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*Oct. 24, 25.
*Nov. 21.

STEPHEN ALLEN SPENCER (DEFENDANT)..... } APPELLANT;

AND

THE ALASKA PACKERS ASSOCIATION (PLAINTIFFS).. ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Practice—Jury trial—Findings as to negligence—Questions as to special grounds—Judge's charge—Non-direction—Misdirection—Application of law to facts—New trial.

Upon a trial by jury, the judge in directing the jury as to the law is bound to call their attention to the manner in which the law should be applied by them according to their findings as to the facts, the extent to which he should do so depending on the circumstances of the case he is trying, and, where the form of the charge was defective in this respect and, consequently, left the jury in a confused state of mind as to the questions in issue, there should be a new trial. Judgment appealed from (10 B. C. Rep. 473) affirmed, Davies J. dissenting.

Held, per Nesbitt J.—That in an action founded on negligence it is advisable that specific questions should be submitted to the jury to enable them to state the special grounds on which they find negligence or no negligence.

APPEAL from the judgment of the Supreme Court of British Columbia (1), which reversed the judgment of the trial court in favour of the defendant and ordered a new trial.

The defendant had undertaken to tow the respondents' ship into Victoria, B.C., from a point outside the harbour where she had been driven by a gale. The ship was attached to the defendant's tug by a hauser and proceeded to haul up her anchor when the winch

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 10 B. C. Rep. 473.

chain broke. After the necessary repairs had been made, the ship continued to haul in the anchor chain without regard to the position of the tug which was such that the tug could not exercise power over the ship and, when the ship broke ground, she was swung by the current upon an island near by and was injured. In an action for damages founded on negligence and want of skill, judgment was entered in favour of the defendant upon the verdict of the jury, but this judgment was set aside by the judgment now appealed from and a new trial ordered on the ground that, in charging the jury, the trial judge had failed to point out the bearing of the facts in evidence upon the questions to be determined and, consequently, that the jury had been misled by the incompleteness of the charge.

The questions at issue upon the present appeal are fully discussed in the judgments now reported.

Peters K.C. for the appellant.

Bodwell K.C. for the respondents.

SEDGEWICK J. concurred in the judgment dismissing the appeal with costs.

GIROUARD J.—From what took place at the time of the trial, I think that the learned trial judge did not give proper and full directions to the jury and, as a consequence, that the latter did not understand the case. The confused state of their minds is revealed in the number of applications by them for further instructions which the judge did not, however, give, holding that they involved only questions of fact. I entirely concur in the opinion of my brother Justice Nesbitt.

DAVIES J. (dissenting).—I would allow this appeal.

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Davies J.

On full consideration of all the facts proved and in evidence before the jury I do not doubt that they fully understood the charge of the trial judge. His language, it is true, is vague but it must be read and understood in the light of the facts as they were then before the jury and, so read now, or heard by the jury then, I think they leave no reasonable room for doubt. I do not think the real facts to be determined were imperfectly and inadequately stated by the judge and so stated as tending to mislead the jury.

At any rate, if the counsel for the plaintiff thought the charge defective for non-direction it was his duty clearly to have pointed out the nature of the charge the judge should have made, and I am not satisfied that he did this.

As, however, a majority of my colleagues think that, under the circumstances, there should be a new trial for non-direction, I purposely refrain from discussing at length the reasons why I differ from that conclusion.

NESBITT J.—This is an appeal from a judgment of the Supreme Court of British Columbia directing a new trial in a case tried by a jury in which a general verdict was rendered in favour of the defendant.

The case was very fully argued and the appellant relied upon certain authorities (which I propose shortly to analyze), as establishing the position that the case at the furthest was one simply of non-direction, and that in any event the judge was not bound to do more than direct the jury as to the law which, it was contended, had been very fully done by the learned trial judge in this case.

I think it is necessary to refer to the pleadings to see whether the case which the parties went down to

try was in fact tried out. In the language of Lord Halsbury in *Bray* v. *Ford* (1), at page 48

> the case must be tried again and I desire to say nothing which can in any way influence the arguments upon the trial which must take place.

The plaintiff in substance charges in his statement of claim that the tug "Mystery" coming alongside the "Santa Clara" which had drifted in a storm to a position just outside Trial Island, the captain represented that his tug was supplied with plenty of power and could tow the "Santa Clara" from her then position to Ladysmith, and that relying upon such representations, which were the result of special inquiry, the ship's captain allowed the captain of the tug to undertake the towage. It is to be borne in mind that, apart from any special representation of this kind, the plaintiffs relied upon the rule of law that a steamboat engaging to tow a vessel for a certain remuneration, while not warranting her ability to do so under all circumstances and at all hazards, does engage that she will use her best endeavours for that purpose and will bring to the task competent skill and such a crew, tackle and equipments as are reasonably to be expected in a vessel of her class, and that she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task, and, furthermore, that the captain of such a tug is bound to know the various currents, etc., which set about the places where he undertakes to tow from. In this case, as I have said, an express representation was alleged to have been made that the tug was of capacity to tow a boat double the size of the "Santa Clara."

