Privy Council Appeal No. 105 of 1919.

The Union Steamship Company of New Zealand, Limited - - *Appellants*

v.

Mary Kathleen Brown Robin - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH FEBRUARY, 1920.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.
LORD ATKINSON.

[*Delivered by* LORD BUCKMASTER.]

The question that arises for determination in this case is defined and limited by the summons taken out by the defendants on the 23rd July, 1917. This asks that the plaintiff's claim—a claim brought by an adopted child to recover damages for the death of one John Robin—should be reduced to £500. upon the ground that his death was caused by the negligence of a fellow-servant and that, by Section 13 of the Workers Compensation Amendment Act, 1911. "no servant shall be entitled to recover from his employer . . . in respect of the negligence of a fellow-servant a larger sum by way of damages . . . than £500." Hosking, J., the learned Judge before whom the matter first came for hearing, dismissed the summons. The appeal to the Court of Appeal of New Zealand was heard by four learned Judges. They were equally divided in their opinions—Denniston, J. and Chapman, J. approving the judgment of Hosking, J., while Stout, C.J. and Cooper, J. dissent—with the result that the original judgment stood, and from that judgment the defendants have brought the present appeal.

The question that arises is a pure question of law and depends upon the construction to be placed upon various Acts of Parliament. The history of the legislation is fully set out in the judgment of Cooper, J. and need not be repeated, for it throws no light upon the meaning of the three relevant statutes. The first of these is the Deaths by Accident Compensation Act, 1908 (No. 39 of 1908). This Act by Section 3 confers, in words almost identical with those of Lord Campbell's Act, a right of action in certain circumstances where the death of a person is caused by the wrongful act of another. The words of the section are important, and they are these :—

> " 3. Where the death of a person is caused by wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured."

Section 5 provides that the suit shall be brought in the name of the executor, and adds the provision that the jury may give to the parties respectively for whom and for whose benefit the action was brought " such damages as they think proportioned to the injury resulting from the death." The effect of Section 3 was considered by the Board in the case of *The British Electric Railway Company, Limited* v. *Gentile* (1914, A.C., 1034). The statute in that case was a statute of British Columbia, but it was in the same terms, apart from immaterial differences, with the statute in the present case. The question which then arose for decision was whether a limitation of six months as a period within which any person who was damaged by a certain tramway, or the operations of the tramway company, could commence an action, was applicable as against the father and mother of a man who had been knocked down and killed by one of the trams, and it was held that it was not. The earlier cases which are referred to in the judgments in the Court of Appeal in the present case are carefully examined in the judgment that was then delivered by the Board, and the position is summed up at page 1041 in these words :—

> " This, however, does not end the matter, for although the action under Lord Campbell's Act or the Families Compensation Act is not an action of indemnity for negligence, yet nevertheless it is an action which can only exist if certain conditions precedent are fulfilled. The first is that the death shall have been caused by wrongful act, neglect, or default of the defendants. That has in this case been affirmed by the verdict of the jury. The second is that the default is such ' as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof.' "

This judgment places beyond controversy the law which has been built up by a series of cases of unvarying tendency. They show that neither the cause of action nor the measure of damage in an action brought by the dependents of a dead man is identical with that which would have been possessed by

the deceased himself. It is merely that upon the happening of certain events and the satisfaction of certain conditions a right of action is conferred, and one of the conditions is that the death is caused in such a manner as would have entitled the party injured to maintain an action and recover damages. In the present case, the accident being due to the negligence of a fellow-workman, but for remedial legislation the deceased man could never have maintained such a suit, and consequently the condition precedent established by the Statute would not have been satisfied. The doctrine of common employment has, however, been removed by certain statutes in New Zealand, the first of which is the Workers Compensation Act of 1908 (No. 248 of 1908). Section 62 of that Act is in these terms :—

> "62. (1) When any injury or damage is suffered by a servant by reason of the negligence of a fellow-servant, the employer of those servants shall be liable in damages in respect to that injury or damage in the same manner and in the same cases as if those servants had not been engaged in a common employment.
>
> "(2) This section applies to every case in which the relation of employer and servant exists, whether the contract of employment is made before or after the commencement of this Act, and whether or not the employment is one to which the other provisions of this Act apply.
>
> "(3) No servant shall be entitled to recover from his employer in respect of the negligence of a fellow-servant (whether the right of action is conferred by this section or exists independently of this section) a larger sum by way of damages for any one cause of action than five hundred pounds. Nothing in this subsection shall affect the measure of damages in an action brought against an employer in respect of the death of a servant."

But this section has again been amended by Section 13 of the Workers Compensation Amendment Act, 1911 (No. 34), and this is the statute now operative. Section 13 is as follows :—

> "13. Section sixty-two of the principal Act is hereby amended by repealing subsection three and substituting the following :—
>
> "'(3) No servant shall be entitled to recover from his employer in an action brought under this Act in respect of the negligence of a fellow-servant a larger sum by way of damages for any one cause of action than five hundred pounds.'"

