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May 4.

[IN THE COURT OF APPEAL.]

PENNY *v.* THE WIMBLEDON URBAN DISTRICT COUNCIL AND ANOTHER.

Negligence—Public Body—Contract to Execute Works—Negligence of Contractor — Liability of Employer — Practice — Separate Defence of two Defendants—Payment into Court by one Defendant—Verdict for less than Amount paid in—Liability of the other Defendant for Costs.

A district council, acting under the Public Health Act, 1875, s. 150, employed a contractor to make up a highway, which was used by the public, but had not become repairable by the inhabitants at large. In carrying out the work the contractor negligently left on the road a heap of soil, unlighted and unprotected. A person walking along the road after dark fell over the heap and was injured. In an action against the district council and the contractor to recover damages for the injuries sustained:—

Held, that as, from the nature of the work, danger was likely to arise to the public using the road, unless precautions were taken, the negligence of the contractor was not casual, or collateral to his employment, and the district council were liable.

Where two defendants are sued, and put in separate defences, and one of them has paid money into court exceeding the amount ultimately recovered in the action, the other defendant cannot avail himself of the payment into court by his co-defendant as a satisfaction of the cause of action against himself, and, on the failure of his defence, the plaintiff is entitled to have judgment entered against him for costs.

Judgment of Bruce J., reported [1898] 2 Q. B. 212, affirmed.

APPEAL from a judgment of Bruce J. on further consideration, reported [1898] 2 Q. B. 212.

The action was brought to recover damages for personal injuries sustained by the plaintiff by falling over a heap of surface soil and grass, placed in Queen's Road, Wimbledon, and left there on the evening of October 23, 1897, after dark, without any light, or precaution, to warn persons passing along the road of the obstruction caused by the heap.

The defendants were the Wimbledon Urban District Council and a contractor of the name of Iles employed by the council to make up the road. The two defendants put in separate defences, and both denied liability. Iles paid 75*l.* into court. The district council did not pay money into court, but stated

in their defence that "the defendant Iles, while denying liability, has paid into court 75*l*., and these defendants say that sum is sufficient to satisfy the plaintiff's claim."

It appeared that at the time of the accident the district council had not taken over the road, but had served notice on the owner, under s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), to make up the road, and on his failure to do so had entered into a contract with the defendant Iles that he should do the work. By the terms of the contract Iles was to provide all materials, plant, labour, watching, lighting, fencing, and everything necessary for the speedy and effectual completion of the work, which was to be carried out in the best and most workmanlike manner, and was to be in accordance with a specification, and certain plans and drawings prepared by the surveyor of the district council, and such working and explanatory drawings and instructions as he might from time to time furnish. The surveyor could require improper materials to be removed and others substituted, and could procure the discharge of incompetent workmen. The work was commenced on the day before the accident, and the heaps which were left on the road were heaps of dirt and grass, formed in the course of the preliminary process of cleaning up the road. After the accident lights were placed on some of the heaps by order of the surveyor.

The jury found a verdict for the plaintiff, and assessed the damages at 50*l*. The learned judge directed judgment to be entered for the defendant Iles with costs, and, after argument on further consideration, he held that the district council could not avail themselves of the payment into court by Iles, and that their defence simply amounted to a denial of liability. Judgment was therefore entered against the district council, but it was confined to costs. (1)

The district council appealed.

Macmorran, Q.C., and *C. Tyrrell Giles*, for the appellants. The district council are entitled to have judgment entered in their favour. The cause of action against the two defendants

(1) [1898] 2 Q. B. 212.

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is indivisible; the plaintiff is only entitled to get one set of damages, and when the money paid into court by one defendant has once been decided to be sufficient, the cause of action against the other defendant is gone. The plaintiff might have taken the money out in satisfaction; she did not do so, but proceeded with the action, with the result that the district council's defence, that the amount paid in by Iles was sufficient to satisfy the claim, has been established, and that is an answer to the claim so far as the district council are concerned. It cannot be that each defendant is to pay money into court, for, if the council had paid in the same amount as Iles, and the plaintiff had taken both sums out, she would have got three times the amount she was entitled to. If each defendant had paid in half of the 75*l.*, then, according to the judgment appealed from, neither of them would have succeeded in the action, although the whole amount to which the plaintiff was entitled by the verdict was only 50*l.* If the plaintiff had sued Iles and obtained judgment, and then had sued the council, they could have pleaded satisfaction by judgment recovered, and that is in effect what has happened though in one action.

[They cited on this point *Thurman* v. *Wild* (1); *Brinsmead* v. *Harrison* (2); *Duck* v. *Mayeu.* (3)]

As to the question of the liability of the district council, this is not the case of master and servant, but of the employment of an independent contractor, and the negligence of the contractor in leaving heaps of soil in the road was collateral to the work required to be done. For the consequences of casual or collateral acts of negligence, such, for instance, as leaving a pickaxe in the road, the employer is not liable. If the road had been improperly made, and so damage had arisen, the defendants would have been responsible; but to hold them liable in this case would be to make the liability of an employer the same whether he employed an independent contractor, or did the work by his own servants.

[They cited *Pickard* v. *Smith* (4); *Gray* v. *Pullen* (5); *Black*

(1) (1840) 11 Ad. & E. 453.
(2) (1872) L. R. 7 C. P. 547.
(3) [1892] 2 Q. B. 511.
(4) (1861) 10 C. B. (N.S.) 470.
(5) (1864) 5 B. & S. 970.

v. *Christchurch Finance Co.* (1); *Hardaker* v. *Idle District Council.* (2)]

Lord Coleridge, Q.C. (with him *Stephen Lynch*), was not called on.

