1947
June 4 & 5
August 15

BETWEEN:

LEO R. TISDALE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Negligence—Limitation on amount of damages recoverable by passenger in motor vehicle injured by joint negligence of owner or driver of that vehicle and driver of another vehicle—Negligence Act R.S.O. 1937, c. 115, s. 2(2).

Suppliant, a passenger in a car, was injured as the result of the joint negligence of the driver of that car and of a servant of the respondent acting within the scope of his duties or employment.

Held: That suppliant cannot recover from respondent that portion of his damages caused by the owner or driver of the motor vehicle in which he was a passenger.

PETITION OF RIGHT by suppliant to recover damages from the Crown for injuries suffered by suppliant because of the alleged negligence of a servant or employee of the Crown acting within the scope of his duties or employment.

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

B. H. Furlong, K.C. for suppliant.

M. C. Meretsky for respondent.

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

O'CONNOR J. now (August 15, 1947) delivered the following judgment:

The suppliant claims damages in respect of injuries suffered as a result of a collision which took place at 7.30 p.m., on the 22nd November, 1945, at the west end of a curve on No. 3 Highway, four miles west of Delhi, in the Province of Ontario, between a Packard motor vehicle, owned and driven easterly by M. H. Parsons, in which the suppliant was a passenger, and a Diamond T truck which the respondent admits was owned by the

Crown and driven westerly by one Dupuis, a member of the Military Forces of His Majesty in right of Canada, while acting within the scope of his duties or employment.

The evidence showed that it had been raining. The weather turned colder and the rain turned to snow. The highway was slippery and covered with snow. The witnesses told of scraping the snow from the highway to ascertain the edges of the pavement. It snowed very hard and developed into a blizzard.

The truck was coming out of the west end of the curve and the Packard entering the curve at the same point.

The driver of the Packard estimates his speed at 10 to 12 miles per hour. His passengers say he was driving slowly, not more than 15 miles per hour. They swear the Packard was at the extreme south edge of the highway at the time of impact.

The driver and co-driver of the truck estimate their speed at 10 to 12 miles per hour, and say the truck was almost at the north edge of the highway at the time of impact.

On this evidence I am somewhat in the position of the eminent English judge who said he spent most of his time trying running down actions involving two stationary vehicles each on the proper side of the highway and the horn of each blowing violently.

Rohrer, an independent witness, himself having had an accident, was sitting in his car on the north side of the highway almost at the point of impact. He saw the Packard coming towards him and he saw the truck through the rear view mirror. After the impact he got out of his car and examined the position on the highway of the Packard and the truck. He swore that the impact took place in the centre of the highway. I accept his evidence.

I find that both drivers were negligent. They were driving too fast having regard to the blizzard, the curve and the conditions of the highway. Neither driver was keeping a proper lookout.

The suppliant was injured by the joint negligence of Parsons and the driver of the respondent's truck, and the fault was in equal degree.

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O'Connor J.

The suppliant was driven into the windshield by the force of the impact, and rendered unconscious for a short time. His head was cut and a bone was broken in his instep. He was absent from his work from the 22nd November, 1945, to the 30th of January, 1946. In October, 1945, he had earned $340.68, which included overtime during the month. In February, 1946, he earned $235.07, but he stated that his foot was still troubling him and he was unable to work overtime. After resuming work he continued to take treatments each week-end at Mount Clemens for his foot until the end of February, 1947, at an average cost of $10 per week. He stated at the trial that he was still suffering pain and discomfiture from his foot. He did not, however, appear to have consulted a doctor after February, 1946. No medical evidence was given as to whether the pain is being caused by the broken bone or from any other cause.

I, therefore, assess his damages on the basis that he has had only a partial disability which is not permanent.

I award special damages as follows:

Doctor's bill	$ 50 00
X-ray account	15 00
Loss of wages	650 00
Expenses at Mount Clemens	150 00
	$865 00

I award general damages of $1,500.

The suppliant cannot recover from the respondent that portion of his damages caused by the negligence of the owner or driver of the motor vehicle in which he was a passenger under the provisions of Section 2(2) of the Negligence Act, R.S.O. 1937, Chap. 115. *Verroche* v. *Russell and Niagara, St. Catharines and Toronto Railway Company* (1), and affirmed on appeal at p. 860.

The suppliant is, therefore, entitled to recover one-half of $2,365, viz., $1,182.50 and the costs of the action.

Judgment accordingly.

(1) (1946) O.W.N. 198.