

CANADA / JUDGMENT

Bradford v. Kanellos

[1974] SCR 409

COURT

Supreme Court of Canada

DECIDED

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Bradford v. Kanellos

Collection

Supreme Court Judgments

Date

1973-06-29

Report

[1974] SCR 409

Judges

Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Laskin, Bora

On appeal from

Ontario

Subjects

Torts

Decision Content

Supreme Court of Canada

Bradford v. Kanellos, [1974] S.C.R. 409

Date: 1973-06-29

Elizabeth Bradford and Roderick Bradford (Plaintiffs) Appellants;

and

Gus Kanellos and Pete Stamatio Carrying on business under the firm name and style of Astor Delicatessen & Steak House (Defendants) Respondents.

1972: November 16, 17; 1973: June 29.

Present: Martland, Judson, Ritchie, Spence and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Flash fire in restaurant—Accumulation of grease in grill—Hissing sound made by fire extinguisher—Patron shouting “gas, it’s going to explode”—Resulting panic—Appellant injured—Proprietor not liable.

The appellants (husband and wife) were seated at the counter of the respondents’ restaurant when a flash fire occurred as a result of the failure to clean the grill efficiently. The grill was equipped with an automatic fire extinguisher system, of an approved type, which, when it became operative, discharged carbon dioxide on to the heated area to extinguish the fire. Shortly after the start of the fire the fire extinguisher was activated, manually, and the fire was extinguished almost immediately.

The fire extinguisher made a hissing or popping noise when it operated. This caused an unidentified patron in the restaurant to shout that gas was escaping and that there was going to be an explosion. The result of these words was to cause a panic in the restaurant. While people ran from the restaurant the appellant wife was pushed or fell from her seat at the counter and sustained injury.

The appellants brought action against the respondents, the appellant wife claiming general damages and the appellant husband claiming special damages for expenses incurred as a result of his wife’s injuries. Judgment at trial was given in favour of the appellants. By unanimous decision, the Court of Appeal allowed the appeal of the respondents and thereupon the appellants, with leave, appealed to this Court.

Held (Spence and Laskin JJ. dissenting): The appeal should be dismissed. Per Martland, Judson and Ritchie JJ.: The appellant wife’s injuries resulted from the hysterical conduct of a customer which occurred when the safety appliance properly fulfilled its function. That consequence, as found by the Court of Appeal, could not fairly be regarded as within the risk created by the respondents’ negligence in permitting an undue quantity of grease to accumulate on the grill.

Per Spence and Laskin JJ., dissenting: A reasonable person would know that a greasy grill might well take fire and that in such event a carbon dioxide fire extinguisher is put into action either automatically or manually and makes a hissing and popping sound, and he could not fail to anticipate that a panic might well result. The person or persons who shouted the warning of what they were certain was an impending explosion were not negligent. They acted in a very human and usual way and their actions were utterly foreseeable and were part of the natural consequence of events leading inevitably to the appellant’s injury.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Lane Co.Ct.J. Appeal dismissed, Spence and Laskin JJ. dissenting.

Peter C.P. Thompson, for the plaintiffs, appellants.

Claude Thomson, for the defendant, respondent, Gus Kanellos.

The judgment of Martland, Judson and Ritchie JJ. was delivered by

MARTLAND J.—On the morning of April 12, 1967, the appellants, who are husband and wife, were customers in the respondents' restaurant in the City of Kingston. While seated at the counter in the restaurant, a flash fire occurred in the grill used for cooking purposes. The grill was equipped with an automatic fire extinguisher system, of an approved type, which, when it became operative, discharged carbon dioxide on to the heated area to extinguish the fire. Shortly after the start of the fire the fire extinguisher was activated, manually, and the fire was extinguished almost immediately. The fire was not a cause of concern to the appellants. No damage was done by the fire because the fire was of very short duration and all that burned was grease that had accumulated in the grill and a rag or rags which had been thrown on the fire when it broke out in an effort to extinguish it.

The fire extinguisher made a hissing or popping noise when it operated. This caused an unidentified patron in the restaurant to shout that gas was escaping and that there was going to be an explosion. The result of these words was to cause a panic in the restaurant. While people ran from the restaurant the appellant wife was pushed or fell from her seat at the counter and sustained injury.

The appellants brought action against the respondents, the appellant wife claiming general damages and the appellant husband claiming special damages for expenses incurred as a result of his wife's injuries.

The trial judge awarded damages in the amounts of \$3,582.43 to the appellant husband and \$6,400 to the appellant wife. He found there had been negligence involved in the flash fire because the grill had not been cleaned as efficiently as it should have been, and said:

Therefore while the negligence may be small, it pinpoints this as negligence.

He did not find that the fire, in itself, had caused the panic, but ascribed it to the noise caused by the fire extinguisher. He said:

As a result of this hissing explosive noise, or whatever it was, some rather foolish people in the restaurant called out that it might explode. For this reason it appears that some considerable panic ensued and there was a rushing for the door. His conclusion was that, while the act of yelling out almost qualified as that of an "idiotic person", the panic could have been foreseen.

