Supreme Court of Canada

William *v*. Bartling (1899) 29 SCR 548

Date: 1899-06-05

Josiah Williams (Plaintiff)

Appellant

And

William W. Bartling and James C. Bartling (Defendants)

Respondents

1899: Feb. 24; 1899: June 5.

Present:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Matters of fact—Finding of Jury.

W. was working on a vessel in port when a boom had to be taken out of the crutch in which it rested and he pointed out to the master that this could not be done until the rigging supporting it, which had been removed, was replaced which the master undertook to do. When the boom was taken out it fell to the deck and W. was injured. In an action against the owners for damages the jury found that the fall of the boom was owing to the said rigging not being secured, but that this was not occasioned by the negligence of the owners or their servants

*Held,* affirming the judgment of the Supreme Court of Nova Scotia (30 N. S. Rep. 548) Gwynne J. dissenting, that the first part of the finding did not necessarily mean that the rigging had never been secured, or that if secured originally it had become insecure by negligence of defendants, and the jury having negatived negligence their finding should not be ignored.

APPEAL from a decision of the Supreme Court of Nova Scotia[[1]](#footnote-2) affirming the judgment at the trial in favour of the defendants.

The action was brought to recover damages for injury to plaintiff while working on defendants' vessel in Halifax Harbour. The facts constituting the alleged negligence by which the injury was caused and the finding of the jury thereon are sufficiently

[Page 549]

stated in the above head note and in the judgment of Mr. Justice King on this appeal.

W. B. A. Ritchie Q.C. and King Q.C. for the appellant. Drysdale Q.C. for the respondents.

GWYNNE J., dissenting—This case presents to my mind a painful instance of the miscarriage of justice and of the injury which is occasionally inflicted upon litigants by the law's delay.

In the month of May, 1892, the plaintiff sustained a very serious injury resulting in the loss of a leg while rendering service as a ship carpenter to the defendants on a schooner of theirs.

The cause of action is thus stated in the statement of claim.

2. On the 6th day of May, 1892, the plaintiff was in the employ of one Young who was employed by the captain of the said schooner on behalf of the defendants to make such repairs in and upon the said schooner *Topaz* then lying at the port of Halifax as might be required and pointed out by said captain, and plaintiff had by said Young's instructions proceeded to the deck of said schooner for the purpose of doing any work that might be required of him by the captain of said vessel.

3. In order to do said work, the plaintiff, under the direction of the said captain, was obliged to pass under, around and upon the boom of the said schooner and to remain there for some time in order to remove the band of said boom and repair the same, and it was necessary and the duty of the defendants, and the said captain undertook on their behalf, properly to secure the said boom, and then to turn the crutch of the same aside so as to expose the said band and the defects which they desired the plaintiff to repair, and the captain having represented to the plaintiff that the said boom had been properly secured and that all was in readiness for the said work to go forward, the plaintiff at the request of the said captain and under his direction proceeded to the said boom to repair the band thereof.

4. Owing to the negligence of the servants of the defendants in discharging their said duty in wholly neglecting and omitting to secure the said boom, or in negligently, improperly and insufficiently securing the same, and in negligently, wrongfully and improperly swinging said boom to one side while the same remained improperly

[Page 550]

and insufficiently secured, and while the plaintiff in the discharge of his duty was astride the same the plaintiff was precipitated upon the deck of the said schooner and the said boom fell upon the plaintiff with great violence and broke and crushed his leg and crushed and paralized his left arm and shoulder and effected internal and other injuries.

The defendants in their statements of defence plead as follows:

1. They do not admit that they are owners of the schooner *Topaz.*

2.They deny that it was their duty to secure said boom.

3. They deny that the captain undertook on their behalf or on behalf of either of them or at all to secure the said boom.

4. They deny that the captain represented to the plaintiff that the said boom had been properly secured.

5. They deny that they or any of their servants swung said boom while the plaintiff was astride the same or while he was engaged on said vessel.

6. They aver and plead that the said boom was properly and sufficiently secured when the plaintiff began to work at the same, and that if the said boom afterwards became insecure it was made so by the plaintiff and not by the defendants or any of their servants.

7. They aver and plead that the plaintiff by his own negligent acts in loosening the topping lift ropes contributed to the accident, and lastly

8. They aver and plead that the plaintiff was a workman and was engaged as a fellow servant in one common service and employment with certain of defendants' servants who were also workmen and competent to do that work and the said injuries, if caused by negligence of any person or persons for whose negligence the defendants would be answerable (all of which is denied) were caused by defendants' said servants while they and the plaintiff were such fellow

[Page 551]

servants and engaged in such common service and employment, and in course thereof and not otherwise without any personal negligence or interference on the part of the defendants.

