CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

CANADIAN INDUSTRIES LIMITED (PLAINTIFF) ..... RESPONDENT.

1941

* Mar. 24, 25.
* Oct. 20.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Carriers — Railways — Negligence — Contract — Pleadings — Evidence — Goods damaged by derailment and fire while being carried on defendant's railway—Suit for damages for defendant's failure to deliver—Allowance by trial judge of amendment to plead negligence against defendant—Judgment grounded on negligence—Onus of proof as to negligence—Defendant claiming benefit of conditions in standard bill of lading: as to notice and benefit of insurance—Whether such conditions, if available, afforded defence.

Plaintiff sued defendant railway company for damages for defendant's failure to deliver goods which, plaintiff alleged, defendant had undertaken to transport. The goods had been purchased by plaintiff from manufacturers in England and shipped from there, and at Saint John, N.B., the shipping line, pursuant to instruction in the bill of lading, delivered them to defendant for carriage to Schumacher, Ontario. The goods were damaged by derailment and fire while being carried on defendant's railway. The trial judge found that there was no contract between plaintiff and defendant but, when delivering judgment, gave leave to plaintiff to amend its statement of claim by adding an allegation that the goods were damaged by the negligence of defendant, and gave judgment for plaintiff. Said allowance of amendment and judgment was affirmed by the Court of Appeal for Ontario ([1940] O.W.N. 452; [1940] 4 D.L.R. 629) subject to giving to defendant an opportunity (not exercised) of denying negligence (it was held that the onus was on defendant to disprove negligence) and having a new trial on the questions raised by the amendment. Defendant appealed to this Court.

Defendant claimed that its carriage of the goods was subject to conditions in a standard form of bill of lading approved by the Board of Railway Commissioners for Canada, one of which conditions provided that,

* PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.

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unless a certain notice of loss was given, the carrier should not be liable, and another gave to the carrier (on reimbursing to the insured the premiums paid) the full benefit of any insurance that might have been effected upon the goods, "so far as this shall not avoid the policies or contracts of insurance." There was insurance, and after the loss the insurers advanced a sum to plaintiff under terms set up in a loan receipt, by which the sum was received "as a loan, not a payment of any claim," and plaintiff agreed "to repay this loan to the extent of any net recovery made from" any carrier responsible for the loss, and authorized the insurers to sue the carrier in plaintiff's name. The policy was subject to the provisions of the (Imperial) *Marine Insurance Act, 1906* (c. 41, s. 79), providing specifically for subrogation.

Held: Defendant's appeal should be dismissed. The affirmance (in terms as aforesaid) by the Court of Appeal of allowance of said amendment and of judgment for plaintiff on the ground of negligence was right.

Even if the conditions in said standard form of bill of lading were available to defendant (as to which, *quaere*), the conditions relied on did not afford a defence. As to the condition as to notice (non-observance of which was not pleaded but was claimed at trial): *Per* the Chief Justice: Defendant was bound to plead non-observance, and no amendment should in the circumstances be allowed. *Per* Rinfret, Kerwin, Hudson and Taschereau JJ.: In view of the evidence as to actual notice of the damage and of intention to make claim, and subsequent conduct of the parties, a defence based on this condition was not maintainable. As to the condition as to insurance: *Per curiam:* Any contract made by plaintiff which would impair the insurers' right of subrogation would relieve the latter from liability. Under the terms of the loan receipt the insurers would be entitled to return of the money advanced if it were found that they had been deprived of the fruit of subrogation because of some action by the insured. There was no suggestion, and it was entirely improbable, that the insurers knew anything about the condition now set up. Under the circumstances, the condition was not operative.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) dismissing the defendant's appeal from the judgment of Rose C.J.H.C. (2) adjudging that the plaintiff recover the sum of $2,765.26 for loss suffered by the plaintiff by reason of damage to its goods by derailment and fire at Bagot station, while being carried on defendant's railway en route to Schumacher, Ontario. The goods had been purchased by plaintiff from manufacturers in England and on their arrival at Saint John, New Brunswick, the shipping line, pursuant to instruction in the bill of lading, delivered them to defendant for carriage to Schumacher.

(1) [1940] O.W.N. 452; [1940] 4 D.L.R. 629.
(2) [1940] 3 D.L.R. 621.

