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BETWEEN:

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 May 2

THE STEAMSHIP GIOVANNI }
 AMENDOLA } APPELLANT;

AND

MARJORIE MANZ LEVAE, Executrix of the Estate of Gray Buxton LeVae, LILIAN ANNIE ILOTT, Executrix of the Estate of George William Ilott, and MARION ADELAIDE CROOKS, Executrix of the Estate of George Goodwin CrooksRESPONDENTS.

Shipping—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 726 and 727—Workmen's Compensation Act, British Columbia, s. 11 as enacted by Statutes of British Columbia 1954, c. 54, s. 9—Pensions paid under Workmen's Compensation Act not to be taken into account in determining damages to which respondents entitled in action brought by virtue of the Canada Shipping Act—Appeal from District Judge in Admiralty dismissed.

Held: That in assessing damages awarded in an action brought by respondents under Part XVII of the *Canada Shipping Act* R.S.C. 1952, c. 29 pension payments made under *British Columbia Workmen's Compensation Act* are not to be considered.

APPEAL from judgment of the District Judge in Admiralty for the British Columbia Admiralty District.

The appeal was heard by the Honourable Mr. Justice Thurlow at Ottawa.

J. R. Cunningham for appellant.

R. M. Hayman for respondent.

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

THURLOW J. now (May 2, 1960) delivered the following judgment:

1960
 S.S.
Giovanni Amendola
 v.
 LEVÆE
 et al.

This is an appeal from a direction forming part of an order for judgment granted by Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District¹, upon the trial of this action. The action was brought to recover damages resulting from the deaths in a collision at sea of the husbands of the respondents, and by the order in question, after pronouncing in their favour on the question of liability, the matter of the damages to which they are entitled was referred to the Deputy Registrar of the Court to take accounts of such damages and to report the amounts due, and it was directed that, in determining such damages, the Deputy Registrar should not take into account the British Columbia Workmen's Compensation Board pension payments which the respondents were receiving. The appeal is from the direction so given to the Deputy Registrar not to take these pension payments into account.

The right of the plaintiffs to bring the action arises under Part XVII of the *Canada Shipping Act*, R.S.C. 1952, c. 29, ss. 726 and 727 of which are as follows:

726. Where the death of a person has been caused by such wrongful act, neglect or default as if death had not ensued would have entitled the person injured to maintain an action in the Admiralty Court and recover damages in respect thereof, the dependants of the deceased may, notwithstanding his death, and although the death was caused under circumstances amounting in law to culpable homicide, maintain an action for damages in the Admiralty Court against the same defendants against whom the deceased would have been entitled to maintain an action in the Admiralty Court in respect of such wrongful act, neglect or default if death had not ensued.

727. (1) Every action under this Part shall be for the benefit of the dependants of the deceased, and except as provided in this Part shall be brought by and in the name of the executor or administrator of the deceased, and in every such action such damages may be awarded, as are proportioned to the injury resulting from the death to the dependants respectively for whom and for whose benefit such action is brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the dependants in such shares as may be determined at the trial.

(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.

¹[1959] Ex. C.R. 324.

1960
 S.S.
*Giovanni
 Amendola*
 v.
 LEVAR
et al.
 Thurlow J.

The general rule as to the measure of damages recoverable under such legislation is stated in *Davies v. Powell Duffryn Associated Collieries, Ltd.*¹ by Lord Russell of Killowen as follows:

The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well-settled, viz., that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts, the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately. It is conceded, and rightly conceded, that the general rule must apply, unless some statutory exception to the rule prevents its application.

It is, I think, also established that, when a defendant seeks to have taken into account in reduction of damages anything in the nature of a benefit accruing by reason of the death, such alleged benefit must be taken into consideration along with the terms upon which it accrues. Thus, in *Grand Trunk Railway Company of Canada v. Jennings*² Lord Watson said at p. 804:

Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding judge as may be suggested by the facts in evidence. It appears to their Lordships that money provisions made by a husband, for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; *but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased.*

In *Baker v. Dalgleish Steam Shipping Company*³ the question was whether it was necessary to take into account in reduction of damages a naval pension received by the widow which, under regulation 24(b) of the applicable regulations, was liable to be cancelled or reduced on account of the recovery of such damages. Younger L.J. said at p. 375:

It follows that if for any purpose of this case the receipt of 3l. 2s. 10d. is relied on by the appellants, as that sum is being paid under the regulations of 1920, and under them only, the appellants are at once relegated to these regulations to ascertain the terms on which the payment is being made, and for that purpose they must have regard to all the provisions of those regulations, including, of course, r. 24(b), to which reference has already been made.

