OMER LAMONTAGNE (PLAINTIFF) . . . APPELLANT; 1914

AND

THE QUEBEC RAILWAY, LIGHT, HEAT AND POWER COMPANY (DEFENDANTS) . . . . . RESPONDENTS.

*Nov. 13.
*Dec. 29.

ON APPEAL FROM THE JUDGMENT OF THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Negligence—Operation of tramway—Employers' liability—Accident in course of employment—"Workmen's Compensation Act"—Right of action—Dependent relations—Construction of statute—(Que.) 9 Edw. VII., c. 66, ss. 3, 15—R.S.Q., 1909, arts. 7321, 7323, 7335—Incompatible enactment — Repeal — Art. 1056 C.C. — Practice — Charge to jury—Misdirection—Excessive damages—Modification of verdict—New trial—Art. 503 C.P.Q.

The remedy given by article 1056 of the Civil Code, in cases of *délit* and *quasi-délit*, was taken away in regard to the classes of persons enumerated in section 3 of the Quebec statute respecting compensation for injuries to workmen, 9 Edw. VII., ch. 66, by the limitation in section 15 of that statute (now articles 7323 and 7335 of the Revised Statutes of Quebec, 1909), but the effect of these enactments was not to repeal the provisions of article 1056 C.C., with respect to ascendant relations who were only partially dependent for support on a deceased workman to whom the statute applied. The judgment appealed from (Q.R. 23 K.B. 212), was reversed, Davies and Brodeur JJ. dissenting.

Per Davies J. dissenting.—The words "in all cases to which this Act applies," in the Quebec statute respecting compensation for injuries to workmen, 9 Edw. VII., ch. 66, sec. 15, have reference to the special classes of employment referred to in the first section of the Act, and not to the classes of persons entitled to compensation thereunder. Consequently, the effect of section 15 is to limit the employers' liability to the compensation prescribed by that Act and to that only.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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Where no objection has been taken to the judge's charge to the jury at the trial and it does not appear that any substantial prejudice was thereby occasioned there should not be an order for a new trial under the provisions of articles 498 *et seq.* of the Code of Civil Procedure.

The majority of the court considered that the amount of damages awarded by the jury was so grossly excessive that there should be a new trial and it was ordered accordingly unless the plaintiff agreed that the verdict should be reduced to an amount mentioned. (See art. 503 C.P.Q.)

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the Superior Court, District of Quebec, entered by Lemieux C.J. on the verdict of the jury at the trial, and dismissing the plaintiff's action with costs.

The plaintiff, the father of a conductor employed by the company who died in consequence of injuries sustained in the course of his employment on the tramway, brought the action against the company to recover damages stated at $2,500, claiming $450 for medical and hospital attendance, funeral expenses, loss incurred through the closing of his place of business during three days, and $2,050 for being deprived of the advantages and assistance which he and his family derived from the deceased. The company denied liability and set up the defence that the plaintiff, not being wholly dependent upon deceased for support, by the operation of the Quebec "Workmen's Compensation Act," was deprived of any recourse either under that statute or under the provisions of the Civil Code. At the trial there were no objections taken to the charge of the learned Chief Justice; the jury returned a general verdict against the company and assessed damages at $2,000, for which amount

(1) Q.R. 23 K.B. 212.

judgment was entered in the Superior Court. On an appeal to the Court of King's Bench this judgment was set aside, Trenholme J. dissenting, and the plaintiff's action was dismissed with costs.

The questions in issue on the present appeal are stated in the judgments now reported.

L. S. St. Laurent for the appellant.

G. G. Stuart K.C. for the respondents.

THE CHIEF JUSTICE.—A difficult and interesting question which, however, because of recent amendments to the Quebec "Workmen's Compensation Act," is of no practical importance to any one except to the parties here, arises in the consideration of this case.

The plaintiff, appellant, who was, as he alleges, partially dependent for his support upon a son killed when in the service of the corporation, defendant and respondent, brought this action under article 1056 of the Quebec Civil Code, which reads:—

> In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.
>
> * * * * * * *
>
> In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.

It is alleged by way of defence that the plaintiff is without recourse because of certain provisions of the Act first above referred to.

It is admitted that the accident which resulted in the death of the deceased comes within the definition

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of section 1 of the Act, but sections 15 and 3 of the Act, now articles 7335 and 7323 of the Revised Statutes of Quebec, are relied upon in support of the contention that the right of action which the plaintiff undoubtedly had under the Code is barred.

Section 15 enacts:—

> The employer shall be liable to the person injured or to his representatives mentioned in article 3 of the Act, for injuries resulting from accidents caused by or in the course of the work of such person, in the cases to which this Act applies, only for the compensation prescribed by this Act.

