1934
*Nov. 26
1935
*May 13

CLEMENT HAMBOURG (PLAINTIFF), APPELLANT;

AND

THE T. EATON COMPANY LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Injury to pianist while playing in auditorium, from bursting of lens of spotlight—Liability of proprietor of auditorium—Relationship between proprietor and pianist—Mere licensee—Extent of proprietor's duty.

Defendant rented its auditorium to H. for a musical recital which H. was giving, and permitted H., without charge, to use it for a rehearsal previous to the recital. Plaintiff, H.'s brother, was, for a fee (which also covered his preparatory work), to assist H. as a pianist in the recital. During the rehearsal, while plaintiff was playing a piano on the stage of the auditorium, the lens of a spotlight suspended above the piano burst and a piece of broken glass cut his hand. He sued defendant for damages.

Held: Plaintiff was a mere licensee of defendant, without an interest, plaintiff not having entered the auditorium upon business which concerned

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

defendant upon defendant's invitation, express or implied. In such circumstances plaintiff did not come within the rule applied in *Indermaur* v. *Dames*, L.R. 1 C.P. 274, L.R. 2 C.P. 311, and certain later cases, which treat a licensee with an interest as being entitled practically to the same degree of protection at the hands of the licensor as an invitee in the usual sense. To bring a person within this category it must be shewn that he was upon the premises for some purpose in which he and the proprietor had a common or joint interest (*Hayward* v. *Drury Lane Theatre*, [1917] 2 K.B. 899, at 913; *Addie* v. *Dumbreck*, [1929] A.C. 358, at 371). Even if plaintiff had a substantial financial interest in the success of the recital, this would make no difference in the relationship between defendant and plaintiff and would be quite insufficient to make plaintiff a licensee with a joint or common interest as between him and defendant. Plaintiff being a mere licensee, defendant's only duty to him was not to expose him to a hidden peril or trap, that is, a peril which was not apparent to the licensee but the existence of which was known to the licensor (or which ought to have been known to the licensor, should it be taken from certain dicta in *Addie* v. *Dumbreck*, [1929] A.C. 358, and *Fairman* v. *Perpetual Investment Bldg. Soc.*, [1923] A.C. 74, that the proprietor's duty is recognized as so enlarged; whether so or not, the law still recognizes a distinct line of demarcation between the duty owed to an invitee and that owed to a mere licensee).

Held, further: Upon the evidence, the spotlight in question was not a trap or hidden peril within the meaning of the cases.

Dismissal of the action by the Court of Appeal for Ontario (reversing judgment at trial) was affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1), which reversed the judgment of McEvoy J. in his favour, and dismissed the action. The action was for damages for injury to the plaintiff's hand caused by its being struck by a piece of broken glass when the lens of a spotlight, suspended above the piano at which the plaintiff was playing on the stage of the defendant's auditorium, burst. Plaintiff claimed that the injury was caused by defendant's negligence. The material facts of the case are sufficiently stated in the judgment now reported. The plaintiff's appeal to this Court was dismissed with costs.

J. E. Corcoran K.C. for the appellant.

G. W. Mason K.C. for the respondent.

The judgment of Duff C.J. and Cannon, Crocket and Hughes JJ. was delivered by

(1) [1934] O.W.N. 115.

1935

HAMBOURG v. THE T. EATON CO. LTD.

CROCKET, J.—The appellant, a professional pianist and piano teacher, was playing a piano on the stage of the auditorium of the respondent company in its Toronto departmental store in the forenoon of May 10th, 1932, when the lens of a spotlight suspended above the piano burst and one of the pieces of the broken glass fell upon his left hand and cut his forefinger. The resulting wound was dressed by a surgeon who put four stitches in it. These stitches were taken out a week later when the skin had fully healed but the appellant claimed that he suffered serious damage in consequence of his being incapacitated for the proper carrying on of his lessons with his pupils for some weeks and in the enforced cancellation of several important concert engagements to which he was looking forward as opportunities for enhancing his professional reputation. He brought this action to recover compensation from the respondent as the proprietor of the auditorium, claiming that his injury was caused by the respondent's negligence.

