NATIONAL TRUST COMPANY LIMITED, Executors under the Last Will and Testament of Douglas James Taylor, Deceased (*Defendant*) .....APPELLANT;

1968
*Oct. 11, 15
1969
Jan. 28

AND

WONG AVIATION LIMITED and ANTHONY M. WONG (*Plaintiffs*) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bailment—Aircraft rented for solo flight—Pilot and aircraft never seen again—Action in contract and tort against pilot's executors—No direct evidence of negligence on pilot's part—Factors equally consistent with negligence and no negligence—Res ipsa loquitur not applicable—Burden of proof.

An aircraft owned by the second respondent and leased by him to the respondent company was rented by the company to one T for the purpose of flying, solo, "in a tight flight circuit around Toronto Island Airport". T, a licensed but inexperienced pilot, took off from the airport and neither he nor the aircraft was ever seen again. In an action brought by the respondents against the executor of T's estate for damages for the loss of the aircraft, the claim of the respondent company was framed in both contract and tort and that of the second respondent in tort only. The action was dismissed at trial. On appeal, the Court of Appeal allowed the appeal and awarded the respondents $10,500. The executor then appealed to this Court.

Held: The appeal should be allowed.

Adopting the views of the trial judge that it had been satisfactorily demonstrated the loss of the aircraft could have been caused by many other factors as equally consistent with no negligence as with negligence on the part of T and that, accordingly, the maxim *res ipsa loquitur* did not apply, the claims in negligence, based as they were solely on the application of that maxim, should be dismissed.

Both the bailee and the bailed chattel having disappeared and there being no evidence of negligence on the part of the bailee, the rule of evidence whereby the onus is placed on the bailee to disprove negligence was not applicable and the general rules governing proof where performance of a contract has become impossible due to the destruction of the subject-matter should be applied. As the respondents had not adduced any evidence to "establish a fault or default in the defendant", the bailment action depended upon the application of the rule embodied in the maxim *res ipsa loquitur*. As there were factors which might well have caused the loss of the aircraft without any negligence on T's part, that maxim was not applicable.

The appellant had produced an explanation from which it would be just as reasonable for a Court to conclude that the happening occurred without the negligence of the bailee as to conclude that he was negligent. Where there was no direct evidence of negligence, no more could be required of the executor of a deceased bailee who perished with the chattel.

---

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

1969

NATIONAL TRUST CO. LTD. v. WONG AVIATION LTD. *et al.*

Pratt v. Waddington (1911), 23 O.L.R. 178; *Macdonell v. Woods* (1914), 32 O.L.R. 283; *Stables v. Bois* (1956), 3 D.L.R. (2d) 701; *McCreary v. Therrien Construction Co. Ltd. and Therrien,* [1951] O.R. 735; *The "Ruapehu"* (1925), 21 Ll.L.Rep. 310; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.,* [1941] 2 All E.R. 165, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Moorhouse J. Appeal allowed.

Hugh Rowan, Q.C., and *J. G. Pink,* for the defendant, appellant.

B. F. Kennerly, for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from a judgment rendered at trial by Mr. Justice Moorhouse and directing that the respondents recover the sum of $10,500 from the appellant in respect of the loss of a Cessna 172A aircraft (hereinafter sometimes referred to as CF-LWE) which had been rented by Wong Aviation Limited to the late Douglas Taylor on October 28, 1962, for the purpose of flying, solo, "in a tight flight circuit around Toronto Island Airport", and which was lost, together with its pilot. No trace of the aircraft or Taylor has ever been found.

The aircraft was owned by the respondent, Anthony M. Wong, and was leased by him to the respondent company which carried on the business of providing flying instruction and of leasing aircraft to licensed pilots at the Toronto Island Airport. Douglas Taylor, although far from being an experienced pilot, was the holder of a valid pilot's licence and in this sense qualified to fly the aircraft in question under visual flight conditions, although there is no evidence that he had ever flown a Cessna 172A aircraft before. The learned trial judge found that the aircraft was in satisfactory flying condition and had sufficient fuel for the purpose of the projected flight.

[1] [1966] 2 O.R. 182, 56 D.L.R. (2d) 228.

In opening the argument before us, counsel for the appellant stressed the fact that the claim of the respondent company was framed in both contract and tort, being founded primarily on the appellant's alleged breach of the contract of bailment in that he failed to return the plane which he had hired, and in the alternative, on the ground that the plane was lost due to Taylor's negligence. Counsel pointed out that this created a somewhat anomalous situation in that the claim in bailment involved the contention that the onus lay on the appellant to prove that the loss was not caused by Taylor's negligence, whereas it was acknowledged that in the tort claim the onus of proving negligence rested upon the respondents who relied exclusively on the application of the maxim *res ipsa loquitur* to discharge it.

