England and Wales Court of Appeal (Civil Division) Decisions

BAILII Citation Number: [1953] EWCA Civ 2

Case No.:

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL.

Royal Courts of Justice
June 24 1953.

B e f o r e :

LORD JUSTICE SINGLETON
LORD JUSTICE DENNING
and
LORD JUSTICE MORRIS

Between:

WHITE

V

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(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters, Limited , Room 392 Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London W.0.2).

Counsel for the Appellant: MR DONALD MACINTYRE, instructed by Messrs Alfred H Silvertown & Co., London, Agents for Mr Arnold K Maplesden, London.
Counsel for the Respondents: MR E BRIAN GIBBENS, instructed by Messrs Doyle, Devonshire & Co., London, Agents for Messrs Dennis Berry & Co., Reading.

HTML VERSION OF JUDGMENT

LORD JUSTICE SINGLETON:

LORD JUSTICE SINGLETON: The Plaintiff, Mr Tom White, is a newsagent and tobacconist carrying on business at Canonbury, and he entered into an arrangement with the Defendants,who have a number of carrier cycles and other things of that nature, that they should supply him with a tradesman's cycle, a cycle with a large carrier in front, so that he could deliver his newspapers by that means.

The arrangement which I have mentioned was embrased in a written contract dated 13th April, 1948. When I say a "written contract" I mean that it is on a printed form used by the Defendant Company on which their name appears in print, and the agreement is stated to be made between them and the Plaintiff, who is spoken of as the hirer, while they are described as the Defendants

Clause 1 is:

> "The Defendants agree to let, and the Hirer agrees to hire, Carrier Cycles Nos. 13409 for the term of three years from the date hereof (and thereafter from year to year) at the weekly rent of 5s. each payable Quarterly in advance at the Defendants' above address, the first payment being due on delivery of the machines."

Clause 2:

> "In consideration of such sum the Defendants agree to maintain the machines in working order and condition (punctures excepted) and to supply Spare Carriers as soon as possible when the Hirer's machines are being repaired without any charge beyond the agreed amount as above … "

And in other clauses Defendants also agree to supply lamps and accessories and the like, and to repair damage in certain cases.

Upon that the Defendants supplied a machine which was used by the Plaintiff for a considerable period, and which, so far as we know, was kept in order until towards the end of May, 1950, when the machine, which was in the Plaintiff's possession under the contract, was in need of repair, and the Defendants were told of that.

On Saturday the 3rd June a representative of the Defendants went to the Plaintiff's newsagents shop and left a spare cycle instead of the cycle which was out of order, and he took away the cycle which required repair. In doing that the Defendants were purporting to perform their obligation under Clause 2 of the contract. The Plaintiff very soon got upon the cycle to go about his work. He did not examine the cycle, but made off up the road, and when he had gone about a quarter of a mile the saddle of the cycle went forward in such a manner that he was thrown off the machine on to the ground, and he hurt his right leg rather badly and he was shaken. He said he got up and pushed the bicycle back to his shop, the saddle then sloping down on to the cross-bar, and when he looked at the cycle again he found that the saddle was quite loose and moved about. It was not thought at first that Mr White was badly hurt, but unfortunately he had suffered an injury to his knee; he was in hospital some considerable time suffering from synovitis, and his condition, as shown by the medical reports, is that there is a certain amount of stiffness in the knee joint and that he is likely to have further trouble from time to time. The Judge who had the Plaintiff's claim before him said that if he had found the Plaintiff entitled to damages he would have awarded £505. That was a provisional assessment and no more.

Mr Gibbens, on behalf of the Defendants, has submitted that that amount is too much having regard to the nature if the injury and to the medical report. It was indicated to him, when he dealt with that part of the case, that this Court could not see any reason why it should be asked to interfere with the provisional assessment of damages by the learned Judge.

