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McLAUGHLIN v. DAILY TELEGRAPH NEWSPAPER CO. LTD.

McLAUGHLIN v. VALE OF CLWYDD COAL MINING CO. LTD. (No. 1).

been no difficulty in sending instructions to either place, as the point involved is not at all difficult. There is no more hardship in compelling the applicants to do this than there is in making country solicitors send instructions to their city agents to make an application in Chambers. As the defendants had an opportunity of making these applications in good time, and chose not to do so, I shall follow the practice as to such matters followed in appeals in England. I hold that the applications are too late. Both applications are therefore dismissed with costs, but no costs of affidavits will be allowed on either side. As in my opinion this matter was a simple one, the fees of one counsel only will be allowed.

Attorney for Vale of Clwydd Coal Mining Co., *Mark Mitchell.*

Attorneys for Daily Telegraph Newspaper Co., *Laurence and Laurence.*

Attorney for J. McLaughlin, *W. Morgan.*

[HIGH COURT OF AUSTRALIA.]

MOUNTNEY . . . . . APPELLANT;
PLAINTIFF,

AND

SMITH . . . . . RESPONDENT.
DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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March 15, 16, 17.

Griffith, C.J., Barton and O'Connor, JJ.

Negligence—Dangerous state of premises—Injury to customer—Invitation by owner—Scope of servant's authority—Direction by servant—Evidence—Liquor Act (No. 18 *of* 1898) *sec.* 24.

It is the duty of an hotelkeeper to inform customers of the position of the lavatories which by sec. 24 of the *Liquor Act* (No. 18 of 1898) he is bound to provide.

A servant representing his employer in any department of the employer's business, has an implied authority to give customers who deal with the employer

through him, any information or directions which the employer himself is bound to give his customers in that department.

The plaintiff, who had a drink at an hotel bar, asked the barmaid to direct him to the lavatory, which she did. Following her directions he went to a portion of the premises, where, looking for the lavatory, he fell down an unguarded lift-well and was injured. In an action against the hotelkeeper for negligence:

Held, that the conversation between the barmaid and the plaintiff was admissible in evidence to prove that the plaintiff was on that part of the premises at the invitation of the proprietor.

Decision of the Full Court (1903), 3 S.R. (N.S.W.), 668, reversed.

This was an appeal from a decision of the Supreme Court of New South Wales making absolute a Rule Nisi for a New Trial. The action, which was tried before the Acting Chief Justice and a jury of four at the June sittings, 1903, was brought by the plaintiff to recover compensation for injuries that he had sustained owing to the alleged negligence of the defendant or his servants.

The following statement of the facts is taken from the judgment of *Griffith*, C.J.:—

The defendant was the proprietor of an hotel called the Arcadia Hotel, situated in an Arcade that runs from Castlereagh street to Pitt street, in Sydney. The lower floor of the building forms what is called the Arcade, which consists of a wide passage running from street to street, with shops on either side. At the eastern or Castlereagh street end of the ground floor is the hotel bar, in a room occupying the corner formed by the street and the Arcade passage. The rest of the hotel premises is at a distance from the bar, and is entered from the western end of the Arcade. The bar itself extends about twenty or thirty feet back from Castlereagh street, and from the room in which it is there is one door opening into that street and another into the Arcade. Nearly opposite the latter door, across the Arcade, is an open archway, having printed over it in large letters the words "Hotel Arcadia." A person going through that door from the Arcade enters first of all a vestibule. On the right-hand side is a staircase leading up from the further corner to other portions of the hotel, and the space beneath the staircase is covered in with panelling that reaches to the floor, but does not extend quite to the archway, so that a small recess is left on the right-hand side immediately inside the

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archway. A door at the entrance to this recess leads downstairs to a lavatory, but it has no letters upon it, or anything to indicate that it is a door or leads to a lavatory. On the left-hand side of the vestibule there is a wall extending for some distance, beyond which is a recess leading to a lift well, with lattice doors opening towards the left-hand wall of the main building. The lift itself had not been in use for some years, and the doors of the lift well were usually kept fastened by means of a spring latch at the top, but they could be easily opened by pulling a cord hanging from the latch behind the lattice-work of the doors. The only light in the vestibule was an incandescent electric burner fixed at a spot about twelve feet from the floor in the corner where the staircase began.

