1954

Jan. 26, 27

Mar. 8

BETWEEN:

JOHN T. IVEY .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Damages—The Exchequer Court Act R.S.C. 1952, c. 98, s. 31—The Highway Traffic Act R.S.O. 1950, c. 167, s. 61(1) —Claim barred by provincial law relating to prescription and limitation of actions—"Damages occasioned by a motor vehicle".

Suppliant's motor boat resting on blocks and a trailer and supported by props was standing on dry ground about ten or fifteen feet from the highway. Respondent's servant while acting within the scope of his duties or employment damaged the motor boat through the negligent operation of a motor vehicle owned by respondent. Suppliant brought his petition of right to recover from respondent the damage sustained. The damage was sustained beyond twelve months prior to the date when the petition of right was filed.

Held: That the claim of suppliant is barred by The Exchequer Court Act, R.S.C. 1952, c. 98, s. 31 and The Highway Traffic Act, R.S.O. 1950, c. 167, s. 61(1).

2. That the words in The Highway Traffic Act "occasioned by a motor vehicle" are not to be restricted so that they do not cover the damages sustained by suppliant.

PETITION OF RIGHT by suppliant seeking damages from the Crown for injury to his motor boat through the alleged negligent operation of a motor vehicle by a servant of respondent acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice Potter at Toronto.

John G. McGarry, Q.C. for suppliant.

A. W. Winter for respondent.

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

POTTER J. now (March 8, 1954) delivered the following judgment:

This is a petition of right within the Petition of Right Act, chapter 158, R.S.C. 1927, now chapter 210, R.S.C. 1952, by which the suppliant, John T. Ivey, prays that he be granted damages for damage allegedly caused to his motor boat *Stealaway Too* by the negligent operation of a motor vehicle owned by the Crown and driven by Gunner James Young of the Royal Canadian Artillery, a servant of the Crown, while acting within the scope of his duties or employment.

On the evening of the 19th day of March, 1951, the 25th Medium Regiment of the Royal Canadian Artillery (Reserve), having its headquarters at the armouries at Simcoe in the County of Norfolk, in the Province of Ontario, was to hold one of its weekly parades and Captain W. J. Metcalfe of that regiment, whose duty it was, issued a Transport Work Ticket to Gunner Driver James Young of the same unit, authorizing him to use a 15-cwt. vehicle of the Crown to transport a number of the personnel of the regiment from their homes to the said armouries.

Young, in the course of his duty, picked up a gunner James Noble and proceeded with him to the home of Ivan Reid on River Drive of Port Dover in the said County, about eight miles from Simcoe, to pick up his son, a member of the regiment. The Reid home adjoined the cottage property of the suppliant on which was hauled out or stored his motor boat *Stealaway Too.*

The boat, which was twenty seven feet in length with a beam of eleven feet, was supported by trailer wheels under her stern and blocks under her bow. On one side, at least, there were shores or props set obliquely against the sides of the boat with the lower ends braced in the earth. The boat was standing, bow toward the road, and about ten to fifteen

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feet from the same. A tarpaulin which covered her deck and accommodations hung down over her sides to about her water line.

According to the evidence of Noble, he was riding in the front seat of the vehicle with gunner James Young, and when gunner Reid got in, he, Reid, sat in the rear. Young then drove the vehicle part way round a circular driveway, stopped and backed a short distance when a slight bump was felt and Young said that he had backed into a boat.

Ivan Reid, father of gunner Reid, who was in his house with the doors and windows closed, said that he heard a crash shortly after his son left the house.

The suppliant stated that on Good Friday, March 23, he visited his cottage property and discovered that the tarpaulin covering his boat had been torn, that there was a hole in her starboard side above the chime, about two feet above the ground and another in her gunwale, where the deck met the side and near to, but above the hole first described and according to the evidence of another witness, about six feet from the ground.

The Crown admitted liability for the damage done to the gunwale of the suppliant's boat, but denied liability for the damage done at or near the chime, for the reason that, according to the construction of the vehicle in question and the flare of the boat's side, it would have been impossible for any part of the vehicle to have touched the boat at that place.