¹[1942] 1 All E.R. 657.

²(1888) 13 A.C. 800.

³[1922] 1 K.B. 361.

Again, in *Johnson v. Hill*¹ du Parcq L.J., speaking for the Court of Appeal, said at p. 273:

Where dependants have a reasonable prospect of receiving a pension from the Crown by reason of the death on which their claim for damages is founded, that prospect like any other reasonable expectation of benefit must be taken into consideration in assessing the damages. In *Baker v. Dalgleish Shipping Co.*, where the principle which we have just stated was affirmed, the pension in question was granted on the terms that it might be reduced or cancelled if compensation was paid by a tortfeasor. This is true of the present case also. It is common ground that the Minister of Pensions must act in accordance with the Royal Warrant dated Dec. 4, 1943, of which art. 56(1) is as follows:

Where the Minister is satisfied that compensation has been or will be paid to or in respect of a person to or in respect of whom a pension or gratuity is being or may be paid or that any compensation which has been or will be paid will benefit such a person, the Minister may take the compensation into account against the pension or gratuity in such manner and to such extent as he may think fit and may withhold or reduce the pension or gratuity accordingly.

As was pointed out in *Baker's* case it is reasonable to assume that if full compensation is recovered from the wrongdoer, the Minister will withhold, or at least drastically reduce, the pension. (See especially the judgment of *Scrutton, L.J.*, at pp. 372, 373). *Prima facie*, therefore, little or no deduction should be made in respect of so shadowy an expectation of benefit, and in *Baker's* case this court affirmed the decision of a judge who had made no deduction in respect of the pension payable.

I turn now to consider the nature of the alleged benefits which the respondents are receiving from the British Columbia Workmen's Compensation Board and which the appellant contends should be taken into account in assessing their damages. It may be noted at this point that it was not contended that such pension payments were insurance payments and were thus exempted from the computation of damages by s. 727(2), of the *Canada Shipping Act*.

The payments are made pursuant to the *Workmen's Compensation Act* of British Columbia, which provides for their payment where a workman has been killed by accident arising out of and in the course of his employment. This provision was in effect prior to and at the time of the accident which took the lives of the respondents' husbands, and the right of the respondents to such payments undoubtedly arose by reason of their husbands' deaths. If there were nothing more to be said about them, they would thus appear to be payments of the kind which, under the general rule, must be taken into account in determining the

1960
 S.S.
Giovanini
Amendola
 v.
 LEVÆE
et al.
 Thurlow J.

¹ [1945] 2 All E.R. 272.

1960
 S.S.
 Giovanni
 Amendola
 v.
 LEVAE
 et al.
 Thurlow J.

respondents' damages. But that is not the situation for, while the *Workmen's Compensation Act* does not provide as did the regulations governing the pension payments considered in *Baker v. Dalgleish* and *Johnson v. Hill* that the pension payments may be withheld or reduced in the event of the dependent obtaining compensation from the wrongdoer, it contains a different provision which, in my opinion, goes further. By s. 11, as enacted by Statutes of British Columbia 1954, c. 54, s. 9, the *Workmen's Compensation Act* provides as follows:

(1) Where an accident arising out of and in the course of his employment happens to a workman in such circumstances as entitle him or his dependent to an action against some person other than his employer and other than an employer in an industry within the scope of this Part or against the Crown, the workman or his dependent, if entitled to compensation under this Part, may claim such compensation or may bring such action; but if the workman or dependent elects to claim compensation, he shall do so within three months after the happening of the accident or, in case it results in death, within three months after the death.

(2) If the workman or his dependent brings such action and, if after trial, or after settlement out of court with the written approval of the Board, less is recovered and collected than the amount of the compensation to which the workman or dependent would be entitled under this Part, the workman or dependent shall be entitled to compensation under this Part to the extent of the amount of the difference.

(3) If any such workman or his dependent makes application to the Board claiming compensation under this Part, neither the making of such application nor the payment of compensation thereunder shall restrict or impair any such right of action against the party or parties liable, but as to every such claim the Board shall be subrogated to the rights of the workman or his dependent and may maintain an action in his name or in the name of the Board, and if more is recovered and collected than the amount of the compensation to which the workman or his dependent would be entitled under this Part, the amount of the excess, less costs and administration charges, may be paid to the workman or his dependent. The Board shall have exclusive jurisdiction to determine whether it shall maintain an action or compromise the right of action, and the decision of the Board shall be final and conclusive.