The French version reads:—

> Les dommages résultant des accidents survenant par le fait du travail ou à l'occasion du travail dans les cas prévus par la présente loi, ne donnent lieu, à charge du chef d'enterprise, *au profit de la victims ou de ses ayants droit*, tels que définis à l'article 3 de la présente loi, qu'aux seules réparations déterminées par cette loi.

It is obvious that the remedy given in cases like this against the employer by the Civil Code is taken away from the persons mentioned in section 3 of the Act, who are (*a*) the surving consort, (*b*) the children under a certain age, and (*c*) *the ascendants of whom the deceased was the only support at the time of the accident.* But the question here is: Can the plaintiff who admittedly does not come within this enumeration of representatives entitled to recover under the Act, being only *partially dependent* upon the deceased, maintain this action? Or, in other words, is the action which the plaintiff undoubtedly had under article 1056 of the Civil Code barred by the joint operation of sections 3 and 15 of the Act?

Assuming that the Act was intended to substitute the theory of professional risk for those provisions of the Civil Code which fixed the liability of an employer

in case of accident, due to his fault, and to provide a complete and comprehensive body of law in relation to the subject of workmen's compensation for injuries received in the course of their employment, I do not think we should lightly attribute to the legislature an intention to go so far as to deprive those who are not among the enumerated beneficiaries of a right of action which they clearly had before the Act was passed.

The Act was evidently intended to fix in those accident cases to which it applies the conditions of liability, the amount of compensation and the method of apportionment among those entitled to its benefits, and to that extent it may be considered as exclusive. But the question remains: The plaintiff not belonging to any one of the enumerated classes specifically dealt with, is it possible to hold that by necessary intendment his admitted right of action was taken away ?

It must be accepted as settled law that:—

> No statute operates to repeal or modify the existing law, whether common or statutory, or to take away rights which existed before the statute was passed, unless the intention is clearly expressed or necessarily implied. (Halsbury, vol. 27, p. 167.)

Assuming the Civil Code to be merely a statute, it has been in force for a long time and the principle of the special article upon which the plaintiff relies was part of the law long before the enactment of that Code. It seems, therefore, reasonable that the recent Act should be construed consistently with the Code if it is possible to do so. The ordinary rule of construction is that

> if two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be so read,

and I can see no repugnancy between the Code and the

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Act. They apply to different classes of persons and the conditions of liability are different.

Those who are partially dependent upon the injured employee are left to their remedy under the Code, their right to recover continues subject to the obligation to prove that the accident was attributable to an "offence or quasi-offence of the employer" and to hold that this class is to be entitled to the benefit of the Act in the absence of express terms, would be to legislate for a case which the legislature has not thought proper to provide for. In a word the plaintiff bases his claim upon the Code and to defeat that claim the defendant relies upon a statute which makes no provision for this particular case. To maintain its defence the court must add to the Act a provision which it does not contain.

Article 12 C.C., provides that when a law is doubtful or ambiguous it is to be interpreted so as to fulfil the intention of the legislature and to attain the object for which it was passed. Here the language of the statute leaves nothing to doubt or to uncertainty. The only question is: Are we, under the pretence of giving effect to what is alleged to be the intention of the legislature, "a common but very slippery phrase," to supply what is clearly an omission in the statute. As I said before, that is not interpretation but legislation.

Much reliance was placed by the Chief Justice in the court below on the French Act from which the Quebec Act is taken and the jurisprudence that has grown out of that Act in France. But it must be borne in mind that the language of section 15 in question here differs somewhat from that of the French model which reads (art. 7) :—

Les ouvriers et employés *désignés à l'article précédent* ne peuvent se prévaloir, à raison des accidents dont ils sont victimes dans leur travail, d'aucunes dispositions autres que celles de la présente loi.

In France it is held that the ordinary right of action on the part of the representatives of the deceased is entirely taken away (Cabouet, vol. 1, No. 392; Sachet, vol. 1, No. 754), but the French article 7 uses the expression "la victime ou ses représentants" without limitation, whereas section 15 of the Quebec Act has deliberately altered that expression and, in terms, limits those entitled to the benefit of the Act to those previously enumerated in section 3, and the Quebec section 3 substitutes the words "of whom the deceased was the only support" for the words used in the French Act which are "chacun des ascendants et descendants qui étaient à sa charge." The words used in section 3 in the Quebec Act are unambiguous. The benefits of the Act are given to the ascendants of the deceased **of whom he was *the only support*** at the time of the accident, whereas the French model applies to *all* ascendants without distinction. The French authorities are, therefore, of little use. On the whole, I am of opinion that the Act may be and should be construed to mean that those whom the deceased did not support entirely are left to their action under the Code, they must prove fault on the part of the employer and also the extent to which they have been prejudiced in a pecuniary way by the death of the deceased. There seems to be good reason for the distinction because of the uncertainty which exists in the case of those only partially dependent as to the quantum of their right. The case is not free from doubt, but I think, all things considered, it is impossible to say that the statute has, by implication, taken

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away a vested right of action when it is possible to so construe it as to leave that right subsisting.

