THE QUEBEC AND LEVIS FERRY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

THOMAS JESS, ÈS QUALITÉ, (PLAINTIFF)..... } RESPONDENT.

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*Mar. 9, 10.
•Mar. 20.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Negligence—Ferry boat wharf—Dangerous way—Precautions for preventing accidents—Evidence—Findings of jury—Non-suit.

A passenger, arriving on the pontoon wharf, as a ferry boat was swinging out and was a few feet away from the wharf with the gangways withdrawn, attempted to jump aboard over the stern bulwarks and was drowned. In an action by her representatives to recover damages from the ferry company on account of negligence in failing to provide proper means to prevent accidents at their wharf, the jury found that the drowning was caused by the fault of the company "in not having proper gates at the gangway openings leading from the pontoon to the boat," and that deceased was herself negligent "by her imprudence in attempting to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon," but that she "was not then aware that the boat had left the wharf."

Held, reversing the judgment appealed from (Girouard J. dissenting, on a different appreciation of the facts), that, as there was no proof of any negligence on the part of the company which proximately and effectively contributed to the accident, but, on the contrary, it appeared that the sole, direct, proximate and effective cause of the accident was the wilful and rash act of the deceased in attempting to jump aboard the ferry boat over the bulwarks, after the gangways had been withdrawn and the boat had got under way, the company could not be held responsible in damages. *Tooke* v. *Bergeron* (27 Can. S. C. R. 567) and *The George Matthews Co.* v. *Bouchard* (28 Can. S. C. R. 585) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, sitting in review at Quebec, which ordered judgment to be entered for the plaintiff on the

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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verdict of the jury at the trial on a case reserved for the consideration of that court by the trial judge.

The action was brought by the tutor of a minor child of the deceased, Annie Jess, widow of Edouard Loiseau, who was drowned under the circumstances mentioned in the head-note, to recover damages on behalf of said minor, on the ground that the accident resulted from the gross negligence of the company in failing to place proper guards on their pontoon wharf to secure the safety of the public making use of their ferry boats and leaving the wharf insufficiently lighted and in neglecting to have men there to assist and warn the passengers.

The questions submitted to the jury and their answers, so far as they are material to the issues on the present appeal, are as follows :—

"Second question—Was the drowning of the said Annie Jess caused by fault, neglect or want of care on the part of the defendants? If so, what was such fault, neglect or want of care?

"Answer—Yes, by not having proper gates at the gangway openings, leading from the pontoon to the boats.

"Third question—Was the said Annie Jess guilty of any fault or negligence leading to her death? If so, what; and specially did she attempt to board the defendant's ferryboat after it had left its wharf, and, if so, was she then aware it had left it?

"Answer—Yes, by her imprudence in attempting to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon.

"The said Annie Jess was not then aware that the boat had left wharf.

"Fourth question—Had the defendants taken proper precautions for the due protection of the public against

such accidents; if not, what precautions had the defendants omitted to take?

"Answer—No; in not having proper gates at the gangway opening leading from the pontoon to the boats. The jury would recommend that the company provide proper gates at the gangway leading to the boats from the pontoon for the general safety of the public.

"Fifth question—If the jury find the defendants liable, what sum do they find the said minor child, Mabell Jess, entitled to, as being the damage caused her by the death of her mother?

"The jury finds the company defendants liable in the sum of one thousand dollars."

The trial judge, Andrews J., reserved the case under article 491 C. P. Q. for the consideration of the Court of Review, stating the following reasons:

"1. By the answer of the jury to the second question to them submitted they find the defendants in fault in 'not having proper gates at the gangway openings leading from the pontoon to the boats,' and by their answer to the fourth question the jury repeat that imputation of fault. But I entertain doubts: (*a*) Whether this is a matter covered by the plaintiff's declaration. (*b*) Whether there was any legal obligation on the defendants to have such gates. (*c*) Whether the absence of such gates can be considered a fault causing the death of Annie Jess.

