DONALD BECHTHOLD, JOHN GIBSON AND OTTO HAROLD MEHEW (*Defendants*) .... APPELLANTS;

1953
*May 26, 27
*Jun 26

AND

ALBERT OSBALDESTON as Administrator of the estate of MARVIN HAROLD OSBALDESTON, Deceased, and AGNES MARGARET HARVIE (*Plaintiffs*) .... RESPONDENTS.

AND

JOHN GIBSON AND OTTO HAROLD MEHEW (*Defendants by Counterclaim*) .... APPELLANTS.

AND

DONALD BECHTHOLD (*Plaintiff by Counterclaim*) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA APPELLATE DIVISION

Damages—Fatal injuries—Motor vehicle—Car stationary on highway—Approaching driver—Liability—Negligence—Last clear chance—Trustee Act, R.S.A. 1942, c. 215, c. 32.

The respondent sued under the *Trustee Act* (R.S.A. 1942, c. 215) as administrator of the estate of his son who was a passenger in a car and who was fatally injured when that car was hit by a truck. The road was straight and the visibility clear. The victim was in a coma from the date of the accident to the date of his death which occurred one year later. There was evidence that during that period he reacted only to pain from stimuli. The trial judge found the driver of the truck solely to blame and awarded $10,000 general damages. The Court of Appeal for Alberta upheld the finding of negligence but reduced the general damages to $7,500.

Held: Following the principle set down in *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation* Co. ([1924] A.C. 406), the sole cause of the accident was the negligence of the driver of the truck.

Held: The principles to be followed in fixing damages under this head being as set down in *Benham v. Gambling* ([1941] A.C. 157), which was presumably followed in this case by the Appellate Division, the latter's adjudication should stand. If there was anything included therein for pain and suffering, the maxim *de minimus non curat lex* applied.

---

*PRESENT: Kerwin, Taschereau, Estey, Cartwright and Fauteux JJ.

1953

BECHTHOLD AND OTHERS v. OSBALDESTON AND OTHERS

APPEAL and CROSS-APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), dismissing an appeal from the judgment at trial in an action for damages.

H. W. Riley Q.C. and *J. R. McColough* for the appellant.

S. H. McCuaig Q.C. for the respondents Harvie and Osbaldeston.

C. W. Clement Q.C. and W. R. Sinclair for the respondent Bechthold.

The judgment of the Court was delivered by

KERWIN J.:—The position in this appeal on the question of liability is that put by Lord Shaw in *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* (2):

> And I take the principle to be that, although there might be—which for the purpose of this point I am reckoning there was—fault in being in a position which makes an accident possible yet, if the position is recognized by the other prior to operations which result in an accident occurring, the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part, could have been avoided. Unless that principle be applied it would be always open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encountering of danger was contributed to by the fact that there was a danger to be encountered.

The trial judge found that Bechthold's car was stationary and, in effect, that Gibson saw that to be so, and his judgment was approved unanimously by the Appellate Division (1). Mr. Riley has said all that was possible on the point but he has not convinced me that the concurrent judgments in the Courts below should be set aside. Without reference to the signals either by Bechthold or Gibson and assuming that Bechthold was negligent in proceeding to the south side of the road, it was Gibson's negligence that was the sole cause of the accident.

There still remains the question of damages. We are concerned only with the amount awarded the plaintiff Albert Osbaldeston as administrator of his son Marvin Harold Osbaldeston. The trial judge, Mr. Justice Egbert allowed $13,000 and it is admitted that of that amount $3,000 represents special damages. The remaining $10,000 was awarded in accordance with the principles the trial

(1) [1952-53] 7 W.W.R. (N.S.) 253. (2) [1924] A.C. 406 at 419.

judge had previously enunciated in *Maltais v. C.P.R.* (1). There he had adopted as correct the reasons for judgment of Mr. Justice Adamson in the Manitoba Court of Appeal in *Anderson v. Chasney* (2), in whose conclusion on this particular topic Mr. Justice Coyn had agreed. There was an appeal to this Court in that case (3), which was dismissed but the question of damages was not in issue. Mr. Justice Adamson departed from the principles set forth by the House of Lords in *Benham v. Gambling* (4). In Manitoba, as in Alberta, there is a statutory provision which in the latter province is found in the *Trustee Act*, R.S.A. 1942, c. 215, s. 32:—

32. The executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased except in cases of libel and slander in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do; and the damages when recovered shall form part of the personal estate of the deceased; but such action shall be brought within one year after his decease.

I am unable to perceive any difference in substance between this provision and that in England whereby all causes of action vested in a person shall survive for the benefit of his estate.

