BETWEEN:

ELIZABETH CORNELL OAKES .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1952
Apr. 28
1954
June 29
July 30

Crown—Petition of Right—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)—Pension Act, R.S.C. 1927, c. 157, ss. 5, 18, 18B—Civil Code of Quebec, Art. 1056—General Rules and Orders, Rule 104—An Act respecting debts due to the Crown, S. of C. 1932, c. 18—Order in Council P.C. 14/6288, dated Nov. 21, 1951—No right under Pension Act to recover properly paid pensions—Principles to be applied in assessing damages in claim based on Art. 1056 of Civil Code.

(1) [1943] 1 D.L.R. 434.

The suppliant for herself and her children brought a petition of right to recover the balance of a judgment of this Court in her favor for damages for the death of her husband. The Crown withheld part of such balance on the ground that the suppliant and her children had received pensions under the Pension Act, that after the judgment the Canadian Pension Commission had cancelled the pensions from their commencement so that their amount was an overpayment which the Crown had a right to recover from her and set off against the judgment in her favor.

Held: That since there is no provision in the Pension Act clearly and expressly empowering the Canadian Pension Commission to cancel a properly paid pension retroactively to its commencement in such a way as to make its amount an overpayment and recoverable as such, the decision of the Commission of October 12, 1951, did not have the effect it purported to have and the Crown has no right to recover from the suppliant the amount of the pensions paid to her and her children.

2. That the Crown's attempt to recover the amount of the pensions paid to the suppliant and her children is an indirect attack on the principle underlying the judgment in their favor, namely, that they were entitled to damages under section 19(c) of the Exchequer Court Act notwithstanding the fact that they had been awarded pensions under the Pension Act.

3. That if the servant of the Crown whose negligence caused the death of the suppliant's husband had been sued personally he could have insisted that the amount of the pecuniary benefit which the suppliant and her children had received or might reasonably have expected by way of pension under the Pension Act should be taken into account and the amount so taken into account deducted from the amount of damages for which he would otherwise have been liable, and the Crown's liability under section 19(c) of the Exchequer Court Act could not have been greater than his would have been.

4. That the amount of the award in the judgment of this Court in favor of the suppliant and her children should be regarded as the amount of damages to which they were entitled notwithstanding the amount which they had received by way of pension under the Pension Act and, consequently, over and above such amount.

PETITION OF RIGHT to recover the balance of a judgment.

The action was tried before the President of the Court at Ottawa.

S. L. Mendelsohn, Q.C. and *S. Goldner* for suppliant.

W. R. Jackett, Q.C. and *J. Desrochers* for respondent.

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

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THE PRESIDENT now (July 30, 1954) delivered the following judgment:

The facts from which this petition of right arises may be stated briefly. By a judgment, dated May 17, 1951 (1), this Court did order and adjudge that the suppliant in her personal capacity was entitled to recover from His late Majesty The King the sum of $18,000 and in her capacity as tutrix to her two infant children the sum of $6,000 in respect of each of such children, together with her costs of the action which were taxed at $865.40. This judgment was rendered in a petition of right brought by the suppliant in her personal capacity and in her capacity as tutrix of her two children for damages for the death of her husband George Walsh Oakes, the father of the children. The claim was made under section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, Chapter 34, on the ground that the death of the deceased was the result of the negligence of LAC R. E. Hitsman, a member of His late Majesty's Royal Canadian Air Force, while acting within the scope of his duties.

Prior to launching this petition the suppliant and her children had been awarded pensions under the Pension Act, R.S.C. 1927, Chapter 157. The facts relating to this award may be put briefly. The suppliant's husband was killed on June 5, 1945. At the time of his death he was a member of His late Majesty's Royal Canadian Air Force and was on duty. On August 10, 1945, the Canadian Pension Commission ruled that his death was directly connected with Air Force service and awarded a pension to the suppliant and her children at the current rates with effect from the date following her husband's death, and on August 17, 1945, the suppliant was advised accordingly. Her pension was at the rate of $60 per month, that of her first child at $15 and that of her second at $12, making a total of $87 per month. Subsequently, the amounts of these pensions were raised. On November 1, 1947, the suppliant's rate was increased to $75 per month, that of her first child to $19 and that of her second to $15, making a total of $109 per month. These rates continued until

(1) [1951] Ex. C.R. 133.

