Ponyicky v. Sawayama

Between
Ponyicky, and
Sawayama and Sawayama

[1942] B.C.J. No. 38

58 B.C.R. 299

British Columbia Court of Appeal
Victoria, British Columbia

McDonald C.J.B.C., McQuarrie, Sloan,
O'Halloran and Fisher JJ.A.

Heard: September 29, 1942.
Judgment: November 10, 1942.

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1 **McDONALD C.J.B.C.**:-- Appellant, as representing his deceased wife's estate, recovered $1,000 for her loss of expectation of life, and, as her husband, recovered $125 compensation for her death.

2 Neither party presses an appeal against the award of $1,000, but both parties appeal against the smaller award, the appellant on the ground that it is too small, the respondents on the ground that nothing should have been allowed.

3 Several important points have been raised, but all seem to be well covered by authority.

4 The recent decision of the House of Lords in Davies v. Powell Duffryn, [1942] 1 All E.R. 657 makes it clear that a plaintiff cannot recover twice for the death of a relative, so that if he recovers as administrator of the deceased, at the same time taking the estate beneficially, under the intestacy, that factor reduces the damage he suffers as an individual from the death, so that if the latter is separately assessed, he can only recover the larger sum of the two, and not both.

5 Appellant argued that here there is nothing in the record to show that appellant took the deceased's property beneficially. I [58 BCR Page302] cannot agree. We have the letters of administration, which show that deceased died intestate. We have also proof that there are no surviving children. It is true that the deceased child survived its mother by a few days, and became entitled under section 112 of the Administration Act, R.S.B.C. 1936, Cap. 5 (taken with section 126) to one-half of her estate, the appellant taking the other half. But on the child's death, appellant became entitled to the whole: ibid, section 115.

6 Appellant complains of the inadequacy of the award of $125 to him as husband, on the ground that it takes no account of his loss of consortium and generally that it gives no real compensation for his loss.

7 We have several times allowed husbands damages for loss of consortium in cases of mere injury. No case has been brought to our attention where damages for "consortium" as such have been assessed where the accident was fatal. But it seems to me perfectly clear that nothing can be recovered under such a head. In Blake v. Midland Railway Co. (1852), 18 Q.B. 93, it was said that nothing can be given for "solatium" and the Privy Council in Grand Trunk Railway Company of Canada v. Jennings (1888), 13 App. Cas. 800 and Royal Trust Company v. Canadian Pacific Railway Company (1922), 38 T.L.R. 899, laid down in the most sweeping terms that no compensation could be given for any but pecuniary loss. See likewise Berry v. Humm & Co., [1915] 1 K.B. 627, where as here the plaintiff's wife was killed. I see nothing to the contrary in The St. Lawrence & Ottawa Railway v. Lett (1885), 11 S.C.R. 422, so strongly relied on by respondents.

8 It may seem peculiar that loss of consortium is remediable where the injured wife lives, but not where she dies. Probably the distinction turns on the theory that a bereaved husband may remarry, whereas, if his wife is incapacitated but living, he cannot. Whatever the reason, it seems to be settled that nothing can be given, except for pecuniary loss, where the wife is killed.

9 Apart from the element of consortium, the appellant complains that $125 is inadequate to meet his pecuniary loss. But where a married man has no children, it can be only rarely that he suffers pecuniary loss by his wife's death; for in most cases the [58 BCR Page303] wages of a housekeeper would be less than it would cost a husband to feed and clothe his wife, and keep her supplied with spending-money. Most childless men, when they become widowers, either remarry or give up keeping house. The present appellant appears to have only kept a housekeeper for a month after his wife's death. All the cases that I have seen where a husband recovered substantial damages for the death of his wife are cases where he had children. I can easily see that there a husband might be put to a good deal of expense by his wife's death. I have not overlooked that the appellant's child survived his wife by four days, nor the argument that we must take the facts as at the date of the accident. If that is correct, it does not help us. It might if there was some conventional way of arriving at damages; but where we can consider only pecuniary loss, it seems clear that the survival of the infant for four days cannot affect the quantum of loss caused by the wife's death.

10 Appellant tried to show damage by setting up that he and his wife had planned to set up a hairdressing business in which they would be partners, and that he expected to make a good profit out of this. It is, however, a novel idea that one partner can recover damages for the killing of his business partner. And the estimate of profit cannot be taken seriously. It seems to me that this evidence is, if anything, damaging to the appellant, as showing that the wife would have very little time to give to her housekeeping.

