1955
*Nov. 15
1956
*Feb. 10

OLIVA ROSSIGNOL AND RODOLPHE ROSSIGNOL (*Plaintiffs*) ..... APPELLANTS;

AND

MOE HART (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Labour—Workmen's compensation—Refusal by Board to entertain claim—Finding that no injury sustained—Whether conclusive and binding in subsequent action against co-employee for negligence—Whether action precluded—Workmen's Compensation Act, R.S.N.B. 1952, c. 255, ss. 9, 11, 32.

The determination by the Workmen's Compensation Board of New Brunswick that an employee sustained no injury as the result of an employment accident, does not preclude that employee from suing a co-employee in a common law action on the grounds of negligence. That determination by the Board is not conclusive nor binding between the two parties.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), holding, Michaud C.J.Q.B. dissenting, that the finding of the Workmen's Compensation Board was conclusive in a subsequent negligence action.

P. E. Pelletier for the appellants.

E. N. McKelvey for the respondent.

The judgment of the Court was delivered by:—

RAND J.:—The question here arises out of the Workmen's Compensation Act of New Brunswick. The appellant, Oliva Rossignol, wife of Rodolphe, was a fellow

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ. Estey J. died before the delivery of the judgment.

(1) [1955] 2 D.L.R. 823; 37 M.P.R. 284.

employee of the respondent Hart and was allegedly injured in the course of her employment through the negligence of Hart. A claim for compensation was made on her behalf but the Compensation Board found that she had not in fact suffered any injury. This action was thereupon commenced in which the defence raised the ground that that finding of fact by the Board was binding in this proceeding on the appellants. A question of law was by consent referred to the Appellate Division (1) in the following words:

> Is the determination by the Workmen's Compensation Board of the Province of New Brunswick that the plaintiff Oliva Rossignol did not suffer an injury of any kind or degree as a result of an accident occurring on the 6th day of April, 1951, while she was in the employ of Dalfen's Department Store in the City of Edmundston in the said province, in which said accident she was hit on the head by a falling manikin, conclusive and binding between the plaintiffs and the defendant herein, so that this court, in determining the issues herein, is precluded from reconsidering the question determined as aforesaid by the said Board?

The court by a majority judgment of Richards C.J. and Hughes J. held the ground to be well taken and answered the question in the affirmative; Michaud C.J. of the Trial Division dissented and the question comes before us by special leave.

The respondent relies upon certain sections of the statute:

> 9. (1) Where an accident occurs to a workman in the course of his employment in such circumstances as to entitle him or his dependents to an action against some person other than his employer, the workman or his dependents, if entitled to compensation under this Part, may either claim compensation or bring the action.
>
> (2) If the workman or his dependents bring an action, and less is recovered and collected than the amount of the compensation to which the workman or his dependents would be entitled under this Part, the workman or his dependents shall be entitled to compensation under this Part to the extent of the amount of such difference.
>
> (3) If the workman or his dependents, or any of them, have claimed compensation under this Part, the Board shall be subrogated to the position of such workman or dependents as against the other person for the whole or any outstanding part of the claim of such workman or dependents against such other person.
>
> 11. The provisions of this Part are in lieu of all claims and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of the workman for or by reason of an accident in respect of which compensation is payable under this Part.

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32. (1) Except as provided in Section 34 the Board has exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court, and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court.

(2) Without thereby limiting the generality of the provision of subsection (1), it is declared that such exclusive jurisdiction extends to determining,

(a) the existence of, and degree of, disability by reason of any injury;

* * *

It is clear that the statute deals primarily with the relations between employers and employees and except in certain cases of wilful or reckless conduct gives an absolute right to compensation regardless of negligence in the employer or third person; injuries to employees occurring within the course and out of their employment are gathered within the area of ordinary wastage of business and industry and are accorded compensation analogous to any other loss or expense therein.

Only incidentally are third persons, whether fellow employees or not, affected. S. 9(3), in providing subrogation, does not effect a statutory novation of the claim against the third person to the Board, as s-s. (2) conclusively indicates, and that interpretation was given to similar language of the Ontario Act in *Toronto Railway Company* v. *Hutton* (1) and of the British Columbia statute, in the case of *The King* v. *Snell* (2). Whatever rights in such a claim vest in the Board are equitable in nature and are a matter of interest only between the Board and the employee receiving compensation.

I think it beyond serious argument that the respondent has no interest in the investigation by the Board of a claim for compensation; and it would be contrary both to the statutory provisions and to principle generally that a person should be bound by a finding pronounced in his absence. If he is to be bound, then certainly he is entitled to notice of and to participate in the enquiry. Not only the actual wrongdoer but every other third person liable vicariously for his tortious act should also be brought before the Board.

(1) (1919) 59 Can. S.C.R. 413. (2) [1947] S.C.R. 219.

But the statute is silent on this essential consideration and counsel could not point to any case in which such a third party has ever been treated as interested in the adjudication of a claim. But if, as between the respondent and the appellants, the latter are barred, so must the former be; a ruling in rem such as was found below would bind everybody: it would be impossible, as between themselves, that one should be free and the other bound.

It would, moreover, in any case, be a novel procedure that a claimant or a third party, employee or employer, must submit to the adjudication of such an administrative body on an essential element of his common law right or liability. It would in ordinary cases be ultra vires of the province to confer that power on a provincial tribunal. Even assuming that the issue of negligence could ever be committed to an inferior court, beyond petty jurisdiction the judges, for such purpose, must, by the Confederation Act, be of Dominion appointment.

The case of *Noell* v. *Canadian Pacific Railway Company* (1), was relied upon by Richards C.J., but with the greatest respect the question there raised was wholly different from that here. An action had been brought in Ontario against the employer company and an application was made by the latter to the Compensation Board of New Brunswick for a determination whether the accident from which the injury arose had arisen "out of and in the course of the employment". If that had been determined affirmatively, by the express language of s. 11 no action at law against the employer would lie. What was held by this Court was that the employer was entitled to call upon the Board to decide that question and that the finding by the Board to that effect was, vis a vis the claimant, binding on the employer for all purposes. The decision involved the provisions of the Act both as to the conclusiveness of the findings of the Board and the effect on the right of action against the employer and it dealt solely with the issue as between the parties before the court. The reasons for a judgment must, as it has so frequently been said, be read *secundum subjectam materiam;* the subject matter of the Noell issue was whether the accident was or was not a case for compensation. Who, then, was interested in that question? As I

(1) [1952] 2 S.C.R. 359.

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have endeavoured to show, not any third person who might, by his own negligence or vicariously, have caused or was liable for the injury. It must be one whose interest is derived through or bound up with that of the injured employee or his employer. For example, another employer in the same class whose assessment would depend on the claims established against his class might possess that interest. How, then, the case can be taken to be an authority for the proposition that a finding as between employer and employee, on a subsidiary issue, the fact and degree of injury, can, in the absence of clear statutory provision, absolve a third party from liability under the general law I am quite unable to appreciate. This was the view of Michaud C.J. and with it I am in entire agreement.

The appeal should be allowed and the question answered in the negative. The appellants will be entitled to their costs in both courts.

Appeal allowed with costs.

Solicitors for the appellants: *Pichette & Pelletier.*

Solicitors for the respondent: *McKelvey, Macaulay & Machum.*