June 30, 1951, when the suppliant's rate was still $75 per month but the first child's rate was at $38 and the second child's at $30, making a total of $153 per month.

In view of the fact that pensions under the Pension Act had been awarded to the suppliant and her two children the claim under section 19(*c*) of the Exchequer Court Act was strongly opposed. It was pleaded by way of defence to the petition of right, *inter alia*, that the respondent was not under any responsibility to the suppliant other than the obligation to pay the pensions awarded under the Pension Act. When the petition came on for trial counsel for the respondent, in support of this plea, relied upon the decision of Angers J. in *Meloche* v. *The King* (1). There the suppliant brought a petition of right to recover damages for the death of his son, who was a member of His Majesty's Canadian Armed forces and was being taken in a military ambulance to a military hospital. The death was alleged to be the result of negligence on the part of the driver of the military ambulance who was also a member of the Canadian Armed forces. Angers J. held that since the dependents of the deceased soldier were entitled to pension under the Pension Act they were not entitled to any relief under the Exchequer Court Act. The reasoning was that since a special remedy was created by statute, namely, the Pension Act, it displaced the remedy provided by the general Act, namely, the Exchequer Court Act. Accordingly, Angers J. held that the suppliant was not entitled to any of the relief sought by him. But Cameron J. declined, quite rightly, in my opinion, to follow the *Meloche* case (*supra*) and applied instead the principles laid down in *Bender* v. *The King* (2).

After the judgment of May 17, 1951, the Canadian Pension Commission, on representations made by the suppliant's solicitor, continued the pensions under the Pension Act pending decision whether an appeal should be taken from the judgment. On June 26, 1951, the Department of Justice advised the Department of National Defence that it had decided not to appeal. Previously, as it appears, the Canadian Pension Commission had required the suppliant

(1) [1948] Ex. C.R. 321.

(1) [1946] Ex. C.R. 529; [1947] S.C.R. 172

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to elect whether she would pay to His Majesty the capitalized value of each of the pensions formerly awarded and have pension continued for herself and her children without deduction or retain the damages secured and forego her right to pension for herself and her children in which case she would have to refund the total amount of the pensions paid to her and her children from June 6, 1945, to May 31, 1951, which then amounted to $7,217.50. The suppliant took the position that she was not obliged to make any such election or refund. On July 19, 1951, the Canadian Pension Commission, after certain recitals, decided as follows:

1. Continue pension on behalf of widow and two children pending action with respect to payment of damages awarded by Exchequer Court judgment of May 17, 1951, in this case.

2. If the amount of damages paid is "greater than the capitalized value of pension", no further pension shall be paid.

3. Following any payment of damages, this case will be further reviewed by the Commission.

The Commission then continued the payment of pension to July 31, 1951, by which time the total amount of the pensions paid to the suppliant and her children came to $7,470.63.

The next step taken in the matter was on August 6, 1951, when the respondent paid the suppliant the sum of $22,000 on account of the judgment. Then on September 25, 1951, the Canadian Pension Commission informed the suppliant that it had under consideration the question whether the pensions awarded to her and her two children on August 17, 1945, should be cancelled from the commencement thereof and whether the amount already paid to her in the sum of $7,470.63 should be recovered from her, and that the Commission would be glad to consider any representations in writing that she desired to make or have made on her behalf. To this communication the suppliant's solicitor replied on October 2, 1951, Exhibit C. Finally, the Canadian Pension Commission, on October 12, 1951, made the following decision:

WHEREAS, on August 17th, 1945, a pension was awarded under the Pension Act to Mrs. George Walsh Oakes on her own behalf and that of her two infant children effective from the date following her husband's death which occurred on June 5th, 1945, and such pension has been paid to her in respect of a period ending July 31st, 1951;

