SANITARY COMMISSIONERS FOR GIBRALTAR v ORFILA and others

Privy Council
Lord Watson, Sir Barnes Peacock and Sir Richard Couch
2, 3 May 1890

Statutory bodies — liability of
Roads — maintenance of retaining walls
Negligence — liability of statutory bodies

The respondents claimed damages for injury to their property, caused by the fall of an overhanging road, supported by a retaining wall which gave way following exceptionally heavy rains. The claim was based on an allegation that the appellants, who were charged with the duty of maintaining and repairing public highways, had negligently remained ignorant of structural defects. The Chief Justice, sitting with assessors, found for the respondents. The appellants appealed.

Held: (i) The liability of a statutory body must be determined upon a true interpretation of the statute under which it was created.

(ii) The only duty expressly laid on the appellants was to maintain and repair retaining walls for the safety of passengers and ordinary traffic.

(iii) The appellants were merely a body exercising administrative powers on behalf of the Government and had no liability which did not exist before in respect of original defects in the retaining wall.

Note. The Sanitary Order, 1883, was repealed by the Public Health Ordinance Gibraltar, 1907, which was in turn repealed by the Public Health Ordinance (Cap. 131, 1970 Ed.). Under s. 242 of the latter ordinance, it is now the duty of Government to maintain all public highways.

Cases referred to in the judgment

Mersey Docks and Harbour Board Trustees v Gibbs, (1866) L.R. 1 H.L. 93.
Coe v Wise, (1866) L.R. 1 Q.B. 711.
Gibson v Mayor of Preston, (1870) L.R. 5 Q.B. 218.

Appeal

This was an appeal from a decree of the Supreme Court awarding the respondents 55,000 pesetas as damages for negligence, and an order refusing a rule to show cause why a new trial should not be granted.

Cohen, Q.C., Sir Horace Davey, Q.C., and Cowell, for the appellants
Finlay, Q.C., and English Harrison, for the respondents

28 June 1890: The following judgment was delivered —

This is an appeal from a decree and order of the Supreme Court of Gibraltar, entering judgment against the appellants for 55,000 pesetas in respect of a verdict obtained by the respondents before the chief justice and assessors, and refusing a motion for a rule to shew cause why the verdict should not be set aside and a new trial granted. The points raised for decision in the course of the argument cannot be intelligibly stated without some detail of the circumstances of the case. The substantive facts proved at the trial were not made matter of dispute, although the parties seriously differed as to the inferences which ought to be derived from them.

The respondents have amongst them the full title to a parcel of ground in Gibraltar, with a dwelling-house and other premises erected thereon, situate at the base of a steep rocky cliff. At the height of 45 feet above the respondents' property, a highway 15 feet wide, and known as the Castle Ramp or Road, runs along the face of the cliff. The inner edge of the road is bounded by the wall of an old Moorish castle, and has apparently a secure foundation; but its outer edge, which was bounded by a parapet wall, rested upon soil kept in position by a retaining wall, which was carried down to the rock. The parapet wall had its foundation in the soil confined between the face of the rock and the retaining wall. In these circumstances it is obvious that the efficacy of the support given to the outer part of the road depended upon the stability of the retaining wall, and the pressure which the latter had to resist was increased by the weight of the parapet wall.

The appellants are the Sanitary Commissioners for Gibraltar appointed in terms of the Sanitary Order in Council, Gibraltar, 1883. It will be necessary hereafter to make particular reference to the terms of the ordinance; for the present it is sufficient to say that the appellants are thereby charged with the duty of maintaining and repairing public highways, including the road already described.

During the seven days commencing on 26 December 1887, and ending on 1 January 1888, there was continuous and heavy rain. From 26 to 29 December the total rainfall was 5.92, and on the three following days 7.02 inches. On 29 December part of the retaining wall gave way at its base, and the débris fell upon the respondents' property, occasioning considerable damage. On 2 January a second slip occurred, when the remainder of the retaining wall came down, bringing with it the parapet wall and four feet of the outer margin of the road, to the further injury of the respondents' premises.

The action is directed against the appellants in their capacity of Sanitary Commissioners, and the only conclusion to which it is necessary to advert is that for recovery of damages for injury to the premises consequent upon the giving way of the retaining wall. Shortly stated, the allegations made by the respondents in support of their claim are to the effect that the appellants being, by the Sanitary Order of 1883, vested with the road, its culverts, water-channels, and retaining and other walls, for the purpose of "controlling, managing, and maintaining" the same, did discharge the duties thus imposed upon them so negligently and unskilfully that "the said highway and walls were in a dangerous state, whereof the defendants had or were bound to have notice," in consequence of which the "said wall or walls, or part thereof, slipped and fell" in and upon the premises of the respondents. The alleged grounds of liability may be resolved into these propositions,— (1) that the sanitary ordinance cast upon the appellants the duty of maintaining the road and retaining walls in a stable condition, with a view to the safety and protection of the respondents' property, and (2) that the appellants, or those for whose acts and omissions they are responsible, negligently failed to perform that duty.