If the company were the only plaintiff in this action, I do not think that the mere fact of its having pleaded negligence in the alternative would have any great significance. The company's action is one in bailment. In the present case, however, there are in fact two separate and distinct actions pleaded because the second plaintiff, Anthony M. Wong, who was the owner of the aircraft, was not a party to the contract of bailment and his action depends entirely upon proof that the plane was lost through Taylor's negligence. This phase of the matter does not appear to have concerned the Courts below, but as I think that Anthony M. Wong's claim should be dealt with, I find it necessary to make a brief review of the essential allegations in the pleadings.

It is alleged in the statement of claim that on October 28 the company, by its servant George Morewood, "orally agreed to let on hire to Taylor CF-LWE at a rental at the rate of $17.00 per hour" on the express condition that Taylor was to fly, in accordance with visual flight rules, "in a tight flight circuit around Toronto Island Airport" going no further west than High Park in the City of Toronto and that after completing two such circuits, he was to fly the aircraft back to the airport and land there. It is further alleged that it was an implied condition of hire that Taylor would take due and proper care of the aircraft and would restore it to the company at the airport at the conclusion of the flight in the same condition as

1969

NATIONAL TRUST CO. LTD. v. WONG AVIATION LTD. *et al.*

Ritchie J.

that in which he had received it. The breach of this contract is alleged in para. 8 of the statement of claim in the following terms:

> In breach of the conditions of hire, Taylor has never returned the CF-LWE to the Company at the Toronto Island Airport or elsewhere. The Company and Wong have no knowledge of the whereabouts of CF-LWE or of Taylor after Taylor took . . . off from the Toronto Island Airport on the 28th of October, 1962.

The claims of Wong and the company in tort are made by reason of *The Trustee Act*, R.S.O. 1960, c. 408, s. 38(2) "for the loss of CF-LWE due to the negligence of Taylor". These claims are pleaded in para. 11 of the statement of claim as follows:

> Wong as owner of the CF-LWE claims and the Company by way of alternate plea further claims that the loss of CF-LWE was due to the negligence of Taylor and as such loss occurred while CF-LWE was in the sole control and possession of Taylor, the Plaintiffs will rely on the doctrine of *res ipsa loquitur*.

During the course of the examination for discovery of Anthony M. Wong, this paragraph was read into the record and the following exchange then took place between Mr. Rowan, acting on behalf of the present appellant, and Mr. Church, acting for the respondents:

> Q. In Paragraph 11 of the Statement of Claim the company claims that the loss of CF-LWE was due to the negligence of Taylor. Can you tell me on what acts of negligence you rely in paragraph 11?
>
> MR. CHURCH: We rely on the doctrine of *res ipsa loquitur*.
>
> MR. ROWAN: I understand that. Apart from the doctrine of *res ipsa loquitur*, are there any more acts of negligence on the part of Taylor that you rely on?
>
> MR. CHURCH: No, we have no knowledge of any particular acts. His conduct was beyond reproach at the time the aircraft was rented. Our allegations of negligence are by way of our reliance on the doctrine of *res ipsa loquitur*.
>
> MR. ROWAN: Exclusively?
>
> MR. CHURCH: Yes.

I think it convenient to deal first with the claims in negligence and to say at the outset that I agree with the finding of the learned trial judge which is expressed in his reasons for judgment in the following language:

> It was agreed there was no evidence of negligence by Taylor. The plaintiffs rely upon the maxim *res ipsa loquitur*.
>
> The management of the aircraft was under the sole control of Taylor but it has been demonstrated to my satisfaction the loss of the aircraft could have been caused by many other factors as equally consistent with

no negligence as with negligence on the part of Taylor. For these reasons I believe that maxim is not here applicable. Many of the explanations of loss are indeed probable without negligence by Taylor. Air turbulence, carburetor icing, loss of vision with reference to ground or horizon to name but three.

The learned trial judge then quotes from the decision of this Court in *United Motors Service, Inc. v. Hutson*[2], where Sir Lyman Duff said:

> Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff.

Adopting, as I do, these views expressed by the learned trial judge, it follows that I would dismiss the claims in negligence based, as they are, solely on the application of the maxim *res ipsa loquitur*, and this means that the appeal against Anthony M. Wong should be allowed as he has made no claim in contract.

