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Campbell v. Royal Bank of Canada [1964] S.C.R. 85

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NEGLIGENCE — INVITOR AND INVITEE — UNUSUAL DANGER — FAILURE TO USE REASONABLE CARE — DEFENCE OF VOLENTI NON FIT INJURIA.

Since the decision in *London Graving Dock Co. v. Horton*,[1] there has been some doubt as to the scope of an occupier's duty to an invitee. Two of the contentious issues have been; (a) whether an objective or subjective test should be used in ascertaining what is meant by an "unusual danger", and (b) the relevance of an invitee's knowledge of such a danger in discharging the invitor's duty to the invitee. Recently these issues were considered by the Supreme Court of Canada in the case of *Campbell v. Royal Bank of Canada*.[2]

In that case the plaintiff, a customer of the defendant bank, slipped and fell in some water which had collected around the teller's wicket. Snow had been tracked inside the bank and had melted,

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19 *Supra*, footnote 1 at 311.

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1 [1951] A.C. 737; [1951] 2 All E.R. 1.

2 (1963), 46 W.W.R. 79; 43 D.L.R. (2d) 341; [1964] S.C.R. 85.

creating water puddles. The plaintiff had been aware of the presence of the water but did not have full knowledge of the danger, a distinction which the court raised. It found that the plaintiff had walked "gingerly" and that the bank had provided a rubber mat occupying the entire vestibule. The Supreme Court of Canada, upholding the trial decision[3] and reversing the Court of Appeal of Manitoba,[4] split three to two[5] in finding the bank liable for the damages caused to the plaintiff.

There was no dispute that the relationship between the parties was that of invitor-invitee. The question raised in the appeal was whether the bank had discharged its duty to the appellant. Essentially the problem was to interpret the requisite standard of care.

Spence J., speaking for the majority of the Court, quoted the classic statement made by Willis J. in *Indermaur v. Dames*:

> 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.[6]

The question thus raised was what was meant by an "unusual danger". In deciding that "unusual" should be used in an objective sense, Spence J. applied the words of Lord Porter in the *Horton* case:

> 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 which the invitee has in hand, though what is usual, will, of course, vary with the reasons for which the invitee enters the premises.[7]

Reference was also made to what Freedman J. A., when speaking for the minority in the Court of Appeal, had 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.[8]

Spence J. also felt that the ease and economy with which the condition on the floor could be removed should also determine whether such a condition was "unusual".

Spence J. felt that in applying the above tests, the state of the floor did constitute an "unusual danger".

On the question whether the bank exercised reasonable care to prevent damage from this unusual danger, Spence J., after reviewing the conduct of the defendant, held that the bank had failed to use

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3 The trial judge was Maybank J.
4 (1963), 41 W.W.R. 91; 37 D.L.R. (2d) 725. (Freedman and Monniner J.J.A. dissenting).
5 Judson, Hall and Spence J.J. for the majority (Martland and Ritchie dissenting).
6 (1886), L.R. 1 C.P. 274.
7 [1951] A.C. 737 at 745.
8 [1964] S.C.R. 85 at 96, referring to 37 D.L.R. (2d) 725.

reasonable care to prevent damage to its customers, including the plaintiff whom the bank could expect to frequent its premises.[9]

The next question considered was whether the plaintiff's knowledge was sufficient to discharge the bank's duty to take care. At the trial it had been proved that the plaintiff had been aware of the wet condition on the floor but that she had not fully appreciated the danger in the area of the teller's wicket and therefore she had not been *sciens*. Spence J. said, that "the defendant has failed to show such knowledge as to leave the inference that the risk had been voluntarily encountered".[10] But, more important than this to the decision, an implication was made that, even if the plaintiff had been *sciens,* this would not have been enough to discharge the duty. Reference was made to the decision of Cartwright J. in *Lehnert v. Stein* where he said:

> . . . the burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence.[11]

Spence J. could not find anything in this case to indicate that the plaintiff consented to absolve the defendant from this duty to take care.

Thus, the effect of the *Campbell* case is to uphold the view taken in the *Horton* case that an objective test should be used in ascertaining whether a certain condition is an unusual danger. That is, taken from the view of a reasonable person in the position of an occupier with knowledge he has or ought to have of (a) the capacity of the invitee or (b) the capacity of the class to which he belongs.[12] Also the *Campbell* case implies that the Court will no longer follow the idea expressed in the *Horton* case that an invitee's knowledge of the danger will necessarily discharge the invitor's duty of care, but will follow the rationale of *Lehnert v. Stein.* Where the plaintiff clearly did not have full knowledge of the danger in circumstances leading to an inference that she had voluntarily assumed the risk, the defendant's duty of care is not discharged.

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9 [1964] S.C.R. 85 at 97.

10 [1964] S.C.R. 85 at 99. On this point Spence J. refers to *Letang v. O Hawa Electric Railway Co.* [1926] A.C. 725. That case should be distinguished from the present case on the facts. In the *Letang* case, the plaintiff was aware of the danger but had no alternative but to walk over the ice, *i.e.,* there was no voluntary asumption of risk.

11 [1963] S.C.R. 38 at 43; 36 D.L.R. (2d) 159; see also (1964) Osgoode Hall L.J. 229 where A. Scace said, "It is submitted by the writer that the defence of *volenti* has outlived its usefulness. The doctrine of contributory negligence can absolve a defendant from any liability whatsoever, and also has a far greater degree of flexibility. It is readily apparent that the courts are loathe to apply the doctrine as is evidenced by the instant case. In addition the test for its application is quite unreal. In the absence of an express bargain, or active encouragement by the plaintiff the inference is almost never drawn and therefore the defence ought to be abolished as a useless appendage to the law of torts".

