BETWEEN:

PETER VALENTINE GAETZ *et al.* .....SUPPLIANTS;

1955
Mar. 21
Apr. 22

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Negligence—Pedestrian struck by motor vehicle owned by the Crown and driven by its servant acting within the scope of his duties—The Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a), 3(2), 4(2) and (3)—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(c)—Onus of proof on suppliants—Liability of the Crown a statutory one and limited to express terms of the statute creating it.

Suppliants claimed special and general damages for personal injuries and losses sustained by them as a result of an accident in which one of the suppliants while walking on a highway was struck by a motor vehicle owned by the Crown and driven by one of its servants who was then acting within the scope of his duties. On the facts the Court found that both the pedestrian and the driver of the motor vehicle were negligent and fixed the former's share of responsibility at 30 per cent and the latter's at 70 per cent.

Held: That the law applicable to claims against the Crown for damages caused or losses sustained as the result of the negligence of one of its servants while acting within the scope of his duties or employment is the same under the Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(*a*) and 3(2) as it was under the Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(*c*).

2. That the onus of proof of the following facts rests upon the suppliants: (*a*) that the driver of the respondent's motor vehicle was a servant of the Crown and was acting within the scope of his duties at the time and at the place of the collision; (*b*) that he was negligent in the performance of his duties; (*c*) that the suppliant suffered injury and sustained losses; (*d*) that the injuries and losses to the suppliants resulted from his negligence. No presumption or assumption can displace this statutory obligation.

3. That although the liability of the Crown under this Act is to be determined by the law of negligence in force in the province in which the alleged negligence occurred such provincial law shall apply only so far as it is not repugnant to the statute by which the liability was imposed and does not seek to place a liability upon the Crown different from that imposed by Parliament. This liability is a statutory one and is limited to the express terms of the statute creating it.

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PETITION OF RIGHT under the Crown Liability Act.

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

N. A. Davidson and *P. D. Seaton* for suppliants.

R. M. Hayman and *D. S. Maxwell* for respondent.

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

FOURNIER J. now (April 22, 1955) delivered the following judgment:

In this petition of right the suppliants seek to recover from the Crown damages, special and general, for personal injuries and losses sustained by them as the result of a collision between a motor vehicle owned by the respondent and driven by Robert Sidney Rogers, a member of the Royal Canadian Mounted Police, a servant of the Crown then and there acting within the scope of his duties and employment, and Peter Valentine Gaetz, a pedestrian, hereinafter referred to as the male suppliant.

The petition is taken in the name of the male suppliant by William Charles Rotar, his next friend, and by his mother, hereinafter referred to as the female suppliant, the latter claiming special damages for the expense to which she has been put, for hospital, medical care and incidentals, and also general damages.

The suppliants allege that the collision was due solely to the negligent driving and operation of the respondent's motor vehicle, that by reason of this negligence they suffered personal injuries and sustained losses and that they are entitled to the relief sought in their petition of right. The Crown, through one of its officers, admitted that the driver of its motor vehicle was its servant acting within the scope of his duties, but denied that the collision was due to his negligence and alleged that the accident was caused by the negligence of the male suppliant or by the negligence of both the driver of the motor vehicle and the pedestrian.

The suppliants' claims are made under the Crown Liability Act, Statutes of Canada, 1952-53, chapter 30, which came into force on May 14, 1953. The rules to be considered in

the present instance are to be found in section 3 (1) (*a*) (2) and section 4 (2) (3). They are correlated and should be read in conjunction. They are thus worded:

3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

(*a*) in respect of a tort committed by a servant of the Crown, . . .

(2) The Crown is liable for the damage sustained by any person by reason of a motor vehicle, owned by the Crown, upon a highway, for which the Crown would be liable if it were a private person of full age and capacity.

4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

(3) No proceedings lie against the Crown by virtue of subsection (2) of section 3 in respect of damage sustained by any person by reason of a motor vehicle upon a highway unless the driver of the motor vehicle or his personal representative is liable for the damage so sustained.