I find some support for this view in the French cases where the question has arisen as to whether the enumeration of section 1 of the Act is limitative or exhaustive. The French writers seem to favour the restricting of the cases to which the law applies to those specially mentioned in the statute for the reason that it is an innovation upon the common law; the same reason would seem to me to apply to the question which has arisen here; Dal. 1902, 2, 330; 1907, 1.85.

There has been some criticism of the judge's charge but, as has been very frequently said (*Clark* v. *Molyneux*(1); *Blue* v. *Red Mountain Railway Co.*(2); *Barthe* v. *Huard*(3)), a summing up is not to be rigorously criticized, and it would not be right to set aside the verdict of a jury because in the course of a long and elaborate summing up the judge has used language which, detached from the context, might appear inaccurate; the whole charge must be read together in order to determine whether it afforded a fair guide to the jury. A new trial is not granted on the ground of misdirection unless some substantial prejudice was thereby occasioned. Art. 500 C.P.Q. In *Barthe* v. *Huard*(3), Sir Louis Davies said (at page 409):—

> It is possible that if the learned judge's attention had been called to this language and its full meaning at the time, and objection taken to it, he would have corrected the apparently misleading direction before the jury had retired or if they had already retired, before they had agreed upon their verdict, but no such objection was taken at the time.

(1) 3 Q.B.D. 237, at p. 243. (2) [1909] A.C. 361, at pp. 367 and 368.
(3) 42 Can. S.C.R. 406, at p. 410.

This only goes to shew the imperative necessity of courts of appeal insisting, when asked to grant new trials as a matter of right, that only objections to particular statements made by the judge in his charge to the jury will be considered or given effect to when it is shewn that objection has been taken to them at a time when their misleading character can be corrected before the jury.

No objection was taken to the charge (arts. 498 (3) and 500 C.P.Q.) and no reference is made to misdirection in the reasons in support of the inscription in appeal before the Court of King's Bench (art. 493 C.P.Q.).

As to the question of the amount of the verdict I would have been disposed to follow the rule laid down in *Taff Vale Railway Co.* v. *Jenkins*(1) :—

> When once you have got it that there was evidence to go to the jury, and that there was a principle on which it could proceed of taking into account any reasonable prospective pecuniary advantage to the parents, then, unless the verdict is so perverse and against the weight of evidence that it cannot stand, it is not for the court to interfere.

But I defer to the opinion of my colleagues and agree to a new trial unless the appellant accepts a reduction in the amount of damages awarded. (See *Barthe* v. *Huard*(2).)

The appeal should be allowed with costs in this court, but the opinion of the majority is that the amount of damages awarded is so grossly excessive there must be a new trial (costs of first trial to abide the event), unless the plaintiff agrees that the verdict should be reduced to the sum of $1,250, in which case there would be judgment for that amount with costs of the trial and of this court.

DAVIES J. (dissenting) :—At the conclusion of the argument, I inclined to the opinion, which further

(1) [1913] A.C. 1, at p. 5. (2) 42 Can. S.C.R. 406.

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consideration has confirmed, that the judgment of the Court of King's Bench, (appeal side,) was right and that this appeal should be dismissed.

I think the legislative scheme of insurance by employers against "accidents happening to workmen by reason of or in course of their work" up to a fixed amount embodied in the "Workmen's Compensation Act" of Quebec, 9 Edw. VII. ch. 66, and subsequently made part of the Revised Statutes of Quebec (1909), was a substitution for the former liability of the employer for fault or negligence as declared and enacted in the Code (chapter 3), and was intended to be and is complete in itself. It was, if I may so call it, compromise legislation as between the respective so-called common law obligations and rights of the employers and employees and their representatives.

Previously to the passage of that Act the liability of the employer was confined to cases when fault or negligence causing the injury or death complained of was found either in him or in his servants and workmen. Those entitled to recover damages arising from such fault or injury were in cases of death of the injured person *inter alia* his ascendant and descendant relations who were either wholly or partially dependent upon him for their support. Only one action could be brought on behalf of those entitled to indemnity and the judgment determined the proportion which each was entitled to receive.

All this was changed by the "Workmen's Compensation Act." Fault or negligence were no longer necessary to be proved in order to sustain an action. The maximum of the employer's liability was fixed: he became an insurer of his workmen up to that maxi-

mum and the classes entitled to share in the indemnity were designated. Ascendants only partially maintained or supported by the deceased were omitted from those entitled to share in the indemnity.

