

WILLIAM YORK, ADMINISTRATOR OF THE ESTATE AND EFFECTS OF CATH- ARINE YORK, DECEASED (PLAIN- TIF)	} APPELLANT.	1893
		*May 2, 3. *June 24.

AND

THE CANADA ATLANTIC STEAM- SHIP COMPANY (DEFENDANT)...	} RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Negligence — Passenger vessel — Use of wharf — Invitation to public —
Accident in using wharf — Proximate cause — Excessive damages.*

A company owing a steamboat making weekly trips between Boston and Halifax occupied a wharf in the latter city leased to their agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side part way down the wharf and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They went down the plank sidewalk and instead of turning off at the end, there being no lights and the night being dark, they continued straight down the wharf which narrowed after some distance and formed a jog, on reaching which Y's wife tripped and as her husband tried to catch her they both fell into the water. Forty four days afterwards Mrs. Y. died.

In an action by Y. against the company to recover damages occasioned by the death of his wife it appeared that the deceased had not had regular and continual medical treatment after the accident and the doctors who gave evidence at the trial differed as to whether or not the immersion was the proximate cause of her death. The jury when asked : Would the deceased have recovered, notwithstanding the accident, if she had had regular and continual attendance? replied, "very doubtful." A verdict was found for the plaintiff with \$1,500 damages which the Supreme Court of Nova Scotia set aside and ordered a new trial. On appeal from that decision :

Held, that Y. and his wife were lawfully upon the wharf at the time of the accident ; that in view of the established practice they had

*PRESENT :—Sir Henry Strong C.J. and Fournier, Taschereau, Gwynne and Sedgewick JJ.

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a right to assume that they were invited by the company to go on the wharf and assist their friends in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care and the company was under an obligation to see that they were safe.

Held, further, that it having been proved that the wharf was only rented to the agent because the landlord preferred to deal with him personally and that it was rented for the use of the company whose officers had sole control of it, the company was in possession of it at the time of the accident.

Held, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y's death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside a verdict for the plaintiff and ordering a new trial.

The material facts of the case are sufficiently set out in the above head-note and more fully in the judgment of the court.

Newcombe for the appellant. As to the right of deceased to be on the wharf see *Holmes v. North-eastern Railway Co.* (1); *Wright v. London & North-western Railway Co.* (2).

As to the accident being the proximate cause of death see *Davis v. Garrett* (3); *Sauter v. New York & Hudson River Railroad Co.* (4); *Coomes v. Houghton* (5).

The defendant company was in possession of the wharf. *John v. Bacon* (6).

Borden Q.C. for the respondent. Plaintiff should have proved the accident to the proximate cause of

(1) L. R. 4 Ex. 254; 6 Ex. 123. (3) 6 Bing. 716.

(2) L. R. 10 Q.B. 298; 1 Q.B. (4) 23 Am. Rep. 18.
D. 252. (5) 102 Mass. 211.

(6) L. R. 5 C. P. 437

death. Pollock on Torts (1); Sherman & Redfield on Negligence (2); Encyclopedia of English and American Law (3).

The meaning of proximate cause should have been explained to the jury. *New Brunswick Railway Co. v. Robinson* (4); *Morgan v. Vale of Neath Railway Co.* (5).

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The defendant company had no property in the wharf. *Wendell v. Baxter* (6).

The court will not interfere with an order for a new trial. *Allcock v. Hall* (7).

The judgment of the court was delivered by

SEDGEWICK J.—The defendant is a steamship company owning a steamer, the SS. "Halifax" plying weekly between Halifax and Boston. The landing place of the steamer at Halifax was at the wharf known as Noble's wharf. The defendant company used Noble's wharf for that purpose under an arrangement with their general agents Messrs. Chipman Bros., the nominal lessees of the wharf, by which arrangement the defendant company had the privilege without making specific payment therefor of using the wharf and of occupying the store on the wharf and the office at the head of the wharf. The wharf is reached from Water Street by a passage way about 250 feet long. When this passage way reaches the head of the wharf there is an archway with a large gate at its west end the passage under the archway being about 12 or 15 feet wide. Immediately beyond the archway at the head of the wharf, on the occasion of the arrival or departure of the steamer, cabs stand at each side leaving a passage about the same width as that under the archway down the middle of the wharf; this passage under the archway

(1) 3rd ed pp. 404, 410.