The argument based upon these provisions is this: That the express proviso in the original section which exempted from the limitation as to damage an action brought in respect of a dead servant is not repeated in the amending statute; that it must be assumed to have had some definite purpose, and that, as it is removed, it must follow that the limitation it was designed to avoid has been once more re-imposed. This view found favour with Cooper, J., who stated his opinion in these words :—

> "Some effect must be given to this alteration of the law, and I am of opinion although not without some doubt that the result is to limit the amount which the personal representatives of a servant or the dependents of a servant can recover in consequence of the death of the servant through

> the negligence of a fellow-servant to the sum of £500, the maximum amount which the servant himself could have recovered for the injury sustained by him."

With this opinion their Lordships are unable to agree. The mere omission in a later Statute of a negative provision contained in an earlier one cannot by itself have the result of effecting a substantive affirmation. It is necessary to see how the law would have stood without the original proviso and also the terms in which the repealed clauses are subsequently re-enacted. The real question is whether, with the Statute as it now stands, the limitation imposed on the servant is extended to his dependents and successors. The argument in support of the appellants' case is best put in the assertion that as, without an express statutory relief from the doctrine of common employment, no suit could be maintained, and such relief being conferred by a section which limits the remedy, the whole of these conditions must be imported into every action to which the doctrine of common employment would have afforded a defence. Their Lordships cannot accept this view. The only operation of the doctrine of common employment in a suit by the dependents of a dead man would be that the conditions precedent were not satisfied. The dead man could not have brought an action in respect of damage or injury. This he can now do. But although in the action that he might have brought there would have been a limitation as to damage, there is nothing to restrict the right expressly conferred by Section 5 of the Deaths by Accident Compensation Act enabling the jury to give damages as they think proportioned to the injury resulting from the death.

In forming this opinion their Lordships have the misfortune to differ with Chief Justice Stout. He regarded the basis of the action as the right of the deceased person to sue. He realised that the damages were independent and that the action was a new and independent action. But it appears from his judgment that he regarded the dependent's right as affected by the infirmity attaching to the rights of the dead man. This is, in fact, the reasoning contained in the following extract from his judgment :—

> " What then is the cause of action given by the Deaths by Accident Compensation Act to the plaintiff ? First it is clear that the basis of the action must be the right that the deceased person had to sue, for Section 3 already quoted says that the act neglect or default must if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof. Now the right that was given to the person who died was a special and limited right—that is, he had only a right to sue for a sum not exceeding £500. It is true that a relative could not sue for certain things for which he could sue such as mental suffering : See *Blake* v. *The Midland Railway Company* (18 Q.B. 93 at p. 110), and therefore in one sense the mode of arriving at the damages sustained is different in the two actions. It has, however, to be remembered that the right of action that the deceased person had was given by the Workers Compensation Act ; it was not a right at common law, and the basis of the suit of the present plaintiff is the right of action that the deceased had.

> The right of action is based on Section 62, which allowed a workman to sue an employer for negligence even though the negligence was the act of a fellow-servant, and in giving this new right of action, it was expressly provided that the damages could not be more than £500."

This necessarily involves the conclusion that the dependent's rights are limited by those of the deceased, but it does not in their Lordships' opinion afford an accurate exposition of the law.

The cause or basis of the action is the death of the workman under certain conditions. It is not his action that is transmitted, but a new right of action arising on his death with a consequent measure of damage independent of that by which the deceased would have been limited. Their Lordships see no difference between the restrictions by which the law, apart from statute, would have regulated the claim of the workman, and the limitation expressly imposed upon those rights by Act of Parliament; yet in the former case it is plain such conditions did not affect the dependents, for they established a standard inapplicable to their claim.

The damages which the dependents are entitled to recover are such damages as the jury think proportional to the injury and on this right no statutory limitations have been imposed.

The contention that if the workman had in the interval between the injury and his death accepted payment in full as to his claim, the dependents would have been disentitled to sue, and that consequently a modification of his claim must also modify their rights is not in their Lordships opinion sound. The right of the workman to claim is a right which must exist on his death, and if by any means that right has been taken away, the conditions cannot be satisfied which enabled the dependents to sue.

In the present case the right to sue was unimpaired—it was only the damage to be recovered which was controlled. For these reasons their Lordships think that this appeal should be dismissed with costs, and the respondent must have her costs in the Court of Appeal. They will humbly advise His Majesty accordingly.

In the Privy Council.

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND, LIMITED,

v.

MARY KATHLEEN BROWN ROBIN.

DELIVERED BY LORD BUCKMASTER.

Printed by Harrison & Sons, St. Martin's Lane, W.C

1920.