AND WHEREAS the aggregate of the amounts so paid to Mrs. Oakes is $7,470.63;

AND WHEREAS the Canadian Pension Commission has been informed that George Walsh Oakes' death was caused under circumstances creating a legal liability upon His Majesty in right of Canada to pay damages therefor, that Mrs. Oakes did, on May 17th, 1951, obtain a judgment of the Exchequer Court of Canada (in her personal capacity and in her capacity as tutrix to her two infant children) in the sum of $30,000.00 and costs in respect of the death of her husband and that on August 6th, 1951, Mrs. Oakes did collect $22,000.00 on account of the said judgment;

AND WHEREAS the amount so recovered and collected is greater than the capitalized value of the pension so awarded;

AND WHEREAS the Canadian Pension Commission has to determine whether the provisions of Sections 5, 18, and 18B of the Pension Act require and authorize the Commission to cancel the aforesaid pension from the commencement thereof;

AND WHEREAS the Commission has determined pursuant to subsection (3) of section 5 of the said Act, that it is, by the said sections 5, 18, and 18B, required and authorized to cancel the aforesaid pension from the commencement thereof and to direct the recovery of the overpayment that has been made.

NOW, THEREFORE, The Canadian Pension Commission hereby adjudges

1. that the pension awarded on August 17th, 1945, to Mrs. George Walsh Oakes and her two children effective from June 6th, 1945, be, and is hereby, cancelled from the commencement thereof; and
2. that the overpayment of pension to the said Mrs. George Walsh Oakes in the sum of $7,470.63 be recovered from her, and directs that the Secretary of the Canadian Pension Commission arrange for such action as may be necessary to effect the said recovery.

The suppliant then filed the present petition of right claiming $8,000 as the balance of the judgment and $865.40 as her taxed costs on the ground that these amounts were still owing to her.

Under Rule 104 of the General Rules and Orders of this Court the Attorney General of Canada in the statement of defence herein confessed that the suppliant was entitled to judgment declaring that she was entitled in her personal capacity and in her capacity as tutrix to her two children to be paid the sum of $1,394.77, being the amount of $8,865.40 claimed in the petition of right less the amount of $7,470.63. Regardless of the dispositon of the balance of her claim the suppliant is, therefore, in her two capacities entitled to recover the sum of $1,394.77 together with her costs of the petition up to delivery of the statement of defence.

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As to the balance of the claim it is contended that the decision of the Canadian Pension Commission, dated October 12, 1951, made the sum of $7,470.63 which the suppliant had received by way of pension for herself and her children an overpayment to her and that the respondent was entitled to recover this amount from her. By Order in Council P.C. 14/6288, dated November 21, 1951, made under an Act respecting debts due to the Crown, Statutes of Canada, 1932, Chapter 18, the Minister of Finance was authorized to retain this amount from the amount of the award made by Cameron J. I should perhaps note that counsel for the respondent did not stand on the letter of the Act referred to, a most astonishing one, if taken literally, but relied upon it as providing for a right of set-off, if there was a debt due to the Crown. It is then contended that the respondent was entitled to set off the amount of $7,470.63 against the amount of the suppliant's claim. In the alternative, the respondent counterclaims against the suppliant for the said amount of $7,470.63 as an overpayment of pensions which she has not repaid.

The sole issue in the case is thus whether the respondent is entitled to recover from the suppliant the amount of $7,470.63 which the Canadian Pension Commission paid to her by way of pension for herself and her children up to the end of July 31, 1951.

