

Amelia McColl - - - - - *Appellant*
v.
The Canadian Pacific Railway Company - - - - - *Respondents*
and
The Attorney-General of Manitoba - - - - - *Intervener*

FROM

THE COURT OF APPEAL FOR MANITOBA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 26TH OCTOBER, 1922.

Present at the Hearing :

VISCOUNT CAVE.

LORD PARMOOR.

MR. JUSTICE DUFF.

[*Delivered by MR. JUSTICE DUFF.*]

This appeal presents a question as to the construction of Section 385 of the Railway Act of Canada, and one as to the construction and effect of the Workmen's Compensation Act of Manitoba, Section 13 of Ch. 125 of the Statutes of Manitoba, 6 Geo. V.

The appellant's husband, a workman employed on the respondents' railway, was killed when travelling on one of the respondents' trains in the course of his employment, when the car on which he was riding came into collision with an obstruction and was wrecked. The accident was due to the neglect of the Company's servants in not observing an order of the Board of Railway Commissioners for Canada, which required the defendant Company in loading its railways cars to be governed by "the clearance limits" of the road over which they passed.

The section of the Railway Act (Section 385), with which we are concerned, is in these words :—

“ S. 385. Any company which, or any person who, being a director or officer thereof, or a receiver, trustee, lessee, agent, or otherwise acting for or employed by such company, does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders, regulations or directions of the Governor-in-Council, or of the Minister, or of the Board, made under this Act, or omits to do any matter, act or thing, thereby required to be done on the part of any such company, or person, shall, in addition to being liable to any penalty elsewhere provided, be liable to any person injured by any such act or omission for the full amount of damages sustained thereby, and such damages shall not be subject to any special limitation except as expressly provided for by this or any other Act. R.S., c. 37, s. 427 (2) ; 1910, c. 50, s. 12. Am.”

The appellant's husband having received the injury which caused his death from a contravention of an order of the Board of Railway Commissioners, on behalf of the appellant it is contended that she herself (as well as her infant daughter, for whose benefit she sues), is in respect of the loss accruing to her in consequence of his death, a “ person injured,” within the meaning of the section, and that the effect of the section is to create, without regard to Provincial law, a liability to each of them in respect of such loss. On behalf of the respondents Mr. Tilley argues that the section creates no liability independently of the law of the Province where the injury occurs, and that its office is limited to affirming the responsibility of the Company, and of the persons to whom it applies according to the principles of Provincial law for acts or omissions falling within it. Their Lordships consider it unnecessary to express any opinion upon this view advanced by the respondents as to the construction and effect of the section.

The contention of the appellant in effect is that Section 385 establishes in respect of acts and omissions to which it applies a new principle of responsibility. New in the sense that independently of Provincial legislation it creates a liability to pay damages in a civil action for causing the death of a human being and new in the sense that the liability so created extends to consequences which are neither the immediate or the direct result of the act or omission complained of nor within the intention actual or presumed of the defendant.

It must indeed be apparent that if under this section the dependents of a person suffering death in consequence of a dereliction falling within it are entitled to be indemnified in respect of “ the full amount of damages sustained ” by reason of such death, then the statutory right of indemnity must, by strict analogy, be shared by other classes of persons having legal or business relationships with the deceased and suffering loss in consequence of being deprived of advantages which they might reasonably have expected to enjoy if he had continued to live. Nor, if this be the effect of the section in cases in which death has ensued, can responsibility be limited to such cases. It must exist in numerous other cases where loss is indirectly inflicted upon persons other than those

who suffer directly in their persons or property by reason of a default within the section; as for instance where a breach of statutory duty causes an injury disabling the immediate sufferer from performing his contractual obligations or carrying out his business or professional engagements or making provision in the usual way for his family.

It is of course conceivable that interests thus indirectly affected might be considered by a legislator to be fit subjects for protection by remedial process; but the difficulty of prescribing limits for the operation of such a method of assigning responsibility is obvious, and the common law, speaking generally, regards the protection of such interests as impracticable. As Blackburn, J. (as he then was) said in delivering the judgment of the Court of Queen's Bench in *Cattle v. The Stockton Waterworks Company*, L.R. 10 Q.B. 457:—

“It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge, J., in *Lumley v. Gye*. Courts of justice should not allow themselves in the pursuit of perfectly complete remedies for all wrongful acts to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.’ In this we quite agree.”