"2. I entertain doubts (*a*) Whether the fact found by the jury in their answer to the third question (viz: that the said Annie Jess attempted 'to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon' does not deprive the plaintiff of all recourse. (*b*) Whether there was any evidence to justify the jury in finding

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that the said Annie Jess was not then aware that the boat had left the wharf.' "

In the Court of Review the plaintiff moved for judgment on the verdict, and the defendants moved for judgment dismissing the action or in the alternative for a new trial. By the judgment of the Court of Review (Andrews J., dissenting) the defendants' motion for a non-suit or a new trial was dismissed with costs and judgment ordered to be entered for the amount of the verdict in favour of the plaintiff with costs. On appeal to the Court of King's Bench the judgment of the Court of Review was affirmed, Bossé J. dissenting, and the defendants now assert the present appeal to the Supreme Court of Canada.

The material questions at issue upon this appeal are referred to in the judgment of the majority of the court, as delivered by His Lordship Mr. Justice Davies.

Stuart K.C. for the appellants.

Alex. Taschereau K.C. for the respondent.

The judgment of the majority of the court was delivered by :

DAVIES J.—The court is of the opinion, Girouard J. dissenting as to facts, that this appeal must be allowed and the action dismissed.

We are also of the opinion after careful consideration of the evidence that the defendant's motion for a non-suit at the close of the plaintiff's case should have been granted. There was no evidence on which the finding of the jury could be sustained which held that the death of the unfortunate woman, Mrs. Loiseau, called in the pleadings Dame Annie Jess, was directly caused or effectively contributed to by any negligence of the defendant company or its servants.

The facts are few and simple. The defendant is a ferry company whose steamers ply between

Quebec and Levis. The late Mrs. Loiseau was a passenger on these steamers and, on the evening of the accident, was returning to Quebec from Levis accompanied by her sister Alice Jess and one Joseph Rankin. These three persons passed through the gates at the head or entrance of the ferry gangway, paid their fares and hearing the boat's whistle ran down the gangway and on to the floating pontoon, alongside of which the boats lie, hoping to be in time to get aboard. When they reached the end of the pontoon they saw that the steamer's bow had swung out and off from the pontoon, that the gangway by which passengers entered the boat had been withdrawn from its position and raised up on the steamer, as part of her bulwarks, thus effectually debarring passengers from entering, and that the steamer was under way. The stern of the ferry boat was only a couple of feet or a little more from the wharf and the sister, Alice Jess, jumped with the object of getting aboard over and across the bulwarks of the steamer. Her feet seemed to have landed on the guard which runs outside of the bulwarks level with the deck. She was caught by one of the passengers aboard the boat in his arms and dragged on board. She says she cannot say whether, but for his timely assistance, she also would not have fallen into the water or whether she landed on the top of the rail or on the guard which ran around the boat. Mrs. Loiseau followed right after her sister but was not so fortunate. She seems to have struck against an upright stanchion, but at any rate she fell backward into the water and, notwithstanding every effort to rescue her, was drowned.

Rankin did not jump but remained on the pontoon. The bulwark's rail was eighteen inches or two feet higher than the pontoon. The boat was at least two feet away from the pontoon and under way when Mrs.

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Loiseau jumped. The gangway drawn up and forming part of the bulwarks effectually prevented any access to the boat except over the rails of the bulwarks. The attempt of these two woman to jump aboard at this time and under these circumstances cannot, we think, be characterised better than by calling it reckless imprudence. Nothing but superior skill and strength on the part of the women or the assistance of third persons could, under the circumstances, have avoided an accident. Some men aboard, who saw them, gave evidence that they shouted warnings to the women not to jump but the warnings do not appear to have been heard. The unfortunate woman's wilful imprudence was the direct cause of her death.

The jury found, in answer to questions put to them, —first that the drowning of Mrs. Loiseau (Annie Jess), was caused by the fault of the defendants in not having proper gates at the gangway openings leading from the pontoon to the boats; and, secondly, that she was herself guilty of fault or negligence leading to her death

by her imprudence in attempting to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon. The said Annie Jess was not then aware that the boat had left the wharf.

