Hague et al. v. Billings et al.; Foster et al., Third Parties

[Indexed as: Hague v. Billings]

13 O.R. (3d) 298
[1993] O.J. No. 945
Action No. C10677

Court of Appeal for Ontario,
Blair, Griffiths and Abella JJ.A.
April 27, 1993*

*Released April 30, 1993.

Appeal -- Grounds -- New issue raised on appeal -- Defendant withdrawing all allegations of negligence against co-defendant before trial to avoid potential liability for costs of that party -- Defendant not being permitted to re-raise issue of co-defendant's negligence on appeal where plaintiffs did not appeal dismissal of their action against co-defendant.

Torts -- Apportionment of liability -- Hotel found liable for serving drinks to grossly intoxicated person who then caused motor vehicle accident -- Trial judge erring in apportioning liability 50-50 between hotel and intoxicated driver -- Driver 85 per cent at fault and hotel 15 per cent at fault.

The defendant B and two friends, all in an extremely intoxicated state, went to the defendant tavern, where they were served one beer but were refused another because of obvious signs of intoxication. The three men then went to the defendant hotel, where B was served three or four beers over a 90-minute period. After he left the hotel, B drove his automobile on the wrong side of the road and collided with a vehicle in which the plaintiffs were passengers, injuring them and killing their mother.

The plaintiffs sued B, the tavern, and the hotel. B admitted liability. The trial judge found that the hotel was liable, both under s. 53(b) of the Liquor Licence Act, R.S.O. 1980, c. 224, and at common law, since its employees served B three or four beers when he was in an obviously intoxicated condition, thereby increasing his intoxication so that he would be in danger of causing injury to others. He held that the tavern was not liable under the statute since B's intoxication was not apparent to employees before he was served one beer. He found that the proprietor of the tavern had a positive duty at common law to prevent intoxicated persons from driving on the highway and that, in the circumstances of this case, he ought to have telephoned the police. However, the trial judge held that the tavern was not liable because the evidence did not establish that the accident would have been prevented had the police been called.

The trial judge found B and the hotel equally liable for the plaintiffs' damages. He dismissed the action against the tavern with costs against the plaintiffs but declined to make a Bullock order permitting the plaintiffs to add those costs onto their judgment against the hotel. The hotel had withdrawn all allegations of negligence originally pleaded against the tavern in order to avoid any potential liability for the costs of that party.

The hotel appealed the findings of liability. The plaintiffs cross-appealed the refusal of the trial judge to make a Bullock order.

Held, the appeal should be allowed in part; the cross-appeal should be dismissed.

There was ample evidence upon which the trial judge could base a finding of statutory liability on the part of the hotel. However, a 50-50 apportionment of liability between B and the hotel was totally disproportionate to their respective degrees of culpability, both legal and moral. While a very strong and exceptional case is required before an appellate court should interfere with and vary the degrees of fault fixed by a trial

judge, this was such an exceptional case. B was 85 per cent at fault and the hotel was 15 per cent at fault.

Although counsel for the hotel sought to argue that the trial judge erred in failing to find the tavern also liable, it had no status to do so. The hotel waived any claims against the tavern for a consideration and it would be entirely inappropriate to now permit the hotel to reassert a claim on the appeal.

The matter of costs was clearly a matter for the discretion of the trial judge, and he did not err in declining to make a Bullock order.

Dabous v. Zuliani (1976), 12 O.R. (2d) 230, 68 D.L.R. (3d) 414, 1 C.P.C. 48 (C.A.), distd

Other cases referred to

Sparks v. Thompson, [1975] 1 S.C.R. 618, 46 D.L.R. (3d) 225, 6 N.S.R. (2d) 481, 1 N.R. 387

Statutes referred to

Evidence Act, R.S.O. 1990, c. E.23, s. 52
Liquor Licence Act, R.S.O. 1980, c. 244 [repealed by s. 64 of and superseded by Liquor Licence Act, 1990, S.O. 1990, c. 15], s. 53(b)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 63.03

APPEAL from a judgment of the High Court of Justice (1989), 68 O.R. (2d) 321, 48 C.C.L.T. 192 (Granger J.), in favour of the plantiffs in a personal injury action; CROSS-APPEAL by the plaintiffs from the refusal of the trial judge to make a Bullock order (additional reasons delivered September 20, 1989, unreported (H.C.J.)).

Richard E. Anka, Q.C., for defendant/appellant, Ship and Shore Hotel.

D.W. Goudie, Q.C., and H. David, for plaintiffs/respondents.

Hans J.B.A. Dickie, Q.C., and C. Philip, for defendant/respondent, Oasis Tavern.

Glenn A. MacPherson, Q.C., for respondent, Kevin Billings.

