

CARTER v. NICHOL

(1911), 4 Sask. L.R. 382 (also reported: 1 W.W.R. 392, 19 W.L.R. 736)

Saskatchewan Supreme Court , Lamont J., 26 December 1911

Negligence--Operating Threshing Machine--Fire Set Thereby--Damage to Property--Failure to Comply with Statutory Conditions as to Operation-- Defendant Officer of Crown--Liability for Damage Resulting.

It was found that plaintiff's property was destroyed by a fire resulting from the operation of a threshing machine controlled and operated by the Department of Indian Affairs under the direction of defendant. The defendant was not present at the time the accident occurred, but he was shewn to have had knowledge of the fact that the operation of the machine was dangerous in that the engine was too small to run the separator without forcing, thereby adding to the danger of fire; and it was also shewn that certain statutory conditions imposed on the operation of threshing engines for the prevention of fires had not, to his knowledge, been observed. In an action for damages:--

Held, an official of the Government having the management of some branch of the Government business is not responsible for any negligence or default on the part of other officials, not his servants or agents, in the same employment, but where he is himself guilty of a breach of duty imposed upon him by law he is personally responsible to any person who sustains injury thereby.

2. The defendant, being the person having charge of the management and operation of the machinery in question, was charged with the responsibility of seeing that the statutory conditions respecting its operation were complied with, and not having done so, and such failure having been the cause of the damage, he was liable therefor.

This was an action to recover damages for destruction of the plaintiff's goods by fire, resulting from the operation of threshing machinery under the control of defendant, and was tried before LAMONT, J., at Regina.

G. H. Barr, for the plaintiff.
J. A. Allan, for the defendant.

December 26. LAMONT, J.:--The plaintiff, who is a farmer, sues the defendant, who is the Indian Agent of the Dominion Government at Pasqua Indian Reserve, for damages resulting from a prairie fire alleged to have been caused by a threshing engine under the defendant's control while operating on said reserve. On the evidence I find the following facts.

On October 29th, 1910, threshing operations were being conducted upon the said Indian Reserve at the place of one Antoine Cyr. The engine was an old one (being at least seven years old) which had been purchased by the Government for the Indians. The outfit was controlled and operated by the Dominion Government through the Department of Indian Affairs. The defendant had charge and control of the machine on the reserve, and those who were actually engaged in operating it in the field were under his authority. On the day in question there was an unusually high wind from the west, or a little south of west. The machine reached Cyr's place in the forenoon, and was set for threshing. In setting it, the engineer who was in charge set the engine and separator east and west, the engine west of the separator, which was placed between the stacks. The result was that as soon as they started threshing the smoke from the engine blew with the wind over the separator on the stacks. After threshing about twenty minutes the top of one of the stacks was noticed to be on fire. Those present attempted to put it out, without avail. The stacks were burned, as was also the separator, and with the high wind the fire rapidly spread. The stubble on the field in which the threshing was being done was high and very dry, as was also the prairie grass. The fire swept before the wind to the edge of the reserve, about a mile from Cyr's place, where it jumped the railway grade between the reserve and the plaintiff's farm, which bordered on the reserve, and consumed the following property of the plaintiff:--

One grain bin, worth	.....	\$40.00
480 bush. wheat, totally destroyed, worth	.....	321.60
67 cents a bushel	.....
300 bushels wheat, damaged to the extent	.....	69.00
of 23 cents a bushel	.....
15 loads of hay, worth \$5.50 a load	.....	82.50
20 loads of straw, at \$2.50 per load	.....	50.00
36 loads of wood, worth \$1.50 per load	.....	54.00
200 fence posts, worth 4 cents each	.....	8.00

On the day the fire occurred the defendant had gone to another reserve under his agency, about twenty miles away, and had left the engineer in charge of the threshing operations. Practically all the witnesses agree that owing to the high wind the day was a dangerous one for threshing. So dangerous was it felt to be that Cyr went to the engineer and said he was afraid of fire. To him the engineer said nothing. Joseph McIvor, separator man, also went to the engineer and told him he was afraid of fire. The engineer said that "he was afraid the agent would say something to him if he stopped threshing." It was also shewn that the engine was too light for the work, being only a 15 h.p., while under ordinary circumstances it requires a 20-h.p. engine to operate a separator of the size of the one in use on that occasion. The effect of the engine being under size was that it had to be forced to its full capacity all the time, which necessitated the draughts being on to their fullest extent, with the result that more and larger sparks were forced through the smoke-stack than would have been the case if an engine requiring a less draught had been in use. The defendant appreciated the danger of operating with this light engine, and some time previously he made an application to the department for a heavier one. Unfortunately, as it turned out, his request was not complied with.

I also find that the provisions of sec. 12 of the Prairie Fires Ordinance then in force were not complied with in the following respects:--

(1) There was no metal pan placed under the engine as a receptacle for cinders and ashes, as required by sub-sec. 2. The defendant knew there was no such pan with the engine.

(2) There was, to the defendant's knowledge, no reservoir in the smoke-stack filled with water, as required by sub-sec. 3.