11 However, I do not think it necessary to consider whether the allowance of $125 for loss of the wife's services is adequate, for at all events I would not be prepared to increase this to $1,000; and unless more than that amount were allowed, appellant could not benefit by an increase, in view of the decision in Davies v. Powell Duffryn, supra. In fact, he can recover nothing under this head.

12 This appeal, therefore, substantially fails. And for the reasons given, the cross-appeal against the award of $125 succeeds.

13 On the argument before us, it appeared that an item of $40 for disbursements by appellant was not allowed by the judgment below. So far as appears this was an oversight. When the point was raised before us, respondents' counsel at once objected [58 BCR Page304] that it was not raised by the notice of appeal, saying that if it had been, he would probably have yielded the point. He further stated that he did not object to the allowance provided it did not affect costs. As the point was not raised until the hearing before us, I do not see how the appellant can claim to have succeeded on that point; it is yielded as a matter of indulgence. So as to the costs of the appeal and cross-appeal, I do not see how the appellant can escape liability.

14 Since writing the above I learn that my brothers, other than O'HALLORAN, J.A. would dismiss the appeal and cross-appeal with a set-off as to costs. I am therefore withholding any dissent and judgment will go accordingly.

15 McQUARRIE J.A.:-- I agree that the appeal and cross-appeal should be dismissed with a set-off as to costs.

16 SLOAN J.A.:-- The appellant seeks to increase the amount of damages awarded him under the provisions of the Families' Compensation Act, R.S.B.C. 1936, Cap. 93 for the death of his wife. The respondents cross-appeal from the judgment below, alleging that the appellant is not entitled to any damages because he failed to prove that he had sustained any pecuniary loss by her death.

17 Prior to the passage of the Families' Compensation Act the husband could not at common law have recovered anything for the death of his wife. As Sir W. J. Ritchie, C.J. said in Monaghan v. Horn (1882), 7 S.C.R. 409, at pp. 420-22:

> The death of a human being, though clearly involving pecuniary lose, is not at common law the ground for an action for damages,

It was to remedy this situation that the said Act was passed, but the right conferred upon the surviving spouse to recover damages is restricted to the actual pecuniary loss sustained by him. Pym v. The Great Northern Railway Company (1863), 32 L.J.Q.B. 377 and Grand Trunk Railway Company of Canada v. Jennings (1888), 13 App. Cas. 800. There may be included in the assessment of damages future pecuniary benefits lost to him by reason of the death of his wife. Hetherington v. North Eastern Rail. Co. (1882), 51 L.J.Q.B. 495.

18 In the present appeal the appellant sought to have his damages increased, claiming a present and potential pecuniary loss in [58 BCR Page305] excess of the $125 awarded by the learned trial judge. If the matter stood there I am of the opinion that something might be said in favour of his submission. I do not, however, interpret the findings of the learned trial judge as awarding that sum. In my view the addition of the phrase "without abatement" after his awards under the Administration Act and Families' Compensation Act must mean, unless it be ignored as meaning nothing at all, that the learned trial judge assessed the damages under the Families' Compensation Act at $1,125 and then applying Davies v. Powell Duffryn, [1942] 1 All E.R. 657, deducted therefrom the $1,000 awarded under the Administration Act, leaving a balance of $125 for which judgment was to be entered under this head.

19 On the evidence I am unable to say that in awarding $1,125 the learned trial judge was obviously in error or had overlooked some relevant element in his assessment of the damages. Stroud v. DesBrisay and Colgan (1930), 42 B.C.R. 507.

20 I would, therefore, dismiss both the appeal and cross-appeal.

21 O'HALLORAN J.A.:-- The twenty-seven-year-old wife and fifteen-month-old daughter of the appellant were killed when run down by a motor-car belonging to one of the respondents, and negligently driven by the other. Damages were awarded in the Court below in the sum of $1,125 ($1,000 under the Administration Act and $125 under the Families' Compensation Act) in respect to his wife, and $750 (under the Administration Act only) in respect to his infant daughter. This appeal relates to the wife only, and is confined to the quantum of damages. It raises questions of general importance.

