

(1940) 06 PRI CK 0009

In the Privy Council

Case No : Privy Council Appeal No. 44 of 1938

John E. Brownlee

APPELLANT

Vs

Vivian MacMillan

RESPONDENT

Date of Decision : 04-06-1940

Acts Referred:

Citation : (1940) AIR(PC) 219

Hon'ble Judges : Roche, Russell of Killowen, Lords Thankerton, Viscount Sankey, Lords Chancellor, JJ.

Advocate : Redden, Blake, Charles Russell and Co., F. Gahan, for the Appearing Parties.

Judgement

Lord Thankerton

This appeal comes by special leave granted on 1st July 1937, from a judgment of the Supreme Court of Canada. By a majority of four Judges to one the Supreme Court allowed the respondent's appeal from a judgment of the Supreme Court of Alberta (Appellate Division) dismissing her appeal from the judgment of Ives J. dated 2nd July 1934. The respondent and her father brought an action against the appellant under the Seduction Act, Chap. 102 of the Revised Statutes of Alberta, 1922, in which they severally claimed damages for the seduction of the respondent. The jury found in favour of both plaintiffs, awarding the respondent 10,000 dollars damages and her father 5000 dollars. Ives J., the trial Judge, expressed disagreement with the verdict of the jury, and subsequently, notwithstanding the verdict, gave judgment dismissing the action with costs, on the construction of the statute. He was of opinion that damage in the nature of loss of service, or at least of interference with the woman's ability to serve, is the gist of the action for seduction, and that there is nothing in the statute to convey a contrary intendment. In the absence of any evidence of the birth of a child or of pregnancy he thought the seduction of the respondent in no way interfered with her ability to serve.

Both the respondent and her father appealed. The Supreme Court of Alberta

(Appellate Division) unanimously dismissed the father's appeal, and he has not appealed from that decision. The respondent's appeal was dismissed by a majority of three Judges to two. Harvey C. J. A., who thought that Ives J., had misdirected the jury, and that for other reasons the appellant had not had a fair trial, was further in favour of dismissing the respondent's appeal substantially for the reasons given by Ives J.

Two other Judges of the Appellate Division, Mitchell J. A. and Ford J. A., agreed with the Chief Justice. Clarke J. A. and Lunney J. A. took a different view on the construction of the Seduction Act and would have allowed the respondent's appeal. The respondent then went to the Supreme Court of Canada where her appeal was allowed. Sir Lyman Duff C. J. was of opinion that damage actually, or presumptively, entailing some loss of service or some disability for service is not of the gist of the action under S. 5, Seduction Act, which gives an unmarried female a right of action in her own name for seduction. The Chief Justice had no doubt that there was sufficient evidence of damage to support the action. In dealing with the submission of the appellant's counsel that the verdict of the jury was against the weight of evidence, the Chief Justice said it had not been established by argument that the verdict of the jury On the evidence was one which no jury acting judicially could give. Rinfret and Kerwin JJ., agreed with Sir Lyman Duff C. J. and Hudson J., concurred in the result. Davis J., dissented. He was of opinion that all the provisions of the Seduction Act, including S. 5, imputed as an essential ingredient of the cause of action an illegitimate child born or conceived as a result of the relations complained of. Without expressing any opinion as to whether the jury was justified in arriving at its verdict of guilty against the appellant on the evidence, Davis J. thought the evidence disclosed no cause of action and that the action should be dismissed.

In presenting the case for the appellant, Mr. Gahan invited their Lordships to review the evidence and the summing up by the trial Judge, with a view to disturbing the verdict of the jury. Their Lordships were not disposed to take this course. They have no doubt that when special leave to appeal was granted, there was no intention on the part of their Lordships who heard the application to permit argument on any point except the effect of S. 5, Seduction Act.

The only question, therefore, which was argued before this Board was the construction of the statute. The respondent was not represented but their Lordships have had the advantage of a full and careful argument by Mr. Gahan on behalf of the appellant. The Seduction Act of 1922 provides as follows :

SHORT TITLE.

1. This Act may be cited as "The Seduction Act."

Persons Entitled to Maintain Action.

2. The father or, in case of his death, the mother (whether she remains a widow or remarries) of any unmarried female who has been seduced and for whose

seduction the father or mother could maintain an action in case such unmarried female was at the time dwelling under his or her protection may maintain an action for the seduction notwithstanding such unmarried female was at the time of her seduction serving or residing with another person upon hire or otherwise. ((1903) (2), c. 8, s. 1.)

3. Upon the trial of an action for seduction brought by the father or mother it shall not be necessary to prove any act of service performed by the party seduced but the same shall in all cases be presumed and no evidence shall be received to the contrary; but in case the father or mother of the female seduced had before the seduction abandoned her and refused to provide for and retain her as an inmate then any other person who might at common law have maintained an action for the seduction may maintain such action. ((1903) (2), c. 8, s. 2.)

4. Any person other than the father or mother who by reason of the relation of master or otherwise would have been entitled at common law to maintain an action for the seduction of an unmarried female may still maintain such action if the father or mother is not resident in Alberta at the time of the birth of the child which is born in consequence of the seduction or being resident therein does not bring an action for the seduction within six months from the birth of the child. (1903) (2), c. 8, s. 3.)