It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities.

Per Lord Loreburn in *Richard Evans and Company* v. *Astley* (1) which was adopted by Duff J. in *Grand Trunk Railway Company* v. *Griffith* (2).

Broadly speaking in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with

(1) [1911] A.C. 674 at 678. (2) (1911) 45 S.C.R. 380 at 387.

whom the decision rests. It is, generally speaking, sufficient if he has produced such a preponderance of evidence as to show that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts. This proposition is referred to by Mr. Justice Willes in *Cooper* v. *Slade*, 6 H.L. CAS. 746, in these words 'The elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict.'

Duff, C.J. in *Clark* v. *The King* (1).

This principle was acted on in several cases arising out of fires allegedly set by railway locomotives and in which it was either proved that a fire started shortly after a locomotive passed or that a fire was known to have been set by a locomotive in one place and later another fire broke out some distance away. See *Young* v. *C.P.R.* (2), per Turgeon, J.A.; *Armour* v. *Marshall* (3), and *C.P.R. v. Kerr* (4), per Idington, J.

I find therefore that the damage done to the suppliant's boat both at or above the chime and at or on the gunwale on the starboard side, was caused by the operation of the respondent's vehicle on the occasion alleged.

As to damages. The evidence established that what the suppliant called "temporary repairs" were made by a local boat builder at a cost of $106.15 shortly after the damage was done; that the repair work could be seen from the inside; that the boat "looked very well"; was seaworthy and that he had operated her during the following seasons.

The suppliant had purchased the boat in the year 1950 for $4,900 which he at that time considered somewhat less than her market value. He said that boats of that type had increased in value and, at the time of the trial, it had a market value of about $6,000. He was, however, unable to estimate her market value immediately before the accident.

Captain V. J. Green, who was called by the suppliant, stated that he had been engaged in the inspection of hulls and the assessing of damages to the same and cargoes for a number of years. He examined the boat after the repairs were made, and said that the rule generally applied by him was to estimate the damage in such a case to be one-third of the market value of the craft at the time the damage was

(1) (1921) 61 S.C.R. 608 at 616.
(2) [1931] 2 D.L.R. 968 at 972.
(3) (1910) 15 W.L.R. 173, 3 Sask. L.R. 394.
(4) (1913) 49 S.C.R. 33 at 36.

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done and, assuming that the suppliant's boat was worth $4,500 at the time of the accident, the boat thereby was reduced in value by $1,500.

Other witnesses called by the suppliant with regard to damages, had no opinion of the value of the boat before the damage was done or had no experience with that type of craft.

G. E. Black, called by the respondent, was a foreman in the employ of a boat building company at Hamilton, Ontario, and had inspected the boat shortly before giving evidence. He stated that he had had considerable experience in valuing boats and that he knew the one owned by the suppliant. He expressed the opinion that the depreciation of the boat due to the accident was the amount of the cost of repairs—by which he must have meant to be immediately after the accident and before the repairs were made, or, in other words, that there was no depreciation after the repairs were made.

The question for the Court is—What was the loss to the suppliant as a result of the respondent's vehicle striking his boat? He paid $106.15 to have her repaired; he had her painted for which no cost was given, but which he said he would not have done but for the accident. The suppliant had a boat in which he evidently took considerable pride and used with care and he probably would have refused a large sum before agreeing to permit such damage to be done to it, but that of course is not the measure to be applied. If there had been reliable evidence of the market value of the boat immediately before the accident and of its market value immediately after she was repaired and painted, the difference between such values, if any, would have been the loss suffered by the suppliant. But such evidence was evidently not available.

It is obvious, however, that the boat was not, following the accident and the repairs, as attractive to a purchaser as she formerly was, and after considering all the evidence I fix the depreciation at the sum of $500. The loss suffered by the suppliant was therefore $606.15.

There is, however, another question to be considered.

