[COURT OF APPEAL]

*ROWE v. HERMAN AND OTHERS

1997 April 23; May 7

Simon Brown and Morritt L.JJ. and Sir Brian Neill

Vicarious Liability—Independent contractor—Negligence—Independent contractor employed to build garage on first defendant's property—Contractor laying metal plates across public highway for purposes of work—Metal plates left by contractor after completion of works—Plaintiff tripping over metal plate at night—Whether first defendant vicariously liable for independent contractor's negligence

The first defendant employed an independent contractor to build a garage on his property. To protect the paving stones on the public highway outside the property against the passage of heavy lorries delivering to site, the contractor laid metal plates across the highway. On completion of the building works the contractor withdrew but left the metal plates on the highway. One night the plaintiff tripped over the unlit and unprotected metal plates and fractured his right ankle. The plaintiff brought proceedings in the county court against the first defendant and the independent contractor for damages, alleging that his injury had been caused by their negligence. On the first defendant's application to strike out the action against him as disclosing no reasonable cause of action, the district judge allowed the application. The judge allowed the plaintiff's appeal, holding that the plaintiff had a cause of action against the first defendant; that an occupier of premises had a duty of care in relation to the acts or omissions of his independent contractor on the public highway outside his home; and that once the contractor had completed the work for which he was employed and had withdrawn from the site, the employer had a duty of care to ensure that no hazards were left behind on the highway.

On appeal by the first defendant:—

Held, allowing the appeal, that where an independent contractor employed for contract work on private land had created an obstruction on the public highway which was not a necessary part of the contract work, the employer was not responsible for any injury caused by the unnecessary obstruction of the highway, nor was he under a duty to take active steps to remove any hazards created and left on the highway by his independent contractor; that there was no allegation or evidence that obstruction of the highway was a necessary part of the construction of the garage; and that, accordingly, the particulars of claim disclosed no reasonable cause of action against the first defendant and should be struck out (post, pp. 1394D–1395E).

Salsbury v. Woodland [1970] 1 Q.B. 324, C.A., considered.

Penny v. Wimbledon Urban District Council [1899] 2 Q.B. 72, C.A. distinguished.

The following cases are referred to in the judgments:

Hardaker v. Idle District Council [1896] 1 Q.B. 335, C.A.

Penny v. Wimbledon Urban District Council [1899] 2 Q.B. 72, C.A.

Salsbury v. Woodland [1970] 1 Q.B. 324; [1969] 3 W.L.R. 29; [1969] 3 All E.R. 863, C.A.

No additional cases were cited in argument.

INTERLOCUTORY APPEAL from Barnet County Court.

By particulars of claim dated 5 December 1994 the plaintiff, Roland Rowe, brought an action against the defendants, Peter Ian Herman, A. Demetriou, L. Lynch (Plant Hire & Haulage) Ltd. and Barnet London Borough Council, for damages for personal injury caused by tripping over metal plates which had been left on the highway. On 24 June 1996 the first defendant made an application to strike out the plaintiff's claim against him on the ground that the particulars of claim disclosed no reasonable cause of action. On 18 July 1996 the district judge allowed the application. On 19 September 1992 Judge Viljoen allowed the appeal of the plaintiff therefrom.

By notice of appeal dated 16 October 1996 the first defendant appealed on the grounds that: (1) the judge erred in holding that the plaintiff had a cause of action against the first defendant; (2) the judge erred in holding that an occupier of premises had a duty of care in relation to the acts or omissions of his independent contractors on the public highway outside his home; and (3) the judge erred in holding that once the independent contractor had completed the work and withdrawn, the employer had a duty of care to ensure that no hazards were left behind on the public highway.

The facts are stated in the judgment of Simon Brown L.J.

Francis Treasure for the first defendant.
Quintin Iwi for the plaintiff.
The other defendants did not appear and were not represented.

Cur. adv. vult.

7 May. The following judgments were handed down.

SIMON BROWN L.J. This is an appeal by leave of the judge below against the order of Judge Viljoen made at the Barnet County Court on 19 September 1996 refusing the first defendant's application to strike out the plaintiff's claim against him on the ground that it discloses no cause of action. That application had succeeded before District Judge Karet on 18 July 1996. Judge Viljoen, however, allowed the plaintiff's appeal.

