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Burkhardt v. Beder, [1963] S.C.R. 86

F. E. A.

Burkhardt v. Beder, [1963] S.C.R. 86.

In the case of *Burkhardt v. Beder,*[1] the Court has settled a problem in procedure which had apparently puzzled the Ontario Bar for some time.

In this case the widow of the late Christian Burkhardt sued for damages under the Fatal Accidents Act.[2] The statement of claim as originally delivered claimed general damages of $15,000 and $300 for funeral expenses. By an amendment made at the opening of the trial, the claim for general damages was increased to $20,000.

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1 [1963] S.C.R. 86.
2 R.S.O. 1960, c. 138.

After the jury assessed the total damages of the plaintiff at $26,000 as general damages and $300 as special damages, Aylen J. awarded her $13,150 and costs in accordance with the finding that her late husband had been 50% negligent. Three days after endorsing the record and discharging the jury, he recalled counsel and informed them he had overlooked the fact that the total claimed for general damages was $20,000 and, as he was of the opinion that he could not enter judgment for more than one-half of that amount and that it was now too late for a further amendment of the statement of claim, judgment was directed to be entered for $10,150 and costs.

The Ontario Court of Appeal decided that there was non-direction in the charge amounting to misdirection upon the question of damages and set aside the judgment of the trial judge so far as it related to the assessment of damages and directed a new trial restricted to the assessment of damages.

In the Supreme Court of Canada, Cartwright J., allowing the appeal and delivering the judgment of the Court, disagreed that the charge of the trial judge was inadequate and was unable to say that the sum fixed by the jury was so inordinately high as to constitute a totally erroneous estimate of the plaintiff's loss.

His Lordship then went on to hold that it was unnecessary to deal with the plaintiff's contention that a further amendment of the statement of claim should have been allowed because she was entitled to $13,150 on the pleadings as they stood. He said that Aylen J. had apparently considered himself bound by the decision of McRuer C.J., in *Grant v. Hare*[3] who had there purported to (but in fact did not) apply the principle laid down by the Ontario Court of Appeal in *Kong et al. v. Toronto Transporation Commission.*[4] *Parker v. Hughes*[5] and *Anderson v. Parney*[6] seem to support the decision in *Grant v. Hare,* but may be distinguished insofar as they turn on the Division Courts Act R.S.O. 1927 c. 95. But if they are not distinguishable, Cartwright J. would decline to follow them as they were not applied by the Court of Appeal in the *Kong* case. His Lordship adopted the language of Orde J.A. who had dissented in *Anderson v. Parney*:

> The limit of $20,000 placed upon the general damages claimed by the plaintiff in this action is a limit upon the amount recoverable by the judgment of the court. It is immaterial by what steps the amount due the plaintiff in respect of her cause of action is ascertained and fixed. When so ascertained, judgment may be given thereon but not in excess of the limit fixed by the amount claimed in the prayer for relief.[7]

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3 [1948] O.W.N. 653.
4 [1942] O.R. 433.
5 [1933] O.W.N. 508.
6 (1930) 66 O.L.R. 112.
7 *Supra,* footnote 1, at p. 91.