THE CITY OF BRANDON (*Defendant*) ...APPELLANT;

AND

KIMBELL RUSSELL ROY FARLEY (*Plaintiff*) ..... RESPONDENT.

1967
*Nov. 6
1968
Jan. 23

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Invitor and invitee—Plaintiff carrying on business of purchasing water from defendant for resale—Accumulation of ice at doorway of defendant's premises resulting from spillage of water in freezing temperatures—Plaintiff injured in fall—Whether an unusual danger—Knowledge of danger by plaintiff.

The plaintiff, an invitee, brought an action for damages for injuries he sustained when he fell on the ice covered sills of a doorway leading into the east side of the defendant city's fire hall. The plaintiff had for many years carried on the business, along with a number of others, of purchasing water from the city for resale to farmers in the outlying districts, and for this he used a truck with a 500-gallon tank on it which he brought to the east side of the fire hall stopping it with its back opposite the doorway just south of which there was a pipe with a hose extension through which the water was delivered. The accident occurred on a day when the weather was cold and snow was blowing. Shortly before 4 p.m. the plaintiff backed his truck up according to his practice, inserted the hose into the tank and then entered the building through the doorway. As he came in he noticed that the sills were covered with an accumulation of ice which had

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

gathered there from the spillage of water while filling the tanks. A few minutes later the plaintiff left through the door by which he had entered and in so doing he slipped on the ice and fell approximately 42 inches to the ground below suffering serious injuries to his left shoulder and thigh.

The trial judge found that the danger presented by the ice at the doorway was not an unusual one and that the plaintiff knew and fully appreciated it, but the Court of Appeal found the danger to be an unusual one and held that the defendant was negligent in failing to remove the ice and apply sand at the entrance. The Court of Appeal further found the plaintiff guilty of contributory negligence and assessed the liability to the extent of one-third against the plaintiff and two-thirds against the defendant, as a result of which damages were awarded to the plaintiff in the amount of $19,076.10. An appeal by the defendant from the judgment of the Court of Appeal was brought to this Court.

Held: The appeal should be allowed and the action dismissed.

The plaintiff was a member of a class whose business in obtaining water from the city exposed them to the hazard in winter-time created by ice accumulating on the door sills from the spillage of water. This danger was not an unusual one for persons of that class and indeed it was one which was to be expected by those engaged in the transfer of water in freezing temperatures. The plaintiff had knowledge of the actual danger at the place where he fell because he had entered and left through the doorway twice on the very day of the accident and had entered over the ice only five or six minutes before his fall.

The duty owed by an occupier to an invitee as defined by Willes J. in *Indermaur v. Dames* (1866), L. R. 1 C.P. 274, is predicated upon the existence of an unusual danger on the occupier's premises and the finding that the damage in the present case was not caused by such a danger was a complete answer to the plaintiff's claim.

Campbell v. Royal Bank of Canada, [1964] S.C.R. 85, distinguished; *London Graving Dock Co. Ltd. v. Horton,* [1951] A.C. 737, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], setting aside a judgment rendered at trial by Hall J. Appeal allowed.

F. O. Meighen, Q.C., for the defendant, appellant.

A. C. Hamilton, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba[1] which set aside a judgment rendered at trial by Mr. Justice Hall whereby he dismissed the respondent's action claiming damages for injuries which he sustained when he fell on the ice covered sills of a

[1] (1966), 58 W.W.R. 538, 61 D.L.R. (2d) 155.

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doorway leading into the east side of the City of Brandon fire hall. The learned judge found that the danger presented by the ice at the doorway was not an unusual one and that the respondent knew and fully appreciated it, but the Court of Appeal found the danger to be an unusual one and held that the appellant was negligent in failing to remove the ice and apply sand at the entrance. The Court of Appeal further found the respondent guilty of contributory negligence and assessed the liability to the extent of one-third against the respondent and two-thirds against the appellant, as a result of which damages were awarded to the respondent in the amount of $19,076.10.

