Millar Vs. Galashiels Gas Co.

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Court : House of Lords

Decided On : Jan-20-1949

Judge : LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT, LORD REID

Appeal No. : No

Appellant : Millar

Respondent : Galashiels Gas Co.

Judgement :

LORD NORMAND.—I have had the advantage of reading in print the speeches which my noble and learned friends are about to deliver, and I find myself in complete agreement with them. The facts will be dealt with by my noble and learned friend Lord Reid. I desire only to emphasise that no new principle and no extension of any principle already recognised is involved in the conclusion that the appellants are liable to the respondent for breach of the duty imposed on them by section 22 (1) of the Factories Act, 1937. The only question of law in the case is the proper construction of the obligation imposed by section 22 (1) as controlled by the definition of "maintained" in section 152 (1), and on that I wish to add nothing.

LORD MORTON OF HENRYTON.—Section 22 (1) of the Factories Act, 1937, is in the following terms:—

"Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained."

The statutory duty which, it is alleged, the appellants have failed to discharge is contained in the words, "Every hoist or lift shall be properly maintained" in section 22 (1) read in conjunction with the definition of "maintained" in section 152 (1):

"'Maintained' means maintained in an efficient state, in efficient working order, and in good repair."

I think there can be no doubt that this subsection imposes a continuous obligation on the appellants. I shall shortly consider the precise nature of that obligation. Equally there can be no doubt, in view of the Lord Ordinary's findings of fact, that the brake of the lift in question was not in efficient working order at the time when the accident happened, though it would appear to have worked efficiently during the periods before and after the accident.

The contention of the respondent, which has so far succeeded, is that she has

established a breach of statutory duty by the appellants simply by proving that the brake was not in efficient working order at that time. If this contention is sound, the appeal must fail, for contributory negligence by the deceased workman has been negatived, and there can be no doubt that the failure of the brake to operate efficiently caused the death of the deceased.

The appellants contend that no breach of statutory duty has been proved. They contend that their statutory duty is to take such active steps as will ensure that the lift is in efficient working order, and that the respondent cannot succeed unless she can point to some particular step which the appellants omitted to take and which would have prevented the accident. They say truly that the respondent cannot point to any such step, and failed to prove any specific cause for the failure of the brake to operate. They rely strongly upon the following passages in the judgment of the Lord Ordinary (1948 S. C. at p. 195):

"I am satisfied that the defenders took every practical step to ensure that the lift mechanism worked properly and was safe to use. I am equally satisfied that the failure of the brake was one which, apparently, nobody could have anticipated or, after the event, explain.... That the defenders took all reasonable steps to provide a suitable lift and to maintain it properly is to my mind established beyond doubt."

In my view, the Lord Ordinary supplied the correct answer to the whole of this argument when he said:

"In my opinion ... there is imposed on the defenders an absolute and continuing obligation binding upon them which is not discharged if at any time their lift mechanism, in this case the brake, is not maintained in an efficient state, in efficient working order, and in good repair."

The words of the subsection are imperative "shall be properly maintained" and I can find nothing in the context or in the general intention of the Act, read as a whole, which should lead your Lordships to infer any qualification upon that absolute obligation. It is quite true that the subsection, so read, imposes a heavy burden upon employers, but the object of this group of sections is to protect the workman. I think the subsection must have been so worded in order to relieve the injured workman from the burden of proving that there was some particular step which the employers could have taken and did not take. This would often be a difficult matter, more especially if the cause of the failure of the mechanism to operate could not be ascertained. The statute renders the task of the injured workman easier by saying, "You need only prove that the mechanism failed to work efficiently and that this failure caused the accident."

Counsel for the appellants contended that a decision against his clients "Would go further than any decided case." I do not agree, but, even if I did agree, I should not be unduly perturbed. Your Lordships were not referred to any decision on this particular subsection, but there are other statutory provisions for the protection of workmen which have been held to impose an absolute and continuing obligation upon employers. See for instance, Smith v. Cammell Laird and Co .; Riddell v. Reid; Carroll v. Andrew Barclay and Sons [1948] AC 477 . In the last mentioned case this House had to decide a question as to the nature of the fencing which was required under section 13 (1) of the Factories Act, 1937, but no member of the House doubted that the obligation as to fencing was absolute and continuous. Lord Normand observed:

"The subsection imposes an absolute obligation in the sense that the obligation, whatever its meaning and effect, must be actually fulfilled and not merely that the occupier of the factory must do his best to fulfil it."

