CARRIE M. SMALLMAN (PLAINTIFF)....APPELLANT;

AND

NELLIE A. MOORE ET AL (DEFENDANTS)..RESPONDENTS

1947
*Dec. 4, 5, 8, 9
1948
*Apr. 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Action against deceased's estate for breach of promise to marry—Whether cause of action survives—General damages—Special damages—Whether corroboration of promise sufficient—Whether breach or postponement—Trial by jury—Trustee Act, R.S.O. 1937, c. 165, s. 37—Evidence Act, R.S.O. 1937, c. 119, s. 10, 11.

Held: (Kellock J., dissenting)—That the right of action for damages for breach of a promise to marry survives after the death of the promisor by reason of subsection two of section 37 of *The Trustee Act,* R.S.O., 1937, chapter 165.

Per The Chief Justice and Taschereau, Estey and Locke JJ.: What is to be considered is the nature of the injury rather than the form of the action in which redress may be obtained; and the injury occasioned is a personal injury to the plaintiff. Such an injury is a wrong to the plaintiff "in respect of his person" within the meaning of ss. 2 sec. 37 of the Trustee Act, whether it results from a breach of contract or is occasioned by a tort.

Per Kellock J. (dissenting): The action does not survive, in so far as general damages are concerned, as it is an action for breach of contract.

*PRESENT: The Chief Justice and Taschereau, Kellock, Estey and Locke JJ.

1948

SMALLMAN v. MOORE

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment in favour of plaintiff in an action, tried by Urquhart J. with a jury, for breach of promise to marry.

H. E. Harris K.C. and *P. K. Kerwin* for the appellant.

John R. Cartwright K.C. and *S. MacInnes K.C.* for the respondents.

The judgment of The Chief Justice and of Taschereau, Estey and Locke JJ. was delivered by

LOCKE J.: The question as to whether the right of action for damages survives after the death of the promisor depends upon the construction to be placed upon the words "a wrong to another in respect of his person" where the same appear in ss. 2 of sec. 37 of the *Trustee Act, R.S.O. 1937, cap. 165.*

There can be no doubt that at common law any right of action for general damages for breach of a promise to marry did not survive. As to a claim for special damages in respect of the breach of such a promise, the matter is not free from doubt. The reason that the principle expressed in the maxim *actio personalis moritur cum persona* applied was explained by Lord Esher, M.R. in *Finlay* v. *Chirney* (1888) 20 Q.B.D. 494 at 498, as follows:

> Is an action for breach of promise of marriage a personal action in the sense that the cause of action or complaint or injury is one affecting solely the person both of the promisor and promisee? It is clear that it is not a complaint of anything affecting property, whether personal or real; it is an injury; that is, it is a cause of action purely personal on both sides, personal both to the person to whom and the person by whom the promise is made. It is true that in the old days an action for breach of promise of marriage was in form an action founded on contract, and that even now it is still treated as an action for breach of contract. Formerly an action of tort was almost inevitably a personal action; but it did not follow necessarily that an action was not personal because it was founded on a breach of contract. The complaint in an action for breach of promise of marriage is indeed a complaint of a breach of contract, but the injury is treated as entirely personal, and not only are damages always given in respect of the personal injury to the plaintiff, but also damages arising from and occasioned by the personal conduct of the defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation. The ages of the respective parties may be taken into account, as well as their whole behaviour; and the damages may be much enlarged if the conduct of the defendant has been an aggravation of the breach of his promise. A consideration

(1) [1947] 1 D.L.R. 434.

of these facts goes to shew that an action for breach of promise of marriage is strictly personal, and that, although in form it is an action for breach of contract, it is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff.

Of course it is said, and said justly, that the damages recovered in the action affect the property of the respective parties; but that is not the proper test to apply; the true test is whether the cause of action itself is one which affects property. The question is therefore concluded both upon principle and by authority.

Bowen, L. J. in the same case, after tracing the history of the maxim and of its application to an action of this nature, approves (p. 506) the following statement as to its nature taken from Sedgwick on Damages:

This action is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections and wounded pride, as well as the loss of marriage.

In *Chamberlain* v. *Williamson* (1), Lord Ellenborough, C.J. said in part:

The general rule of law, is actio personalis moritur cum persona; under which rule are included all actions for injury merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate.