But more serious questions arise, and in order to appreciate them it is desirable that I should say a word or two upon the facts. The evidence given by the Plaintiff and by his wife, and by a young man named

Anthony who was employed by the Plaintiff, seemed to show that the cycle was out of order in that some nuts under the seat were rusty and could not be moved. The chief witness, whose evidence impressed the judge on that, was Anthony, who was not employed by the Plaintiff at the time of the trial, but was engaged on delivering newspapers and the like for the Plaintiff in June, 1950. He told the judge that, after hearing of the accident, he saw the cycle, and the saddle had tilted back. He said that on several occasions thereafter he used the cycle, and the saddle used to slip and caused him to lose control. He said the saddle slipped backwards generally when he was riding it; he tried to tighten the nut, but it was too rusty, the nut was too rusty to shift. There was other evidence on that on both sides.

The Plaintiff in this action against the Defendants set up two causes of action; the first was that the Defendants were responsible to him in damages for breach of warranty; they were under a duty under the contract to supply a cycle which was reasonably fit for the purpose for which it was required. I was said that they did not do so, and that the Plaintiff was entitled to damages.

The Plaintiff mad an alternative claim in paragraph 6 of the Statement of Claim in this way:

> "The said accident was due to the negligence and/or breach of contract of the Defendants their servants or agents whereby the Plaintiff has sustained personal injury and suffered damage. Particulars of negligence and/or breach of contract. The Defendants their servants or agents failed to take any or any proper care to ensure that the said spare carrier cycle was in proper working condition or in a proper state of repair or equipped or prepared for use by the Plaintiff and handed over the same and permitted the Plaintiff to mount and ride such spare cycle without warning when they knew or ought to have known that by reason of its defective condition as aforesaid the saddle thereof was not properly fastened and was dangerous whereby an accident and injury such as occurred was to be apprehended."

The second claim of the Plaintiff thus was: You, the persons from whom I had this cycle, owed a duty to take reasonable care, that is, to take that care which a reasonably careful cycle owner would take on the hiring to another of a cycle for his use, and you failed in that duty. If you had examined the cycle, you would have found that the nuts were rusty and that the saddle was loose. I used the bicycle in the way in which it was intended that I should use it, and I sustained an accident because you had not fulfilled your duty; you had not taken reasonable care; you were negligent, and I am entitled to damages.

In reply to both those claims the Defendants said: in the first place, they denied negligence and said that there was no breach of duty, nor was there a breach of contract. They added a plea in Paragraph 4 of the Defence:

> "By Clause 11 of the written agreement between the parties the Defendants are not liable for any personal injuries to the Plaintiff when riding a machine provided for him."

Clause 11 of the agreement is:

> "Nothing in this Agreement shall render the Defendants liable for any personal injuries to the riders of the machines hired nor for any third-party claims, nor loss of any goods, belonging to the Hirer, in the machines."

The important part of that is in the first line in the printed form: "Nothing in this Agreement shall render the Defendants liable for any personal injuries to the riders of the machines hired."

It is conceded by Mr Macintyre, who appears for the Plaintiff, that that clause would prevent the Plaintiff from succeeding on a claim based on breach of contract, but his submission is that in the circumstances proved there was negligence on the part of the Defendants, and that that clause is no bar to an action for damages for negligence.

The case was heard before Mr Justice Parker, whose judgment was in favour of the Defendants and against that judgment the Plaintiff appeals.

Mr Justice Parker appears to have accepted the evidence of the Plaintiff as to the condition of the cycle in preference to the evidence given on behalf of the Defendants, but he did not say in so many words that he found there was negligence on the part of the Defendants or of their servants. he said at page 7 of his judgment: The Defendants however rely on clause 11 of the written agreement", and he added, after reading that clause: "The first answer to that defence made on behalf of the Plaintiff is that the accident in question did not occur with a machine hired, but with a spare machine. It is submitted that this agreement, on its true construction, applies, and can only apply, to a hired machine. In other words, it was said the clause of the agreement which specifically mentioned machines hired gave the Defendants exemption or and escape only in respect of a machine which was a machine hired under the terms of the contract and not in respect of a spare machine provided to replace the hired machine when the hired machine was out of order, and that is the first point taken by Mr Macintyre on behalf of the Plaintiff in this Court.

Its is to be observed that the printed form of the agreement seems to contemplate that the hirer is going to take more than one machine; it deals with machines in the plural generally; but when you come to Clause 11 you find that the exemption is given in respect of personal injuries to the riders of "the machines hired".