For the purposes of this appeal it is necessary to assume the facts to be as alleged in the plaintiff's particulars of claim. These are essentially as follows: (1) The first and second defendants are jointly the owners and occupiers of 246, High Road, London, N.2. (2) In 1992 the first and second defendants engaged the third defendant company as independent contractors to build a garage at No. 246. (3) For the purpose of those works and more particularly to protect the paving stones outside No. 246 against the passage of heavy lorries delivering to site, the third defendants laid metal plates across the footway. (4) Those metal plates constituted a foreseeable hazard to passers-by. (5) The third defendants completed their works and left the site, leaving the metal plates in situ. (6) The plaintiff occupies the ground floor flat at No. 248 (immediately adjacent to No. 246). (7) On 12 December 1992, whilst walking home late at night, the plaintiff tripped over one of the metal plates and fractured his right ankle.

The plaintiff sues the first, second and third defendants in negligence. He also sues the fourth defendant highway authority for negligence and breach of statutory duty for failing to have the metal plates removed. The present appeal, however, is concerned only with the plaintiff's cause

of action against the first defendant, although necessarily its outcome determines also the identical case against the second defendant. The judge below held that there was a duty upon occupiers such as the first and second defendant "when the contractor withdraws from the works to ensure that there are no remaining hazards which could injure a third party." The question before us is whether that is a correct view of the law.

The starting point for consideration of this issue must be the basic principle that an employer is not liable for an independent contractor's negligence, provided always that the contractor employed is one reasonably supposed by the employer to be competent, a principle conveniently found stated in Widgery L.J.'s judgment in *Salsbury v. Woodland* [1970] 1 Q.B. 324, 336–337:

> "It is trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor. He is not able to control the way in which the independent contractor does the work, and the vicarious obligation of a master for the negligence of his servant does not arise under the relationship of employer and independent contractor. I think that it is entirely accepted that those cases—and there are some—in which an employer has been held liable for injury done by the negligence of an independent contractor are in truth cases where the employer owes a direct duty to the person injured, a duty which he cannot delegate to the contractor on his behalf."

There are two main classes of case in which the employer is held to be under a non-delegable duty: first, cases where the work commissioned involves "extra-hazardous acts;" second, cases where danger is created by work on a highway. These are sometimes spoken of as exceptions to the general principle; sometimes as cases where, because the employer's duty is non-delegable, the contractor is to be regarded as his agent for performing the primary duty of care which lies upon the employer himself—although even then the employer is not liable for the contractor's casual or collateral negligence.

There was no question here of these works involving extra-hazardous acts. As to work on a highway, the judge below readily accepted the first defendant's contention that the work here was carried out on private land, not on the highway, and that it was entirely the contractor's idea to put down these metal plates. There was accordingly no liability on the first defendant as employer whilst the contractor was undertaking the contract work on site. The judge held, however, that once the contractor had left the site there then sprang up a duty upon the employer to ensure that no hazards had been left behind on the highway.

Although on its face the appeal before us was concerned solely with what I may call the springing duty, we saw great difficulty with such a notion and thought it right to consider also whether this case should properly be regarded as one involving a non-delegable duty on the employer akin to that arising in the highway cases. After all, if it was a necessary part of the contractor's fulfilment of his commission here that he should obstruct the public highway in this fashion, it is not immediately obvious why the mere fact that the actual contract work was being undertaken on private land should make a difference to the employer's liability for highway hazards.

A We accordingly explored the true nature of the highway exception. An early illustration of it is to be found in *Penny v. Wimbledon Urban District Council* [1899] 2 Q.B. 72. There the district council had employed a contractor to repair a highway. In the course of their works the contractors negligently left a heap of soil unlighted and unprotected over which the plaintiff fell one night and was injured. In upholding Bruce J.'s finding of liability against the district council, A. L. Smith L.J. B said, at p. 76:

> "Dealing with the facts [Bruce J. says] '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 C warning to the public.' Higher up on the same page he had stated, with regard to *Pickard v. Smith* [10 C.B. (N.S.) 470]: '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, D 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 E 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 can return now to *Salsbury v. Woodland* [1970] 1 Q.B. 324 where the highway cases were dealt with by each of the three members of the court as follows. *Per* Widgery L.J., at p. 338:

F "The second class of case, which is relevant for consideration, concerns dangers created in a highway. There are a number of cases on this branch of the law, a good example of which is *Holliday v. National Telephone Co.* [1899] 2 Q.B. 392. These, on analysis, will all be found to be cases where work was being done in a highway and was work of a character which would have been a nuisance G unless authorised by statute. It will be found in all these cases that the statutory powers under which the employer commissioned the work were statutory powers which left upon the employer a duty to see that due care was taken in the carrying out of the work, for the protection of those who passed on the highway. In accordance with principle, an employer subject to such a direct and personal duty cannot excuse himself, if things go wrong, merely because the direct H cause of the injury was the act of the independent contractor."

