

*Privy Council Appeal No. 137 of 1913.*

**The British Columbia Electric Railway Com-  
pany, Limited** - - - - - *Appellants,*

*v.*

**Violet Gentile** - - - - - *Respondent.*

FROM

**THE COURT OF APPEAL OF BRITISH COLUMBIA.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 16TH JUNE 1914.

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*Present at the Hearing :*

LORD DUNEDIN.

LORD SUMNER.

LORD MOULTON.

SIR GEORGE FARWELL.

LORD PARKER OF WADDINGTON.

*[Delivered by LORD DUNEDIN.]*

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The appellants are a company working the tramways in the streets of the city of Vancouver. This they do as assignees of the Consolidated Railway Company incorporated by cap. 55 of the Acts of British Columbia, 1896. The respondent is the administratrix of Vernon Aldrich, deceased, who was struck and killed by one of the appellants' cars on 7th October 1911.

The respondent raised action on behalf of the father and mother of the deceased on 10th June 1912, in virtue of the provisions of the Families Compensation Act, c. 82, of the Revised Statutes of British Columbia. In the statement of claim the plaintiff averred that the death of Vernon Aldrich was caused by the negligence of the servants of the defendants.

The defendants denied negligence and joined issue on the fact. They also pled that the action was barred, not having been raised within six months of the death of the deceased. This plea they rested on the terms of Section 60 of the Consolidated Railway Act, which is in the following terms :—

“ All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act.”

— — — The case came before a jury. The learned Judge repelled the plea founded upon Section 60 and the jury found a verdict for the plaintiff and assessed damages at \$3,000 which sum the Judge then directed should be paid, \$2,000 to the father and \$1,000 to the mother of the deceased man.

The defendants appealed to the Court of Appeal repeating their plea founded on Section 60, and further contending that the verdict was contrary to evidence. The Court of Appeal affirmed the judgment of the Court below, but granted leave to appeal to this Board. The question of the verdict being contrary to evidence was not argued before, and would not have been entertained by their Lordships. The whole question is therefore whether the action was barred as being raised too late.

To get the benefit of the limitation expressed in Section 60 the appellants must show that the present suit is one for “ indemnity for damages sustained by reason of the railway or the operations of the Company.” Indemnity

obviously means indemnity to the plaintiff in the suit, in respect of wrong done to the plaintiff and damages sustained by him owing to the railway or the operations of the Company. Their Lordships assume without deciding that the words "operations of the Company" include negligent driving of a car.

The question therefore comes to turn on whether a suit raised in virtue of the provisions of The Families Compensation Act answers to the description above set forth.

The Families Compensation Act is for all practical purposes textually the same as the Act known as Lord Campbell's Act in the United Kingdom, of which Act it is indeed a copy. Now the character of the right given by Lord Campbell's Act has been the subject of much judicial decision. As early as 1852, in the case of *Blake v. The Midland Railway Company*, 18 Q.B. 93, Coleridge, J., giving the judgment of the Court said, "It is evident that this Act does not transfer this right of action (of the deceased) to his representative, but gives to the representative a totally new right of action on different principles." Then in the case of *Pym v. Great Northern Railway Company*, 4 B. and S. 396, Erle, C. J., said, "The statute gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on a different principle." In his judgment Williams and Willes, J.J., and Bramwell and Channell, B.B., concurred. And, finally, in the case of *The Vera Cruz*, 10 App. Cas. 59, Selborne, L.C., says:—

"Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim '*Actio personalis moritur cum personâ*,' because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action

“ which could survive, but to his wife and children, no  
 “ doubt suing in point of form in the name of his executor.”

And Lord Blackburn says :--

“ I think that when (Lord Campbell's) Act is looked at  
 “ it is plain enough that if a person dies under the circum-  
 “ stances mentioned, when he might have maintained an  
 “ action if it had been for an injury to himself which he  
 “ had survived, a totally new action is given against the  
 “ person who would have been responsible to the deceased  
 “ if the deceased had lived ; an action which, as is pointed  
 “ out in *Pym v. The Great Northern Railway Company*, is  
 “ new in its species, new in its quality, new in its principle,  
 “ in every way new.”