Counsel for the appellants relied upon the word "properly" in section 22 (1), and contended that the presence of this word indicates that the obligation of the employers is limited. I cannot agree. If the word "maintain" alone imposes upon the employers the absolute obligation, I cannot see that the addition of the word "properly" can lessen their obligation. In the case of Cole v. Blackstone and Co. [1943] KB 615, Macnaghten, J., had to consider section 25 (4) of the same Act which provides, "all ladders shall be soundly constructed and properly maintained." The facts were that, when a workman named Cole was ascending a ladder, a rung gave way, with the result that he fell to the ground and received injuries from which he died. The ladder was subsequently taken to pieces and examined. The strings were made of deal and the rungs of coppice oak, and both the strings and all the rungs, including that which had given way, were found to be in perfect condition. The rungs were screwed to the strings with three-inch steel screws, and it was found that the screws holding the rung which had given way had broken in half at a point between the rung and the string and that the fractures were due to corrosion. All the other screws were in perfect condition. A few weeks before the accident happened the ladder had been inspected by a "safety first" committee appointed by the defendants, to which the workmen elected their own representatives, and nothing had been found requiring attention. Cole, who used the ladder several times a day, had never made any complaint about it. Cole's widow was successful in an action alleging breach of the statutory obligation imposed by section 25 (4), and Macnaghten, J., said, in regard to the words "properly maintained":

"Mr Marshall, for the defendants, submitted that the statutory duty to keep the ladder in an efficient state and in good repair is not an absolute duty, and that the words of the Act must be qualified to this extent that, if the employer took all reasonable steps to see that the ladder was in an efficient state and in good repair, he would have discharged his duty. In support of this contention he relied on the observations of Lord Wright in English v. Wilsons and Clyde Coal Co., while Mr Dixon, on the other hand, relied on the observations made in Riddell v. Reid . I see no ground for qualifying the words of section 25 (4) of the Factories Act, 1937. The duty to keep all ladders in an efficient state and in good repair appears to me to be as absolute as the duty imposed by the Act to fence all dangerous parts of machinery. It is true that the defendants took great care for the safety of their men, and that this particular failure was one which, apparently, nobody could have anticipated."

Later, the learned Judge added:

"The ladder was not in fact in an efficient state or in good repair on the morning of the accident. The plaintiff, therefore, is entitled to recover compensation."

I agree with the reasoning and with the conclusion of Macnaghten, J., and, in my view, a similar construction should be placed on the same phrase "properly maintained" where it appears in section 22 (1). I have carefully considered all the other sections of the Act which were mentioned in the course of the argument on the present appeal, but I can find nothing in them which throws doubts upon this view.

Counsel sought to rely upon the observation of Lord Atkin in Caswell v. Powell

Duffryn Associated Collieries, Limited :

"The statute does not in terms create a statutory cause of action. It does not, for instance, make the employer an insurer."

That observation of does not assist the appellants, when read in its context. Lord Atkin went on to say:

"The person who is injured, as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach."

So in the present case the respondent would have failed in her action if the Lord Ordinary had held that there was a breach of duty, but that such breach of duty was not the cause of the fatal accident.

Finally, counsel sought to derive assistance from certain observations of the Lord President in the case of Reilly v. William Beardmore and Co. In that case the First Division had to consider section 23 (1) (a) of the Act, which provides, "No chain, rope or lifting tackle shall be used unless it is of good construction, sound material, adequate strength and free from patent defect." The last five words are not present in the section now under consideration, and, in my view, the Lord President's observations, properly construed, contain nothing which is inconsistent with the views which I have already expressed as to the absolute duty imposed by section 22 (1).