The respondent has pleaded that the petition of right was not brought within a period of twelve months from the time when the suppliant is alleged to have sustained the damages complained of, as required by section 32 of the Exchequer Court Act, chapter 34, R.S.C. 1927, (now section 31 of chapter 98, R.S.C. 1952), and section 61 of The Highway Traffic Act, chapter 167, R.S.O. 1950, and that the suppliant is therefore barred from bringing these proceedings.

Section 31 of chapter 98, R.S.C. 1952, the Exchequer Court Act, is as follows:—

31. Subject to any act of the Parliament of Canada, the laws relating to prescription and limitation of actions in force in any province between subject and subject apply to any proceedings against the Crown in respect of a cause of action arising in such province.

Section 61, subsection (1) of The Highway Traffic Act, chapter 167, R.S.O. 1950, is as follows:—

61. (1) Subject to subsections (2) and (3) no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

Subsection (2) deals with limitation in case of death and subsection (3) deals with counterclaims and third party proceedings and are not relevant to this action.

A number of cases in which Courts were required to interpret statutes of limitation were cited by counsel for the suppliant and respondent and taking them in chronological order, they were:—

Winnipeg Electric Railway Company v. *Aitken* (1). In this case, the Manitoba Railway Act, by section 116, provided that:—

All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained, or if there be continuation of damages then within twelve months next after the doing or committing of such damage ceases, and not afterwards.

The respondent was injured whilst a passenger on the appellant's railway by reason of one of the company's cars running behind that in which he was being carried negligently colliding with the said car. The question to be decided was did this section embrace within its purview an

(1) (1921) 63 S.C.R. 586.

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action brought by a passenger for default in the company's duties arising out of a contract of carriage or from the acceptance of the passenger for carriage?

It was argued that an action by a passenger for the negligent working of the railway was excluded from the operation of this section, but it was held by the Court, Idington and Cassels (*ad hoc*) JJ. dissenting, that the limitation prescribed applied to an action brought by a railway passenger claiming indemnity for injury so sustained.

B.C. Electric Railway Company Limited v. *Pribble* (1). In this case, section 60 of the Consolidated Railway Company's Act, 1896 (B.C.) chapter 55, provided in part as follows:—

> All actions or suits for indemnity for any damage or injuries sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, . . .

The respondent was a passenger on the appellant's street railway in the City of Vancouver, who had paid her fare and reached the end of her journey, when she fell from the car as she was getting off the step at the rear of it. There was a hole in the step which ought not to have been there and her heel caught in it, so that, as she moved on, her foot was held. She recovered $5,000 on the trial, although the action was brought more than six months after she had received her injuries. It was held by the Privy Council that the action was barred by the provisions of the section and that the application of the same could not be limited (*a*) to cases incapable of being pleaded as breaches of contract; (*b*) to cases of injuries occasioned without negligence; or (*c*) by excluding cases where injuries were occasioned by the operation and user of the railway in the course of its business. *Winnipeg Electric Railway Company* v. *Aitken* (*supra*) was approved.

In *Harris* v. *Yellow Cab Limited* (2), the Court had to interpret what was then section 54 of chapter 48 of The Highway Traffic Act, 1923 (Ontario), which provided in part that:—

> No action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of six months from the time when the damages were sustained.

(1) [1926] A.C. 466; [1926] 2 D.L.R. 865.

(2) [1926] 3 D.L.R. 254.

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The plaintiff, a passenger in one of the defendant company's motor cabs, had her thumb broken by the driver employed by the defendant negligently closing the cab door upon it, and the defendant pleaded that it was not liable because the action was commenced more than six months after the injury. It was held by the Appellate Division of the Ontario Supreme Court, Magee, J.A. dissenting, that the limitation was only intended to apply to damages caused by violations of The Highway Traffic Act and did not include a negligent act such as that on which the action was based.

In *Hughes* v. *Watkins & Company* (1), an automobile truck owned by the defendant, in charge of an employee, loaded with bales of straw which projected about eight inches beyond the platform of the truck, was being driven along a street in Toronto, and at the intersection of the same with another street turned northwardly following closely the curb at the north-east corner of the two streets. The plaintiff, who was coming eastwardly along the northern side of one street stepped on the curb on the east side, when she was struck by a projecting bale of straw and injured.