In *Beckham* v. *Drake* (2), Baron Platt refers to an action for breach of promise as one which would not pass to an assignee of a bankrupt because the cause of action relates immediately to the person and not to the estate of the bankrupt, and in the same case at p. 624 Baron Parke says:

It is not disputed that the rights of the assignee under the statute law are not identical with, nor are they so extensive as those of an executor, who stands in the place of his testator, and represents him as to all his personal contracts, and is by law his assignee, and therefore may maintain any action in his right which he himself might. That must be understood to mean any action on a contract, for an executor never could sue for wrongs to his testator "actio personalis moritur cum persona." And with respect to contracts, some exceptions have been introduced by modern decisions; Chamberlaine *v.* Williamson (2 Maule and S. 408), Kingdon *v.* Nottle (1 Maule and S. 355, and 4 id. 53) as explained by Lord Abinger in the case of Raymond *v.* Fitch (2 Cr., M. & R. 588, 599), and the executor cannot sue upon contracts the breach of which is a mere personal wrong.

In Chitty on Contracts, 18th Ed. 627, the authors in dealing with the nature of the action say:

The promise is so far of a personal nature, that the breach of it furnishes no cause of action to the personal representative of the party

(1) 1814) 2 M. & S. 409 at 415. (2) (1849) 2 H.L.C. 580 at 601.

1948

SMALLMAN v. MOORE

Locke J.

to whom it was made, or against the personal representatives of the party having made it, unless indeed it be alleged and proved that damage of a particular kind has been incurred in consequence of the breach. In the one case the damage must be damage affecting the estate of the deceased: in the other it must be damage to the property, and not the person, of the promisee.

It is true that the manner in which redress is to be obtained for the injury is by an action for breach of contract but, in considering whether the words "a wrong to another in respect of his person" in sec. 37, ss. 2 of the *Trustee Act* apply, it is I think the nature of the injury rather than the form of the action in which redress may be obtained which is to be determined. That the breach of a contract of this nature is a mere personal wrong is, in my opinion, concluded by authority: the injury occasioned is a personal injury to the plaintiff. Such an injury is, in my view, a wrong to the plaintiff "in respect of his person" within the meaning of the section, whether it results from a breach of contract or is occasioned by a tort. In the *Sussex Peerage Case* (1) (1884), Tindal, C.J. said at p. 143:—

> The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

Assigning to the words "a wrong to another in respect of his person" their natural and ordinary meaning, I consider they include an action in respect of a personal injury of this nature irrespective of the form of the remedy. If this were not clear some assistance in assigning the proper meaning to the words is given by the fact that cases of libel and slander are excepted. If "a wrong to another in respect of his person" was intended to mean a bodily injury or trespass to the person, it would have been unnecessary to except libel and slander where the injury is personal in its nature: the fact that these actions are excepted indicates to me that the intention was that a wider meaning should be given to the expression and that actions for all injuries of a personal nature should be included. If the words of subs. 2 are to be construed as if they read "committed a tort causing injury to another in

(1) (1844) 11 Cl. & F. 86.

respect of his person or property", it would seem that subs. 1 of sec. 37 reading "may maintain an action for all torts or injuries to the person or to the property" would read otherwise and not use both the words "torts" and "injuries" which would at least indicate that the words should not be construed as synonymous. If the language of subs. 2 of sec. 37 is not free from ambiguity so that resort should be had to the earlier enactments to assist in its proper construction, I find nothing that would lead me to assign any other meaning to the subsection than that above indicated. The statute of 1886 (49 Vict. cap. 16, sec. 23) recites that secs. 8 and 9 of the Revised Statutes respecting trustees and executors and the administration of estates are repealed "as regards torts, injuries and wrongs hereafter committed"; the substituted sections while not identical in form use the same phraseology as that above quoted from ss. 1 and 2 of sec. 37. Again the use of the three terms "torts", "injuries" and "wrongs" would indicate that the words were not to be construed as identical in meaning. I note also that the marginal notes to sec. 37 of the *Trustee Act, R.S.O. 1937,* read as to ss. 1 and 2 respectively "Actions by executors and administrators for torts" and "Actions against executors and administrators for torts", but these form no part of the statute and do not, in my view, assist in the interpretation of the section. If it was the intention of the Legislature to restrict the effect of the subsection to causes of action sounding in tort, I think it has failed to express that intention in the language used.

As to corroboration: I have had the advantage of reading the reasons for the judgment of my brother Kellock and I agree with his conclusions on this aspect of the matter. I also agree with him that it was open to the jury upon the evidence to take the view that what was said by the deceased, as related by the plaintiff in the action, amounted to a refusal to carry out the promise to marry her on the date fixed. I have considered the various objections raised by the respondent against the Judge's charge to the jury on the ground of alleged misdirection and non-direction and I find nothing which, in my opinion, would justify the granting of a new trial under the terms of sec. 27 of the *Judicature Act, R.S.C. 1937, cap. 100.*

1948

SMALLMAN v. MOORE

Locke J.

