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HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Damages—Remoteness—Employee awarded compensation payable by employer under Workmen's Compensation Act for injury in course of employment caused by negligence of third party—Employer suing third party to recover amount of compensation.

C was a switchman in the employ of the National Harbours Board which is, by statute, an agent of the Crown in the right of the Dominion of Canada. While riding, in performance of his duties, on the foot board on the front of an engine on the Board's terminal railway in Vancouver, British Columbia, he was injured by being struck by a gate negligently left by respondent's servants open and projecting on to said railway. Under provisions of *The National Harbours Board Act* (Dom., 1936, c. 42) and the *Government Employees Compensation Act* (R.S.C. 1927, c. 30, and amendments), C, when so injured became entitled to receive compensation from the Crown, to be determined under provisions of the latter Act, and in accordance

*Present: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

(1) (1914) 32 O.L.R. 270 at 280. (2) (1913) 227 U.S. 489 at 493.

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with such provisions he was awarded sums by the Workmen's Compensation Board of British Columbia. For the sums so awarded, which were paid or set aside for payment by the Crown (through said Compensation Board) to C, the Crown sued respondent.

Held: The Crown's action failed on the ground of remoteness; in law, its payment to C under its statutory obligation was not a loss suffered as a direct consequence of respondent's negligence. Also the Crown could not recover in this case on the basis of an action *per quod servitium amisit,* as neither the action as framed nor evidence in the case supported a claim on that basis. (Appeal from judgment in the Exchequer Court, [1946] Ex. C.R. 375, dismissed.)

APPEAL by the Attorney-General of Canada from the judgment of the Honourable Mr. Justice Sidney Smith, Deputy Judge of the Exchequer Court of Canada (1) dismissing the action brought by His Majesty the King on the information of the Attorney General of Canada against the present respondent in which the Crown claimed the sum of $13,839.07, being the amount which the Workmen's Compensation Board of British Columbia, in accordance with provisions of *The National Harbours Board Act* (Dom., 1936, c. 42) and the *Government Employees Compensation Act* (R.S.C. 1927, c. 30, and amendments thereto), determined to be the amount of compensation to which one, Christian, a switchman in the employ of the National Harbours Board (which is, by statute, an agent of the Crown in the right of the Dominion of Canada), became entitled because of injury suffered by him while acting in the course of his employment. The injury was caused when the said Christian, while riding upon the foot board on the front of an engine on the National Harbour Board's terminal railway at Vancouver, British Columbia, was struck by a gate which, as found by the trial Judge, was left negligently by the respondent's servants ajar and projecting over the said railway. The trial Judge's dismissal of the action was on grounds as follows:

> What is here sought is the recovery of monies which by an Act of the Dominion Parliament, the Crown is made liable to pay to its injured servant * * * such an action will not lie. The compensation cannot be regarded as legal damages, for it is not the proximate and direct result of the act complained of * * * The liability of the Crown (Dominion) to pay the compensation arises from an independent intervening cause, namely, an Act of the Dominion Parliament, which lies

(1) [1946] Ex. C.R. 375; [1946] 2 D.L.R. 158.

wholly outside the common law of the province * * * The compensation in question is compensation to an injured servant, payable by the Crown, and is in no sense compensation in the form of damages to the Crown for the loss to His Majesty of a servant's services. Nor is it claimed as such.

F. A. Sheppard, K.C. and *W. R. Jackett* for the appellant.

C. F. H. Carson, K.C. and *D. I. McNeill, K.C.* for the respondent.

KERWIN, J.—On January 15, 1942, Hubert William Christian, a switchman in the employ of the National Harbours Board, while engaged in the performance of his duties on the National Harbours Board Terminal Railway main line in the Province of British Columbia was injured as a result of the negligence of the servants of the Canadian Pacific Railway Company. By *The National Harbours Board Act, 1936,* chapter 42, the Board was created a body corporate and politic and declared to be the agent of His Majesty in His right of the Dominion of Canada. By subsection 2 of section 4, the *Government Employees Compensation Act,* R.S.C. 1927, chapter 30, is made to apply to the employees of the Board, and by the latter Act, as amended by chapter 9 of the 1931 Statutes, an employee who is caused personal injury by accident arising out of and in the course of his employment is entitled to receive compensation at the same rate as is provided for an employee of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty. In accordance with these provisions, Christian was awarded by the British Columbia Workmen's Compensation Board the sum of $959.76 compensation for lost time, $523.50 for medical aid, the sum of $150 in cash and, for permanent disability, $49.98 per month for life. The first three amounts were paid by the Board and also the monthly sum from October 20, 1942, to the 30th of September, 1945, which was the last month before the trial on October 16, 1945. This monthly sum will continue during Christian's lifetime. Under the procedure adopted by the Board and the Dominion Government, a certain

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sum of money is kept on hand with the Board, and it is out of this sum that the first three items were paid.

By information, in the Exchequer Court, the plaintiff claimed from the respondent the total of these three items (the second of which was stated to be at the time the information was filed $511.20 but which, by the date of the trial, had been increased to $523.50). The plaintiff also claimed the sum of $12,218.11 which was the amount considered by the Board to be necessary to be set aside to pay the monthly pension for life to a man of Christian's age, thirty-seven. It does not appear whether that particular sum was placed on deposit by the Dominion Government with the Board or whether merely sufficient funds were in their hands to include such a figure. In any event the pension would cease upon Christian's death.