(2) 4 ed. vol. 1 s. 26.

(3) Vol. 16 p. 430.

(4) 11 Can. S. C. R. 688.

(5) 13 L. T. N. S. 564.

(6) 12 Gray 494.

(7) [1891] 1 Q. B. 444.

1893 is thus continued along the middle of the wharf. There
 YORK is also access to the wharf by turning to the left after
 v. going through the archway and passing at the head of
 THE the cabs standing on the left of the archway, and then
 CANADA the cabs standing on the left of the archway, and then
 ATLANTIC turning and going down the wharf by a plank sidewalk
 STEAMSHIP running along the north side for about 20 feet, and then
 COMPANY. turning to the right at the end of the plank sidewalk
 Sedgewick J. and passing through a gap left in the line of the cabs
 for that purpose to the passage way before mentioned
 along the middle of the wharf. About 50 feet east of
 the end of the plank sidewalk the wharf narrows a
 little and there is what is called in the evidence a jog;
 there is a capsill around the wharf at the jog about 8
 inches above the level of the wharf; a short distance
 beyond the jog there is a fence across the wharf with
 a gate through which persons coming from or going
 to the steamer are admitted; beyond this fence there
 is a freight shed.

The SS. "Halifax" which is a passenger vessel making weekly trips between Halifax and Boston and carrying large numbers of passengers, arrived at Noble's wharf on November 30th, 1890, between 7 and 8 o'clock in the evening. Catharine York whose mother was an expected passenger on the steamer went with her husband (the plaintiff), her brother and another to meet her mother. The plaintiff and his wife in going down the wharf did not go down between the two lines of cabs but turned to the left after passing through the archway, went down the plank sidewalk on the north side of the walk and when they reached the end of the plank sidewalk, instead of turning to the right and coming back to the passage way along the middle of the wharf, continued straight along the north side of the wharf to the jog and then turned to the right, and as they did so Mrs. York tripped and as her husband tried to catch her they both fell into the water. Forty-

four days afterwards Mrs. York died, and her death is alleged by the plaintiff to have been occasioned by this accident.

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An action was brought by the plaintiff, who was appointed the administrator of the estate of his wife under the Provincial Act (1) which is substantially a copy of what is known as Lord Campbell's Act, to recover the damages occasioned by her death. The case was tried before Mr. Justice Meagher with a jury. Upon the finding of the jury judgment was entered for the plaintiff for \$1,500. Upon appeal to the Supreme Court in *banc* the verdict was set aside and a new trial ordered, the Chief Justice dissenting. Mr. Justice Weatherbe was of opinion that it was not proved that the submersion of the deceased was the cause of death, nor did he appear to think that the defendants were under any obligation to protect the place where the accident occurred. Mr. Justice Townshend was of opinion that the plaintiff and the deceased were trespassers while on the wharf, or at least had no business there, and could not therefore throw the responsibility of the accident on the defendants. And Mr. Justice Graham thought that the case should be submitted to another jury, to ascertain whether there was a want of proper medical treatment and attendance, and also which one of the causes was the proximate cause of the death.

I am of opinion that, under the evidence, the plaintiff and his wife were lawfully upon the wharf. The deceased went upon the wharf with the permission and upon the implied invitation of the company for the purpose of meeting her mother, who was in fact a passenger, and assisting her home. In view of the practice which had long previously prevailed she was right in presuming an invitation on the part of the

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company to go there and assist her friends in disembarking from the steamer. She had equally a right to expect that the means of approach to the steamer were safe for any one using ordinary care, and the company were, I think, under an obligation to see that they were safe.

