Privy Council Appeal No. 4 of 1940

Olga Hall – – – – – – – – – *Appellant*

v.

Kingston and Saint Andrew Corporation – – – *Respondent*

FROM

THE COURT OF APPEAL OF THE SUPREME COURT OF JAMAICA

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH FEBRUARY, 1941

Present at the Hearing:

VISCOUNT SANKEY
LORD ATKIN
LORD JUSTICE LUXMOORE

[*Delivered by* LORD JUSTICE LUXMOORE]

On the 13th November, 1934, Olga Hall, who was then about seven years old, acting by her father as her next friend sued the Kingston and St. Andrews Corporation (hereinafter called the Corporation) for damages for personal injuries. It was alleged that the injuries were caused on the 15th June, 1934, by the negligent driving by one Mortimer Brown an employee of the Corporation of a cart marked K.S.A.C. Number 11, one of the wheels of which passed over and crushed the plaintiff's foot. The Corporation denied that any injury was caused by the cart because no part of it ever came in contact with the plaintiff. The Corporation also alleged that on the 15th June, 1934, the cart in question was being driven by Mortimer Brown on behalf of the Council of the Corporation under and in obedience to and in execution of duties imposed on the Council by section 22, sub-section 2 (*a*), of the Public Health Law, 1925, of Jamaica and that the cart was the property of the Council and Mortimer Brown was the servant of the Council. The Corporation consequently claimed that the action was improperly constituted and that the Council of the Corporation and not the Corporation was the proper defendant. The Corporation further claimed that if the action was maintainable the Corporation was acting pursuant to and in execution of the duties created by section 22, sub-section 2 (*a*), of the Public Health Law, 1925, and that the action was barred by the provisions of section 89, sub-sections 1 and 2, of that Law in that no proper notice of action was given and the amount of damages claimed was not specified and the action was not commenced within three months after the alleged accident.

The action was tried before Seton J. sitting with a jury.

Five questions were left to the jury, viz.:—

(1) Was the plaintiff injured by a cart running over her foot? If so

(2) Was the cart driven by Mortimer Brown? If so

(3) Was the injury caused by the negligent driving of the cart? If so

(4) Was the cart at the time of the accident engaged exclusively in the collection and removal of sweepings, rubbish refuse, night-soil or other waste matter from private premises or public places?

(5) Damages
(i) Special.
(ii) General.

The jury answered the first three questions in the affirmative and the fourth question in the negative and fixed the special damages at £8 19s. 6d. and the general damages at £300.

Seton J. accordingly on the 19th June, 1936, entered judgment for the plaintiff for £308 19s. 6d. with costs.

The Corporation appealed from this judgment to the Court of Appeal of the Supreme Court of Judicature in Jamaica (hereinafter called the Court of Appeal). The material grounds on which this was based were (1) that the answer in the negative by the jury to question number 4 was against the weight of evidence and was perverse. (2) that the driver of the cart which was alleged to have occasioned the injuries was at the material time engaged in using the cart to remove rubbish pursuant to and in performance of the Public Health Law, 1925, section 22, and consequently (*a*) the action was brought out of time having regard to section 89 (2) of the said Law; (*b*) the notice of action was bad in that it did not state the amount of damages claimed as required by section 89 (1) and (*c*) the Corporation was not the proper defendant.

The appeal was heard by Sir Robert Furness C.J. and Sherlock J. On the 19th October, 1936, they set aside the jury's answer to question 4 holding that a negative answer was wholly irreconcilable with the evidence and substituted for it an answer in the affirmative. The Court of Appeal in the course of its judgment stated:

> " In our view the only inference to be drawn from the answer to question 4 which we have substituted for that of the jury is that at the time of the accident Brown was using the cart in pursuance of duties imposed by the Public Health Law, 1925. It follows that whether his employer should properly be said to have been the Corporation or should properly be said to have been the Council of the Corporation the employer's rights and liabilities are governed by the Public Health Law, 1925."