Mr. Justice Laskin, in the reasons for judgment which he delivered on behalf of the Court of Appeal, was content to limit himself to a consideration of the facts in terms of an action for damages for breach of the contract of bailment and he felt free to leave the maxim *res ipsa loquitur* out of his consideration altogether saying:

> Since I do not agree that *res ipsa loquitur* has any place in our law of bailment I need not deal with the contention that it is inapplicable to the facts.

It is, I think, significant to note that the Court of Appeal did not disagree with the finding of the learned trial judge that many of the explanations of the loss of the aircraft were "indeed probable without negligence by Taylor".

It appears to me to be obvious that the contract of bailment was dependent for its performance upon the continuing existence of the bailed chattel and the disappearance of the chattel made that performance impossible. Under these circumstances, the bailee's position at law is well summarized in 2 Hals., 3rd ed., p. 126, para. 242, as follows:

> He must also return the chattel hired at the expiration of the agreed term. But if the performance of his contract to return the chattel becomes impossible because it has perished, this impossibility (if not arising from the fault of the hirer or from some risk which he has taken upon himself) excuses him.

---

[2] [1937] S.C.R. 294 at 297.

1969

NATIONAL TRUST CO. LTD. v. WONG AVIATION LTD. *et al.*

Ritchie J.

The basic question in this case is whether the onus is upon the bailee's executor to show that the disappearance did not occur through his fault or on the bailor to prove that it did, and it appears to me that the Court of Appeal has rested its decision on the ground that in the bailment action the burden of proving that Taylor's negligence was not the cause of the loss lay on the appellant and that this involved the onus of disproving negligence by affirmative proof of reasonable care by Taylor which was not discharged by producing an explanation equally consistent with negligence or no negligence. In reaching this conclusion, Laskin J.A. expressed himself as follows:

> The jurisprudence of this Court has been clear, at least since *Pratt v. Waddington* (1911), 23 O.L.R. 178, that on a plea and proof of bailment and non-return of the bailed goods, the bailee must disprove negligence: see also *McCreary v. Therrien Construction Co. Ltd. and Therrien,* [1951] O.R. 735. I do not think that the type of bailment, whether gratuitous or for reward makes any difference in the application of this proposition. Nor do I think that the proposition is affected by the circumstance that the cause of loss of the bailed chattel is unknown. I readily agree, however, that the evidence offered in exoneration may be different in its thrust according to whether the cause of loss is known or unknown. Where known, the bailee must negative negligence in respect of the occurrence. Where the bailed chattel disappears and the disappearance is unaccountable, the bailee must still disprove negligence by affirmative proof of reasonable care, but he is not to be put to the obligation to show how the loss occurred and then saddled with the duty to disprove negligence in respect thereto: see *Macdonnell v. Woods* (1914), 32 O.L.R. 283; *Brooks Wharf & Bull Wharf, Ltd. v. Goodman Bros.*, [1936] 3 All E.R. 696; *Stables v. Bois,* [1956] O.W.N. 164, 3 D.L.R. (2d) 701. Indeed, proof of the cause of loss does not inevitably carry disproof of negligence, although in particular circumstances it may do so . . .

In the last two sentences of the next paragraph of his reasons for judgment, the learned judge says:

> I note that counsel for the plaintiffs was content to rest his appeal on the proposition that the bailee, or the defendant in this case, had the burden of bringing forth a reasonable explanation of how the aeroplane may or could have been lost without the bailee's negligence. In putting his case on this footing he was apparently accepting the burden of persuasion if the evidence on the whole case was in balance, but, as already pointed out, this is not the law of Ontario.

Earlier in his reasons for judgment, Mr. Justice Laskin expressed the opinion that "the principles of proof do not vary merely because the bailee and the chattel bailed disappeared together", but we were not referred to any reported cases in which this had happened and it appears to me to be desirable to examine the cases cited by

Laskin J.A. in order to determine whether they afford any authority for imposing on the executor of a dead bailee the same onus of disproving negligence that rests upon one who knows all about the circumstances of the chattel's disappearance and is alive to give evidence.

The case of *Pratt v. Waddington, supra,* was one in which the plaintiff had loaned a horse to the defendant who in turn, without obtaining any permission from the plaintiff, had loaned it to a third party by the name of Spain who used it for heavy work as a result of which it died within three weeks. In the course of his reasons for judgment, Middleton J. said:

> Here the defendant was entirely in the wrong; the loan of the horse was to him, and he had no right to pass it on to Spain. . . . It [the horse] was subject to conditions and risks not contemplated by the bailment; the defendant, and Spain holding the horse under him, have the means of shewing what was done, and in fairness and in law the onus is upon them to excuse the default in making due return.