The case is within the principle stated in *Smith on Negligence* (1) and as illustrated in the cases of *Holmes v. North-eastern Railway Company* (2); and of *Wright v. London and North-western Railway Company* (3), affirmed on appeal (4). In accordance with the same rule is a decision of Denman J. in *Watkins v. Great Western Railway Company* (5) where he says :—

I am of opinion that a railway company keeping open a bridge over their line for the use of their passengers is bound to keep that bridge reasonably safe, and that if in practice the friends of passengers are allowed to see them off by the train and to cross the bridge without asking special permission, the duty of the company in that respect cannot be put down towards them otherwise than it is towards those whom they accompany for such not unreasonable purposes.

I think that this view is consistent with the case of *Corby v. Hill* (6) and *Smith v. London Docks Company* (7) :—

I regard the passenger's friend so permitted to go along the bridge by constant acquiescence on the part of the railway company as not being in the nature of a person barely licensed to be there but as being invited to go to the same extent as the passenger whom he accompanies, and is there on lawful business in which the passenger and the company have both an interest.

And the rule is the same in the United States (8).

I am also of opinion that the jury were right in finding that the defendant company were in possession of the wharf at the time of the accident. I gather from the evidence as a whole that the wharf was rented by Mr. Chipman for the use of the company ; that it would

(1) 2 ed. pp. 130 & 135.

(2) L.R. 4 Ex. 254 ; affirmed on appeal L. R. 6 Ex. 123.

(3) L.R. 10 Q.B. 298.

(4) 1 Q. B. D. 252.

(5) 37 L.T.N.S. 193.

(6) 4 C.B.N.S. 556.

(7) L.R. 3 C.P. 326.

(8) See *Patterson's Railway Accident Law* 1886, p. 219 sec. 227.

have been rented in the name of the company except that the landlord preferred leasing it to the company's agent personally and that as a matter of fact the company's officers, as such officers, had sole control of the wharf and regulated the conduct of those having occasion to use it upon the arrival or departure of the steamer. The company, carrying on the business of carriers of passengers by water, inviting as they do the public to use their vessel were bound to use all reasonable efforts to secure the safety of persons who might lawfully come upon their premises. I agree with Mr. Justice Weatherbe that no wharf owner is under any obligation to erect barriers around his wharf with a view to prevent persons from falling into the water; a wharf surrounded by such a structure would cease to be a wharf; nor do I think they were under this obligation as respects the jog where the accident occurred; but the place on the night in question was manifestly a dangerous one; there were no lights near it; it was somewhat in the nature of a trap; the fact that both the husband and wife fell in is some evidence at least that it was dangerous (*res ipsa loquitur*); and the jury having found that there should have been a light there I am not disposed to disturb their finding on that point.

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I do, however, entertain the doubts expressed by Mr. Justice Weatherbe and Mr. Justice Graham as to whether as a matter of fact the accident in question was the proximate cause of Mrs. York's death; that question, it seems to me, was the crucial one, and it is that question chiefly which is left in doubt, not only by the evidence but by the finding of the jury.

I have already in the case of the *Corporation of the Town of Prescott v. Connell* (1), now before this court on appeal from the Court of Appeal for Ontario, discussed somewhat fully the law as to the remoteness of damage

(1) 22 Can. S. C. R. 147.