A. L. SMITH L.J. This is an appeal from a judgment of my brother Bruce, who tried the case with a jury, and one matter before us is whether one set of defendants, the Wimbledon District Council, should have judgment against them for costs. The facts are that the plaintiff was passing at night along a highway which was being made up by a contractor, the other defendant Iles, for the district council. There were some heaps of soil left thereon unfenced and unlighted, and the plaintiff was injured by falling over one of them. The action is brought against the district council and the contractor. The latter denied his liability, set up contributory negligence, and paid 75*l.* into court. The council denied liability, but they set up also a defence different from that of the contractor, for they said that he was an independent contractor, and that if he had been guilty of negligence the council were not liable. They added, further, a plea that the money paid into court by their co-defendant was enough to satisfy the claim of the plaintiff, but they paid no money into court. A verdict passed for the plaintiff for 50*l.*, so that the contractor got judgment in his favour, for he had paid more than sufficient into court, and my brother Bruce came to the conclusion that the defence of the council that Iles was an independent contractor was not a good defence, because, having control of the works, the council were liable for the negligent acts of their contractor. The position, then, is that the council are found to be liable as principals for the negligence of their agent. They have not paid anything into court in respect of their liability, and can have no defence to the action. That the plaintiff has got 50*l.* from Iles does not shew that there is no cause of action against the council, and the only effect of it is that the judgment against them must be for costs only, for the plaintiff cannot get damages twice over.

(1) [1894] A. C. 48. (2) [1896] 1 Q. B. 335.

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There was another point—that the negligence complained of was casual or collateral, having regard to the nature of the employment, and that the council were therefore not liable. My brother Bruce laid down with great accuracy the law applicable in such a case. Dealing with the facts, he says, as will be found at page 217 of the report, that "the district council employed a contractor to do work upon the surface of a road which they knew was being used by the public, and they must have known that the works which were to be executed would cause some obstruction to the public, and some danger, unless means were taken to give due warning to the public." Higher up on the same page he had stated, with regard to *Pickard* v. *Smith* (1): "The principle of the decision, I think, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor." I agree with this entirely, but would add as an exception the case of mere casual or collateral acts of negligence, such as that given as an illustration during the argument—a workman employed on the work negligently leaving a pickaxe, or such like, in the road. I cannot hold that leaving heaps of soil in the road, which would by the very nature of the contract have to be dug up and dealt with, is an act either casual or collateral with reference to the contract.

I think the decision of the learned judge was quite right, and that the appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I entirely agree. With regard to the practice point, it seems to me to be a fallacy to treat the plea set up by the council as if it were within Order XXII., r. 1, which permits a defendant with a defence denying liability to pay money into court. Under that rule there may be payment into court which involves admission of the cause of action, or

(1) 10 C. B. (N.S.) 470.

payment with a defence denying liability. Throughout the argument addressed to us on behalf of the council it was assumed that the defence was payment into court; but when that payment is made with a denial of liability the defence is that denial. The importance of this in the present case is that both defendants have put in defences denying liability; but one of them only with that defence chose to pay a sum of money into court. In doing so he did not set up the payment as a defence, but it was an offer of amends made for the sake of peace. The result is that, though he has been defeated as to the denial of liability, he is not placed in the position of a defeated defendant because of the provisions of rule 6 of the same order, the amount recovered being less than the amount paid in. Thus, notwithstanding his defeat on the question of liability, he is successful on the question of costs. He has improved his position, but I can see no reason for saying that his payment into court has improved the position of the other defendants. Looked at from that point of view, the cases cited as to satisfaction have no application. There never was, in relation to the district council, satisfaction of the cause of action against them at any time during the trial.

As to the question of the liability of the council for the acts of the contractor, there is hardly any subject on which the course of the authorities, down to the recent case of *Hardaker* v. *Idle District Council* (1), has been so uniform and clear. In cases like the present, where a statutory authority has power to do something to a road which involves stopping it, or to do something to it which will make it dangerous while it is being done, there is a duty cast upon them to take care that the Queen's subjects are not injured by any carelessness in the doing of that which has to be done. This is expressed in the judgment in *Pickard* v. *Smith* (2) thus: "If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. The rule is, however, inapplicable to cases in which the act which occasions the injury is one which the employer is employed to do; nor,

(1) [1896] 1 Q. B. 335. (2) 10 C. B. (N.S.) 470.

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by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." This has been applied expressly and tersely in the present case by Bruce J. in the passage that has been already quoted. I entirely agree with his application of the principle to the facts of the present case, and his judgment should not be disturbed.

ROMER L.J. Having regard to the present state of the authorities, I think that the following is a correct statement of the law on the subject. When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take these precautions. I desire to point out that accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand, and do not come within this rule. The work done in this case was the making up of a road frequented by the public. From the nature of this work danger was likely to arise to the public accustomed to use the highway by the alteration of level, and by the heaps of soil and the holes almost inevitable in work of the kind. The usual precaution to take in such a case is to put up lights or other warnings to prevent persons falling into the holes or over the heaps of soil. In my opinion, it is unreasonable not to take those precautions, and the passages from the contract that I have referred to in the course of the argument shew that this view is correct.

As to the other point, the case before us is not one in which the district council have adopted the defence of their co-defendant, and offered to treat the payment into court as made on their behalf, and agreed to abide by all the consequences that may arise from their co-defendant's pleading.

Appeal dismissed.

Solicitor for plaintiff: *S. A. Jones.*

Solicitor for district council: *W. H. Whitfield.*

A. M.