

BRITISH COLUMBIA ADMIRALTY DISTRICT

1955
Nov. 3
Nov. 29

BETWEEN:

MARJORIE MANZ LeVAE, LILIAN }
ANNIE ILOTT and MARION } PLAINTIFFS,
ADELAIDE CROOKS

AND

THE STEAMSHIP GIOVANNI }
AMENDOLA } DEFENDANT.

Shipping—Motion to dismiss action for want of jurisdiction—Action in rem lies for death caused by a ship.

Held: That an action *in rem* will lie for death caused by a ship.

MOTION to dismiss the action for want of jurisdiction.

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

J. Cunningham for the motion.

D. McK. Brown contra.

SMITH D.J.A. now (November 3rd, 1955) delivered the following judgment:

This interlocutory motion (heard by me on the 3rd instant) to dismiss the action for want of jurisdiction raises several unusually interesting and difficult points.

The action is brought by several executrices (widows) of seamen who were drowned through the foundering of a tug following collision with the defendant vessel. It is common ground that they claimed either under the British Columbia Families Compensation Act (which is substantially a copy of the English Fatal Accidents Act—otherwise known as Lord Campbell’s Act) or equivalent Dominion legislation though the endorsement on the writ does not expressly say so. Objection was taken as to this but I held the endorsement sufficient.

The Provincial Act gives a right of action against “any person” who causes the death of another, if the death causes loss to specified dependents including widows. The neat

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point raised before me is whether that Act has been adequately supplemented by other legislation to give an action to plaintiffs *in rem* against the ship itself. Such is this action. It may be noted that much the same point at common law came before the Court of Appeal in *Haley v. Brown Fraser* (1).

Apart from statute, no admiralty action was open for physical injuries or loss of life, but Parliament has at intervals enlarged admiralty jurisdiction, and the question is whether it has gone far enough to support this action. This legislation has been uniform in England and Canada, except for an amendment here in 1948, not paralleled in England.

Section 7 of the Admiralty Court Act (1861) (Imperial) conferred on this Court

Jurisdiction over any claim for damage done by any ship . . .

At first this section was construed by Courts of first instance as enabling actions *in rem* to be brought under Lord Campbell's Act. But in the "*Vera Cruz*" (No. 2) (2), the Court of Appeal and House of Lords decided that that view was wrong, and that such an action *in rem* would not lie. But there was a striking divergence in the reasons given by the two tribunals. The Court of Appeal held that the loss suffered by the dependents of a person killed by the operation of a ship was "not damage done by a ship". Brett M.R. said (9 P. at page 100)

The death of the man caused by the negligence of the defendants is only part of the cause of action. There must be actual injury to the person on whose account the action is brought. The real cause of action is in fact pecuniary loss caused to these persons; it is not a cause of action for anything done by a ship, which is only one ingredient in the right of action.

Bowen L.J. said at page 101

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.

And Fry L.J. said at page 102

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.

(1) (1955) 15 W.W.R. (N.S.) 1. (2) (1884) 9 P. 96; 10 A.C. 59.

The House of Lords gave no countenance to this reasoning, but put their affirmance on quite a different basis. The Lords did not hold that an action under Lord Campbell's Act, when a man was killed by a ship, was not "an action for damage done by a ship"; they held that it was not such an action within the meaning of Section 7 of the 1861 Act which was quite a different matter.

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Lord Selborne L.C. began by saying that the effect of the Act was that if the Admiralty Court had jurisdiction it could proceed *in rem*. But he pointed out that Lord Campbell's Act in no way suggested Admiralty jurisdiction

Every word of that legislation being, as it appears to me, legislation for the general case and not for particular injury by ships, points to a common law action, points to a personal liability and a personal right to recover, and is absolutely at variance with the notion of a proceeding *in rem* (10 A.C. 67).

It may also be noted that earlier on the same page Lord Selborne said "death is essentially the cause of the action". This was quite contrary to the Court of Appeal views.

At page 68 Lord Selborne went on to point out that if an action *in rem* were brought to enforce a claim under Lord Campbell's Act, it would bring in procedure in conflict with that prescribed by that Act. He concluded that as it was not a necessary inference that actions under that Act were intended by Section 7 of the 1861 Act, and anomalies would be caused, Section 7 should be otherwise construed.