These dicta are in their Lordships' opinion directly applicable to the Families Compensation Act. It follows that, in their opinion, a suit brought under the provisions of that Act is not a suit for indemnity for damage or injury sustained by the plaintiff by reason of the operations of the defendants, and that Section 60 has no application. They do not agree with the reasoning of and the result arrived at in the case of *Markey v. The Tollworth Joint Isolation Hospital District Board*, (1900) Q.B. 454 which they consider directly in conflict with the law as laid down in the case of *The Vera Cruz* in the House of Lords. This, however, does not end the matter, for although the action under Lord Campbell's Act or the Families Compensation Act is not an action of indemnity for negligence yet nevertheless it is an action which can only exist if certain conditions precedent are fulfilled. The first is that the death shall have been caused by wrongful act, neglect or default of the defendants. That has in this case been affirmed by the verdict of the jury. The second is that the default is such “ as would if death had not ensued have “ entitled the party injured to maintain an action “ and recover damages in respect thereof.”

Their Lordships are of opinion that the *punctum temporis* at which the test is to be taken is at the

moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment, maintained, *i.e.*, successfully maintained his action, then the action under the Act does not arise. Therefore when the deceased had already been compensated and discharged all claims (*Read v. Great Eastern Railway Company*, L.R. 3 Q.B. 555), or had covenanted away his rights (*Griffiths v. Earl of Dudley* 9 Q.B.D. 357), he was not in a position to "maintain an action." This is the ground on which Lord Blackburn in the former case expressly puts his judgment. Their Lordships feel bound to add that, in their opinion, the remark which follows has been misunderstood. Lord Blackburn, after commenting on Section 1, goes on to say that Section 2 does not give a "new right of action." That means in law beyond what is given by Section 1. But it has been interpreted in a wider sense by Field and Cave, JJ., in Griffiths' case. That this is erroneous is best appreciated by remembering that Lord Blackburn himself used the emphatic words quoted above in *The Vera Cruz* two years after he pronounced the judgment in *Read's* case and that when the erroneous view of *Read's* case was urged in argument he quoted the words above cited from the older case of *Pym*.

It follows from what their Lordships have said that the dicta in the case of *Green v. British Columbia Electric Railway Company*, 1906, 12 B.C. 199, cannot be supported in their entirety. Since that case was decided, however, the case of *British Columbia Electric Railway Company v. Turner* has been decided by the Supreme Court of Canada, and their Lordships have been furnished with a transcript of the judgments. The views of the learned Judges—subject to one point to be presently noticed—seem to their Lordships in

accordance with the views now expressed. The learned Chief Justice says specially of the action—

“ In one sense it is a new action, but the condition, “ subject to which that right of action may be exercised, “ being that the deceased did not receive indemnity or “ satisfaction during his lifetime to that extent, and in that “ respect it is a representative or derivative action.”

The other Judges base their opinion on the same view, although they partly also go on the view expressed in Green's case.

In the only point of difference between them their Lordships agree with the view expressed by Mr. Justice Anglin. That learned Judge says :—

“ I find no satisfactory ground of distinction between “ the extinguishment of the cause of action by the injured “ man by an accord and satisfaction, evidenced by a “ release, and its extinguishment by the recovery of a “ judgment upon it or the expiry of a period of limita- “ tion.”

In their Lordships' view this is correct, and the case of *Williams v. Mersey Docks, Ltd.*, 1905, 1 K.B. 804, was rightly decided. As to the case of *Turner v. British Columbia Electric Railway Company* it is scarcely necessary to add that their Lordships are in entire accordance with the view there given effect to, viz., that the raisers of the action under the Families Compensation Act have a title to set aside a release obtained from the deceased man by fraud.

Applying these views to the facts of the case the deceased man had at the moment of his death in no way forfeited or parted with the right of action competent to him for the injury done him. His death took place and the action on the part of the respondent sprang into being. It was raised within 12 months after the death and is therefore competent.

The result is that in their Lordships' opinion the decision of the Court below was correct and they will humbly advise His Majesty to dismiss the appeal with costs.

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In the Privy Council.

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THE BRITISH COLUMBIA ELECTRIC  
RAILWAY COMPANY, LIMITED

2.

VIOLET GENTILE.

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DELIVERED BY LORD DUNEDIN.

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