BETWEEN:

DAME ANTOINETTE HOULE.....SUPPLIANT,

AND

HER MAJESTY THE QUEEN.....RESPONDENT,

AND

JOSEPH ALBERT ARCAND AND LOUIS PHILIPPE LACROIX,... } THIRD PARTIES.

1954

Mar. 22, 23 & 24

June 7

Crown—Petition of right—Action by a widow to recover damages from the Crown for her husband's death—Negligence of a servant of the Crown while acting within the scope of his duties—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19(c) and 50A—Pensions awarded by the Canadian Pension Commission to widow and her minor children—The Pension Act, R.S.C. 1927, c. 157, s. 11(2)—Receipt of pension under provisions of The Pension Act not a bar to proceedings against the Crown under s. 19(c) of The Exchequer Court Act—Provisions of s. 207(8) of the Pay and Allowance Regulations for the Canadian Army not a bar to right of action under s. 19(c) of the Exchequer Court Act—Funeral expenses of a person killed by negligence of another not recoverable under article 1056 c.c. of Quebec—Plaintiff entitled to costs in action based on negligence despite the fact claim may have been reduced by reason of concurrent negligence.

On December 11, 1950, suppliant's husband, then a member of Canadian Army and on duty, was killed while a passenger in a motor vehicle owned and driven by one A, also a member of the Canadian Army,

1954

HOULE
v.
THE QUEEN
AND
ARCAND AND
LACROIX

and which collided with another vehicle driven by one L. The Canadian Pension Commission ruled that the death of suppliant's husband was attributable to military service and pensions were awarded to her and her two minor children. Alleging that the said collision occurred as a result of A's negligence while the latter was acting within the scope of his duties, suppliant, by her petition of right, sought to recover damages from the Crown for the death of her husband. Third party proceedings were filed by respondent and served on A and L who filed defences and took part in the trial. On the facts the Court found that at the time of the accident A, while driving his own automobile, was acting within the scope of his duties and employment and that both drivers were negligent. Having fixed L's share of responsibility at 70 per cent and that of A at 30 per cent the Court declared that respondent was entitled to recover from A and L, as third parties, the amount awarded by the judgment to suppliant in proportion to the degree of that responsibility.

Held: That the Pension Act, R.S.C. 1927, c. 157, creates a right of action for compensation for injury or death arising out of and attributable to his military service. The Exchequer Court Act, R.S.C. 1927, c. 34, imposes a liability on the Crown and gives a general right of action for damages for death or injuries resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties. The first liability the Crown accepts is the protection of the members of the armed forces and of the wife and children when the injuries or death is attributable to military service. The second liability arises out of the damages caused by the negligence of an employee on duty. The suppliant has two causes of action, one based on the statutory provisions of the Pension Act, the other based on negligence as provided under section 19(c) of the Exchequer Court Act. *Bender* v. *The King* [1946] Ex. C.R. 529; [1947] S.C.R. 172; *Oakes* v. *The King* [1951] Ex. C.R. 133 referred to and followed. *Meloche* v. *The King* [1948] Ex. C.R. 321 disapproved.

2. That s. 207(8) of the "Pay and Allowance Regulations for the Canadian Army" by which the Crown does not assume any liability or responsibility for any accident, injury or damage to any person or property which may occur while a private motor vehicle is being used by an officer or soldier, is not a bar to the right of action contemplated by s. 19(c) of the Exchequer Court Act. If s. 207(8) did affect the liability of the Crown for damages caused by its servant through negligence while acting within the scope of his duties or employment, it would be limiting the liability to cases where the car involved in a collision belonged to the Crown. This can be hardly reconciled with the statutory liability assumed by the Crown and the statutory right of action provided by s. 19(c) of the Exchequer Court Act.

3. That the funeral expenses of a person who has been killed by the negligence of another are not recoverable from the latter under the provisions of article 1056 c.c. of the Province of Quebec. *Bahen* v. *O'Brien* (1938) 65 K.B. 64 referred to and followed.