The judgment of the court was delivered by

GRIFFITHS J.A. (orally):--This is an appeal by Ship and Shore Hotel (owned by the defendant 546749 Ontario Limited) from the judgment pronounced on September 20, 1989 by the Honourable Mr. Justice Granger (reported (1989), 68 O.R. (2d) 321, 48 C.C.L.T. 192 (H.C.J.)).

The following is a sketchy summary of the facts as found by the trial judge, relevant to the issues on this appeal.

On October 28, 1983, at approximately 10:45 p.m., the defendant Billings, in a highly intoxicated state, was driving his automobile in a southerly direction on Highway 28, a short distance north of Peterborough, when he drove onto the wrong side of the road into a head-on collision with a vehicle driven by Jacqueline Hague in which her daughters Melissa and Jennifer were passengers. Jacqueline Hague was killed and her daughters were injured, Melissa's injuries being extremely serious.

Damages in favour of the plaintiffs were agreed at $1.8 million.

Throughout the day of the accident, from approximately 9:30 a.m., Billings was in the company of two men, Foster and Majors, and the three drank at least 50 pints of beer, a 26-ounce bottle of rye whisky and, in addition, they smoked a substantial amount of marijuana.

At approximately 7:15 p.m. on the night of the accident, the three men entered the Oasis Tavern (owned and operated by the defendants Walter and Hannelore Scheurer). Billings and the other two were served one beer but were refused a second because of obvious signs of intoxication. The owner of the tavern attempted to persuade Billings to give the keys to his car to Foster, who appeared to be more sober, but Billings refused. Billings, accompanied by the other two, then drove his vehicle in a southerly direction on Highway 28 to the Ship and Shore Hotel.

The three men were at the Ship and Shore Hotel from 9:00 p.m. to 10:30 p.m. and the trial judge found that Billings was served three or four beers during this period. The three men left the Ship and Shore Hotel at 10:30 p.m. and Billings proceeded to drive his vehicle in a southerly direction on Highway 28. At this point, he was thoroughly intoxicated and his driving so erratic that Foster and Majors insisted upon getting out of the car. Billings then continued to drive south to the scene of the accident which occurred at 10:45 p.m.

At trial Billings admitted liability and the central issue was the liability of the two taverns. The trial judge found the Ship and Shore Hotel to be liable, both under s. 53(b) of the Liquor Licence Act, R.S.O. 1980, c. 244, and at common law since its employees served Billings three or four beers when he was in an obviously intoxicated condition, thereby increasing his intoxication so that he would be in danger of causing injury to others. In making this finding the trial judge apparently accepted the evidence of an expert, Dr. Kalant, who testified that notwithstanding the fact that Billings had consumed a large quantity of alcohol before arriving at the tavern, his additional consumption of beer would have had a "very marked effect on the degree of [Billings'] impairment". The trial judge held that the Oasis Tavern was not liable under the statute, apparently accepting the evidence of the employees that Billings' intoxication was not evident to them before he was served the one beer. The trial judge did find that the proprietor of the Oasis tavern had a positive duty at common law to prevent intoxicated persons from driving

on the highway and that, in the circumstances of this case, he ought to have telephoned the police. However, the trial judge held that the tavern was not liable in this case because the evidence did not establish that if the police had been called the accident would have been prevented. That is, the plaintiffs had failed to establish the element of causation between the breach of duty and the damages suffered.

The trial judge found Billings and Ship and Shore Hotel equally responsible for the plaintiffs' damages. He dismissed the action against the Oasis Tavern with costs against the plaintiffs but declined to make a Bullock order permitting the plaintiffs to add those costs onto their judgment against Ship and Shore Hotel.

Ship and Shore Hotel appeals the findings of liability. The plaintiffs cross-appeal, with leave of this court, the refusal of the trial judge to make a Bullock order.

The grounds of appeal by Ship and Shore Hotel against liability imposed on it may be summarized as follows:

1. The trial judge erred in accepting the evidence of Foster, the only witness to place Billings in the Ship and Shore Hotel at the relevant time, in view of the inconsistencies and discrepancies in the evidence of Foster and his intoxicated condition.

2. The trial judge erred in refusing to receive in evidence the opinion of Dr. Cappell as to the effect of alcohol and marijuana on Foster's memory.

3. In view of Billings' high state of intoxication from alcohol consumed outside the Ship and Shore Hotel, it was his earlier consumption of alcohol that was the effective cause of the accident and not the three or four beers served at the tavern.

4. The trial judge erred in holding that post-judgment interest should run from April 27, 1989, when liability had been determined, rather than September 20, 1989, when all

substantive matters in the action, including costs, were finally determined.