By unanimous decision, the Court of Appeal allowed the appeal of the present respondents. Schroeder J.A., who delivered the judgment of the Court, said:

The practical and sensible view to be taken of the facts here leads fairly to the conclusion that it should not be held that the person guilty of the original negligence resulting in the flash fire on the grill ought reasonably to have anticipated the subsequent intervening act or acts which were the direct cause of the injuries and damages suffered by the plaintiffs.

From this judgment the present appeal has, with leave, been brought to this Court.

I agree with the decision of the Court of Appeal. The judgment at trial found the respondents to be liable because there had been negligence in failing to clean the grill efficiently, which resulted in the flash fire. But it was to guard against the consequences of a flash fire that the grill was equipped with a fire extinguisher system. This system was described by the Chief of the Kingston Fire Department, who was called as a witness by the appellants, as, not only an approved installation, but one of the best.

This system, when activated, following the flash fire, fulfilled its function and put out the fire. This was accomplished by the application of carbon dioxide on the fire. In so doing there was a hissing noise and it was on hearing this that one of the customers exclaimed that gas was escaping and that there was danger of an explosion, following which the panic occurred, and the appellant wife was injured.

On these facts it is apparent that her injuries resulted from the hysterical conduct of a customer which occurred when the safety appliance properly fulfilled its function. Was that consequence fairly to be regarded as within the risk created by the respondents' negligence in permitting an undue quantity of grease to accumulate on the grill? The Court of Appeal has found that it was not and I agree with that finding.

In my opinion the appeal should be dismissed with costs.

The judgment of Spence and Laskin JJ. was delivered by

SPENCE J. (dissenting)—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on December 10, 1970. By that judgment, the Court of Appeal for Ontario allowed an appeal from the judgment of Lane Co.Ct.J. and dismissed the appellants' action.

I have had the opportunity of reading the reasons written by Mr. Justice Martland and I shall adopt his statement of facts except where hereafter I shall mention additional facts or evidence. I must, however, with respect, disagree with the result.

Schroeder J.A., in giving the reasons for judgment for the Court of Appeal for Ontario, expressed his conclusion in one paragraph as follows:

The practical and sensible view to be taken of the facts here leads fairly to the conclusion that it should not be held that the person guilty of the original negligence resulting in the flash fire on the grill ought reasonably to have anticipated the subsequent intervening act or acts which were the direct cause of the injuries and damages suffered by the plaintiffs.

Schroeder J.A., in order to come to this conclusion, had to distinguish a decision in the same Court only a few years previously: *Martin v. McNamara Construction Co. Ltd. et al.*[2], citing what was there said at p. 527:

I hold it to be an established principle that damage is recoverable if, despite the intervening negligence of a third party, the person guilty of the original negligence ought reasonably to have anticipated such subsequent intervening negligence and to have foreseen that if it occurred the result would be that his negligence would lead to loss or damage.

I am of the opinion that in the particular circumstances of this case, “the person guilty of the original negligence ought reasonably to have anticipated such subsequent intervening negligence and to have foreseen that if it occurred the result would be that his negligence would lead to loss or damage”. Upon the evidence, the owner and proprietor, the respondent here, did anticipate that such negligence as leaving the grill in a dirty and greasy condition would cause a fire and frequently warned the cook of such fact and requiring the cook not once but on several occasions to clean up the grill. The grill was midway down the length of the restaurant. There was seating for many patrons to the rear of the grill so that the grill intervened between them and the only entrance or exit at the front of the restaurant and the space between the grill and the other restaurant equipment through which the said patrons would have to pass was narrow.

The proprietor knew of the fire extinguisher and its action. Such action was described by the witness Warren Gibson, the Chief of the Kingston Fire Department, as being a very rapid expansion of carbon dioxide that makes a hissing noise which explodes rather rapidly as it expands.

I am of the opinion that any reasonable person knew that a greasy grill might well take fire and that in such event a CO₂ fire extinguisher is put into action either automatically or manually and that such fire extinguisher makes a hissing and popping sound and he could not fail to anticipate that a panic might well result. The panic did result and on the evidence the whole affair from beginning to end was almost instantaneous. The plaintiff Elizabeth Bradford described it variously in the words “no, it was quick”. Again, that she had been watching the fire approximately a minute when the man next to her called out “gas” and that thereupon there was an immediate panic. The respondent Gus Kanellos was examined for discovery and part of his examination for discovery was read into the evidence by counsel for the plaintiffs. Neither defendant gave evidence at the trial. He testified that the stove used was a gas stove, and, in my view, it was most natural for the one patron to call out the word “gas” when the hissing sound was heard and either that patron or another, and I think it is impossible to distinguish in view of the confusion, to remark that “it is going to explode”.