The respondent had for many years carried on the business, along with a number of others, of purchasing water from the City of Brandon for resale to farmers in the outlying districts, and for this purpose he used a truck with a 500-gallon tank on it which he brought to the east side of the fire hall stopping it with its back opposite the doorway just south of which there was a pipe with a hose extension through which the water was delivered. The accident occurred at approximately 4 p.m. on January 4, 1965, which was a cold day with the snow blowing. The respondent had made two previous visits to the fire hall on that day on each of which he had entered through the doorway in question and observed the icy condition, and shortly before 4 o'clock he backed his truck up according to his practice, removed the metal top from his tank, inserted the hose and then entered the building through the doorway stepping upon the concrete step and then on the concrete sill across the length of which on the inner side was a wooden sill measuring approximately 4 feet 1 inch. The distance from the top of the concrete sill to the ground below was approximately 42 inches and as he came in the respondent noticed that the sills were both covered with an accumulation of ice which had gathered there from the spillage of water while filling the tanks. Either the respondent or one of the firemen turned on the water from inside the building and in five or six minutes when the water would be nearing the capacity of the tank, the respondent left through the door by which he had entered and in so doing he slipped on the ice and fell to the ground below suffering serious injuries to his left shoulder and thigh.

The respondent knew that in winter-time there was always ice on the top step and sill of the doorway which he used, he recognized that the situation was a dangerous one and was aware of the fact that he could have entered and left the building by the front entrance and that this was in fact done by some purchasers of water because it was safer than using the east side door. It is to be observed also that the respondent had entered the building only a few minutes before his fall by going over the very ice on which he fell. It is true that icy conditions and the dangers which they create may vary considerably from time to time, particularly under conditions of blowing and drifting snow such as there were on the day in question, and it is also true that the respondent stated that there was more of a film of snow when he left than when he entered, but I am quite unable to accept the suggestion which appears to have carried some weight with the Court of Appeal that there could have been any material change in the icy condition of the doorway during the time which it took to fill the 500-gallon tank with water.

The relationship between the parties was correctly treated in both the Courts below as being that of an occupier and an invitee and the learned trial judge, in conformity with the decision of Mr. Justice Spence, speaking for the majority of this Court in *Campbell v. Royal Bank of Canada*[2], adopted the definition of the occupier's liability as it was stated by Willes J. in *Indermaur v. Dames*[3], and the definition of "unusual danger" which is contained in the judgment given by Lord Porter in the House of Lords in *London Graving Dock Co. Ltd. v. Horton*[4]. For greater clarity it appears to me to be desirable to restate these definitions. The outline of liability established by Mr. Justice Willes in his famous judgment is in the following terms:

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know.

and Lord Porter's definition of unusual danger reads as follows:

> I think 'unusual' is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function

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[2] [1964] S.C.R. 85.
[3] (1866), L.R. 1 C.P. 274.
[4] [1951] A.C. 737 at 745.

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which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises. Indeed, I do not think Phillimore L.J., in *Norman v. Great Western Railway Co.*, [1915] 1 K.B. 584 at 596, is speaking of individuals as individuals but of individuals as members of a type, e.g. that class of persons such as stevedores or seamen who are accustomed to negotiate the difficulties which their occupation presents. A tall chimney is not an unusual difficulty for a steeplejack though it would be for a motor mechanic. But I do not think a lofty chimney presents a danger less unusual for the last-named because he is particularly active or untroubled by dizziness.

In the *Campbell* case, *supra,* at p. 93, Spence J. also made reference to Lord Normand's judgment in the *Horton* case, *supra,* at p. 752 where he said:

> I am of opinion that if the persons invited to the premises are a particular class of tradesman then the test is whether it is unusual danger for that class.

In the *Campbell* case Mr. Justice Spence was dealing with a situation where "the invitee was an ordinary customer of the bank but of no particular class" and he reaffirmed the finding of the trial judge that the condition of the bank floor around the tellers' wickets was "more than mere moisture or dampness; it may have been less than actual puddles; but certainly there was at least a dangerous glaze or film of water under foot near the tellers' wickets", and the further finding "that the plaintiff's knowledge was not knowledge of the dangerous condition around the tellers' wickets. The conditions were worse there".