The argument on behalf of the appellant before this Court covered a wide field, including a contention that the plaintiff would at common law have a right to bring an action *per quod servitium amisit*. This is not such an action. It is not alleged that the plaintiff lost Christian's services. On the contrary, in paragraph 7 of the information it is stated that:

> By virtue of the said Government Employees Compensation Act the Plaintiff was obliged to compensate the said Christian for the said injury in an amount to be determined by the Workmen's Compensation Board of the Province of British Columbia and the said Board did determine the compensation to be paid to the said Christian in respect of his said injury at the sum of $13,839.07 * * *;

and in paragraph 8:

> That the said accident to the said Christian, the injury received by him and the damage sustained by the Plaintiff by reason of the obligation so imposed on the Plaintiff to make payment of the aforesaid compensation, were caused solely by the negligence of the Defendant * * *

Furthermore, it appears from Christian's testimony that at the date of the trial he was employed as a telephone operator with the National Harbours Board and there is no evidence as to what extent the Harbours Board lost his services. It is therefore unnecessary to consider what would happen in an action brought on that basis.

Nor was the claim put on any alleged right that the plaintiff might have under or by virtue of the British Columbia *Workmen's Compensation Act* as an employer

whose employee had been injured through the negligence of a third party. If it had been, the question of the jurisdiction of the Exchequer Court to hear the action might have been raised. Even on the basis of the action as actually framed, the respondent suggested in its factum a doubt as to that Court's jurisdiction but before us counsel declined to set up or argue such a point and nothing, therefore, is said upon it.

Reliance was placed by the appellant upon the decision of the Court of Appeal in England in *Re Polemis and Furness, Withy and Co.* (1), and on Lord Russell of Killowen's statement in *Hay (or Bourhill)* v. *Young* (2):

> In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man.

Opinions in the House of Lords in the latter case differed and no doubt there will be cases when it will be necessary to consider the effect of both decisions, but this is not one of them. More to the point is the unanimous judgment of the House of Lords in *Liesbosch (Owners of)* v. *Edison (Owners of)* (3), delivered by Lord Wright. It was there held that in assessing the amount of damages payable by the owners of the steamer *Edison* as solely to blame for the loss of the plaintiff's dredger, the *Liesbosch,* any special loss or extra expense due to the financial position of the parties could not be considered because, as it is put at page 460, "the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort." It is true that the cause referred to was an antecedent cause, but in the *Hay* case (4), Lord Wright, speaking for himself alone and referring to the *Polemis* case (5), after stating that the second point therein decided, not for the first time but merely reiterated, that the question of liability is anterior to the question of the measure of the consequences which go with the liability, proceeded: "It must be understood to be limited, however, to 'direct' consequences to the

(1) [1921] 3 K.B. 560.
(2) [1943] A.C. 92 at 101.
(3) [1933] A.C. 449.
(4) [1943] A.C. 92, at 110.
(5) [1921] 3 K.B. 560, 571.

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particular interest of the plaintiff which is affected. *Liesbosch (Owners)* v. *Edison (Owners)* (1) illustrates this limitation."

In the present case, if the plaintiff's property had suffered damage as a result of the negligence of the respondent's employees, the plaintiff would undoubtedly have a good cause of action but Christian was not the property of the plaintiff. The payment by the plaintiff in accordance with the *Government Employees Compensation Act* is not a "direct" consequence to the particular interest of the plaintiff which is affected but is too remote.

The appeal should be dismissed with costs.

TASCHEREAU, J.—This is an appeal from the judgment of the Honourable Mr. Justice Sidney Smith, sitting as a judge of the Exchequer Court of Canada, dismissing with costs the appellant's action in damages.

The appellant was the owner of a terminal railway, known as the National Harbours Board Terminal Railway, running east and west and parallel to a spur track leading into the British Columbia Sugar Refinery, in the City of Vancouver, in the Province of British Columbia. On the 15th of January, 1942, one Hubert William Christian, who was riding upon the foot board on the front of the engine, and who was an employee of the Railway, was the victim of a serious accident while in the performance of his duties. As a result of this mishap, one of his legs had to be amputated. The accident was caused by a heavy iron gate, owned by the respondent, which hung from a hinged post immediately north of the terminal railway. Swinging clockwise, it hit Christian who was in front of the engine.

Christian was a servant of the Terminal Railway, and, by virtue of *The National Harbours Board Act*, the *Government Employees Compensation Act* is made applicable to the employees of this railway. Under the provisions of that statute, employees employed by His Majesty the King, and who receive injuries arising out of and in the course of their employment, are entitled to a compensation determined by the provincial Workmen's Compensation Board,

(1) [1933] A.C. 449.

and the amount of that award is to be paid out of the Consolidated Revenue Fund. The relevant part of the *Government Employees Compensation Act* reads as follows:

An employee who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of an employee whose death results from such an accident, shall, notwithstanding the nature or class of such employment, be entitled to receive compensation at the same rate as is provided for an employee, or a dependent of a deceased employee, of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty, and the liability for and the amount of such compensation shall be determined subject to the above provisions under such law, and in the same manner and by the same board, officers or authority as that established by such law for determining compensation in cases of employees other than of His Majesty, or by such other board, officers or authority, or by such court as the Governor in Council shall from time to time direct: Provided that the benefits of this Act shall apply to an employee on the Government railways who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of such an employee whose death results from such an accident, to such an extent, and such an extent only, as the Workmen's Compensation Act of the province in which the accident occurred would apply to a person in the employ of a railway company or the dependents of such persons under like circumstances.