The learned trial judge, in giving judgment, said:

Now it is said to me that even if this is negligence there is an intervening factor involved here that is not within the control of the restaurant owners. That intervening factor is applied by some customers of the restaurant who acted hysterically. Whoever yelled that out almost qualifies in my opinion for that type idiotic person. But this is a foreseeable, human nature is rather unstable

in emergencies and must be recognized as being unstable in emergencies. The proprietors themselves were running around the restaurant rather excitedly. The only person that the evidence would indicate was not excited was Mrs. Emmons, and she shook after it was all over according to her story. The panic in the restaurant could have been foreseen.

With that statement, I am in exact agreement.

I am not of the opinion that the persons who shouted the warning of what they were certain was an impending explosion were negligent. I am, on the other hand, of the opinion that they acted in a very human and usual way and that their actions, as I have said, were utterly foreseeable and were part of the natural consequence of events leading inevitably to the plaintiff's injury. I here quote and adopt Fleming, *The Law of Torts*, 4th ed., at pp. 192-3:

Nowadays it is no longer open to serious question that the operation of an intervening force will not ordinarily clear a defendant from further responsibility, if it can fairly be considered a not abnormal incident of the risk created by him—if, as sometimes expressed, it is 'part of the ordinary course of things'. Nor is there room any longer for any categorical distinction in this regard between forces of nature, like rain or ice, on the one hand, and the action of human beings even when consciously controlled, on the other.

Least difficult are instances of just normal and reasonable response to the stimulus of the hazard engendered by the defendant's negligence... A time-honoured illustration is the famous Squib Case: *Scott v. Shepherd* (1773) 2 W.Bl.892, where a wag threw a lighted fire-work into a market whence it was tossed from one stall to another in order to save the wares until it eventually exploded in the plaintiff's face. Yet it was held that trespass lay because "all that was done subsequent to the original throwing was a continuation of the first force and first act and continued until the squib was spent by bursting".

Even if the actions of those who called out "gas" and "it is going to explode" were negligent and, as I have said, I do not think it was, then I am of the opinion that the plaintiffs would still have a right of action against the defendants, here respondents, or against such persons or against both.

In *Grant v. Sun Shipping Co. Ltd.*[3], Lord Du Parcq said:

My Lords, I regard it as a well-settled principle that when separate and independent acts of negligence on the part of two or more persons have directly contributed to cause injury and damage to another, the person injured may recover damages from any one of the wrongdoers, or from all of them. The Lord Ordinary's view was that "the effect of any negligence of the second defenders was broken by the later negligence of the first defenders." This reasoning seems to me to be akin to that which had led to frequent and determined attempts to establish the so-called "rule of the last opportunity", of which less will be heard since the decision of your Lordships' House in *Boy Andrew (Owners) v. St. Rognvald (Owners)*, [1948] A.C. 140. I refer especially to the opinion of Viscount Simon. With the greatest respect for the Lord Ordinary's opinion I think that his reasoning is fallacious. If the negligence or breach of duty of one person is the cause of injury to another, the wrongdoer cannot in all circumstances escape liability by proving that, though he

was to blame, yet but for the negligence of a third person the injured man would not have suffered the damage of which he complains. There is abundant authority for the proposition that the mere fact that a subsequent act of negligence has been the immediate cause of disaster does not exonerate the original offender... In the same case, *The Bernina*, Lord Esher M.R., in the Court of Appeal, discussed the question “what is the law applicable to a transaction in which a plaintiff has been injured by negligence, and in the course of which transaction there have been negligent acts or omissions by more than one person?” The learned Master of the Rolls said that upon many points as to such a transaction the common law was clear, and stated the first of these points in these words: “If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer.”

My Lords, it was truly said by counsel for the appellants that the case now before your Lordships would in normal times have been one proper for the consideration of a jury. A jury would not have profited by a direction couched in the language of logicians, and expounding theories of causation, with or without the aid of Latin maxims. It would, I think, have been right to instruct them in language similar to that used by Lord Esher in the passage which I have just quoted. For my own part I have no doubt (leaving aside for the moment the question whether fault can be attributed to the pursuer) that the negligence and breach of statutory duty attributable to each of the defenders “partly” and “directly” caused the pursuer injuries. Whether or not a cause is a “direct” cause is sometimes a difficult question, but here the precautions, which the regulations prescribed and ordinary prudence should have dictated, have for their object the prevention of accidents of the very nature of that which befell the pursuer.

For these reasons, I would allow the appeal and restore the judgment at trial. The appellants are entitled to their costs here and in the Court of Appeal.

Appeal dismissed with costs, SPENCE and LASKIN JJ. dissenting.

Solicitors for the plaintiffs, appellants: Scott & Aylen, Ottawa.

Solicitor for the defendant, respondent, Gus Kanellos: Claude R. Thomson, Toronto.

[1][1971] 2 O.R. 393, 18 D.L.R. (3d) 60.

[2] [1955] O.R. 523.

[3] [1948] A.C. 549 (H.L.).

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