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*Oct. 8, 11.
*Nov. 4.

BERTHA P. KNIGHT (PLAINTIFF).....APPELLANT;

AND

GRAND TRUNK PACIFIC DEVELOPMENT CO. (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Negligence—Dangerous premises—Invitee—Licensee—Duty of hotel proprietor to person attending banquet—Jury trial—Verdict.

In an action under *The Fatal Accidents Act*, 1922, c. 196, by the widow of a person who had been in attendance at a banquet given by an association in the defendant's hotel and, after the conclusion thereof, met his death by falling into a private service elevator shaft, a general verdict was rendered by a jury in favour of the plaintiff, upon which judgment was entered for $40,000 damages. Upon appeal to the Appellate Division, judgment was reversed and the action was dismissed.

Held, affirming the judgment of the Appellate Division (22 Alta. L.R. 237), that, upon the undisputed facts disclosed at the trial, the deceased was not at the time and place of the accident, entitled to be treated as an invitee, and, as the defendant's liability must be determined in view of its duty to a mere licensee, there was no failure of duty to the deceased on the part of the defendant company. Beyond the material facts in proof and their fair implication, everything was left to conjecture; and, although the courts must be careful to distinguish between the separate functions of judge and jury and to avoid the disposition of a case upon inferences inconsistent with findings which there is evidence to sustain, there was no evidence in this case to support the finding implied in the general verdict that the deceased was invited, or was justified to believe that he was invited, by the defendant company to enter or to use the private passage, or to meddle with the door of the service elevator.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Walsh J., with a jury and dismissing the appellant's action.

The appellant is the widow and administratrix of the estate of one A. M. Knight, in his lifetime a barrister in the office of the Attorney General of Alberta, who was accidentally killed in the MacDonald Hotel in Edmonton, which is owned and operated by the respondent company. On the night of December 20, 1924, the Alberta Bar Asso-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) 22 Alta. L.R. 237.

ciation, of which the deceased was a member, held a banquet in the hotel at which the deceased was present. While in the hotel he fell down an elevator shaft and was killed. The action was brought under the *Fatal Accidents Act* for damages. It was tried with a jury and a verdict for $40,000 damages was rendered. That judgment was reversed by the Appellate Court. The trial judge instructed the jury that the deceased, in attending the banquet, was an invitee of the company and that the duty owed the deceased was something more than was owed a mere licensee. The Appellate Court held that although it was true that the deceased was the invitee when attending the banquet he was, at the time and place of the accident, a mere licensee, as at that time the banquet was over; and the Appellate Court held further that whatever duty might be owed a mere licensee along the main corridors or immediately adjacent thereto, there was no duty owed him to keep an elevator door free from danger, situated as it was at the end of a service passage which the public had no right or reason to use.

Eug. Lafleur K.C. and *H. A. Friedman* for the appellant.

N. D. Maclean K.C. for the respondent.

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

The judgment of the court was delivered by

NEWCOMBE J.—The appellant's husband met his death on the evening of 20th December, 1924, at or about 11.30 o'clock, by falling down the shaft of the private service elevator in the MacDonald Hotel at the city of Edmonton, a distance of about 30 feet. He was a barrister, residing and practising at Edmonton, and, that evening, had attended a banquet held on the mezzanine floor of the hotel by the Alberta Bar Association, of which he was a member. The respondent company, the proprietor, carrying on the business of the hotel, had provided and served the banquet for the Bar Association. The service of the dinner had concluded before 10 o'clock, and some speeches

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followed, but after these were finished, and sometime previously to the accident, the banquet had broken up, and the guests had left the mezzanine floor. Shortly before 11.30 o'clock, the deceased had visited a room on the 2nd floor, which was occupied by a guest of the hotel, and where some friends of the guest were, but he remained there only a few minutes; he enquired of a witness whether there were a lavatory in the room, and, being informed that there was none, said that

he had looked all down the corridor and couldn't find one.

There were in fact two marked lavatories, one at each end of this corridor. He was next seen, after a short interval, in the corridor contiguous to the banquet-room which leads from the main stairway and passenger elevators. This corridor runs east and west. The deceased was seen at the east end of the corridor, the main stairway and passenger lifts being situated to the westward. Adjoining the banquet-room, the entrances to which from the main corridor are on the north side of the latter, there is a narrow corridor or passage leading from the main corridor to the service elevator, a distance of about 15 feet, and from the east side of this passage a stairway leads down to a cloak room in connection with the main dining room on the floor below. The stairway extends only between the main or ground floor and the mezzanine floor, and is used for service purposes exclusively. The passage from the main corridor to the private service elevator is of a width at the entrance of about 3 feet. There is no door, but, within the entrance, the passage has a uniform width of about $4\frac{1}{2}$ feet. This space was in part occupied by a buffet or sideboard, used for service purposes, which stood in the middle of the passage against the wall on its western side, and was of the dimensions of about 7 feet by $2\frac{1}{2}$ feet, so that there would be, opposite to the sideboard, a space of not more than $2\frac{1}{2}$ feet between the sideboard and the rail which guards the well of the private stairway. It is said by the coroner, who visited the place immediately after the accident, that

it was very narrow between the sideboard and the railing to get in there.