4. That the plaintiff who succeeds in an action for damages based on negligence is entitled to his costs, irrespective of the fact that the claim may have been reduced by reason of concurrent negligence on the part of the defendant or his servant. *The King* v. *Lightheart* [1952] Ex. C.R. 12 at 19 referred to and followed.

1954

HOULE v. THE QUEEN AND ARCAND AND LACROIX

PETITION OF RIGHT to recover from the Crown damages for death of suppliant's husband alleged caused by the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice Fournier at Montreal.

Pierre Décary for suppliant.

John Ahern, Q.C., Paul Trépanier and *Paul Ollivier* for respondent.

Archibald J. MacDonald for third party Lacroix.

Jules Deschenes for third party Arcand.

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

FOURNIER J. now (June 7, 1954) delivered the following judgment:

In this petition of right the suppliant seeks to recover damages from the respondent for the death of her husband, killed as the result of a collision between two motor vehicles. On December 11, 1950, Henry James Kenny, then a member of the Canadian Army and on duty, was a passenger in a motor vehicle operated by Lieutenant Joseph Albert Arcand, also a member of the Canadian Army, alleged to have been then acting within the scope of his military duties, and that the said collision occurred because of the fault and negligence of the said Arcand.

The suppliant is the widow of the said H. J. Kenny, having married him on September 12, 1936. Two children were born of their marriage, namely, Joan Annette, born August 26, 1938, and Carol Marie Antoinette, born September 8, 1942, who are both living. On November 2, 1951, the suppliant was duly appointed tutrix of the above mentioned two minor children. On November 9, 1951, she filed this petition of right claiming damages for the death of the said H. J. Kenny, both in her own behalf and in her quality of tutrix to the two minor children.

The respondent denies responsibility on the grounds 1) that the suppliant and her two minor children being in receipt of a pension under the provisions of the Pension Act,

1954

HOULE
v.
THE QUEEN
AND
ARCAND AND
LACROIX

Fournier J.

R.S.C. 1927, chap. 157, she was barred from proceeding by petition of right under sections 19(c) and 50A of the Exchequer Court Act, R.S.C. 1927, chap. 34; 2) that Lieutenant J. A. Arcand, driving his own automobile, was not acting within the scope of his duties and employment; 3) that even if he were and the collision *was caused by his negligence,* the Crown could not be held liable for the damages claimed according to the Pay and Allowance Regulations of the Canadian Army, 1946, section 207, subsection (8); 4) that the collision was caused by the fault, negligence and false movement of Louis Philippe Lacroix, owner and driver of the other motor vehicle involved in the collision.

A third party notice was filed herein by the respondent on August 19, 1952, and served on L. P. Lacroix and J. A. Arcand, third parties. By order made on February 4, 1954, it was directed that the question of liability as between the third parties and the respondent be tried at the trial of the action; that the third parties be at liberty to defend the action, to appear at the trial, to plead and to take part therein and that the third parties be bound or made liable by judgment in the action in the manner and to the extent as may be determined by the judge before whom the action shall be heard. Both third parties appeared at the trial, filed pleas and took part in the trial.

Before considering the facts which caused the collision and the amount, if any, of the damages sustained by the widow and minor children, the main issues between the parties must be determined.

The suppliant's petition of right is taken under subsection (c) of section 19 and section 50A of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended.

The material part of section 19 reads as follows:—

> The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

Section 50A is thus worded:—

> For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-

eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

Counsel for the respondent submits first that the suppliant and her two minor children being in receipt of a pension under the provisions of the Pension Act, R.S.C. 1927, chap. 157, as amended, she has no right of action under the above sections of the Exchequer Court Act.

The pension awarded and payable to the suppliant and her two minor children was paid under the provisions of section 11 (2) which read:

11. In respect of military service rendered during World War I or during World War II and subject to the exception contained in subsection two of this section.

