
(1929) 06 CAL CK 0010
In the Calcutta High Court

The Bengal Nagpur Railway Co. Ltd.

APPELLANT

Vs

Dhanjishah Pestonji and Another

RESPONDENT

Date of Decision : 07-06-1929

Acts Referred:

Citation : 124 Ind. Cas. 332

Hon'ble Judges : Mukerji, J

Bench : Single Bench

Judgement

Mukerji, J.—This Rule is directed against a decree made by the Small Cause Court Judge of Sealdah for Rs. 671 as compensation and Rs. 123 as proportionate costs in favour of the plaintiff and as against the petitioners, the Bengal Nagpur Railway Company, Limited who were the defendant No. 2 in the suit.

2. The plaintiff's claim related to a consignment of 65 bales of cotton piece-goods despatched from Nagpur to Sealdah, 15 of which were damaged by wet in transit.

3. There were two rival theories before the Court. The plaintiff's case was that the roof of the wagon in which the consignment was carried was leaky and the damage was caused by rain water entering through the leaks. The defence was that the damage was due to rain water entering through the crevices of the flapdoor. The Judge has accepted the plaintiff's version and the reasons given therefor are quite sound.

4. Having done so, the Judge proceeded to resort to the following process of reasoning: "A considerable amount of rain water found its way into the wagon.... In all probability there were holes big enough to be easily detected, on inspection, in the roof of the wagon, and through these holes the rain water entered into the wagon. I, therefore find that there were holes in the roof easily detectable.... Their (i.e., of the Railway Company) servants stored the consignment of cotton piece-goods in the wagon in the roof of which were holes

easily detectable. This was certainly very careless and unbusiness-like conduct on the part of the servants and, in my opinion, amounted to misconduct." Having thus found misconduct on the part of the Company's servants the Judge held that the Risk Note H which says "Except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants," did not absolve the defendant No. 2 from liability.

5. Before dealing with this finding, which is a finding of fact, it would be convenient to have a clear appreciation of the exact import of the word "misconduct," The expression "wilful misconduct" is a well-known expression in connexion with Risk Notes. As Avory, J., observed in the case of *Sheppard v. Midland Ry.* (1916) 85 L.J.K.B. 283 : 114 L.T. 515, "if the principle upon which wilful misconduct is to be inferred from one case, the fewer cases beyond that are referred to the less likely is confusion to result." Johnson, J, in the case of *Grahvm v. Belfast and Northern Counties Ry Co.* (1901) 2 Ir. R. 13 said: "Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or to omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act failure or omission, regardless of consequences." In the case of *Forder v. Great Western Ry Co.* (1905) 2 K.B. 532 : 74 L.J.K.B. 871 : 53 W.R. 574 : 93 L.T. 344 : 21 T.L.R. 625 Lord Alverstone, C.J., accepted this definition with the addition of the words, "or acts with reckless carelessness, not caring what the result of his carelessness may be." Some confusion is likely to arise from the addition of these words, but there can be no objection to them BO long as they are meant to include only "reckless indifference" see *Sheppard v. Midland Ry. Co.* (1916) 85 L.J.K.B. 283 : 114 L.T. 515 and *Norris v. Great Central Ry. Co.* (1916) 85 L.J.K.B. 285 : 114 L.T. 183 : 32 T.L.R. 120.

6. An oftener quoted definition of "wilful misconduct" is that given by Bramwell, L.J., in *Lewis v, Great Western Ry. Co.* (1878) 47 L.J.K.B. 131 : 3 Q.B.D. 195 : 37 L.T. 774 : 26 W.R. 255. "Wilful misconduct," said he "means misconduct to which the will is a party, something opposed to accident or negligence: the misconduct, not the conduct must be wilful," Brett, L.J., in the same case said: "In a contract where the term "wilful, misconduct" is. put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something or the omitting lo do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the aet whjch he is doing or that which he is omitting to do is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think" that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do, and also as my Lord has put it, if it is brought to his notice that what he is doing or omitting to do, may seriously endanger the things which

are to be sent, and wilfully persists in doing that against which he is warned, careless, whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that as he does it intentionally, he is guilty of wilful misconduct, or if he does or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which, he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct and I think, these two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission." Cotton, L.J., also observed to the same effect. In *re Lord Mayor of London and Tubb's Contract* (1894) 2 Ch. 524, Lindley, L.J., observed that he was disposed to concur with Lord Bramwell's observations on the term "wilful misconduct" and that they were quite consistent with Lord Bowen's observations in *In re Young and Harston's Contract* (1885) 54 L.J. Ch. 1144 : 31 Ch. D. 168, if it be remembered that Lord Bowen presupposed knowledge of what was done and intention to do it and was not addressing himself to a case of an honest mistake or oversight.