As a result of the injury which he suffered, Christian was paid by His Majesty the King, the present appellant, a compensation in the following amounts:

Payments on account of total temporary disability, Jan. 15 to Oct. 20, 1942		$ 959.76
Medical aid payments		511.20
Pension award for partial permanent disability:		
Lump sum	$ 150.00	
Capitalized pension per month ($49.98) for life..	12,218.11	
		12,368.11
Total		$13,839.07

His Majesty the King on the information of the Attorney General of Canada brought action to recover this amount from the Canadian Pacific Railway, but the claim was dismissed in the Exchequer Court. It is alleged that the accident of which Christian was the victim was caused by the negligence of the Company respondent, and it is not disputed that such negligence was the determining cause of the accident. It is also admitted that if Christian had sued the respondent Company for damages, he could

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have recovered on the ground that his injury was the direct result of the negligence of an employee of the respondent.

It is further conceded by the respondent that His Majesty the King, in his capacity of employer, would have a right of action at common law against the respondent, if the servant was so injured as to be unable to perform his service for the appellant. The gist of such an action by the appellant would not then be the injury to the servant but the *loss of service* to the employer. The right of His Majesty the King to institute a *per quod servitium amisit* action under the circumstances of the case, could not be successfully denied.

But the present action is not an action *per quod*. The loss of services has not been pleaded, and the case has not been fought on that basis. There is no claim that the appellant's servant has been so injured as to incapacitate him from performing his service for the appellant. Paragraph 7 of the information filed by the Attorney General is quite unambiguous:

> 7. That the said Christian was an employee in the service of the Plaintiff and was paid a direct wage or salary or on behalf of the Plaintiff and was thereby an employee within the meaning of the Government Employees Compensation Act 1927, R.S.C. Cap. 30 as amended by 1931 S.C. Cap. 9, or alternatively was an employee of the National Harbours Board and therefore deemed an employee of the Plaintiff as defined by the Government Employees Compensation Act by reason of the National Harbours Board Act, 1936, S.C. Cap. 42, Sec. 4, S.S. 2, and the said Christian was caused personal injury by accident arising out of and in the course of his employment. By virtue of the said Government Employees Compensation Act the Plaintiff was obliged to compensate the said Christian for the said injury in an amount to be determined by the Workmen's Compensation Board of the Province of British Columbia and the said Board did determine the compensation to be paid to the said Christian in respect of his said injury at the sum of $13,839.07, computed as follows: [itemized amounts].

It is because the plaintiff compensated his employee Christian, as he was bound to do under the *Government Employees Compensation Act*, that the present Information has been filed. It is to recoup himself for the disbursements made in the discharge of a statutory obligation, that the appellant seeks to recover from the respondent.

The question would be trifling if the amounts paid to Christian by the appellant had been compassionate allow-

ances or pensions, left to the discretion of the employer. The claim for such amounts against the author of the injury would unquestionably fail. But the right to compensation given to the victim of an accident is an accessory to his contract of employment. As the Privy Council said in *Workmen's Compensation Board* v. *C.P.R.* (1), this right "arises, not out of tort, but out of the Workman's Statutory contract". It is a benefit conferred on the employee as a result of his employment. In the case at bar, Christian had a right to claim compensation, and the appellant had the obligation to pay.

When the House of Lords dealt with the *Amerika* case (2) their Lordships had to consider facts which were different from those which give rise to the present controversy, but the law which was applied is, I think, relevant.

One of His Majesty's submarines was run into and sunk by a steamship, and the crew were drowned. The Commissioners for executing the Office of Lord High Admiral of the United Kingdom took action against the owners of the ship, and claimed as an item of damage the capitalized amount of the pensions payable by them to the relatives of the deceased men. It was held that the claim failed, and one of the grounds for dismissing it was that the pensions were voluntary payments in the nature of compassionate allowances. Lord Parker of Waddington said at page 42:

> These pensions and allowances are granted under statutory authority, but it does not appear that their grant formed any part of the contract between the Admiralty and the seamen whose lives have been lost through the respondents' negligence. They are, it seems, compassionate pensions and allowances only, which, from a legal standpoint, the Admiralty might have granted or withheld at its discretion. Under these circumstances they cannot constitute an item of damage.

And Lord Sumner, at page 60, also said:

> In the present case the sums claimed were paid to widows and other dependants of the drowned men under Admiralty Regulations (pars. 1974 A1 and 2011A), which expressly declare that these are compassionate payments, and granted of grace and not of right, both in kind and in degree. True that in such cases they are always made, and most properly made, but none the less the money claimed was lost to the Exchequer directly because the Crown through its officers was pleased to pay it.

(1) [1920] A.C. 184 at 191.
(2) *Admiralty Commissioners* v. *Owners of Steamship Amerika* [1917] A.C. 38.

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In the *Amerika* case, as it appears by the above citations, the payments made to the relatives of the victims were voluntary, while in the present instance they were the effect of a binding statutory contract. But I do not think that this distinction can influence the final outcome of this case.

In the same speech already referred to, Lord Parker also said, at page 42:

> But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion that they could not properly constitute an item of damage for loss of service.

And dealing with the same point, Lord Sumner expressed his views as follows, at page 61:

> Had the present action been brought upon a contract it might well be the case that these payments would have been within the contemplation of the contracting parties, but they are not the natural consequences of the tort which is sued for. Nor would it have assisted the appellants' case if they could have established that the making of these compassionate allowances by the Crown was in the nature of *a contractual obligation.* In any case the contract would have been a contract with the deceased man, and the damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment. Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy (*Bradburn* v. *Great Western Ry. Co.* (1)), and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured, so conversely a master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead. The appeal is enterprising and has been of considerable interest, but I think it fails.

The action of the Admiralty against the *Amerika* was not an action *per quod,* although it was argued as if it were. It was an action to recover the amounts of pensions voluntarily paid to relatives of the victims. But it seems that the language used by their Lordships is clear enough to allow us to conclude that even if these pensions had been paid under a statutory obligation, as in our case, the claim of the Admiralty to recoup itself would fail on the ground of remoteness.