2. In respect of military service rendered after the war, pensions shall be awarded to or in respect of members of the forces who have suffered disability, in accordance with the rates set out in Schedule A of this Act, and in respect of members of the forces who have died, in accordance with the rates set out in Schedule B of this Act, when the injury or disease or aggravation thereof resulting in disability or death in respect of which the application for pension is made was attributable to military service as such.

The Pension Commission ruled that H. J. Kenny was a member of the armed forces and that his death was attributable to military service. Upon the application of the suppliant, pensions were awarded to her and the two children at current rates.

Has the suppliant, widow of a service man, and receiving the benefits of the Pension Act, the right to claim damages from the respondent under section 19(c) of the Exchequer Court Act? This is the first question to be determined.

In the case of *Oakes* v. *The King* (1) Cameron J. held "that the receipt of pension under the provisions of the Pension Act, R.S.C. 1927, chap. 157, is not a bar to proceedings against the Crown under section 19 (c) of the Exchequer Court Act, R.S.C. 1927, chap. 34". He based his finding on the principles laid down by the learned President of this Court in *Bender* v. *The King* (2) where it was held "that an employee of the Crown who has claimed and received compensation for injuries arising from and out of the course of his employment under the Government

(1) [1951] Ex. C.R. 133. (2) [1946] Ex. C.R. 529.

1954

HOULE
v.
THE QUEEN
AND
ARCAND AND
LACROIX

Fournier J.

Employees Compensation Act is not thereby barred from pursuing his claim for damages for such injuries under section 19 (*c*) of the Exchequer Court Act."

An appeal was taken by the Crown to the Supreme Court, which affirmed the judgment of the learned President (1). The head-note reads in part:

An employee of the Crown (Dom.) who has, under the Government Employees Compensation Act (R.S.C. 1927, c. 30, as amended in 1931, c. 9), claimed and received compensation for personal injuries by accident arising out of and in the course of his employment is not thereby barred from pursuing a claim for damages against the Crown for such injuries under s. 19 (c) of the Exchequer Court Act (R.S.C. 1927, c. 34).

The said enactments are not repugnant to each other; they deal with two entirely different matters; s. 19 (c) of the Exchequer Court Act applies only where negligence is shown, while the Government Employees Compensation Act applies whether or not negligence on anyone's part is proved; the right thereunder arises, not out of tort, but out of the workman's statutory contract.

The only other case brought to my attention by counsel for the respondent was that of *Meloche* v. *The King* (2) in which Angers J. held:

1. That a soldier of the Canadian Army who is wounded or killed on active service and his dependents have no claim against the Crown on account of injuries or death under ss. 19 (c) and 50A of the Exchequer Court Act since Parliament has in their favour created a special remedy by way of a pension under the Militia and the Pension Acts.

2. That where a special remedy is created by a statute it prevails over that provided by the general law.

It was argued that this last decision should apply to the present case because the remedy by way of pension by the Pension Act to the wife and minor children of a member of the forces killed under certain circumstances prevails over the provisions of sections 19 (c) and 50A of the Exchequer Court Act. I cannot agree with this principle.

The pension granted and paid to the suppliant and her children was for the death of her husband killed while on duty and whose death was attributable to his military service.

In this petition she claims damages for the death of her husband killed through the negligence of a servant of the Crown while acting within the scope of his duties.

The Pension Act creates a right of action for compensation for injury or death arising out of and attributable to his military service. The Exchequer Court Act imposes a

(1) [1947] S.C.R. 172. (2) [1948] Ex. C.R. 321.

liability on the Crown and gives a general right of action for damages for death or injuries resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties. The first liability the Crown accepts is the protection of the members of the armed forces and of the wife and children when the injuries or death is attributable to military service. The second liability arises out of the damages caused by the negligence of an employee on duty.