The Court of Appeal also held that the action was out of time because whether the Corporation or the Council of the Corporation was the proper defendant the requirements of section 89 (1) and (2) had not been fulfilled. The Court of Appeal accordingly set aside the judgment of the Court below and entered judgment for the defendant with costs except as to the costs of a particular summons in the action which were awarded to the plaintiff and directed to be set off against the general costs of the action. On the 25th July, 1939, the plaintiff obtained special leave from His Majesty in Council to appeal *in forma pauperis* from the judgment of the Court of Appeal.

The case for the appellant was filed in due course but no case has been filed on behalf of the Corporation nor did the Corporation appear at the hearing of the plaintiff's appeal before their Lordships. Counsel for the plaintiff contended (1) that the Court of Appeal erred in substituting its finding for that of the jury on a pure question of fact. (2) That the question of the ownership of the cart and the uses to which it was put and whether it belonged to the Corporation or the Council of the Corporation was a mere technicality as the Council of the Corporation is part of the Corporation and the Corporation is liable for the acts of its servants and agents. (3) That the plaintiff's action was properly instituted in accordance with the provisions of section 223 of the Kingston and St. Andrew Corporation Law, 1931. Their Lordships have considered the note made by Seton J. of the evidence adduced at the trial with regard to the user of the cart in question at the date when the accident to the plaintiff occurred. The material evidence with regard to these matters was given by the driver Mortimer Brown and by Chief Sanitary Inspector Codling. Mortimer Brown stated in his evidence in chief that he was a cartman. He said, " I drive a garbage cart. Mr. Codling is my master. He is Chief Sanitary Inspector of St. Andrew. When garbage is collected I dump it. I drive cart No. 11. I have been doing this work nearly four years. I have never done any work but this under Mr. Codling. The cart is specially constructed for rubbish. On Friday, 15th June, 1934, I was collecting garbage." In cross-examination he said, " I am still employed

by the Corporation. Corporation carts are marked K.S.A.C. I still drive No. 11." Mr. Codling the Chief Sanitary Inspector said in his evidence in chief, " Brown drives cart No. 11. No. 11 is used solely for sanitary purposes, i.e., picking up household rubbish. It has never been used for any other purpose. On the 15th June, 1934, I can say cart No. 11 was solely being used for that purpose." In his cross-examination he said, " The Corporation pay Brown. They pay me too. This cart (meaning cart No. 11) is the property of the Corporation. The carts are all numbered . . . they are all marked K.S.A.C."

Mr. Pritt on behalf of the appellant urged that the jury were entitled to ignore the whole of this evidence because they refused to accept either Brown or Codling as truthful witnesses in their denials that the injuries to the plaintiff were caused by the cart driven by Brown. Their Lordships are unable to accept this argument and find themselves in complete agreement with the opinion expressed by Sir Robert Furness C.J. and Sherlock J. that a negative answer to question 4 is wholly irreconcilable with the evidence and they are satisfied that the Court of Appeal had ample jurisdiction to correct the answer to question 4 in the manner already mentioned.

The Court of Appeal held that it was unnecessary to decide whether the Corporation or the Council of the Corporation was the proper defendant to the action because the non-compliance by the plaintiff with the requirements of section 89 of the Public Health Law, 1925, afforded a complete answer to the plaintiff's claim. Section 89 (1) provides that no action

> " shall be instituted against any member of the Central Board or any Local Board or a Health Officer or any Sanitary Inspector or any Assistant or other employee of the Central Board or any Local Board in respect of any act done in pursuance or execution or intended execution of the Public Health Law, 1925, until the expiration of one month's notice in writing of such intended action given by the person complaining to the person concerned specifying the act or injury complained of and the amount of damages claimed therefor."