The action was not brought until after the expiration of six months from the time when the plaintiff's damages were sustained and the defendant pleaded section 54 of The Highway Traffic Act, 1923, chapter 48, (Ontario) to the action.

Magee, J.A. said at page 179:—

> I cannot convince myself that section 54 refers to less than what it says, that is, to damages occasioned by a motor vehicle—or that it would not apply to collisions or negligence on a farmer's driveway just as much as to the same on a highway.

And he held that the action was barred.

Hodgins, J.A. considered the contention of plaintiff's counsel to the effect that it was a common law cause of action for damages which still existed notwithstanding that the damages were occasioned by a motor vehicle on the highway and he said at page 181:—

> The elements or onus of proof may be different, but the action is nevertheless one for damages for an act of negligence which is common to both causes of action. But, as the negligence in this case falls clearly

(1) [1928] 2 D.L.R. 176.

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within the prohibition of the statute, the cause of the damage being reckless and negligent driving of a motor vehicle on the highway, I find it impossible to bring myself to think that any such cause of action as at common law can survive or exist apart from that exigible under the statute.

Commenting on *Harris* v. *Yellow Cab Limited* (*supra*), he said at pages 179 and 180:—

> In the case of *Harris* v. *Yellow Cab Ltd.*, it was decided that the accident, which was due to the negligence of a chauffeur in shutting the car door by which the passenger's hand was injured, was not occasioned by a motor vehicle on the highway within the purview of the statute. Consequently the limitation s. 54 did not bar it.

The other members of the Court agreed and the appeal of the plaintiff was dismissed.

In *Hubbell* v. *Oshawa* (1), the facts were that a nurse in the employ of the Board of Health of the Municipality of Oshawa while in the course of her duties and using her own car, for the use of which she was paid by the Board, visited the Water Works of the Corporation and while off the highway, negligently backed her car into the plaintiff seriously injuring him. The defence of the limitation section of The Highway Traffic Act, section 53(1) of chapter 251, R.S.O. 1927, was pleaded. But it was held, that as the accident had not occurred upon a highway, that the section did not apply.

In *Dufferin Paving & Crushed Stone Limited* v. *Anger* (2), the plaintiff sued the defendant for damages for injury to the plaintiff's dwelling house in the City of Toronto through the vibrations caused by the operation of the defendant's cement-mixing motor trucks in the street in front of the house. Permission had been granted (pursuant to authority under The Highway Traffic Act) by the City of Toronto to the defendant to operate the said trucks on said street (otherwise the use of such trucks was prohibited by the Act). Practically all the damage was sustained beyond twelve months prior to the date when the action was brought and the defendant corporation pleaded section 53 of The Highway Traffic Act, R.S.O. 1927, chapter 251, as amended by 1930 chapter 48, section 11 and which was as follows:—

> 53. (1) Subject to the provisions of subsections (2) and (3) no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

(1) [1932] O.W.R. 103. (2) [1939] S.C.R. 174.

McTague J., before whom the action was tried decided that:—

> The right to damages here is a common law right. I cannot find that it is within the purview of The Highway Traffic Act. Therefore I am of opinion that this defence has no application. sub nom. *Anger et al* v. *Northern Construction Co. et al* [1938] 4 D.L.R. at 76.

The Ontario Court of Appeal evidently accepted the decision of McTague, J. on this point for his judgment was affirmed on appeal without reference to the same (1).

With the exception of the words "the provision of" section 53(1) of chapter 251, R.S.O. 1927, as amended, was in exactly the same language as section 61(1) of chapter 167, R.S.O. 1950, and section 41*a* as added by 1930, chapter 48, section 10, with reference to the responsibility of the owner of a motor vehicle causing damage and section 42 with respect to the onus of disproving negligence were similar in their terms to sections 50 and 51 of the Act now in force.