7. The above as well as various other authorities on the meaning of the term "wilful" have been discussed in *In re City Equitable Fire Insurance Co.* (1925) 1 Ch. 407 : 94 L.J. Ch. 445 : 133 L.T. 520 : 40 T.L.R. 853 : 17 L.I.L. R 225, and there is hardly any doubt to-day as to what it means. Wilful misconduct is very different from negligence *Astbury, J., in Buckton & Co. v. London and North Western Ry.* (1918) 87 L.J.K.B. 234 : 117 L.T. 556 : 34 T.L.R. 119 and is not necessarily established by proving culpable negligence *Glemster v. Great Western Ry. Co.* (1873) 29 L.T. 423 and *Forder v. Great Western Ry. Co.* (1905) 2 K.B. 532 : 74 L.J.K.B. 871 : 53 W.R. 574 : 93 L.T. 344 : 21 T.L.R. 625. It has also been held that though gross negligence and wilful misconduct are not convertible terms, the latter may include the former and that there are many cases in which wilful misconduct and gross negligence correspond.

8. Risk Note H with which we are concerned speaks of "misconduct and not "wilful misconduct." The word misconduct means the doing of a wrong thing per Brett, L.J. in *Lewis v. Great Western Ry. Co.* (1878) 47 L.J.K.B. 131 : 3 Q.B.D. 195 : 37 L.T. 774 : 26 W.R. 255." That wilful misconduct is included in misconduct goes without saying But as Tindal, C.J., observed in *In re Hall and Hinds* (1840) 2 M & G 847, "Lata culpa or crassa negligentia both by the civil law and our own approximated and in many instances cannot be distinguished from dolus mains or misconduct." (Quoting Vinn. Instit. Imper. Comment lib. 3 tit. 15 b. 605). Culpable negligence or gross negligence as distinguished from ordinary negligence may thus amount to " misconduct What this distinction is it is not easy to define Rolfe B in the case of *Wilson v. Brett* (1843) 11 M & G 113 said: "I said I could see no difference between negligence and gross negligence--that it was the same thing with the addition of a vituperative epithet and I intended to leave it to the Jury to say whether the defendant being, as appeared by the evidences person accustomed to the management of horses, was guilty of culpable negligence." Negligence has been variously defined. Aldereon, B? in the

case of *Blvth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781 said Negligence is the omission order something which a reasonable man guided upon these considerations which Ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants would, have been liable for negligence if unintentionally they omitted to do what a reasonable person would have done, or did what a reasonable person would have done." A somewhat similar definition has been given by *Hudleston, B.*, in *Snook v. Grant Junction Waterworks Co., Ltd.* (1886) 2 T.L.R. 308--"By negligence was meant substantially the doing by a person of some act which a reasonable and prudent man would not have done under the circumstances of the case in question, or the omission to do everything that could be fairly and reasonably expected of such a man under such circumstances." Or as *Bramwell, B.*, put it in the case of *Caroline Degg v. Midland Ry. Co.* (1857) 1 H. & N. 773--"There is no absolute or intrinsic negligence: it is always relative to some circumstances of time, place or person." The words "gross" and "culpable" do not alter the character of the thing omitted. The word "gross" does not define the negligence, but expresses a practical difference between the degrees of negligence, and when the degree is such that in view of all the circumstances it amounts to a breach of duty, it is culpable.

9. To turn once more to the facts, the learned Judge has, as already; mentioned, found that there were easily detectable holes in the roof of the van. If this finding is capable of being maintained, the case would clearly be one of wilful misconduct, if the Company's servants seeing the holes, recklessly put the goods in it, or a case of culpable negligence if they omitted to see the holes that were easily detectable. The difficulty of upholding this findings however, is very great. The evidence stands thus, P.W. No. 2 says--"The roof of the wagon was rusty in the centre and showed trace: of leakage. There was no water on the roof of the wagon. There was red rust on the roof." P.W. No. 3 says--"When the goods were taken out I went inside it and found one or two holes in the roof. Kesho Babu and I entered into the wagon and I showed him the bales." But Kesho Babu, P.W. No. 2, says nothing about the holes. Then D. W. No. 2, the consignor's man, says" definitely that he inspected the wagon before it was loaded and did not notice any hole in the roof; and further says: "I inspect every wagon I load. I inspect the roof. I reject a wagon if I find it faulty." Over and above, there is the evidence of the defendants' servants at Nagpur who found nothing wrong with the wagon when the Consignment was loaded. On this evidence it is impossible to uphold the Judge's finding, and the case does not seem to be anything more than that of leaks not discernible on inspection giving way in the course of the journey.

10. The result is that, in my opinion; negligence has not been established, far less any negligence that is gross or culpable. The plaintiff having failed to prove misconduct his claim must fail.

11. The Rule is made absolute, the decree passed by the Court below is set aside

and the suit dismissed, but there will be no order for costs.