In my opinion "machines hired" as used in that clause covers the spare machine which takes the place of the machine hired. I have formed that view after considering Clause 2 of the agreement, and Clause 12. I think it is the natural reading of the agreement, and that the submission made on behalf of the Plaintiff on that head fails.

The next submission on behalf of the Plaintiff is that though this clause, Clause 11, relieves the Defendants in respect of a claim for breach of contract arising from the agreement, it does not absolve them if there is a cause of action established on the ground of negligence.

Mr Gibbens, on behalf of the Defendants, submits that if there was negligence it was negligence in connection with the performance of the contract, that the machine which was supplied was supplied in performance of the obligation arising under the contract, and that that which was done was under the agreement, and that the cause of action, if there was one, arose out of the agreement, and that, whether there was negligence or not, Clause 11 prevents the Plaintiff from succeeding in an action of this nature.

That gives rise to a question of some nicety. Mr Justice Parker said (and I read from page 9 of his judgment):

> "There are many cases where a claim can properly be brought either in contract or in tort. Two examples spring to mind: the first is a case of a claim against a carrier. It can be brought in written contract; it can also be brought at common law for breach of the carrier's agreement at common law. Similarly, in the case of bailment, if a bailee fails to deliver goods at the end of the bailment the claim can be based on tort, on the ground that the bailee has detained or converted the bailor's goods, but in the present case there is, as it seems to me, no room for an alternative claim at common law."

I am not sure that this is right. We have had an advangage in this Court which was not given to Mr Justice Parker, in that we have had cited to us a number of authorities. I am inclined to think for this purpose most help is given by reference to the Speech of Lord MacMillan in the case of M'Alister (or Donoghue) v Stevenson reported in 1932 Appeal Cases at page 562 at page 609. The passage is as follows:

> "On the one hand, there is the well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence - and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the

> relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort. I may be permitted to adopt as my own the language of a very distinguished English writer on this subject. 'It appears', says Sir Frederick Pollock, Law Of Torts, 13th Edition, page 570, 'that there has been (though perhaps there is no longer) a certain tendency to hold that facts which constitute a contract cannot have any other legal effect'."

It is clear from those words of Lord MacMillan that you may have arising from some set of facts an action for damages for breach of contract and an action for a tort. It is said that that position arises in this case, and that, though an action for damages for breach of contract may be said to be barred by Clause 11 of the contract, it cannot be said that the words of that clause shut out the Plaintiff from that which he would normally have, an action for damages for the tort of negligence.

In Taylor v Manchester, Sheffield & Lincolnshire Ry Company, reported in 1895 1 Queen's Bench Division at page 134, Lord Justice A. L. Smith said at page 140:

> "It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with the company or not."

We were also referred to Kelly v Metropolitan Railway Company, which is reported in the same volume of the reports at page 944, and further to the case of Olley v Marlborough Court Ltd., which is reported in 1949 1 King's Bench Division at page 532, where at page 547 there is a reference in the judgment which I delivered, to words of Lord Justice Scrutton in Rutter v Palmer :

> "First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used … ."

Lord Justice Denning at page 550 of the same report said:

> "In cases where the establishment is clearly a common inn or, indeed, where it is uncertain whether it is a common inn or a private hotel, I am of opinion that a notice in these terms would not exempt the Defendants from liability for negligence but only from any liability as insurers."

In Olley's case the words of the notice were:

> "The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained."

Mr Macintyre, too, referred the Court to Alderslade v Hendon Laundry Ltd., which is reported in 1945 1 King's Bench Division at page 189, and in particular to the words of Lord Greene the Master of the Rolls at the top of page 192 where the learned Master of the Rolls summarised the effect of the authorities in this way:

> "The effect of those authorities can I think be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence."