The defence substantially set up was that the damage occurred owing to the negligence of those on board the "Santa Clara" in breaking ground with the

(1) [1896] A. C. 44.

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anchor at a time when the tug was in a position that she could not reasonably be expected to save the "Santa Clara" from drifting on the rocks.

Such being the substantial issue to be tried the plaintiffs say that the learned trial judge proceeded to give a very full and accurate statement of the law of negligence and contributory negligence and adverted at considerable length to a further suggested defence, namely, that owing to the breaking of one of the propeller blades on the tug, the tug was unavoidably deprived of the power she otherwise would have had, but that he did not apply the law to the facts, or give the jury any instruction as to what the plaintiffs claimed were the obligations undertaken by the defendants and what would form an answer in law by them, and that the questions by members of the jury showed that they were unable to grasp what the real issues were, and particularly unable to appreciate what bearing, as a matter of law, the last act of negligence, as it was described by the trial judge, had upon the case, and I think it is apparent from the questions asked both before the jury retired and afterwards when they came into court to seek information that they were greatly puzzled to know how to apply the law, as stated to them by the trial judge, to the facts. Mr. Bodwell, at the conclusion of the charge, pressed in various ways upon the trial judge a request that he should charge the jury that the plaintiffs relied upon an express representation as to the power of the tug and if they found that that representation was made that it would have a double bearing on their view of the case: First, that, as a matter of law, if the representation was made the plaintiff was entitled to a verdict, and: Secondly, in any event, that the captain of the "Santa Clara" was entitled to assume that he could safely break ground with his anchor in the position

the tug was in, as he claimed that the evidence showed that if the tug was of sufficient power she could easily have prevented drifting, and that, therefore, under such circumstances, the act of the captain of the "Santa Clara" was not negligence, in fact being reasonably prudent with a powerful tug. He also pressed upon the trial judge that under his direction the jury would naturally assume that the hoisting of the anchor was an act of negligence *per se*, and that if that act was found to have been, in point of time, the last act before the disaster it amounted to substantially a direction to the jury to find for the defendant. I agree that the charge is open to this construction.

The learned trial judge, after the jury returned to court and made some inquiries, repeated in another form his definitions of negligence and contributory negligence, but Mr. Bodwell again requested the trial judge to point out to the jury how the law did apply to the facts, and the more I read the direction to the jury the more I am convinced that the jury had a very confused idea of how they were to apply the law to the facts before them.

A number of cases were commented on to shew what was the duty of a judge in directing a jury. I think that one cannot do better than adopt the language of Lord Watson in the case of *Bray* v. *Ford* (1), at page 49,

> that every party to a trial by jury has a legal and constitutional right to have *the case* which he has made either in pursuit or in defence *fairly submitted* to the consideration of that tribunal.

I think it is very dangerous to quote from cases statements of the duty of a judge in directing a jury which are only applicable to the particular case. I quote the language of Lord Halsbury in *Quinn* v. *Leathem* (2):

(1) [1896] A. C. 44.
(2) [1901] A. C. 495 at p. 506.

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Now before discussing the case of *Allen* v. *Flood* (1), and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

Much reliance was placed upon the language of the court in *Ford* v. *Lacey* (2), as adopted by the Privy Council in the case of the *Great Western Railway Company of Canada* v. *Braid* (3), (at page 122) namely that *non-direction* is only a ground for granting a new trial where it produces a verdict against the evidence.

Let us see the circumstances under which that language was used. Turning then to *Ford* v. *Lacey* (2), it will be found that that was a case for trespass for breaking and entering land of the plaintiff, and it appeared that the plaintiff had been for many years in the occupation of certain lands, and the land, the subject of the action, according to the plaintiff's case, formed part of a property of the landlord of the plaintiff, and that the land in question had been left dry by the river gradually changing its course. Four questions were left to the jury and a motion for a new trial was made upon the ground that the judge ought to have directed the jury on the question raised by the defendants, that land left by the gradual change of a river becomes part of the adjoining property. Mr. Baron Bramwell pointed out that the rule had not been obtained on the ground of the ver-

(1) [1898] A. C. 1. (2) 30 L. J. Ex. 351.
(3) 1 Moo. P. C. N. S. 101.