As the President of the Court says in the case of *Bender* v. *The King (supra),* the two enactments deal with entirely different matters and separate and distinct rights are conferred. The suppliant has two causes of action, one based on the statutory provisions of the Pension Act, the other based on negligence as provided under section 19 (c) of the Exchequer Court Act.

The Supreme Court of Canada in re *Bender* v. *The King* decided that the enactments were not repugnant to each other and that they dealt with entirely different matters.

This decision, in my mind, applies as to the enactments of the Pension Act and the Exchequer Court Act applicable to the facts of the present case.

For the above reasons, I have come to the conclusion that the suppliant herein, though in receipt of a pension under the Pension Act, has a right of action against the Crown under section 19 (c) and section 50A of the Exchequer Court Act.

It was then submitted that at the time of the collision Lieutenant J. A. Arcand was driving his own car and was not acting within the scope of his duties or employment.

He had been ordered to proceed to Sherbrooke on December 11, 1950, with Sergeant Major Kenny and Sapper St. Aubin, to do some inspection work.

On August 8, 1950, his superior officer, Major J. D. Hazen, R.C.E., A/Command Engineer Officer, Quebec Command, had requested from the D.A.Q.M.G., under paragraph 207 (2) (a) of the Pay and Allowance Regulations, that Lieutenant Arcand be authorized to use his own car while carrying out his duties. On August 9, 1950, he was granted this authority to use his car and claim reimbursement under the provisions of the Pay and Allowance Regulations (see

1954

HOULE v. THE QUEEN AND ARCAND AND LACROIX

Fournier J.

Exhibit 2). Being thus authorized, he proceeded in his own car to Sherbrooke with his associates, as ordered. En route, the collision occurred.

At the trial the respondent filed as Exhibit D a form entitled "Route Directions and Claim for Travelling Expenses and Subsistence". This document was put in evidence to establish the procedure followed by the National Defence Department in the settlement of claims for travelling expenses when a private car was used. It carries a certificate that the car was used in the public interest while on military duty and with the proper authorization. The same procedure was followed in the present instance, but the claim was not pressed because the Department, on hearing of the collision, sent a military vehicle to take care of the transportation of their three men. Lieutenant Arcand, now a captain, was a member of the Royal Canadian Engineer Corps and was going to Sherbrooke to act as a member of a Board of Officers for the taking over of property which had been purchased by the Department. He was authorized to use his car as a means of transportation for the carrying out of his duties. He was on duty on that trip and the driving of his vehicle was within the scope of his duties. I cannot agree with the submission of the respondent on this point.

Then it was argued that the Crown was not liable or responsible for any accident, injury or damage to any person or property which may occur while a private motor car is being used by an officer or soldier under section 207 (8) of the Pay and Allowance Regulations and that the suppliant had no right to action against the respondent in this instance.

When section 50A of the Exchequer Court Act was enacted it had the effect of imposing a liability on the Crown and creating a right of action which had not previously existed. Members of the armed forces then became, as all other officers or employees, for all purposes of the Act, servants of the Crown.

This section of the regulations may establish the relationship between the Department and the members of the armed forces when injuries and damages to persons and property are caused by members of the forces driving their own vehicle on duty, but would not affect the liability of

the Crown for damages caused by their servant through negligence while acting within the scope of his duties or employment. If it had, it would be limiting the liability to cases where the vehicle involved in a collision belonged to the Crown. This conclusion, in my mind, can hardly be reconciled with the statutory liability assumed by the Crown and the statutory right of action provided by section 19 (c) of the Exchequer Court Act.

The Crown may well, as regards its own servant, not assume responsibility and reserve its recourse to recover amounts paid for damages resulting from its servants' wrongful acts, as was done in this case, by giving a third party notice to Lieutenant Arcand, but this regulation is certainly not a bar to the right of action contemplated by the section of the Act above mentioned.

