ALFIO MINGARELLI (*Defendant*) .....APPELLANT;

1958
*Oct. 9
Dec. 18

AND

MONTREAL TRAMWAYS COMPANY (*Plaintiff*) ..... } RESPONDENT.

ALFIO MINGARELLI (*Defendant*) .....APPELLANT;

AND

GUISEPPE MEZZAPELLA (*Plaintiff*) ...RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Damages—Employee injured—Workmen's compensation paid by employer—Subrogation in favour of employer—Actions by employer and victim against tort-feasor—Apportionment of damages—Workmen's Compensation Act, R.S.Q. 1941, c. 160, ss. 7(3), 8.

The plaintiff M, an employee of the plaintiff company, was injured in the course of his employment when struck by a car owned and driven by the defendant. He was paid compensation under the *Workmen's Compensation Act* by his employer. The employer took action against the defendant by virtue of the subrogation contained in s. 7(3) of the Act, and the plaintiff M, by way of a separate action, sued under s. 8 to recover the additional amount required to constitute, with the amount paid to him under the Act, full compensation for his loss. Both actions were joined for proof and hearing, and were heard together. The trial judge found the defendant solely to blame and apportioned damages between the two plaintiffs. This judgment was affirmed by the Court of Appeal.

In this Court, the plaintiffs' counsel was requested to restrict his argument to the question of apportionment of damages. It had been contended by the defendant that the damages must be allocated without regard to their headings, because the subrogation in favour of the employer operates in regard to all the rights of the victim, whatever the headings under which the damages are claimed may be.

Held: The appeal should be dismissed.

The subrogation in s. 7(3) of the Act is an exception to the general law; it must be strictly interpreted and is only a partial subrogation. It is limited to amounts paid by an employer with respect to those losses for which he is legally liable to pay compensation under the Act and can be applied only to amounts recovered by way of these losses from the tort-feasor. There was evidence upon which the trial

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*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Judson JJ.

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judge could properly make the apportionment which he did. This apportionment was accepted by both plaintiffs and it is doubtful whether the defendant had any legal interest in questioning it. In any event, it was rightly affirmed by the Court of Appeal.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Archambault J. Appeals dismissed.

Jean Brisset, Q.C., for the defendant, appellant.

Jules Deschènes, for the plaintiffs, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—The respondent Mezzapella, an employee of the Montreal Tramways Company, was seriously injured while in the course of his employment, as a result of being struck by an automobile owned and operated by the appellant. He was entitled to receive and was paid by the respondent Montreal Tramways Company compensation under the *Workmen's Compensation Act,* R.S.Q. 1941, c. 160, as amended.

Under the provisions of that Act, the respondent, Montreal Tramways Company, sued appellant in virtue of the subrogation contained in s. 7(3) of the Act, and respondent Mezzapella also took a separate action under s. 8 of the Act to recover from appellant an additional amount required to constitute, with the amount paid to him under the Act, compensation for the total loss which he had sustained as a result of his injuries.

Both actions were joined for proof and hearing and were heard and argued together.

The learned trial judge found the appellant solely responsible for the accident. He fixed the total damages suffered by the respondent Mezzapella at $9,302.60, apportioned these $3,134.72 to Mezzapella and $6,167.88 to Montreal Tramways Company, and rendered judgments in the two actions accordingly. With a minor adjustment as to the amount awarded the Montreal Tramways Company which is not relevant to these appeals, these judgments were confirmed by the Court of Queen's Bench[1]. Mr. Justice Martineau, dissenting, would have held the

[1] [1956] Que. Q.B. *620*

respondent Mezzapella in part responsible for the accident and would have reduced the amount awarded for permanent partial incapacity.

At the conclusion of the argument on behalf of appellant, the respondents' counsel was informed by the Court that it desired to hear him only as to the question of the apportionment of damages which had been raised by appellant.

In his factum counsel for appellant submitted that this apportionment should have been based upon the following principle:

> Une fois établis, . . . les dommages doivent être attribués . . . sans tenir compte des chefs en regard desquels ces dommages ont pu être accordés, car la subrogation en faveur de l'employeur opère en regard de tous les droits de la victime, quels que soient les chefs sous lesquels les dommages puissent être réclamés.

In my opinion that submission is not well founded. The rights of the parties depend upon the effect to be given to ss. 7(3) and 8 of the *Workmen's Compensation Act*, which read as follows:

> 7(3) If the workman or his dependents elect to claim compensation under this act, the employer, if he is individually liable to pay it, or the Commission, if the compensation is payable out of the accident fund, as the case may be, shall be subrogated *pleno jure* in the rights of the workman or his dependents and may, personally or in the name and stead of the workman or his dependents, institute legal action against the person responsible, and any sum so recovered by the Commission shall form part of the accident fund. The subrogation takes place by the mere making of the election and may be exercised to the full extent of the amount which the employer or the Commission may be called upon to pay as a result of the accident. Nevertheless, if as a result of this act, the employer or the Commission happen afterwards to be freed from the obligation of paying a part of the compensation so recovered, the sum not used shall be reimbursable within the month following the event which determines the cessation of the compensation.
>
> Agreements or compromises effected between the parties respecting such action or right of action shall be null and void, unless approved and ratified by the Commission, and the payment of the amount agreed upon or adjudged shall be made only in the manner indicated by the Commission.
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> 8. Notwithstanding any provision to the contrary and notwithstanding the fact that compensation may have been obtained under the option contemplated by subsection 3 of section 7, the injured workman, his dependents or his representatives may, before the prescription enacted in the Civil Code is acquired, claim, under common law, from any person other than the employer of such injured workman any additional sum

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Abbott J.

required to constitute, with the above-mentioned compensation, an indemnification proportionate to the loss actually sustained.

The subrogation provided for in subsection 3 of section 7 is an exception to the general law; it must be strictly interpreted and, as Bissonnette J. has pointed out in *Commission des Accidents du Travail de Québec v. Collet Frères Limitée*[1], the section provides only for a partial subrogation. In my opinion that subrogation is limited to amounts paid by the employer with respect to those losses for which the employer is legally liable to pay compensation under the Act and can be applied only to amounts recovered with respect to such losses from the author of the accident. For instance, a workman has no claim against his employer under the Act for damages sustained by him as a result of pain and suffering and, if he claims and recovers such damages from the author of the accident, the employer is not entitled under the subrogation to receive or be paid any portion of such amount.

As was pointed out in the Court below, the provisions of the *Workmen's Compensation Act* giving two rights of action, one to the employer (or the Workmen's Compensation Commission) and another to the workman, do not operate effectively unless either (1) a joint action is taken; (2) the employer or the Commission is brought in as *mise-en-cause* or (3) the two separate actions, if taken, are joined for proof and hearing, as in the present case.

The learned trial judge fixed the amount of the total damages which the respondents had suffered and for which the appellant was held solely responsible, apportioned these damages between the two respondents, and rendered judgment in each of the two actions accordingly. In my opinion there was evidence upon which he could properly make the apportionment which he did. Both respondents accepted the apportionment made and I doubt whether appellant has any legal interest in questioning that appor-

[1] [1958] Que. Q.B. 331 at 334.

tionment. In any event it has been confirmed by the Court below and in my opinion that Court was right in so doing.

I would dismiss both appeals with costs.

Appeals dismissed with costs.

Attorneys for the defendant, appellant: Beauregard, Brisset, Reycraft & Lalande, Montreal.

Attorneys for the plaintiffs, respondents: Létourneau, Quinlan, Forest, Deschènes & Emery, Montreal.