Section 1 of the Act enacts that accidents to workmen, apprentices and employees engaged in any of the works or industries therein mentioned shall entitle the person injured or his representatives to compensation as subsequently provided in the Act and that

> the Act shall not apply to agricultural industries nor to navigation by means of sails.

Then follow provisions regulating the extent and amount of compensation payable in cases where the accident causes incapacity either absolute and permanent or permanent and partial or temporary, and also where death is caused and in the latter case the persons and classes entitled to compensation.

Section 15 provides as follows:—

> The employer shall be liable to the person injured or to his representatives mentioned in article 3 of this Act for injuries resulting from accidents caused by or in the course of the work of such person, in the cases to which this Act applies, only for the compensation prescribed by this Act.

It is contended on the part of the appellant that as compensation is payable under section 3 only to ascendants of whom the deceased was the *only* support at the time of the accident, ascendants who were *partially* supported by the deceased not being included still retain their former rights of action under the Code.

The results of this contention, if successful, would be curious and I venture to think unlooked for.' The new statutory but limited liability of the employer as an insurer for accidents to his workmen created by the

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statute would not, as was supposed, be substituted for the old unlimited common law liability entirely. The class eliminated from those entitled to share in the statutory damages, namely, partially dependent ascendants, would still continue to retain their former rights of action and the liability of the employer as to them would still be subject to the determination of a jury.

The results could possibly if not probably be that ascendants of whom the deceased were the *sole* support would, in many cases, be worse off with their share of the statutory damage that ascendants receiving only *partial* support from the deceased would be whose damages were fixed by a jury. The employer, while assuming new and onerous obligations would be subject not to one action with a maximum statutory damage, but to several actions in some of which the amount of damages would be uncertain and the very basis on which the legislative compact or compromise rested would disappear. Instead of being an insurer with a liability fixed, but divorced from questions of fault or negligence, he would continue in that relation so far as ascendants wholly supported by the deceased workman were concerned but would also carry in addition the common law liability so far as ascendants *only partially* supported by the deceased workmen were concerned.

Of course, it was easy to cite cases of supposed hardship upon parties who under chapter 3 of the Code were formerly entitled to recover damages and were deprived of their right under the Act I am construing. But it must be remembered that the Act was in itself a legislative compromise on a most difficult and perplexing question and it certainly would not be

surprising if such a legislative compromise enactment resulted in some personal hardships.

The argument that the ascendants of whom the deceased was the *partial* support are not deprived of their former right of action under articles 1053 and following of the Code because they are not expressly so deprived by the statute loses much of its weight in my mind because, first, of the compromise character of the legislation, secondly, because there is no express deprivation of the former right under the Code of *any* ascendant, even of those who are entitled to share in the statutory compensation — they being only excluded under the general provisions of section 15 — thirdly, because of the provision in the Code, article 1056, that there shall be only *one* action brought against any person responsible for the death of another by or on behalf of those entitled to indemnity in consequence of such death, and the judgment in such action determines the proportion of such indemnity which each is to receive. Fourthly, because the legislature has expressly reserved the so-called common law rights of parties in cases where they thought it desirable these rights should be reserved. On the last point I refer to section 4 of the Act which declares that if a foreign workman or his representatives

> cannot take advantage of this Act the common law remedy shall exist in his or their favour,

and section 14 which reserves and continues the common law rights of the person injured or his representatives in addition to the statutory recourse, against persons responsible for the accident other than the employer, his servants or agents.

The legislature had its attention expressly drawn

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to the reservation of these so-called common law rights and in cases where it desired them to be continued so declared. I do not think the courts should add another section to the Act continuing these rights as regards other classes than those declared to be entitled to share in the statutory compensation. Lastly, I construe section 15, above quoted, as limiting the employer's liability to the compensation prescribed by the Act and to that only, *in all cases to which the Act applies,* and I hold the Act applies in cases where the deceased workman and the employer sued, are within its provisions quite irrespective of the parties or classes entitled to share in the distribution of the statutory compensation which may in any action be awarded. The words "in all cases to which this Act applies" have reference to the special classes of employment, stated in the first section, to which alone the Act is applicable, and have no reference to the different classes of people, ascendants or descendants, wholly or partially dependent upon the deceased, which the Act declares to be entitled to share in the statutory compensation.

For these reasons, I would dismiss the appeal.

IDINGTON J.—The appellant's son when acting as conductor on respondent's street railway received fatal injuries under such circumstances as would give the father a right of action in virtue of article 1056 of the Code. That article so far as relates to our present purpose reads as follows:—

1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

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The action was brought accordingly and the case tried by Mr. Justice Lemieux with a jury who rendered a verdict of $2,000 damages. Judgment was entered accordingly. On appeal to the Court of King's Bench for Quebec that court set aside the judgment and dismissed the action. Mr. Justice Trenholme dissented, but thought the damages should be reduced to $1,200.

