
1945

Oct. 12, 13
Oct. 27

BETWEEN:

BESSIE MAY SNELL AND THE WORKMEN'S COMPENSATION BOARD OF BRITISH COLUMBIA. } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Workmen's Compensation Act, R.S.B.C. 1936, c. 312—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)—Liability of Crown to Workmen's Compensation Board for damages due to death of workman caused by negligence of a servant of the Crown—Subrogation—Right of action not barred by assignment of claim against Crown—Acceptance of compensation not a bar to recovery—Damages—Disposition of amounts received.

By virtue of the Workmen's Compensation Act, R.S.B.C. 1936, C. 312, when a workman is injured in an accident under such circumstances as entitle him or his dependents to an action against some person other than his employer, such workman or his dependents, if entitled to compensation under the Act, may claim such compensation or bring such action, and if compensation is claimed the Workmen's Compensation Board shall be subrogated to the rights of the workman or dependents against such other person for the whole or any outstanding part of the claim of the workman or dependents against such other person.

The Suppliant, Bessie May Snell, now seeks to recover from Respondent compensation on behalf of herself and her infant son for the death of her husband as the result of a collision between a motor truck driven by him and one driven by a member of the armed forces of the Crown whose negligence was admitted by the Respondent. Suppliant Snell had applied for and been granted compensation by the Workmen's Compensation Board of British Columbia, which

Board had obtained from her an assignment of all her claims against the Respondent in respect to the death of her husband. No notice of the assignment was given to Respondent and the Board now brings its Petition of Right against the Respondent in the name of suppliant Snell by virtue of its right of subrogation and also by virtue of the assignment.

Held: That the Workmen's Compensation Act R.S.B.C. 1936, C. 312, does not affect the liability of the Crown as created by the Exchequer Court Act, R.S.C. 1927, C. 34, S. 19 (*c*) and Suppliant's action is not barred by acceptance of compensation from the Board.

2. That the Petition of Right is brought by the Workmen's Compensation Board in the name of suppliant Snell in the exercise of its statutory right of subrogation and it is of no consequence in this case whether recovery is had under such right of subrogation or under the assignment.

3. That the Respondent is responsible in damages to the suppliant Snell and her child and that they have individual rights.

4. That the amount received by the suppliant Snell should be paid to the Board to be dealt with by it in due course, and the amount received by the child should also be paid to the Board to be repaid to suppliant Snell on behalf of the child.

ACTION by Suppliants to recover from the Crown damages for the death of the husband of suppliant Snell caused by the negligence of a servant of the Crown.

The action was tried before The Honourable Mr. Justice Sidney Smith, Deputy Judge of the Court, at Vancouver.

C. H. Locke, K.C. and K. L. Yule for Suppliant.

B. M. Isman for Respondent.

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

SIDNEY SMITH, Deputy Judge now (October 27, 1945) delivered the following judgment:

In this Petition of Right, the Suppliant, Mrs. Bessie May Snell, seeks to recover from His Majesty the King compensation on behalf of herself and her infant son under the provisions of the "Families' Compensation Act" of British Columbia, R.S.B.C. 1936, ch. 93. This compensation is sought for the death of her husband which occurred on the 29th of September, 1943, in consequence of a collision between motor trucks on that day near the City of Nanaimo, British Columbia. The collision in question took place between a truck owned by one Sidney

1945

BESSIE MAY SNELL ET AL. v. THE KING

Smith D.J.

Dines, driven by the husband of the Suppliant, and an army motor truck, the property of the Respondent, which was being driven by a member of the armed forces of the Crown. The Respondent does not deny that the said collision was occasioned by the negligence of the last mentioned driver. On this phase of the matter therefore, subject to the defence presently to be mentioned, the only question before the Court is the amount of the compensation that should be paid by the Respondent.

On 27th of October, 1943, Mrs. Snell made an application under the provisions of the Workmen's Compensation Act of British Columbia, R.S.B.C. 1936, ch. 312, and amendments, for payment to her of appropriate compensation. Her husband's employment fell within Part 1 of the said Act, and the Board thereupon became obligated to pay to Mrs. Snell and is now paying to her the sum of $40 per month during her life-time, together with a monthly payment of $10 for her child until the child shall have reached the age of 16 years, and thereafter a monthly payment of $12.50 between the ages of 16 years and 18 years, provided the child shall then regularly attend an academic, technical or vocational school.