Contrary to what had been considered to be the law in practically every jurisdiction where similar provisions existed, a claim for what may be described as damages for shortened expectation of life, was upheld by the House of Lords in *Rose v. Ford* (5). As a result, particularly in England, excessive damages were from time to time awarded under such a head and it was in an effort to offset that tendency that the House of Lords decided *Benham v. Gambling*. With the consent of counsel on both sides, the tables of expectation of life periodically prepared by the Registrar General had been placed before the trial judge but Viscount Simon, delivering the judgment of the House of Lords, stated that the trial judge had observed that these tables "are not really evidence in a matter of this kind." Viscount Simon considered that this statistical material was not of assistance in such a case as the one before the House but I take it that this was because the child in respect of

(1) [1950] 2 W.W.R. 145.
(2) [1949] 2 W.W.R. 337.
(3) [1950] 4 D.L.R. 223.
(4) [1941] A.C. 157.
(5) [1937] A.C. 926.

whose death its father and administrator had brought the action was but two and one-half years of age. Later in his speech Viscount Simon acknowledged that the age of the individual might in some cases be a relevant factor but that "arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years have been lost, unless one knows how to put a value on the years." It was pointed out that all lives are not uniformly happy and that the thing to be valued was not the prospect of length of days but the prospect of a predominantly happy life. It is generally recognized that infants are subject to children's diseases, which in many cases prove fatal, and the House of Lords therefore felt justified in reducing the amount of damages allowed by the trial judge.

In *Anderson v. Chasney,* Mr. Justice Adamson seemed to consider that the *Benham* judgment should not be followed in Canada because of the difference in conditions here and in England. While differences do exist, they may be taken into account without departing from the ratio of the House of Lords decision. He also appeared to think that Viscount Simon's statement that "compensation is not being given to the person who was injured at all" was opposed to the provision in the *Manitoba Trustee Act* that such an action may be brought "as if the representative were the deceased in life." I am satisfied that the members of the House of Lords who took part in the judgment in *Benham v. Gambling* meant only that while the matter was to be treated as if the representative were the deceased in life, any compensation would in fact go to those entitled on an intestacy or under a testamentary disposition. Furthermore, an allowance is not made to compensate the parents, or either of them, for money spent to rear a son or daughter as Mr. Justice Adamson's statement on page 369 of the report in *Anderson v. Chaseney* might indicate.

If the matter were left in this position, the award of Mr. Justice Egbert could not stand. However, the Appelate Division reduced the amount awarded by $2,500. There was no difference on this point among the members of that Court, the main judgment of whom was delivered by Mr. Justice Parlee. Previously he had delivered the reasons for judgment on behalf of the Appellate Division in *Kirschman v. Nichols* (1). There, in fixing damages under this head, he referred to a number of cases, among which was *Benham v. Gambling,* thus indicating that the Appellate Division was following the House of Lords decision.

Under these circumstances and bearing in mind the depreciation in the value of money, this Court should not interfere with the amount fixed by the highest provincial court unless Mr. Riley is correct in his contention that that adjudication cannot stand in view of the following statement in the reasons of Mr. Justice Parlee:— "It is, I think, fair to say that there is evidence that the deceased did suffer pain; in any event, such should not be excluded in determining the amount to be awarded the administrator under the Trustee Act." The accident occurred on June 10, 1950, and Osbaldeston died June 16, 1951. The medical evidence was by consent given in the form of written reports. Dr. Stevens reported on February 15, 1951, that Osbaldeston "has not regained consciousness though he does react somewhat to external stimuli such as pain and spoken word. He has moved his arms and legs slightly but only as an involuntary response to stimulus." Dr. Gordon first saw the patient on June 13, 1950, and had him under observation until he was transferred from Macleod Hospital to the University Hospital in Edmonton on July 11, 1950. Dr. Gordon reported:— "He responded only to most painful stimuli." There is also the evidence of the deceased's father who saw his son frequently and who testified as follows:—

Q. Did he ever show signs of recognition?—A. At times he did.

Q. Were you satisfied that he recognized you?—A. Well, we liked to make ourselves believe that he knew us, although he never said anything, he never spoke.

It is clear that the deceased was always in a coma and, therefore, if he suffered any pain it would not be to the same extent as one who was in full possession of all his faculties. In his claim for damages, the father, and administrator of Marvin Harold Osbaldeston, did not include anything for pain and suffering of his son and in fact counsel disclaimed any such pretension. Particularly in view of the

(1) (1950) 2 W.W.R. 420.

1953

BECHTHOLD AND OTHERS v. OSBALDESTON AND OTHERS

Kerwin J.

extract from the reasons of Mr. Justice Parlee quoted above, I am satisfied that the Appellate Division realized that the only possible evidence under this head was as I have indicated and anything included in the award finally made should be treated by this Court as within the maxim *de minimus non curat lex.*

The appeal should be dismissed with costs and the cross-appeal without costs.

Appeal dismissed with costs.

Cross-Appeal dismissed without costs.

Solicitors for the appellant: *Macleod, Riley, McDermid, Bessemer & Dixon.*

Solicitors for Respondents: *Osbaldeston and Harvie: McGuaig, Parsons & McGuaig.*

Solicitors for Respondent Bechthold: *Smith, Clement, Parlee & Whittaker.*