Issue was joined on these pleas and the whole material question raised by such issue and which in fact the parties went down to try was: First, whether or not the defendants were under any obligation of duty arising either from the nature of the work on which the plaintiff was engaged or from express contract with the captain of the vessel as the defendants' agent to secure the boom; and secondly, whether the injury sustained by the plaintiff was caused by the negligence of the defendants as charged in the plaintiff's statement of claim *or* on the contrary by his own negligence as charged by the defendants in their statement of defence.

The case went down for trial first in 1893 when the learned trial judge took the case from the jury and rendered judgment for the defendants. The Supreme Court of Nova Scotia sustained the judgment, but upon appeal to this court it was reversed and a new trial ordered. Accordingly the case was tried a second time in 1895 when a verdict was rendered for the plaintiff with $2,800 damages, but this verdict was set aside by the Supreme Court of Nova Scotia on the alleged ground of misdirection and the exclusion of certain questions from the jury and a new trial was again ordered. The third trial proved abortive by reason of the jury being unable to agree and the case was brought down to trial for the fourth time in 1897. It is against the result of this trial, namely a judgment in favour of the defendants rendered by the Supreme Court of Nova Scotia, the Chief Justice of that court dissenting that this appeal is taken.

[Page 552]

It was not disputed that the defendants were owners of the schooner and there was no evidence in support of the allegations contained in the eighth paragraph of the defendants' statement of defence, and in fact the sole contestation between the parties upon each of the trials was: First, whether as the defendants had denied in their statement of defence any duty or obligation lay upon the defendants to secure the boom; and secondly, whether the accident had happened as alleged by the plaintiff by reason of the negligence of the defendants or their servants in not properly securing the boom upon which the plaintiff was engaged in working, which the plaintiff alleges it was the duty of the defendants to do, and which, as he also alleges they, through the master of the schooner as their agent, expressly undertook to do, and assured the plaintiff was effectually done when he went to work on the boom *or* in negligently, wrongfully and improperly swinging the said boom on one side whilst the same remained improperly and insufficiently secured and while the plaintiff was engaged in working upon it *or* on the contrary was caused by the plaintiff's own negligence as alleged by the defendants in the sixth and seventh paragraphs of their statement of defence.

Now by the plaintiffs uncontradicted evidence it appeared that he was sent by his employer, one Young, a master ship carpenter, to do what carpenter work the captain should require to be done on the schooner—that the first thing pointed out by the captain to the plaintiff was the band on the main boom which the captain said must be taken off—the plaintiff observed that there was no topping lift aloft and the boom was resting upon a crutch alone, in order to take the band off the boom it had to be taken out the crutch, and for that purpose it was a necessity that the boom should

[Page 553]

be secured by the topping lift. The captain said that this should be done so soon as he should return from Richmond where he was going to discharge his cargo and he then said to his mate "when the carpenter takes off that band you assist him and see the boom secured."

The importance and in fact the absolute necessity of the topping lift being made secure to the boom arose from the fact established by undisputed evidence that when the boom should be taken out of the crutch it would be held up by the topping lift alone, and if that should not be securely fastened, the boom as soon as the crutch should be removed must fall upon the deck, and on the contrary that the boom could not fall if the topping lift should be properly fastened.

The plaintiff further said that on the morning of the 6th May, 1892, while he was doing other repairs upon the vessel as required by the captain, the latter said to him "carpenter you have forgotten the band" to which the plaintiff replied "no I have not forgotten the band but you have forgotten to secure the boom" whereupon the captain said "is not the topping lift aloft," and on the plaintiff answering "no" the captain addressing one Willis, a rigger employed on the vessel, said "why don't you put up that topping lift and secure the boom," whereupon Willis and some others proceeded to put up the topping lift and had it up at about 11 o'clock, and then the same persons proceeded to unbend the mainsail in taking down which two or three men were working on the boom. This work was completed about one o'clock and before the plaintiff went to work on the boom at all. The plaintiff also said that while taking his dinner on the vessel he asked the captain if the boom was secured and that he said it was, with all new gear, and that the plaintiff need not be afraid, whereupon the captain

[Page 554]

went ashore after having given directions to the mate to assist the plaintiff.

