CANADIAN PACIFIC RAILWAY COMPANY (*Defendant*) ..... APPELLANT;

AND

VERA McCRINDLE (*Plaintiff*) ..... RESPONDENT.

1956

*Feb. 15, 16
*Mar. 28

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Whether licensee or trespasser—Seaman lost way while returning to ship in dense fog.

The respondent's husband, a seaman returning after shore leave to his ship moored at the appellant's pier, lost his way in the dense fog in the area and drove in the wrong direction off the end of a pier and was drowned. The jury found for the respondent and that the deceased had been guilty of contributory negligence. The Court of Appeal, considering the deceased a licensee, affirmed the verdict.

Held: The appeal should be allowed.

There was no evidence upon which it was open to the jury to find that the deceased was a licensee in the locality where he met his death. His licence extended only to such reasonable area of the appellant's property as was necessary for him to reach his ship. Being outside that area, he was therefore a trespasser and no evidence can be found of any breach of duty toward him on the part of the appellant.

*PRESENT: Taschereau, Kellock, Locke, Cartwright and Fauteux JJ.

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C.P.R. v. McCRINDLE

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment at trial.

H. A. V. Green, Q.C. and *H. M. Pickart* for the appellant.

H. Ray for the respondent.

The judgment of Taschereau, Kellock, Locke and Fauteux JJ. was delivered by:—

KELLOCK J.:—The material facts out of which this appeal has arisen are as follows. The deceased was a member of the crew of H.M.C.S. *Sioux*, which was moored on the easterly side of the appellant's Pier "A" in Vancouver Harbour, gratuitous permission having been given to the Canadian Naval authorities to so moor the ship.

On October 11, 1952, the deceased had left his ship about 3 p.m. and spent the following hours until about midnight in the city, from which he was driven back to the harbour area by one Stewart in the latter's car. Access to the ship from the city was gained by proceeding over a viaduct running westerly from the northern end of Granville Street, and then turning to the north out on to the pier at the westerly end of the ramp of the viaduct.

When Stewart and the deceased returned there was a fog, described by all the witnesses as very dense, one of them stating that he could not see his feet even with a flashlight. Instead of turning off the ramp immediately to his right on to Pier "A", Stewart missed the turn and drove westerly along a hard top road on the appellant's property which bordered to the south a number of docks. After proceeding some 1,500 feet, Stewart realized he was lost and turned around and began to retrace his journey. While proceeding westerly, he had crossed a number of railway tracks, in order to do so having to turn slightly to the north and again to the south. On the return journey, after retracing the road for about 500 feet, he missed the first turn in the fog and instead of turning slightly to the south, drove some 300 feet out on to a pier where the car went over the end of the pier into the water.

At the point where the railway tracks crossed the road the hard top was replaced by planking which followed the

(1) [1955] 5 D.L.R. 195.

railway tracks to the north and south. On his return journey, Stewart had, as already mentioned, not only failed to turn to his right but followed the planking and the tracks, straddling one of the rails as he did so.

The trial took place before Whittaker J. and a jury, the latter returning a verdict in favour of the respondent but finding the deceased guilty of contributory negligence. Judgment was entered accordingly and was upheld in the Court of Appeal, which considered the deceased a licensee. The court considered it was immaterial under the circumstances whether the jury's verdict should be regarded "as defining by implication the area covered by the licence or as extending the duty owed by the occupier to the licensee beyond the actual area covered by the licence", and that the ferry dock constituted a danger of which the deceased was entitled to have warning.

In my opinion there was no evidence upon which it was open to the jury to find that the deceased was a licensee in the locality where he met his death. No doubt the licence extended to such reasonable area of the appellant's property as was necessary for the deceased to reach his ship from the end of the city street. It is quite irrelevant, in my opinion, that other persons having business from time to time with the appellant might be invitees in using the road leading along the docks farther to the west. So far as the deceased was concerned, he was, in my opinion, a trespasser once he got beyond any point over which he was reasonably entitled to pass in going to or from his ship.

In my opinion, the principle of the decision in *Mersey Docks and Harbour Board* v. *Procter* (1) applies. In that case, Viscount Cave L.C., at p. 261, referred to *Hardcastle* v. *South Yorkshire Railway Co.* (2), in which a man had wandered from a highway and had fallen into a reservoir on land at some little distance from the highway, the court holding the owner of the land not liable. Pollock C.B., said, at p. 74:

> . . . but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury no one could tell whether he was liable for the consequences of his act upon his own land or not.

(1) [1923] A.C. 253. (2) 4 H. & N. 67.

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Kellock J.

After citing this judgment, Viscount Cave continued at p. 262:

> It is true that these observations had reference to a public way, but the reasoning appears to me to apply equally to a way which a person is invited or permitted to use.

In *Procter's* case, the deceased had been working on a ship in a floating dock lying to the east of a piece of ground which separated that dock from another floating dock on its westerly side. On leaving the ship on which he was working, the deceased had proceeded southerly over this piece of ground and over a bridge at the southern end, called the Duke Street Bridge. The piece of ground was traversed from north to south by two double lines of rails leading to and over the bridge, the site of the railway being used as a public highway. The deceased apparently lost his life while endeavouring to proceed south but had wandered to the west and fallen into the water. An action brought by his widow under the *Fatal Accidents Act* failed.

In the course of his judgment, Lord Sumner, with whom Lord Carson agreed, said, at p. 272:

> A free range over the whole estate is not given to every invited workman. The respondent, recognizing this, suggested two forms of limitation . . . the second, that the limit varied according as the day was clear or foggy . . . As to the second, it amounts to this, that a man, who can see where he is going, enjoys the rights of an invitee within modest boundaries; but a man, who cannot carries them with him as far as the limits of his actual error. Both suggestions are ingenious, but they are suggestions ad hoc. There is no decision to support them.

Lord Sumner continued at p. 273:

> He was actually going where he had no business to go at the time of the accident, though his mistake was alike innocent and accidental. How can a workman extend the Board's liabilities, indicated by this term "invitation," by making a mistake of his own and getting lost in a fog? What legal reason can there be for the Board's "inviting" him to go somewhere in a fog, where he does not want to go at all and would certainly not be invited to go in clear weather, and where, moreover, the Board has no interest or desire to invite him at any time? There is none: the suggestion is a mere impulse of compassion.

In my opinion, this is the law and applies in the case at bar. Reference may also be made to *Caseley* v. *Bristol Corporation* (1).

The deceased, in the case at bar, being a trespasser in the place where he met his death, I can find no evidence of any

(1) [1944] 1 All E.R. 14.

breach of duty toward him on the part of the railway company. The appeal should therefore be allowed, the judgments below set aside and judgment entered for the appellant with costs if demanded.

CARTWRIGHT J.:—I have had the advantage of reading the reasons of my brother Kellock and I agree with his conclusion that there was no evidence on which the jury could find that the late Kenneth McCrindle was other than a trespasser at the place where he met his death. This being so, the action cannot succeed although the mistake made by Stewart and the deceased was, in the words of Lord Sumner quoted by my brother Kellock, "alike innocent and accidental."

I would dispose of the appeal as proposed by my brother Kellock.

Appeal allowed, with costs if demanded.

Solicitor for the appellant: *F. H. Britton.*

Solicitors for the respondent: *Haldane & Campbell.*