This statute imposes a liability on the Crown for the torts of its servants generally. The former statute which imposed a liability on the Crown for damages resulting from the negligence of its officers and servants was the Exchequer Court Act, R.S.C., 1952, chapter 98, section 18 (1) (*c*) which replaced section 19 (1) (*c*) of the Exchequer Court Act, R.S.C. 1927, chapter 34. Section 18 (1) (*c*) provides:

18. (1) The Exchequer Court also has 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;

This provision of the Exchequer Court Act was repealed upon the coming into force of the Revised Statutes of Canada, 1952, and replaced by the provisions of the Crown Liability Act. The Crown, instead of being liable only for the damage resulting from the negligence of its officers and servants, is now liable for the damage resulting from a tort committed by its servants. The Crown is in the same legal position with respect to liability in tort as a private person of full age and capacity.

But the law is the same under both statutes whenever a claim against the Crown arises out of the death of or injury to the person resulting from the tort or negligence of a servant of the Crown. That is to say that the law applicable

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to claims based on damage caused or losses sustained as the result of the negligence of a servant of the Crown while acting within the scope of his duties or employment is the same under sections 3 (1) (*a*) (2) and 4 (2) (3) of the Crown Liability Act, as it was previously under section 18 (1) (*c*) of the Exchequer Court Act.

The suppliants to succeed against the respondent must establish (*a*) that the driver of the respondent's motor vehicle was a servant of the Crown and was acting within the scope of his duties at the time and at the place of the collision; (*b*) that he was negligent in the performance of his duties; (*c*) that the suppliant suffered injury and sustained losses; (*d*) that the injuries and losses to the suppliants resulted from his negligence.

The onus of proof of these facts rests upon the suppliants and no presumption or assumption can displace this statutory obligation. Though it is well established that the liability of the Crown under this statutory provision is to be determined by the law of negligence in force in the province in which the alleged negligence occurred, this rule is subject to the qualification that such provincial law shall apply only so far as it is not repugnant to the statute by which the liability was imposed and does not seek to place a liability upon the Crown different from that imposed by Parliament. This liability is a statutory one and is limited to the express terms of the statute creating it.

Now let us see if the suppliants have discharged their obligation to establish the necessary facts to succeed in their claims.

It has been established that the driver of the respondent's motor vehicle, at the place and at the time of the collision, was a servant of the Crown acting within the scope of his duties. It is in evidence that the male suppliant was injured and that both suppliants sustained losses as a result of the collision.

The questions to be determined are whether the driver was negligent while driving the motor vehicle and, if the answer is in the affirmative, whether his negligence was the cause of the injuries to the male suppliant and of the losses sustained by both suppliants.

On November 17, 1953, at or about 11.30 p.m., the suppliants were walking on highway 97-A in an easterly direction between the city of Armstrong and the town of Enderley in the Province of British Columbia. At the same time, on the same highway, at the same place and in the same direction, the respondent's motor vehicle was being driven and operated. At approximately 1·5 miles east of the city of Armstrong the male suppliant was struck by the motor vehicle when the driver was attempting to pass another motor vehicle travelling in the same direction.

As in most cases of collision, the evidence is contradictory. The male suppliant says that he was walking in an easterly direction on the extreme left side of the paved portion of the roadway and that his mother was following a foot or two behind him. At a certain moment he turned his head and saw at a distance two motor vehicles travelling in the same direction on the right lane of the highway. He noticed the lights of these vehicles and heard his mother say: "They are coming straight on us, jump." At that precise moment, he was struck by the respondent's vehicle and was thrown on the left shoulder of the road. As a result, he was severely injured. His two legs were fractured and also his pelvis. His legs and right buttock were bruised and lacerated. He had no time to jump to his left because he was struck just as his mother was warning him. He had a flash-light, but was not using it seeing there was no oncoming traffic. He was then driven in a car to the Armstrong Hospital where he was treated.

Mrs. Gaetz, the female suppliant, was walking behind her son, a little to his left on the shoulder of the roadway. She was so close to her son that she could touch him with her outstretched hand. On three occasions in a very short period of time, she saw the two motor vehicles coming. They were on the right lane of the highway when she looked back the two first times, but the last time that she glanced back one of the vehicles was coming on the left lane in their direction. She cried out a warning to her son and at the same time jumped to her left. Both these witnesses maintain that at no time they had walked in the middle of the left lane; they had kept to the extreme left portion of the hard-surfaced pavement.

