

Flipper Draggors Ltd et al (Plaintiffs) v. "Ocean Rockswift" et al.
 (Defendants)

Present: Thurlow J., in Admiralty—Ottawa, December 4, 23. 1969.

Admiralty—Infants—Fatal accidents—Ship's crew killed in collision at sea—Action for damages by dependants—Proposed settlement of infants' claims—Application for court's approval—Jurisdiction of court—No power to administer infants' property—Order for payment to guardian appointed under provincial law—Canada Shipping Act, R.S.C. 1952, c. 29, Part XVII (secs. 725-733).

A fishing vessel and her crew were lost in a collision at sea with a tug boat. The fishing vessel's owner and the widows and infant children of her crew brought an action for damages against the owner and master of the tug boat. Defendants offered \$135,000 in full settlement of all claims. Application was made to this court to give effect to the settlement, approve it on behalf of the infant plaintiffs and directing the investment and administration of the infants' moneys during their minorities. It was also proposed to discontinue the action in the case of one infant plaintiff who had become 18. The court found the proposed settlement to be in the interests of the infant plaintiffs.

Held: (1) Before the settlement could be approved an affidavit must be filed by a plaintiff as required by s. 730 (2) of the *Canada Shipping Act*, stating that in the case of each deceased crew member the persons in whose behalf the action was brought are the only persons entitled to damages in respect of the death.

(2) With respect to the proposal to discontinue the action on behalf of an infant over 18, to justify approval of the settlement as to that infant it would be necessary either to satisfy the court that he had no reasonable expectation of receiving support from his father after reaching 18 and that he had received such support up to that time or to establish the extent of his claim.

(3) The court, being concerned on this motion only with the adequacy of the amount to be recovered for the infant plaintiffs and its apportionment among them, would not make an order as to its distribution nor for payment of solicitors' fees therefrom. (Moreover it is not the practice in this court to pay out to solicitors moneys in court paid in to the credit of parties.) Nor would the court declare that the plaintiffs are the only persons entitled to claim against the defendants.

(4) In approving the settlement on behalf of infants the court, which has authority to fix and award damages, is concerned simply with the adequacy of the amount. Its only additional jurisdiction is that provided by secs. 732 and 733 of the *Canada Shipping Act*, which do not clearly authorize it to enter upon the administration of damages awarded to infant plaintiffs during their minority or to give directions therefor, which should be governed by the law of the province in which the infant resides, and payment should be directed to the guardian appointed under that law.

MOTION.

B. Flemming for applicants.

No-one contra.

THURLOW J.: This action arises out of a collision which occurred in waters off Yarmouth, Nova Scotia on August 22, 1967, between the fishing vessel "*Silver King I*" and the tug *Ocean Rockswift*. As a result of the collision the *Silver King I* sank and six members of her crew were drowned. The plaintiff, Flipper Dragers Limited, is the owner of the *Silver King I* and the other plaintiffs are the widows and infant children of the deceased crew members. The action was brought *in rem* against the *Ocean Rockswift* and *in personam* against her owners and master claiming damages which have been estimated by the plaintiffs at some \$90,000 for the loss of the *Silver King I* and \$200,000 in respect of the deaths of six members of the crew. Some time later an action was brought by the owners of the *Ocean Rockswift* seeking a declaration under the *Canada Shipping Act* limiting their liability to a sum of \$68,000 or thereabouts. The action is still pending. In the meantime an arrangement has been reached under which the defendant, Saint John Tug Boat Company Limited, is prepared to pay a sum of \$135,000 on behalf of all the defendants in full settlement of the plaintiffs' claims and the corporate plaintiff has arranged with the widows, who are parties in their own interest and, in each case, are as well next friends for their infant children in the proceeding, that of the amount to be so paid \$35,000 should be allocated to Flipper Dragers Limited and the remaining \$100,000 to the claims of the widows and infant children. Of the latter amount it is proposed to allocate \$10,000 for solicitor and client costs, a total of \$21,789 to the claims of the ten infants and the remaining \$68,211 to the claims of the six widows. Application is now made to the court for an order or orders giving effect to the proposed settlement, approving the proposed settlement on behalf of the infant plaintiffs and directing the investment and administration of the moneys payable to the infant plaintiffs during their respective minorities.