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in cases of negligence, and it is therefore unnecessary for me to enter into detail upon the same question here; but so far as the facts are concerned it seems to me that in the present case there is at least ground for believing that Mrs. York would have died when she did and from the same disease even if the accident had not happened at all. This difficulty appears to have pressed itself upon the jury, and when asked: Would the deceased have recovered, notwithstanding the accident, if she had had regular and continual attendance? they replied "very doubtful." The answer to the question implies that she might have recovered. The length of time between the accident and her death would of itself give rise to doubt as to whether it was the accident which set the disease, of which she died, in motion. On the evening of the accident, the 30th November, she was attended by Dr. Jones. He saw her again next morning, when according to him she had recovered from the shock after passing a very good night. She was up afterwards every day and had been going out for seventeen days when she went to Dr. Jones complaining of a pain in the right lung, with a cough. She had not in the mean time seen a medical man or undergone any treatment. The doctor then found a slight derangement of the lung and prescribed a mixture for the cough. During the ten days following she remained in town without treatment and then went to her husband's home in Preston, a distance of several miles. She attended the funeral of her sister who died meanwhile of lung disease. Nineteen days after Dr. Jones had seen her Dr. Weeks, a physician in Dartmouth, near Preston, was called to see her; this was on January 6th. No professional man was ever called to see her after that, and on the 13th January, seven days after Dr. Weeks' first visit, and forty-four days after falling from the wharf, she died. While

Dr. Jones testified that her death was due to some acute affection of the lungs, which in all probability was tubercular, an immersion such as she received at that season of the year would in all probability cause disease of the lungs, and might produce fatal results. Dr. Weeks, who was also called by the plaintiff, testified that she should have been under medical care throughout; that acute bronchitis requires constant medical care and treatment; and he comes to the conclusion, and he expressed the opinion, that if she had received continuous medical treatment after the accident there was a fair chance that the disease would not have been established. This is about all the evidence there is to establish the fact that the death of the deceased was occasioned by immersion.

I do not wish to express here any opinion to the contrary; that is the "function of the jury;" but what I do insist upon is that, upon a point of such importance, it was the primary duty of the judge who tried the case to explain to the jury in the clearest terms possible the fundamental principle that a person who merely contributes in some way towards an accident is not necessarily responsible for the damages occasioned by it; that it must be his negligent act or omission that directly caused it; and that in the present case if the deceased or those in charge of her were careless in the use of means: if for instance they failed to provide efficient and continuous medical attendance, or if the deceased came to her death by reason of her failing to comply with the proper directions of her medical attendants, and if in consequence thereof, death ensued, the defendants were not liable. It might also I think have been suggested to the jury that the deceased might have died when she did irrespective of the accident altogether; her sister had in the meantime died; she herself had taken a journey in the

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meantime, and in an inclement season, on which journey she might have caught cold, or by which journey her disease might have been developed. There might between the time of the accident and her death have been an innumerable number of acts or omissions, one or all of which might have been the occasion of the rapid development of the disease. All this is wanting in the judge's charge. He told them, it is true, that in an action founded on negligence the plaintiff would fail if the jury found that he was himself negligent or had contributed to the cause of the accident. But that was not the question here; he should likewise have told them that the plaintiff in this case would equally fail even if there had been no negligence on the part of the deceased contributing to the accident, if as a matter of fact there had been negligence on her part contributing to or hastening her death.

I am further of opinion that the damages in this case are excessive. I can gather nothing in the evidence to convince me that the pecuniary loss which the plaintiff sustained by his wife's death amounts to the sum of \$1,500, and I think the case should go back for a new trial upon this ground.

On the whole I do not think the judgment of the court below should be disturbed.

The appeal should therefore be dismissed, but the general rule as to costs should in the present case be departed from. At the argument below two judges thought that under no circumstances could the plaintiff succeed. Mr. Justice Graham's view as to the merits was uncertain. The plaintiff in coming to this court has obtained a declaration that there was an obligation due from the company to the deceased as to the safety of the wharf, and that there was negligence on the company's part (two points which the decision below

left in doubt and which would remain in doubt had the case gone to a new trial without this appeal). He has therefore partially succeeded and has probably obviated the necessity of the case coming before us again. For this reason I think the appeal ought to be dismissed without costs.

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Appeal dismissed without costs. Sedgewick

J.

Solicitor for appellant: *W. B. Wallace.*

Solicitor for respondent: *Pearson, Forbes & Covert.*