22 The respondents cross-appealed on the ground that damages allowed under the Families' Compensation Act should take into consideration any award made under the Administration Act; in short that the two awards should not be added together in this case. That also involves a principle of general importance. The appellant is 42 years of age, is a millwright and carpenter by trade, and appears to be in moderate circumstances. He owns a furnished six-room home, and at the time of his wife's death they were planning an annex to cost between $1,000 and $1,500 in order to open a lunch-counter and a hairdressing establishment. [58 BCR Page306] His wife was young, active and healthy. They had been married only two years and two months and had the one child. The evidence portrays them as responsible citizens, happily married, well settled in life and to whom the future held out favourable prospects.

23 In view of the 1942 amendment to our Administration Act no ground was advanced upon which to increase the sum of $1,000 awarded under that Act. But in my view the award of $125 to the husband under the Families' Compensation Act is wholly insufficient, and has no intelligible relation to the realities of a normal married life. In particular it bears no relation whatever to the favourable marital conditions the evidence discloses in the case under review. While damages under the Families' Compensation Act are founded on a reasonable expectation of pecuniary benefit which the death has terminated, that does not mean that only special damages are recoverable, or that the damages are calculated on the basis that marriage must be regarded as a business relationship and vide Taff Vale Railway v. Jenkins, [1913] A.C. 1, Lord Atkinson at p. 7.

24 In addition to her management of the household, a wife does numberless things which add to the husband's comfort, convenience, health and actual saving of money, as well as helping him in improving his business prospects. Those varied services, while essentially of pecuniary value, seldom admit of complete reduction to precise figures. In Grand Trunk Railway Company of Canada v. Jennings (1888), 13 App. Cas. 800 Lord Watson said in this respect at p. 804 that often,

> the extent of lose depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture.

25 Evidence of loss of pecuniary benefit does not appear here with such meticulous particularity that the assessment of damages is resolved into a matter of almost automatic computation. But the evidence does show her general capacity and relation to her family. It shows her a loyal, competent, active wife who performed her household and conjugal duties efficiently and satisfactorily. That such services are of pecuniary value cannot be doubted. Their value is a matter of estimate, even though some of it, as Lord Watson said, may be a matter of conjecture. [58 BCR Page307] Her death obviously imposed a monetary loss upon the husband in respect to those services rendered gratuitously by the wife at the time death interrupted the certain prospect of their being continued

freely reasonably in the future; and vide Scrutton, J. in Berry v. Humm & Co., [1915] 1 K.B. 627, at p. 633.

26 The St. Lawrence & Ottawa Railway v. Lett (1885), 11 S.C.R. 422 related to a statute described as a copy of Lord Campbell's Act. A 63-year-old husband (and therefore with an actuarial life expectation of some twelve years) was apportioned $1,500 damages arising from the death of his 53-year-old wife. The point taken and to which the Court did not accede, was that the loss of a wife, no matter how industrious, careful or attentive she might have been in looking after her husband's domestic affairs, was still sentimental, and not of sufficient pecuniary character to support the action. Sir W. J. Ritchie, C.J. with whom the majority of the Court agreed, pointed out that the term pecuniary is not used in the statute and that damages for the injury should not be limited only to an immediate loss of money or property.

27 He explained the principle of the English decisions to be, that if there is a reasonable expectation of pecuniary advantage, the destruction by death of such expectation by the negligence of a third party, will sustain the action.

28 The judgment proceeded at p. 433:

> I am free to admit that the injury must not be sentimental or the damages a mere solatium, but must be capable of pecuniary estimate; but I cannot think it must necessarily be a loss of so many dollars and cents capable of calculation. The injury must be substantial; ... It may be impossible to reduce such an injury to an exact pecuniary amount.

And further at p. 434:

> There are abundant cases in our law where there is the same difficulty in reducing the injury to a pecuniary standard; ... slander ...; libel, breach of promise of marriage, and many others where substantial injury is complained of, but the amount of damage is left to the discretion and judgment of the jury; there are no judicial tables by which the amount of such damages can be ascertained, nor any judicial scales on which they can be weighed, yet pecuniary damages are, without difficulty awarded, assessed by the good sense and sound judgment of the jury, upon and by reference to, all the facts and circumstances of each particular case, and who are, as Lord Campbell expresses it, to take a reasonable view of the case and give a fair compensation.