In its statement of claim, as originally framed, plaintiff alleged that defendant undertook to transport the goods from Saint John, N.B., and deliver them at Schumacher, Ont.; that defendant did not deliver the goods as undertaken, the goods having been damaged as a result of a train derailment on defendant's railway line at Bagot station; that plaintiff lost the sum for which it claimed by reason of the default of defendant to deliver the goods in pursuance of its duty and/or undertaking. A question arose as to whether or not there was any contractual relationship between plaintiff and defendant on which plaintiff could make a claim based on contract. The trial judge, Rose, C.J.H.C., was of opinion that there was no contract between plaintiff and defendant, but, when delivering judgment, gave leave to plaintiff to amend its statement of claim by adding an allegation that the goods were damaged by the negligence of the defendant; and gave judgment for the plaintiff. The Court of Appeal upheld the trial judge in allowing the amendment to plead negligence, but gave an opportunity to defendant to deny negligence and have a new trial on the questions raised by the amendment. (The Court was of opinion that the onus was upon the defendant to disprove negligence.) The formal judgment in the Court of Appeal, reciting "that the defendant has elected not to file an affidavit denying negligence pursuant to leave granted by the court," ordered that the appeal be dismissed with costs.

In its statement of defence the defendant pleaded (*inter alia*) that the shipment delivered to it and transportation thereof by it "was subject to the tariffs and classifications in effect on the date the said shipment was received by" defendant "and to all terms, conditions and exceptions of the Carriers carrying the said shipment beyond the port of discharge, and in particular but without limitation to the conditions set forth in the form of Straight Bill of Lading approved by the Board of Railway Commissioners for Canada by Order No. 7562 dated the 15th day of July, 1909."

The conditions relied upon by defendant were in respect to notice and insurance and are set out in the reasons for judgment in this Court now reported. Non-observance of the condition as to notice was not pleaded but was claimed

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at trial. As to the condition as to insurance, defendant (after pleading that it was not liable in law for any loss or damage by reason of the fire) pleaded in the alternative that if it was liable on account of loss of or damage to any of the goods, it was ready and willing to reimburse to the insured the premiums paid in respect thereof and was entitled to the full benefit of any insurance that might have been effective on account of the said goods.

The appeal to this Court was dismissed with costs.

R. E. Laidlaw K.C. and *A. D. McDonald* for the appellant.

T. N. Phelan K.C. and *B. O'Brien* for the respondent.

THE CHIEF JUSTICE—I agree that the amendment directed by the Chief Justice of the High Court, Rose, C.J., was a competent and proper amendment. Mr. Justice Middleton in his judgment has given convincing reasons for this, with which I agree, and I will add nothing to them.

It is unnecessary to decide whether or not the statement of claim without the amendment contained a sufficient allegation of negligence. Failure to deliver by reason of damage to the goods "as a result of a train derailment" is alleged. Derailment of the train would be evidence of negligence sufficient to constitute a *prima facie* case. Whether there is a presumption of law that the goods were damaged by reason of the carrier's negligence, within the meaning of the rules of pleading, is a question on which it is unnecessary to express any opinion.

Negligence being established, it is not disputed that the appellants are responsible unless relieved by the conditions in the bill of lading. Here again it is unnecessary, in my view, to decide whether or not the rights of the respondents are regulated by these conditions, and I should prefer to reserve for another occasion the decision of the question whether, in circumstances such as those presented by this case, the railway company is not protected by the stipulations of the bill of lading.

The two conditions upon which the appellants rely are that relating to notice and that relating to insurance. As regards the first, the appellants were, in my opinion, bound to plead non-observance of the condition and no amend-

ment ought, in the circumstances, to be allowed. As regards the second, the appellant's contention, in my opinion, fails.

For the reasons given by my brother Hudson, I think the carrier cannot be given the benefit of the policy of insurance without avoiding the policy and, consequently, the condition is not operative.

The question does not arise, I may add, whether, assuming the appellants are not entitled to the benefit of the conditions of the bill of lading, their liability in respect of the goods would necessarily rest upon the negligence of their servants. Lord Dunedin's judgment in *London & North Western Railway Company* v. *Richard Hudson & Sons, Ltd.* (1) seems to show that, according to the view of that great judge, the appellants would be responsible as insurers, unless, of course, as regards Dominion railway companies the common law obligation is in some way affected by the provisions of the *Railway Act*.

I should dismiss the appeal with costs.

The judgment of Rinfret, Kerwin, Hudson and Taschereau JJ. was delivered by

HUDSON J.—A quantity of sodium cyanide belonging to the plaintiffs, while being conveyed by the defendants on their railway, was badly damaged, and this action was brought to recover for the loss sustained.

At the trial, Chief Justice Rose held that the goods had been damaged under circumstances justifying a finding of negligence and gave judgment for the plaintiffs.

On appeal to the Court of Appeal, the learned judges there thought that the defendants should be given the option of giving evidence on the question of negligence, if they so desired, but, defendants failing to take advantage of this option, the appeal was dismissed.