For these reasons, which are in substance the same as the reasons advanced by the majority of the Second Division of the Court of Session, I would dismiss the appeal.

LORD MACDERMOTT.—But two questions remain for determination in this appeal. The first is as to the nature of the duty imposed by subsection (1) of section 22 of the Factories Act, 1937; the second is whether the respondent has proved a breach of the duty arising under that subsection. Section 22 (1) of the Act of 1937 reads thus:—

"Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained."

To this must be added the following definition from section 152 (1):—

"'Maintained' means maintained in an efficient state, in efficient working order, and in good repair."

Leaving out of these provisions the words which are not immediately material, the terms of the obligation are:

"Every … lift shall … be properly maintained … in efficient working order…."

If this means that every lift shall be kept continuously—or at least while it is available for use as a lift—in efficient working order the nature of the obligation is clear. It then falls into a category long recognised and firmly established by authority; it is a strict or absolute duty and neither intention nor lack of care need be shown in order to prove a breach of it. This was not, indeed, disputed, but Mr Guest, on behalf of the appellants, submitted that on the true construction of the subsection such was not its

meaning. He contended that, in this context, "maintained" did not connote the continuance of a state, and he relied upon the adverb "properly" as introducing something less than an absolute standard. If, he said, the appellants had done all that was reasonable and proper to "maintain" the lift and its mechanism, they had not fallen short of what the statute requires.

The word "maintain" when used in relation to the state or condition of things is not always used in the same sense. It may be used to indicate the continuance of a particular state or condition, as when one says of someone that "he maintains his buildings just as they were." But on occasion it takes colour from the work of maintenance and is used in reference to the acts done or requisite to be done in the course of maintenance, as when one says of another that "he maintains his buildings methodically." This latter use gives the word "maintained" in relation to machinery rather the meaning of "serviced" or "looked after" or "attended to"—I doubt if there is an exact synonym—and it was in this sense, according to the appellants' argument, that the word ought to be read in section 22 (1). If that argument prevails the appeal should succeed, as the Lord Ordinary has found that the appellants took "every practical step to ensure that the lift mechanism worked properly and was safe to use," and, again, that "the failure of the brake was one which, apparently, nobody could have anticipated or, after the event, explain."

Had the Legislature thought fit not to define "maintained" Mr Guest's submission on this aspect of the case would have encountered less difficulty. But, when the terms of the definition are regarded, the meaning for which he has contended is, in my opinion, at once displaced. To my mind they indicate conclusively that in section 22 (1) "maintained" is employed to denote the continuance of a state of working efficiency. In the ordinary use of language one cannot be said to maintain a piece of machinery in efficient working order over a given period if, on occasion within that period, the machinery, whatever the reason, is not in efficient working order. In short, the definition describes a result to be achieved rather than the means of achieving it. I do not think the use of the word "properly" weakens or detracts from the compelling effect of this definition. Why exactly "properly" was inserted is perhaps a matter of speculation, as the Act does not appear to furnish any very obvious explanation. But, however this may be, the word is certainly not incompatible with the duty in question being absolute in character. There may be more than one way of discharging such a duty, and I do not see that the quality of the duty need be affected by an additional obligation to discharge it in a proper manner.

I turn now to the second question. Did the respondent prove the breach alleged? The point made against her was that she had failed to do so because the cause of the failure in the lift mechanism had not been discovered and remains a mystery. In my opinion, this point has no substance. There was abundant proof that the mechanism had failed and that that failure resulted in the death of the respondent's husband. Once the absolute nature of the duty imposed by the statute is established, that is proof enough. The obligation was to have the lift "in efficient working order" at the time of the accident, as well as at other times, and the breach of that obligation has been clearly shown.

For these reasons I am of opinion that the view taken by the Courts in Scotland was right. I would therefore affirm the interlocutors and dismiss the appeal.

LORD REID.—[After the narrative quoted above]—I agree with the Lord Ordinary in

saying:

"I am satisfied that the defenders took every practical step to ensure that the lift mechanism worked properly and was safe to use. I am equally satisfied that the failure of the brake was one which, apparently, nobody could have anticipated or, after the event, explain."