The appellant recovered judgment for $100 for special damage, the claim apparently being based upon the fact that the plaintiff had purchased a quantity of clothing in anticipation of the proposed marriage. I find nothing in the evidence to sustain this branch of the plaintiff's claim. Apart from the question as to whether in any event special damages are recoverable in an action of this nature discussed in the judgments of the Court of Appeal in *Quirk* v. *Thomas* (1), the evidence in the present case does not, in my view, sustain a claim for any special damage.

As to the general damages, the amount awarded is very large but I think that having regard to all the circumstances of the case it is not so excessive that no twelve men could reasonably have awarded the amount and I think the verdict should not be disturbed on this ground.

The appeal should be allowed and the appellant should have judgment for the $25,000 general damages awarded by the jury: the claim for special damages should stand dismissed: the appellant should have her costs of this appeal and of the appeal to the Court of Appeal and the costs awarded to her at the trial.

KELLOCK J. (dissenting):—The first question which rises in this appeal, taking it in the order in which it was dealt with in argument, is as to whether or not on the evidence, the requirements of section 11 of the *Evidence Act, R.S.O., 37, cap. 119,* were met. The section reads as follows:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

It was held by the Court of Appeal that there was no evidence corroborative of the appellant's evidence with respect to breach as distinct from the promise itself and that this was insufficient. The position of the respondents is that in an action of this character the main fact is the fact of breach and corroborative evidence which is not corroborative of such fact is insufficient.

(1) (1916) 1 K.B. 516.

While the action is always referred to as an action for breach of promise of marriage, the plaintiff, in such an action, must establish not only the breach but the promise, and section 10 of the *Act* requires corroborative evidence of the promise. Thus, if it can be said that in the view of the legislature one is more important than the other, it would seem to be the promise. However that may be, the section here does not say that every fact necessary to be proved to establish a cause of action must be corroborated by evidence other than that of the interested party but that the evidence of the interested party itself is to be corroborated by *some other material evidence.* I do not think that the word "matter" in the section is to be taken as synonymous with every fact required to be proved in establishing a cause of action and it has never, as far as I am aware, been so construed.

In the leading case in this court, *Thompson* v. *Coulter* (1), Killam, J., said at page 263:

> In my opinion this enactment demands corroborative evidence of a material character supporting the *case* to be proved by such "opposite or interested party" . . . Unless it supports that case, it cannot properly be said to "corroborate" . . . At the same time the corroborating evidence need not be sufficient in itself to establish the case.

Killam, J., approved as applicable to the legislation the following from the judgment of Jessel, M.R., in *In re Finch* (2).

> As I understand corroboration is some testimony proving *a material point* in the testimony which is to be corroborated. It must not be testimony corroborating something else—something not material.

Killam, J., held that in the case then before the court there was not any evidence which could properly be treated as corroborating the defendant on the only point on which the onus was upon him and that except for the defendant's own testimony all the evidence was as consistent with one view as with another. This decision in my opinion is no authority for the proposition for which the respondent contends.

It is clear of course that the corroborating evidence need not be that of a second witness but may be afforded by circumstances; *McDonald* v. *McDonald* (3).

(1) 34 S.C.R. 261.
(2) 23 Chancery Div. 267 at 272.
(3) 33 S.C.R. 145.

1948

SMALLMAN v. MOORE

Kellock J.

In *McKean* v. *Black* (1), Anglin, J., as he then was, in referring with approval to *Radford* v. *Macdonald* (2), said at page 208:

> . . . all that the statute requires is that the evidence to be corroborated shall be "strengthened by some evidence which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to", and as was said in Green *v.* McLeod, 23 A.R., 676, "the material evidence in corroboration may consist of inferences or probabilities arising from other facts and circumstances".

In *Radford* v. *Macdonald* (2), Osler, J.A., at 171 had said:

> Then the question arises in what degree, or to what extent? It has long been conceded that it need not be corroborated in every particular. Had that been the intention of the Act, it would have been simpler to enact that the party in such case should not be a competent witness, since the evidence required in corroboration would alone be sufficient. Nor is corroboration required to be directed to any particular fact, or part of the evidence. It is the evidence of the party which is to be corroborated by some other material evidence. If then the evidence in corroboration is not required either to prove the contract itself or any particular fact deposed to by the party, the only test or formula which can be applied to it is that it must be relevant and material and calculated to lead to the belief that the evidence of the party is credible.