In general, but subject to what is hereinafter set out, on the material before the court, the proposed settlement appears to me to warrant approval on behalf of the infant plaintiffs. In particular the proposed settlement involves interests of others of greater magnitude than those of the infant plaintiffs. To reject the proposal and go on with the litigation involves the risk that the infant plaintiffs as well as the other plaintiffs might ultimately get less than is now obtainable. To go on involves someone undertaking to pay costs and to finance the proceedings for the infant plaintiffs. The most likely persons to do so, that is to say their mothers, are apparently content with the proposal. There is of course the possibility that a vigorous prosecution of the suit through a trial might produce more for them but that chance must, I think, be regarded as speculative and it depends as well on defeating the defendants' right to limit their liability under the *Canada Shipping Act*.

Moreover, in comparison with the amounts proposed to be paid to the widows the amounts to be allocated to the infants under the proposed arrangement appear to have been favourably calculated since they represent the full capitalized value of workmen's compensation benefits obtainable while those to be paid to the widows represent some \$20,000 less than the full capitalized value of their workmen's compensation entitlement. Assuming the proportion of respective workmen's compensation entitlements to represent a fair basis for allocation of the damages it appears that in effect the widows' shares are to bear the costs and to suffer a considerable additional reduction as well while the infants' shares are to be paid in full without deduction for costs. In general, therefore, I see no reason to think that the proposed settlement and allocations are not in the interests of the infant plaintiffs.

There are, however, several matters to be considered and dealt with before formal approval and effect can be given to the settlement.

The first of these is that the affidavit or affidavits required by section 730(2) of the *Canada Shipping Act* have not been filed. The section reads as follows:

730. (1) The plaintiff shall, in his statement of claim, set forth the persons for whom and on whose behalf the action is brought.

(2) There shall be filed with the statement of claim an affidavit by the plaintiff in which he shall state that to the best of his knowledge, information and belief the persons on whose behalf the action is brought as set forth in the statement of claims are the only persons entitled or who claim to be entitled to the benefit thereof.

(3) The Admiralty Court or a judge thereof, if of opinion that there is a sufficient reason for doing so, may dispense with the filing of the affidavit.

The purpose of these requirements appears from the other sections. It is provided in section 727 that every action under Part XVII of the Act shall be for the benefit of the dependants of the deceased. The same is reiterated in section 731(2). By section 725 "dependants" are defined as meaning the wife, husband, parents and children of the deceased. Section 729 further provides that only one action lies for or in respect of the same subject matter of complaint. This appears to mean that only one action lies in respect of the death of a particular individual. The purpose of the affidavit required by section 730(2) thus seems to be to put on record in the court a sworn statement by the plaintiff giving him information as to who are the persons who fall within the class defined as dependants and who thus may be entitled to damages in respect of the death of the deceased. Here the proceedings under Part XVII are brought to recover in respect of the deaths of six persons and call for an affidavit by a plaintiff in the case of each of the six stating that the persons on whose behalf the action has been brought as set forth in the statement of claim are the only persons entitled to damages in respect of the death. As without such affidavits the Court will have no assurance that there are no others entitled to share in the proposed settlement it will be necessary to have such affidavits filed before the settlement can be approved. In the view I take of the matter the present

is not the sort of situation contemplated by section 730(3) and the affidavit of Mr. Pink filed since the motion was made in my view does not comply with the statute or serve the purpose.

The second point also arises out of the nature of the proceedings. Since the action when brought is on behalf of the class it seems doubtful that any member of the class can discontinue and even more doubtful that an infant plaintiff can do so. But even if an infant can discontinue, as is proposed in the case of the infant plaintiff, Charles Boudreau, the action will remain what the statute declares it to be, that is to say an action for the benefit of all members of the class of dependants as defined in section 725. It seems to me therefore that the proposal is ineffective to accomplish its purpose. What the proposed discontinuance is apparently designed to achieve is to eliminate any claim on the particular infant plaintiff's behalf since he has already reached eighteen years of age and the amounts to be allocated to the several infant plaintiffs are all calculated on a workmen's compensation basis which provides for \$30 per month for each infant until the infant reaches eighteen years of age. It did not come to the attention of the court when the application was presented that there was one infant plaintiff to whom it was not intended to allocate any portion of the amount to be distributed. To justify approval of the settlement so far as he is concerned it would seem to be necessary either to satisfy the court that he had no reasonable expectation of receiving support from his father after reaching eighteen years of age and that he has received such support up to that time or to establish the extent of his claim for the purpose of having his entitlement to share in the fund adjudged.

