CANADIAN NATIONAL STEAMSHIPS COMPANY LTD. (DEFENDANT)..... APPELLANT;

AND

ALFRED WATSON (PLAINTIFF) .....RESPONDENT.

1938
* May 26.
* Dec. 12.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

*Negligence—Shipping—Maritime law—British ship—Accident to member of crew—High seas—Port of registration—Defence of common employment—Conflict of laws—Which law applicable—Section 265 of the Merchants' Shipping Act (Imperial), 1894—Jury trial—Verdict—Ascertaining its meaning—Intention of the jurors—Answer to question—Terms not clearly enunciated—New trial.*

The respondent, while a member of the crew of the ss. *Cornwallis*, owned by the appellant company, met with an accident on November 6th, 1935. The *Cornwallis* was a British vessel registered at Vancouver, B.C., and at the time of the accident was proceeding from the West Indies to Charlottetown, P.E.I. The respondent, a carpenter on board the vessel, who had been hired in Montreal, was engaged with other members of the crew in putting locking bars on the hatches. While so engaged, about one hundred miles off Bermuda, a wave

* PRESENT:—Duff C.J. and Cannon, Crocket, Kerwin and Hudson JJ.

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crashed onto the deck, swept the respondent against the bulkhead and hatch combings and caused injuries for which the action was brought. The jury found the accident to be due to the fault of the appellant in the following language: "Question: Was the said accident due to the fault of the defendant; if so, state in what said fault consisted? Answer: Yes (unanimous). If the Chief Officer, Lieutenant Scott, had ordered life lines erected earlier the accident might have been avoided." The trial judge, on the finding of the jury, ordered judgment to be entered for the respondent, and this judgment was affirmed on appeal. The appellant's grounds of defence was a denial of negligence, and, alternatively that, if there was any, it was the negligence of a fellow servant from which under the common law of England, which was applicable, no cause of action arose.

*Held* that there should be a new trial.

*Per* The Chief Justice and Crocket, Kerwin and Hudson JJ.—The answer of the jury to the question submitted to them should be read as a whole; and, if so read, the meaning of the verdict is not sufficiently free from obscurity to enable one to conclude that the jury have found or intended to find the existence of a causal *nexus* between the fault and the injury to the respondent. The second sentence of the answer, in which the nature of the fault is explained, does seem to be concerned not only with the character of the fault, but with the relation between the fault and the accident as well. If the jury intended, by answering the first question in the affirmative, to say, with an appreciation of the purport of the words, that the accident was due (i.e., caused by) the fault of the appellant, it is difficult to understand how the jury could have used the language they do employ in the second sentence.

*Per* Cannon J.—The finding of the jury was unsatisfactory. The verdict seems to be based not on a fact of which the jurymen were convinced, but on a probability or a possibility. The verdict is not sufficient to create the certainty required to connect the injuries suffered by the respondent with the alleged negligence or omission of the officer tc order life lines erected earlier.

*Per* The Chief Justice and Crocket, Kerwin and Hudson JJ.—In an action brought in the province of Quebec for damages in respect of personal injuries due to a tortious act committed outside that province, it is essential, as a first condition, that the plaintiff prove an act or default actionable by the law of Quebec; and in order to fulfil the second condition necessary for his right to recover, i.e., to establish that the tort charged is non-justifiable by the *lex loci delicti,* the plaintiff is entitled to pray in aid a presumption which is a presumption of law, viz., that the general law of the place where the alleged wrongful act occurred is the same as the law of Quebec. Where a defendant relies upon some differences between the law of the locality and the law of the forum, the onus is upon him to prove it. The provisions of section 265 of the *Merchants' Shipping Act,* 1894, apply to this case. It was the duty of the trial judge to apply the law of Quebec unless that law or some law of the Imperial Parliament or competently enacted law of the Parliament of Canada prescribed another rule. But a conflict of law appeared within the meaning of that section when it became apparent that the trial judge had to determine whether it was his duty to follow the rules of the law of Quebec or rules derived from some other system of jurisprudence. Therefore the *lex loci*

*delicti* was the law of the port of registry, i.e., the law of British Columbia; and the trial judge was entitled to assume that that law was the same as the law of Quebec.