At the trial of the cause, it was proved that neither the road, nor the retaining wall which was necessary for its support, had been constructed by the Sanitary Commissioners, and that both had existed from a period beyond human memory. After the fall occurred it was discovered that the original construction of the base of the retaining wall was defective. The foundation of the wall is said by the witnesses to have been wanting in thickness and solidity, and it was rested on the rough slope of the rock, instead of a transverse cutting being made into the face of the rock for its reception.

The surface of the road, which was paved with cobbles, and also its water-channels, were, in the end of December, 1888, in the same condition in which they had been kept for more than twenty years past. It does not admit of dispute that cobbles permit water to percolate through them more freely than a surface macadamized or flagged.

The evidence points to the conclusion that the original weakness of its foundation, and possibly the presence of water between it and the rock, were the proximate causes of the retaining wall bulging out or slipping on 29 December, and of its subsequent collapse. Captain Buckle, R.E., the Colonial Engineer, and leading witness for the respondents, after describing

the defects of the foundation, goes on to say, "The saturation of the strip between walls would be another source of want of safety." But the same witness explains that "if outer wall had foundations, proper thickness and solidity, it would have retained the road, wet or dry, even if pavement permeable"; and in this he is corroborated by Colonel Stephens, R.E., the other witness of skill for the respondents, who says, "If foundations of wall had been in good rock the rain would not have affected them."

No attempt was made by the respondents to prove that the appellants or their officials actually knew or believed that the foundation of the retaining wall was insecure. And it has not been suggested that, assuming the appellants to have been justified in supposing the foundation to be sufficient, they were guilty of negligence, inasmuch as they did not make the surface of the road impervious to water. The only fault which the respondents, in their evidence, attribute to the appellants, consists in the latter having, before the disaster, negligently remained ignorant of the structural defects which it exposed. There being a controversy between the parties on this point, it is necessary to advert to the circumstances upon which the imputation of negligent ignorance rests.

Until December, 1888, the retaining wall had remained in situ, giving efficient support to the Castle Road, without exhibiting any symptoms of frailty or decay. So long as it stood, there were no external or visible signs to indicate that it was less stable, and therefore more liable to give way, than it had been ten or even sixty years ago. The disaster of 1888–89 revealed the fact that it was, and had all along been, attended with danger owing to structural defects in its foundation. That is admitted on all hands; but the fact that latent danger did exist does not necessarily imply that there was negligence in not discovering its existence. There is no evidence tending to fix such negligence upon the appellants, except in the testimony of Captain Buckle; and all that he says on the subject is: "I was engineer of the Sanitary Commissioners nearly three years. Do not recollect visiting that road. The result proves that there must have been danger. I had a special assistant for roads, Mr. Tudury. Jones' Battery is over road. *As an expert I say that if it had been specially inspected the danger would have been discovered. The whole should have been examined if you wish to discover danger.*" It may be observed that these statements were made on cross-examination, no allusion being made to the subject in his evidence-in-chief; but on re-examination he says, "*I think the locality called for special examination.*"

At the end of the trial the learned Chief Justice submitted eleven questions, to all of which his assessors gave unanimous replies; and judgment was then reserved, in order that parties might be heard upon the points of law arising upon the application of these special findings. Some of them, which relate to the title of the respondents, contributory negligence, and other issues which have not been referred to in the course of the argument, need not be noticed here. The questions and answers of material importance

in this appeal are the following:—

Question 3. Whether the wall and portion of ground which fell 29 December 1887, formed part of road, or was necessary for support of road?—*Answer.* That the wall which fell on 29 December 1887, did not form part of road, but was necessary for its support.

And, if the reply to this question be in the affirmative, then,—

Question 4. Whether the defendants, by their servants, took reasonable care, considering the situation of the road and retaining wall, to ascertain that they, as well as the surface and other drains, culverts, &c., were in a proper state of repair?—*Answer.* No.

Question 5. And whether the defendants, through their servants, had the means of knowing that the road and retaining wall, as also the above drains, &c., were not in a proper state of repair?—*Answer.* Yes.

Question 6. And whether the damages would equally have happened if the road and retaining wall, drains, &c., had been in a proper state of repair?—*Answer.* No.