Damages, in order to be recoverable, must be the direct consequences of the fault of the offending party. When the prejudice complained of does not normally flow from

(1) (1874) L.R. 10 Ex. 1.

the act of the tort feasor, or as Pollock (The law of Torts, 13th Ed., pp. 31-32) says, "when some new factor intervenes which is unconnected with the original culpable act or default," liability ceases.

In the present case, the amounts claimed cannot in my view be regarded as damages in the true legal sense. The obligation imposed upon the employer to compensate his injured employee, does not naturally arise from the act of the respondent. The loss sustained by the appellant is attributable to an independent cause, intervening between the tortious act and its logical consequences. It is this new intermediate cause which is the source of the appellant's obligation. It may be that the negligence of the respondent was the occasion which set in motion the *Government Employees Compensation Act,* but, as Lord Sumner said in the *Amerika* case (1), the accident was the *"causa sine qua non",* but it was not the *"causa causans"* of the damages which the plaintiff now seeks to recover.

The appeal should, I think, be dismissed with costs.

RAND, J.—The Crown puts its claim on four grounds: first, that the act of leaving the gate overhanging the harbour property was a trespass, and workmen's compensation to the injured employee was consequential damage; next, that injury to an employee and the statutory obligation on the Crown to pay compensation must be taken to be within the contemplation of probable consequences of the tortious act and so to create a duty direct to the Crown; the third is a general proposition that if the consequences of a wrongful act of A toward B give rise to damage to C through an obligation in law toward B, a right arises in C to reimbursement from the wrongdoer; and the last is the right of a master to recover for injury to the servant by what is known as a *per quod* action.

I think the first two must be rejected on the principle of remoteness both as to liability and damages. The consequences of an act by reason of which a duty of care arises are a chain of occurrences reasonably and probably

(1) [1917] A.C. 38.

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flowing from the act, affecting general interests, and uniform in scope toward all persons; special interests issuing from legal relations are in general outside of that range; *Cattle* v. *Stockton Waterworks Co.* (1). This exclusion would not be affected by the fact that here the liability to pay compensation arises from a statute; the relation of employer and employee is special, and the inclusion of the injured person within the contemplation of probabilities arises from his right to be on the land, not his being employed by the owner; *a fortiori,* the resulting statutory obligation is beyond that scope; and these considerations exclude any direct duty on the part of the Pacific Company toward the Crown based on negligence.

The object of damages is to repair a person to the extent to which the economy of his life has been prejudiced by the negligent act, but the difficulty lies in the inherent limitations to which an ascertainment of them is subject. Theoretically it involves a prevision in all its vicissitudes of the life with and without the injury. But the estimation becomes rapidly one of conjecture as we pass beyond immediate effects; and in the language used by Blackburn J. in *Cattle* v. *Stockton Waterworks, supra,* at p. 457, quoting Coleridge J. in *Lumley* v. *Gye* (2),

> Courts of justice should not "allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts."

As results of the trespass, then, the damages claimed come thus under the ban of remoteness.

The proposition set forth in the third ground is closely related to that of the second. The difference lies in the exclusion of contemplated consequence in the former and its inclusion in the latter. The former is therefore of an absolute nature.

But it is a proposition for which we have been furnished with no authority. As formulated, it was, in my opinion, rejected by the House of Lords in *Simpson* v. *Thomson* (3), where at p. 289, Lord Penzance uses these words:

(1) (1875) L.R. 10 Q.B. 453.
(2) (1853) 2 E. & B. 216, at 252; 22 L.J. (Q.B.) 463, at 479.
(3) (1877) 3 App. Cas. 279.

But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel.

and I see no difference in principle between an interest arising by contract and one by statute, where the latter in substance merely adds a beneficial condition to the contract.

It was sought to be supported by the case of *McFee* v. *Joss* (1). There the owner of an automobile was by statute under an absolute liability for damage wrongfully caused by the automobile in the hands of a person whom he had permitted to use it. There were, therefore, two distinct rights in the injured person arising out of the same act and covering the same area of damages; there was also a contractual relation between the owner and the wrongdoer in circumstances that would imply an indemnity toward the owner; and, as between the two rights, on equitable principles that against the wrongdoer was primary. But the scope of liability here is quite different between the corresponding rights: the whole of the damage is recoverable from the tort-feasor, but only a portion by way of compensation; there is no implied indemnity, because—a fact sufficient here—the parties are strangers to each other; in the former case the statutory liability made the tortious act of the wrongdoer that of the owner, but the obligation under the Compensation Act arises from injury to the employee, the particular act which brings it about is not attributed to the employer and the liability exists whether that act is tortious or innocent: *McMillan* v. *Canadian Northern Ry. Co.* (2).

There remains the rule by which a master recovers for injuries inflicted upon his servant. As it has been many times remarked, this right is an anomalous survival from

(1) (1925) 56 O.L.R. 578. (2) [1923] A.C. 120, at 124.

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social conditions in which the servants belonged to the household and their relation to the master was more of the nature of status than contractual. But with the evolution of individualism the economic and remedial position of the employee has long since changed and as it is to-day as ample to protect his interests as those of the employer. Such an anachronism should, therefore, be held to the precise limits within which it has been established.

What are those limits? I think it clear that they are confined to the value to the master of the services actually lost, and to those incidental outlays such as medical and hospital expenses made by him which naturally follow from personal injury; but they do not include pain and suffering or the impairment of earning capacity.