*Per* Cannon J.—The law applicable to this case is the law of Quebec. *Lex fori* was the law of Quebec; *lex loci contractus* was also the law of Quebec, because the respondent was engaged in Montreal. The *lex loci commissi delicti* would be either the law of England or that of the port of registration: the latter was not pleaded and the defence of common employment, under the law of England, was not established and was not put to the jury.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge, Greenshields C.J., with a jury (1), which had maintained the respondent's action for an amount of $4,000.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

*I. C. Rand K.C.* for the appellant.

*A. I. Smith* and *H. H. Harris* for the respondent.

The judgment of the Chief Justice and of Crocket, Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—It is now settled that, in an action brought in the province of Quebec for damages in respect of personal injuries due to a tortious act committed outside that province, the plaintiff's right to recover rests upon the fulfilment of two conditions. These conditions are stated in the following passage in the judgment of Lord Macnaghten in *Carr* v. *Fracis Times & Co.* (2):

> In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and, secondly, the act must not have been justifiable by the law of the place where it was committed.

"Justifiable" here refers to legal justification; and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than "justifiable" within the meaning of the rule (*Walpole* v. *Canadian Northern Railway*) (3).

That this rule prevails in Quebec results from *O'Connor* v. *Wray* (4).

It is essential that the plaintiff prove an act or default actionable by the law of Quebec. While it is also part of

(1) (1937) Q.R. 75 S.C. 123.
(2) [1902] A.C. 176, at 182.
(3) [1923] A.C. 113, at 119.
(4) [1930] S.C.R. 231.

*way Co.* (1).

(1) (1920) A.C. 184.

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his case to establish that the tort charged is non-justifiable by the *lex loci delicti* in the sense mentioned, he is entitled to pray in aid a presumption which is a presumption of law, viz., that the general law of the place where the alleged wrongful act occurred is the same as the law of Quebec. Where a defendant relies upon some difference between the law of the locality and the law of the forum the onus is upon him to prove it. (*The Parchim*) (1); *Dynamit Actien-Gesellschaft* v. *Rio Tinto Co. Ltd.* (2).

In practice, it appears to have been treated as matter of defence for the purposes of pleading as well as proof. (*The M. Moxham* (3); *Carr Times & Co.* v. *Fracis* (4), per Lord Lindley). Statements of textwriters of a seemingly contrary import must be read in light of this consideration e.g., Cheshire, Private International Law, 306).

The alleged wrong was committed on board the ss. *Cornwallis*, a British ship owned by the appellants and registered in Vancouver. The tort, as the jury found, consisted in the negligent omission of the chief officer to order the erection of life lines at the proper time.

Among other defences, the appellants pleaded that the law governing the liability of the appellants for acts done by the officers and crew on board the ship was the common law of England; and that, by the common law of England, the appellants were not legally responsible to the respondent for the negligence of his fellow servant, the chief officer, in the course of his duties as such. At the trial, the appellants after verdict moved on this ground for judgment *non obstante veredicto*. On behalf of the respondent, the application was answered by reference to section 265 of the *Merchants' Shipping Act* (Imperial), 1894, which is in these words:

> 265. Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

The learned Chief Justice of the Superior Court (5) who tried the action held that the section applied, that the law applicable was the law of British Columbia; and that, on

(1) [1918] A.C. 157, at 161.
(2) [1918] A.C. 260, at 301.
(3) (1876) 1 P.D. 107.
(4) [1902] A.C. 176, at 184.
(5) (1937) Q.R. 75 S.C. 123.

the state of the record and the evidence, he was bound to give judgment on the assumption that the law of British Columbia is the same as the law of Quebec. The Court of King's Bench agreed with the learned trial judge.

I think the learned Chief Justice was right in holding that section 265 of the *Merchants' Shipping Act* applies. It was the duty of the learned Chief Justice to apply the law of Quebec unless that law or some law of the Imperial Parliament or competently enacted law of the Parliament of Canada prescribed another rule. I think a conflict of law appeared within the meaning of the section when it became apparent that the trial judge must determine whether it was his duty to follow the rules of the law of Quebec or rules derived from some other system of jurisprudence. I think, moreover, that this class of case is within the scope of the section, and that the law applicable for determining it is the law of the place of registry.

