Privy Council Appeal No. 2 of 1946

The Auckland Electric-Power Board - - - *Appellant*

v.

The Public Trustee of the Dominion of New Zealand and another - - - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH OCTOBER, 1946

Present at the Hearing:

LORD THANKERTON
LORD MACMILLAN
LORD SIMONDS
LORD DU PARCQ
LORD NORMAND

[*Delivered by* LORD NORMAND]

This is an appeal from a judgment of the Court of Appeal of New Zealand, affirming by a majority the judgment of Fair J. in the Supreme Court. The action was brought under the Deaths by Accidents Compensation Act 1908 and the Law Reform Act 1936 by the Public Trustee of the Dominion of New Zealand as executor of Francis Harold Baker deceased. The defendants were (1) the present appellants, who were the suppliers of electric power to the respondents (2) the appearing respondents, John Burns & Co. Ltd., who were the employers of the deceased and (3) H. K. Brown & Co. Ltd., electrical contractors, who performed certain repair and maintenance services under a contract for services with the respondents. The ground of the action as laid is that the death of Francis Harold Baker was caused by the negligence or breach of statutory duty of the defendants or of one or more of them. The plaintiff was awarded damages or compensation against the appellants and the respondents. The respondents have acquiesced in the judgment against them, but they appear in this appeal because they have an interest to support the judgment which involves the appellants along with themselves in the liability to pay the compensation.

The material facts must now be stated. They are in part admitted and in part found by the jury in answers to questions settled by Fair J., and there is now no serious controversy about them. The appellants are a Statutory Corporation constituted by the Auckland Electric Power Board Act, 1921, and they are suppliers of electricity under licence granted by the Governor-General in Council. They have since 1935 supplied electric power to the Holdship and Morton buildings belonging to the respondents from electric mains which are connected to a main switch just inside the Holdship building and near the main entrance to it from Customs Street, Auckland. From this main switch wires were laid to the main switchboard and from the switchboard electric energy was directed into the various electrical circuits in the respondents' buildings. The lines or conductors between the main switch and the switchboard, the switchboard itself, and the circuits and electric apparatus connected to or supplied with current from the switchboard were the property and under the control of the respondents. The appellants on the other hand owned and had control of the lines leading from the street

to the main switch. The appellants had inspected the respondents' electrical installations in 1935 before connecting their cables to the main switch, but no inspection had been made by them since July, 1935. On the 18th August, 1941, a plug on a circuit used for energising an adding machine in the respondents' office in the Holdship building was accidentally broken, and one of the prongs was broken off and remained in the socket. H. K. Brown & Co. Ltd., had then been for some time working on the respondents' electrical installation, and one of their employees, Campbell, was asked by an employee of the respondents to repair the broken plug. Campbell used a screw driver to remove the broken fork and there was an instant flash at the plug which set fire to the Holdship building and so caused Baker's death. The flash was the result of a sustained arc on the respondents' switchboard, and the sustained arc was in a sense brought about by the electric short circuit caused by the use of the screw driver by Campbell. But there would have been no flash and no fire if there had been no defects at the switchboard. In fact, however, there were two defects. The cut out on the adding machine circuit was designed as a 10 ampere cut out and it required for safety that the fuse or fuse link fitted to the cut out should fuse at not more than a 20 ampere current and should be covered with a tube or stockinette of asbestos. But on the occasion of the fire the cut out was fitted with a fuse or fuse link capable of carrying approximately 40 amperes and it was not covered with an asbestos stockinette. The second fault was that on the base of the cut out there was a copper deposit which acted as a conductor after the fuse link was blown. Such a copper deposit is usually formed by blowings of fuse links which have not been protected by asbestos stockinette. These two defects and the short circuit caused by the unskilled use of the screw driver by Campbell provided all the conditions necessary for the causation of a sustained arc. It is not possible on the evidence to say when the fuse link in use when the fire occurred was fitted, nor when the copper was deposited on the base of the cut out. These things may have occurred at any time between the inspection of the installation by the appellants in July, 1935, and the moment when Campbell set to work on the plug with his screw driver.