Now it will be seen that to a considerable extent these items are common to the damages recoverable by the servant. In the ordinary case, where wages are paid as work is done, a direct consequence is the loss of earnings; but in that case, the only interest of the master would be the sum by which the service was in fact of a greater value than he was paying for it. That would be the maximum recoverable, and both parties apparently could maintain actions accordingly. It might be that the master has remunerated the servant in advance, and in such a case his recovery would exhaust that particular item: *Osborn* v. *Gillett* (1), per Bramwell B.:

> [The master] sustained damage which may be real and substantial from the valuable character of the service, prepayment of the wages, or otherwise.

Then it is altogether probable that the master's recovery of expenses for necessary care arose from the fact that out of the relationship they would ordinarily be borne by him. The same rule was applied to the parent in relation to his child and the husband to his wife. In those cases, although in the former the right to recover calls for the fiction of service, the husband or father is under a legal or a moral duty toward the physical well-being of wife and child, and, apart from exceptional cases, it is by him that the expenses are incurred. But in the general conditions of modern employment, that is not so. This personal interest of the employee has become dissociated from the

(1) (1873) L.R. 8 Ex. 88.

employment relationship; his credit supports the services rendered; and he only can include the cost of them in his damages.

Now the compensation provided under the *Government Employees Compensation Act,* R.S.C. 1927, c. 30, neither extends to the whole field of recovery by the servant against the wrongdoer nor does it necessarily exhaust the damages in the particular items of loss to which it is related; but the master's recovery for compensation paid might result in subjecting the third person to greater damages than the total at common law. Since the compensation is partial or at least is not specifically related to the basis of the claim of the servant, the rule proposed would result merely in a distribution of the liability of the guilty person, multiplying actions and complicating the quantum recoverable.

The payments to the injured workman under the Dominion Act, for medical and hospital expenses are of moneys provided to reimburse the employee; "an employee * * * shall * * * be entitled to receive compensation" including such benefits; and they may, as in many cases they do, form only a portion of the actual expenses to which he may be put or which he may voluntarily incur; if they happen to be paid direct by the Crown to the physician or hospital, they are so dealt with as an administrative convenience and security; and in an action by the employee against the wrongdoer, their payment by the Crown would be excluded from consideration; *Bradburn* v. *Great Western Ry. Co.* (1).

Then the compensation for disability may be looked upon as insurance, either indemnity or accident: *McMillan* v. *C. N. Ry. supra* (2); or as an incident of remuneration attributed to past services, with or without a continuing engagement to work; but however viewed, its effect is the same, and in an action by the employee against the wrongdoer, the payment would be unavailable in reduction of damages. On the other hand, it could not be recovered direct from the wrongdoer by the employer as insurer; *London Assur. Co.* v. *Sainsbury* (3).

But neither can it represent damage to the employer from loss of service. The question is, what follows as a

(1) (1874) L.R. 10 Ex. 1.
(2) [1923] A.C. 120.
(3) (1783) 3 Dougl. 246; 99 E.R. 636.

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direct and natural result of that loss? The damage might be absolute or the service be fully supplied by new help, and in each case ordinary measures would be applied. But compensation arises from special terms of employment; it is not referable to nor is it a consequence of the loss of service.

This conclusion follows dicta in the case of *Admiralty Commissioners* v. *S.S. Amerika* (1) in which the facts were quite similar. One of His Majesty's warships was run down and sunk by a vessel, against the owners of which the Admiralty brought action. Among the items of damage were pensions paid to the dependents of naval ratings lost. Although the House of Lords held the pensions to be voluntary payments and therefore not recoverable under legal damages, both Lord Parker and Lord Sumner went further and expressed the view that even had these been obligatory upon the Government, the result would have been the same; their language is significant and I quote it:

Lord Parker:

> But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion that they could not properly constitute an item of damage for loss of service. They would in this case constitute deferred payment for services already rendered, and have no possible connection with the future services of which the Admiralty had been deprived.

Lord Sumner:

> Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy—*Bradburn* v. *Great Western Ry. Co.* (2)—and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured; so, conversely, a master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive, and a pension to his widow when he is dead.

The master then does not recover because those payments have not, in a legal sense, been caused by the wrong against the servant; the wrong is the occasion of their being made; the cause is the contract; and special terms of the contract are irrelevant to damages for loss of service. The disability benefits are paid out of accumulations, actual or constructive; the damages remain the direct loss to the employer consequent upon the deprivation of service.

(1) 86 L.J. P.D. & A. 58; [1917] A.C. 38.
(2) (1874) 44 L.J. Ex. 9; L.R. 10 Ex. 1.

The case of *Bradford Corporation* v. *Webster* (1) was pressed on us. There a municipal corporation brought action for injuries caused to a police officer and the damages allowed were based on the increased amount of pension and the acceleration of its payment resulting from the injury. Lawrence J. considered the dicta quoted, but declined to follow them; but for the reasons given, I must hold that such damages cannot be recovered in an action of this nature.

One of the objects of the many forms of insurance by way of compensation, pensions, etc., of these days is to ease the burden on the individual of consequences attendant upon the increasing hazards of complex social and industrial activities. But it would tend to reverse that policy to extend the established liability of the individual for the benefit of these collective interests. Liability is necessary for the essential standards of social conduct, but any enlargement of the field which in general rule our legal experience has mapped out should come from the legislature and not the courts.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.—Appellant put its case before us first upon the basis of an action *per quod servitium amisit*. The question is as to whether or not there is any evidence upon which damages of the kind recoverable in such an action may be assessed. In so far as the claim is confined to lost services, damages are to be assessed upon the value of those services to the master; *Bradford Corp.* v. *Webster* (2); *Admiralty Commissioners* v. *S.S. Amerika* (3). In *Osborn* v. *Gillett* (4) Bramwell B. said:

* * * the plaintiff lost her services and sustained damage which may be real and substantial from the valuable character of the service, prepayment of the wages, or otherwise.