29 Applying what has been said, I am of the view, with respect, [58 BCR Page308] that an award of $7,500 damages under the Families' Compensation Act, would represent a just appreciation of the substantial nature of the injury suffered. The 42-year-old husband has an actuarial expectation of life of 26.14 years, vide Schedule B of the Succession Duty Act, Cap. 270, R.S.B.C. 1936. In the Lett case, supra, $1,500 was apportioned the husband in 1885, when the purchasing power of a dollar in Eastern Canada was certainly several times as great as it is today in Vancouver. The wife there was 53 compared to 27 here. The husband's actuarial expectation of life there was twelve years compared to 26 here. The deceased's wife's actuarial expectation of life there was eighteen years compared to 36 years here. In Price v. Glynea and Castle Coal &c. Co. (1915), 85 L.J.K.B.

1278, Bankes, L.J. said at p. 1282 that in a claim under Lord Campbell's Act the expectation of life of the claimant as well as that of the deceased must be taken into consideration.

30 If for that period of 26 years his much younger wife would have contributed services to him and to his household to the extent of $25 per month, or $300 per year, we would have here the figure of $7,800. And that would not include special services, such as, for example, nursing in illness. As conditions of living have existed on this coast for many years, such an estimate for cooking, washing, sewing, nursing, cleaning and generally looking after a household and a husband, month in and year out, cannot be considered out of the way, in the condition of home life the evidence discloses. It contemplates not an eight-hour day, but virtually a 24-hour day. It includes care and thought in the carrying out of duties, which the husband could not expect or receive from a month-to-month employee. It includes an eye to the prevention of waste and the saving of money in the repair and maintenance of clothes, furniture, house and household effects. While many of those services may be described as routine, yet they would not be of a perfunctory or casual nature. The management of the home virtually fell on her shoulders. All that, of course, terminated with her death and represents a real monetary loss to the husband. Such a computation is not referred to as a conclusive method of calculating the loss of pecuniary benefit. It is an illustration how that loss may be [58 BCR Page309] estimated in everyday terms, if emphasis is sought to be placed upon some precise method of calculating the reasonable expectation of loss of pecuniary benefit to the husband.

31 It is recognized, of course, that figures calculated to represent the actuarial expectations of human life are based on averages. But under modern conditions the great assistances to be derived from such figures is an element which cannot be ignored in claims under the Families' Compensation Act. It is to be observed also that the willingness, intelligence and enthusiasm with which a happily-married woman may perform her numerous duties is necessarily an element which enters into the value of her services. For certainly the services of a wife are pecuniarily more valuable than those of a month-to-month employee. The frugality, industry, usefulness, attention and tender solicitude of a wife surely make her services greater than those of an ordinary servant, and therefore worth more.

32 During the wife's lifetime they received $26 per month from roomers. After her death the husband discontinued that and instead rented the four downstairs rooms furnished for $25 per month. It seemed to be argued before us therefore that any loss the husband incurred by the death of his wife was offset by the rental of $25 per month. That submission is obviously untenable. It excludes entirely the real basis of the husband's claim, viz., loss of services his wife rendered him as a wife in the conduct and management of his home. The comforts and conveniences a married man has in his own home are something more than is available to him living as a bachelor in a single room. As was said by Cockburn, C.J. in Pym v. The Great Northern Railway Company (1862), 31 L.J.Q.B. 249, at p. 252, the enjoyment of greater comforts and conveniences of life depend on pecuniary means to procure them, and hence their loss is one which is capable of being estimated in money.

33 It further omits from consideration that the husband is now either buying his meals, or if he prepares them himself, he is deprived of his wife's services in that respect. This extends also to his laundry, cleaning and repairing his clothes and dozens of things for which a husband depends on his wife. The $25 rental now received has only this effect, that if he did not have [58 BCR Page310] it or could not get it, the basis of his claim would be increased by the $26 received from roomers before her death. It is in effect the same as if he had kept the roomers and had hired a housekeeper at $25 per month for that purpose. Reduced to its proper perspective his pecuniary loss in that respect

alone arising from the wife's death would then be the $25 a month he would pay the housekeeper to do the work his wife had been doing to maintain the monthly roomer rental of $26. But quite apart from the roomers and the subsequent rental which may be said to set off each other, there is the basic ground of the claim, viz., loss of his wife's services. Sir W. J. Ritchie, C.J. observed in the Lett case, supra, at p. 435:

> I must confess myself at a loss to understand how it can be said that the care and management of a household by an industrious, careful, frugal and intelligent woman, ..., is not a substantial benefit to the husband ...; or how it can be said that the loss of such a wife ... is not a substantial injury but merely sentimental, is, to my mind, incomprehensible.