In the circumstances of the present case the primary object of the clause, one would think, is to relieve the Defendants from liability for breach of contract or for breach of warranty. Unless, then, there be

clear words which would also exempt from liability for negligence, the clause ought not to be construed as giving absolution to the Defendants if negligence is proved against them. The result , Clause 11 ought not, I think, to be read as absolving the Defendants from liability for negligence, that is, if it is proved that the accident which the Plaintiff sustained is due to negligence, in other words, to lack of that care which one in the Defendants' position ought to take when handing out a cycle for the use of a Plaintiff; if that is proved, then the Defendants do not escape liability by reason of Clause 11.

The difficulty in this case arises from the fact that there is no finding on negligence. It may well be said that the learned Judge, in accepting the Plaintiff's evidence in preference to that of the Defendants, was inclined to the view that there was negligence on the part of the Defendants, but he did not so say. He placed an interpretation on Clause 11 which would cover negligence on the part of the Defendants; he assumed that it would. In those circumstances, I am afraid we are not in a position to deal with this case finally, and it appears to be necessary that there should be a new trial on the subject of negligence, with the expression of opinion of this Court that if negligence is proved against the Defendants they do not escape liability by reason of the terms of Clause 11.

In that sense I think this appeal ought to be allowed, and there ought to be a direction for a new trial between the parties.

LORD JUSTICE DENNING: In this case the Defendants supplied a bicycle on hire to the Plaintiff, who was a newsvendor, intending that he and his servants should ride it. The bicycle was defective, and, in consequence of the defect, the newsvendor was thrown off and injured. The newsvendor now claims damages for breach of contract or negligence. The Defendants claim to be protected by the printed clause which my Lord has read.

In this type of case two principles are well settled. The first is that if a person desires to exempt himself from a liability which the common law imposes on him, he can only do so by a contract freely and deliberately entered into by the injured party in words that are clear beyond the possibility of misunderstanding. The second is: If there are two possible heads of liability on the Defendant, one for negligence, and the other a strict liability, an exemption clause will be construed, so far as possible, as exempting the Defendant only from his strict liability and not as relieving him from his liability for negligence.

In the present case, there are two possible heads of liability on the Defendants, one for negligence, the other for breach of contract. The liability for breach of contract is more strict than the liability for negligence. The Defendants may be liable in contract for supplying a defective machine, even though they were not negligent. (See Hyman v Nye 1881), reported in 6 Queen's Bench Division at page 685.) In these circumstances, the exemption clause must, I think, be construed as exempting the Defendants only from their liability in contract, and not from their liability for negligence.

Mr Gibbens admitted that, if the negligence was a completely independent tort, the exemption clause would not avail, but he said that the negligence here alleged was a breach of contract, not an independent tort. The facts which give rise to the tort are, he said, the same as those which give rise to the breach of contract, and the Plaintiff should not be allowed to recover merely by framing his action in tort instead of contract. That was the view which appealed to Mr Justice Parker but I cannot agree with it.

In my opinion, the claim for negligence in this case is founded in tort and not on contract. That can be seen by considering what would be the position if, instead of the newsvendor himself, it was his servant who had been riding the bicycle and had been injured. If the servant could show that the Defendants had negligently sent out a defective machine for immediate use, he would have had a cause of action in negligence on the principle stated in Donoghue v Stevenson, reported in 1932 Appeal Cases at page 562, and, as against the servant, the exemption clause would be no defence. That shows that the Defendants owed a duty of care to the servant. A fortiori they owed a like duty to the newsvendor himself. In either case, a breach of that duty is a tort which can be established without relying on any contract at all. It is true that the newsvendor could also rely on a contract, if he had wished, but he is not bound to do so, and if he can avoid the exemption clause by framing his claim in tort he is, in my judgment, entitled to do so.

Mr Gibbens relied on a passage in the Speech of Lord Finlay in the case of Elder, Dempster v Paterson reported in 1924 Appeal Cases at page 548. That was a case where a clause in a Bill of Lading exempted the charterers and the owners from liability for bad stowage, and the question was whether the owners (who were not parties to the contract) could take advantage of the exemption. It was held that they could. The decision, as I read it, was that, when a party to a contract has deliberately in plain words agreed to exempt a third party from liability for negligence, intending that the third party should have the benefit of the exemption, he cannot go back on his plighted word and disregard the exemption. It is one of the cases where a third party can take advantage of a contract made for his benefit, of which I gave some illustrations in Smith v River Douglas Catchment Board reported in 1949 2 King's Bench Division at page 514 to 516. It has, however, no application to this case.