At the time of the accident a rehearsal was in progress of a program for a recital which the appellant's brother, Boris Hambourg, with the assistance of some other musicians, was to give in the auditorium that night. The latter, through his concert agent, had some time previously entered into a written rental agreement for the use and occupation of the auditorium for the purpose of this recital between the hours of 7 p.m. and 12 p.m. on May 10th at a rental of $125, one of the terms of which was that the lessor should heat, seat and light the auditorium, but that it should not be responsible for any interruption of or interference with such heating or lighting. The lessee upon his part agreed, *inter alia,* that no alterations should be made to the auditorium, its furnishings or equipment, without the consent of the lessor in writing, and that if any special lights, decorations or settings were required, to the installation of which the lessor might be agreeable, such would be supplied by the lessee at the lessee's own expense.

The lease contained no provision for the holding of any rehearsal but permission had been granted by the respondent's auditorium manager to Mr. Boris Hambourg to use the auditorium for this purpose without charge dur-

ing the forenoon of that day. The appellant was to assist in the recital as a pianist but was not a partner of his brother in the undertaking, having no responsibility for any of the expenses or no right to share in the profits. He was to receive a fee or honorarium of $100 for his participation, which, it was explained, was to cover all his preparatory work therefor.

The evidence shews that the rehearsal had been in progress for about two hours when the appellant went to the piano to play an accompaniment for his brother in a particular piece and that he had been at the piano for not more than five or ten minutes when the lens burst. The lights apparently had been on from the beginning of the rehearsal, including the spotlight in question.

As to just what happened in connection with the positioning of the spotlight in relation to the piano the evidence is very obscure and unsatisfactory. Mrs. Hambourg says that some red and blue lights had been in use which she told someone—she couldn't remember whom—she did not like, and that these lights were almost instantaneously turned off, she presumed by a switch, leaving a beam of uncoloured light trained on the piano and that the crash occurred almost instantaneously with the turning off of the coloured lights. Mr. Tait, the manager of the auditorium, who is an experienced electrician, was not on the stage at the time but in some portion of the wing. He said he knew nothing about any request being made for or anything being said about the non-use of coloured lights in connection with the rehearsal or the recital either before or during the progress of the rehearsal, and did not remember Mrs. Hambourg speaking to him at any time about coloured lights. He said he had given the instructions for the hanging of the spotlight because he had been asked to arrange the lighting as it had been for a concert held a few nights before and that he gave these instructions to one or other of two union electricians whom he usually employed for the placing or changing of the stage lights to suit the requirements of the lessees. It appears that these men hung the spotlight in the usual manner from one of several parallel metal pipes or battens extending from one side of the stage to the other, and which were movable up and down by means of pulleys,

1935

HAMBOURG v. THE T. EATON CO. LTD.

Crocket J.

and that the particular spotlight with which the action is concerned was placed for use on this occasion between 15 and 17 feet above the keyboard of the piano.

No evidence was given to shew who placed the piano under the spotlight, or whether the spotlight was suspended from the batten after the position for the piano had been selected, but it appears that a Heintzman concert grand piano had been supplied to Boris Hambourg for special use at the recital, so that one would naturally infer that either the lessee or some of his assistants would select the particular position in which it was to be placed. Neither of the two men who were employed to do the work and actually placed the spotlight in position was called as a witness, and none of the plaintiff's witnesses vouchsafed any explanation as to the placing of the piano directly below the spotlight or who directed it to be placed in that position.

Although no definite evidence was given on the point, it was estimated by a Mr. Gordon Best, an electrician, who gave evidence in behalf of the plaintiff, from two of the broken pieces which fell on the piano, that the lens was an 8-inch diameter lens and several inches thick. It was mounted in the frame or housing containing a 5-inch diameter 1,000 watt bulb 5 inches below the bulb, by means of a grooved ring of spring brass or bronze in which it was firmly held by two small bolts. Provision for ventilation was made by means of a circle of round holes bored through the metal of the hood below the bulb and above these a number of rectangular slits running lengthwise of the lamp. That at least is the effect of the somewhat confused description which was attempted of the ventilation system of the lamp, as I interpret it.