The evidence as so far extracted was undisputed and having regard to the nature of the work required to be done, namely the removal of the band from the boom, and to the necessity, established by the evidence in order to the performance of that work, that the boom should be removed from resting on the crutch and should depend for its sole support so as to prevent its falling and injuring the plaintiff, upon the topping lift being securely fastened to it, it cannot, in my opinion, admit of a doubt that a duty and obligation rested on the defendants, as well from the nature of the service required to be rendered by the plaintiff as from the express undertaking and assurance of the captain to take care that the boom should have been so fastened, and that the duration of such duty and obligation was co-extensive with the period during which the plaintiff should be engaged in the performance of his work (undertaken upon the faith of the boom being so secured) and exposed to danger in the event of its proving not to be securely fastened, to hold that any less duty rested upon the defendants would be utterly illusory and would be in effect to hold as the defendants in their statement of defence plead that no duty to the plaintiff to secure the boom rested upon them.

The plaintiff having gone to work on the boom on the assurance of the captain that it was secured and that plaintiff had nothing to fear gives this account of the accident which befell him.

There was, he says, a mat over the band of the boom which the captain had asked him not to destroy. He got on the boom to take the mat off and having loosened it he was taking off the band when, as he says, the mate who was, by the captain's directions, assisting

[Page 555]

him to take off the band, cast off the crutch tackle and instantly the boom fell on the plaintiff and crushed his leg from the knee down; the guy, he said, had to be cast off to let the crutch out to enable the plaintiff to go on with his work, and the mate said "we will have to cast off this guy" to which the plaintiff says he did not object. The mate said that the plaintiff told him to unhook the crutch tackle which he did, but this variation in the evidence is immaterial for the evidence is conclusive that if the topping lift had been properly secured the boom could not have fallen. It thus appears that within about two hours after the topping lift was put up and almost immediately after the defendants' riggers had ceased working on the boom in bending down the mainsail and upon the very instant of the removal of the boom from the crutch to provide against any damage arising from which the boom was required to be secured by the topping lift the accident happened, in short *eo instanti* of the topping lift being required to render the service for the purpose of rendering which it was put up it failed. The plaintiff throughout all the trials which have been had in this case has persistently contended that upon this evidence the defendants are responsible to the plaintiff for the injuries sustained by him as occasioned by the negligence of the defendants' servants, such negligence consisting in the inefficient manner in which the topping lift served the purpose for which, in discharge of a duty due from the defendants to the plaintiff it was put up.

The defendants on the contrary besides denying that they owed any duty to the plaintiff to secure the boom, insist that the topping lift was properly secured and that it became insecure afterwards either as pleaded by the defendants in their statement of defence by some careless conduct of the plaintiff himself or

[Page 556]

else from some other unknown and unsuggested cause for which the defendants contend that they cannot be held to be responsible. As to the topping lift having been secured the defendants called one Allan who said that he was the man who fastened the topping lift to the cleat. He, there is no doubt, said that he had fastened it properly—that it could not have become unfastened unless it had been interfered with after he left it. The topping lift he said, was a new one, of wire rope, he could not say with certainty whether the sheet was stretched before putting it on, but he said, "when I fasten a piece of rope on a vessel I know I do right. I hauled the sheet taut and made it fast on the cleat," and he is one of the many witnesses who testified that "the boom could not fall even if the crutch were removed if the topping lift had been properly secured." Now the only interference with the boom after the topping lift was put up is shewn by the evidence, to have been caused by those same riggers who had put up the topping lift and who continued to be engaged for about two hours more in working on the boom in bending down the mainsail. There does not appear in the case any evidence to justify the conclusion that the plaintiff by any act of his, as pleaded by the defendants, had caused, or contributed to the causing of the accident, and there does not appear to have been any one upon the vessel but the plaintiff and the servants of the defendants who were engaged in putting up the topping lift and rigging the vessel.

Willis who was in charge over the men so employed said that he looked at the cleat immediately after the accident and that the rope was entirely clear of it and the boom was down on the starboard side. *He did not examine the cleat, nor the way the rope was belayed around it*; he said he did not need to look at that

[Page 557]

because he goes upon what he believes his man did. There is, he said, a proper way of taking a turn "in the cleat" and added "I can't say it was properly belayed. If not properly fastened the fall would run around the cleat when the strain came suddenly upon it." Now under these circumstances and notwithstanding the evidence of the witness Allan who said that he was the one who had put up the topping lift the fact of its failure, upon the very instant of its being called upon to serve the purpose for which it was required to be securely fastened to the boom, coupled with the fact of there having been no explanation offered in evidence reasonably to account for its becoming unfastened without fault of the defendants if it had been properly secured, and the undisputed testimony that if it had been properly secured the accident could not have happened, seem to afford conclusive proof that the topping lift never had been properly fastened—that seems to be the natural and rational inference to draw from the evidence. The suggestion that the topping lift could have become unfastened in the presence of the defendants' servants employed on the vessel from some unknown cause within about two hours after it was properly fastened, and that therefore the defendants are exculpated appears to be quite illusory.