In *Radford* v. *Macdonald* (2), Osler, J.A., at 171 had said:

> I think, in such cases, the first question is, does it strengthen the evidence given by the party adducing it? If these two questions are answered in the affirmative, I think the evidence answers the requirement of the statute, provided the judge, or the jury, as the case may be, believe it. "Corroborate" means to strengthen, to give additional strength to, to make more certain, and if the evidence helps the judicial mind appreciably to believe one or more of the material statements or facts deposed to by the party, then, I think, it is what is required by the statute.

Burton, J.A., dissented on the ground that the documents relied upon in the case as corroborative did not meet the test of the statute but he does not state the law in different terms from the other members of the court. At page 181 he said:

> I quite agree with Chief Justice Armour that, if there is evidence adduced corroborating the evidence of the interested party in support of his claim or defence in *any* material particular, it must be submitted to the jury as sufficient corroboration in point of law . . . That is the well understood rule in all cases, but the question remains what is meant by a material particular.

The above reference is to the judgment of Armour, C.J., in *Parker* v. *Parker* (3). The passage to which Burton, J.A., referred is immediately preceded by the following:

> I think, therefore, that the decision in Bessela *v.* Stern, L.R., 2 C.P.D., 265, indicates the true construction to be put upon the provision in our

(1) 62 S.C.R. 290.
(2) 18 A.R. 167.
(3) 32 U.C.C.P. 113 at 128.

Act, and that if the learned Chief Justice, in Orr *v.* Orr, 21 Grant, 397, meant to say that the interested party must be corroborated, as to every issue raised in the cause by some other evidence material to that issue, I think he was putting too narrow a construction upon the provision under discussion.

This, in my opinion, was merely stating what followed in a different way.

The respondent relies upon *Elgin* v. *Stubbs* (1), as establishing a different rule. At page 131 Hodgins, J.A., said:

> In deciding the real meaning of the statute and of the expressions in the decisions upon it, the choice is of course between holding that the end sought by the statute is merely to establish the plaintiff's veracity generally, by requiring that some material or relevant fact stated therein should have support by evidence ab extra, or, on the other hand, that the statute demands that the corroboration must be of something essential to be shewn before the plaintiff can upon his own evidence obtain a verdict, judgment or decision in his favour on the cause of action he is setting up; his case, in other words.

In *Bayley* v. *Trusts and Guarantee Co.* (2), Hodgins, J.A., referred to *Stubbs'* case as insisting "only on the corroborative evidence containing *something* essential to the plaintiff's recovery, and not evidence essential only to the defence set up, and not otherwise supported by any one."

In *McGregor* v. *Curry* (3), the same learned judge had thus stated the law:

> As the statute has been construed in the cases upon the subject, corroborative evidence is not required as to every fact necessary to enable the opposite party to recover. It is enough if sufficient relevant facts and circumstances appear, which tend to prove that the evidence relied on for recovery is true, or probably true, in some material particular. . . . But the respondent's whole testimony, both in proof of his claim and in disproof of the defence, is the *evidence* upon which he recovers. Applying the cases referred to, if *any* part of that whole evidence is corroborated the statute is satisfied. This appears to follow as a proper conclusion.

In the same case Meredith, C.J.O., said at p. 270:

> . . . the corroboration which the statute requires is not corroboration of every material fact which is required to be proved in order to entitle the party to succeed, but only of such material facts as lead to the conclusion that the testimony is true.

I think therefore that the respondents fail in the contention above referred to. In my opinion the law is correctly laid down in the authorities to which I have referred and *Elgin* v. *Stubbs* (1) is not to be taken as at variance

(1) 62 O.L.R. 128.
(2) 66 O.L.R. 254.
(3) 31 O.L.R. 261.

1948

SMALLMAN v. MOORE

Kellock J.

therewith. In that case the facts were not unlike those in *Thompson* v. *Coulter* (1) in that the evidence relied upon as corroborative was as consistent with the one case as the other and therefore not corroborative of either.

It is next said on behalf of the respondents that the appellant's evidence as to the conversation between herself and the deceased relied on as establishing the breach is as consistent with a postponement as with breach and that other evidence submitted by or on behalf of the appellant is inconsistent with there having been any breach.

