

SECOND DIVISIONAL COURT.

DECEMBER 4TH, 1916.

*DOAN v. NEFF.

Trial—Action by two Plaintiffs — Damages for Negligence—Verdict of Jury—New Trial Confined to Assessment of Damages—Judicature Act, sec. 27—Costs of Appeal.

Appeal by the plaintiffs from the judgment of BRITTON, J., upon the findings of a jury, in so far as it dismissed the action as against the plaintiff Violet B. Doan.

The action was brought by E. F. Doan and Violet B. Doan, his wife, to recover damages arising from a collision upon a highway of a buggy belonging to the plaintiff E. F. Doan with the defendant's automobile. The buggy was smashed, and it was alleged that the plaintiff Violet was injured. The plaintiffs charged negligence on the part of the defendant. The jury found a verdict as follows: "On account of slight evidence of Mr. Neff we give a verdict of \$125 to Mr. Doan, and nothing to Mrs. Doan." Judgment was given for the plaintiff E. F. Doan for \$125 with costs on the County Court scale and without set-off; and dismissing without costs the claim of the plaintiff Violet B. Doan.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, KELLY, and MASTEN, JJ.

W. M. German, K.C., for the appellants.

Frank Denton, K.C., for the defendant, respondent.

RIDDELL, J., in a written judgment, said that the injuries suffered by the wife were substantial, and it would be impossible to allow the finding against her to stand. The question arose whether the Court should exercise the power given by sec. 27 (2) of the Judicature Act, R.S.O. 1914 ch. 56, and assess the damages. It was urged that the jury thought that the amount given the husband was enough for both. That might be. On the hearing, the learned Judge said, he inclined to the opinion that there were "before the Court all the materials necessary for finally determining the matters in controversy;" but he was now quite clear that all the necessary material was not before the Court; so that, even if the power would otherwise exist in such a case to assess the damages, it should not be exercised here.

There should be a new trial, but limited to an assessment of damages. In view of the damages assessed to the husband,