The third point is concerned with the proposed order for the payment to be made on behalf of the defendants. In the first order suggested the procedure proposed was that the whole sum of \$135,000 should be paid to the plaintiff Flipper Druggers Limited whereupon the action should stand dismissed. Directions were then included in the order requiring Flipper Druggers Limited to distribute the fund by paying \$35,000 to Donald A. Kerr a solicitor for Flipper Druggers Limited and the hull and machinery underwriters, \$5,000 to Irving C. Pink to cover solicitor's fees and disbursements incurred on behalf of the widows and infant children, \$5,000 to Donald A. Kerr by way of contribution by the plaintiffs, other than Flipper Druggers Limited, to his solicitor and client fees and disbursements on their behalf as plaintiffs' solicitor herein, \$21,789 to Irving C. Pink as trustee for the infant plaintiffs upon certain trusts therein specified and the remaining \$68,211 to the widows of the six deceased crew members. As the proposal to pay the whole fund to Flipper Druggers Limited was not acceptable to the Court it has now been suggested that there be two orders, the first providing that the whole amount of \$135,000 be paid into this court and the second providing for its distribution. This method is also unacceptable since it involves the court in the distribution of funds with which it is not concerned, to parties who are not before the court, and in amounts on which the court has had no occasion to pass as between the several persons

interested in them. Indeed all that the court has had thus far to consider was that the adequacy of the amount to be recovered on behalf of the infant plaintiffs, the propriety of the allocation thereof from the point of view of their interest and the adequacy of the net amount to be realized and paid to them. For example, no bills of cost having been submitted, the propriety of the amounts proposed for costs (as to which no opinion is expressed) has been considered only in the light of how far the amounts proposed would have effect to reduce in the whole picture the amounts to be recovered by the infant plaintiffs and as such amounts do not appear to have been reduced at all by the proposed amounts to be paid for costs there has been no occasion to consider them in detail, the matter being one between the widows, who are *sui juris*, and their solicitors. Moreover, it is not the practice in this court to pay out to solicitors moneys in the court standing to the credit of parties to proceedings.

Apart from these observations, the second paragraph of the proposed order for payment of the money into court suggesting for the first time that the court declare

that the plaintiffs herein are the only persons entitled to claim against the defendants or any of them with respect to the said collision

is an extraordinary proposal which the court will not entertain.

Finally, the problem raised on the hearing of the application with respect to the proposal for administration of the amounts allocated to the infant plaintiffs appear to have been misapprehended. In approving a settlement on behalf of infants the court is simply concerned with the adequacy of the amount to be paid in settlement of their rights having regard to the many factors involved in an over all settlement of numerous claims and to the alternative possibilities if the settlement is not approved. In adjudicating upon the adequacy of such a proposed settlement, the court is exercising a function that arises from its authority to fix and award the damages. Apart from awarding damages the only jurisdiction of the court is that provided by sections 732 and 733. These sections do not clearly authorize the court to enter upon the administration of the damages awarded to infant plaintiffs during their minority or to give directions therefor. Moneys recovered by infant plaintiffs have at times been paid into this court but if this is done the moneys are only dealt with from time to time as directed by the court on a particular application. As the amounts here involved are small, this method, besides being cumbersome and unnecessarily expensive, would effectively prevent the use of the moneys or the income therefrom for the support of the infants during their minorities. On the other hand, there appears to be no authority for directing the payment of such moneys to a trustee or for giving such trustee directions for its investment and administration. Rather the whole matter appears to be more properly one for the law of the province in which the infant resides and the most appropriate disposition to be to direct payment to the guardian appointed under that law, with proper safeguards, who can thereupon exercise such powers of administration in respect thereto as the law or the courts of the province confer upon him.