The question raised is whether or not the "Workmen's Compensation Act," 9 Edw. VII. (Quebec), ch. 66, has taken away the right of action given by the Code.

It is quite clear that if the father cannot rely upon the Code he has no remedy. For the said Act only gives relief to

> ascendants of whom the deceased was the only support at the time of the accident.

The solution of the question turns upon the construction of section 15 of the Act which is as follows:

> 15. The employer shall be liable to the person injured or to his representatives mentioned in article 3 of this Act, for injuries resulting from accidents caused by or in the course of the work of such person, in the cases to which this Act applies, only for the compensation prescribed by this Act.

It is argued that this section must be read as if the old law had been repealed in its relation to such a case as this either by the express terms of the section or by its interpretation when read in light of the purview of the whole statute and the only remedy a father can have must be within the provisions of the Act.

It seems to me I must say, with great respect, absurd to read this section as in itself repealing the above article of the Code. It is an enabling statute and gives new rights of action which reach to cases of

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accidental injuries in certain employments whether by the fault or without fault of any one and in those cases takes away the remedy resting upon any other.

Its very language is only made applicable to, and I submit is restricted to, "cases to which this Act applies." But it is said that we must read the whole Act and especially the terms of what appears in what is now article 7321 of the Revised Statutes of Quebec, which, omitting the enumerated employments specified, is as follows:—

> Accidents happening by reason of or in course of their work to workmen, apprentices and employees engaged in the work of * * * shall entitle the person injured or his representatives to compensation ascertained in accordance with the following provisions.
>
> This sub-section shall not apply to agricultural industries nor to navigation by means of sails.

How much further can such language carry us towards holding article 1056 C.C., is repealed, save as to cases to which this Act applies?

And article 7323 R.S.Q., provides as follows:—

> 7323. When the accident causes death, the compensation shall consist of a sum equal to four times the average yearly wages of the deceased at the time of the accident, and shall in no case, except in the case mentioned in article 7325, be less than one thousand dollars or more than two thousand dollars.
>
> There shall further be paid a sum of not more than twenty-five dollars for medical and funeral expenses, unless the deceased was a member of an association bound to provide, and which does provide therefor.
>
> The compensation shall be payable as follows:—
>
> * * * * * * *
>
> (*c*) To ascendants of whom the deceased was the only support at the time of the accident.

How does that help us to extend the meaning of the section 15, above quoted, defining liability?

I am unable to see anything therein to aid respondent's argument. I see much to destroy its effect. For

to give effect to it the old mother or grandmother dependent upon say two of her descendants for support, if deprived by the death of one, perhaps the main support, caused by the most abominable conduct of his employer, is left without any remedy.

She is to be told by the courts that the legislature has deliberately taken away her bread and given her instead this stone which she cannot use.

Surely such a method of interpretation and construction of a statute as leads to such results by repealing merely by implication a most beneficent statute of long standing which indeed is alleged by some to be but declaratory of ancient common law, has something wrong in it.

In short the Act formulated a scheme of insurance against accidents, for the benefit of those brought within its express terms in the circumstances to which these terms are fitted and only applied to such, and any implication of repeal of the old law is bounded thereby and extends no further. It sounds plausible to say that the employers as classified contribute on the basis of that being in full for liability or expenses on score of accidents in their business. But that is not so, for there are the cases expressly excepted by the Act, and this unprovided for class only forms one more. To argue from the express extension for the inclusion of all others stretches further than common sense can carry us. The maxim *expressio unius est exclusio alterius* is not of universal application.

With deference, I must conclude the Court of King's Bench judgment cannot be upheld.

The respondent then argues if we so hold that it is entitled to a new trial by reason of the misdirection

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of the learned trial judge in charging the jury. Two answers to this are apparent when we read the whole charge and the proceedings at the trial.

The learned trial judge did use rather warm language in a sentence or two of his charge, but I think that was cured by his specific instructions at the close of his charge which was somewhat lengthy, but most lucid.

The other answer is that no objection was taken to the charge and hence such ground cannot be taken now. If it struck the hearers as the sentences culled therefrom may strike us, I think objection would have been taken.

The case of *Barthe* v. *Huard*(1) is relied upon to overcome this difficulty.

As I read that case it does not help one bit to overcome this answer.

In that case there was a long list of objections filed at the trial or immediately after the verdict, and whether as the result of some prior understanding or not does not appear from the report or the original record on file here.