There cannot, I think, be entertained a doubt that the defendants owed a duty to the plaintiff to secure the topping lift to the boom in such a manner as to prevent as far as practicable the occurrence of its falling when the crutch should be removed which was the event against the consequences of which the plaintiff required that the boom should be secured. That it was practicable so to fasten it was not denied, and that it was not done is beyond doubt. It was argued that to impose such a duty on the defendants would

[Page 558]

be to make them insurers of the plaintiff against all damage that might be occasioned to him by the falling of the boom. Well there is no hardship in holding that they are insurers against damage occasioned by the non-execution or the imperfect execution by them of a work which was capable of being made practically effective, and which it was the duty of the defendants to have made as effective as practicable. It could only be during the period that the plaintiff was working on the boom that they owed to him the duty of keeping it secured from falling; except while so employed the defendants owed the plaintiff no such duty, nor was it of any importance to him whether the boom was so secured, but if it was not properly secured during that period and by reason thereof it fell and did injury to the plaintiff then the defendants have failed to discharge the duty they owed the plaintiff and so are liable to him in this action. This must be so unless the defendants are entitled to succeed upon the issue joined upon the first paragraph of their statement of defence namely, that they owed no duty whatever to the plaintiff to secure the boom.

The learned trial judge submitted certain questions to the jury, some of which they answered, some they did not. It is only necessary to refer to the three following:

1. What was the proximate cause of the injury?

2. Was it occasioned by the negligent act or omission of the defendants or their servants?

3. Could the plaintiff by the exercise of ordinary care have avoided the *consequence* of the accident?

To the first question the jury answered as follows:

The falling of the boom owing to the topping lift sheet not being secured.

To the second they answered "no," and to the third "yes."

[Page 559]

The natural and reasonable construction of the above answer of the jury to the first question is that the jury were of opinion as the evidence as already pointed out fully warranted that the topping lift never had been properly secured. This appears also to have been the finding of the jury on the second trial. That it was not secured at the only time when it was of any importance that it should be secured is undisputed. It is now contended however that the jury in the recent trial having answered the second question in the negative must have meant that the defendants had properly secured the topping lift as stated by Allan, but that it had subsequently become unfastened by some unknown cause not constituting negligence of the defendants. Such a strained construction cannot be put upon the answers of the jury. It is not very intelligible how, the cause being unknown, there having been none in evidence the jury could intelligently say that it did not constitute negligence in the defendants; moreover such a construction put upon the answers of the jury implies that the jury have assumed to determine matters which they were not competent to decide, namely, that the defendants owed no duty to the plaintiff to keep the boom secured while he was working upon it, and that its not having been secure during that period constituted no negligence in the defendants. The difficulty which has arisen from the conflicting answers of the jury to the first and second questions is, I think, attributable to confusion in the minds of the jury both as to what was the duty which the defendants owed to the plaintiff and what constituted negligence in the discharge of such duty.

Then as to the third question. It is difficult to see what was meant by this question or upon what material the jury could have been expected intelligently to answer whether the plaintiff could, and in what

[Page 560]

manner have avoided the *consequence* of an accident which there was no evidence to justify the finding that he had either caused or contributed to the causing of.

Upon the whole for the above reasons and for those given in the judgment of the learned Chief Justice of the Supreme Court of Nova Scotia in his dissenting judgment I am of opinion that this appeal must be allowed and the judgment of the Supreme Court of Nova Scotia set aside with costs and that a rule for another trial, without costs, must be ordered to issue in the court below.

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

KING J.—This is an action to recover damages for injuries sustained by the plaintiff while working on board a vessel owned and managed by defendants. The vessel was lying in the port of Halifax and work was being done on her spars and rigging. The defendants employed a master carpenter to do the carpenter work who sent the plaintiff with others on board with instructions to do such work as they might be directed by the master of the vessel to do. A master rigger was also employed, and he also sent several men aboard with the like instructions. Amongst the things which the master of the vessel required of the plaintiff was the removal of an iron band from near the outer end of the main boom. In order to the doing of this it was considered by the plaintiff necessary that the boom should be taken out of a crutch in which it was resting for support. When the plaintiff was directed by the master to do this work he pointed out to the latter that it could not then be safely attempted as the topping lift had been removed—the topping lift being that part of the rigging running from the mast head to the end of the boom and by which the boom

[Page 561]

is ordinarily supported. The master acquiesced in this very obvious view and said that he would have a topping lift set up, and accordingly he directed the riggers to do it.