That was a case of gratuitous bailment in which it was clear that the death of the horse was a consequence of the bailee's breach of contract in loaning it to a third party without the bailor's authority, and it is significant to note that the third party, who knew more than anyone else about the cause of the horse's death, was alive and was not called to give evidence at the trial. In the present case there is no suggestion that the loss was in any way related to a breach of contract by Taylor, there is no evidence of negligence, and there was nobody available who knew the circumstances under which the loss occurred.

The case of *Macdonnell v. Woods, supra,* was one in which a trunk had been left at a rooming house for safe-keeping pending the plaintiff's arrival and the defendant's servant undertook to send it to the room which the plaintiff had booked, but in breach of this contract, the trunk was left in the passageway unprotected from whence it was stolen. This was clearly another case in which the goods were lost through a breach of the contract by the bailee, and, like the *Pratt* case, the principles upon which it was decided do not, in my view, apply to a case where the bailee and the chattel bailed have disappeared together and there is no evidence of negligence or breach of contract by the bailee.

1969

NATIONAL TRUST CO. LTD. v. WONG AVIATION LTD. *et al.*

Ritchie J.

Stables v. Bois[3], was a case in which the plaintiff had left his car in a garage for repairs when one of the servants of the garage owner bailee was using an acetylene torch to remove the muffler from another car in the garage. A fire broke out and the garage, together with the plaintiff's car, was destroyed. There was no evidence that the operator of the acetylene torch had made any inspection of the gasoline tank in the car that he was working on and it was shown to be a common occurrence that would be known and anticipated by an experienced operator for such an acetylene torch to flash back.

The Court of Appeal for Ontario, in an oral judgment rendered by Laidlaw J.A., held that the burden lay on the garage owner to show that his servant had not been negligent and concluded by saying:

> In those circumstances, and in the light of that evidence, how could it be found that the defendant had explained this happening in such a manner that the Court could reasonably consider that there was no negligence on the part of the defendant? We think the onus was not satisfied and that on the evidence that conclusion is the reasonable one to reach.

That was a case where the garage mechanic who knew all about the cause of the fire was available to give evidence and where the circumstances themselves were such as to require an explanation.

It is interesting to note, however, that even under these circumstances Mr. Justice Laidlaw's decision appears to have turned on the fact that the defendant had given no explanation from which the Court could reasonably conclude that there was no negligence on the part of the defendant. With all respect, this does not appear to me to afford any authority for the broad statement made by Mr. Justice Laskin to the effect that under the law of Ontario it is not enough for a bailee to bring forth a reasonable explanation of how the bailed chattel could have been lost without his negligence.

The case cited by Mr. Justice Laskin which is closest to the present case is that of *McCreary v. Therrien Construction Co. Ltd. and Therrien*[4], where the defendant had rented a "cabin trailer" from the plaintiff for use as living quarters for himself and others and the trailer was

[3] 3 D.L.R. (2d) 701, [1956] O.W.N. 164.

[4] [1951] O.R. 735, [1952] 1 D.L.R. 153.

destroyed by fire while in the defendant's possession. It was held that in these circumstances the onus rested on the bailee to show that the loss of the property had not resulted from negligence or improper conduct on his part, and Mr. Justice Laidlaw, who wrote the reasons for judgment of the Court of Appeal for Ontario, made a careful review of the authorities and concluded by explaining the principle governing the burden of proof in bailment cases in the language which was used by Atkin L.J. in *The "Ruapehu"*[5]. Mr. Justice Laidlaw said:

> Lord Justice Atkin explains the grounds upon which the principle is founded, and I quote his language as follows: "The bailee knows all about it; he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take care, result in the obligation on the bailee to show that that duty has been discharged."

Although Mr. Justice Laidlaw and Lord Atkin referred to this as "a principle" it might, in my view, be more accurately described as a rule of evidence and as it is one which has the practical effect of placing on the bailee the heavy onus of proving a negative (*i.e.* that he was not negligent) it should, in my opinion, only be invoked in cases where *all* the considerations stipulated by Lord Atkin can be found to be present.