What is claimed in this action is:

(*a*) Payments on account of total temporary disability, January 15 to October 20, 1942—$959.76;

(*b*) Medical aid payments—$511.20;

(*c*) Pension award for partial permanent disability:

Lump sum—$150.

Capitalized pension per month ($49.98), *for life*—$12,218.11.

(1) (1920) 89 L.J.K.B. 455.

(2) [1920] 2 K.B. 135, per A. T. Lawrence, J., at 145.

(3) [1917] A.C. 38, per Lord Sumner at p. 61.

(4) (1873) L.R. 8 Ex. 88, at 93.

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All of these items of alleged damage find their basis in those parts of the *Workmen's Compensation Act* of British Columbia, R.S.B.C. 1936, cap. 312, which may be said to be incorporated by reference into the *Government Employees Compensation Act*, R.S.C. 1927, cap. 30. Items (*a*) and (*c*) are governed by sections 21 and 20, respectively, of the former statute, which provide as to (*a*) for payment to the injured workman during temporary total disability of an amount equal to two-thirds of his average earnings, and as to (*c*) an amount equal to two-thirds of the difference between his average earnings before the accident and the average amount which he earns or is able to earn after the accident, or the amount payable may be based upon the nature and degree of the injury having regard to the workman's fitness to continue in the employment in which he was injured or to adapt himself to some other suitable employment or business. As to (*b*), this is based upon section 23, which provides for certain medical, hospital and other aid. It is to be remembered that the above benefits are to be considered as being called for under a statutory contract between the workman and the appellant; *Workmen's Compensation Board* v. *C. P. R.* (1).

In Clerk and Lindsell on Torts, 9th Ed., 249, the authors state:

> In the case of an ordinary servant the master may recover not merely the actual damage sustained up to the time of action brought, but also in respect of the future service which he is likely to lose. It would seem, however, that he ought to be limited to the period for which he has a binding contract of service. Any further damage founded on a speculation that the service would continue beyond the agreed time would be too remote.

In my opinion, the authorities bear out the text. In the *Amerika* case (2), Lord Sumner said, at p. 55:

> If the contract of service had already determined before the wrongful act had any disabling effect upon the capacity to serve, as might be the case when a wrongful act is done to a servant who is under notice, I take it likewise that the action would not lie. It is the loss of service which is the gist of the action, and loss of service depends upon a right to the service, and that depends on the contract between the master and the servant.

In *Hodsoll* v. *Stallbrass* (3), the plaintiffs' apprentice, who was serving under articles for a term which had

(1) [1920] A.C. 184.
(2) [1917] A.C. 38.
(3) (1839) 9 C. & P. 63.

still some time to run, was injured by the defendant's dog and was permanently disabled so that the plaintiffs lost the benefit of his services for the remainder of the term. It was held that the plaintiffs might recover for the loss of service up to the end of the apprenticeship.

In *Martinez* v. *Gerber* (1), the action was for loss of service through injury to a traveller of the plaintiffs' as a result of which it was alleged the plaintiffs had to hire another traveller to whom they were obliged to pay £200 for expenses and wages. A verdict was returned for £63 damages, and upon a motion in arrest of judgment the verdict was sustained. While it did not appear for how long the injured servant was engaged, the declaration stated that he was at the date of the injury "and from thence hitherto had continued and still was" the plaintiffs' servant. Tindal C. J., at p. 91, said:

> The declaration alleges that Goss was, and *still is*, the plaintiffs' servant, which is sufficient. There was no necessity to state that he was hired at any wages or salary.

In a note added by the reporter it is stated:

> The damage would be the same whether the services of the disabled servant were gratuitous or paid for, supposing the masters to be obliged to hire another, or to do the work themselves, or to leave it undone. The allegation that *Goss was and still is* the plaintiffs' servant, shows that whilst paying Gassiot, they were *entitled* to the services of Goss.

While the plaintiffs were obliged to pay Gassiot, the substituted servant, £200, they recovered only £63, the value placed by the jury upon the services of Goss of which the master was deprived.

These authorities show, therefore, that in order to recover in an action of this kind, the master must have been entitled to future services of the servant. It is the value of those services lost, which may be recovered. The quantum is for the jury upon all the evidence.

I cannot find it alleged or proved in the case at bar that the appellant was entitled to any future service subsequent to the injury of its servant, Christian. For that reason alone there appears to be no basis upon which it is possible to assess any damages under heads (*a*) and (*c*) of the claim.

(1) (1841) 3 M. & G. 88.

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As to (*b*) the claim is based upon the class of case of which *Dixon* v. *Bell* (1) is an example. There Lord Ellenborough directed the jury that the plaintiff might recover in this form of action the amount of a surgeon's bill for attending his son which he had paid but not for physician's fees for which he was not liable.

Turning to section 23 of the provincial statute, it appears that the term "medical aid" covers "such medical, surgical, hospital and other treatment, transportation, nursing, medicines, crutches and apparatus, including artificial members, as it may deem reasonably necessary at the time of the injury, and *thereafter during the disability* to cure and relieve from the effects of the injury" as well as a subsistence allowance during treatment away from home.

Such expenditures may well cover a much wider field than would be recoverable at common law, particularly in the case, e.g., of a servant under notice or having a short term remaining under his contract of employment. Under the statute, however, even though injured during the last hour of his employment, a servant would be entitled to the above benefits provided by section 23 as well as to the other items covered by the other sections. I do not think that a claim for "medical aid payments $511.20" without more, can be said, in the circumstances of the present case, to be within the category of medical expense recoverable in this particular type of common law action.