In my opinion, the true inference to be drawn from the evidence was for the jury. They have taken the view that what was said by the deceased, as related by the appellant, amounted to a refusal and I am not prepared to say that such a view was not open to them. The other evidence relied upon by the respondents is with respect to the conduct of both of the parties after the alleged breach. The fact that they did not quarrel, however, or break off seeing each other, nor the appellant's own conduct, does not in my opinion establish in the circumstances either that the evidence was consistent only with a postponement.

In *Mott* v. *Trott* (2), the trial judge had dismissed the action on the ground that a breach had occurred in 1919, at such a time that the action was barred by the *Statute of Limitations,* although the evidence showed that the parties had continued to associate for many years afterwards. It was held in this court that it was for the jury to conclude upon the evidence as to whether there had been a breach in 1919 or whether the promise was a continuing one thereafter or whether the contract had been mutually abandoned. In my opinion the question of breach or postponement in the case at bar was similarly for the jury.

It is next objected on behalf of the respondents that in so far as general damages are concerned the action does not lie at all where the promisor is deceased; and that there was in fact no evidence of special damages. The appellant contends that the right of action is preserved by section 37 (2) of the *Trustee Act, R.S.O., 1937, cap. 165,* and that it was open to the jury to find that special damage had been proved.

(1) 34 S.C.R. 261.

(2) [1943] S.C.R. 256.

In *Finlay* v. *Chirney* (1), it was held that the action, in so far as general damages were concerned did not lie. All the members of the court were of opinion that the action was an action ex contractu but that the maxim actio personalis moritur cum persona applied to her recovery.

In *Quirk* v. *Thomas* (2), a similar result was reached. Both Phillimore, L.J., and Pickford, L.J., held that the action was ex contractu. The former, had he felt free upon the authorities to have followed his own view would appear to have felt that even with respect to special damage such an action would not lie. The latter was content to assume that special damage could be recovered. Although Swinfen Eady, L.J., at page 527, says that "the action is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff", I do not think he is to be taken as referring to the cause of action as an action in tort, but to the extent of the damages recoverable, as he refers to the action as one within *Baker* v. *Smith* (3), which was an action in assumpsit.

7 Wm. IV, cap. 3, section 2, which is the ancestor of the present Ontario statute was taken from the *Imperial Act, 3 & 4 Wm. IV, cap. 42,* section 2. This section permitted an action of trespass or trespass on the case against an executor in respect of any wrong committed by the testator in respect of the real or personal estate of the person wronged. As late as *R.S.O. 1877, cap. 107,* section 9, the legislation was in much the same form. By *49 Vict., cap. 16,* section 23, relief was extended to wrongs in respect of the person, but while the amending legislation dropped the words "of trespass or trespass on the case", I do not think it can be said that actions for breach of contract were intended to be included. The mere non-performance of a promise is not to be taken as a substantive tort; *Courtenay* v. *Earle* (4), Pollock on Torts, 14th Ed., 428. I think, therefore, that in so far as the present action is for general damages, it is not helped by the statute referred to. The appellant's action must therefore fail, I think as to the general damages found.

I do not think the case *Davy* v. *Myers* (5), is an authority which can be accepted at the present day.

(1) 20 Q.B.D. 494.
(2) [1916] 1 K.B. 516.
(3) [1651] 3 Sty. 295.
(4) 10 C.B. 73.
(5) (1824) Taylor 89.

1948

SMALLMAN v. MOORE

Kellock J.

The view of the majority was that the maxim had never been applied to an action ex contractu and that as an action for breach of promise was within that category, it was maintainable. This view is sufficiently dealt with by Bowen, L.J., in *Finlay's* case (1). I therefore think the law must be taken to be as laid down in *Chamberlain* v. *Williamson* (2), followed as it was by the latter cases to which I have referred. If any change in the law is, in my opinion, to be made it must be by the legislature; *Hayden* v. *Vreeland* (3).

As to the special damage pleaded, the jury awarded $100. This was all for clothing purchased by the appellant in contemplation of the marriage. The appellant testified that all of it she still had at the trial and that it had been worn. I do not think that, assuming special damage to be recoverable in an action of this character, the evidence is sufficient to establish that any special damage was in fact suffered.

It is not therefore necessary to deal with the other matters argued. I would dismiss the appeal with costs if demanded.

Appeal allowed with costs; claim for special damages dismissed.

Solicitors for the appellant: *Trapnell, Fleming & Harris.*

Solicitors for the respondents: *Raymond, Spencer, Law & MacInnes.*

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(1) 20 Q.B.D. 494.
(2) 2 M. & S. 408.
(3) 37 N.J.L.R. 372 at 379.