(3) There were not two buckets provided and placed conveniently to the stacks or combustible material near the engine, as required by sub-sec. 5.

(4) The spark arrester was not in good repair, in that it did not fit the smoke stack. There was between the rim of the spark arrester and the smoke stack at one point a space two or three inches long by three-sixteenths to one-quarter of an inch wide which was not covered by the arrester, and through which sparks and burning straw could escape.

It was not contended by counsel for the defendant--as indeed on the evidence it could scarcely be contended--that the fire which consumed the plaintiff's property did not originate from the engine in operation at Cyr's place. Nor can there be any doubt, it seems to me, that the engineer in charge was guilty of negligence in setting his engine as he did to windward of the stacks and in operating in such a high wind. No contention was made that this did not amount to negligence. It was, however, argued that, notwithstanding there might be negligence on the part of the engineer, the defendant was not liable, for the reason that he was an officer of the Crown, and that officers of the Crown are not liable in respect of a tort unless they have been personally guilty of negligence, and that in this case the defendant was not personally guilty of negligence. For the plaintiff it was argued that the defendant had been personally guilty of negligence in that he caused the engine to be operated, (1) knowing that the statutory provisions had not been complied with, and (2) knowing that on account of its being undersized it was dangerous to operate that engine.

It has long been settled law that where a person is an official of the Government, and as such has the management of some branch of the Government's business, he is not responsible for any negligence or default on the part of other officials, not his servants or agents, in the same employment as himself: *Mersey Docks Trustees v. Gibbs* (1864), L.R. 1 H. of L. 93, at p. 111, 35 L.J. Ex. 225, 14 L.T. 677; and *Nicholson v. Mouncey* (1812), 13 R. R. 501. But where a public officer is guilty of a breach of duty imposed upon him by law he is personally responsible to any person who sustains injury thereby: *Boyd v. Smith*, 4 Exch. (Can.), at p. 127. In the present case the defendant was the person having charge of the management and operation of the threshing machine upon the reserve. As such there were certain duties imposed upon him by sec. 12 of the Prairie Fires Ordinance, which reads as follows:--

"The following provision shall be observed in and about the management and operation of engines used for threshing and other purposes, but shall not apply to railway locomotive engines or engines enclosed in a suitable building:--

1. The engine shall not be placed for the purpose of working so that any part thereof will be within thirty feet from any building or stack;

2. A metal pan of adequate size shall be placed under the engine as a receptacle for cinders and ashes, and such metal pan shall be kept filled with water;

3. Before the fires are lit in the furnace and during the whole time the engine is in operation the reservoir in the smoke stack shall be filled with water;

4. All cinders and ashes shall be thoroughly extinguished before the engine is removed from where it has been in operation;
5. A barrel of water and two buckets shall be provided and placed conveniently to any stacks or combustible material near the engine;
6. A spark arrester in good repair shall be used and shall not be opened while the engine is in operation.

(2) Any person contravening or failing to comply with any of the provisions of this section shall be guilty of an offence and liable on summary conviction thereof to a penalty not exceeding \$5." The requirements of this section were not observed by the defendant. He authorised and directed that the threshing be done knowing that the engine had no metal pan as required by sub-sec. 2, and knowing that it had no reservoir in its smoke- stack. It was also his duty to see that it had a spark arrester in good repair before being operated, and that two buckets were "provided and placed conveniently to" the "stacks or combustible material near the engine." As a matter of fact, on the day of the fire there were no buckets belonging to the outfit. The only bucket which there was one obtained from Cyr, and at the time the fire started the tank man had that bucket away for water, and although there was one barrel of water near the engine there was nothing with which that water could be dipped out of the barrel, and the water was not available for extinguishing the fire. There had been two buckets with the engine when the season began, but one of these had been run over and smashed by the engine and the other suffered a similar fate under the wheels of the tank. The evidence, however, does not shew that the defendant knew that the spark arrester was not in good repair or that there were not two buckets with the engine. Nevertheless, it was his duty to see that the statutory provisions above referred to were complied with when he caused the engine to be operated, and in not doing so he was guilty of negligence. Negligence has been defined as "the want of care which an ordinary prudent man would exercise under the circumstances." These statutory provisions set forth the standard of care which the Legislature thought necessary to be observed by those conducting threshing operations. Failure to observe them is to neglect the precautions which a prudent man would take under the circumstances. The authorising of threshing operations with this engine, without first seeing that it complied With the statutory requirements, was, in my opinion, personal negligence on the part of the defendant and a breach of the duty cast upon him by law, for which he is liable.

The next question is, did that breach contribute to the damage suffered by the plaintiff? I am of opinion that it did. From the fact that the smoke from the engine was blown towards the stacks and that the fire started near the top of one of the stacks I have no difficulty in coming to the conclusion that the fire was caused by sparks or burning material from the smoke-stack. A proper reservoir in the smoke-stack and a spark arrester in good repair would in all probability have prevented the damage. The plaintiff is therefore, in my opinion, entitled to recover for the loss he has sustained. There will be judgment for the plaintiff for \$625.10 with costs.