The question at issue in this case is the nature and extent of the duty imposed on employers by section 22 (1) of the Factories Act, 1937. That subsection requires that "every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained." The word "maintained" is defined in section 152 as meaning "maintained in an efficient state, in efficient working order, and in good repair." It has been held by the Lord Ordinary and by the learned Judges of the Second Division, Lord Mackay dissenting, that this section imposed upon the appellants an absolute duty to have the lift in efficient working order, that the accident was caused by its not being in efficient working order, and that therefore the respondent is entitled to damages.

The appellants' case is that section 22 (1) of the Act does not impose an absolute duty to keep lifts in efficient working order and that a pursuer cannot succeed without averring and proving the nature of the defect which prevented the lift from being in efficient working order. It was argued that the requirement is, not that the lift shall be in efficient working order, but that the employer shall take all necessary steps to ensure that it is so, and therefore that a pursuer must show what it was that the employer could have done to prevent the accident but did not do. But it is clear, as the appellants' counsel properly admitted, that the employer's duty under the section goes beyond a duty to take care. It was admitted that the employer is liable in damages where the defect could not have been discovered before the accident by any examination which any reasonable man would have undertaken, and even where the defect was a latent defect which could not have been discovered by examination before the accident of the defective part of the mechanism. In such cases it would have been physically possible to prevent the accident. In the present case, as no one has discovered the cause of the defect, the respondent cannot show whether or how the accident could have been prevented, and therefore, it is said, cannot establish any breach of duty by the appellants.

I can understand a duty to exercise a high degree of care and I can understand an absolute duty under which the mere fact that a machine is not in efficient working order entails liability if that is the cause of injury to a workman, but I find it hard to understand the nature of a duty which falls short of an absolute duty but yet cannot be discharged even by the highest degree of care, and equally hard to understand what practical object could be achieved by enacting a duty of this character. The result would be that the pursuer would have to undertake an investigation of the precise nature of the defect which would often be difficult and expensive. Where this investigation was successful, it would be no defence for the employer to show that he could not by any exercise of care have prevented the accident. But where this investigation failed, as it did in this case, the employer would be under no liability. I think that clear words would be necessary before it could be held that such was the intention of the Legislature.

Much stress was laid by the appellants' counsel on the word "properly" in section 22 (1). It was argued that the introduction of this word must be held to have some effect;

that, if the section without this word would have imposed an absolute duty, the insertion of the word could not increase the obligation on the employer, so it must have been intended to reduce that obligation. "Properly" must refer to the conduct of the employer so that the section requires, not that the mechanism shall always be in efficient working order, but that the employer shall take such active steps as are necessary to ensure that it is in efficient working order. It follows that, if a pursuer cannot specify any step which could have been taken by the employer to avoid the accident, he cannot show that the employer was in breach of the statutory duty; as the present respondent has not proved the cause of the accident, she cannot point to any particular step which could have been taken to avoid it. I cannot attribute any such effect to the use of this word. I think that there may be a much simpler explanation of its use. If the definition of "maintained" in section 152 (1) had been written into section 22 (1), there would have been no need to insert the word "properly." The relevant part of the subsection would then have read:—

"Every hoist or lift shall … be maintained in an efficient state, in efficient working order, and in good repair."

But if the definition were not written in and the word "properly" omitted, the result —"every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be maintained"—would have been so bald as to be misleading. I doubt whether the word "properly" was inserted for any purpose beyond rounding off the sentence. In any event it does not appear to me to alter the sense of the sentence. If the duty is proper maintenance and maintenance is defined as maintenance in efficient working order, then, once it is established that the duty goes beyond a duty to exercise care, the fact that on a particular occasion the mechanism was not in efficient working order shows that there had not been proper maintenance. Reference was made to a number of sections of the Act where the word "maintained" occurs, and particularly to sections 24 and 25 where the phrase "properly maintained" is used, but I do not think that a comparison of these sections with section 22 assists materially the decision of the present case.