The Supreme Court of Canada reviewed *Winnipeg Electric Railway Company* v. *Aitken; B. C. Electric Railway Company Limited* v. *Pribble; Harris* v. *Yellow Cab Limited* and *Hughes* v. *Watkins and Company* already cited but applied the rule of construction of statutes to the effect that:—

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

and held that the action was barred by the statute.

> Taken by themselves the words used in this subsection are clear and unambiguous. In terms they are not limited to circumstances where damages are occasioned by a motor vehicle on a highway; they are not restricted to cases where damages are caused by a motor vehicle coming in contact with a person or thing; they do not state that the damages must have been occasioned by negligence in the operation of a motor vehicle or by reason of the violation of any of the provisions of the Act. It is contended on behalf of the respondents that the subsection must be construed in a narrower sense and that such a claim as the present, based as it is on an alleged nuisance at common law, is not within its purview.

Per Kerwin, J. at page 189.

And at pages 189 and 190 Kerwin, J. said:—

> Attention is called to the liability for loss or damage section and the onus section (now ss. 47 and 48 of the current Highway Traffic Act, R.S.O. 1937, c. 288) and it is argued that s-s. (1) to s. 53, should be construed as limited to damages occasioned by contact with a motor vehicle itself in its use of the highway for the purpose of traffic. . . .

(1) [1938] 4 D.L.R. 738.

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Further at page 190:—

> Upon consideration, I am unable to agree with these contentions.
>
> Considerable difference of opinion upon the question has existed in the Courts of Ontario, but upon the whole I am forced to the conclusion that there is nothing in the Act to warrant restricting the plain words of the subsection, 'occasioned by a motor vehicle,' so that they do not cover the damages sustained by the present respondents.

As the action was not commenced within the time limited by the section, the appeal of the defendant corporation was allowed with costs.

In *Allard* v. *Charbonneau* (1), an action for damages resulting from a motor car collision which occurred on a provincial highway in the province of Quebec was brought in the province of Ontario, the place of residence of the defendant, but more than one year after the date of the accident and section 61(1) of The Highway Traffic Act, R.S.O. 1950, chapter 167, was pleaded by the defendant.

Following the judgment of the Supreme Court of Canada in *Dufferin Paving & Crushed Stone Limited* v. *Anger* (2), it was held that the action was barred by the provisions of the statute.

The Legislature of the Province of Ontario must be taken to have had cognizance of the interpretations given the various statutes of limitation by the various Courts of Canada and in particular of the differences of opinion existing in the Courts of Ontario prior to the revision of the statutes in 1937. The Legislature nevertheless by section 60(1) of chapter 288 of the R.S.O. 1937, reenacted without change section 53(1) of chapter 251, R.S.O. 1927, as amended by 1930, chapter 48, section 11. No amendment was made to section 60(1) of chapter 288, R.S.O. 1937, following the decision of the Supreme Court of Canada in *Dufferin Paving & Crushed Stone Limited* v. *Anger* (*supra*) on December 9, 1939, and when the statutes were revised in 1950, these provisions were reenacted as section 61(1) of chapter 167, R.S.O. 1950.

It must therefore follow that the Legislature did not intend to restrict or extend the meaning of the section under consideration.

(1) [1953] 2 D.L.R. 442.

(2) [1939] S.C.R. 174; [1940] 1 D.L.R. 1.

The damage to the suppliant's motor boat by the respondant's motor vehicle was done on the 19th day of March, 1951, and the petition of right, by which these proceedings were commenced was dated the 10th day of November and was filed the 13th day of November, 1952, more than twelve months from the time when the damages were sustained.

For the above reasons the Court has no other alternative than to hold that the claim of the suppliant is barred by the provisions of section 61(1) of chapter 167, R.S.O. 1950, and section 32 of the Exchequer Court Act, R.S.C. 1927, now section 31 of chapter 98, R.S.C. 1952.

The suppliant is therefore not entitled to recover anything from the respondent and the respondent will recover against the suppliant her costs to be taxed.

Judgment accordingly.