

Privy Council Appeal No. 42 of 1922.

Edith May Walpole - - - - - *Appellant*

v.

The Canadian Northern Railway Company - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR SASKATCHEWAN.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 24TH OCTOBER, 1922.

Present at the Hearing :

VISCOUNT CAVE.
LORD PARMOOR.
LORD PHILLIMORE.
LORD JUSTICE CLERK.
MR. JUSTICE DUFF.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal from a judgment of the Court of Appeal for the Province of Saskatchewan affirming the judgment of the Court of King's Bench for the same Province, whereby judgment was entered for the respondents in an action brought by the appellant for damages under the Fatal Accidents Act of the Province.

The respondents are a Railway Company incorporated by a Dominion Act (1 Edward VII, Chapter 51), and operating a system of railways in British Columbia, Saskatchewan, and other parts of Canada. Thomas William Walpole (the appellant's husband) was a locomotive engineer in the employment of the respondent company, and at the time of the accident which gave rise to this action, was resident at Lucerne in British Columbia. On the 17th April, 1919, he was in charge of a locomotive which was proceeding with a freight train on the respondents' railway, westward of the village of Lucerne; and when the train reached a high bridge supported by piles, the bridge gave way and the

locomotive fell into the stream beneath, and Walpole sustained injuries which proved fatal. The appellant took out letters of administration of her husband's estate in British Columbia; but shortly afterwards she went to reside at Saskatoon in Saskatchewan, and her letters of administration were re-sealed in that Province. On the 4th November, 1919, she commenced in the Court of King's Bench of Saskatchewan an action against the respondents under the Fatal Accidents Act, claiming, on behalf of herself and her infant daughter, damages for the respondents' negligence and the resultant death of her husband.

The action was tried at Regina by Mr. Justice Bigelow and a jury. At the close of the case the respondents moved for a nonsuit on the ground that, having regard to the provisions of the Workmen's Compensation Act of British Columbia, the action did not lie. The learned Judge reserved his decision on this question, and put certain questions to the jury, who answered them as follows :---

" 1. Was the accident caused by the negligence of the defendant ?

Answer.—Yes.

" 2. If so, in what did such negligence consist? *Answer.*—The negligence of the defendant consisted in not keeping the bridge in safe repair.

" 3. Damages.

" (a) For widow Edith May Walpole. *Answer.*—\$10,000.00.

" (b) For infant Madeline Isabel. *Answer.*—\$6,000.00."

The learned Judge, however, entered judgment for the respondents on the point of law, and upon appeal to the Court of Saskatchewan that Court affirmed the decision. Thereupon the present appeal was brought to His Majesty in Council.

The Fatal Accidents Act of Saskatchewan (R.S.S. 1909, c. 135), which is similar for all purposes material to this action to the British statute known as Lord Campbell's Act, provides as follows :—

" Whenever the death of a person has been caused by such wrongful act, neglect or default as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in each case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the party injured."

It is provided by the Act that every such action is to be for the benefit of the wife or other dependents of the person whose death has been so caused, and is to be brought by the executor or administrator of such person. A similar statute is in force in British Columbia (R.S.B.C., 1902, c. 11).

Part I of the Workmen's Compensation Act of British Columbia (R.S.B.C., 1916, c. 77), which applies to railways, provides (by section 6) that

" Where, in any industry within the scope of this Part, personal injury by accident arising out of and in the course of the employment is caused to a workman, compensation as provided by this Part shall be paid by the Board out of the Accident Fund."

Accident is defined (in section 2) as including a wilful and an intentional act, not being the act of the workman, and a fortuitous event occasioned by a physical or natural cause. Section 11 (1) of the Act is as follows :—

“ The provisions of this Part shall be in lieu of all rights of action to which a workman or his dependents are entitled, either at common law or by any statute, against the employer of such workman for or by reason of any accident which happens to him arising out of and in the course of his employment, and no action against the employer shall lie in respect of such accident.”

The scale of compensation payable to a workman, or (when death results from the injury) to his dependents, is fixed by sections 15 to 24. Later sections provide for the formation of the Accident Fund, which is raised by yearly assessments on the employers on the basis of their pay-rolls; and for the constitution of a Workmen's Compensation Board, which is to make and collect the assessments, and is to determine, without appeal, all questions relating to compensation.

The question raised in this appeal is whether, having regard to these provisions, the appellant, as administratrix of the deceased, can recover in the Courts of Saskatchewan damages for the respondents' negligence in British Columbia, which resulted in his death. In their Lordships' opinion she cannot. By the Common Law the legal personal representative of a person whose death is caused by the negligence of another has no right to sue for damages; and the Fatal Accidents Act of Saskatchewan confers that right on the representative only in cases where the deceased himself, if he had lived, would have been entitled to maintain an action and recover damages. Now, in the present case such an action if brought by Walpole himself, would have been barred by the provisions of the Workmen's Compensation Act of British Columbia, and particularly by section 11 (1) of that Act. The effect of that statute was that the deceased, who was resident and employed in British Columbia, held his contract of employment subject to the double condition—first, that he should be entitled to compensation for accidents, however caused, and, secondly, that he should have no other remedy. These conditions were, by virtue of the statute, incorporated in his contract, and were binding upon him wherever his action might be brought; and if he had lived and had himself commenced proceedings in Saskatchewan for the company's negligence, the condition would have been a sufficient answer to his claim.

From this it follows that the condition upon which alone the appellant was entitled to sue—viz., that the deceased himself might have sued had he lived—is not fulfilled, and the action fails on that ground. The decisions of the Board in *Canadian Pacific Railway Company v. Parent* (L.R. 1917 A.C. 196) and *Workmen's Compensation Board v. Canadian Pacific Railway Company* (L.R. 1920 A.C. 184) are in point.

The difficulty may be put in another way. By the well-known rule laid down by Willes J. in *Philips v. Eyre* (1870, L.R. 6

Q.B. 1), an action will not lie in one country or province for a wrong committed in another unless two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in the country of the *forum*; and, secondly, it must not have been justifiable by the law of the country where it was done. It is unnecessary for the purposes of this appeal to consider the precise meaning of the term "justifiable," as used by Mr. Justice Willes; but, at all events, it must have reference to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule. In the present case the negligence of the company was not actionable in British Columbia; for, under the Workmen's Compensation Act of the Province, no action would lie against the company, but only a claim against the Board for compensation. It was, indeed, suggested that the negligence of the company might have been the subject of a prosecution in British Columbia under art. 283 or 284 of the Criminal Code; but criminal negligence was neither alleged nor proved in the Canadian Courts, and the Board cannot assume its existence. This being so, then on this ground also an action by the deceased would have failed, and the appellant's action fails also.

It was further suggested on behalf of the respondent company that the Fatal Accidents Act of Saskatchewan is confined to cases of negligence occurring within that Province; but this question was not fully discussed, and their Lordships therefore express no opinion upon it.

For the reasons above given, their Lordships agree with the conclusion of the Court of Appeal, and they will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

In the Privy Council.

EDITH MAY WALPOLE

v.

THE CANADIAN NORTHERN RAILWAY
COMPANY.

DELIVERED BY VISCOUNT CAVE.

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