dict being against evidence, and Chief Baron Pollock pointed out that the assumption of liability argued for did not arise where there was positive evidence of ownership, which existed in the case in question. Mr. Baron Martin thought that the third and fourth questions left to the jury were the real and substantial questions in the case, and that, so far as he could see, the evidence appeared to be all one way, and said that as the verdict was right and there was no complaint of it being against evidence, he did not see how the fact of the judge not having drawn the attention of the jury to a particular proposition of law could be a ground for setting aside the verdict. Mr. Baron Bramwell said that the court thought there might be some cases where *non-direction* would amount to *misdirection*, but he did not see that the fact of the judge not having adverted to the law upon the point in that case amounted to a misdirection. And Baron Channell (at page 355) said:

> I do not mean to say that it may not be a good ground for a new trial that a direction has been left so bare as to require an explanation to prevent the probability of its being misunderstood. For instance suppose a plea of payment and no evidence to show an actual delivery by the defendant of the money claimed, but evidence of circumstances amounting in point of law to a payment, if the judge, without informing the jury of the legal effect of those circumstances, left it nakedly to them to say whether or not there had been a payment, I think so bare a direction would amount to a misdirection that would justify a new trial. But if the law is clear, as it is here—for there is no question that the law as laid down by Lord Hale is correct—and if, as here, the jury have found a distinct issue, I do not think that the omission of the judge to instruct the jury respecting a clear proposition of law *which does not affect the issue*, is an omission of anything he was bound to state.

Is the non-direction complained of here of the character referred to in that case?

If the facts here were found by the jury as the plaintiff contended for they would necessarily find no negli-

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gence upon his part, and it seems to me that the jury were left wholly without direction as to the application of the law of negligence to the particular contentions which the parties were respectively making.

The observations of Mr. Justice Brett in the case of *Bridges* v. *The North London Railway Co.* (1), were also much relied upon. Those observations would not be disputed if read in connection with the case. The learned judge, at page 159, sets out what a plaintiff must prove in order to shew that defendants were guilty of negligence causing the injury, and that as between him and the defendants such negligence was the sole cause of the injury, and he points out that such a direction is not sufficient; it requires to be amplified by a legal definition as to what amounted to negligence and he proceeds to give such definition and then says:

> The final and full and strict direction to a jury, therefore, in such cases, is contained in the following questions: Have the defendants or their servants done anything in the conveyance of the plaintiff to his destination which persons of ordinary care and skill under the circumstances would not have done? * * * Have they or their servants by such act of commission or omission caused injury to the plaintiff? Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident? The plaintiff can only recover if he satisfies the jury by evidence that the defendants or their servants were guilty of negligence as described and that he has been injured thereby, and that he has not been guilty of negligence, as described, contributing to the accident.

He then proceeds to consider what is the duty of the judge before giving such a direction, and then follows the sentence so much relied upon, (at page 160), namely:

> When the judge has so directed the jury as to the law he has finished all which it is legal for him exclusively to determine in the case. He

(1) 43 L. J. Q. B. 151.

ought then, though I do not think there is any legal absolute obligation on him to do so, to point out to the jury the bearing of the facts in evidence upon each of the questions which they must determine, and which of the facts are in his judgment in dispute, and that there are not only the facts directly deposed to which are to be considered but facts or propositions of fact which are to be inferred by them from the facts directly deposed to, and finally that it is for them to say whether the facts directly in evidence and adopted by them, and the facts and propositions of fact inferred by them, do or do not amount in their judgment to proof of the propositions which the plaintiff is bound to maintain. But the judge has no legal right, either directly or indirectly, to force upon the jury his view of any fact or inference of fact.

He follows this statement by amplifying at considerable length what he means, pointing out that judges would have no right, for instance, in such a case as that before him, to say to a jury that the calling out of the name of a station was no intimation that the passengers might, on the stopping of the train, alight; that was a matter in his opinion of life and habits solely for the determination of the jury. I do not view this as in any way impeaching the view generally held that a judge's duty is to place distinctly before the jury the application of the rules of law laid down by him according as they find the facts and inferences of the facts are made out. I consider the illustrative charge given by the learned judge the best possible example of what I mean when I say the law must be applied to the facts. I do not think the judge is bound to comment upon evidence in the sense of reviewing what the several witnesses have sworn to, or to point out for the consideration of the jury anything which may strike him as throwing light upon the credibility of the story, but I think he is bound to direct the jury as to the law and to direct their attention how that law is to be applied to the facts before them according as they find them.

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Reliance was also placed upon the judgment of Lord Justice Bramwell in *Clark* v. *Molyneux* (1), (at page 243) where that learned judge said:

> I certainly think that the summing-up is not to be rigorously criticized; and it would not be right to set aside the verdict of a jury because, in the course of a long and elaborate summing-up, the judge has used inaccurate language; the whole of the summing-up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions. In the present case, however, I cannot help coming to the conclusion that the question left by the judge to the jury was put in an inaccurate shape.