12 This aspect of the *Horton* case is discussed in an article, *Significant Developments in the Law of Occupier's Liability* (1964), 42 Can. Bar Rev. 607 at 608.

It is apparent that the law with regard to an occupier's liability has not conformed with the modern concepts of legal negligence.[13] The courts have continued to categorize all visiors to premises into tight compartments. Unlike the latter, they persist in defining a separate standard of care for each different category.

The addition of the *Horton* case further complicated the picture, for had the law been based solely on *Indermaur v. Dames,* not qualified by the *Horton* case, then, although an invitee had been warned by an occupier of an unusual danger, this would not necessarily have had the effect of discharging the occupier's liability. The duty would be to exercise reasonable care for the protection of an invitee and it would be a question for the jury to decide whether the occupier had fulfilled that duty of care.[14] If an invitee was warned or otherwise had knowledge of the unusual danger, the danger did not cease to be an unusual one. The *Horton* case held that although knowledge of the danger on the part of the invitee did not prevent the duty from arising, it had the immediate effect of discharging that duty. Thus if the plaintiff incurred the risk *sciens,* he would fail in his action and it would not be necessary to prove that he incurred it *sciens et volens.*[15] This would then have the effect of rendering superfluous a consideration of the application of the maxim *volenti non fit injuria* to the relationship of invitor and invitee.[16]

The *Horton* case has often been attacked on the ground that even if the invitee knew and appreciated the danger he should be entitled to succeed in his action if it could be shown that in all circumstances of the case he acted reasonably in entering the premises notwithstanding the existence of the danger.

In the Manitoba Court of Appeal decision of the *Campbell*[17] case, the defendant argued that since the plaintiff had some knowledge of the wetness on the floor then the condition ceases to be an "unusual danger". Freedman J.A. said that the plaintiff must have full knowledge and appreciation of the dangers involved for the defendant to say that the condition was not an unusual danger. Freedman J.A. did not consider the question as to whether the plaintiff was *volens* since it was not even proved that she was *sciens.* Guy J.A. speaking for the majority in the Court of Appeal said:

> . . . if danger is usual danger it must be assumed that ordinary, reasonable people know and appreciate it fully, conversely if they know and appreciate it, it ceases to be unusual.

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[13] This refers to the concepts which were established in the Cases *Donoghue v. Stevenson* [1932] A.C. 562; *Norman v. Great Western Ry. Co.* [1915] 1 K.B. 584; *Bourhill v. Young* [1943] A.C. 92.

[14] For a discussion on this point see the *Law Reform Committee's Third Report. Occupiers' Liability to Invitees Licensees and Trespassers.* 1954 p. 11, Section 17.

[15] *Id.* at p. 13.

[16] *Id.* Section 23.

[17] (1963), 41 W.W.R. 91; 37 D.L.R. (2d) 725.

Guy J.A. also said that the invitor shows reasonable care if he (a) warned the invitee or (b) abates or removes the danger. Thus the Court of Appeal upheld the decision in the *Horton* case, as restricted by *Smith v. Austin Lifts Ltd.*,[18] that full appreciation of the danger by the plaintiff will free the invitor of liability.

The Nova Scotia Supreme Court has ruled that "unusual" should be decided objectively. In the case of *Fiddes v. Rayner Construction Ltd.*,[19] the court held that "unusual" is not to be construed subjectively as meaning "unexpected by the particular invitee concerned". Also, it held that the Supreme Court has never committed itself to the doctrine that the knowledge of a particular invitee is not a factor in determining whether a danger is "unusual" or otherwise, and is free to hold to the contrary.

The British Columbia Supreme Court[20] said that knowledge and full apreciation by the plaintiff of the risk of danger involved would exonerate the defendant from any liability to her for damage arising out of the existence of some unusual danger provided the full significance of the risk was recognized.

In England, the problem created by the *Horton* case was resolved by legislation.[21] By an Act of Parliament, the *Horton* case was reversed and the occupier is now said to owe a "common duty of care". The *Occupiers' Liability Act* states that:

> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
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> (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances so that:
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> (a) where damage is caused to a visitor by a danger of which he had not been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.

In the United States, the concept of an "unusual danger" does not exist. The duty of the occupier is to use reasonable care for the protection of the invitees.

> He must not only warn the visitor of dangers of which he knows, but must also inspect the premises to discover possible defects. There is no liability, however, for harm resulting from conditions from which the occupier did not know and could not have discovered with reasonable care.[22]

Apparently, nothing more than a warning is ordinarily required yet the jury may be permitted to find that obviousness, warning or even knowledge is not enough.

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18 [1959] 1 All E.R. 81. Here it was decided that full appreciation of the danger by the plaintiff was necessary to exonerate the occupier of his liability.
19 (1962), 35 D.L.R. (2d) 63.
20 *Sanders v. Shauer* (1964), 43 D.L.R. (2d) 685.
21 *Occupiers' Liability Act* 1957.
22 Prosser, *Law of Torts*, 3rd ed. p. 403.

It is apparent that the *Campbell* case did not go so far as to conform with the English and American position with regard to the standard of care owed by an occupier of premises, and it remains to be seen in future decisions whether the courts will make express that which the *Campbell* case implied, namely, that an invitee's knowledge of the unusual danger will not necessarily discharge the invitor's duty of care.