“Instances might be indefinitely multiplied” Lord Penzance observed in *Simpson v. Thomson*, 3 A.C. at 290, of claims indistinguishable in principle from that now advanced “giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel.”

Their Lordships think that an intention to establish a novel principle of responsibility of such indefinite scope in relation to a special class of acts and omissions ought not to be inferred from general words which are not apt for the purpose, and to which full effect can be given by a construction in harmony with the policy of the law in granting redress in other cases of *injuria cum damno*.

The courts below have taken the view that the operation of the section is subject to the rule of the common law that an action does not lie for damages suffered in consequence of the death of a human being. Their Lordships see no reason to differ from this conclusion; and their Lordships agree with the observation of Prendergast, J., that in this connection the absence of anything specifying the class or classes of persons entitled to indemnity in such circumstances is significant.

Since Lord Campbell's Act was enacted in 1846 similar legislation has been passed by many legislatures in the United States as well as in British dominions. Many of these statutes are collected in an appendix to Shearman & Redfield's Law of Negligence, and it appears to be the general practice in enacting such statutes to define the class or classes of persons for whose

benefit an action may be brought ; and the fact that the Railway Act is silent upon this matter affords, their Lordships agree, an indication that the section is not addressed to the subject of indemnity for damages arising from death.

The opinion already indicated touching the effect of the general words employed in Section 385 is not without support from the analogy of decided cases dealing with similar language in other statutes. In *The Vera Cruz*, 9 P.D. 96, for example, the plaintiff contended that an action *in rem* for damages under Lord Campbell's Act was within the jurisdiction created by the Admiralty Court Act of 1861, 24 Vict. Ch. 10, Section 7, which gave power to that Court to entertain an action *in rem* when brought to enforce "any claim for damage done by any ship." In the judgments of the Lords Justices there are observations apposite to the question now presented for decision. Bowen, L.J., at p. 101, said :—

"The plaintiff is in this dilemma. The only claim that can arise must either be a claim for the killing of the deceased, or the injuriously affecting his family. The killing of the deceased *per se* gives no right of action at all, either at law or under Lord Campbell's Act. But if the claim be, as it only can be, for the injuriously affecting the interests of the dead man's family, the injuriously affecting of their interests is not done by the ship in the above sense. It arises partly from the death which the ship causes ; and partly from a combination of circumstances, pecuniary or other, with which the ship has nothing to do. The injury done to the family cannot, therefore, be said to be done by the ship."

And Fry, L.J., added :—

"Secondly, assuming injury to the person to be within the section, is an action under Lord Campbell's Act within it ? Compare, by way of illustration, damage done to a barge by the bowsprit of a ship, and a person killed by the same thing. In the first instance, the cause of action is the injury actually caused by the ship. But in the second, the real ground of action is injury sustained by relatives resulting from the death of a person which resulted from the damage done to him by the ship. It cannot be correctly said that it is an action *for* damage done (which are the words of the Act) though it is for damage resulting from or arising out of damage done."

Again, in the *British Electric Railway Company v. Gentile*, 1914, A.C. 1034, the question before this Board was whether a clause in the appellant company's special Act affecting actions against the company "for indemnity for any damage or injury sustained by reason of the railway or the operations of the company" with a certain time limit applied to an action under the British Columbia Statute re-enacting Lord Campbell's Act taken by the dependents of a person killed in circumstances which, if he had survived, would have brought his right of action within the clause. Lord Dunedin in delivering the judgment of the Board said that (p. 1039) "indemnity" in the clause mentioned "obviously means indemnity to the plaintiff in the suit in respect of the wrong done to the plaintiff and the damage sustained by him owing to the railway or the operations of the company," and the Board held (p. 1040) that "a suit brought under the

provisions of that Act" (Lord Campbell's Act) "is not a suit for indemnity for damage or injury sustained by the plaintiff by reason of the operations of the defendants" which "operations" *ex hypothesi* had been the cause of the death that was the foundation of the claim; in other words, an action under Lord Campbell's Act is not an action for "damage sustained by the plaintiff by reason of" the wrongful act which caused the death in respect of which the claim is made.