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Three witnesses who were at the time on the scene of the collision testified on behalf of the respondent. Constable Rogers, of the Royal Canadian Mounted Police, was driving the Crown's motor vehicle in the same direction as the two previous witnesses were walking. He was following another car. He had been driving at 35 miles an hour more or less till he came up to about 40 feet to the rear of the car preceding him. He saw that there was no traffic behind him and decided to overtake the first vehicle. He increased his speed to 40 miles an hour and turned to his left. He says that as he saw no oncoming traffic he got on the left lane of the highway, put his lights on high beam and noticed at that moment a pedestrian walking ahead of him in the middle of the left lane, in front of his car, at a very short distance, say 15 to 20 feet. He immediately put his foot heavily on the brakes, turned his wheel to his right, but at that moment the front left light of the car hit the pedestrian, who was thrown on the left side of the hood, bounced sideways on the left front door and fell on the left shoulder of the road. The constable stopped, parked his car, gave his attention to the victim and drove to the hospital with the male suppliant and another party. Later that night, accompanied by Corporal Calvert, he took measurements at the location of the accident and drew a sketch and plan of the roadway, place of impact, position of victim after the collision, skid-marks, and so forth.

The car which Constable Rogers was trying to pass was driven by James Shiach accompanied by Miss Shirley Patton, now his wife, and her father and mother. These two last were seated in the rear and did not see what took place. Miss Patton was seated sideways in the front and was looking to her left, so that she could see and speak to her friend. She says that when she first noticed the pedestrians they were in the middle of the left lane and very close. The other car was attempting to pass them. The driver saw the pedestrians when they were at a distance of the length of a car in front of his vehicle. As to their position, he started by saying that they were in the middle of the centre line, but when pressed he said that Mrs. Gaetz was walking on the extreme left of the pavement and that her son was at her side at a distance of about one foot. He was driving at 35 miles an hour. Previously he had seen

the police car parked on the right side of the highway. Having passed that spot he had increased his speed to 40 miles an hour and then had slowed down to 35 miles an hour when he saw that the police car was following him. Both cars were proceeding on a part of the highway where the speed limit was 50 miles an hour. Though he knew by the light signal that the police car was attempting to pass him, he continued on the right lane without going further to his right. Other witnesses were heard but they were not eye-witnesses of the accident.

I will not deal at length with the testimonies relating to the skid-marks. In my opinion the measurements of the skid-marks would indicate that the police car was being driven at a rate of speed of at least 40 miles an hour. It is possible, and perhaps probable, that he was driving a little faster than that, taking into consideration that he was travelling on a straight stretch of the road where the speed limit was 50 miles an hour and that he was attempting to pass another car.

As to exactly where the pedestrians were walking, it would appear from the evidence as a whole that the suppliants were walking side by side on the left side of the paved portion of the highway, the mother on the outside and the son on the inside. At exactly what distance from the shoulder of the pavement is difficult to determine, but I believe they would have occupied between $2\frac{1}{2}$ and 4 feet of the paved portion.

Regarding the visibility that evening, while listening to the testimonies I became convinced that not one witness knew exactly if it was clear, dark, cloudy or starry. In my mind it was an ordinary night of November, the nights at this period of the year being never very clear but rather dark. The visibility being such, I understand that a driver would have difficulty in seeing dark obstacles on the roadway.

The drivers of both vehicles told the Court that their lights were in good condition and that their eyesight was good. Taking for granted that with good lights on high beam, one having no impairment to his eyesight can see at a distance of 200 to 300 feet, how can it be explained that they saw the pedestrians at a distance of only 15 to 20 feet?

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They gave as their reason that it was very dark, that the pedestrians were dressed in dark clothing and that there were mountains in the background. At the same time, they admitted that they were familiar with this stretch of the road and knew that pedestrians often travelled on the roadway, even at night.