5. Notwithstanding anything in this Act an action for seduction may be maintained by any unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort and in any such action she shall be entitled to such damages as may be awarded. ((1903) (2), c. 8, s. 4.)

These provisions were first enacted as Ch. 8 of the Ordinances of the North-West Territories, 1903, Ss. 2, 3 and 4, having been then adopted from legislation in Upper Canada dating from 1837 (7 Will. IV, c. 8) with the addition of S. 5. If the language of S. 5 of the Act is read in its natural and ordinary meaning, and apart from other considerations, an intention to give an unmarried female who has been seduced a right of action in her own name for damages plainly appears. Seduction may well have been thought to be a wrong to the woman from whatever angle it was considered, though there are no doubt cogent reasons for great caution in giving her a remedy for what may be said to be no more than a voluntary loss of chastity.

It is said, however, on behalf of the appellant that the Section must be read as one of a group of sections all of which are dealing only with an action of seduction of the same nature as the action for seduction known to English law. An obvious objection at once suggests itself. The cause of action in the English law is the loss of service suffered by the plaintiff and, though so little proof of the relations of master and servant as scarcely to amount to more than a fiction will suffice to found the action, the action must fail if there be not some evidence. Proof of seduction is an incident rather than the essence of the action. All this

was pointed out by Harvey C. J. A., in the course of his elaborate discussion of the English authorities. If, on the other hand, the woman is to have her own action for her seduction, it is inapposite to speak of loss of service, and it has apparently been supposed in some cases in the Provincial Courts of Canada that proof of loss of ability to serve takes the place of proof of loss of service as the real ground of the action when brought by the woman herself. Such a modification of the cause of action per quod servitium amisit seems to their Lordships, with all respect to the learned Judges who have approved this reasoning, to be unsatisfactory.

The action for seduction as known to English law has itself had an unsatisfactory development, as may be seen from the case in 82 ER 809, *Norton v. Jason Style* 398 to which their Lordships were referred. This was an action on the case for entering the house of the plaintiff and making an assault on his daughter and getting a bastard by her. Roll C. J. in ordering the case to be set down for argument said that the action was brought for the damage done to the master and he might have an action for the damage caused to him by the battery and although the daughter could not have an action, her father might, although not for entering his house, because it was with his leave, nor for assaulting his daughter and getting her with child, because this was a wrong particularly done to her, yet for the loss of her service caused by this he might have an action. In (1847) 1 Ex 61 = 16 LJ Ex 236=74 RR 584, *Eager v. Grimwood* the declaration was framed in trespass, thus avoiding the necessity for proving the loss of service. The action failed notwithstanding the argument of counsel for the plaintiff that the debauching of the plaintiff's servants who was his daughter was an act of trespass and an invasion of the legal right of the plaintiff who had a kind of property in her. The decision of Tindal C. J., in (1844) 7 M and G 1033=8 Scott NR 741=2 Dowl and L 16=14 LJ CP 19=8 Jur 1101=66 RR 835, *Grinnel v. Wells* was said by Pollock C. B. to be precisely in point, where Tindal C. J., said:

The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest.

As has been repeatedly said this is little more than a fiction, and it had the result noticed in the comment appended to the report of the judgment of Tindal C. J., and attributed to Serjeant Manning:

It may be observed that the quasi fiction of *sermtium amisit* affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child as here is sent unprotected to earn her bread amongst strangers.

It may be also observed that it leaves without redress the child herself. Their Lordships see no reason based upon the language of S. 5 for supposing that the

Legislature did not intend to close the gap and give the unmarried female redress. It was contended that the words which stand at the head of the group of Ss. 2, 3, 4 and 5 of the Act, namely "persons entitled to maintain action" support the construction contended for by the appellant's counsel. Their Lordships were also invited to say that light is thrown upon the proper interpretation of S. 5 by S. 4 which gives a right of action to a person other than the father or mother, in circumstances in which the birth of a child in consequence of the seduction is predicated. These contentions do not commend themselves to their Lordships. It appears to them that the Legislature -intended to give a new right of action ?in the same manner as an action for any other tort? to an unmarried female who has been seduced. Their Lordships agree with the view stated in the judgment of Sir Lyman Duff C. J., and adopted by him, that the action under S. 5 has nothing to do with the parental relations, nothing to do with the relation of master and servant, and nothing to do with loss of service or service, and that there is no a priori probability that S. 5 contemplates relief conditioned upon the seduction being followed by childbirth or pregnancy or illness directly traceable to the physical act of copulation and giving rise to some disability for service. No such conditions are expressed in S. 5. Having regard to the construction which their Lordships place upon S. 5, a construction which seems to them to be the natural and reasonable meaning of the language used, it is unnecessary to examine the numerous authorities in England and in Canada with regard to the action for seduction at common law.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. The respondent did not lodge a printed case and was not represented at the hearing. An appearance was however entered on her behalf and such costs as she is entitled to must be paid by the appellant.