MANDER v. O'TOOLE.

SUPREME Court. Auckland. 1948. June 18; July 16. FINLAY, J.

FINLAY, J. Initially it was suggested that 50 should be allowed to Merrial Mander, who is now eighteen years of age, 100 to Ernest Turnbull Mander, and the balance to the plaintiff for her own sole and separate use, but subject as to such balance to the payment of the plaintiff's costs in the action as between solicitor and client. The propriety of this proposed apportionment not being apparent, an opportunity of being heard was afforded to the parties.

As a result, the circumstances and the relative interests of those concerned have become more clearly defined. Donald Mander, who was named in the statement of claim, has been proved to have been completely independent of his father for some time before his father's death. He has never made any claim, and does not now make any. Merrial Mander, who is deceased's own daughter, is, and has apparently all along been, living with her mother. The deceased paid maintenance for her until she reached the age of seventeen years. Thereupon he ceased to make any specific payments towards her maintenance. He continued, however, to pay the sum of 1 9s. 6d. per week towards the maintenance of her

mother, and so in some sense, it is suggested, contributed to Merrial's maintenance.

Merrial's mother has no assets, and her sole income is 35s. a week, which she gets in the form of invalidity pension. Merrial is a shop-assistant earning 2 1s.7d. per week net. She was, I think, in a very real sense, a dependant of the deceased at the date of his death. The deceased was very attached to her up to the time of his latest marriage. Her income was and is meagre, and deceased would doubtless have assisted her financially from time to time. That assistance would probably have been forthcoming in larger measurer when need arose and on marriage. I think a sum of 200 should be appropriated in satisfaction of the claims of Merrial.

The position of Ernest Turnbull Mander, the stepson of the deceased by his present marriage, has been made very clear by Mr. A. K. Turner, who has gone with great care into the circumstances of his client. This boy is at present working in the Post Office at Hamilton as a telegraph messenger. His wages are 2 15s. 7d. per week plus a boarding-allowance of 1 3s. per week. His salary will increase by 4s. per week when, on September 21, 1948, he becomes sixteen years of age. The boy enjoys robust health and is intelligent. Had the stepfather lived, it was the, intention of the latter to keep the boy at school until he had passed his School Certificate. As a result of his stepfather's death, however, he was compelled to leave school whilst still in the Fourth Form. His occupation keeps him engaged all day, but at night he is studying by correspondence for the Post Office entrance examination. If he passes this examination in December, he intends going on by correspondence to pass the School Certificate examination. His plans may possibly be disrupted because of the difficulty of

obtaining board at Hamilton. This may entail his resigning from the Postal Department.

Mr. Turner suggests that a sum of not more than 200 and not less than 100 should be made available for his client. I am satisfied that Ernest Turnbull Mander did suffer financial loss as the result of his stepfather's and, whilst he would doubtless be entitled to more under normal circumstances, I think he should have allotted to him a sum of 150, and I so direct accordingly.

The two foregoing allotments have been made with a due regard to the fact that the plaintiff was compelled to accept a relatively small sum by way of compromise by reason of the inherent weakness of the claim against the defendant.

This leaves for consideration the claims of Douglas William Galloway and of the plaintiff. The former is a junior pilot in the employ of the Wellington Harbour Board, and was at the date of the death of deceased, and for some time before, completely independent of him. When the deceased was divorced from this claimant's mother in May, 1944, the claimant was overseas, and he remained away from New Zealand for some years. In December, 1944-that is, seven months after his mother's marriage to the deceased was dissolved-he recovered a judgment against the deceased in the Magistrates' Court for the sum of 148 10s. This judgment was in respect of moneys due on a promissory note. There is evidence that the deceased made promises to pay this debt, and Mr. Galloway testifies to a continued expectation that the deceased would have discharged the liability had he lived. No question of dependency arises with respect to Mr. Galloway. His claim is founded exclusively upon the loss he will suffer by reason of the death of the deceased defeating any prospect of payment of

the judgment debt. For reasons which I will later give, I do not think Mr. Galloway has any claim to any part of the fund available for apportionment.

In the result, therefore, I think that the available balance of the fund, after payment of the amount I have allotted to Merrial Mander and Ernest Turnbull Mander, should be allotted to the wife, subject to her paying thereout her solicitor and client costs in the action and in these proceedings. I think that the plaintiff is also under an obligation to pay the funeral and medical expenses aggregating 59 12s.