It may be, although for the reason just stated it is not necessary to decide the question, that the only relevancy of such a claim in this type of action is that the value of the right on the part of the servant to such a benefit should, together with the value of his right to the other items of compensation included in (*a*) and (*c*) above, be considered as part of the servant's remuneration, and hence as evidence of the value of his services to the master, rather than that the actual amounts paid should themselves constitute recoverable damages. Wages paid to the injured servant and, if a substitute is hired, to such substitute, may well be of some evidentiary value, although not conclusive, in an inquiry as to the *value* of the services

(1) (1816) 1 Starkie, 287.

of the injured servant which are lost to the master. From this standpoint what is stated by Lord Sumner in the *Amerika* case (1) at p. 61:

> A master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead.

and by Lord Parker, at p. 42:

> But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion that they could not properly constitute an item of damage for loss of service. They would in this case constitute deferred payment for services already rendered, and have no possible connection with the future services of which the Admiralty had been deprived.

may be consistent with what is stated by Lawrence J. in *Webster's* case (2) at pp. 144-5:

> A pension may, no doubt, be properly regarded as payment for past services, but that fact does not exclude it from consideration in estimating the value of the services lost. But for the injuries the services of the constable would have been as valuable after the date of the injuries as they had been before that time. The cost of the services to the plaintiff Corporation was pay, plus the plaintiffs' contribution to the pension fund. No ground has been suggested for holding that the services were not worth that which was paid for them. If this be so the services which were lost were worth pay, plus right to pension.

Appellant next rests its case upon the submission that, the gate in question being in such close proximity to appellant's railway, it must necessarily have been foreseen that negligence in failing to fasten the gate would probably cause damage to appellant, which imposed a duty toward the latter, the breach of which entitled it to damages. *Bourhill (or Hay)* v. *Young* (3); *M'Alister (or Donoghue)* v. *Stevenson* (4), and *In re Polemis and Furness, Withy & Co.* (5) are cited.

In whatever circumstances these authorities may be applicable, they are not, in my opinion, relevant here. Merely because appellant has been obliged to pay under a contract between itself and Christian does not render such payment an item of damage for which the person whose

(1) [1917] A.C. 38.
(2) [1920] 2 K.B. 135.
(3) [1943] A.C. 92.
(4) [1932] A.C. 562.
(5) [1921] 3 K.B. 560.

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wrongful act injured Christian is liable; *Simpson* v. *Thomson* (1), per Lord Penzance at 289-290. The decision in *Mowbray* v. *Merryweather* (2), to which appellant also refers, was a case of breach of contract.

It is also contended that the appellant's claim may be supported upon trespass to its property, the gate having been allowed to project over it, and *Gregory* v. *Piper* (3) is cited. Assuming the trespass, the above case is no authority for the proposition that the amount here claimed may be recovered as damages in trespass. I think the claim fails for remoteness on this ground also.

As to the argument founded upon the decision in *McFee* v. *Joss* (4), the principle applied in the case is stated by Ferguson, J.A., at p. 584, as follows:

> Everyone is responsible for his own negligence, and if another is, by a judgment of a court, compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer.

In that case a person injured by the negligence of the defendant Joss in the operation of an automobile belonging to the plaintiff recovered judgment against the plaintiff by reason of a statutory liability resting upon the latter as owner. It was held that as the plaintiff had been compelled to pay damages which the defendant ought to have paid, the latter must indemnify the former.

In the case at bar no liability rested upon appellant in respect of the tort of the respondent. The appellant's liability arises by reason of a contract between appellant and Christian, but no relationship exists between appellant and respondent and no right to indemnity as between them arises.

I would dismiss the appeal with costs.

ESTEY, J.—The appellant, the Crown in the right of the Dominion, operates a railway known as the National Harbours Board Terminal Railway in Vancouver, B.C. An employee of this Terminal Railway, H. W. Christian, while acting in the course of his employment, was injured because of the negligence of the agents and servants of the respondent Canadian Pacific Railway Company.

(1) (1877) 3 App. Cas. 279.
(2) [1895] 2 Q.B. 640.
(3) (1829) 3 B. & C. 591.
(4) (1925) 56 O.L.R. 578.

Under the provisions of *The National Harbours Board Act*, 1936 S.C., c. 42, and the *Government Employees Compensation Act*, R.S.C. 1927, c. 30, and amendments thereto, Christian when injured became entitled to receive, and has received in part, compensation from the Crown as determined under the provisions of the *Government Employees Compensation Act*. It is the amount of this compensation as so determined that the Crown in this action seeks to recover from the respondent railway.

The learned trial judge in the Exchequer Court dismissed the plaintiff's action on the basis that:

> The compensation cannot be regarded as legal damages for it is not the proximate and direct result of the act complained of (Halsbury, vol. 10, page 103, para. 130; *The Amerika* (1) at pp. 53 and 61). The liability of the Crown (Dominion) to pay the compensation arises from an independent intervening cause, namely, an act of the Dominion Parliament, which lies wholly outside the common law of the Province. (*The Circe* (2)). The compensation in question is compensation to an injured servant, payable by the Crown, and is in no sense compensation in the form of damages to the Crown for the loss to His Majesty of a servant's services. Nor is it claimed as such.

Upon this appeal counsel for the appellant submitted four different bases upon which he contended this judgment should be reversed:

One: That the Crown as owner of the Terminal Railway premises has a cause of action for the recovery of any damages resulting from the negligent swinging of the gate over its premises. The appellant's and respondent's railways are so situated at this point that a gate or swinging bar operated and controlled by the respondent was negligently left in such a condition on the early morning of January 15, 1942, that it extended over and upon appellant's tracks, as a result of which Christian, in the course of his employment riding upon the front of appellant's engine, was injured. Counsel supported this contention by cases in which actions were brought for injury through trespass: *Gregory* v. *Piper* (3); *Pickering* v. *Rudd* (4); and for personal injury resulting from property left in a dangerous position, *Reid* v. *Linnell* (5). The appellant's action is rather different. Its position is that its employee, Christian,

(1) [1917] A.C. 38.
(2) [1906] P. 1.
(3) (1829) 9 B. & C. 591.
(4) (1815) 171 E.R. 400.
(5) [1923] S.C.R. 594.