The Workmen's Compensation Act contains the following provisions as Section 11 (1) and (3):

> 11. (1) Where an accident happens to a workman in the course of his employment in such circumstances as entitle him or his dependents to an action against some person other than his employer the workman or his dependents, if entitled to compensation under this Part, may claim such compensation or may bring such action.
>
> (3) If any such workman or dependent makes an application to the Board claiming compensation under this Part, the Board shall be subrogated to the rights of the workman or dependent against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person.

The Board thus acquired a statutory right of subrogation in addition to whatever similar right it might have at common law. But apart from this the Board thought it well to obtain, and did obtain from Mrs. Snell on the 13th of March, 1934, an assignment of all her claims against His Majesty the King and other parties in respect of the death of her husband. Notice of this assignment was not given to the Respondent, and so it remains an equitable assignment only. The Board now brings this Petition of Right against the Crown in the name of Mrs.

Snell by virtue of its right of subrogation and also by virtue of the said assignment which, being equitable only, requires the filing of this Petition in the name of the assignor. *Union Assurance Company et al* v. *B.C. Electric Railway Company Limited* (1).

The ground having been cleared by the position on liability taken by the Respondent as above mentioned, I think the foregoing short statement of facts contains all that is necessary for the exposition of the questions which must be answered by the Court.

The Respondent disputes liability upon three grounds, (1) that Mrs. Snell, having elected to claim compensation from the Workmen's Compensation Board, and having accepted the same, is barred from maintaining this action against His Majesty, (2) that she has assigned her right of action against the Respondent, and as a result thereof is not entitled to maintain this action, (3) that the provisions of the Workmen's Compensation Act are not applicable to the Respondent, and that the Board can acquire no right of action against the Respondent by subrogation under the said Act. I am unable to find support for any of those contentions.

Section 19 (*c*) of the Exchequer Court Act, R.S.C. 1927, ch. 34, as amended, imposes a liability upon the Crown (Dominion) for the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, where such negligence has resulted in death or injury to the person, or to property. As pointed out in an informing judgment of the learned President of this Court in *Tremblay* v. *The King* (2), the language of this section not only gives jurisdiction to the Exchequer Court but imposes a liability upon the Crown which did not previously exist; and further (at p. 12) that the provincial law applicable to circumstances such as these in the present case is the law that was in force in this Province on the 24th of June, 1938, when the amendment to Section 19 (*c*), which first imposed liability upon the Crown in this type of case, came into effect. At that date the relevant provisions of the Workmen's Compensation Act were in force in this Province.

(1) (1914) 21 B.C.R. 71 at 76. (2) (1944) Ex. C.R. 1 at 8.

1945

BESSIE MAY SNELL ET AL. v. THE KING

Smith D.J.

The Interpretation Acts, R.S.C. 1927, ch. 1, s. 16, and R.S.B.C. 1936, ch. 1, s. 35, both read as follows:

> No provision or enactment in any Act shall affect, in any manner (or way) whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

It seems to me that the Workmen's Compensation Act in no way affects the liability of the Crown (Dominion) as created by Section 19 (*c*) aforesaid. It neither adds to it, detracts from it, or varies it in any manner whatsoever. *Dominion Building Corporation Limited* v. *The King* (1). All it seeks to do in sec. 11 is to deal with the disposition of the damages as between the Board and the dependents of the deceased. That this is so is evident from the language of Duff, J. (as he then was) in *Toronto Railway Company* v. *Hutton* (2), when dealing with sec. 9 of the Ontario Workmen's Compensation Act which is comparable to sec. 11 of the British Columbia Act:—

> In sum my view of sec. 9 is this: Its subject matter is the reciprocal rights of the claimant on the one hand and the employer and Compensation Board on the other. The effect of the section may perhaps be more conveniently considered with reference to the case of the employer. As between the employer and the claimant then, the claimant is entitled to choose one of two alternatives. He may claim compensation or he may elect to pursue his remedy against the third party. If he elects to claim compensation, the employer becomes subrogated to the claimant's rights against the third person; in other words, he becomes entitled to enjoy the benefit of them and may enforce them in the name of the claimant. But all this is intended to be and is a disposition as to the rights of the employer and the claimant *inter se*. A dispute may arise upon the point whether or not an election has taken place within the meaning of the enactment, but that is a matter to be settled as between employer and claimant. No other party is interested except, of course, a party claiming through one of them.