It was therefor suggested in my memorandum filed on December 15 that an appropriate order in this case would be that the sums payable to the infant plaintiffs be paid by the defendants, in cases where the amount does not exceed \$500, to the mother of the infant in her capacity as guardian of the infant under section 4 of the *Guardianship Act*¹ and, in cases where the amount exceeds \$500 to a guardian appointed by the Court of Probate under section 5 of that Act by the Supreme Court of Nova Scotia to be administered by such guardian in each case as property of the infant in accordance with the law of the Province of Nova Scotia.

Subject to what is required by the foregoing and on the court being satisfied on the points raised, it is considered that an appropriate form of order would follow these lines:

UPON hearing counsel on behalf of plaintiffs and upon reading the affidavit of Britain Flemming sworn herein the 1st day of December, 1969, the affidavit of (or affidavits of)

AND it appearing to the Court that the proposed settlement of this action is in the interests of the infant plaintiffs and should be approved on their behalf, counsel for the defendants consenting hereto

IT IS ORDERED AND ADJUDGED that the proposed settlement of this action by the payment to the plaintiffs of a total sum of \$135,000, to be allocated as to \$35,000 thereof to the claim of Flipper Druggers Limited and as to \$100,000 thereof to the claims of the other plaintiffs, and the proposed allocation of the total sum of \$21,789 to the claims of the infant plaintiffs and \$78,211 to the claims of the plaintiffs, Florence Mary Boudreau, Theresa Anne Bourque, Charlotte Anne LeBlanc, Martha Isabelle Boudreau, Margaret Frances LeBlanc, and Julia Ann Boudreau, the share of the said last mentioned plaintiffs to bear the costs of all the plaintiffs, other than Flipper Druggers Limited, in these proceedings, and the proposed allocation of the said sum of \$21,789 among the infant plaintiffs as hereinafter directed to be paid be and the same are hereby approved on behalf of the infant plaintiffs.

AND IT IS FURTHER ORDERED that the defendant, Saint John Tugboat Company Limited, for and on behalf of all the defendants herein to pay the total sum of \$135,000 in full and final settlement and satisfaction of all claims in this action of the plaintiffs herein against the defendants herein, such total sum to be paid as follows, that is to say:

1. The sum of \$35,000 to the plaintiff Flipper Druggers Limited;
2. the total sum of \$78,211 to the plaintiffs Florence Mary Boudreau, Julia Ann Boudreau, Charlotte Anne LeBlanc, Margaret Frances LeBlanc, and Theresa Anne Bourque for division among themselves equally, and
3. the total sum of \$21,789 in settlement of the claims of the infant plaintiffs as follows, that is to say:

(a) to Charlene Boudreau	\$ 559.00
(b) to Guy LeBlanc	770.00
(c) to Michelle LeBlanc	3,072.00
(d) to William Boudreau	1,963.00
(e) to Sharon Boudreau	4,157.00
(f) to Eric LeBlanc	3,461.00
(g) to Brenda LeBlanc	3,765.00
(h) to Julian V. Boudreau	3,765.00

¹ R.S.N.S. 1954, c. 113.

in each case by paying the said sum to such guardian of the said infant plaintiff as may be appointed by the Supreme Court of Nova Scotia or by a Court of Probate of that Province and

to Cecile Bourque 277.00

by paying the said sum to her mother, Theresa Anne Bourque, as her guardian; and

to Charles Boudreau

AND IT IS FURTHER ORDERED that upon the said defendant Saint John Tugboat Company Limited paying the said sums in the manner above mentioned, these proceedings shall stand dismissed.

AND IT IS FURTHER ORDERED that the solicitor and client costs of the plaintiffs, other than the plaintiff Flipper Draggars Limited, be borne in their entirety by the plaintiffs, Florence Mary Boudreau, Theresa Anne Bourque, Charlotte Anne LeBlanc, Martha Isabelle Boudreau, Margaret Frances LeBlanc, and Julia Ann Boudreau and that no portion thereof shall be chargeable against the sums recoverable by the infant plaintiffs.