The plaintiff's case was that on the afternoon of July 24th, 1902, he went into the defendant's bar and there purchased two drinks. Shortly afterwards he asked the barmaid who had served him with the drinks if she could tell him where the hotel lavatory was. She replied—"Go through them two doors, cross the Arcade and you will find it there." He then opened the door referred to, leading into the Arcade, went across as directed, and entered the vestibule through the archway. He saw no lavatory, but, hearing the sound of dripping water, turned in the direction of the sound, to the left, and came to the doors of the lift well. He says that the doors were open, and, thinking it was the lavatory, he stepped in, fell down the well, and was injured. The room, he says, was dark, and he did not notice any light burning at the time. In any case the electric lamp must have shed but a feeble light on that part by reason of its position. The plaintiff was a stranger to the premises. He claims that he is entitled to maintain an action against the defendant for the breach of a duty which defendant owed to him in the circumstances.

The declaration alleged that "the defendant was possessed of a certain hotel and hotel premises," in one portion of which was a lift shaft, "and the entrance to the said lift shaft was by means of a doorway, and the defendant negligently left the doors of the said doorway unfastened," unprotected, &c., and the space near the lift shaft "insufficiently lighted," and "upon the same portion of the

said premises was another doorway, being the entrance to a lavatory, &c., belonging to and used in connection with the said premises and it was reasonably likely that a person being upon the said premises, and desiring to use the said lavatary, &c., would mistake for the doorway thereof the doorway of the said lift, which doorway " " was highly dangerous to persons using the said portion of the said premises, then being unacquainted with the same as the defendant well knew, and thereupon the plaintiff, being a customer of the defendant, lawfully, and by the direction of the defendant's servant, went into the said portion of the said premises," &c., and " fell down the said lift shaft, and was greatly injured," &c.

The pleas were—

1. Not guilty:
2. Denial of allegation that plaintiff was a customer of defendant, and that plaintiff went upon the premises lawfully, and by direction of defendant's servant:
3. Denial of allegation that lavatory, &c., belonged to, and were used in connection with the hotel premises.

Joinder of issue.

At the trial there was a conflict of evidence as to whether the doors of the lift well were open at the time and whether the lavatory approached through the vestibule was used by the customers of the hotel. Counsel for the defendant also objected to evidence being given of the question asked of the barmaid by the plaintiff and her answer. The jury found a verdict for the plaintiff with £300 damages. On the 27th July the defendant moved the Full Court for a Rule Nisi for a New Trial, and the Rule was granted on the following grounds:—

1. That there was no evidence that the lavatory referred to by the plaintiff belonged to or was used in connexion with the hotel or hotel premises in the declaration mentioned.

2. That there was no evidence of negligence in the defendant to go to the jury.

3. That the verdict was against evidence and the weight of evidence.

4. That His Honor should not have admitted in evidence a question asked by the plaintiff of the defendant's barmaid and her reply thereto.

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On 28th October the Full Court, consisting of *Owen*, *Simpson*, and *Pring*, JJ., made the Rule absolute for a New Trial on the fourth ground, the other grounds not having been dealt with. (1903, S.R (N.S.W.), 668).

From this decision the defendant now appealed.

Armstrong, for the appellant. I contend that the plaintiff went to the place where the accident happened at the invitation of the defendant. The defendant's contention is that the plaintiff was at best merely a licensee. But, even if he was a licensee, the defendant was guilty of negligence in allowing a place, in the nature of a trap, to exist on his premises. The plaintiff was there on business. The second proviso to sec. 24 of the *Liquor Act*, No. 18 of 1898, provides that "During the continuance of such licence every such house shall be provided with at least two decent places of convenience, on or near the premises, for the use of customers thereof, so as to prevent nuisances and offences against decency." By virtue of that Act every customer of an hotelkeeper has a right to the use of a place of convenience, which must be on or near the premises. The plaintiff was a customer, having bought a drink at the defendant's bar. The evidence which proved that the plaintiff went where he did at the invitation of the defendant was the question asked of the barmaid, and her answer. I do not admit that the plaintiff must stand or fall by the admission or rejection of that evidence. but I admit that, if it is rejected, he cannot make out the case of being there by invitation, or as a customer; he would be a mere licensee. The question and answer are admissible because they were virtually a question put to and answered by the defendant himself. The barmaid had implied authority to direct customers where to find the lavatory. The hotelkeeper is bound to provide such places, and therefore to inform customers where they are situated, consequently the customer has a right to obtain the information as to their whereabouts from the person with whom his business as a customer is transacted. The barmaid is the person employed by the defendant to transact the whole of his business with customers at the bar, and she must therefore be regarded as the agent of the defendant in that behalf, and by her answer she binds her principal.