I have not overlooked the doubt which has been expressed whether for the present purpose a wrong committed upon a ship on the high seas stands in the same relation to the law of the flag as that in which a wrong committed on land within the territory of another jurisdiction stands to the jurisprudence which exclusively prevails there. Having given the matter the best consideration I am capable of, I think the effect of this section is that the *lex loci delicti* is the law of British Columbia. We are not concerned with the question whether, if section 265 had no application, the learned trial judge ought to have dismissed the action upon the application of the appellants.

In this Court the appellants contended that the field of jurisprudence concerned with the responsibility of ship owners for the negligent acts of the ship's officers in the management of the ship is within the exclusive jurisdiction of the Dominion Parliament in respect of Navigation and Shipping and, there being no Dominion legislation dealing with the matter, the common law applies and British Columbia legislation is irrelevant. I am unable to agree with this view. It is inconsistent with the judgment in *Workmen's Compensation Board* v. *Canadian Pacific Railway Co.* (1).

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In the absence of Dominion or Imperial legislation on the subject or of some special rule of law relating to navigation and shipping prevailing at the date of Confederation, the general rules of the law of British Columbia applicable to the responsibility of masters for the acts of their servants govern the liability of shipowners to whom such rules apply.

Nor do I think any ground of appeal based upon the law of British Columbia is admissible in this Court. In the first place, the law of British Columbia was not pleaded. Then there was no suggestion at the trial that the law of that province would be relied upon. This Court has power to amend, a power which it has exercised in appeals from Quebec, but I think we ought not to exercise it in this case.

The most serious question remains. The finding on the subject of negligence is expressed in question 4 and the answer thereto. They are in these words:

> 4. Was the said accident due to the fault of the defendant; if so, state in what said fault consisted?
>
> A. Yes (unanimous). If the Chief Officer, Lieutenant Scott, had ordered life lines erected earlier the accident might have been avoided.

The view taken by the Court of King's Bench appears to be that the affirmative answer to the question whether the accident was due to the fault of the defendant is unequivocal and that the remaining words ought to be read as merely descriptive of the fault.

I have given this matter anxious consideration. It is of the greatest importance that the verdict of a jury should be read with a determined effort to ascertain its meaning in substance and, if, on a fair reading, the intention of the jury in substance can be discovered effect ought to be given to that intention. I am forced to the conclusion, however, that this answer must be read as a whole. The second sentence, in which the nature of the fault is explained, does seem to be concerned not only with the character of the fault, but with the relation between the fault and the accident as well. *Ex facie* that seems to be so. My difficulty then is this: If they mean, by answering the first question in the affirmative, as they do, to say, with an appreciation of the purport of the words, that the accident was due to (that is to say, caused by) the fault of the appellants, I cannot really understand how

the jury could have used the language they do employ in the second sentence. I am driven to the conclusion that the meaning of the verdict is not sufficiently free from obscurity to enable one to conclude that the jury have found or intended to find the existence of a causal *nexus* between the fault and the injury to the respondent. I say this with the greatest respect for the views of the judges of the Court of King's Bench who thought otherwise.

In the result, there should be a new trial; the costs of both appeals and of the abortive trial to abide the result of the new trial.

CANNON J.—The appellant complains of the concurrent judgments of the lower courts allowing to the respondent $4,000 damages unanimously awarded by a jury for an accident to the respondent, on November 6th, 1935, while a member of the crew of the ss. *Cornwallis*, owned by the appellant. The *Cornwallis* was a British vessel registered at Vancouver, B.C., and at the time of the accident was proceeding on the high seas to Charlottetown, P.E.I. The respondent, a carpenter on board the vessel, was engaged, with other members of the crew, in putting locking bars on the hatches. While so engaged, about one hundred miles off Bermuda, a wave crashed onto the deck, where the respondent was working, swept him off his feet and carried him about twenty-five feet across the deck, causing him to strike his head violently against a bulkhead with the result that the respondent suffered a severe injury which necessitated an operation and a long treatment in the hospital from which he was finally discharged on the 17th of March, 1936.