5. The trial judge erred in finding the Ship and Shore Hotel 50 per cent responsible for the accident in view of the much higher degree of culpability on the part of Billings.

With respect to the first four grounds of appeal, this court was not persuaded that these grounds had merit and we did not call upon the respondents to respond to these issues.

With respect to the first ground of appeal, it is my view that it was open to the trial judge to accept the evidence of Foster that Billings had been at the Ship and Shore Hotel at the time in question and had consumed sufficient beer to increase his intoxication and we decline to interfere.

As to the second issue, the trial judge refused to admit the opinion of Dr. Cappell for two reasons, namely, first, the report of Dr. Cappell did not deal with the issue of the effect of marijuana and therefore the opponents had not received appropriate notice of the intention to introduce this expert evidence as required under rule 63.03 of the Rules of Civil Procedure and s. 52 of the Evidence Act , R.S.O. 1990, c. E.23. Secondly, the questions which counsel proposed to put to Dr. Cappell did not take into account the fact that Foster had vomited earlier and had slept for a considerable period of time before arriving at the Ship and Shore Hotel. In my view, the trial judge was correct in the exercise of his discretion in deciding to exclude the evidence.

With respect to the third ground, there was ample evidence upon which the trial judge could base a finding of statutory liability on the part of Ship and Shore Hotel as a consequence of having served Billings additional beer on the evening of the accident, particularly in the light of the evidence of Dr. Kalant with regard to the effect the additional ingestion of alcohol would have had upon Billings. If the requirements of the Liquor Licence Act have been satisfied, the question of causation becomes largely irrelevant because of the absolute liability imposed.

With respect to the fourth ground of appeal, the determination of post-judgment interest was a matter entirely in the discretion of the trial judge and I agree with his disposition in that respect.

With respect to the fifth issue, the apportionment of liability as between Billings and the Ship and Shore Hotel, I agree with counsel for the appellant that an apportionment of 50-50 liability between Billings and the Ship and Shore Hotel was totally disproportionate to the respective degrees of culpability, both legal and moral, of these two parties.

As the Supreme Court of Canada has said in Sparks v. Thompson, [1975] 1 S.C.R. 618, 46 D.L.R. (3d) 225, a very strong and exceptional case is required before an appellate court should interfere with and vary the degrees of fault fixed by a trial judge. In my view, this is such an exceptional case as to justify interference. Without in any way diminishing the legal responsibility cast on the tavern not to serve liquor to an intoxicated person, it seems to me that the conduct of Billings in all the circumstances of this case was so reprehensible as to require that he be fixed with the largest degree of liability. In my opinion, an appropriate apportionment in the circumstances would be to find Billings 85 per cent at fault and the Ship and Shore Hotel 15 per cent at fault.

Counsel for the Ship and Shore Hotel also sought to make submissions on this appeal that for a number of reasons the trial judge erred in failing to find the Oasis Tavern also liable. There was a threshold issue raised by counsel for the Oasis Tavern as to whether the Ship and Shore Hotel had any status to now argue the liability of Oasis Tavern.

Prior to the trial which began on October 12, 1988, counsel for Ship and Shore Hotel, by letter dated October 7, 1988, addressed to counsel for the plaintiffs, withdrew all allegations of negligence pleaded by his client against Oasis Tavern. That letter read in part:

> I wish to confirm that I have received instructions from my client and wish to advise you and all other counsel involved in the main action and third party actions that my client withdraws any and all counter-claims or cross-claims for contribution and indemnity or other relief over as against its Co-Defendants, except the Defendant Billings, and abandons any and all allegations of negligence which may be pleaded by my client as against the said Co-Defendants.
>
> . . . . .
>
> Unless I hear from you to the contrary prior to trial, I will presume that you insist upon keeping all of the Defendants and Third Parties in the action. In that event, please be advised that it will be our position at the trial that our client should not be responsible for any of the trial costs of the other two hotels, Oasis Tavern and The New Commercial Hotel, as well as the costs of either of the Third Parties and we shall oppose any submission you may make at the conclusion of the trial for a Bullock Order that you may seek against my client, assuming some liability is found against it. I propose to advise the presiding Judge at the opening of the trial of the contents of this correspondence and I will seek to file a copy of same with His Lordship.

It is clear, then, that the primary purpose of the Ship and Shore Hotel in withdrawing any allegations of negligence against the Oasis Tavern was to avoid any potential liability for the costs of that party.

At trial, counsel for the Ship and Shore Hotel again went on record to advise the court that no claims were being made against the Oasis Tavern.

The plaintiffs have not appealed the dismissal of their action against the Oasis Tavern. The question then is whether Ship and Shore Hotel, who withdrew all allegations against Oasis Tavern, should now be permitted to argue on this appeal that Oasis should be found liable.