In the support of the contention that the respondent has such a right of recovery reliance is put on the decision of the Canadian Pension Commission, dated October 12, 1951, and it is contended that this decision is valid under the authority of Sections 5, 18 and 18B of the Pension Act. These sections, so far as relevant, provide as follows:

5. (1) Subject to the provisions of this Act and of any regulations made thereunder, the Commission shall have full and unrestricted power and authority and exclusive jurisdiction to deal with and adjudicate upon all matters and questions relating to the award, increase, decrease, suspension or cancellation of any pension under this Act and to the recovery of any overpayment which may have been made; and effect shall be given by the Department and the Comptroller of the Treasury to the decisions of the Commission: Provided that the power vested in the Commission to cancel any award of entitlement shall not extend to any award of entitlement granted by the Federal Appeal Board, the Pension Tribunal, a quorum of the Commission, an Appeal Board of the Commission or the Court: Provided also that before any pension is cancelled or reduced,

due to a change in the basis of entitlement, the pensioner shall be afforded an opportunity of appearing before an Appeal Board of the Commission.

(2) In any case in which the Commission finds that a pension has been awarded by the Commission or by the Board of Pension Commissioners for Canada as a result of an error and not as a result of fraud or misrepresentation or concealment of material facts on the part of the applicant, if such pension has been paid for not less than five years and its cancellation or reduction would, in the opinion of the Commission, result in undue hardship to the pensioner, the Commission, in its discretion, may ratify the payment already made and may continue payment in whole or in part.

(3) The Commission shall determine any question of interpretation of this Act and the decision of the Commission on any such question shall be final.

18. (1) Where a death or disability for which pension is payable is caused under circumstances creating a legal liability upon some person to pay damages therefor if any amount is recovered and collected in respect of such liability by or on behalf of the person to or on behalf of whom such pension may be paid, the Commission, for the purpose of determining the amount of pension to be awarded, shall take into consideration any amount so recovered and collected in the manner hereinafter set out.

18B. (1) Where any amount so recoverable and collected . . . is greater than the capitalized value of the pension which might otherwise have been payable under this Act no pension shall be paid.

(2) Where any amount so recovered and collected . . . is less than the capitalized value of the pension which might otherwise have been awarded under the provisions of this Act, a pension in an amount which, if capitalized, equals the difference between such amount . . . and the capitalized value of the pension which might otherwise have been payable under this Act, may be paid.

(3) If any amount so recovered and collected, or any part thereof, is paid to His Majesty, a pension which, if capitalized, equals the amount so paid but is not in any event greater than the total pension which, apart from this section, would be payable under this Act, may be paid.

It was contended by counsel for the suppliant that, even if the Canadian Pension Commission had the right to cancel the pensions of the suppliant and her children after the sum of $22,000 had been paid to her, there was no provision in the Pension Act whereby the amounts of the pensions paid to her and her children could be made overpayments and recoverable as such. This was the main submission for the respondent. It follows, of course, that if there was no right of recovery there could be no right of set-off with the result that the suppliant's claim would have to be maintained and the respondent's counterclaim dismissed.

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It was argued on behalf of the respondent that when the sum of $22,000 was collected by the suppliant the direction in section 18B(1) of the Act that no pension should be paid came into operation and that sections 5, 18 and 18B of the Act empowered and authorized the Canadian Pension Commission to do what it did by its decision of October 12, 1951, and made the amounts of the pensions which it then cancelled overpayments to the suppliant and recoverable from her. I shall briefly set out the process of reasoning by which this conclusion was reached. There was no right of action to a pension under the Pension Act. Historically, the payment of pensions of this sort was an exercise of executive discretion and the fact that the administration of the Pension Act was turned over to the Canadian Pension Commission did not fundamentally change the nature of the discretion except to make it administrative rather than executive. The Act gave the Commission wide powers. Subject to the provisions of the Act, section 5(1) gave it full and unrestricted power and authority and exclusive jurisdiction to do certain things, including the cancellation of any pension under the Act and the recovery of any overpayment which might have been made. Section 5(2) contemplated that under section 5(1) there was power to make orders with retroactive effect so that section 5(1) should be read in the light of section 5(2) and construed as giving power to cancel pensions retroactively to their commencement. Then section 5(3) gave the Commission power to interpret the Act in such a way as to oust the jurisdiction of the Court to challenge the correctness of its interpretation. Under this power the Commission could construe the direction contained in section 18B(1) as not operating until the facts which gave rise to its operation were established. If it were otherwise, so the argument went, it would not be possible for the Commission to award any pension in any case where the applicant might have a claim against a third person until after the issue between them was determined whereas, under the argument put forward, the Commission could award a pension immediately with full knowledge that if it should develop that the recipient subsequently recovered and collected from a third person an amount greater than the capitalized value of the pension the Commission could