On the question of election, I was referred by counsel for the Crown to certain dicta of the late learned President of this Court in *The Ship Catala* (3), which would seem to indicate that the President was of the opinion that an election to accept compensation barred any right of recovery from a wrongdoing third party. His observations, though admittedly made obiter, would of course be extremely weighty in the present case; but I think it clear that the learned President is there directing his

(1) (1933) A.C. 533 at 548.
(2) (1919) 59 S.C.R. 413 at 420.
(3) (1928) Ex. C.R. 83 at 95.

remarks to recovery from the same employer by way of compensation under the Act, and also by way of subsequent action at common law. He is not speaking of a case like the present where, after payment by the Board to a dependent, recovery is sought by the Board by virtue of its right of subrogation from a third party.

I respectfully agree with Mr. Justice Angers when he says in *Rochon* v. *The King* (1) when dealing with similar questions under the kindred Workmen's Compensation Act of Quebec whose provisions in this respect are not materially different:—

> The fact that the suppliant exercised his recourse against his employers, under the Workmen's Compensation Act of Quebec as he did .....does not, in my opinion, deprive him of his right of action against the Crown, if such right exists under the provisions of subsection (c) of section 19 of the Exchequer Court Act.

See also *McNicoll* v. *The King* (2); *Yukon Southern Air Transport Limited et al* v. *The King* (3); and *Zakrzewski* v. *The King* (4).

Moreover, it seems to me that it is not open to the Crown to adopt the position that it may take the benefit of the Act by arguing that Mrs. Snell has received compensation under its provisions, and is thus not entitled to further compensation from the Crown; and at the same time deny to the Board the right of subrogation given by the Act as against the person responsible, in this case the Crown. I think this follows from such cases as *re Excelsior Electric Dairy Machinery Ltd.* (5); and *Attorney-General of British Columbia* v. *Royal Bank of Canada et al* (6), on other grounds. See also the authorities referred to in an interesting article on this topic by Mr. D. M. Gordon of Victoria, B.C., in Vol. 18, Canadian Bar Review (1940) p. 751.

The Petition of Right is essentially one filed by the Board in the name of Mrs. Snell in the exercise of its statutory right of subrogation. It seems to me to be a matter of indifference whether recovery is made under such right of subrogation or under the assignment before mentioned. Both parties (that is to say, Mrs. Snell on behalf of herself and her child on the one hand, and the

(1) (1932) Ex. C.R. 161 at 170.
(2) (1941) Ex. C.R. 104.
(3) (1942) Ex. C.R. 181.
(4) (1944) Ex. C.R. 163.
(5) (1923) 52 O.L.R. 225.
(6) (1936) 51 B.C.R. 241.

1945

BESSIE MAY SNELL ET AL. v. THE KING

Smith D.J.

Board on the other hand), are before the Court, and there is no dispute between them as to the disposition of any fund recovered.

For these reasons I find that the Crown is responsible in damages to Mrs. Snell and her child, and that they have individual rights. See *Avery* v. *London and North Eastern Railway Company* (1) *London Brick Company Limited* v. *Robinson* (2). Fortunately I am not concerned here with the difficult problems which arose in these two cases under the English Workmen's Compensation Acts. My duty is simply to assess the damages to which Mrs. Snell and her child are separately entitled.

At the date of the collision and of the death, the respective ages were as follows: the husband 36 years, the wife 33 years, the child 7 years. The deceased was earning an average salary of approximately $160 per month as a truck driver. He appears to have allowed his wife a sum of about $80 per month for housekeeping. Had he lived this would no doubt have continued. Taking all these various factors into consideration, and also the ups and downs of life, I think it fair to assess damages to Mrs. Snell in the sum of $13,500, and to the child in the sum of $3,500.

The amount recovered by Mrs. Snell "should be paid to the Board to be dealt with by them in due course", as was said in *Toronto Railway Company* v. *Hutton supra* at p. 416. It is true that sec. 9 (3) of the Ontario Act states expressly that any sum recovered from the third party by the Board under its right of subrogation "shall form part of the accident fund" of the Board. But I think the result is the same although these words are absent from the British Columbia Act.

The amount recovered by the child should also be paid to the Board to be repaid to Mrs. Snell on behalf of the child in accordance with the present scheme of payments, but in such increased monthly amounts as may be possible after deduction by the Board of such amounts as have already been paid on behalf of the child.

The Suppliants are entitled to their costs.

Judgment accordingly.

(1) (1938) A.C. 606.

(2) (1943) 1 All E.R. 23.