I adopt this but it is to be observed that, in that case, the Lord Justice was of opinion that the very form of the questions left by the judge to the jury was in itself a misdirection. And I think, in this case, without, as I have said, expressing any view whatever upon the evidence, that the form of the charge must necessarily have left the jury in a confused state of mind, and that they were not directed as to the real contest between the parties and as to what should be the proper result in law according to the view they took of the facts sworn to. The plaintiff was suing upon a contract the very making of which involved certain legal obligations which obligations the plaintiff contended were added to by express representations which in any point of view he contended rendered his conduct perfectly proper and not negligent, whereas if such representations had not been made and were not relied upon by the captain of the "Santa Clara" the jury might take a very different view of the reasonableness of his conduct under the circumstances. None of this was pointed out to the jury. If questions are answered by a jury many difficulties are avoided and the jury's attention would be directed to the points at issue.

(1) 3 Q. B. D. 237.

In case of a new trial I would suggest that, particularly in actions of negligence, it is well for a trial judge to get from a jury, by questions to be answered, the grounds specifically upon which they find negligence. Lord Coleridge in the case of *Pritchard* v. *Lang* (1), uses some strong expressions in reference to this subject, in fact saying that in pursuing the course of not asking the jury to put the specific ground upon which they found negligence was calculated to mislead them and to defeat justice.

I have had an opportunity of reading the judgment prepared by my brother Killam and I entirely concur in the view he expresses regarding the respective duties of judge and counsel and the distinction between misdirection and non-direction.

I would dismiss the appeal with costs.

KILLAM J.—I would dismiss this appeal. Stated in the abstract, it may be said that it is the duty of a judge presiding at a jury trial to see that the jury are instructed as to what are the issues of fact upon which their findings are required, and the law relating to these, and how their verdict should be according as their findings of fact are in one way or another. But the degree in which it is important to point out these things expressly in a formal charge must always depend upon the circumstances of the case.

It can never, then, be a sufficient statement of an objection to the judge's charge that he did not apply the law to the facts. If in the opinion of counsel some further direction than that given by the judge is required, in justice to his client, counsel should formulate the propositions of law, applicable to the facts, which he desires that the judge should express to the jury and ask the judge to instruct the jury accordingly.

(1) 5 Times L. R. 639 at p. 640.

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I find nothing in section 66 of the Supreme Court Act, 1904, referred to by Mr. Justice Martin in the court below, which varies in these respects the practice at common law. The effect of that section in regard to objections not taken at the trial is not now in question.

In *The Great Western Railway Co.* v. *Braid* (1), the Judicial Committee of the Privy Council expressly approved of the rule stated to have been laid down in *Ford* v. *Lacey* (2), that

> non-direction is only a ground for a new trial when it produces a verdict against the evidence.

While this may be taken as the general rule, it must be confined to cases of pure non-direction, and not applied to cases in which non-direction on some particular matter amounts to misdirection.

Upon the latter point the correct principles were well stated by Lord Blackburn in *The Prudential Assurance Co.* v. *Edmonds* (3), at pages 507-8:

> I take it that when there is a case tried before a judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them. Further than that, it is not necessary for him to go. * * * So far as a statement of the law is necessary to give a proper guide to the jury upon the case, the judge should state it; and, although it is generally said, and said truly, that non-direction is not a subject of a bill of exceptions, yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be a subject for a bill of exceptions and would be a ground for a *venire de novo*. When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide, to the jury, when the facts were such as to make it the duty of the judge to give a guide, we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo*.

(1) 1 Moo. P. C. N. S. 101. (2) 30 L. J. Ex. 351.
(3) 2 App. Cas. 487.

Upon a careful reading of the charge, I am of opinion that the portion relating to contributory negligence, especially after the return of the jury into court, was calculated to leave the jury in a very confused state of mind respecting the law. The learned judge was not bound to tell the jury, as the plaintiffs' counsel asked, that there was an express warranty or representation of the power of the tug. That was matter of inference from the evidence of a conversation. It might have been better if the judge had asked the jury to consider the conversation and take it into account in determining how far the plaintiff's captain was justified in relying upon the tug's power and whether, in view of that and the other circumstances, he was negligent in raising the anchor when he did. But the omission to do this was merely an omission to comment on particular portions of the evidence.

Some parts of the charge, however, seem to me to have been misleading. These were the portions in which the learned judge spoke of the last act of negligence as a determining factor. It was for the jury to find on the power of the tug and whether, if the tug had had the requisite power, she might have been able to save the ship even after the anchor had been raised. An alleged deficiency of power was one of the chief complaints on the part of the plaintiff, and yet it was hardly likely to be considered by the jury as the last act of negligence.

Upon the whole I think that the court below was right in directing a new trial.

Appeal dismissed with costs.

Solicitors for the appellant: *Peters & Wilson.*

Solicitors for the respondents: *Bodwell & Lawson.*