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suffered an injury "by accident arising out of and in the course of his employment", because of which he was entitled to and has been awarded compensation under the *Government Employees Compensation Act*, R.S.C. 1927, c. 30, and amendments thereto. It is for the amount of this compensation that the Crown as appellant claims from the respondent. In order to succeed upon this basis it must be established that the payment of this compensation is a direct consequence of respondent's negligent conduct. The issue is therefore, is this compensation a direct or a remote consequence?

As to the rights or claims that Christian personally as the injured party may have against the respondent we are not concerned. The only issue here is whether the compensation awarded under the provisions of the statute and payable by the Crown to Christian, in the absence of any provision in that statute for subrogation or similar provision, may be recovered from the respondent in an action of this type. It is a statutory obligation and seems rather an unrelated consequence, or in the language of Lord Wright in *Liesbosch (Owners of)* v. *Edison (Owners of)* (1), "a separate and concurrent cause, extraneous to and distinct in character from the tort" of the respondent. The compensation payable under this obligation may be looked upon as Lord Wright regarded the impecuniosity of the party suffering the loss in the case just cited as either "too remote" or as "an independent cause, though its operative effect was conditioned" upon the employee suffering the injury.

The observations of Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika* (2) support this view.

Two: The second basis is upon much the same ground except that counsel suggests the existence of the statutory obligation was a foreseeable consequence. That injury to some person was a foreseeable consequence is not the point. One must go further and conclude that under the circumstances of this case a reasonable man would have foreseen that the employer was under a statutory obliga-

(1) [1933] A.C. 449 at 460. (2) [1917] A.C. 38 at 61.

tion to provide compensation to its servant in the event of injury from his negligence. The case of *Hay or Bourhill* v. *Young* (1) was cited by the appellant. That case is concerned with foreseeability as a factor in determining liability of the negligent party toward one who suffered personal injury at or near the scene of the accident. That, upon its facts, is quite a different case. No case was cited which supports the appellant's contention and the comments already made under the first submission, that the damage was either too remote or resulting from an independent cause, are applicable to this submission.

Three: That whenever the defendant by negligence imposes an obligation on a third party that third party has an action to recover the damages resulting therefrom. In support of this contention is cited *McFee* v. *Joss* (2). There McFee, the owner of an automobile, rented it to Joss who in driving same negligently collided with a car driven by Watson. Watson recovered damages from McFee under the statute by virtue of the fact that he was the owner of the car. Then McFee recovered judgment against Joss for the amounts he had paid to Watson on the basis that he was entitled to be indemnified by Joss. In that case there was a contract between McFee and Joss and therefore a basis for indemnity. Mr. Justice Ferguson, in writing the judgment of the Appellate Court, quoted a statement of Lord Wrenbury in delivering the opinion of the Privy Council in *Eastern Shipping Co. Ltd.* v. *Quah Beng Kee* (3):

> A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other.

In this case there is neither a contract nor any relation between the appellant and respondent upon which under the authorities an indemnity might be based.

Other cases are cited, such as *Bradford Corp.* v. *Webster* (4), where the actions are by the master for loss of services. The appellant also cites cases where parents have recovered

(1) [1943] A.C. 92, at 101.
(2) (1925) 56 O.L.R. 578.
(3) [1924] A.C. 177, at 182.
(4) (1920) 89 L.J.K.B. 455.

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for expenses incurred on behalf of his (or her) injured infant. One of these is *Hall* v. *Hollander* (1). There the father did not recover in his action for loss of services because the infant was incapable of performing services and he had incurred no expense. It is the dictum of Bayley J. that is stressed:

> In this case, too, it was proved that the father did not necessarily incur any expense; if he had done so I am not prepared to say that he could not have recovered upon a declaration describing, as the cause of action, the obligation of the father to incur that expense.

This dictum has often been quoted and it has been suggested that where the infant resides at home the rendering of services will be presumed. Such observations have reference to the relationship of parent and child and do not assist in the determination of this general submission, particularly in an action so pleaded and conducted at trial as this one.

In the absence of any of the above suggested bases the appellant cannot succeed under this submission.

Four: The fourth ground is that the action *per quod servitium amisit* is sufficiently broad and inclusive to permit of the appellant's recovery in this case. The essential difficulty is that the pleadings make no reference to nor is there evidence adduced which would support a claim for loss of services. Then the damages asked are not on the basis of loss of services but rather "the damage sustained by the plaintiff by reason of the obligation so imposed on the plaintiff to make payment of the aforesaid compensation". The claim is therefore confined to the payments made because of the statutory obligation and has no relation to any loss of services which may have been suffered by the appellant as master on account of its employee being injured through the negligence of respondent's servants and agents. The action as framed is on a basis entirely different from that of loss of services.

It therefore follows that the appellant cannot succeed upon this basis, and, as already intimated, there does not appear to be any basis upon which the appellant can recover from the respondent.

(1) (1825) 4 B. & C., 660; 107 E.R. 1206.

A question as to the jurisdiction of the Exchequer Court to hear this action was raised. It was not pressed but rather we were asked to deal with the case upon its merits. The question of jurisdiction has not, therefore, been discussed.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitor for the respondent: *J. A. Wright.*