These spotlights and the other electrical equipment had been purchased about a year before on the opening of the auditorium by Mr. Tait from the Amalgamated Electric Co. of Toronto, which he described as one of the best electrical equipment firms in the country. The electrical equipment provided for the auditorium, he said, he considered the best on the market, both in construction and design and adaptability to their needs.

The action was tried before Mr. Justice McEvoy without a jury. His Lordship found that the defendants knew

or ought to have known that the lens was liable to crack from the heat of the bulb and fall and strike anyone upon the stage, and that it was quite impossible on the evidence to hold that the plantiff had any possible chance of knowing the danger created by suspending over the stage such a lens with such a light behind it and that such a piece of mechanism was liable to crack and fall upon the stage. He held that the defendants were negligent in not having inspected the dangerous lens to see that it was in safe condition and in not providing some shield to prevent the same from falling upon the plaintiff or other people lawfully using the stage from time to time, and that upon the evidence the defendants were liable to the plaintiff for the injuries suffered. He assessed the damages at $3,000.

On appeal to the Court of Appeal the trial judgment was set aside and the action dismissed, per Mulock, C.J., and Riddell and Middleton, JJ. The Appeal Court held that the plaintiff was nothing more than the licensee of the defendant; that, while he undoubtedly had permission to use the auditorium, the sole right he had as licensee was as a member of the concert company; and that any change which had been made in the premises or its equipment after his entry into the auditorium was made at the express request of those through whom his right as licensee came; that the change was made for his advantage in all probability and that it would be absurd to hold the defendant liable for a change so made; that he was excluded from the rule in *Indermaur* v. *Dames* (1); and that, even if the plaintiff could be considered in the category of invitee, there was no actionable negligence for which the defendant could properly be held liable.

I am of opinion that the Appeal Court was right in holding upon the evidence that the relationship between the respondent and the appellant was that of a mere licensee without an interest, the latter not having entered the auditorium upon business which concerned the respondent upon the respondent's invitation, express or implied. In such circumstances the appellant in my judgment does not fall within the rule which was applied in *Indermaur* v. *Dames* (2) or in the later cases of *Holmes*

(1) (1866) L.R. 1 C.P. 274; L.R. 2 C.P. 311.

(2) (1866) L.R., 1 C.P. 274, affirmed L.R. 2 C.P. 311.

1935

HAMBOURG v. THE T. EATON CO. LTD.

Crocket J.

v. *North Eastern Ry. Co.* (1) and *Wright* v. *London & North Western Ry. Co.* (2), all of which treat a licensee with an interest as being entitled practically to the same degree of protection at the hands of the licensor as an invitee in the usual sense. To bring a person within this category, however, it must be shewn that he was upon the premises for some purpose in which he and the proprietor had a common or joint interest, as pointed out by Scrutton, L.J., in *Hayward* v. *Drury Lane Theatre* (3), and by Viscount Dunedin in the Scottish Appeal of *Addie* v. *Dumbreck* (4) in the House of Lords.

In the case at bar the learned trial Judge, in addition to the findings already quoted, held as a fact that the plaintiff had a substantial financial interest in the success of the recital. This, with all respect, I think, makes no difference in the relationship between the respondent and the plaintiff and is quite insufficient to make the latter a licensee with a joint or common interest as between him and the respondent whom he seeks to fix with the same degree of liability as if the respondent were an invitor, and he the respondent's invitee, that is to say, with the duty on the part of the invitor to the invitee, to quote the words of Willes, J., in *Indermaur* v. *Dames* (5) to "use reasonable care to prevent damage from unusual danger, which he (the invitor) knows or ought to know," or, as Lord Hailsham, L.C., put it in *Addie* v. *Dumbreck* (6), "the duty of taking reasonable care that the premises are safe." Apart from contractual obligations, this is the highest duty the law imposes upon proprietors of premises towards those who go upon them, and applies only where persons go upon the premises as invitees of the proprietors. "The lowest," said Lord Sumner, then Hamilton, L.J., in *Latham* v. *Johnson* (7).

is the duty towards a trespasser. More care, though not much, is owed to a licensee—more again to an invitee * * * The rule as to licensees, too [as in the case of trespassers], is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril.

