GREAT EASTERN OIL AND IMPORT COMPANY LIMITED AND ANGUS OAKLEY (*Defendants*) ..... APPELLANTS;

1961
*Oct. 30, 31
Dec. 15

AND

FREDERICK E. BEST MOTOR ACCESSORIES COMPANY LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND (ON APPEAL)

*Negligence—Plaintiff's premises destroyed by fire—Standard procedure and employer's instructions not followed by operator of gasoline delivery truck—Vapour from spilled gasoline ignited by heating-stove—No contributory negligence on part of plaintiff—Co-defendant's negligence subsequent to and severable from act or omission of plaintiff—The Contributory Negligence Act, R.S.N. 1952, c. 159.*

*Courts—Authority of Superior Court to determine own jurisdiction and hear appeal—The Judicature Act, R.S.N. 1952, c. 114.*

The defendant company, a supplier of gasoline, through its servant and agent O, the co-defendant, delivered gasoline to the premises of the plaintiff by means of a hose from the company's delivery truck inserted in the fill pipe of the plaintiff's storage tank. Contrary to standard procedure and his employer's instructions, O failed to remain at the nozzle of the hose while the gasoline was being discharged from the truck and as a consequence a quantity of gasoline was sprayed on the floor of the plaintiff's shop. Vapour from the gasoline was immediately ignited due to the close proximity of a heating-stove which was in operation at the time, and in the resulting fire the premises and a large quantity of stock-in-trade and equipment were destroyed or greatly damaged. In an action for damages it was ordered that the plaintiff recover against the defendants 20 per cent of its damages to be assessed and 20 per cent of its costs and that the defendants recover from the plaintiff 80 per cent of their costs. The trial judgment was affirmed by the Supreme Court (On Appeal). In that Court the Chief Justice disqualified himself as, before his appointment to the Bench, he had been engaged professionally in another matter which concerned the same circumstances as the present case. One of the two remaining judges adhered to the views he had already expressed in his capacity as the trial judge, while the other would have dismissed the plaintiff's claim, allowed the defendants' appeal and dismissed the action. The defendants appealed and the plaintiff cross-appealed to this Court.

*Held:* The appeal should be dismissed and the cross-appeal allowed.

The Supreme Court of Newfoundland (On Appeal) had authority to determine its own jurisdiction and hear the appeal. *Walker v. R.*, [1939] S.C.R. 214; *Re Padstow* (1882), 20 Ch. D. 137, referred to.

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Martland and Ritchie JJ.

O had been negligent; his actions were fool-hardy and were the direct cause of the occurrence. It was not negligent, on the part of the plaintiff, to maintain the premises in the condition in which they were at the time of the fire. Even if the premises were in a dangerous condition, the defendants knew and must be taken to have accepted the situation. To constitute contributory negligence it does not suffice that there be some fault on the part of a plaintiff without which the damage would not have been suffered; the negligence charged must be proximate in the sense of an effective cause of the damages. *McLaughlin v. Long*, [1927] S.C.R. 303; *Bechthold and Others v. Osbaldeston and Others*, [1953] 2 S.C.R. 177, followed; *Ellerman Lines, Ltd. v. H. & G. Grayson, Ltd.*, [1920] A.C. 466, referred to.

The negligence of O was clearly subsequent to and severable from the act or omission of the plaintiff even if such act or omission could be considered a fault, and therefore, under the provisions of s. 6 of the *Contributory Negligence Act*, R.S.N. 1952, c. 159, the question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof could not be taken into consideration.

APPEAL and cross-appeal from a judgment of the Supreme Court (On Appeal) of Newfoundland[1], affirming a judgment of Sir Brian Dunfield J. Appeal dismissed and cross-appeal allowed.

*W. G. Burke-Robertson, Q.C.*, for the defendants, appellants.