then carry out the direction of section 18B(1) that, under such circumstances, no pension should be paid by the exercise of its power under section 5(1) to cancel the pension retroactively to its commencement and make the amounts paid to the recipient recoverable as overpayments and thus put itself in the same position as it would have been in if the applicant for pension had recovered and collected such sum prior to any award of pension in which case the Commission would be bound by the direction in section 18B(1) that no pension should be paid.

I must confess that I have found this case a difficult one. But, while the careful argument of counsel for the respondent carries much weight, I have come to the conclusion that the contention on behalf of the respondent ought not to be adopted.

When the Canadian Pension Commission awarded pensions to the suppliant and her two children it did so with full knowledge that the suppliant's husband had been killed as the result of the negligence of LAC Hitsman and it must be assumed, as a matter of law, that it knew that she and her children had a cause of action against him and could, consequently, bring a petition of right against the Crown under section 19(c) of the Exchequer Court Act because of the responsibility of the Crown for the negligence of its servant. The pensions paid to the suppliant and her children were thus properly paid and received. There was no fraud or misrepresentation or concealment of material facts on the part of the suppliant such as would bring the case within section 60 of the Act. Nor were the pensions awarded as a result of error. In every respect the payments were validly made. Moreover, they continued to be so made for approximately six years. Under the circumstances, it seems anomalous to me that amounts that were validly and properly paid to the suppliant with full knowledge of her rights and those of her children should, by reason of a subsequent event that was forseeable, be turned into overpayments to her, that is to say, amounts which she was not entitled to retain but was obliged to repay as if they had been improperly paid to her. The

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possibility of such a conversion of proper and valid payments into overpayments with a statutory right of recovery of them should not be accepted unless there is clear and express statutory authority for it.

In my judgment, there is no provision in the Pension Act whereby the Canadian Pension Commission is empowered to convert a payment of pension into an overpayment that was not basically an overpayment when it was made. Proper payments of pension under the Pension Act cannot retroactively become overpayments. It was, of course, within the competence of the Commission, after the suppliant had been paid $22,000, to take this amount into account and decide that no more pension should be paid. But, even if it should be conceded that when the suppliant had collected the said sum section 18B(1) came into operation with its direction that no pension should be paid, it does not follow that the amount of pensions already paid came retroactively within the prohibition or negative direction of the section.

Nor am I prepared to accept the view that section 5(2) indicates that section 5(1) empowers the Commission generally to make orders with retroactive effect but, even if it should be conceded that it has power to cancel pensions retroactively, such power should not, in the absence of clear and express terms, be construed as extending to the cancellation of pensions that were properly paid and received in such a way as to make their amounts overpayments, and to that extent improper payments, and recoverable as debts.

And while the Commission is given wide powers of interpretation of the Pension Act they ought not, in the absence of clear and express terms, to be construed as empowering the Commission to give retroactive effect to section 18B(1) as if the facts giving rise to its operation had been in existence prior to the award of pension and so authorizing the Commission to decide that the pensions which it had paid ought not to have been paid and that their amounts must be repaid by the suppliant. A power of interpretation leading to such extraordinary results ought not to be read into the Pension Act unless the Act clearly makes such a reading compulsory.