(1) (1869) L.R. 4 Ex. 254; (1871) L.R. 6 Ex. 123.
(2) (1876) 1 Q.B.D., 252.
(3) [1917] 2 K.B. 899, at 913.
(4) [1929] A.C. 358, at 371.
(5) (1866) L.R. 1 C.P. 274.
(6) [1929] A.C. 358.
(7) [1913] 1 K.B. 398, at 410-411.

With every word of this passage Viscount Dunedin said in *Addie* v. *Dumbreck* (1) he agreed and that it was the law of Scotland as well as that of England. In the same case Lord Hailsham, L.C., said:—

> In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.

Whether the words "or ought to be known" in the last quoted dictum are to be taken as a recognition that the proprietor's duty in respect of concealed dangers or "traps" has been enlarged, is a question upon which there has been much argument. It is clearly obiter, as all the Law Lords taking part agreed that the boy in that case was a trespasser and not a licensee, either with or without an interest. In *Fairman* v. *Perpetual Investment Building Society* (2), Lord Atkinson, in discussing the question of "a hidden peril," also made use of the phrase "of the existence of which he knew, *or ought to have known,*" and Lord Wrenbury did the same thing. In the following year, in *Sutcliffe* v. *Clients Investment Co.* (3) where the question of the correctness and intention of these dicta was elaborately and ably argued, Bankes, L.J., stated that these dicta were obiter and that it did not appear anywhere in the *Fairman* case (4) that either Lord Atkinson or Lord Wrenbury intended to make any alteration in the law. He added:—

> No alteration was in fact made if the plaintiff in that case was a licensee with an interest, because there is no material difference between a licensee with an interest and a person who is described as an "invitee," that is to say, a person in the position of the plaintiff in *Indermaur* v. *Dames* (5).

Scrutton, L.J., said:—

> If that is law, in what class should this workman be placed? He was allowed by the tenant to be upon the premises for the purpose of doing repairs, and so far as access to the balcony was necessary for that purpose he was there with the consent of the landlords. He was a licensee with an interest. Now I will do nothing to interfere with the classical judgment of Willes J. in *Indermaur* v. *Dames* (6).

Atkin, L.J., agreed.

(1) [1929] A.C.358.
(2) [1923] A.C. 74.
(3) [1924] 2 K.B. 746.
(4) [1923] A.C. 74.
(5) L.R. 1 C.P. 274; L.R. 2 C.P. 311
(6) L.R. 1 C.P. 274, 288.

1935

HAMBOURG v. THE T. EATON CO. LTD.

Crocket J

Whether or not the dicta of Lords Atkinson, Wrenbury and Hailsham are accepted as recognizing any extension of the proprietor's obligation in respect of concealed dangers by making the liability of a proprietor of premises for a concealed danger depend not only upon his actual knowledge, but upon his means of knowledge as well—or what he ought to have known—it is quite apparent that the law still recognizes a distinct line of demarcation between the duty owed by a proprietor of premises to one who is an invitee and to another who is a mere licensee. Indeed the very dicta themselves, from which the debated alternative phrase has been extracted to support the extension of the principle contended for, afford conclusive evidence that it was never intended thereby to place invitees and mere licensees in the same category as regards the proprietor's responsibility towards them. Witness Lord Hailsham's statement that in the case of persons who go upon the premises by leave and licence, express or implied, the duty is *much less stringent,* than in the case of those who are present by the invitation of the occupier. If there were not still a material and very important distinction between the two degrees of duty, can it be supposed that Viscount Dunedin in the very same case would have emphasized as he did that in considering cases of that class the first duty of the trial tribunal was "to fix once and for all into which of the three classes the person in question falls" (trespassers, licensees or invitees) and apply the law governing that category without "looking to the law of the adjoining category?" Or that His Lordship should have used such a striking expression as: "There is no half-way house, no no-man's land between adjacent territories"?