*J. H. Amys, Q.C.*, for the plaintiff, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal by Great Eastern Oil and Import Company Limited and Angus Oakley, the defendants in an action in the Supreme Court of Newfoundland, and a cross-appeal by the plaintiff, Frederick E. Best Motor Accessories Company Limited, against the judgment of the Supreme Court of Newfoundland (on Appeal), affirming the judgment at the trial whereby it was ordered that the plaintiff recover against the defendants twenty per cent of its damages to be assessed and twenty per cent of its costs and that the defendants recover from the plaintiff eighty per cent of their costs.

No point as to the jurisdiction of this Court was raised by either party but, because of a question put from the Bench, it should be noted that by s. 6 of *The Judicature Act*, R.S.N. 1952, c. 114, the Supreme Court of Newfoundland is composed of a Chief Justice and two other Judges.

[1] (1961), 45 M.P.R. 207.

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By s. 3 of c. 33 of the Statutes of 1957, this s. 6 was repealed and it was enacted that the Supreme Court should consist of a Chief Justice and three other Judges. However, it was provided by s. 13 that s. 3 was to come into force on a date to be fixed by proclamation of the Lieutenant-Governor in Council and no such proclamation has been issued. So far as relevant s. 9 of *The Judicature Act*, R.S.N. 1952, c. 114, provides that the Supreme Court may be held by one judge who may hear and determine all causes and matters except (inter alia) appeals. Sections 27 and 30 read as follows:

> 27. Every judgment finding or order of a Judge in Court or chambers may be reviewed, varied or set aside by the Court constituted by any two or by the three Judges, subject, in cases in which two only sitting shall differ in opinion, to re-hearing and determination before the three Judges.
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> .....
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> 30. Where two Judges sit together in the first place and join in any judgment or order, the decision shall be final and absolute, unless by their leave; but if they differ in opinion application may be made to the three Judges to review, vary or set aside such judgment or order.

In this action the trial judge was Sir Brian Dunfield. The appeal was heard by the Chief Justice, Winter J. and the trial judge. When reasons were delivered the Chief Justice filed a statement disqualifying himself as, before his appointment to the Bench, he had been consulted professionally in connection with other proceedings by a third party against the parties to this litigation arising out of the events complained of in this action. The trial judge adhered to the views he had already expressed while Winter J. would have dismissed the plaintiff's claim, allowed the defendants' appeal and dismissed the action. The former order affirmed the judgment at the trial and dismissed the appeal and cross-appeal.

The Supreme Court of Newfoundland (on Appeal) is a Superior Court. In *Walker v. The King*[1], Chief Justice Sir Lyman Duff stated at 216:

> It is clear that, the learned trial judge having intended to pronounce, and having considered he was pronouncing a valid judgment of acquittal, what he did cannot be treated as a nullity. Presiding in a court of general jurisdiction, having authority to pronounce on its own jurisdiction, and his judgment being one which under appropriate conditions could competently be given, it was in its nature susceptible of being the subject of

[1] [1939] S.C.R. 214, 2 D.L.R. 353, 71 C.C.C. 305.

appeal (*re Padstow* (1882) 20 Ch. Div. 137); and the Court of Appeal rightly dealt with it upon the footing that it constituted a judgment or verdict of acquittal.

In the *Padstow* case the following appears in the judgment of Sir George Jessel, Master of the Rolls, at p. 142:

> The first point to be considered is whether, assuming that the association was an unlawful one, and that the Court had no jurisdiction to make the order, an appeal is the proper mode of getting rid of that order. I think that it is. I think that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous.

Lord Justice Brett at p. 145 put it thus:

> In this case an order has been made to wind up an association or company as such. That order was the order of a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal.

Lord Justice Lindley commenced his judgment by stating: "I am of the same opinion". In the present case the Supreme Court of Newfoundland (on Appeal) had authority to determine its own jurisdiction and hear the appeal.