Per Harman L.J., at p. 345:

> "The second exception is a special one—that of work on the highway. There, liability for independent contractors arises because those who have statutory authority to dig up a highway themselves owe a duty to the public using that highway, and the fact that they have a statutory authority to excavate does not absolve them from

that duty, even though they employ an independent contractor to do the work. It is not a vicarious liability at all but a direct one; and this explains *Penny v. Wimbledon Urban District Council* [1899] 2 Q.B. 72 on which the judge relied."

Per Sachs L.J., at p. 348:

"[The categories] include another where the dangers are created by work done upon a public highway, whether by a public authority or others; and this is a category discussed under that precise and limited heading in *Salmond on Torts*, 14th ed. (1965), p. 691. It is there treated as being a separate and narrow category, and rightly so to my mind—on the assumption, of course, that the phrase 'upon a highway' or 'in a highway' includes the air space above it and the ground below it."

Mr. Iwi, whilst not principally concerned to address the situation arising here before the contractor left the site, nevertheless seeks to place considerable reliance upon *Penny v. Wimbledon Urban District Council* [1899] 2 Q.B. 72. There is, he points out, a marked similarity between the accident here and the accident there. Both involve the plaintiff walking at night into an unlit and unprotected obstacle on the highway, there a heap of soil, here a metal plate. The act here was no more casual or collateral than there. There should, he submits, be liability here just as there.

In my judgment, however, there are two critical differences between this case and *Penny's* case and, indeed, the other highway cases. First, the highway cases all involve obstruction to the highway as a result of work being carried out under statutory powers. The category is, as Sachs L.J. says, at p. 348: "a separate and narrow category." Second, the obstruction or other event giving rise to the loss, for example the breaking of the gas-main during the construction of a sewer in *Hardaker v. Idle District Council* [1896] 1 Q.B. 335, arose in those cases directly from the work which the employer himself was required to do and was integral to it. In *Penny's* case [1899] 2 Q.B. 72, 76 the soil "would by the very nature of the contract have to be dug up;" or, as Vaughan Williams L.J. put it in the same case, at p. 77: "the act which occasions the injury is one which the employer is employed to do."

Here, by contrast, not merely were the first and second defendants not obliged to build a garage in the first place, but there is no suggestion (no evidence and no pleaded allegation) that it was in fact a necessary part of the garage construction to obstruct the footway outside No. 246 in this way. There is no reason to suppose that the garage could not have been constructed and the plant and materials delivered to site without these metal plates being put down to protect the footway. Given, moreover, that they constituted a hazard (as the claim postulates) one might suppose that the highway authority's permission was required for them, as for a builder's skip: see section 139 of the Highways Act 1980. If permission was required and not obtained, it is impossible to regard the laying of these plates as a necessary part of the contract work. And if permission *was* obtained, it seems to me likely to have been granted subject to conditions to promote safety and no doubt (as with builders' skips: see section 139(2)(*f*)) a condition also as to removal at the end of the period of permission. Although the point was not argued before us, I find it difficult to suppose that an occupier would be legally liable for, say, an injury caused by his builder's negligently unlit skip.

I entertain no doubt, therefore, that had the plaintiff's accident occurred during the course of the contract works, the first and second defendants as occupiers could not have been held liable for it. Why, then, should they suddenly come under a duty once their contractor leaves the site? If they are not responsible for these plates even whilst they are being used (whether as a matter of necessity or not) for the purpose of building their garage, why should they be responsible for them afterwards? The question appears to me unanswerable.

By the same token that the employer has no control over the manner in which his independent contractor carries out his work—the reasoning underlying the general rule—so too he has no control over the way his independent contractor clears up. Even had the first defendant here, perhaps out of a sense of civic duty, telephoned the third defendants at some point (precisely when is this duty said to arise?) to suggest that they should now remove these plates, he could not have compelled them to do so. Should he then have removed them himself? That would be to impose upon him a duty to take active steps to remedy a danger not created by him, and for the creation of which he was not in law responsible. An occupier is, of course, responsible for any dangers created or left on his own land. He is not, however, to be treated, as the judge's order below in effect does treat him, for all the world as if he were the occupier also of the adjacent highway.

I would rule as a matter of law that no duty of care arose here such as to found this claim against the first defendant. I would accordingly allow the appeal and strike out the pleading against him as one disclosing no cause of action.

MORRITT L.J. I agree.

SIR BRIAN NEILL. I also agree.

Appeal allowed with costs.
Plaintiff's claim against first defendant struck out.
Legal aid taxation of plaintiff's and first defendant's costs.
Leave to appeal refused.

Solicitors: Chambers Rutland & Crauford; Chesham & Co.

M. F.