Moreover, if it had been intended that the Canadian Pension Commission should be able to cancel proper pensions retroactively to their commencement and make their amounts recoverable as overpayments Parliament should have conferred such a power expressly and clearly. It has conferred a power of a similar nature under section 60 of the Act which provides as follows:

> 60. Should the Commission consider that an award of entitlement granted by the Federal Appeal Board, the Pension Tribunal, a quorum of the Commission, an Appeal Board of the Commission, or the Court should, on the ground of fraud or misrepresentation or the concealment of material facts, be cancelled, it shall refer the case, with all relevant information to an Appeal Broad of the Commission for investigation after notification to the pensioner that he shall be given an opportunity to be heard, and if such Appeal Board of the Commission is satisfied that the award should be cancelled, it may order cancellation and the recovery of any overpayment which may have been made.

If the Commission had the power of retroactive cancellation submitted on behalf of the respondent section 60 would not have been necessary. The fact that Parliament conferred this power of retroactive cancellation with its concomitant recovery of overpayments expressly in the cases covered by section 60 is some indication that in cases outside of section 60 there is no such power: *expressio unius est exclusio alterius.*

I am, therefore, of the opinion that, since there is no provision in the Pension Act clearly and expressly empowering the Canadian Pension Commission to cancel a properly paid pension retroactively to its commencement in such a way as to make its amount an overpayment and recoverable as such, the decision of the Commission of October 12, 1951, did not have the effect it purported to have and that the Crown has no right to recover from the suppliant the amount of the pensions paid to her and her children.

While this finding is, in my opinion, sufficient to dispose of these proceedings in favor of the suppliant there is another reason for holding that the Crown's attempt to recover the amount of the pensions should not be allowed to succeed. In a sense, it is a denial of the suppliant's right and the rights of her children to the relief to which Cameron J. found them entitled and an indirect attack on the principle underlying his judgment, namely, that the suppliant and her children were entitled to damages under

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section 19(c) of the Exchequer Court Act notwithstanding the fact that they had been awarded pensions under the Pension Act. There may be a difference of opinion on the wisdom of a policy that permitted such a situation. Indeed, Parliament put an end to it in 1952 when by section 3 of chapter 47 of the Statutes of Canada, 1952, it amended the Pension Act by adding section 69 in the following terms:

> 69. No action or other proceeding lies against Her Majesty or against any officer, servant or agent of Her Majesty in respect of an injury or disease or aggravation thereof resulting in disability or death in any case where a pension is awarded or awardable by the Commission under or by virtue of this or any other Act in respect of such disability or death.

It is obvious that since this amendment, which might well, under certain circumstances, work an injustice to the dependents of a deceased member of the forces, there cannot be another case like the present one. But the rights of the suppliant and her children must be dealt with under the law as it stood prior to this amendment. They were so dealt with by Cameron J. in his judgment of May 17, 1951. He properly rejected the decision of Angers J. in the Meloche case (*supra*), which was, in my judgment, contrary to authority, and applied principles similar to those laid down in the *Bender* case (*supra*) and held that the fact that the suppliant and her children had been awarded pensions under the Pension Act did not bar their right to recover damages under section 19(c) of the Exchequer Court Act. In the course of his judgment he made the following statement, at page 144 of the report of the case:

> That being so, and finding as I do that the suppliant and her children were entitled to the provisions of the Pension Act, and that the driver of the respondent's vehicle at the time of the accident was a servant of the respondent within the intendment of section 50A, it must follow that the plaintiff is entitled to invoke the provisions of section 19 (1) (c) of the Exchequer Court Act and therefore, on the admitted facts, is entitled to damages.

This statement was stressed by counsel for the suppliant as having been an adjudication by Cameron J. that the suppliant and her children were entitled to pensions under the Pension Act and it was submitted in effect, that their rights to such pensions were a matter of *res judicata*. I do not accept this submission. The question of their entitlement to pension was not before Cameron J. for adjudication. Indeed, it was not within his jurisdiction to make any adjudication thereon, that being a matter exclusively for the authorities

established for the purpose under the Pension Act. I am satisfied that all that he meant by the statement was that notwithstanding the fact that the suppliant and her children had been awarded pensions under the Pension Act—and were, consequently, entitled to them—they were entitled to damages under section 19(c) of the Exchequer Court Act. He thereupon proceeded to assess such damages and awarded them the sum of $30,000. Under these circumstances, it was a natural reaction to his judgment that his award was, although not specifically so stated, over and above the amount of the pensions to which by the fact of their award he had assumed the suppliant and her children to be entitled. That was the reaction of the Minister of Justice, as the solicitor for the suppliant pointed out in his letter to the Canadian Pension Commission, dated October 2, 1951, Exhibit C, when, referring to the judgment of Cameron J., he stated in the House of Commons on May 29 1951:

> . . . he awarded Mrs. Oakes, the wife of the airman killed in the course of duty as a result of admitted negligence, the sum of $20,000 in addition to any rights she might have in regard to pension and the like.

Vide Hansard, May 29, 1951, pages 3503-4. The amount of the award meant to be stated was, of course, $30,000. I have already expressed the opinion that this reaction was a natural one. In any event, it is clear from his reasons for judgment that Cameron J. certainly did not contemplate that the Crown would be able to recover the amount of the pensions which had been properly awarded to the suppliant and her children and then cut down the amount of his award by setting off against it the amount so recovered. The Crown's attempt to do so is thus, in a sense, tantamount to an indirect attack on the principle underlying the judgment, namely, that the suppliant and her children were entitled to damages under section 19(c) of the Exchequer Court Act notwithstanding their receipt of pensions under the Pension Act. If there had been any intention to challenge this principle an appeal should have been taken from the judgment. The indirect attack on it which is now made should not be sanctioned.

Moreover, it would be inconsistent with the principles governing the assessment of damages in a case such as Cameron J. had to deal with to allow the deduction now

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sought to be made. It should be noted that the suppliant's husband was killed in the Province of Quebec. Consequently, while her claim against the Crown for herself and her children was made under section 19(*c*) of the Exchequer Court Act the law to be applied was Article 1056 of the Civil Code of Quebec which reads in part as follows:

> 1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and decendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

This article is the Quebec counterpart or equivalent of Lord Campbell's Act: *vide* Mignault-Droit Civil Canadien, Volume 5, page 339. And it would be fair to say that the principles to be applied in the assessment of damages in a claim based on it are similar to those laid down in England in cases under Lord Campbell's Act and in the common law provinces in cases under its various counterparts.

It is, of course, well established that where there is liability under a Fatal Accidents Act, as Article 1056 may be styled, the measure of compensation to the dependents of the deceased is the loss of pecuniary benefit or advantage to them as the result of his death, and not otherwise. This is, likewise, the limit of the liability of the person responsible for the death of the deceased. He is thus entitled to have any monetary benefit coming to the dependents of the deceased by reason of his death taken into account in the assessment of the damages chargeable to him.

This was an important consideration in the case before Cameron J. It is, therefore, necessary to keep in mind what would have been the extent of the liability for damages of LAC Hitsman, for the Crown's liability, being only a vicarious one, could not be greater than his would have been if he had been sued personally. He could have insisted that the amount of the pecuniary benefit which the suppliant and her children had received or might reasonably have expected by way of pension under the Pension Act should be taken into account and the amount so taken into account deducted from the amount of damages for which

he would otherwise have been liable. It would have been no answer to his insistence to say that the suppliant and her children had no legal right of action for pensions and that their award depended on the exercise by the Canadian Pension Commission of its administrative discretion. The fact of the receipt of the pensions would have been sufficient. This was settled by the Court of Appeal in England in *Baker* v. *Dalgleish Steam Shipping Co.* (1). This was an action brought by the plaintiff, the widow of one Philip Baker, under the Fatal Accidents Act, 1846, on behalf of herself and her four children to recover compensation for her husband's death. He had been a chief petty officer in the service of the Navy at the time of his death and subsequently the plaintiff was awarded a pension for herself and her children. The action was brought as a test action for the purpose of getting a decision as to whether in assessing the damages the fact that the plaintiff was receiving a pension from the Crown was to be taken into account. The trial judge held that it could not be but the Court of Appeal was unanimously of the view that he had been in error in so holding. The soundness of this decision has never been questioned. There was a similar decision in *Lory* v. *Great Western Railway Company* (2). There the plaintiff claimed damages in respect of the death of her husband for herself and her children. Her husband had been a policeman. On his death she received a gratuitous payment from a charitable fund, a pension for herself and her children from a statutory pension fund and pensions for the children from a voluntary pension fund. It was held that these pensions had to be taken into account in the assessment of damages. The principle involved in this holding was also applied in *Smith* v. *British European Airways Corpn.* (3).