Finally, Spence J. agreed with the dissenting opinion of Freedman J.A. in the Court of Appeal where he said:

> One does not normally expect that bank premises, to which members of the public customarily resort in large numbers, will be wet and therefore hazardous.

In the result, Mr. Justice Spence found that the state of the floor in the bank on the afternoon in question constituted "an unusual danger".

The facts which form the basis of the decision of this Court in the *Campbell* case are, in my opinion, clearly distinguishable from those with which we are here concerned.

The respondent in the present case was one of a particular class of customers who bought water from the fire hall premises and who filled their trucks by bringing them to the eastern entrance where icy conditions existed on the

door sills in winter-time occasioned in part by the fact that there was usually some spillage from the tanks in delivering water.

In holding that the icy condition constituted an "unusual danger", the Court of Appeal relied on a finding that the appellant's officials had been negligent in not having removed the ice and applied sand, and Mr. Justice Freedman, whose reasons were adopted by the other members of the Court, applied to the circumstances here disclosed the following language employed by Mr. Justice Spence in the *Campbell* case at pp. 96 and 97:

> It is perhaps a test of some value to determine whether a condition is one of unusual danger to investigate the ease by which the occupier might avoid it . . . If the danger could have been prevented by these economical and easy precautions then surely a member of the public . . . would have been entitled to expect such precautions or others equally effective, and their absence would tend to make the danger an 'unusual' one.

In making this statement, Mr. Justice Spence was commenting on the finding of the learned trial judge that a few strips of matting placed on the busy parts of the lobby of the bank "would have kept the floor nearly dry", and in dealing with the conditions which "a member of the public frequenting such a busy place as this bank would have been entitled to expect", he found that failure to take the "easy precautions" suggested by the trial judge "would tend to make the danger an 'unusual' one".

As has been indicated, the respondent in the present case was not "an ordinary customer ... of no particular class" like the plaintiff in the *Campbell* case. He was, on the other hand, a member of a class whose business in obtaining water from the city exposed them to the hazard in winter-time created by ice accumulating on the door sills from the spillage of water. This danger was not, in my opinion, an unusual one for persons of that class and indeed it was one which was to be expected by those engaged in the transfer of water in freezing temperatures and I do not think that under these circumstances the failure of the city to keep the doorway free of ice or to apply sand can be said to have made the danger "unusual". It is also clear that unlike the plaintiff in the *Campbell* case, the respondent here had knowledge of the actual danger at the place where he fell because he had entered

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and left through the doorway twice on the very day of the accident and had entered over the ice only five or six minutes before his fall.

I am in agreement with the learned trial judge when he says:

> I have come to the conclusion that the condition of the ice and snow was not an 'unusual danger'. The Plaintiff was one of many customers who purchased water from the defendant. The ice condition was incident to that operation and existed in varying degrees during the whole of the winter season of 1964-65. It was a condition known experienced and fully appreciated by plaintiff not only on three occasions the same day but on many other occasions during that winter season.

The duty owed by an occupier to an invitee as defined by Willes J. in *Indermaur v. Dames, supra,* is predicated upon the existence of an unusual danger on the occupier's premises and the finding that the damage in the present case was not caused by such a danger is in my view a complete answer to the respondent's claim. I would allow the present appeal on this ground.

I have not overlooked the fact that the learned trial judge also found that even if the danger had been an unusual one the appellant would have been protected from liability because the respondent, although not *volens,* had full knowledge and appreciation of it, but I do not find it necessary to embark on a consideration of the cases which he cited in support of this proposition or to express any opinion in this regard because the question does not appear to me to arise and I do not think it arose in the case of *Campbell v. The Royal Bank, supra,* which was expressly based on a finding that the plaintiff did not have full knowledge and appreciation of the danger at the place where he fell.

As I have indicated, I would allow this appeal and dismiss the respondent's action.

The appellant is entitled to its costs in this Court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Meighen, Stordy, Haddad, Alder & Mitchell, Brandon.

Solicitors for the plaintiff, respondent: Hamilton, Hunt & Potter, Brandon.