across and $\frac{1}{4}$" wide. There was a hood over the slit, which directed the light down on the road for a distance of 10 or 15 feet. There was a small pencil light on each fender and these were described as being about the size of a pencil and were covered with frosted glass. The vehicles in the convoy were travelling about 35 to 40 feet apart. The ninth vehicle, which is the one which came in contact with the car of the Suppliant, was out of place in the convoy, and was 900 feet behind No. 8 vehicle. At the time of the collision it was being operated by Lieutenant Coyle, who was being instructed in blackout driving by an instructor, who was sitting behind him.

As the station wagon driven by Captain Callendar was about to pass the ninth vehicle in the convoy, the Suppliant's vehicle came up behind the station wagon, turned out and attempted to overtake and pass it, with the result that it came into a head-on collision with vehicle No. 9. The impact took place right beside the station wagon.

At the time of the impact the left front wheel of vehicle No. 9 was 4 feet south of the centre of the highway and the collision took place entirely south of the centre line of the highway.

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The impact that took place was very heavy resulting in the death of Chief of Police Espey, and very severe injuries to Constable Renaud. The Suppliant's vehicle was damaged beyond repair. The heavy Field Army Tractor suffered only slight damage.

Because collision took place almost beside the station wagon, Sergeant Harland and Captain Callendar were in the best position to see just what happened.

Their evidence, which I accept, was that when they passed vehicle No. 8 they believed it to be the end of the convoy, and Captain Callendar then raised the headlights and was able to see the silhouette of vehicle No. 9 in the distance. When he lowered the headlight beams again he could not see the vehicle at all, and he did not see it until he was very close to it, although he knew it was there approaching him and he was watching for it.

Their evidence also shows that the vehicle of the Suppliant came up behind them very fast and that when it pulled over to the left to overtake and pass their vehicle, it was travelling too fast for the driver to get a true picture of the road ahead. This was described by Sergeant Harland as, "I saw the lights behind me and they seemed to be closing up very fast", and that, "Yes, he did pull over to the left, but I think he was travelling too fast to get a true picture of the road ahead of him". Their evidence also showed that they were travelling about 35 miles an hour and the Suppliant's vehicle was travelling much faster, probably 15 to 20 miles per hour more. The evidence further showed that after the collision the indicator on the speedometer on the Suppliant's car was in a fixed position registering 55 miles per hour.

I find that the driver of the Respondent's vehicle was negligent in driving the vehicle without lights when he was so far out of his proper position in the convoy. The warning which approaching traffic would get from the motorcycle and the station wagon, which, with their lights on, were at the head of the convoy, would be completely lost in so far as the 9th vehicle was concerned, because of the gap of 900 feet.

I find that the collision was caused by the negligence of the driver of the Suppliant's vehicle in attempting to pass another vehicle going in the same direction on a high-

way, without first ascertaining that the travelled portion of the highway in front of, and to the left of, the vehicle to be passed, was safely free from approaching traffic. I am of the opinion that the driver of the Suppliant's car turned out so fast, and when travelling at such a high rate of speed, he did not get, in the language of Sergeant Harland, "a true picture of the road ahead of him."

The damage to the Suppliant's vehicle was occasioned by the negligence of both drivers. I am not satisfied by the evidence that the negligence of either driver was clearly subsequent to and severable from the act of the other, so as not to be substantially contemporaneous therewith.

I apportion the degree of fault as follows:—

70% to the driver of the car of the Respondent;

30% to the driver of the car of the Suppliant.

The Statement of Defence admits that the Respondent owned the motor car and that it was being operated by a member of His Majesty's forces while engaged within the scope of his duties or employment, and he is, therefore, under section 50 (a) of the Exchequer Court Act, R.S.C., 1927, chap. 34, deemed to be a servant of the Respondent. The motor vehicle of the Suppliant was in the possession of its driver with the consent of the Suppliant.

The Suppliant's motor vehicle was completely destroyed, and I assess his damage at $875.00.

The Suppliant's evidence as to the loss of use he sustained until he was able to replace the vehicle is too meagre. The Suppliant must not only present facts which show that damage of this nature has been suffered, but they must be of a nature from which an amount can fairly be deduced. *Saint John Tugboat Company* v. *The King* (1).

The liability upon the Crown is to be determined by the laws of the Province where the cause of action arose,— *The King* v. *Derosiers* (2), and the liability is such as existed under the laws in force in the Province at the time when the Crown became liable. *Gauthier* v. *The King* (3).

The question of when the Crown first became liable for

(1) (1946) 3 D.L.R., 225.
(2) (1909) 41 S.C.R., 71 at 78.
(3) (1918) 56 S.C.R., 176 at 179.

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negligence of the kind alleged by the Suppliant was considered in *Tremblay* v. *The King* (1). In that case Thorson, P., held:—

> That in claims against the Crown made under section 19 (*c*) of the Exchequer Court Act, as amended in 1938, where the claim is for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the Province in which such alleged negligence occurred that was in force in such Province on the 24th day of June 1938, when the amendment by which liability for such negligence was first imposed upon the Crown came into effect,.....

I adopt the reasoning of Thorson, P., as set out in the judgment, and I hold, therefore, that the provisions of the Negligence Act of Ontario, R.S.O., 1937, c. 115 are applicable in this case.

The damage to the motor vehicle of the Respondent was admitted by counsel at $75.25.

The Suppliant will have judgment for

70% of $875.00	$612 50
Less 30% of $75.25	22 57
	$589 93

The Suppliant is also entitled to costs.

Judgment accordingly.