It is quite evident from the terms of the chief judgment in the case that objections of some kind to the charge must have been considered by the majority of the court as taken so that they could be looked at.

For my part I found, as did another member of this court, that the learned trial judge had improperly rejected material evidence which he should have admitted and the question then was whether or not there had been some substantial prejudice occasioned thereby and, rightly or wrongly, it seemed pertinent

(1) 42 Can. S.C.R. 406.

in such a case to look at the course of the trial and especially the judge's charge to see if there could be found to be such prejudice.

Whether we are right or wrong in all this may be arguable. But certainly there is no distinct ruling in that case such as needed to maintain the objection to the charge in this case when no objection thought of until the court of appeal and the trial is found otherwise properly conducted.

I pass no opinion upon our possibly inherent jurisdiction, which must be bounded by that of the court of appeal to interfere in a case where there has been a mistrial yet no sort of objection taken.

All I need say if it exists, which I doubt, this is not the sort of case in which to invoke it.

There is a distinct ground taken which is open, if the facts justify it. That is that the amount awarded by the verdict is excessive.

In the consideration of that I should be disposed to take, as I did in the *Barthe Case*(1), notice of the learned judge's charge.

I was disposed at the argument, listening to the reading of the sentences taken by counsel from the charge, to think that blame for the verdict might rest there.

A more careful consideration of the charge as a whole leads me to think that on the whole, and especially towards the close thereof, it was fair and could not necessarily have misled the jury.

I have a very decided repugnance to interfering with the verdict of the jury in any case on the grounds of excessive damages. Not that I approve of exces-

(1) 42 Can. S.C.R. 406.

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sive damages being allowed. The misconduct of a defendant, if gross, may aggravate the damages. And in this case there does seem to have been such negligence.

But to put the parties to the wretched experience and anxiety, to say nothing of costs, of another trial all for the sake of a few hundred dollars here or there, seems most undesirable. And this court, for many years, has never interfered for that cause alone. Indeed, the case of *Central Vermont Railway Co.* v. *Franchère*(1) seems to be the last of the kind and there misdirection also existed. It has only in recent times interfered if the principle of assessing damages has not been properly explained to the jury. Here at the closing of his charge the learned judge correctly explained the law and shewed that it was financial loss alone which must be basis of the assessment of damages. Then the $100 a year sworn to as benefit of services of deceased to the father and what he had habitually paid the mother were on such a basis considerations which left a wide field for the jury to act upon.

The practice of appealing here only upon such a ground has almost disappeared. Rather than revive it I should refuse it herein though I think if I had to assess damages I should put them at Mr. Justice Trenholme's figures. There is no cross-appeal.

The notice of reasons assigned by the respondent in appealing below claimed no material loss, but failed to take the ground of excessive damages in estimating them. I do not think a mere denial of the existence of any material on which to found in law a verdict

(1) 35 Can. S.C.R. 68.

should be treated as synonymous with what is required by the term excessive damages, namely, an admission express or implied of liability coupled with a denial of its accurate and proper measurement. Hence a cross-appeal was needed.

I do not think it should now be allowed as mere matter of discretion. If the next jury should, as has been known to happen where local courts have used such discretion, give same verdict or greater, what should be done? Travel back here? If the court below had interfered in such a way we should not have reversed on that ground alone.

I would allow the appeal with costs here and in the Court of King's Bench and restore the judgment of the trial judge.

DUFF J. — The appellant claims compensation under article 1056 of the Civil Code for loss suffered by him in consequence of the death of his son whose death was found by the jury to have been occasioned by the negligence of the respondents. Article 1056 provides that

> in all cases where the person injured by the commission of an offence or quasi-offence dies in consequence, without having obtained indemnity or satisfaction * * * his ascendant * * * relations have a right * * * to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

The Court of King's Bench held that the right of action which formerly would have accrued under this article to the appellant has been taken away by the provisions of the "Workmen's Compensation Act," 9 Edw. VII. ch. 66. The last named enactment does not profess to repeal or amend the provisions of

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article 1056. The view upon which the Court of King's Bench proceeded was that it was a necessary implication to be found in the provisions of the Act that persons in the situation of the appellant were after the passing of the Act to be deprived of the recourse provided for in that article.

That opinion, as I understand it, rests upon section 15 of the "Workmen's Compensation Act," which is in the following terms:—

> 15. The employer shall be liable to the person injured or to his representatives mentioned in article 3 of this Act, for injuries resulting from accidents caused by or in the course of the work of such person, in the cases to which this Act applies only for the compensation prescribed by this Act.