The collision, in my view, was brought about by two facts. The driver of the respondent's motor vehicle was eager to overtake the car ahead. Seeing that there was no traffic at his rear, without paying attention to what was ahead he turned to his left to get on the left lane when he was only about 40 feet behind the first car and put his lights on high beam. At that moment, when his front bumper was parallel with the rear bumper of the other car, he saw the male suppliant right ahead of his car. Had he taken the left lane when he was further behind the first car I am sure he would have seen the pedestrians in time to return to the right lane before colliding with him, or he could have either warned the pedestrian of his intention to pass ahead or stopped his car in time to avoid striking him.

True that he was proceeding on a 50-mile an hour zone and that driving at say 40 miles an hour, under ordinary conditions, would not have been exaggerated. But in a night when the visibility, according to his own testimony, was very poor, it was an obvious act of negligence and imprudence on his part to attempt to pass another car without giving due warning to the traffic ahead and without being sure that no obstacle lay in his way. He was taking a risk.

As to the pedestrians being on the highway, I cannot bring myself to believe that their presence was the *causa causans* of the collision. They were on the left side of the pavement—at what distance, I am not too sure—, but their duty to exercise due care cannot be compared to that of a driver of a motor vehicle. I do not think that pedestrians are legally bound to walk at all times on the shoulder of a highway. If they conform to the statutes and bylaws prescribing that they should walk to their left side of the road, so that they can see the oncoming traffic and avoid danger,

they cannot be held responsible when they are struck from behind by a motor vehicle travelling in the same direction and whose driver failed to give proper warning of his approach or of his intention to overtake another vehicle.

On the other hand, had they been closer to the left edge of the pavement, perhaps the results of the accident would have been less severe or serious.

Therefore, I find that the accident was due to the negligence of the respondent's servant who failed to keep a proper lookout and who was driving the motor vehicle at a speed in excess of that justified by the facts and circumstances of the collision.

I also find that the accident was not solely due to the negligence of the driver of the car. The male suppliant, with a little more care, could have, by walking closer to the edge of the pavement, perhaps not avoided the impact but diminished the seriousness of the injuries. I have reached the conclusion that there was negligence both on the part of the driver of the motor vehicle and of the victim. On the evidence, I find that the driver of the respondent's motor vehicle was seventy per cent to blame for the collision and the male suppliant 30%.

As a consequence of the accident, the male suppliant was seriously injured. He was skilfully treated and he now appears to be in good condition.

In 1953, which was the first year in which he was gainfully employed, he earned $1,400. He has been unable to work for a year following his accident. I will allow him $1,400 for his temporary disability and $1,600 for his partial permanent disability. I also award him $200 for pain and suffering. Had he not contributed, to a certain extent, to his misfortune he would have been entitled to the sum of $3,200. Thirty per cent (30%) of this sum being deducted as his share of responsibility, he is entitled to $2,240.

Mrs. Gaetz, the female suppliant and mother of Peter Gaetz, as sole support of her son was put to expense for medical, hospital and surgical care and incidentals thereto.

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The amounts duly proven and established before the Court are as follows:

Armstrong & Spallumcheen Hospital	$1,894.70
The Vernon Clinic	192.50
Vernon Jubilee Hospital	13.00
Dr. Ragn Vald Hangen	300.00
Dr. Kope	15.00
Ambulance, taxis, etc.	25.00
	$2,440.20

Mrs. Gaetz will be entitled to seventy per cent (70%) of this amount of $2,440.20 or a sum of $1,708.14.

In the result there will be judgment in favour of the male suppliant Peter Valentine Gaetz for seventy per cent (70%) of his claim established at $3,200, viz. $2,240, and in favour of the female suppliant Mrs. Katherine Christina Gaetz for seventy per cent (70%) of her claim established at $2,440.20, viz. $1,708.14.

It is settled by the practice of this Court that the plaintiff 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 defendant or his servant.

There will therefore be judgment in favour of the male suppliant Peter Valentine Gaetz for $2,240 and in favour of the female suppliant Mrs. Katherine Christina Gaetz for $1,708.14, plus costs to be taxed in the usual way.

Judgment accordingly