It was proved in evidence that, for some time previously to the accident, the company had been accustomed to put a chain across the opening leading from the pontoon to the steamer about four or five feet back from the outside edge of the pontoon, and that upon this occasion the chain was not put across through some negligence on the part of the company's servants.

The plaintiff contended vigorously and the court below found that this was negligence contributory to the accident, and that, therefore, according to the law

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of Quebec, the company was liable for part of the damages.

The company denied any obligation on their part to put up this chain or any negligence in their servants having omitted to put it up on the night in question.

Whether it was an obligation on their part to put up the chain or negligence in omitting to do so at the time in question we are not called upon to decide. We certainly do not intend by our judgment to say that there was not such an obligation or that in a case where any passenger was injured or lost his life by reason of the absence of such a precaution the company would not be liable.

What we do hold is that to make such negligence (assuming it to be such) available to the plaintiff in this action as a contributory cause of the accident, it must be shewn to be a proximate and effective cause.

There is no evidence in this case on which such a finding could be made. The sole, direct, proximate and effective cause of Mrs. Loiseau's death was her wilful and rash act in attempting to jump aboard the ferry boat over the bulwarks after the passenger gangway had been withdrawn and raised up so as effectually to prevent passengers going on board and after the steamboat had got under way.

Suppose Annie Jess or Mrs. Loiseau, in attempting to jump on board the ferry boat over and across the bulwark rail, had slipped on the rail and fallen to the deck breaking her arm or leg. Could it be successfully contended that the company was liable in such a case? And yet the same method of reasoning as that adopted by the plaintiff in this case would, if accepted, create such liability.

The absence of the chain did not induce, or cause the deceased to jump or attempt to jump on board.

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That act was found by the jury to be an imprudent one. It was no doubt that, but it was more, it was a wilfully reckless act, and the one which solely and proximately caused her death.

It was argued that if the chain had been there it probably would have stopped her altogether or at any rate delayed her and caused her to pause and think before attempting to make the jump. But there was no causal connection between the absence of the chain and the fatal act of jumping. So in a slightly remoter degree might it be argued that if the deceased had been stopped at the top of the gangway and not allowed to go down upon the pontoon after the steamer had whistled, her death would have been prevented. It is sufficient to say that such remote negligence as the absence of the chain, the only negligence on the part of the company insisted on at bar, not being the direct and effective cause of the accident, is not such negligence as to make the company liable.

The law governing the case is the same in the Province of Quebec as in the rest of Canada.

In the case of *Tooke* v. *Bergeron* (1), in which Mr. Justice Girouard delivered the judgment of the court, it was held that:

Where an employee sustains injuries, the employer, although he may be in default, cannot be held responsible in damages unless it is shewn that the accident by which the injuries were caused was directly due to his neglect.

And the present Chief Justice, then Taschereau J., said in *The George Matthews Co.* v. *Bouchard.* (2), at pages 584-585;—

It seems to be taken for granted that because there was an accident and because there was an act of negligence it follows that the plaintiff has proved his case. Now that is not the law; * * * The evidence might be consistent with his theory but it is equally consistent, to say the least, with the theory that the accident was due to his own carelessness, and it is a rule that where the evidence is as consistent with one state of facts as with another it proves neither.

(1) 27 Can. S. C. R. 567. (2) 28 Can. S. C. R. 580.

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We adopt this as a correct statement of the law. For these reasons we think the appeal should be allowed with costs.

GIROUARD J. (dissenting)—I believe that the principal cause of the accident was the want of a chain or guard, and for that reason I do not feel inclined to disturb the verdict of the jury.

The appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellants; *Caron, Pentland, Stuart & Brodie.*

Solicitors for the respondent; *Fitzpatrick, Parent, Taschereau, Roy & Cannon.*