On the further hearing of the cause the present appellants argued that judgment ought to be entered in their favour, in respect that—(1) the retaining wall was found not to be part of the road; (2) no duty was cast upon them to repair the wall; (3) that they are a public body executing statutory duties without reward; and (4) that they are not liable for acts of nonfeasance, but only of misfeasance. In his judgment, which was delivered on 7 January 1889, the Chief Justice dealt with all these reasons. He held that the retaining wall was vested in the appellants for all the purposes of the sanitary order; and, although he does not expressly say so, he evidently assumes that the protection of the respondents' premises against risks arising from original defects in the structure of the retaining wall constituted one of these purposes; or, at all events, that the duty was cast upon the appellants of maintaining the wall in such a condition as to prevent injury to these premises. The judge rejected the third reason (which, as an independent proposition, is hardly maintainable) upon the authority of the *Mersey Docks Case* [1] and *Coe v Wise* [2]; and also the fourth, on the ground that *Gibson v Mayor of Preston* [3], and similar decisions which were cited in support of it, have no application to the facts of this case. With a view to the present appeal, the appellants then made an application for a rule to shew cause why a new trial should not be granted, upon the ground, inter alia, that the verdict was contrary to evidence. The learned judge having already expressed his views with respect to the merits of the case, the motion for a rule nisi was refused, without discussion, on 11 January 1889.

1 (1866) L.R. 1 H.L. 93.
2 (1866) L.R. 1 Q.B. 711.
3 (1870) L.R. 5 Q.B. 218.

In considering the responsibilities which attach to the present appellants, in the execution of their statutory duties, their Lordships desire to keep in view the rule expressed by Lord Blackburn, and approved by the House of Lords, in the *Mersey Docks Case,* to the effect "that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created." It is therefore necessary to examine the Ordinance of 1883, in order to ascertain the position occupied by the Sanitary Commissioners, and the powers and duties which are entrusted to them.

The Order in Council of 1883 is the last of a series of four ordinances relating to highways in Gibraltar, the first of them having been enacted on 30 December 1815. At that date all public streets and highways were under the charge of Government, as appears to have been the case from the time when Gibraltar was annexed to the British Crown. The Ordinance of 1815 imposed a rate upon all occupiers of lands and premises within the limits of the garrison and town, to be applied in paving, repairing, and cleansing the streets, lanes, alleys, passages, and other places within the same. The rate was assessed by Commissioners appointed for that purpose by the Government, and was payable to and recoverable by the Governor, Lieutenant Governor, or Commander-in-Chief for the time being. A second Order was passed on 1 February 1819, imposing a rate, to be assessed and levied in the same manner, for the purpose of defraying one half of the expense of lighting the streets and other places to which the previous rate was applicable, the other half being borne by the Government.

These streets and highways remained under the direct charge and control of Government until 1865, when an Order in Council, dated 20 December, repealed the Ordinances of 1815 and 1819, and transferred the management of highways and a variety of other sanitary duties to a body of Commissioners. That Ordinance was followed by the Order in Council of 19 July 1883, which does not expressly repeal, but to a large extent supersedes its provisions. So far as not superseded, the enactments of the Order of 1865 are still subsisting, but the enactments upon which the liability or non-liability of the appellants depends are to be found in the later ordinance.

Under the Order of 1883 a certain number of Commissioners were selected by the Governor from a panel presented by the grand jury. One half of these Commissioners retire from office annually, when their places are supplied by the same method of selection. Besides the Commissioners thus chosen, the Governor appoints four by warrant under his hand—two to represent the Secretary of State for War, one to represent the Government of Gibraltar, and the other the Lords of the Admiralty. The Governor has also the power to dismiss by warrant any Commissioner who shall be guilty of misbehaviour.

The ordinary expenses of the Commissioners' administration are provided for by a general sanitary purposes rate, leviable in respect of real property within the garrison and town, the property of the Crown being expressly included. The duty of fixing and assessing the rate rests in the first instance with the Commissioners; but the rate is subject to the revisal of the Colonial

Secretary, who must be satisfied that it has been duly made, and has power to disallow it if he shall consider it either unreasonable and excessive, or unreasonable and insufficient, there being an appeal from his decision to the Supreme Court who may confirm the rate. S. 240 enacts that "no public work or purpose of any kind, the cost of which is not intended to be defrayed out of the general sanitary purposes rate provided in the estimates for the current year, or for which it may be necessary to raise capital, shall be undertaken or executed by the Commissioners without the previous consent of the Governor by warrant." Capital, as distinguished from ordinary expenditure, may, when the estimate is less than 25,000 pesetas, with consent of the Governor, be raised on mortgage of the sanitary rate, and if it exceeds that sum may, with the approval of Her Majesty, signified by one of the principal Secretaries of State, be defrayed out of the Imperial Exchequer. All moneys received by the Commissioners are (s. 46) directed to be paid into an account kept at the public Treasury, and it is enacted that these moneys "shall be kept separate and distinct from *other public moneys in the Treasury*."