34 On the facts of this case there is an actual and substantial loss, independent of any sentimental feeling, grief, or loss of society, and clearly independent also of any benefit accruing from the $25 monthly rental after death. The latter when viewed in its true perspective, can have no greater effect at best, than to balance the loss of revenue from roomers received before her death. In any event, to my mind it would make a mockery of the Families' Compensation Act to hold, that if a man should be able to rent his furnished home monthly for more than the estimated monthly value of his deceased wife's services, that he should be held for that reason alone, to have suffered no substantial loss from his wife's death. It would, of course, be contrary to the inherent nature of damages as such, to require the surviving husband to adopt a lower scale of living, in order to reduce the amount of damages payable by a third party whose negligence has brought about the interruption in his accustomed and appropriate mode of life.

35 This brings us to the cross-appeal. I think counsel for the respondent was right in principle in his cross-appeal, although I must reject the result based on the figures in the Court below. For reasons stated earlier I must regard them as wholly erroneous estimates of the damages suffered by the husband, bearing no true relation to the factual conditions under review. It is true [58 BCR Page311] that the claims under the two statutes are distinct and independent, although they arise out of the same act of negligence. Under the Administration Act the benefit goes to the estate of the deceased. Under the Families' Compensation Act the benefit goes to the dependants of the deceased. In this case it happens the husband is the sole dependant of the deceased and also the sole beneficiary of the estate of the deceased.

36 In Rose v. Ford, [1937] A.C. 826 it was stated there might be some overlapping in the damages awarded under the two statutes. In Feay v. Barnwell, [1938] 1 All E.R. 31, Singleton, J. held an award under Lord Campbell's Act (the equivalent of our Families' Compensation Act) should be reduced pro tanto by the amount of the damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934 (the equivalent of our Administration Act), even though the "rights" given under the latter statute were expressed to be "in addition to and not in derogation of" any rights conferred on dependants of a deceased person by the former statute. That view was approved by the House of Lords in Davies v. Powell Duffryn Associated Collieries, Ltd. (1942), 111 L.J.K.B. 418.

37 It was there explained that in calculating the damage "proportioned to the injury" under Lord Campbell's Act, gains as well as losses should be taken into account, so as to ascertain on balance the compensation to be awarded under that statute. It was the view that the language of the Law Reform (Miscellaneous Provisions) Act, 1934, was not specific enough to make any change in that method of assessment. Accordingly it was decided that any benefit received indirectly under the

Law Reform (Miscellaneous Provisions) Act, 1934, by a dependant under Lord Campbell's Act, should be taken into account in estimating the damages to be awarded that dependant under the latter statute.

38 Our Administration Act (section 71(6) thereof) provides that

> nothing in this section shall prejudice or affect any right of action under ... the provisions of the Families' Compensation Act.

In 1942 section 71(2) was amended by adding the words

> provided that nothing herein contained shall be in derogation of any rights conferred by the Families' Compensation Act. [58 BCR Page312]

39 That language cannot be read as any wider in meaning than "shall be in addition to and not in derogation of" which appears in the English Act. It seems to me the applicable reasoning in Davies v. Powell Duffryn cannot be escaped. It must be concluded, that if the Legislature had intended that damages which may be awarded under the Administration Act should not be taken into account in assessing damages under the Families' Compensation Act, it would have said so in unequivocal terms.

40 To recapitulate: $7,500 is found to be a proper award to the husband dependant under the Families' Compensation Act subject to any gains from the wife's death which may reduce that amount pro tanto. The wife's estate was awarded $1,000 under the Administration Act and the husband dependant is the sole beneficiary of her estate. The award of $7,500 should therefore be reduced pro tanto to $6,500. In the result the awards stand (a) $1,000 under the Administration Act plus (b) $6,500 under the Families' Compensation Act.

41 I would allow the appeal with costs and in the circumstances would dismiss the cross-appeal but without costs.

42 FISHER J.A.:-- I would dismiss both the appeal and the cross-appeal for the reasons given by my brother SLOAN.

Appeal and cross-appeal dismissed, O'Halloran, J.A., dissenting, except as to cross-appeal.

Solicitor for the appellant: A.H. Fleishman.

Solicitors for the respondents: Farris & Co.