Lord Blackburn, referring to an action under Lord Campbell's Act, said at page 71: "This is a personal action; if personal action there can ever be" and he pointed out that the remedy for dependents of a man killed by a ship was to sue the persons at fault, not the ship.

The matter rested at that until The Maritime Conventions Act 1911 (Imperial) Chapter 57, Section 5 which enacted that:

Any enactment which confers on any Court Admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*.

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The situation is now covered in England by the Judicature Act 1925. Section 22 of this reads

Section 22 (1)—

The High Court shall, in relation to admiralty matters, have the following jurisdiction . . . that is to say,

- (a) Jurisdiction to hear and determine any of the following questions or claims
- (iv) Any claim for damage done by a ship.

Section 22 (2):

The provisions of para. (a) of subsection (1) of this section which confer on the High Court admiralty jurisdiction in respect of claims for damage shall be construed as extending to claims for loss of life or personal injuries.

And Section 33 (2) reads:

The Admiralty jurisdiction of the High Court may be exercised either in proceedings *in rem* or in proceedings *in personam*.

These sections add nothing to the language of Section 7 of the 1861 Act taken with Section 5 of the Maritime Conventions Act 1911.

In England no one has attempted to dispute that the effect of the 1911 Act and the 1861 Act (and equally of the above sections of the Judicature Act) has been to enable claims under Lord Campbell's Act for loss of life caused by a ship to be enforced by action *in rem*. All the leading text books on shipping and admiralty law since 1911 stated this as accepted law: see, for example, 1 Hals. (3rd Ed.) 60; Roscoe's Admiralty Prac. (5th Ed.) 66N; Temperley Merchant Shipping Acts (5th Ed.) 164; Marsden on Collisions at Sea (10th Ed.) 318. Actually there are no reported cases where the point was ever expressly decided; but there is no lack of cases in which the right to sue *in rem* has been clearly assumed by the Court: e.g. in *The Caliph* (1); *The Espanoleto* (2); *The Kwasind* (3), the last being a decision of the Court of Appeal made upon an express admission by counsel that the action was proper.

Legislation in Canada was parallel, though with far different results in the Courts, these probably being the cause of a further enactment in 1948, not found necessary in England.

(1) [1912] P. 213.

(2) [1920] P. 223.

(3) (1915) 84 L.J.Ad. 102.

Our equivalent of Section 7 of the 1861 English Act first appeared in the Colonial Courts of Admiralty Act 1890 and our equivalent of Section 5 of the 1911 English Act is Section 6 of the Maritime Conventions Act 1914.

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But in *S.S. Catala v. Dagsland* (1), President Maclean, the learned President of the Exchequer Court, stated that the relevant legislation was not explicit enough to exclude the principle applied in the *Vera Cruz* (*supra*), and that it did not enable any claim under the Families Compensation Act of British Columbia for a death caused by a ship to be enforced by an action *in rem*. It clearly was not brought to the attention of the President that English legal opinion was entirely opposed to his views (though there were no express English decisions). He quoted *The Moliere* (2), and *The Kwasind* (*supra*), as having held that the 1911 Act had made no change. Actually however *The Moliere* dealt with a claim for Workmen's Compensation (independent of negligence) and not with damage (as the President assumed) and in *The Kwasind* as I have said, the Court assumed that the legislation had authorized an action *in rem* under Lord Campbell's Act. The President at page 91 said that *The Kwasind*

was an instance, I think, where a Judge presiding in the Admiralty Court was exercising his common law jurisdiction.

With respect, that was not so. However I do not presume to criticize the President's general reasoning that the new legislation was not explicit enough to exclude the principle of the *Vera Cruz* case, even if I would be justified as a local judge in refusing to follow him. I shall return to the *Vera Cruz* later.

The Admiralty Act 1934 reproduced the relevant section from the 1890 Act and also brought in Section 22 of the English Judicature Act 1925 verbatim: see Schedule "A" to the 1934 Act. The same is now found in the schedule to the present Admiralty Act.

Following the Act of 1934 Carroll D.J.A. in *Rogers v. Baron Carnegie* (3), followed the President's ruling in the *Catala* case and held that the then state of the legislation still did not permit a claim under Lord Campbell's Act to be enforced against a ship by action *in rem*. It is argued

(1) [1928] Ex. C.R. 83.

(2) [1925] P. 27.

(3) [1943] Ex. C.R. 163.