S. 160 of the Ordinance of 1883 enacts that, "*Subject to such rules and regulations as may be made by the Governor under this Order,* the Commissioners shall be the surveyors of all the public highways in Gibraltar, and shall, for the purposes of this Order, *control, manage, and maintain* the public highways, and also all such culverts and water-channels as may be necessary to carry off the surface water therefrom, and also all walls, *retaining walls and parapet walls situate thereon or pertaining thereto, and which are necessary for their support, or for the safety of passengers or ordinary traffic.*" Section 27 of the Sanitary Order of 1865 vests "all the public highways" in the Commissioners; but it is doubtful whether the clause extends to retaining walls in the position of that which gave way to the injury of the respondents' premises. The point does not appear to their Lordships to be of any consequence, because the vesting is only "so far as may be necessary for the purpose of carrying this Order into execution, but not further," which would not imply a larger interest or measure of control than is expressly conferred upon the Commissioners by s. 160 of the Ordinance of 1883. Their interest and powers are, in either case, limited to purposes of road conservancy; for all other purposes, the property of the retaining wall in question remains with the Government, which has merely given the Commissioners such right of administration and control as may be necessary for the fulfilment of their statutory duties.

In these circumstances, the question arises whether it be according to the intention of these two Orders in Council that the Commissioners shall be responsible to the proprietors of premises adjoining the retaining walls of a roadway in respect of such injuries to their property as occurred in this case. In dealing with that question, it is a material consideration that the injury complained of arose, not from any act of the Commissioners or their servants, but from their nonfeasance. Their Lordships do not wish to suggest that Commissioners or other public trustees who have no pecuniary interest in the trust which they administer can escape liability when they are negligent in the active execution of the trust. It is an implied condition of statutory powers

that, when exercised at all, they shall be executed with due care. But in the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the Commissioners a duty toward himself which they negligently failed to perform. In the *Mersey Docks Case* it was held that the trustees owed to all shippers and shipowners using the docks, and paying tolls for the accommodation, the statutory duty of keeping the docks and their entrances in a safe condition; and further, that the fact that the trustees held the tolls which they collected, not for their own profit but for the public interest, did not exempt these funds from liability for damage arising from their neglect of that duty. Lord Blackburn, in delivering the opinion of the consulted judges [1], stated the proper canon of construction to be that, "in the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing."

The rule thus enunciated, which met with the approval of the House of Lords, admitted of easy application to the Mersey Docks Trust, which was a corporate body, entirely independent of Government and of Government control, and differing in no material respect from a private enterprise authorized by statute, save in the fact that its undertaking and profits were held by trustees in the public interest, and not for the benefit of private corporators. But, under these Orders of 1865 and 1883, the Sanitary Commissioners of Gibraltar stand in a very different position from that occupied by the Mersey Docks Trustees and similar bodies in this country. They are appointed by the Governor, and may be dismissed by him for misconduct. Their powers of levying rates are controlled by the Colonial Secretary, subject to an appeal to the Supreme Court. They cannot raise money on the security of the rate, except with leave of the Governor, and then only to the extent of 25,000 pesetas—a sum less than half the amount for which the court below has given a decree against them; and in cases when it is necessary to raise more than that amount it must come from Government moneys, if approved by one of Her Majesty's principal Secretaries of State. The only duty expressly laid upon them with respect to retaining walls is to maintain and repair them for the safety of passengers and ordinary traffic. And, lastly, it is expressly provided that, in executing the order, they must conform to any rules and regulations which the Governor may think fit to make.

Their Lordships are, in that state of the facts, unable to resist the conclusion that the Government, in so far as regards the maintenance of retaining walls belonging to it, remains in reality the principal, the Commissioners being merely a body through whom its administration may be conveniently carried on. They do not think that it was the intention of the

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1 At p. 110

Crown, in giving the sanitary body administrative powers subject to the control of the Governor, to impose upon it any liability, which did not exist before, in respect of original defects in the structure of the retaining wall which supported the Castle Road.

Their Lordships desire to add that, assuming the Commissioners would have been liable, in respect of their failure to strengthen the foundations of the wall, on its being proved that they were negligently ignorant of its defects, there was, in their opinion, no evidence of such negligence to go to the jury. No doubt the result shewed that its foundations were or had become insecure, but until the result occurred no one suspected it. Captain Buckle says that a special inspection would have disclosed the danger; but the witness was himself the engineer of the Sanitary Commissioners for a period of three years, and at that time the propriety of making an inspection never occurred to him. It is obvious that no examination, short of taking down the foundations of the wall, would have led to the discovery of its defects; and although Captain Buckle, in his re-examination, does say that, in his estimation, "the locality called for special examination," he is evidently speaking in the light of actual experience; and not a single circumstance is suggested, either by him or any other witness, which could indicate to a person of ordinary prudence the necessity or propriety of making an examination of that kind.

Their Lordships are accordingly of opinion that the decree and order of the court below must be reversed, and judgment entered for the appellants without costs; and they will humbly advise Her Majesty to that effect. There will be no costs of this appeal.