The writ, as endorsed, was quite wide enough to enable the plaintiffs to plead either in tort or in contract, but the statement of claim did not in terms allege negligence and, in the opinion of the learned trial judge, was not wide enough to cover a claim in tort. However, at the time of delivering his judgment, he gave leave to amend by adding an allegation of negligence, and this was done.

(1) [1920] A.C. 324.

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The propriety of granting leave to amend was a major subject of controversy in the Court of Appeal, but the only concession made to the defendants was the option to give evidence rebutting negligence. I agree with the decision of the Court of Appeal on this point for the reasons given by Mr. Justice Middleton.

On the merits, the material evidence is very fully set forth in the judgment of Chief Justice Rose. Briefly, the plaintiffs had bought a quantity of sodium cyanide in England, which was shipped by a through bill of lading from Newcastle-on-Tyne in England to Schumacher in Ontario. On arrival at the Port of Saint John the goods were transferred to the defendant company, for carriage by rail. No bill of lading was issued by the railway company and there is no evidence of a contract of carriage, except what can be extracted from a way-bill apparently prepared by the Shipping Company's agent, stating the freight rate to be charged on the shipment from Saint John to Schumacher, such rate being at a figure which would indicate that the goods were being shipped on what is known as a standard bill of lading, the form of which had been approved by the Board of Railway Commissioners.

At the trial, the defendants contended that there was no contractual relationship between the plaintiffs and themselves and that their only contract was with the shipowners, for whom they acted as agents. In the alternative, they claimed that they received the goods on the conditions and limitations of the standard bill of lading approved by the Board of Railway Commissioners, and were entitled to the benefit of certain conditions therein respecting insurance and notice of claim.

The plaintiffs claimed under a contract of carriage and in the alternative for negligence.

The learned trial judge held that the contract made with the shipowners was an entire contract for the carriage of the goods from Newcastle to Schumacher, and that the shipowners had no authority on behalf of the plaintiffs to enter into a contract with the defendants for the carriage of the goods for a portion of the distance. He held that, in the absence of contract, the case was in principle the

same as *Allen* v. *Canadian Pacific Ry. Co.* (1), which was binding on him, and that under the circumstances here the defendants were not entitled to rely upon the terms of a standard bill of lading. Having come to this conclusion, and that defendant had been negligent, he did not find it necessary to deal with the effect of the conditions of the bill of lading, if applicable.

As I have said before, the main question argued before the Court of Appeal was the propriety of allowing the amendment setting up negligence. That question having been disposed of, the Court of Appeal had no difficulty in dismissing the appeal.

The defendants, having caused the loss through their negligence, are liable unless there is some limitation on their liability beyond what is given them by the common law. It has been held by Chief Justice Rose, and indeed it was contended on behalf of the defendants, that there was no privity of contract between the defendants and plaintiffs, and the limitation on liability, if any, must arise in some other way.

The defendants say that they received the goods on the conditions and limitations of the standard bill of lading approved by the Board of Railway Commissioners, and were entitled to the benefit of certain conditions therein respecting insurance and notice of claim. It will be convenient here to state the terms and conditions on which the defendants rely. The first is:

> Notice of loss, damage or delay must be made in writing to the Carrier at the point of delivery, or to the Carrier at the point of origin, within four months after delivery of the goods, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the Carrier shall not be liable.

The defendants did not plead the absence of such notice but claimed in the course of the trial that there was non-compliance with this condition. It appears from the evidence that the defendants were properly notified of the damage and that in due course a claim would be made for the loss, when the amount had been ascertained. Thereafter, the officers of the plaintiffs and defendants actively co-operated in an endeavour to minimize the loss as much as possible. The circumstances are more fully set forth in

(1) (1909) 19 O.L.R. 510; (1910) 21 O.L.R. 416.

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the judgment of Mr. Justice Middleton in the Court below. The defence on this point is purely technical and without merit and should not be upheld.

The second condition relied upon is:

> Any Carrier or party liable on account of loss or damage to any of said goods, on reimbursing to the insured the premiums paid in respect thereof, shall have the full benefit of any insurance that may have been effected upon or on account of said goods, so far as this shall not avoid the policies or contracts of insurance.

The defendants plead alternatively that

> if the defendant is liable on account of loss of or damage to any of the said goods, it is ready and willing to reimburse to the insured the premiums paid in respect thereof and is entitled to the full benefit of any insurance that may have been effective on account of the said goods.