Having arrived at the conclusion that the suppliant and her children, though they came under the provisions of the Pension Act and were in receipt of a pension, are not deprived of their right of action and that Lieutenant Arcand, who was driving his own vehicle with proper authority at the time of the collision, was a servant of the Crown within the meaning of section 50A and acting within the scope of his duties and that furthermore section 207 (8) of the Pay and Allowance Regulations was no bar to the suppliant's claim, it follows that they were entitled to invoke the provisions of section 19 (1) (c) of the Exchequer Court Act and to recover damages if they were the result, in part or in whole, of the negligence of the respondent's servant.

Now here is a summary of the facts relating to the collision. L. P. Lacroix, one of the third parties, on December 11, 1950, between one and one thirty p.m., left Sherbrooke for Montreal. He was driving his own automobile, a Plymouth, model 1948. He was accompanied by his wife and his sister-in-law, who were seated with him on the front seat. He was travelling east-west on No. 1 highway, a thoroughfare comprising three traffic lanes. The weather was clear and the visibility was good. The road from Sherbrooke to Granby was in perfect condition. From Granby on, the highway was covered by five or six inches of snow which had fallen the previous day. The

1954

HOULE v. THE QUEEN AND ARCAND AND LACROIX

Fournier J.

passage of traffic had created two sets of ruts on the road. One, on the north side, was used by vehicles going from Granby to Montreal; the other, on the south side, was used for the traffic from Montreal to Granby. Though the witnesses did not look at the speedometer they state that they were travelling at 30 to 35 miles an hour.

Some short distance after leaving St. Paul d'Abbotsford they passed a truck and to do so Lacroix increased somewhat his speed. The driver of the truck, though he paid no attention to his speedometer, says he was travelling at a rate of from 25 to 30 miles an hour. He followed the other vehicle for eight or ten minutes. He was then trailing the Lacroix automobile by five or six arpents or about 1,000 feet. He had seen another car coming in the opposite direction some five or six arpents ahead of the car he was following, so he saw the other some 2,000 feet ahead. The car had just turned a curve when it started to skid from right to left, then from left to right. This happened two or three times. The last time, this automobile came right over on its left side of the road but pulled immediately to its right. During all this time, Lacroix was travelling on his right side of the road. Seeing the other car coming head-on at quite some distance, he applied his brakes but they had no effect, there being ice under the snow, and he veered to the left to let the other car pass him on his right. That is when the collision occurred. It was then about 2.30 p.m. The collision took place some sixty miles west of Sherbrooke.

Lieutenant J. A. Arcand left Montreal to go to Sherbrooke some time in the forenoon on the same day. He was driving his own automobile, a two-door Ford, model 1950. He had three passengers, his father, who was seated in front with him, and Sergeant Major Kenny and Sapper St. Aubin, who were seated on the rear seat. He was travelling west-east on the same highway. The road, from Montreal to the place of the collision, was covered with five or six inches of snow, with ruts forming two lanes of traffic. Being in no particular hurry or rush, witnesses say that he was travelling at a speed of from 30 to 35 miles an hour, though nobody looked at the speedometer. The day was bright and there was nothing to obstruct his vision. He was travelling on his right side of the road. He had

just passed a slight curve when his car started skidding. The rear end of his car swerved to its left. He does not know what caused the skidding but thinks that probably there was ice under the snow. He turned his wheel to straighten the car out, but then it swerved to the right. He crossed partially across the road into the tracks to his left. At that time, it appeared that he was going to go right across the highway, but he turned his wheel to the right and came back to his right side. The rear of his car was partially on the right side of the centre of the road and the front on his right side when the back left side of his car was struck by the other car.