Their Lordships therefore think that the appellant's claim cannot be sustained by force of Section 385 alone.

The next question for consideration is that raised by the appellant's contention that a right to compensation is vested in her by the combined operation of the provision of the Railway Act already discussed and Sections 2 and 3 of Ch. 36, R.S.M., which, in substance, reproduce the principal enactments of Lord Campbell's Act, 9 & 10 Vict., Ch. 93.

On behalf of the respondents, it is not disputed that the appellant would have a valid claim under this statute, were it not for certain provisions of the Workmen's Compensation Act, a statute of Manitoba (6 Geo. V., Ch. 125), which, it is contended, deprive her of any such right. The Workmen's Compensation Act makes provision for a fund from which compensation is to be paid to workmen injured by accidents arising out of and in the course of, their employment, and to their dependents where such injury results in death, and creates a Board, known as the Workmen's Compensation Board, for its administration. By Section 13 it is enacted that the right to compensation given by the Act shall be "in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependents are, or may be, entitled against the employer of such workman for, or by reason of, any accident" in respect of which a right of compensation is given, and it is further provided that "no action in any Court of law in respect thereof shall . . . lie." By Section 61 of the Act, sub-section 4, and by Section 13, sub-section 2, it is in substance provided that the Board shall upon the application of any party to an action brought by a workman or his dependent against an employer, have jurisdiction to determine whether the party bringing the action is entitled to maintain it, or only to compensation under the Act, and that such decision shall be final and conclusive between the parties. The Board on the 24th November, 1920, after the commencement of the action from which the appeal arises, declared that the accident in respect of which the action was brought was one in respect of which the dependents of the deceased William McColl had a right to compensation under the Act, and that the right of action asserted was not maintainable.

It is quite clear that if Section 13 of the Workmen's Compensation Act applies to the claim advanced by the appellant, then that section affords an answer to the claim. On the part of the appellant it is contended that Section 13 does not apply because on any admissible construction of Section 385 of the

Railway Act, a right of action is thereby given to the employees of the Railway Company injured in consequence of any act or omission within the section, even though the circumstances of the injury should be such as would give the workman a right to compensation according to the terms of the Workmen's Compensation Act. It follows, it is argued, that Section 13 cannot apply to accidents giving rise to rights of action under Section 385, because it must be presumed that the Manitoba Legislature did not intend to enact legislation in conflict with the statutes of the Dominion Parliament within its undoubted jurisdiction.

Their Lordships cannot agree that such an implied exception could properly be introduced into Section 13 of the Workmen's Compensation Act. Section 385 of the Railway Act (a statute passed by the Dominion Parliament) deals with the consequences, by way of civil liability, of the contravention of statutory enactments and regulations on the subject of railways. It was passed by Parliament in exercise of its jurisdiction over that subject. The Workmen's Compensation Act is an Act passed by the Province of Manitoba in exercise of its jurisdiction over civil rights imposing upon employers certain responsibilities and giving employees certain rights in respect of injuries arising out of industrial accidents. The enactments deal with different subjects-matter, although the circumstances of a particular case may bring it within the scope of both enactments, in which case, if a conflict arises, it is the Dominion legislation which prevails. But such conflicts arise only incidentally, and the fact that they do arise is not a legitimate ground for implying words of exception in one of the sections of the Provincial statute, excluding from its application, cases in which the Dominion Act does not apply.

The appellant and her infant daughter, having a right to compensation under the Workmen's Compensation Act, it follows that all rights which otherwise would have accrued to them under Lord Campbell's Act, are displaced by Section 13 of the later Statute.

For these reasons, the appeal, in their Lordships' opinion, fails, and they humbly advise His Majesty that it should be dismissed.

In the Privy Council.

AMELIA MCCOLL

v.

THE CANADIAN PACIFIC RAILWAY COMPANY

and

THE ATTORNEY-GENERAL OF MANITOBA.

DELIVERED BY MR. JUSTICE DUFF.

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