Sub-section 2 of the same section provides that any action for anything done in pursuance or execution or intended execution of that law " shall be commenced within three months after the thing done and not otherwise or in the case of a continuous injury or damages within six months next ensuing after the cessation thereof." Sub-section (1) on its true construction appears to their Lordships to afford protection to persons only and not to bodies corporate or incorporate. The actions in respect of which the required notices are to be given as a condition precedent to their institution are actions against " any Member of the Central Board or any Local Board." The word member is qualified in each case by the reference to the Central Board and also to the Local Board. Further the notice required is to be given to the person concerned. The Central Board is incorporated under the name of the Central Board of Health by section 3 of the Public Health Law, 1925. By section 7 of the same Law it is provided that the Council of the Kingston and St. Andrew Corporation shall be the Local Board for the Parishes of Kingston and St. Andrew while in other parishes the Parochial Boards of such parishes are to be the Local Boards. Section 22 provides so far as is material to be stated that every local board shall provide and maintain an efficient service of sanitary carts and scavengers . . . for the collection and removal of sweepings, rubbish, refuse, night-soil and other waste matter from private and public places. At all material times the Council of the Kingston and St. Andrew Corporation was not a Corporation nor is it now incorporated. It was at all material times a body set up by the Kingston and St. Andrew Corporation Law, 1931. By this Law (section 4, sub-section 1) the inhabitants of the Parish of Kingston and the Parish of St. Andrew are declared to be a Municipal Corporation bearing the corporate name of the Kingston and St. Andrew Corporation and by such name is given perpetual succession. By section 9 (1) of the same Law it was provided that the Corporation should be capable of acting by the Council and that the Council should exercise all powers vested in the Corporation or the Council by this Law or otherwise. Sub-section 2 provided that the

Council should consist of the Mayor Aldermen and Councillors. By a fasciculus of clauses contained in Part VII of the same Law under the heading Rates and numbered 107-111 inclusive it is provided that rates are to be raised levied collected and paid to the Council and paid over to the Town Clerk for the purposes of the Corporation. By section 192 the funds or money belonging to or payable to or collected by the Council under and by virtue of this or any other Law shall after due provision has been made with the approval of the Governor in Privy Council for interest and sinking fund on any loans for which the Council is liable or responsible under this or any Law be applicable towards payment of . . . (*i*) the disposal and destruction of street and house refuse and rubbish, (*j*) the maintenance and preservation of all corporate property, (*k*) the payment of any sums payable by the Council under any judgment of any Court of Law, and (*l*) generally towards the payment of all expenses of and incidental to the carrying out of the provisions of this Law and of all works and matters incidental thereto.

Section 223 provides that " all actions and proceedings to be commenced against the Corporation or any person or persons for anything done in pursuance or intended pursuance of this Law shall be commenced within six months after the act committed and not otherwise and notice in writing of such action or proceedings and of the cause thereof shall be given to the Council member or person against whom it is intended to bring such action or proceedings one calendar month at least before the commencement thereof.

For the reasons already stated their Lordships are of opinion that section 89 has no application to the Corporation as such and that the Court of Appeal was in error in holding that the action was barred by that section although admittedly no notice in accordance with its requirements was given on behalf of the plaintiff before the action was instituted and the writ was issued more than three months after the date when the injuries were inflicted. Further their Lordships are satisfied that the evidence proves conclusively that the cart K.S.A.C. No. 11 was the property of the Corporation and that its driver Mortimer Brown was the servant of the Corporation and that the cart in question was being driven when the accident occurred in circumstances which rendered the Corporation and not the Council of the Corporation liable for the injury caused by the negligence of their servant Brown. Section 223 of the Kingston and St. Andrew Corporation Law, 1931, does not afford any protection to the Corporation because there has been no disregard of any of its provisions. For these reasons their Lordships are of opinion that the plaintiff is entitled to recover the £308 19s. 6d. awarded to her by the jury and for which judgment was entered in her favour by Seton J. They have therefore humbly advised His Majesty in Council that this appeal should be allowed, with the costs of the appeal to the Court of Appeal, the judgment of Seton J. restored, and that such costs of this appeal as are proper to be awarded to the plaintiff suing *in forma pauperis* should be ordered to be paid to her by the respondent Corporation.

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In the Privy Council

OLGA HALL

v.

KINGSTON AND SAINT ANDREW CORPORATION

DELIVERED BY LORD JUSTICE LUXMOORE

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