[BARTON, J.—You say that the *Liquor Act* having provided that such conveniences should be furnished by the defendant, the plaintiff was entitled to find out where they were from the only person representing the defendant with whom he had business dealings.]

Yes. But I contend that on another ground I was entitled to have the evidence admitted, namely, to show how the plaintiff came to be on that particular part of the premises, whether he came there prudently or negligently. That would make this admissible evidence even if hearsay. (*Taylor on Evidence*, 8th ed., pp. 513, 576; *Stephen's Digest of the Law of Evidence*, Art. 8, p. 11).

[GRIFFITH, C.J.—That is rather on the question of contributory negligence. Does that apply here?]

Yes. The plaintiff says in effect "I asked the question of a person whom I might be reasonably expected to ask." But apart from that the evidence is admissible on the question whether the barmaid was the natural person to ask, even if she was not actually the agent of the defendant.

[O'CONNOR, J.—That brings us back to the question of authority.]

There are many cases reported in which the information given to the plaintiff was given by some person on the premises.

[GRIFFITH, C.J.—Yes, but in most of those cases the invitation was necessarily implied from the circumstances.]

[O'CONNOR, J.—For instance, if in this case the lavatory had been immediately behind the bar.]

[*Shand*.—This place was not even on the licensed premises.]

That question must be taken to have been disposed of by the jury in the plaintiff's favour. There was the evidence that the words "Hotel Arcadia" were over the doorway.

[GRIFFITH, C.J.—Would not your argument apply equally to a question asked of a stranger? If it would not, then the question of authority arises again. If the plaintiff were charged with some wrongful act, then any ambiguous act might be explained by showing as an excuse that he acted on information reasonably sought.]

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It is evidence not of the truth of the statement, but on the question of contributory negligence.

[GRIFFITH, C.J.—It would be relevant to show that the plaintiff was there properly or not, but not as against the defendant in this case.]

On that point I refer to *The Douglas*, L.R. 7 P.D., 151.

The evidence was admissible on another ground, as part of the *res gestæ*. What is said by an agent at the time of a transaction, even if he is not the agent for that very purpose, is evidence if it is sufficiently connected with the transaction to give it a colour. There is an ostensible agency.

[GRIFFITH, C.J., referred to *Ewart on Estoppel*, where he points out a distinction between an agent apparently acting within his actual authority and an agent acting within an apparent authority.]

In this case the question was within the apparent authority of the barmaid. Under the circumstances there was a duty cast upon the defendant to take reasonable care that the place was safe, and the plaintiff has shown that he was lawfully there by giving evidence of what was said. [He cited on this point *White* v. *France*, L.R. 2 C.P.D., 308; *Paddock* v. *N.E. Railway Co.*, 18 L.T.N.S., 60; *Beven on Negligence*, 2nd ed., p. 538, citing *Brady* v. *Parker*, 14 Retty 783; *Wingfield* v. *Jenkinson*, 1 T.L.R., 102.]

[O'CONNOR, J., referred to *Wilkinson* v. *Fairrie*, 1 H. & C., 633.]

Shand, for the defendant. The Full Court was right in holding the conversation inadmissible. The plaintiff must show either that the barmaid had express authority to direct customers to the lavatory, or that she was held out by the defendant as having such authority by the nature of her employment, or that there was nobody else on the premises to provide information as to the situation of places which the defendant is bound by law to provide. There was clearly no evidence of express authority. As to the holding out, I submit that there is no evidence as to the duties of a barmaid, and the Court will not take judicial cognizance of her duties beyond that she is in charge of the bar for a certain purpose, namely, that of selling drinks. The question asked by the plaintiff was not connected with the defendant's business.

As to the third point, I contend that before the plaintiff can give evidence of the conversation he must show that there was nobody else on the premises to whom a customer could apply for the information required. There was no evidence given on that point. The foundation for the evidence had therefore not been laid. If there had been a man accessible he might possibly have been taken to know where the men's conveniences were situated.

[O'CONNOR, J.—The inference of authority, the holding out, is independent of the knowledge of the servant. Do you draw any distinction between a barman and a barmaid on this point, except on the ground of sex ?]

I admit that the fact of the sex does not negative the presumption of authority altogether, but I contend that it is a matter which would be of weight in warranting the customers to infer that that person had or had not authority. Again, there was no duty imposed by the *Liquor Act* on the hotelkeeper to direct persons to the lavatory. The only duty was to keep such places.