The jury found the accident to be due to the fault of the appellant, in the following language:

> Question 4: Was the said accident due to the fault of the defendant; if so, state in what said fault consisted? Answer: Yes (unanimous). If the Chief Officer, Lieutenant Scott, had ordered life lines erected earlier the accident might have been avoided.

The defence was a denial of negligence, and, alternately that, if there was any, it was the negligence of a fellow servant from which, under the common law of England, which was applicable, no cause of action arose.

On appeal it was held that section 265 of the *Merchants' Shipping Act* (Imperial), 1894, applied, whereby, upon a

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conflict of laws appearing, the Court is to apply the law of the port of registry, in this case, Vancouver; that the law of British Columbia, in Quebec, must be proved as a fact; that no such fact had been alleged and no proof offered and that such law must be presumed to be the same as the law of Quebec, where the rule of common employment does not exist.

Section 265 of the *Merchants' Shipping Act* of 1894 reads as follows:

> Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws then if there is in this part of this Act any provision on the subject, which is expressly made to extend to that ship, the case shall be governed by that provision, but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

The only provision in the Act which might have an application to the *Cornwallis* and its crew is section 261 applying to seagoing British ships registered out of the United Kingdom; but none of the paragraphs would cover damages resulting from an accident caused by the negligence of the owner or his servants; therefore, the case must be governed by the law of the port where the ship was registered. The vessel being registered in the port of Vancouver, in the province of British Columbia, the law of that province on negligence might have applied if it had been alleged and proven. The absence of allegation distinguishes this case from that of *Logan* v. *Lee* (1). This Court, in cases from the province of Quebec, must follow the rule that all facts in support of the action, e.g., the law of another province, must be alleged and proved; otherwise it would be unfair for this Court to take *suo motu* judiciary notice of the statutory or other laws of another province, ignored in the pleadings, when the Quebec courts did not consider them, and, forsooth were prohibited from considering them as applying to the case.

Moreover, common employment must not only be alleged but proven; and there should be a finding of the fact of common employment by the jury. This has not been done in this case.

I, therefore, reach the conclusion that *lex fori* is the Quebec law; *lex loci contractus* is also Quebec law, because the respondent was engaged in Montreal. The *lex loci*

(1) (1907) 39 Can. S.C.R. 311.

*commissi delicti* would be either the law of England or that of the port of registration. The latter was not pleaded; and the defence of common employment, under the law of England, is not established—was not put to the jury.

To my mind, the real difficulty in the case is the nature of the finding of the jury as to the cause of the accident. They affirm that the accident was due to the fault of the defendant; but, when asked in what the fault consisted, they would not affirm categorically that the cause of the accident was the omission of the Chief Officer Scott to order life lines erected earlier. They simply say that the accident *might* have been avoided. Is this a verdict sufficient to give us the certainty required to connect the injuries suffered by the respondent with the alleged negligence or omission? Is it clear, under the verdict, that the cause of the accident was this omission? The verdict seems to be based not on a fact of which the jurymen were convinced but on a probability or a possibility. It may be fairly implied from the verdict that even if these lines had been erected, in view of the nature of some of the evidence, as to the protection afforded by the life lines, against such a wave, the plaintiff would have been unable to resist the impact of the water and would have suffered the injuries of which he complains. This finding, which must be the basis of the judgment allowing damages, is unsatisfactory. If the jury were uncertain and unable to affirm that plaintiff would have been saved if the life lines had been erected, and this is the only negligence now suggested against the appellants, are we entitled to say that the verdict shows that the plaintiff has discharged the onus of proving that the alleged negligence or fault caused the damage?

I would, therefore, agree with the Chief Justice and order a new trial, the costs of both appeals and of the abortive trial to abide the result of the new trial.

*New trial ordered, costs of both appeals and abortive trial to abide result of new trial.*

Solicitor for the appellant: *C. A. Harwood.*

Solicitor for the respondent: *H. H. Harris.*