The passage was used by the waiters for service on the mezzanine floor, and, during the dinner, had been occupied

by the attendants who served the wine. It provided no accommodation for the use of guests.

At the time when the deceased was last seen in the mezzanine corridor he crossed that corridor and went into this private service passage, and to the door of the elevator, which is at the end of it, where he stood rattling the door. A few minutes later he was found in an unconscious and dying condition on the concrete at the bottom of the shaft. The door of the elevator was closed when the deceased went to it, but there is evidence that the lock was defective, and apt to be released because of insufficient tension. When the deceased fell the lift itself was at one of the floors above, and in its descent the attendant found the mezzanine door open, and closed it, and, when he reached the basement, he discovered the deceased lying in the pit.

The trial judge describes the lift in his charge to the jury. He says:

> The elevator itself was, in appearance a typical elevator. I don't mean to say that it was anything like the two large passenger elevators which we saw in the hotel when we were over there on Tuesday, but it was a structure built of frame with glass in the upper part and some kind of wire netting, if I am not mistaken, behind the glass. There was no handle on the door, there were push buttons beside it—up and down, the regulation buttons that are observable at the side of every other elevator, a dial above the door to indicate the location of the elevator cage.

It should be added however that, as the lift was not used by passengers, and was operated only by the private service waiter, the push buttons and dial had not been connected with the mechanism, and did not serve their purposes.

Immediately to the eastward of the passage leading to this private elevator, and beyond the stairway, was the pantry or serving room for the mezzanine floor, which opened off the main mezzanine corridor, so that there was, adjoining the private dining rooms, which on this occasion had been thrown into one large banquet-room a considerable space or block, comprising the private passage, stairway, elevators and pantry, devoted exclusively to service purposes.

The action was brought by the widow and administratrix of the deceased on behalf of herself and her children, of whom there were four, to recover compensation under the

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statute, and it resulted in a general verdict for the plaintiff, upon which judgment was entered for $40,000 damages. The defendant company appealed and the Appellate Division allowed the appeal and dismissed the action. The Chief Justice, who pronounced the judgment on behalf of the court, after reviewing the evidence, referred to the cases of *Walker* v. *Midland Railway Co.* (1); *Mersey Docks and Harbour Board* v. *Proctor* (2), and *Connor* v. *Cornell* (3), and particularly to the speech of Lord Selborne in the first named case, where it is said, at p. 490:

> I think it impossible to hold that the general duty of an innkeeper to take proper care for the safety of his guests extends to every room in the house, at all hours of night and day, irrespective of the question whether any such guests may have a right or some reasonable cause to be there. The duty must, I think, be limited to those places into which guests may reasonably be supposed to be likely to go, in the belief reasonably entertained that they are invited or entitled to do so.

And the learned Chief Justice concluded, having regard to these authorities, that it was established by the undisputed facts, that at the time and place of the accident the deceased was not entitled to be treated as an invitee, and that therefore there was no failure of duty to him on the part of the defendant company.

I have considered the evidence very carefully and I do not think that the judgment of the Appellate Division should be disturbed. The material facts in proof have been stated. Beyond these and their fair implications, everything is left to conjecture. The court must of course be careful to distinguish between the separate functions of judge and jury and to avoid the disposition of a case upon inferences inconsistent with findings which there is evidence to sustain. But here the case does not depend upon contradicted evidence, and I find no support for the finding, which, in view of the charge of the learned trial judge, must necessarily be implied in the general verdict, that the deceased was invited, or was justified to believe that he was invited, by the respondent to enter or to use the private passage, or to meddle with the door of the service elevator. There can be no doubt that the hotel management did not intend or expect that he should or would go into the private service quarters. It is suggested that

(1) (1886) 55 L.T. 489.
(2) [1923] A.C. 253.
(3) (1925) 57 Ont. L.R. 35.

he was still looking for a lavatory, but there was no lavatory in the passage, and no reason is disclosed why he should expect to find one there, and of course he had no permission to search the recesses of the hotel. The lavatories were in the basement, as he knew, or would have learned by inquiry. If the deceased were looking for an exit, why did he leave the passenger lift, or main stairway, by which he had come up, and by which he had descended from the second floor to the mezzanine, and which would have taken or led him direct to the ground floor? Evidently he was not looking for an elevator. It is said however that, having found this one, he shook the door in order to summon an attendant. That is a surmise which has, perhaps, some suggestion of probability, but certainly there was no holding out of the place to be used by visitors in that manner or for that purpose. I see no evidence to indicate that, by anything for which the hotel is responsible, the deceased was misled into a belief that he was invited to use the private passage; and, having gone there, where he had no right to be, he was not entitled to rely, if he did rely, upon the adequacy of the lock of the elevator door to withstand the shock which he gave it.

If, on the other hand, the view were taken that the defendant company was negligent in the execution of its duty to the deceased, the question would remain as to whether there be in proof a state of facts from which the jury might infer that the defendant's negligence was the cause of the accident, and the considerations suggested by *Wakelin* v. *The London and South Western Ry. Co.* (1), would arise; but, having regard to the conclusions which I have expressed, it is unnecessary to consider this question.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Friedman, Lieberman & Gallaway.*

Solicitors for the respondent: *Short, Cross & Maclean.*

(1) (1886) 12 App. Cas. 41.