In the statement of claim particulars of breaches of statutory duty alleged to have been committed by the appellant and to have contributed to the fire are set out in detail. There is also an allegation of negligence at common law and altogether apart from any breach of regulation. This was the ground on which the judgment of Fair J. is based, but it found no support in the Court of Appeal and it is not now maintained. Accordingly it may be dismissed from further consideration.

The case on breach of regulations is met at the outset by the appellants with the answer that the material regulations are *ultra vires*. They are to be found in the Electric Supply Regulations, 1935, and the Electric Wiring Regulations, 1935, both of which purport to be made in pursuance of the Public Works Act, 1928. The issue between *intra vires* and *ultra vires* depends primarily on the construction of section 319, the provisions of which are set out in the case for the appellant and also, so far as they are material, in the judgment of the Chief Justice. It is needless to repeat them here, because the learned counsel for the respondents conceded the point argued for the appellants, that the section applies only to the electric lines (as defined in subsection (3)) of the licensee, including such installations (if any) on the premises of consumers as are the property and under the control of the licensee, and has no reference to lines which are the property and under the control of consumers. The regulation making power conferred by subsection (2) (*b*) relates therefore only to the use and management of the licensee's works and lines. This accords with the opinion expressed by the Chief Justice, though he did not make it the ground of his dissenting judgment. Blair J. in his dissenting judgment and the three learned judges who formed the majority also concur with the Chief Justice in this view. Their Lordships are of opinion that the construction now conceded by the respondents is the correct construction of the section. It follows that any

regulation which purports to constitute obligations of repair and maintenance in respect of consumers' lines and installations is *ultra vires* of the power conferred by section 319.

The basis of the case against the appellants is that they failed in a duty under the regulations to inspect the respondents' installation, and that if they had inspected it they would have discovered that the installation was in a dangerous condition, and they would then have had, under the regulations, a duty to cut off the current. The respondents' counsel founded on three regulations in the Electrical Supply Regulations. One of these (51-43) is in the part of the regulations dealing with inspection and testing of consumer's installations and the other two (52-01, 52-03) are in the part dealing with maintenance of consumer's installations.

Of these three regulations only 52-03 expressly lays on the licensee a duty to discontinue to supply a consumer whose installation is dangerous. But the obligation is conditional. It depends on the consumer's failing, not simply failing but failing subject to the qualification implied by the word "so", to maintain his installation and every appliance connected therewith. The qualification implied by the word "so" is (so far as this case is concerned) that the consumer's failure was in breach of an obligation in regulation 52-01 to maintain free from electrical hazard the installation and every appliance connected with it on his own premises, except any apparatus or service line belonging to the licensee. But the obligation which regulation 52-01 purports to lay on the consumer is *ex concessis* null and of no effect because it is *ultra vires*. It follows that the obligation in regulation 52-03 being conditional on the non-observance of a null regulation must also be null and of no effect.

An attempt was made to save regulation 52-03 by reading it as if it were contingent merely on the fact that the consumer had not maintained his installation free of hazard. This reading of the regulation underlies the reasoning in the judgments of the learned judges who formed the majority in the Court of Appeal. But their Lordships are of opinion that such a construction is inadmissible and that the dependence of regulation 52-03 on the occurrence of a breach by the consumer of a purported obligation sanctioned by a pecuniary penalty as provided in regulation 71-11 cannot be read out of the regulations. That would be to carry beyond permissible limits a freedom in interpretation which a court may sometimes properly assume, *magis ut res valeat quam pereat.*