These items were specifically claimed in the action, and are represented in fuel in the aggregate amount received under the settlement. I cannot resist the conclusion in consequences that these moneys have come to her hands clothed with an obligation to disburse them to the persons entitled. The point would perhaps not be of any significance if the deceased had any estate from which there was any assurance of payment, or if the plaintiff had not restricted the proposal made in her affidavit of December 9, 1947, that the amount should be paid by her out of a payment of 150 which she received from the Auckland Star from the latter's accident insurance fund. As it is, the 59 12s. having been specifically paid under the settlement for funeral and medical expenses, I think those charges must be paid to the persons entitled, and I so direct accordingly.

That leaves me to deal with the legal and other merits of the claim of Douglas William Galloway. Mr. *West* contends that Mr. Galloway, despite the dissolution of his mother's marriage to the deceased in May 1944, was nevertheless a stepson of the deceased when the latter met his death on April 25, 1947. Unless Mr.

Galloway retained that character, be would not, of course, be a member of the class entitled to the rights conferred by the Deaths by Accidents Compensation Act, 1908.

There is apparently no precise authority on the point. Counsel could find none, nor could I. In its absence, Mr. *West* embarked upon a discussion of the effect and consequences of divorce. He referred to *Fowke v. Fowke*(l) *and Fussell v. Dowding*(2). In his judgment in the first of those cases, *Farwell,* J., in contrasting the effect of a decree of nullity with the effect of a decree of dissolution, said, with respect to the latter:

"The effect of such a decree is to dissolve the marriage as from the date of the decree, but it does not in any way affect the previous position of the two people as having been legally man and wife, and, although as from the decree absolute they are no longer man and wife and no longer under any mutual obligations arising from that relationship, they are none the less persons who have been married and have been man and wife in the legal sense of the word "(3). Paraphrased, that means no more than that, after divorce, the status of married persons as such whilst the marriage endured is recognized by law. It may therefore well follow that Mr. Galloway might properly be regarded as having been a stepson of the deceased during the period the marriage of his mother remained on foot. There is, however, nothing in what was said by *Farwell,* J. which would support the suggestion that Mr. Galloway, after the marriage was dissolved, retained a character which he acquired solely by the marriage. Any such suggestion implies that consequential and subordinate relationships remain unbroken whilst the link by which they were created is completely severed. That is a position which I find it difficult to conceive. There is a clear indication of an existing unity of relationship in the character

of stepfather and stepson, so that a stepson is such in relation to one stepfather only. If, however, Mr. *West's* contention is correct, the stepson of the man to whom his mother is currently married might also be the stepson of any number of other men whom his mother may, during the life of the son, have married and divorced.

Fussell v. Dowding(4) contains nothing more helpful on the point than *Fowke v. Fowke*(5), nor is the Destitute Persons Act of any assistance on the question now under consideration. Generally speaking, I think the term " stepson " has relation only to the man to whom the mother of the son is currently married at the time made crucial by any given circumstances.

Be this generalization right or wrong, I am satisfied, having regard to the purposes sought to be achieved by the Deaths by Accidents Compensation Act, 1908, and to the nature of the relationship to which it was intended to extend, that the term "stepson" in that Act extends only to children who possessed that character by virtue of a subsisting marriage when the cause of action sought to be enforced under the Act arose. Were it otherwise, claims from totally unexpected sources might be presented.

It follows that, in my view, Mr. Galloway does not come into the class of persons to whom the Death by Accidents Compensation Act extends, and he can have no claim upon the fund now subject to apportionment. In any event, his claim is not founded upon any suggestion of a pecuniary benefit accruing from relationship, as is necessary to found a claim under the Act: see *Sykes v. North Eastern Railway Co*.(6). His claim is founded upon a normal debtor-and-creditor relationship and he has suffered no damage different from that suffered by any creditor who can only hope for payment if his debtor survives, and the latter is killed by the

negligence of some third party. The Deaths by Accidents Compensation Act does not extend to such claims. Then, finally, a debtor-and-creditor claim of this kind could not be allowed to deplete funds already insufficient for the maintenance and support of dependants. For these reasons, I disallow the claim by Mr. Galloway.

The funds allotted to the infants are to be paid to the Public Trustee to be administered by him for the benefit, education, and advancement of the respective persons to whom the funds are allotted, any unexpended balance being payable to them respectively on attaining the age of twenty one years.

I allow 10 10s. costs and disbursements to each of the parties represented by Messrs. *West, Trimmer*, and *Turner*, and direct that the same be paid out of the fund the subject of the apportionment.