On March 4, 1959, the defendant company, a supplier of gasoline, was, through its servant and agent, the co-defendant Oakley, delivering gasoline to the premises of the plaintiff by means of a hose from the company's delivery truck inserted in the fill pipe of the plaintiff's storage tank. A fire occurred as a result of which the plaintiff's premises, and a large quantity of its stock-in-trade and equipment, were destroyed or greatly damaged, for which the plaintiff asked damages in the following amounts:

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|---|---|
| Damage to buildings | $ 29,420.38 |
| Equipment damaged or destroyed | 4,304.90 |
| Stock-in-trade damaged or destroyed | 41,987.57 |

The plaintiff claimed that the fire and resulting damage occurred by reason of the negligence of Oakley in failing to follow the standard procedure and his employer's instructions to stay close to the delivery nozzle while the gasoline

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was being discharged from the truck. The defendants denied negligence and alleged that if there had been any such negligence it was not the cause of the damage complained of but that the damage was caused by the negligence of the plaintiff, its servants or agents, in that it had a knowledge that gasoline did, from time to time, spill over the floor of the premises when being pumped into the gasoline storage tank; but, notwithstanding such knowledge, the plaintiff allowed a fire to be maintained at all material times in a stove in close proximity to the fill pipe of its gasoline storage tank through which gasoline deliveries were made and that that fire was the direct cause of the damage complained of in that it ignited vapour from gasoline which had escaped from the fill pipe and had been allowed to flow over the floor of the said premises because of the defective manner in which the fill pipe was installed and maintained in the said building.

The evidence shows that the defendant company had been supplying gasoline to the plaintiff for a great number of years during many of which the premises were in the same condition as on the day of the fire and both defendants knew of this condition. The trial judge found that Oakley had been negligent and with that I agree. Oakley's actions were foolhardy and were the direct cause of the occurrence. Contrary to what was shown to be the usual practice and contrary to the instructions from his employer, he failed to remain at the nozzle and as a result a quantity of gasoline was sprayed on the floor of the premises which immediately caught fire from a a stove which had been installed and which was being used to heat them. In answer to a question by counsel for the defendants, at p. 179 of the Case, Oakley admitted that ordinarily he would hold the nozzle in the fill pipe himself, and at p. 184, in answer to another question by counsel for the defendants, he admitted that, if he had remained at his proper place when he was filling the plaintiff's tank, he could have reached in to turn off the nozzle, although he said "it was a cumbersome spot" and that on one occasion he had strained his wrist in so doing. On the same page he admitted that his instructions were to stay by the nozzle or in a position where he could turn off the nozzle. He further stated that he had asked Delaney, an employee of the plaintiff, to keep an eye on the nozzle and that he had seen Delaney hold

it, but, at p. 208, Delaney denied both statements and gave a circumstantial account of his movements at the relevant time. While noting this discrepancy the trial judge made no finding, but consideration of the evidence satisfies me that Delaney was telling the truth.

The trial judge considered that it was negligent for the plaintiff to maintain the premises in the condition in which they were at the time of the fire but with respect I am unable to agree. There is no doubt that several years prior to the occurrence with which we are concerned gasoline had been spilled but the plaintiff thereupon altered his premises. While the building had been built out over the underground storage tank and while the intake pipe was in the wall of the building, the area of the pipe inside the building was enclosed by an asbestos-lined box to propel gasoline vapours outside the building through the opened outside door of the box.

Even if the premises were in a dangerous condition, the defendants knew and must be taken to have accepted the situation. Oakley by his negligence permitted the hose and nozzle to remain unattended and as a result of the movement of the nozzle gasoline was sprayed on the floor of the premises causing the damage. It was held by this Court in *McLaughlin v. Long*[1], in considering the *Contributory Negligence Act* of New Brunswick, that to constitute contributory negligence it does not suffice that there be some fault on the part of a plaintiff without which the damage would not have been suffered and that the negligence charged must be proximate in the sense of an effective cause of the damages. From time to time there have been discussions in the Courts and otherwise as to proximate cause, *causa causans* and the last clear chance. In *Ellerman Lines, Limited v. H.&G. Grayson, Limited*[2], affirmed by the House of Lords[3], the headnote in the latter report sets forth the circumstances and the decision of the House:

A firm of ship repairers were riveting cleats to the weather deck of a steamer which, under the authority of the Admiralty, they were fitting with apparatus for protection against mines. The rivets were heated in a furnace on the weather deck, and lowered in a bucket through an open hatchway to the 'tween decks, where a riveter drove them into holes bored into the under side of the weather deck to receive them. The steamer was

[1] [1927] S.C.R. 303, 2 D.L.R. 186. [2] [1919] 2 K.B. 514.
[3] [1920] A.C. 466, 89 L.J.K.B. 924.

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discharging from a hold below the 'tween decks, and a 'tween deck hatchway was open directly below the open hatchway on the weather deck, so that a cargo of jute in the lower hold lay exposed. A boy carrying a red-hot rivet in a pair of tongs to the bucket close by the weather deck hatchway slipped on the deck, and the rivet shot over the coamings and through both the open hatchways on to the cargo of jute and set it on fire.

In an action by the owners of the steamer against the ship repairers for damage to the ship and cargo:

*Held,* that the damage was caused by the negligence of the ship repairers in doing the work as they did while the jute was exposed, and that the shipowners were not guilty of any negligence.

At p. 475 Lord Birkenhead put it that he should have been content to state his own conclusion in the language used by Atkin L.J. and he assented particularly to the illustration which Atkin L.J. gave in the latter part of his judgment in which he pointed out that the appellants, under circumstances in which they received remuneration, brought upon the respondent's ship that which was in fact dangerous. In the Court of Appeal Lord Justice Atkin had stated at pp. 535 and 536:

> If a workman is sent to my house containing inflammable material to work with fire, am I to remove the source of danger, or is he to take precautions which will avoid danger? If a man comes to my premises containing an oil tank is he to abstain from smoking in its vicinity or am I to remove the oil tank? And if he chooses to smoke there am I precluded from recovering because I did not remove the oil tank but allowed him to continue at his peril? The doctrine of contributory negligence cannot, I think, be based upon a breach of duty to the negligent defendant. It is difficult to suppose that a person owes a duty to anyone to preserve his own property.

The law applicable in this case is that set forth in the judgment of this Court in *Bechthold and Others v. Osbaldeston and Others*[1] at p. 178:

> The position in this appeal on the question of liability is that put by Lord Shaw in *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* [1924] A.C. 406 at 419:
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> > And I take the principle to be that, although there might be—which for the purpose of this point I am reckoning there was—fault in being in a position which makes an accident possible yet, if the position is recognized by the other prior to operations which result in an accident occurring, the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part, could have been avoided. Unless that principle be applied it would be always open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encounter of danger was contributed to by the fact that there was a danger to be encountered.

[1] [1953] 2 S.C.R. 177, 4 D.L.R. 783.

In addition to providing for cases where two parties are negligent, The Newfoundland *Contributory Negligence Act*, R.S.N. 1952, c. 159, provides:

> 6. Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless he is satisfied by the evidence that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous therewith.

Here I am satisfied that the negligence of Oakley was clearly subsequent to and severable from the act or omission of the plaintiff even if such act or omission could be considered a fault.

I would dismiss the appeal, allow the cross-appeal, set aside the judgment of the Supreme Court of Newfoundland (on Appeal) and the judgment at the trial and direct that judgment be entered in favour of the plaintiff against the defendants for the full amount of its damages to be assessed. The plaintiff is entitled to its costs throughout.

*Appeal dismissed and cross-appeal allowed with costs.*

*Solicitors for the defendants, appellants: Curtis, Dawe & Fagan, St. John's.*

*Solicitor for the plaintiff, respondent: P. Derek Lewis, St. John's.*