The case before us is not, in my opinion, one of "the cases to which this Act applies." Such cases are ascertained—(1) by the nature of the employment of the person injured (sec. 1); (2) by the scale of wages (sec. 6); (3) as regards representatives entitled to compensation by the fact that they fall within the class and answer the descriptions in section 3. In the present case the requirements of the Act as regards the matters numbered (1) and (2) are no doubt satisfied; but the plaintiff does not fall within any of the descriptions of persons who, as representatives, are under section 3 entitled to the benefits of the Act; ascendants entitled to those benefits being limited to those of whom the deceased was the only support at the time of the accident.

It is to be observed that the right to recover damages under article 1056 exists only where death has ensued as a consequence of a delict or quasi-delict, the effect of the construction adopted in the court of appeal being that the right of action for wrongs having such consequences would be wholly taken away from

persons in the situation of the appellant. I think that such effect ought not to be given to a statutory enactment unless the intention of the legislature to take away the right of action is satisfactorily evidenced by the language employed. I do not think that satisfactory evidence of such an intention is to be found in section 15.

ANGLIN J.—I am, with great respect, unable to accept the interpretation which the Court of King's Bench has placed upon the "Employers' Liability Act," R.S.Q., 1909, arts. 7321, 7323, and 7335. That Act takes away certain rights of action which existed under the provisions of the Civil Code, art. 1056. A statute, especially one of this character, should not, upon any assumption or presumption of mistake or omission on the part of the legislature in the expression of its intention (*Commissioners for Special Purposes of Income Tax* v. *Pemsel*(1); *Cowper Essex* v. *Local Board of Acton*(2)), be treated as extinguishing rights of action which it does not expressly or by necessary implication abrogate.

Nor is it permissible to treat a statute, contrary to the expressed meaning, as embracing or excluding cases merely because of a probable view as to legislative intent and because no good reason appears for their inclusion or exclusion, as the case may be (*Denn* v. *Reid*(3); *Nixon* v. *Phillips*(4)), or to indulge in conjecture as to what the legislature would have done if the particular case under consideration had been

(1) [1891] A.C. 531, at p. 549.
(2) 14 App. Cas. 153, at p. 169.
(3) 10 Peters 524, at p. 527.
(4) 7 Ex. 188, at pp. 192-3.

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brought to its attention. *Attorney-General* v. *Noyes* (1); *Rex* v. *Inhabitants of Barham* (2); *Coe* v. *Lawrence* (3); *Jones* v. *Smart* (4).

The liability of the employer to the persons "mentioned in article 7323" is dealt with and restricted by article 7335. His liability to other persons is not touched. To read article 7335 as applicable to cases not within its terms is to legislate, not to interpret. To act upon an assumption of legislative intent which has not been explicitly stated is always attended with some danger; to do so where the result is to take away existing rights of action, if ever justifiable, can be so only where the necessary intendment is so certain from the scope and language of the statute itself that the court has before it what is tantamount to an actual expression of that purpose. Several provisions of the Quebec statute, notably article 7324, make it clear that the legislature did not, even within the specified classes, mean to substitute the statutory compensation for the liability of the employer under article 1056 C.C. in all cases in which his employee is the victim of an accident in the course of his work (art. 7321). It would rather seem to be the scheme of the legislation to substitute the statutory compensation only in the cases specified and in favour of the persons mentioned for the damages to which such persons would formerly have been entitled had an occurrence resulting in injury to an employee been occasioned by some fault ascribable to the employer, and to leave other cases and the rights of other persons in *statû quo*. I find nothing in the statute which indicates an

(1) 8 Q.B.D. 125, at p. 138.
(2) 8 B. & C. 99.
(3) 1 E. & B. 516
(4) 1 T.R. 44, at pp. 51, 52.

intention to deprive of a right to recover damages under article 1056 C.C., persons to whom it affords no substituted relief — certainly nothing which would justify holding that such is its necessary intendment. Moreover, upon such a construction the words in article 7335, "to the person injured or to his representatives mentioned in article 7323" are given no effect. Article 7335 is read as if these words were entirely omitted. Another fundamental canon of construction is thus violated. *Stone* v. *Corporation of Yeovil*(1); *Gaudet* v. *Brown*(2); *Presbytery of Auchterarder* v. *Earl of Kinnoull*(3).

I am, therefore, of the opinion that, because the plaintiff — as an ascendant of whom the deceased was not "the only support" — is not within the class of persons (art. 7323) to whom article 7335 declares that the employer shall be liable "only for the compensation prescribed by this sub-section," his legal right of action under article 1056 C.C., has not been taken away.

The circumstances under which the plaintiff's son was killed were such that, apart from misdirection, the finding of fault on the part of the defendants cannot be impeached. No objection was taken to the charge as is required by articles 489(3) and 506 C.P.Q. Nor was misdirection stated as a ground of appeal to the Court of King's Bench as is prescribed by article 499 C.P.Q. While the charge was undoubtedly open to grave objection in the passages dealing with the scope of the defendants' duty and as cal-

(1) 1 C.P.D. 691, at p. 701.