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that he would have decided otherwise if he had not felt bound by the President's judgment, but I do not so read his language. He urged that further enabling legislation be passed. Possibly as a result of this suggestion, the following amendment was passed in 1948:

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 dependents 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.

This forms Section 726 of the present Canada Shipping Act.

In *Monks v. The Arctic Prowler* (1) (Newfoundland) Walsh D.J.A. decided that by this amendment the legislature had finally succeeded in authorizing an action *in rem* by a claimant under Lord Campbell's Act for a death caused by a ship. Defendant's counsel, in an exceptionally lucid and plausible argument, stoutly contended that the decision was wrong, that the new section in substance goes no farther than the old legislation, and that the *Catala* case is still the ruling authority. He also distinguished the case on the ground that Walsh D.J.A. had a common law as well as an Admiralty jurisdiction under Newfoundland law. That being so, I think I am obliged to consider the matter on principle.

At the outset I will deal with the suggestion that the Probate, Divorce and Admiralty Division of the High Court has greater powers than this Court would have because, by virtue of the Judicature Act, it is also a Court of common law as well as an Admiralty Court. That factor seems to me irrelevant. In *Bow McLachlan & Co. v. Ship Camosun* (2) at page 608 Lord Gorrell said:

Admiralty jurisdiction of the High Court does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court, or may be conferred by statute giving new Admiralty jurisdiction.

(1) (1953) 32 M.P.R. 220.

(2) [1909] A.C. 597.

And in the *Vera Cruz* case (10 A.C. at page 64) Lord Selborne L.C. said:

This question must be determined exactly in the same manner as if the action had been so brought (i.e. in the Court of Admiralty) and as if the Judicature Acts had never been enacted.

That indicates that the mere fact of the Admiralty division having a common law side does not enable it to handle a common law action as though it were an Admiralty action, e.g. by issuing a writ *in rem* or by arresting property. I therefore cannot agree that the variance between English and Canadian views on the common legislation can be explained by the common law jurisdiction of the Admiralty Divisions.

The defendant contended that "Section 726 of the Canada Shipping Act has not altered the recognized interpretation of common law that the infliction of death itself is not remediable". I cannot accept this. The Families Compensation Act abrogates that principle, at least where there is also loss to the dead man's dependents. And when I read Section 726 I find in it all the essentials of the Families Compensation Act. The effect of Section 726 seems to be that where a man who was killed could have sued for his injuries in the Admiralty Court if he were living, then his dependents can sue in that Court any defendants whom he could have sued. The word "defendants" has I think been chosen to avoid restricting those suable to persons and so as to include ships. If a ship is a suable defendant, that means of course an action *in rem*. So the whole question turns on whether, apart from Section 726, a person injured by a ship could have sued the ship.

Apart from statute there was no Admiralty jurisdiction over physical injuries caused by a ship: *The Moliere* (*supra*) page 31. The books in general treat the right to libel a ship for physical injuries as created by the Maritime Conventions Act 1911 Section 5 and of course they are now covered by the later Acts reproducing that section. But such actions were also brought under the 1861 Act before the 1911 Act was passed, so I go back to Section 7 of the 1861 Act, which gave the Admiralty Court

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Did that section allow a plaintiff to sue a ship for personal injuries to himself? That seems obscure. In *The Sylph* (1) and *The Beta* (2) plaintiffs were held entitled to sue *in rem* for their injuries caused by a ship, and *The Sylph* was cited with apparent approval by Lord Herschell in *Mersey Docks v. Turner* (3). On the other hand, in *Smith v. Brown* (4), which actually dealt with an action under Lord Campbell's Act, the Queen's Bench refused to follow *The Beta*. In *The Franconia* (5) which was a case under Lord Campbell's Act in which four judges divided evenly, two approved *The Sylph* and the other two reserved judgment as to whether an injured party could sue *in rem* for his own injuries. In the *Vera Cruz*, Lord Blackburn, after holding that no action *in rem* lay under Lord Campbell's Act, said that he would not apply the same principle to an action to recover for the plaintiff's own injuries, without hearing full argument. In *The Theta* (6) there was very full argument on a plaintiff's right to sue *in rem* for his own injuries and Bruce J. obviously assumed that this right was given under the 1861 Act, though he dismissed the action on other grounds. There were indeed several other cases in which *The Sylph* and *The Beta* were questioned, but in those cases the principle they decided did not really arise.