A number of previous decisions were canvassed in argument. In Cole v. Blackstone and Co., the accident was caused by the rung of a ladder giving way. The rungs were held in place by steel screws. It was found after the accident that the screws which had held the rung which had given way had broken owing to corrosion, but that all the other screws were in perfect condition. The corroded screws broke when the injured workman stepped on the rung which it held. The case was laid on a breach of section 25 (1) of the Factories Act, 1937, which provides that "all ladders shall be soundly constructed and properly maintained." Macnaghten, J., having held that the ladder was soundly constructed said:

"On the question whether the ladder was in an ‘efficient state’ and in ‘good repair’ on the morning of the accident, the fact that the rung gave way establishes, to my mind, beyond question, that the ladder was not in an efficient state and was not in good repair at that time. Mr Marshall, for the defendants, submitted that the statutory duty to keep the ladder in an efficient state and in good repair at that time. Mr Marshall, for the defendants, submitted that the statutory duty to keep the ladder in an efficient state and in good repair is not an absolute duty, and that the words of the Act must be qualified to this extent that, if the employer took all reasonable steps to see that the ladder was in an efficient state and in good repair, he would have discharged his duty. In support of this contention he relied on the observations of Lord Wright in Wilson

and Clyde Coal Co. v. English, while Mr Dixon, on the other hand, relied on the observations made in Riddell v. Reid . I see no ground for qualifying the words of section 25 (4) of the Factories Act, 1937. The duty to keep all ladders in an efficient state and in good repair appears to me to be as absolute as the duty imposed by the Act to fence all dangerous parts of machinery."

The appellants' counsel sought to displace this interpretation by referring to a number of dicta; he was unable to cite any decision which was inconsistent with it. In Lewis v. Denye, Viscount Simon, L.C., quoting from a speech of Lord Atkin in an earlier case—Caswell v. Powell Duffryn Associated Collieries, Limited —said:

"The statute does not in terms create a statutory cause of action. It does not, for instance, make the employer an insurer. The person who is injured, as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach."

That does not appear to me to help the appellants; it is entirely consistent with the existence of an absolute duty. However absolute the duty may be, a pursuer cannot succeed unless he proves that his injury was caused by a breach of that duty. In Lewis v. Denye there had been a breach of absolute duty, but the plaintiff's action failed because the cause of his injury was held to be, not that breach of duty, but his own negligence in failing to use a safety device with which he had been furnished. It was accordingly appropriate to restate that such a duty does not make the employer an insurer. If, in the present case, the appellants had proved that George Millar's death was due to his own negligence and not to their breach of duty they would have succeeded. In Smith v. Cammell Laird and Co., Lord Atkin said:

"It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another."

It was argued that Lord Atkin's reference to "a specified activity" means that the pursuer must specify the act, the doing or neglect of which led to the plant not being safe. I do not so read the words. In that case shipbuilding regulations made under the Factory and Workshop Act had provided that all staging should be securely constructed of sound and substantial material and should be maintained in such condition as to ensure the safety of all persons employed. A workman fell and received injuries as a result of there being a defect in staging, but no point was made in the case about the precise nature of the defect. I think that Lord Atkin was referring to an activity specified in the statute or regulation; he cannot have meant that there was an absolute obligation to perform or forbear from performing some activity not so specified. Reference was also made to a passage in the speech of Lord Warrington of Clyffe in M'Mullan v. Lochgelly Iron and Coal Co., quoted by Lord Thankerton in Riddell v. Reid, beginning with the words "If the obligation is to do or abstain from doing "a particular thing" and it was argued that the particular thing which it was the obligation of the appellants to do in the present case to avoid the accident has not been discovered. I do not agree. The obligation of the appellants was that which is expressed in the Act—to maintain the hoist in efficient working order. That is the particular thing which they were under a duty to do. How they did it or how they failed to do it was their concern. It was not the concern of the workman and is not the concern of the respondent. None of the other authorities cited appears to

me to have any direct bearing on the present case or to aid in its decision. 1 agree with the opinions of the majority of the Judges of the Second Division and I would dismiss this appeal.