(2) L.R. 5 P.C. 134, at pp. 152-3

(3) 6 Cl & F. 646, at p. 686.

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culated to lead the jury to award excessive damages — so much so that, if exception had been duly taken, the defendants, subject to the provisions of article 500 C.P.Q., would have been entitled to have the verdict based upon it set aside — their disregard of the rules has deprived them of that right.

But the damages awarded are so large that from their very excess it is manifest that the jury was either "influenced by improper motives or led into error." Article 550 C.P.Q. The deceased, who was 21 years of age, was employed by the defendants as a street-car conductor. He was at work for ten hours every day. He lived with his father, contributing towards the family expenses $4 a fortnight and occasionally some articles of clothing for his younger brothers and sisters. He sometimes helped his father in the confectioner's shop kept by him. But any such assistance must have been very slight and of trifling value. The cost of the young man's board must have equalled, if it did not exceed, the value of anything which he gave in return. The plaintiff claims that he spent $418 in connection with the funeral of the deceased, of which only $110 was paid to the undertaker and $63 to the Church, including cost of burial and tombstone. The balance was expended, according to the plaintiff's account, in extra household expenses and mourning. It appears that he had not to bear any medical expenses. Nothing is said of any estate which the deceased may have left. Apart from the apparently extravagant expenditure in connection with the funeral, etc. (something certainly not to be encouraged), it is difficult to see from the evidence what pecuniary loss his son's death occasioned to the plaintiff. While I

think that $750 would represent the maximum damages which he should recover, I am not prepared to dissent from the opinion of the majority of my colleagues as to the amount that may be allowed.

This seems to be a proper case for the exercise of the power conferred by article 503 C.P.Q. If the plaintiff will consent, the judgment in his favour for damages rendered by the trial judge may be restored to the extent of $1,250. If he declines to accept a judgment for that amount there will be a new trial.

BRODEUR J. (dissident).—Je suis d'opinion de confirmer le jugement de la cour d'appel.

En vertu des dispositions de l'article 1056 du Code Civil, les ascendants d'une victime avaient le droit de poursuivre l'auteur du délit, mais si cette victime avait un conjoint et des enfants il ne pouvait être porté qu'une seule action pour tous ceux qui avaient droit à l'indemnité.

La loi de 1909 a modifié la responsabilité du patron dans les accidents du travail.

Les ouvriers ou leurs représentants devaient, sous l'empire du code, prouver la faute du maître pour pouvoir réussir dans leur poursuite.

On a substitué par la nouvelle législation à la théorie de la faute le risque professionnel. Les dommages sous l'empire du code pouvaient être accordés pour des sommes très considérables; mais maintenant ces dommages, dans les accidents ordinaires du travail, ne sauraient excéder $2,000. Les ascendants pouvaient autrefois réclamer tous les dommages que leur causait le décès de la victime du délit. Mais le législateur n'a conservé le recours à l'ascendant que si la victime était son seul soutien. Il est bien vrai qu'il

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n'est plus obligé de prouver faute de la part du patron; mais, d'un autre côté, ses droits sont restreints au cas où son fils était son seul soutien.

L'appelant prétend cependant que si le père avait d'autres moyens de subsistance il pourrait tout de même poursuivre le patron sous l'autorité du code civil.

Il y aurait là anomalie, si cette prétention était bien fondée, car les enfants et le conjoint sont obligés de s'unir pour instituer leur poursuite. Or, on se trouverait en présence d'un conjoint et d'enfants dont la réclamation ne pourrait pas dépasser $2,000, tandis que l'ascendant, s'il n'avait pas la victime pour seul soutien pourrait poursuivre, lui, pour une somme plus élevée que $2,000. Il serait obligé de prouver faute de la part du patron, tandis que les enfants et le conjoint ne seraient pas tenus à cela.

L'interprétation la plus rationnelle est, suivant moi, que l'ascendant, dans le cas d'un accident du travail, comme dans le cas actuel, ne peut réclamer que sous l'empire de la loi de 1909 et que son recours, qu'il possédait sous le code, lui a été enlevé par cette nouvelle législation.

Notre loi des accidents du travail a été basée sur la législation française. Elle diffère quelque peu dans les termes mais les principes sont les mêmes. Or, en France, on décide invariablement que l'ascendant n'a pas d'autre recours que celui que la loi des accidents du travail lui donne.

Appeal allowed with costs.

Solicitors for the appellant: *Choquette, Galipeault, St. Laurent, Metayer & Laferté.*

Solicitors for the respondents: *Bédard, Lavergne & Prévost.*