For my part I cannot think that it was intended, by the use of the debated alternative phrase in defining an owner's or occupier's liability for a concealed danger in the quoted passages relied upon, to lay down the principle that the owner or occupier owed the same duty to a licensee without an interest as to an invitee.

The appellant being a mere licensee, the respondent's only duty to him was not to expose him to a hidden peril or trap, that is, as I understand it, a peril, which was not apparent to the licensee but the existence of which was known to the licensor—(or, if one is disposed to add the alternative

phrase above discussed) or which ought to have been known to the licensor.

Was, then, this spotlight, suspended above the piano in the position described, with no netting or screen below it to prevent pieces of broken glass falling upon persons or objects on the stage floor in the event of the lens cracking or bursting, a trap or hidden peril within the meaning of the cases?

I am of opinion that it was not.

There is but one conclusion, I think, which can reasonably be drawn from the evidence regarding the bursting of the lens, viz: that it broke, either in consequence of some latent defect in the glass itself or in consequence of its becoming overheated from the incandescent lamp in the hood above. There was no fore-warning of impending danger. No evidence of anything else than the sudden, instantaneous crash itself. No flaw or defect whatsoever in the lens or any part of the spotlight, so far as the evidence discloses, which was visible or discoverable, to indicate that it held any danger that would not be common to all other spotlights of the same type. The most thorough examination possible before the occurrence of the accident would not have revealed to the manager of the auditorium any more than to the appellant or anybody else that the lens was likely to burst.

This particular spotlight had been used with others of the same type for more than a year since the opening of the auditorium. The lens had never cracked before, even though it seems that it had at times been mounted on the stage floor or a table in a reverse position with the lens above the bulb—a position in which the manager admitted some lenses had cracked—but he had never known of one to crack in a spotlight suspended from above with the lens below the bulb. Best, the plaintiff's witness, admitted that the tendency of a lens to crack was much greater where it was above the lamp than where it was below, and it is obvious that such ample provision as was made for the ventilation of the hood of the particular one in question might reasonably be relied upon by anyone to remove all danger of the lens becoming overheated from an incandescent light above it. The auditorium manager had never known any lens to crack from overheating from an incandescent lamp placed above it. Neither had Donald Cowburne, the only other electri-

1935

HAMBOURG v. THE T. EATON CO. LTD.

Crocket J.

cian who gave evidence in behalf of the respondent. Gordon Best, the appellant's expert, although he stated he had heard of it, was unable to give a single specific instance. Cowburne testified that when lenses did crack they usually cracked directly across the lens; and that it was quite unusual for them to break in any other way.

Apart from the fact that the lens did burst on the occasion in question there was no evidence whatever, it seems to me, to suggest that the spotlight was a source of danger, and, even after the event, the entire evidence leaves it exceedingly problematical as to whether the bursting was in reality caused by the overheating of the lens or by some latent undiscovered defect in the glass.

Be this as it may, the spotlight itself, which had no visible or discoverable flaw or defect, suspended as it was without a protecting shield, was in no sense a trap or hidden peril. If it held any danger, which might reasonably have been anticipated at all, that danger was in no manner a hidden or concealed one. It must have been quite as apparent to any visitor on the stage floor, and especially to one who went to the piano to play in and directly under its flood light, as to the auditorium manager or the particular workman who had placed it in position. The only conceivable ground, in my judgment, upon which it could be held to be a concealed danger within the meaning of the cases would be, either that the auditorium manager knew that the lens was likely to become overheated from the incandescent lamp above it and to burst, or that he ought to have known of that likelihood. That he was convinced that there was no such danger and that the spotlight in the position in which it was placed was absolutely safe cannot, I think, be doubted upon the evidence. This being so, it seems to me to be quite impossible to hold either that he knew the lens was likely to become overheated and burst or that he ought to have known that to be the case.

The appeal should be dismissed with costs.

RINFRET J.—I concur with Mr. Justice Crocket that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Godfrey & Corcoran.*

Solicitors for the respondent: *Mason, Foulds, Davidson, Carter & Kellock.*