The effect of the former s. 11 (s-ss. (1), (2), and (3) of which for the present purpose were not materially different from those above set out) upon the damages recoverable under the *Families' Compensation Act* of British Columbia was considered by the Supreme Court of Canada in *The King v. Snell*¹, and the Court there held that the pension paid to Mrs. Snell by the Workmen's Compensation Board was not deductible from the damages otherwise recoverable.

¹[1947] S.C.R. 219.

Counsel for the appellant sought to distinguish the Snell case on several grounds, but, while there are a number of differences between it and the present case, the judgment, in my opinion, settles the effect of s. 11 of the *Workmen's Compensation Act* and is authority for the proposition that the relevant sections of that Act are to be construed as affecting *inter se* the rights of the dependents and the Board only and that they have no effect by way of reducing the liability of a wrongdoer to the dependents of a workman who has been killed. It was submitted that the provisions of the *Workmen's Compensation Act* could not affect the right of the appellant to have the payments under that Act taken into account since the appellant's right arose under the *Canada Shipping Act* and the provincial statute could not take away such right, but even if it be assumed for the purposes of this case that the *Workmen's Compensation Act* can have no effect *ex proprio vigore* on an assessment of damages under Part XVII of the *Canada Shipping Act*, the fact is that the payments which the appellant seeks to have taken into account were applied for by the respondents and are being received by them only by virtue of the *Workmen's Compensation Act* and upon its terms, including the provision for subrogation, by all of which the respondents are bound. So far as the appellant is concerned, the effect is, accordingly, the same whether the *Workmen's Compensation Act* can, of its own force, affect an assessment of damages under the *Canada Shipping Act* or not, for the appellant, seeking to have these payments taken into account in reduction of the respondents' damages, cannot, in my opinion, have this done without at the same time accepting the fact that the payments are made and received upon the terms set out in the *Workmen's Compensation Act*.

It was also argued that the effect of the authorities is that the pensions must be brought into account in any case, even if at the same time there are terms attaching to them which reduce what otherwise might be their effect on the damages, but I see no reason why this should be so where the terms on which an alleged benefit is received are such as to completely eliminate any effect it might otherwise have in reducing the amount at which damages should be assessed. In this respect, the applicable provision of the

1960
 S.S.
 Giovanni
 Amendola
 v.
 LEVAB
 et al.
 Thurlow J.

1960
 S.S.
 Giovanni
 Amendola

v.
 LEVÉE
 et al.

Thurlow J.

Workmen's Compensation Act differs from the regulations which were applicable in *Baker v. Dalgleish Steam Shipping Company* and *Johnson v. Hill*.

Finally, it was submitted that cases are conceivable where the value of a Workmen's Compensation Board pension alone would exceed the pecuniary benefits which the particular dependent could reasonably have expected from the deceased and that, since such pension would be available to the dependent at the time of the death, the dependent would suffer no pecuniary loss from the death. At first sight, this appeared to me to be a strong argument in favour of the appellant's contention, but on reflection I think it too is fallacious. It disregards the fundamental fact that the dependent can obtain no money at all under the *Workmen's Compensation Act* without claiming the benefits available under that Act and that, in so claiming them, the dependent can do so only upon the terms which confer upon the Workmen's Compensation Board the benefit of the dependent's right to damages from the wrongdoer. The dependent's right to benefits under the *Workmen's Compensation Act* is thus of no interest to the wrongdoer, for the measure of the damages he must pay is the same whether he must pay them to the dependent personally or as a trustee for the Board which, as between the Board and the dependent, has become entitled to them, and the measure is also the same whether the capitalized value of the benefits, which the Board can provide on the terms that the Board shall be subrogated to the dependent's right to damages, exceeds such damages or not.

In the course of the argument, counsel contended that there was nothing in the record before the Court to indicate what the terms were upon which the payments were made, since they are referred to in the agreed statement of facts only as "pensions from the British Columbia Workmen's Compensation Board". I think it is entirely unlikely that the Board could be paying such pensions otherwise than pursuant to the statute, but any possibility of prejudice to the appellant on this account can, I think, be eliminated by varying the direction so as to make it clear that it refers only to pension payments made by the Board pursuant to the *Workmen's Compensation Act*.

The direction will, therefore, be varied accordingly and, subject to this variation, it will be affirmed. The appeal will be dismissed with costs.

1960
S.S.
*Giovanni
Amendola*
v.
LEVAE
et al.

Judgment accordingly.

Thurlow J.