On the whole I think the weight of authority favours the view that an injured party could sue *in rem* for his injuries. I note that 1 Hals. (1st Ed. 1907) page 71 so states the law, citing only *The Sylph*. It may well be that for me this point is concluded by *The Beta*, which was a Privy Council decision and so probably binding on me, though not on the English courts.

Assuming however that the 1861 Act left doubt whether a person injured by a ship could sue the ship, I cannot agree that the Maritime Conventions Act did nothing to remove those doubts. It deals with

any enactment which confers on any Court Admiralty jurisdiction in respect of damage

(1) (1867) L.R. 2 A. & E. 24.

(2) (1869) L.R. 2 P.C. 447.

(3) [1893] A.C. 468 at 478.

(4) (1871) 6 Q.B.D. 729.

(5) (1877) 2 P. 163.

(6) [1894] P. 280.

a class which clearly embraced Section 7 of the 1861 Act. The 1861 Act then was to

have effect as though reference to such damage included references to loss of life or personal injury.

That meant that the Admiralty Court by virtue of the two Acts, was given cognizance of any claim for damage for personal injury. The doubts about the 1861 Act expressed in such cases as *Smith v. Brown* were as to whether "damage" included personal injury: the 1911 Act removed that doubt. That Act then went on to say:

and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*.

That clearly removed any doubt whether a personally injured plaintiff had to sue *in personam*.

The President in the *Catala* case, as we have seen, declined to hold that the 1911 Act extended also to actions under Lord Campbell's Act. His reasoning was that the *Vera Cruz* case had held that the 1861 Section was not intended to give a dependent a claim for the killing of a man, and that the 1911 Section was not explicit enough to give a new application to the 1861 Section. The President may not have been referred to the *ratio decidendi* of the English case, and so may have overlooked the distinction between the reasons of the Court of Appeal and the House of Lords. The President's decision can best be justified, I think, on the basis that Lord Campbell's Act was essentially inconsistent with an action *in rem*, so that general language contemplating an action *in rem* must be taken to deal with causes of action arising elsewhere than under Lord Campbell's Act. That reasoning would apply to the 1911 Act with as much force as to the 1861 Act though it would not apply to an action by an injured person. If Parliament did intend to override the *Vera Cruz* decision by the 1911 Act, it is certainly surprising that it did not find clearer language to achieve this end.

However, when we come to Section 726 and Section 727 of the Canada Shipping Act, we find that most of the language of Lord Campbell's Act has been reproduced, showing that Parliament had it in mind. Moreover, as I have shown, the test whether the dependents can sue is whether the deceased person, if he had been alive, could have sued. No such test

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is set up in either the 1861 or the 1911 Acts. As I have said, the deceased person, if he had been merely injured, could have sued the ship *in rem*; so I think it is established that the dependents can sue *in rem*. I therefore agree with the conclusion reached by Walsh D.J.A. in *The Arctic Prowler* case.

I am unable to agree that any difficulty is raised by the fact that the Families Compensation Act is provincial legislation, whereas the Court's jurisdiction is governed by Federal Acts. Section 726 of the Shipping Act reproduces the essence of the Provincial Act, and I think it was framed as it is to overcome the suggested difficulty which had been raised in former cases. Even apart from that, however, I am far from convinced that the difficulty was real. I see no reason why recognition should not be given in the Exchequer Court to provincial legislation defining substantive law.

It is argued with some plausibility that death by drowning is not within the Families Compensation Act, because it is said that the death itself is the only injury. Presumably what is meant is that the Act contemplates ante-mortem injuries, such as wounding, which it is implied are wholly missing in a drowning case. I presume the defendant means to ask what injuries the deceased men here could sue for, if they were still alive. I think it is fair to answer such a technical argument in a technical way. A drowning man does not die instantaneously, and no doubt these men had their lungs first partially filled and then entirely filled with water for an appreciable number of moments before life became extinct. For them to have to go through this was a wrong and therefore an injury inflicted on them by the navigation of the ship, which I assume for this motion to have been wrongful. If at the last second these men had been rescued and brought back to life by the use of respirators, I have no doubt that they could have sued for being subjected to their ordeal. If so, that is all that is needed to give their dependents a right

of action. The English case of *Morgan v. Scoulding* (1) is somewhat in point though the action there was not under Lord Campbell's Act.

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I therefore hold I have jurisdiction and dismiss the motion with costs.

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Judgment accordingly. Smith D.J.A.