These cases warrant the opinion that in considering the liability in damages of LAC Hitsman if he had been sued personally the fact that the suppliant and her children had been awarded and were receiving pensions under the Pension Act would have had to be taken into account. Thus the damages for which he would have been liable would

(1) [1922] 1 K.B. 361. (2) [1942] 1 All E.R. 230.
(3) [1951] 2 All E.R. 737.

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have been those that would have been assessed after deducting the amount taken into account for the pensions already paid to the suppliant and her children, such continuation of pension as they might reasonably have expected and, in counter balance, the likelihood of cessation of their pensions under the circumstances set out in sections 18 and 18B.

That being so, it follows that the amount of damages for which the respondent was responsible to the suppliant and her children under section 19(c) of the Exchequer Court Act must have been the same as that for which LAC Hitsman would have been liable if he had been sued personally. While Cameron J. did not specifically state that in arriving at the amount of his award he had applied the principle to which I have particularly referred its application is implied in his reasons for judgment when read as a whole and particularly in the light of his reference to the pensions paid to the suppliant and her children and their assumed entitlement to them. Viewed in this light, as I think it fairly should be, his award of $30,000 represented the amount of damages for which the respondent was responsible to the suppliant and her children after taking into account by way of diminution of damages the pecuniary benefits which they had received and might reasonably have expected by way of pension under the Pension Act. This means that his award should be regarded as an award of $30,000 notwithstanding the amount which the suppliant and her children had received by way of pension under the Pension Act and, consequently, over and above such amount. An award on such a basis was called for in a case such as the one before him and it ought to be assumed, in the absence of a clearly expressed intention to the contrary, particularly in view of the fact that his judgment was not challenged by the Crown, that his award was made in accordance with the principles properly applicable in arriving at it. It was not his function to fix a total amount from which the amount of the pensions paid to the suppliants were to be deducted but to assess the damages to which they were entitled under section 19(c) of the Exchequer Court Act. This he did. And, certainly, he did not intend that the amount of his award should be reduced by the amount of the pensions properly paid to the

suppliant and her children. On the contrary, it is clear that he assumed that they were entitled to the pensions which had been awarded to them.

In this view of the award the attempt of the Crown to deduct the amount of the pension payments from the amount of the award is really an attempt to deduct the amount twice, for it was already taken into account by way of diminution of damages in the assessment of the damages for which the Crown was vicariously liable.

There remains only one other comment. There was a question in my mind whether on August 6, 1951, when the Crown paid the suppliant the sum of $22,000 this amount was greater than the capitalized value of the pensions that might otherwise have been payable to her and her children and I considered it advisable that evidence bearing on this question should be adduced. There was a conflict in the point of view of the experts on the basis of calculation to be used. While I am in some doubt whether, as at August 6, 1951, the amount which the suppliant had recovered and collected, namely, $22,000, was greater than the capitalized value of the pensions that might otherwise have been payable under the Act in such a way as to make the direction in section 18B(1) that no pension should be paid then operative, I have come to the conclusion that this question has only an indirect bearing on the real issues involved. I, therefore, need not consider it.

For the reasons which I have given I have come to the conclusion that the respondent has no right to recover from the suppliant the amount of the pensions paid to her and her children. It follows that there will be judgment declaring that the suppliant is entitled in her two capacities to the relief sought in this petition of right and costs and that the respondent's counterclaim is dismissed with costs.

Judgment accordingly.