Allan, one of the riggers, says:

We put a new topping lift on the main boom between 8 and 10 a.m. I made it fast to the cleat myself. I fastened the topping lift sheet properly. It could not have slipped or become unfastened had it not been interfered with after I left it. \* \* \* The boom could not fall even if the crutch were removed if the topping lift had been properly secured. \* \* \* I hauled the sheet fast and made it fast on the cleat.

The topping lift sheet thus referred to was a manilla rope attached to the lower end of the topping lift and which after passing through a sheave in the boom was led forward and made fast to a cleat upon the boom near the mast.

Several hours afterwards the riggers, assisted by the mate and one of the crew, unbent the mainsail. In this operation two or three men were at work on the main boom, but there is no evidence that the fastening of the topping lift sheet was disturbed.

Soon afterwards the plaintiff went to work upon the main boom to remove the band. When the boom was taken out of the crutch and its weight came upon the topping lift, this was found to be insufficiently secured, and the boom fell to the deck injuring the plaintiff. Upon the trial before Mr. Justice Townshend the jury found, in answer to questions, that the injury was caused by the falling of the boom owing to the topping lift sheet not being secured, but that this was not occasioned by the negligent act or omission of defendants or their servants. Judgment was thereupon entered for the defendants and was confirmed by the Supreme Court of Nova Scotia (per Graham and Ritchie JJ., Macdonald C.J. dissenting.)

[Page 562]

The reported notes of the charge of the learned trial judge are meagre, but, so far as the argument here went, its adequacy to the circumstances of the case is not impugned.

The defendants owed to the plaintiff a duty to take reasonable care to provide that the tackle and appliances upon which he would have to depend for his safety in doing defendants' work were maintained in a proper state and condition. In *Heaven* v. *Pender[[2]](#footnote-3)* Cotton and Bowen, L. JJ. (p. 515) say as applied to the facts in that case:

To these persons, (*i.e.* persons going to the vessel in dock for the purpose of repairing her,) the dock owner was under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by him they were in a fit state to be used, that is in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they were employed.

The corresponding duty as between employer and employed is stated by Lord Herschell in *Smith* v. *Baker & Sons[[3]](#footnote-4)* in these terms:

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

Reasonable care is matter of degree dependent upon the particular facts of each case, and is in all cases a question of fact, where there is any substantial evidence on the point at all. There is nothing in the evidence warranting a conclusion that the plaintiff was himself to attend to the securing of the tackle. The obligation, such as it was, was upon the defendants alone. The jury having found that the topping lift sheet was not secured, there was, so far, and in the result, a failure to insure that which was,

[Page 563]

or ought to have been the object of defendants' care. But that is not enough; and the further finding that the accident was not occasioned by the negligent act or omission of the defendants or their servants negatives the conclusion that such result arose from any want of reasonable and proper care on their part.

If (as contended) the first answer of the jury is to be construed as meaning that the sheet was not at any time secured, then this omission could not well be reconciled with the exercise of proper care. But such interpretation is to be given to the findings as will, if possible, render them consistent. The words "the topping lift sheet not being secured," taken in connection with the question to which it forms part of the answer, point to the facts and causes in existence and operative at the precise time of the accident, and are not to be construed as if they were, "the topping lift sheet not having been secured."

The learned counsel for the appellant addressed to us a very strong argument to show that the sheet having been found not secured at the time of the accident it either had never been properly secured or, having been secured, as testified to by the rigger Allan, it afterwards was suffered to become and remain unsecured through the negligence of the defendants. There may be (and probably is) a preponderance of reason in favour of this view, but its weight is not so considerable as to leave no room for a different opinion. The opinion of the learned Chief Justice in dissenting is, upon this part of the case, a very able presentation of the like view, and if we were free to deal with the facts apart from the opinion of the jury it might appear decisive; but there is the finding of the jury upon a matter entirely one of fact and in respect of which their observation and experience might qualify them peculiarly to judge, and we do not think that we

[Page 564]

ought to ignore such findings. The result of this view is that the appeal should be dismissed,

Appeal dismissed with costs.

Solicitors for the appellant: King & Barss.

Solicitor for the respondents: Hector McInnes.

1. 30 N. S. Rep. 548. [↑](#footnote-ref-2)
2. 11 Q. B. D. 503. [↑](#footnote-ref-3)
3. [1891] A. C. 325. [↑](#footnote-ref-4)