The facts are, that the goods were insured by the consignors at the time they were loaded on the ship at Newcastle. The policy was a marine policy but covered the goods not only by sea but also by rail to Schumacher. After the loss occurred, the insurance company made an advance on the condition set up in a loan receipt reading as follows:

> Received from IMPERIAL CHEMICALS INSURANCE LIMITED and THE MARITIME INSURANCE COMPANY LIMITED the sum of £1,439.9.2, as a loan, not a payment of any claim, pending the ascertainment whether the loss is a loss for which any Carrier, Bailee or other person is responsible; and I/we hereby agree to repay this loan to the extent of any net recovery made from, or from any insurance effected by, any such Carrier, Bailee or other person, and as security for such repayment I/we hereby pledge to said Insurance Company all such claims and any recovery thereon. I/we hereby appoint the Officers of said Insurance Company and their Successors, severally, my/our Agents and Attorneys in fact, with irrevocable power to collect any such claim and to begin, prosecute, compromise or withdraw in my/our name, or in the name of the Insurance Company, but at the expense of the Insurance Company, any and all legal proceedings deemed necessary to the Insurance Company to enforce such claim or claims, and to execute in my/our name any documents, including receipts and releases, which may be necessary or convenient to carry into effect the purposes of this Agreement.
>
> CANADIAN INDUSTRIES LIMITED
> F. T. PARKER.
>
> CANADIAN INDUSTRIES LIMITED
> P. R. BARRY.
>
> MONTREAL, June 30/38.

The policy was subject to the provisions of the (Imperial) *Marine Insurance Act, 1906,* chapter 41, section 79, providing specifically for subrogation. If the plaintiffs or their

successors entered into any contract which would impair this right of subrogation, the insurance company would be relieved from liability: see Arnould on Marine Insurance, 12th Edition, Vol. 2, pages 1639 *et seq.;* and also Porter on Insurance, 8th Edition, page 238, and the case of *Inman* v. *South Carolina Ry. Co.* (1).

Under the terms of the loan receipt the insurance company would, I think, be entitled to a return of the money advanced if it were found that they had been deprived of the fruit of subrogation because of some action by the insured. There is no suggestion here that the insurance company had been advised of any condition such as that set up; in fact, it is entirely improbable that they knew anything about it. Under these circumstances, it would seem clear that the condition relied upon could not in any way cover the circumstances here.

Therefore, even if the conditions in a standard bill of lading could be invoked, they do not afford the defendants any defence.

The question of whether or not the defendants had the right to set up the conditions of the standard bill of lading against the plaintiffs is more difficult. It is now common ground that there was no privity of contract between the parties. The plaintiffs could not set up the terms of the contract against the defendants. How, then, could the defendants set up the terms of the contract against the plaintiffs?

In Pollock on Torts, 14th Edition, page 436, it is stated:

> Wherever the parties have come into such a relation that a duty to take proper care can be established without reference to any contract, there the violation of that duty by negligence is a tort, whether it consist in commission or in omission, and whether there be in fact a contract or not.

This is illustrated in the case of *Meux* v. *Great Eastern Railway Company* (2). In this case a servant of the plaintiff took a ticket for a journey on the defendants' railway, and a portmanteau of his was accepted as his personal luggage. The portmanteau contained property belonging to the plaintiff, his mistress. This property was destroyed through the misconduct of defendants' servant. It was held in the Court of Appeal that the defendants were liable. Lord Esher, at page 390:

(1) (1889) 129 U.S. Reports 128. (2) [1895] 2 Q.B. 387.

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> There being no contract in this case with the plaintiff, she gets no right to sue for a breach of the contract which was made, and there is no duty towards her arising on contract. There is nothing in such a state of things that deprives the plaintiff of a right which she has independently of contract, and which she would have even if there were no contract. * * * They cannot say that it was done without their authority; and, therefore, for such a wrongful act the person injured has a right of action against them, although as between him and them there was no contract, and although there was a contract between them and some one else with regard to the luggage.

See also *Foulkes* v. *Metropolitan District Ry. Co.* (1), particularly the remarks of Lord Bramwell at pages 158-159.

However, some modification of this principle is suggested in more recent cases, the principal one of which is *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (2). This case is fully discussed in the judgment of Chief Justice Rose at the trial, and I will here do no more than quote the concluding words of the judgment of Lord Sumner, at page 564, which was concurred in by a majority of the other members of the Court:

> It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder, Dempster & Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognizes the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention.

The matter is discussed in a learned note in 50 Law Quarterly Review, at page 8, dealing with some statements made by Mr. Justice Langton in *The Kite* (3).

From these discussions it does not appear as yet that any defined principle of general application has been evolved.

I am inclined to agree with the conclusion arrived at by Chief Justice Rose, that the conditions of the standard bill of lading are not available as a defence to this action under all of the circumstances here. However, it is not necessary to give any conclusive opinion on this point and

(1) (1880) 5 C.P.D. 157. (2) [1924] A.C. 522.
(3) [1933] P. 154.