Mr Gibbens also relied on the judgment of Lord Justice Scrutton in Hall v Brooklands Auto-Racing Club reported in 193] 1 King's Bench Division at page 213, when he said :

> "When the Defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort."

This passage only refers to cases where there is a contract by the Plaintiff which plainly gives an exemption to the Defendant from liability for the tort. For instance, if a transport company expressly stipulates with the Plaintiff for exemption from liability for damage, howsoever caused, the Plaintiff cannot overcome that exemption by suing in negligence instead of contract. But the contract in such a case must be by and with the Plaintiff. In a case such as Donoghue v Stevenson, a manufacturer cannot exempt himself from liability to the consumer simply by putting an exemption clause in his contract with the wholesaler, even though the clause is brought to the consumer's notice and says that the consumer is to have no claim for negligence. It is not a clause for the benefit of a third party, but to his prejudice and is not binding on him.

Neither of those cases affect the present case, which turns on the construction of the exemption clause. In my judgment, it exempts the Defendants from liability in contract, but not from liability in tort. If the Plaintiff can make out his cause of action in negligence, he is, in my opinion, entitled to do so, although the same facts also give a cause of action in contract from which the Defendants are exempt.

I agree, therefore, with my Lord that this appeal should be allowed, but as there is no definite finding of negligence or no negligence, and we have no transcript of the evidence with which to decide it ourselves, there must be a new trial to decide that point.

LORD JUSTICE MORRIS: The determination of the matters raised in this appeal depends on construing Clause 11 of the agreement.

Mr Macintyre has submitted, in the first place, that the words "machines hired" bear reference only to machines originally supplied and not to any that are delivered in substitution during a period when the original ones are under repair. Clause 2 of the agreement provide that there is an obligation "to supply spare carriers as soon as possible when the hirer's machines are being repaired without any charge beyond the agreed amount as above," There was therefore to be payment for the substituted machine, and that, in my judgment, was payment by way of hire. I think that a consideration of Clauses 4 and 8 referred to by Mr Justice Parker in his judgment, and a consideration of Clause 12 additionally referred to by Lord Justice Singleton, all make it impossible to sustain that contention raised by Mr Macintyre.

The far more difficult part of the case concerns the interpretation of Clause 11 so as to decide whether it does, or does not, provide an exemption from liability in all circumstances.

During the course of the argument I entertained some doubt in regard to this matter, but on consideration I have reached the clear conclusion that Clause 11 does not provide an exemption if negligence is alleged and proved, and I am in agreement with the judgments which my Lords have delivered.

Although the wording of this clause differs from the wording of other clauses, and, perhaps, by its special language raises certain difficulties, there is no doubt in regard to the general approach in a case of this kind. That approach was clearly laid down by Lord Justice Scrutton in Rutter v Palmer, reported

in 1922 2 King's Bench Division and the three considerations set out by Lord Justice Scrutton were these:

> "In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him.";

and to the same effect were the words of Lord Greene the Master of the Rolls, in the case of Alderslade v Hendon Laundry Ltd., in the passage quoted by Lord Justice Singleton.

Applying those principles to the words in Clause 11, it seems to me that Mr Macintyre is right when he says that the words in Clause 11 may refer to matters other than matters based on an allegation of negligence. The opening words of Clause 2 are as follows:

> "In consideration of such sum the Defendants agree to maintain the machines in working order and condition."

Clause 11 as an exempting clause might operate on such a provision as those opening words of Clause 2; and, doubtless, other provisions also. The clause can apply to some injury occurring without negligence. Applying the principles of construction laid down by Lord Justice Scrutton and by Lord Greene, I have reached the conclusion that Clause 11 is not clear so as to exempt from liability if negligence is proved. I therefore concur in the course which has been proposed for the reasons which my Lords have given.

> **Order: Appeal allowed; judgment below set aside and new trial on issue of negligence. The Appellant to have the costs of the appeal; the costs of the first trial to be dealt with by the judge at the second trial.**