Regulation 51-43 requires the electrical supply authority to make periodical inspections and tests of consumer's installations at intervals of not more than five years for the purpose of ascertaining that the installation and every appliance connected with it is free from electrical hazard. Learned Counsel for the respondents argued that this regulation taken by itself provides sufficient grounds for affirming the liability of the appellants. The argument, if it is to be of value to the respondents in this case, requires that the obligation to inspect should be construed as continuously subsisting after the lapse of five years from the last made inspection, and that the duty to inspect should be treated not as an end in itself but as implying a subsequent duty to take some effective action if the inspection has disclosed (or would have disclosed if it had been made) dangerous defects. But assuming that the argument is sound so far, their Lordships are not of opinion that the only effective action which can be implied is the cutting off of the electric current by the licensee. On the contrary it appears to their Lordships that it is equally reasonable to imply a duty to notify the the consumer, such as is imposed in certain circumstances by regulation 52-02. Their Lordships are further of opinion that the regulations dealing with the inspection and testing of consumers' installations and the regulations providing for the maintenance of these installations dovetail into each other. The scheme of these regulations is that the duty of maintaining the consumer's installation lies on him; if a defect is found on inspection by the licensee he should notify the consumer, and then it is for the consumer to remedy it forthwith; and, if he fails to do so, the

licensee must discontinue the supply, but the consumer then has the right to apply for an inspection by an inspecting engineer (Regulation 51-45). This is accordingly not a case in which it is possible to separate regulation 51-43 from regulations 52-01 and 52-03 and to hold it to be an *intra vires* regulation standing by itself.

Regulations 12-02 and 12-03 of the Electrical Wiring Regulations, also founded on by the respondent's counsel, do not in the opinion of their Lordships advance the case for the respondents. Regulation 12-02 applies where there are new installations on the consumer's premises and accordingly does not affect this case. Regulation 12-03 requires that it shall be a condition of every licence under the Public Works Act, 1928 empowering an electrical supply authority to supply a consumer that the licensee shall not continue to supply electrical energy to any existing installation which is not reasonably free from electrical hazard. The Electrical Wiring Regulations contain many regulations which it is conceded are not authorised by section 319 of the Public Works Act, 1928. It might nevertheless be possible to separate this particular regulation as a valid exercise of the power to prescribe the conditions on which a licence may be issued. If so a breach of the regulation would give a right of action only to the licensor. But even if it is legitimate to construe the regulation as going beyond that and as requiring the licensee to discontinue supply to a consumer whose installation is not reasonably free from electrical hazard, the obligation to discontinue can, as the respondent's counsel conceded, only arise if the licensee knows or ought to know of the defect. The obligation thus depends on the obligation to inspect and stands or falls by regulation 51-43 of the Electrical Supply Regulations, and since that regulation is invalid, so also is this as the foundation for the supposed obligation.

The result is that their Lordships are of opinion that the regulations which were submitted to them as the foundation of the appellants' liability are *ultra vires* and ineffectual for that purpose. It is irrelevant to say that the same regulations might competently have been made under another statute, or that regulations might have been made in another form under section 319 of the Public Works Act, 1928, imposing on licensees a duty to inspect consumer's installations and a duty to discontinue supply, without associating these duties with duties imposed *ultra vires* on the consumer or in respect of the maintenance of consumers' lines. Their Lordships are concerned only with the Order in Council and the regulations as they find them and not as they might have been. The conclusion which their Lordships have reached makes it unnecessary to consider whether, if the regulations founded on had been valid, the breach of them was the cause of the fire, and whether the breach would give rise to any private right of action.

Their Lordships are of the opinion that the appeal should succeed and that the judgment against the appellants should be set aside. The costs of the appellants in the courts in New Zealand should be paid by the plaintiff, the Public Trustee of the Dominion of New Zealand, and by John Burns & Co. Ltd. The costs of H. K. Brown & Co. Ltd. of the hearing in the Supreme Court should be paid by the plaintiff. The plaintiff should be entitled to recover from John Burns & Co. Ltd. all the costs for which he is rendered liable. Their Lordships will humbly so advise His Majesty.

The respondents, John Burns & Co. Ltd., must pay the costs of this appeal.

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In the Privy Council

THE AUCKLAND ELECTRIC-POWER BOARD

v.

THE PUBLIC TRUSTEE OF THE DOMINION OF NEW ZEALAND AND ANOTHER

DELIVERED BY LORD NORMAND

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