

BRITISH COLUMBIA ADMIRALTY DISTRICT

1959
Jun. 1 & 2
Jun. 9

BETWEEN:

MARJORIE MANZ LeVAE, Executrix of the Will of Gray Buxton LeVae, LILIAN ANNIE ILOTT, Executrix of the Will of George William Ilott and MARION ADELAIDE CROOKS, Executrix of the Will of George Goodwin Crooks PLAINTIFFS;

AND

THE STEAMSHIP GIOVANNI }
AMENDOLA } DEFENDANT.

Shipping—Damages for loss of lives caused by defendant’s negligence—Canada Shipping Act, R.S.C. 1952, c. 29, s. 726 and 727(2)—Death “caused” by defendant’s “neglect or default”—“Any sum paid or payable on the death of the deceased” in s. 727(2) of the Canada Shipping Act relates and is restricted to insurance—Amount paid by Workmen’s Compensation Board for deaths to be a discharge pro tanto and deducted from the award.

Plaintiffs are the widows of three of the crew of a tug who lost their lives after the tug foundered following a collision with the defendant vessel. Negligence on the part of the defendant was admitted. The action is to recover damages for the loss of the men.

Held: That it is sufficient for recovery of damages under the *Canada Shipping Act* R.S.C. 1952, c. 29, s. 726 and 727 that death shall have been caused by the defendant’s neglect or default; it is not necessary that the death must have been caused directly by physical impact.

- 2. That “any sum paid or payable on the death of the deceased” in s. 727(2) of the *Canada Shipping Act* relates and is restricted to insurance and does not apply to Workmen’s Compensation which cannot be identified with insurance.
- 3. That plaintiffs will hold any part of the amount awarded which is equal to the amount paid them by the Workmen’s Compensation Board in trust for the Board and that amount should be paid into Court and will be a discharge *pro tanto* and be deducted from the amount of the award.

ACTION to recover damages for loss of three men caused by defendant’s negligence.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

R. M. Hayman for plaintiffs.

J. R. Cunningham for defendant.

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

SIDNEY SMITH D.J.A. now (June 9, 1959) delivered the following judgment:

This is an action brought by the widows (also executrices) of three men who formed the crew of a tug and who perished through the foundering of the tug after collision with the defendant vessel. In an earlier action by the owner of the tug I held the defendant vessel to blame and this judgment was upheld by the Supreme Court of Canada. Negligence has been admitted by the owner of the vessel and it remains to fix the damages.

Two points of law have been raised for the owners; the first is that there is no cause of action because it is said the defendant ship did not directly kill the three men; after the collision the two vessels separated, the tug sank and the men were either drowned or perished from exposure after abandoning the tug in a winter gale.

I can see no substance in this argument. This action is founded on Sections 726 and 727 (1952, Cap. 29, R.S.C.) of the *Canada Shipping Act* (which closely follow *Lord Campbell's Act*) and all that is needed for an action to lie by the dependents of a deceased person is that his death shall have been "caused" by the defendant. The argument that this must have been caused *directly*, which would seem to imply physical impact, is quite inconsistent with Sec. 726. Under this section it is not even necessary for the death to be caused by the defendant's "act"; this may even be caused by "neglect or default". The Statement of Claim, paragraph 7, alleges that the three men perished "as a result of the said negligence" that is the defendant's, and this is not denied by the defence. That means that it is admitted that the defendant caused these deaths by negligence; and that seems to me to leave nothing to argue about.

The next point raised by the defendant is that the plaintiffs all received compensation for their husbands' deaths under the *Workmen's Compensation Act*, and it is argued that the payments should be taken off the damages that

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the plaintiffs are otherwise entitled to. The plaintiffs in answer rely partly on Sec. 727 (2) of the *Canada Shipping Act* as being against deduction. This reads:

727. (2) In assessing the damages in any action there shall not be taken into account any sum paid or payable on the death of the deceased or any future premiums payable under any contract of assurance or insurance.

Similar sections are to be found in several jurisdictions, including England. I do not see how the section can be applied to Workmen's Compensation; this cannot be identified with insurance. The natural meaning of the section is not to be extended. It has been held for instance not to apply to pensions payable to the dependents of the employees killed, even contributory pensions. I have no doubt that the expression "any sum paid or payable on the death of the deceased" relates and is restricted to insurance, the intention being to refer to both lump sums payable on death and periodic payments like annuities.

However, I have still to consider deductions from damages apart from Sec. 727 (2). A number of cases have been cited on both sides of this question. Any conflict in these is more apparent than real. I think the matter is concluded by the decision in *The Queen v. Snell*¹, which dealt with the very issue that we have here. The case did not arise in Admiralty, but arose from a collision between two trucks. The executor of the deceased driver accepted Workmen's Compensation and then sued under the *Families' Compensation Act*. The same question arose as to how this affected the liability of the defendant. The reasoning does not hold that a dependent's rights are unaffected by her having received compensation from the Compensation Board. For the Board have a statutory right under Sec. 11 of the *Workmen's Compensation Act*, where they have paid a dependent, to be subrogated to the rights. That means that the wrongdoer cannot benefit from the payment. Since the subrogated Board must ordinarily sue in the name of the dependent, that means that judgment for the full damages suffered, including the amount paid by the Board, with or without a further award, must be entered for the plaintiff. But the plaintiff will hold

¹[1947] S.C.R. 21.

this, up to the amount paid by the Board, in trust for the Board; see the judgment of Rand, J. in *The Queen v. Snell* (*supra*). 1959
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In that case the Board was a formal party and as a result the Court ordered the amount affected by the trust to be paid directly to the Board. In this case the Board is not a formal party; but I am prepared, if the defendant requests it, to order that that part of the eventual award affected by the trust may be paid into Court, and to direct that no payment out be made without notice to the Board. The payment in will be a discharge *pro tanto*.

The plaintiffs are entitled to their costs.

Judgment accordingly.