One fact is certain, the road from Granby going west was in a very bad condition. There was ice under the snow. Lacroix, when he saw the oncoming vehicle, applied his brakes but without any effect. He said the road was slippery and at his speed could not have stopped before covering one to two arpents, which is to say from 180 to 360 feet. Arcand did not apply his brakes but decreased his speed by giving less gas and still could not control his vehicle. His car continued to skid on account, in my mind, of its speed and the slippery pavement. When the roads are in such a condition, it is compulsory that drivers limit their speed. The general principle laid down in the Quebec Motor Vehicles Act, R.S.Q. 1941, chap. 142, and amendments thereto, reads as follows:

41. Any speed or imprudent action which might endanger life or property is prohibited on all the roads of the Province.

In my opinion both Lacroix and Arcand were driving their vehicles at a dangerous rate of speed at the time of or immediately preceding the collision.

I have no doubt that the speed at which both vehicles were driven was dangerous and illegal considering the circumstances. Lacroix, having left Sherbrooke between 1 and 1.30 p.m. and arrived at the place of the collision at 2.30, covered some sixty miles in less than one hour and thirty minutes. Then, when he saw an oncoming vehicle, at quite a distance, the driver of which had lost control of his car, his speed was such that he could not stop in time to avoid the accident. Faced with that fact, he had two alternatives, veer to his right or to his left. Had he turned

1954

HOULE v. THE QUEEN AND ARCAND AND LACROIX

Fournier J.

to his right, he could have avoided the collision, because there was sufficient space on the paved portion of the highway and on the shoulder of the road, on that side, to pass the other car without incident. But instead, he veered to the left and struck the rear left side of the other car which was then anglewise on the centre and on its right side of the road. To say that in the agony of collision he should not be blamed for making this wrong decision is not justified. He put himself in this position by driving at an excessive rate of speed, as the physical results of the impact on both vehicles would indicate. If he himself had done nothing to bring about the emergency with which he was faced and if the imminence of the collision was wholly due to the other automobile he would not have been at fault. In my opinion, his own negligence contributed to a large extent to create the emergency. When seeing the other car coming from the opposite direction and skidding from one side of the road to the other, his duty was to stop or slow down. His failure to do that can only be explained by his excessive speed.

As to Arcand, he was driving on a snowy and icy road. His speed was such that when his car started skidding he lost control thereof and could not avoid the collision. The distance covered while skidding indicates that his speed was excessive under the circumstances.

I have come to the conclusion that both drivers were negligent and at fault. The excessive speed at which they were driving their vehicles before and at the time of the accident was the *causa causans* of the collision. I am, therefore, of the view that there was "faute commune" of both third parties, with the greater portion of the blame attached to L. P. Lacroix. I fix his share of responsibility at 70 per cent and that of J. A. Arcand at 30 per cent.

The suppliant personally claims $66,640 for damages "as a result of the loss of her husband and the support to which she was entitled" and as tutrix to her two minor children she claims a further sum of $10,000 for each as a result of the loss of their father. The suppliant's husband was thirty-nine years and some months at the time of his death and she was a few years younger. The two children were then approximately eight and twelve years of age.

At the time of his death Kenny was in perfect health. He had been a member of the Canadian Army for twenty years. During the two years preceding his death (1949 and 1950) he received in pay and allowances the sum of $6,857.67. In December 1950, his pay and allowances had been increased to $333 per month.

His life expectancy at the time of his death and that of his wife was over thirty years. For some years to come, the suppliant and her husband would have normally been in receipt of nearly $4,000 a year. Her evidence is that at the present time it costs her $342 a month to maintain herself and her two children. This would include all the ordinary expenses for the upkeep of the family.

The suppliant's right to recover compensation for the death of her husband, killed through negligence, should be the pecuniary benefit which the family could have enjoyed had the head of the family not been killed. The determination of the compensation cannot be mathematical, because the basis upon which the amount will be determined will be estimated on probabilities difficult to foresee.