In the present case, even if Taylor had survived, it is by no means certain that a pilot of his meagre experience would have been able to explain the reason for the loss of the plane; but in any event, he is not available to explain the accident. In a case such as this where the bailee is dead, it seems to me to be quite unrealistic to apply a rule, one of the basic considerations for which is that "the bailee knows all about it; he must explain". In this case nobody "knows all about it", indeed, nobody knows anything about it. Both the bailee and the bailed chattel have disappeared and there is no evidence of negligence on the part of the bailee. I am accordingly of opinion that the rule explained by Lord Atkin respecting burden of proof in bailment cases does not apply to the peculiar circumstances of this case and that the general rules governing proof where performance of a contract has become impossible due to the destruction of the subject-matter, should be applied. Those rules are best stated by

[5] (1925), 21 Ll. L. Rep. 310 at 315.

1969

NATIONAL TRUST CO. LTD. v. WONG AVIATION LTD. *et al.*

Ritchie J.

Lord Russell of Killowen in *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*[6], where he said:

> The defendant will prove the destruction of the *corpus*, and, where possible, the event which brought it about. It may be that the event is of such a nature as of itself to raise a *prima facie* case of fault or default in the defendant. Unless he displaces that *prima facie* case, he will be unable to rely on the doctrine. The frustration will stand as self-induced. On the other hand, it may be that nothing is known as to what event brought about the destruction, or the known event may be of such a nature as of itself to raise no *prima facie* case of fault or default in the defendant. If the matter rests there, he will be excused from liability under the contract. The plaintiff, however, may by cross-examination, or independent evidence, or both, establish a cause of fault or default in the defendant. If the matter rests there, the defendant will be unable to rely on the frustration, which will stand as self-induced. In every case, the contractor will succeed or fail in his defence on frustration according as it is or is not found as the result of the whole evidence that the frustration was self-induced.

This statement of law was applied by Coady J. in *McDonald Aviation Co. Ltd. v. Queen Charlotte Airlines Ltd.*[7], where a leased aeroplane was destroyed by fire and its pilot and his passenger were killed. Mr. Justice Coady's decision was affirmed by the Court of Appeal for British Columbia[8].

As the respondents in the present case have not adduced any evidence to "establish a fault or default in the defendant", the outcome of the bailment action must depend upon whether "the event is of such a nature as of itself to raise a *prima facie* case of fault or default ...". In other words, the bailor's action depends upon the application of the rule embodied in the maxim *res ipsa loquitur*.

I do not find it necessary to review the facts which were so fully considered in the Courts below as I think it sufficient to say that I agree with the learned trial judge that the weather conditions which prevailed while Taylor was in the air were such as to support an inference that air turbulence, carburetor icing or loss of vision with reference to the ground might well have caused the loss of the aircraft without any negligence on Taylor's part, and that the maxim last referred to is therefore not applicable.

---

[6] [1941] 2 All E.R. 165 at 181.

[7] [1951] 1 D.L.R. 195, [1950] 2 W.W.R. 552.

[8] [1952] 1 D.L.R. 291, 3 W.W.R. (N.S.) 385.

With the greatest respect, I am unable to agree with Mr. Justice Laskin that "the principles of proof do not vary merely because the bailee and the chattel bailed disappear together". As I have indicated, I think that the rule explained by Lord Atkin in *The "Ruapehu", supra,* is based on the fact that the bailee, who knew all about the circumstances of the loss and who was under a duty to take care of the chattel, is required to explain its disappearance, and it seems to me that this proposition loses its force when the bailee has disappeared with the chattel and that it is unrealistic to apply such a rule to his executor who obviously knows nothing about the circumstances.

I do not think it desirable, except in the clearest of cases, for a question of liability to be determined on the sole ground that the strict rules of evidence regarding the shifting of the onus of proof have not been complied with. In my view, in cases such as this, what is to be looked to is the evidence as a whole, and in the present case when the evidence is so viewed, it appears to me that the appellant has produced an explanation from which it would be just as reasonable for a Court to conclude that the happening occurred without the negligence of the bailee as to conclude that he was negligent. I do not think that, where there is no direct evidence of negligence, any more can be required of the executor of a deceased bailee who perished with the chattel.

I do not find it necessary to deal with the argument that the respondents voluntarily accepted the risk of the loss of the aircraft, nor do I base my decision in any way on the student-instructor relationship which the learned trial judge found to have existed between the appellant and the respondents.

For all these reasons I would allow this appeal and set aside the judgment of the Court of Appeal, with costs both here and in the Court of Appeal for Ontario.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitors for the plaintiffs, respondents: Manning, Bruce, Toronto.