Privy Council Appeal No. 18 *of* 1948

The Governor General in Council - - - - - *Appellant*

v.

Constance Zena Wells - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH NOVEMBER, 1949

Present at the Hearing:

LORD SIMONDS
LORD MACDERMOTT
LORD RADCLIFFE
SIR JOHN BEAUMONT
SIR LIONEL LEACH

[*Delivered by* LORD MACDERMOTT]

The suit out of which this appeal arises was brought *in forma pauperis* by the respondent against the appellant under the Fatal Accidents Act, 1855, for damages for the death of her husband, Ronald Duncan Wells. He had died on the 14th December, 1937, as the result of injuries received a few days earlier when the engine on which he was serving as a fireman in the employment of the North Western Railway was involved in a collision within the limits of the railway station at Mirpur Mathelo. The respondent alleged that the collision was caused by the negligence of the Railway's employees and claimed on behalf of her two children and herself. At the date of the accident the North Western Railway was owned by the Government of India and administered by the Secretary of State for India in Council acting through the North Western (State) Railway Administration. The deceased was then serving on the Railway pursuant to a contract of service made by him with the Secretary of State on the 29th March, 1929.

The suit came to hearing in the court of the Subordinate Judge, First Class, at Lahore. He held that the accident was solely due to the negligence of the driver of the engine on which the deceased was acting as fireman, that the driver and the deceased were in common employment and that defendant was entitled to rely upon the doctrine of common employment as a defence to the suit notwithstanding the provisions of section 3 (*d*) of the Indian Employers' Liability Act, 1938 (hereinafter referred to as the Act of 1938). He accordingly found for the defendant and on the 5th July, 1940 decreed that the suit be dismissed.

On appeal to the High Court at Lahore this decision was reversed and the plaintiff was granted a decree for Rs. 36,000 to be divided between her and her children in three equal shares. The decree and judgment of the High Court were pronounced on the 18th May, 1945. It is from them that the present appeal is brought by the Governor General in Council.

Before their Lordships' Board no question was raised as to parties or the respondent's right to sue or the quantum of damages awarded by the High Court. The grounds of appeal were limited by counsel on behalf of the appellant to two points of law which had been considered and decided against him by the High Court. They may be stated shortly in question form thus:—

(1) Is the Crown bound, in relation to the administration of the North Western Railway, by the Act of 1938? and

(2) If so, do the provisions of section 3 (*d*) of the Act of 1938 make the defence of common employment inapplicable in the present case?

In view of the conclusion which their Lordships have reached on the second of these questions it becomes unnecessary to decide the first. For that reason and as the respondent was not represented before the Board their Lordships, while acknowledging the assistance they have received from the fair and careful argument of counsel on behalf of the appellant, are not disposed to enter upon a discussion of the important and difficult issues which the first question involves. They, therefore, proceed to a consideration of the second, assuming for the purpose, but without expressing any view on the matter, that the respondent is entitled as against the appellant to rely upon the Act of 1938 by way of answer to the plea of common employment.

In so far as material to this appeal section 3 of the Act of 1938 reads as follows:—

"3. Where personal injury is caused to a workman—

(*a*) . . . .

(*b*) . . . .

(*c*) . . . .

(*d*) by reason of any act or omission of any person in the service of the employer done or made in obedience to any rule or bye-law of the employer . . . or in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties;

a suit for damages in respect of the injury instituted by the workman or by any person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service of, or engaged in the work of, the employer."

The negligence of the engine driver consisted in driving past a signal set at danger. On the facts it is clear that this was not done in obedience to any rule or bye-law or to any instructions the driver had received. It was done in the ordinary course of his employment. It may be open to question whether this is the equivalent of saying, in the words of the section, that it was done "in the normal performance of his duties", but for present purposes their Lordships will assume, in the respondent's favour, that it is.

In these circumstances the crucial question is whether section 3 (*d*) is to be read as covering two categories of negligence or three. For the appellant it was contended that it covered but two—the act or omission of a fellow servant done or made (i) in obedience to any rule or bye-law of the employer; and (ii) in obedience to particular instructions given by a person either by virtue of authority delegated by the employer in that behalf or in the normal performance of such person's duties. If this is the true meaning of paragraph (*d*) it is plain, on the facts stated, that it did not operate to take away the defence of common employment in the present case. The High Court, on the other hand, held that paragraph (*d*) covered three categories—the act or omission of a fellow servant done or made (i) in obedience to any rule or bye-law of the employer;

(ii) in obedience to particular instructions given by a person to whom the employer has delegated authority in that behalf; and (iii) in the normal performance of his, the fellow servant's, duties. If this is the correct interpretation then, on the assumptions already mentioned, the present case would fall within the third category and common employment would not be a defence.

In the view of their Lordships the true construction of section 3 (*d*) is that contended for by the appellant. It accords better with the grammatical structure of the paragraph and is the more natural reading of the language used. In addition, it conforms better with the limited purpose of the Act which, as its title and the particularity of the several paragraphs of section 3 go to show, was intended not to abolish the doctrine of common employment but rather to reduce its scope. If, however, what may be called the three category construction were to prevail the result would be to reduce the doctrine almost, if not altogether, to the point of extinction and to render otiose much in section 3 which is designedly detailed and specific. It is true that in the British Employers' Liability Act of 1880, on which the Act of 1938 was obviously modelled to a considerable extent, section 1 (4)—which is the provision corresponding to section 3 (*d*) of the Indian Act—does not contain the words " or in the normal performance of his duties " or any equivalent. The addition of these words in section 3 (*d*), however, but strengthens the view which their Lordships have already expressed. In 1888 it was held by the English Court of Appeal in *Claxton* v. *Mowlem & Co.* 4 T.L.R. 756, that the words of section 1 (4) of the Act of 1880:—

> " . . . particular instruction given by any person delegated with the authority of the employer in that behalf "

referred to a manager or person in the position of a manager and not to one who was but a fellow worker. The words added at the end of section 3 (*d*) of the Act of 1938 are apt to avoid the limiting effect of this decision and their Lordships have no doubt that they were inserted with that intention and ought, accordingly, to be read as enlarging the class of persons in obedience to whose instructions the fellow servant has done or made the act or omission causing the injury complained of.

Their Lordships are therefore of opinion that the defence of common employment was open to the appellant and that the second question should be answered in the negative. As on the facts and findings it was an effectual defence, it follows that the claim must fail.

Their Lordships will, accordingly, humbly advise His Majesty that the appeal be allowed, the decree of the High Court set aside and that of the Subordinate Judge restored.

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In the Privy Council

THE GOVERNOR GENERAL IN COUNCIL

v.

CONSTANCE ZENA WELLS

DELIVERED BY LORD MACDERMOTT

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