In fixing the amount of damages sustained, I have taken into consideration the life expectancy of the suppliant and her husband, the ages of the two children and the probable amount which the deceased would have contributed to their support had he lived. I was also mindful of the fact that the suppliant and her two minor children were in receipt of a pension under the provisions of the Pension Act. Inasmuch as it was possible, I have taken into account all the ordinary events that may happen in one's life, during a certain number of years, which may increase or decrease productive capacity and the financial aid that may be normally expected by one's dependents. After doing so, I have reached the conclusion that the sum of $20,000 over and above any amount received by the suppliant and her children from the respondent as pension or otherwise would be a fair compensation for the damages sustained. This amount should be divided as follows: to the widow, in her personal capacity, the sum of $15,000; to Carol Marie Antoinette Kenny, the youngest daughter, the sum of $3,000; to Joan Annette Kenny, the sum of $2,000.

1954

HOULE v. THE QUEEN AND ARCAND AND LACROIX

Fournier J.

The suppliant also claims the amounts disbursed for funeral expenses and mourning apparel. I do not think that the respondent is liable for this claim: see *Halsbury's Laws of England,* second edition, vol. 3, p. 459, No. 864, where the author says:

> 864. The funeral expenses of a person who has been killed by the negligence of another appear to be in no case recoverable from the latter either under the Fatal Accidents Act, 1846, or at common law.

See also *Bahen* v. *O'Brien* (1). The head-note is in part as follows:

> La veuve qui exerce le recours de l'article 1056 C.C. ne saurait réclamer les frais funéraires à l'auteur d'un quasi-délit qui a causé la mort de son mari.
>
> Le deuil de la veuve doit être acquitté par la succession; celui des filles reste à la charge de celles-ci.

In this case the suppliant seeks remedy as the widow of the victim J. H. Kenny and not as one of his heirs. This claim is disallowed.

The Court found that the respondent was liable for the damages caused to the suppliant and H. J. Kenny's two minor children by the negligence of its servant J. A. Arcand, while acting within the scope of his duties and employment, to the extent of 30 per cent. The suppliant having exercised her right of action against the respondent, as was her privilege, and the respondent being one of two or more persons responsible jointly and severally for the damages caused by the negligence of its servant, the respondent is held liable for the total amount awarded. This is in accordance with the principle enunciated in article 1106 of the Civil Code which reads as follows:

> 1106. The obligation arising from the common offence or quasi-offence of two or more persons is joint and several.

It is settled by the practice of this Court that the suppliant 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 respondent or his servant: *vide The King and Wilfred Lightheart* (2).

In accordance with the general rules and orders of this Court, the respondent gave a third party notice to L. P. Lacroix and J. A. Arcand. They appeared, filed their

(1) (1938) 65 K.B. 64 et seq. (2) [1952] Ex. C.R. 19.

defence and took part in the trial. The question of liability as between the third parties and the respondent was tried at the trial of the action.

It was found that both third parties were to blame for the damages caused to the suppliant and her minor children and that the greater portion is attached to L. P. Lacroix. His responsibility was fixed at 70 per cent and that of J. A. Arcand at 30 per cent. The respondent is entitled to recover from the third parties the amount awarded by this judgment to the suppliant and her costs in proportion to the degree of their responsibility above stated. The respondent is also entitled to the costs of the third party proceeding, recoverable from the third parties in the same proportion.

There will, therefore, be judgment declaring that the suppliant is entitled to recover from the respondent the sum of $20,000 without any deduction therefrom of any amounts heretofore paid to her by the respondent either on her own behalf or on behalf of the minor children; the said amount to be divided as follows: to the suppliant in her personal capacity, $15,000, as tutrix to Carol Marie Antoinette Kenny, the youngest daughter, the sum of $3,000 and as tutrix to Joan Annette Kenny, the sum of $2,000. The suppliant will also have her costs.

The respondent is entitled to recover:

1. from L. P. Lacroix, third party, $14,000, or 70 per cent of the amount awarded, plus 70 per cent of the costs of the action and third party proceedings;
2. from J. A. Arcand, third party, $6,000, or 30 per cent of the amount awarded, plus 30 per cent of the costs of the action and third party proceedings.

Judgment accordingly.