Counsel for the Ship and Shore Hotel relied on the decision of this court in Dabous v. Zuliani (1976), 12 O.R. (2d) 230,

68 D.L.R. (3d) 414. In that case, the owner of a home brought action against an architect who supervised the installation of a fireplace chimney and a builder who carried out the installation. The trial judge dismissed the plaintiff's claim against the builder as well as a claim by the architect against the builder for contribution. The architect alone appealed the judgment and, on the appeal, argued that the claim ought not to have been dismissed against the builder and that the builder ought to be found jointly liable with the architect. The builder contended on the appeal that the architect had no status to maintain the appeal. In this case, counsel stressed the following passage from the reasons of Zuber J.A., delivering the majority judgment, at p. 233:

> It is the defendant architects and not the plaintiff who appeal the dismissal of the claim against the builder and the builder challenges the right of the architects to appeal this issue. Counsel for the architects I think rightly says that in view of the uncertain state of the law as of the date of this hearing, he is obliged to do so since his right to claim contribution under the Negligence Act, R.S.O. 1970, c. 296, may depend on the liability of the builder to the plaintiff.
>
> But apart altogether from that argument, no good reason and certainly no authority has been given this Court to show why one defendant may not seek to alter his position from one of sole liability to one of joint and several liability with another and thereby create the possibility of his burden being diminished by increasing the number of those who bear it.

In my view, the Dabous case is quite distinguishable from the present case. In that case, the appellant architect had claimed contribution and indemnity from the builder at trial or at least had alleged that the builder should be held entirely at fault for the damages of the plaintiff.

In this case it is clear that Ship and Shore Hotel withdrew all allegations of negligence against Oasis Tavern, as counsel for Oasis Tavern puts it, "for a price". The purpose of withdrawing any claim against Oasis Tavern was to avoid any

potential liability for costs in the event Oasis Tavern should be found not liable. In that respect, Ship and Shore Hotel was successful. Ship and Shore Hotel waived any claims against Oasis Tavern for a consideration and it would be entirely inappropriate to now permit this appellant to reassert a claim on the appeal. I hold the appellant has no status to do so.

Having decided that Ship and Shore Hotel had no status to argue the liability of the Oasis Tavern it is not necessary for me to deal with the grounds raised.

The cross-appeal of the plaintiffs

Counsel for the plaintiffs submits that although Ship and Shore Hotel withdrew its cross-claim against Oasis Tavern, Ship and Shore Hotel insisted as a condition of the agreement as to damages that the plaintiffs maintain their action against Oasis Tavern. It was also submitted that Ship and Shore Hotel are continuing at this stage to argue the dismissal of the action against Oasis Tavern and, therefore, this was an appropriate case for a Bullock order because the actions against the two taverns were separate and independent and the two taverns sought and continue to seek to blame each other for the accident.

In refusing a Bullock order on costs the trial judge gave reasons as follows:

> If this were a case where the plaintiffs were faced by defendants giving contradictory evidence, it would necessitate the plaintiffs continuing their action against all of the hotels. This is not such a case. The defendants Billings, Foster and Majors did not attempt in their evidence or statements to suggest that they were at the New Commercial Hotel or any hotel apart from the Oasis Tavern and the Ship and Shore. The plaintiffs were well aware that the defendants were only at the Oasis Tavern for approximately 45 minutes where Billings and Majors each had one beer.
>
> Knowing the evidence, the plaintiffs chose to proceed against the Oasis Tavern and, regardless of the catastrophic

injuries suffered by Melissa Hague and her need for future care, the plaintiffs must bear the costs of the Oasis Tavern. It would be wrong for me to order Billings or the Ship and Shore to pay the costs of the Oasis Tavern on the grounds that the plaintiffs require all of their damages for future care.

The matter of costs is clearly a matter for the discretion of the trial judge. I find no error in the exercise of discretion in the circumstances of this case.

Disposition

I would allow the appeal to a limited extent only and that is by varying para. 1 of the formal judgment to provide that the liability as between Billings and the Ship and Shore Hotel shall be apportioned on an 85-15 per cent basis. I would otherwise dismiss the appeal.

In my view, the limited success of the appellant does not entitle it to any relief from costs and I would dismiss the appeal with costs payable by Ship and Shore Hotel to the respondent plaintiffs and Oasis Tavern. In reaching this disposition as to costs I observe that counsel for the plaintiffs, Billings and the Oasis Tavern did not take a position in opposition to the appeal against the apportionment of liability. Indeed, counsel for the Oasis Tavern supported the appellant's position in this respect.

I would dismiss the cross-appeal with costs to the respondent Ship and Shore Hotel. There should be no costs for or against the respondent Billings.

Appeal allowed in part; cross-appeal dismissed.