DAVID McKEE AND ELIZABETH McKEE (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CITY OF WINNIPEG (DEFENDANT) ..... } RESPONDENT.

1929
*Oct. 7, 8.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Appeal—Jurisdiction—Appellants, husband and wife, asking for restoration of judgment at trial for damages, awarded by separate amount to each, for injury to wife—Separate causes of action—Insufficiency of each amount to give jurisdiction to Supreme Court of Canada—Appeal quashed—Special leave to appeal refused.

Plaintiffs, husband and wife, sued for damages by reason of injury to the wife through her slipping on an icy sidewalk, owing, as alleged, to defendant's gross negligence. At trial, on the jury's findings, judgment was recovered against defendant, by the husband for $1,000, and by the wife for $1,500. This judgment was reversed by the Court of Appeal (38 Man. R. 1), which directed that the action be dismissed. Plaintiffs appealed to this Court, asking that the judgment at trial be restored.

Held: The appeal must be quashed for want of jurisdiction. In the statement of claim the claims of the two plaintiffs were distinct, the husband claiming in respect of loss personal to him only, and the wife in respect of her personal loss. There were two separate causes of action, though in respect of the same tort (*Admiralty Commissioners* v. *SS. Amerika*, [1917] A.C. 38, at pp. 54-55, referred to). The judgment at trial, now sought to be restored, while in form only one judgment, was in substance and effect two judgments; and the amount awarded to each plaintiff must be looked at separately to determine, in each case, as to its sufficiency to give jurisdiction to this Court.

Quaere as to the case (the present case was not one) of a joint action in which the husband claimed on behalf of himself and his wife.

Application to this Court for special leave to appeal (special leave had been refused by the Court below) was refused.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Manitoba (1), which reversed the judgment of Kilgour J. (on the verdict of a jury) for recovery of damages against the defendant.

The plaintiffs were husband and wife. By paragraph 2 of the statement of claim it was alleged that the plaintiff Elizabeth McKee, while walking on a sidewalk in the city of Winnipeg, and owing to the gross negligence of the de-

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

(1) 38 Man. R. 1; [1928] 3 W.W.R. 561.

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fendant, slipped on the sidewalk, which was covered with ice and snow, and was thrown violently to the ground. Paragraphs 3 and 4 set out her injuries and sufferings. Paragraphs 5, 6, 7 and 8 set out the alleged condition of the sidewalk and the alleged gross negligence of the defendant in respect thereof. By paragraph 9 it was alleged that

By reason of the said accident the plaintiff David McKee was deprived of and will lose the comfort, society, assistance and service of his wife and was obliged to pay hospital bills, to employ a nurse and a servant, and will in future be obliged to pay a nurse and a servant, and has incurred and will incur expenses and liability for medical, surgical, nursing and other attendance for his wife and has been and will be put to further and other expenses.

Paragraph 10 gave the "particulars of the present and estimated loss, expenses and liability incurred by the plaintiffs" in an itemized list, including hospital bill, ambulance, medical attendance, nurse, housekeeper, etc., totalling $1,046.25. Paragraph 11 dealt with the notice to the City of the accident.

The prayer for relief claimed

(*a*) [Declaration with regard to notice given defendant of the accident.]

(*b*) Special damages in the amount of $1,046.25;

(*c*) For the plaintiff Elizabeth McKee general damages in the sum of $25,000;

(*d*) For the plaintiff David McKee general damages in the sum of $2,000;

(*e*) The costs of this action;

(*f*) Such further and other relief as the nature of the case may require or as to this Honourable Court may seem meet.

The jury found that the accident was attributable to gross negligence on the part of the City, and, on the questions as to damages, answered as follows:

4. In what amounts do you assess damages? (*a*) For the male plaintiff? Answer: One thousand dollars.

(*b*) For the female plaintiff? Answer: Fifteen hundred dollars.

Judgment was entered for the plaintiffs in accordance with said verdict, with costs of suit, and it was adjudged that the plaintiff David McKee recover against the defendant one thousand dollars ($1,000) and the plaintiff Elizabeth McKee recover against the defendant fifteen hundred dollars ($1,500), and that the said plaintiffs recover against the defendant their costs of suit * * *.

The defendant appealed to the Court of Appeal, which held (1) that, on the evidence and the law, the jury were not justified in finding the defendant guilty of gross negligence, and that it was not liable. The defendant's appeal

(1) 38 Man. R. 1; [1928] 3 W.W.R. 561.

was allowed and the action dismissed. The plaintiffs appealed to the Supreme Court of Canada, and asked that the verdict of the jury and the judgment thereon in favour of the plaintiffs be restored.

W. N. Tilley K.C. for the appellants.

J. Preudhomme K.C. for the respondent.

At the opening of the argument the Court raised the question of its jurisdiction, and argument was heard upon this point, the appellants' counsel also asking for special leave to appeal (special leave to appeal to this Court had been refused by the Court of Appeal, as stated *infra,* in the judgment now reported). Judgment on these questions was reserved, and at the opening of Court on the following day the judgment of the Court was orally delivered by

ANGLIN C.J.C.—As to the case of *McKee* v. *The City of Winnipeg,* which was partly heard yesterday afternoon—on the question of jurisdiction (raised by the Court) and on an application for special leave to appeal—the Court is now prepared to dispose of it, having had an opportunity to consider it overnight.

In this action, David McKee and Elizabeth McKee are both plaintiffs, the latter being the wife of the former.

The statement of claim sets out the circumstances of the accident which happened to Mrs. McKee, and goes on to specify her injuries and sufferings, etc., as the result of the fall which she sustained; then the 9th paragraph sets out, as the basis of the claim of the male plaintiff, loss of comfort, society, assistance and services of his wife, and expenses for hospital bills, nurse, servant, medical attendance for her, etc.

When we come to the prayer for relief, we find that both plaintiffs claim special damages in the amount of $1,046.25, being the total of the items for hospital and other expenses incurred stated in paragraph 9, as particularized in paragraph 10. Then the prayer proceeds "For the plaintiff Elizabeth McKee general damages in the sum of $25,000," and "For the plaintiff David McKee general damages in the sum of $2,000."

So that in the statement of claim it is made quite apparent that the claims of the two plaintiffs are distinct. David

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McKee claims in respect of loss personal to him only; and his wife claims in respect of her personal loss.

On that state of the pleadings the case went to trial, and the jury brought in a verdict for both plaintiffs for damages, awarding to the male plaintiff—very apparently on his claim as set out in paragraph 9—the sum of $1,000 and to the female plaintiff the sum of $1,500, on her claim for general damages.

It is quite obvious that neither award is enough to give jurisdiction to this Court, the appellants' claim here being to have these awards, which were set aside in the Court of Appeal, restored.

In that state of affairs, application was made to the Court below for special leave to appeal to this Court, which was refused on two grounds:

(1) That leave was unnecessary, as over $2,000 was involved;

(2) That, in any event, there was no matter of public interest involved which would justify such leave being given.

In the refusal on the second ground we entirely concur.

As to the first ground—not only the verdict, as I have stated, but the judgment based on that verdict provides that the several damages respectively found by the jury be recovered by each plaintiff, and is, in effect, two judgments in one. While in form there is only one judgment, we must get at the substance of the matter; and if, in substance, there are two judgments, we must look, as has been frequently decided, at each separately and each appellant must have had judgment for an amount sufficient to give jurisdiction here, when they ask to have such judgments restored.

A joint action in which the husband claimed on behalf of himself and his wife is conceivable; and if such a case were before us it might require careful consideration. Mr. Tilley ingeniously argued that we have here such a case. But that is not the case here. There are two separate causes of action, though in respect of the same tort. *Admiralty Commissioners* v. *SS. Amerika* (1). One thousand dollars

(1) [1917] A.C. 38, at pp. 54-5.

was recovered by one claimant and fifteen hundred by the other; and that is the judgment they would have restored.

Counsel for the respondent stated at bar that he had on the application for special leave below, taken the objection to the jurisdiction of this Court which I have stated. He may have done so; but he failed to take that ground here, in his factum or otherwise. As he might have moved to quash the appeal, so the appellant might have moved to affirm jurisdiction. Either motion would have obviated great expense.

Under all the circumstances, the appeal must be quashed and there will be no order as to costs.

The application for leave to appeal will also be refused without costs.

Appeal quashed.

Solicitors for the appellants: *Anderson, Guy, Chappell & Turner.*

Solicitor for the respondent: *Jules Preudhomme.*