[GRIFFITH, C.J.—Does not that imply a duty to inform customers where they were ?]

No. I submit that it is not a part of the business of the proprietor to keep the lavatories or to supply the information. It is merely a matter of convenience for the customers.

This was a large hotel, and in the absence of evidence the Court cannot assume that there was nobody else on the premises besides the barmaid who could have supplied the information in question.

[The Court desired *Shand* to address himself to the other grounds stated in the Rule Nisi and the case generally in the event of their being against him on this point. As these grounds depended upon the evidence in the particular case and raised no question of law of general interest the arguments on them are omitted.]

Shand, on the other points, cited *Jones* v. *Spencer*, 77 L.T. (N.S.), 536 ; *Metropolitan Railway Co.* v. *Wright*, 11 A.C., 152 ; *Municipal Council of Brisbane* v. *Martin*, (1894) A.C., 249.

Armstrong, in reply. The defendant is not entitled to have a verdict entered for him, or a nonsuit. By Common Law a non-

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suit cannot be entered by the Court unless leave has been reserved at the trial. The *Supreme Court Procedure Act* (No. 49 of 1900), sec. 7, gave the Court power to enter a nonsuit in the absence of leave reserved, but this is purely a discretionary power and as the Supreme Court has not exercised it, this Court will not do it for them. This Court has not the power.

[GRIFFITH, C.J.—We have power to do anything that the Full Court "ought to have done."]

Yes, that the Court "ought to have done"; but they were not bound to do this. In a criminal case, if an inferior tribunal makes a mistake of law, the Court of Appeal sets the finding aside, but will not impose a fine or imprisonment.

[GRIFFITH, C.J.—No, because that is the peculiar function of the inferior tribunal.]

[BARTON, J., referred to sec. 37 of the *Judiciary Act*.]

As to the fourth ground of the Rule Nisi, *Garth* v. *Howard*, 8 Bing., 451, is an authority strongly in my favour.

As to the main question, whether there was any duty to the plaintiff and negligence on the part of the defendant; if there was no evidence of this there should be a new trial, but where the jury has had a view of the premises, as they had in this case, and the judge does not disapprove of the verdict, a new trial never is granted.

[O'CONNOR, J., referred to *Von Meyer* v. *Borough of East St. Leonards*, 3 W.N. (N.S.W.), 297, 309, a case where a new trial was granted after the jury had had a view.]

In that case there were questions of title involved. In *Butchart* v. *Dodds*, 12 N.S.W. S.C.R., 371, *Martin*, C.J., at p. 382, deals with cases where the jury has had a view.

[O'CONNOR, J. It is always a matter for the discretion of the Court of appeal, what weight is to be attached to a view.]

Cur. adv. vult.

17th March. GRIFFITH, C.J.—This is an appeal from an order of the Supreme Court of New South Wales making absolute a rule nisi for a new trial in an action for negligence. The negligence alleged was a breach of duty on the part of the defendant to take reasonable care of premises occupied by him and used for the

purpose of an hotel business, by reason of which want of care the plaintiff, a customer of the defendant, was injured while using those premises. At the trial the plaintiff obtained a verdict for £300, and subsequently the defendant obtained a rule nisi for a new trial on the following grounds:—First, that there was no evidence that the part of the premises where the accident occurred was used in connection with the defendant's place of business; secondly that there was no evidence of negligence on the part of the defendant; thirdly, that the verdict was against evidence and the weight of evidence; and fourthly that the judge wrongly admitted certain evidence of a question asked by the plaintiff of a barmaid employed by the defendant and of her answer to that question.

[After stating the facts as above reported His Honor proceeded:]

The law dealing with such matters is not in dispute, but I will read a very clear statement of it from the judgment of Mr. Justice *Willes* in the case *Indermaur* v. *Dames*, L.R. 1 C.P., at p. 287. "We are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation express or implied. The common case is that of a customer in a shop; but it is obvious that this is only one of a class; for whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap door, unfenced and unlighted." In the case of *Heaven* v. *Pender*, reported in 11 Q.B.D., *Brett*, M.R., says at p. 509:—"The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." In the present case there can be no doubt that the plaintiff on entering the bar was entitled to expect from the

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defendant such reasonable care as is indicated in the passages that I have just read. While in the bar he became a customer of the defendant, and I apprehend that it is an ordinary incident of such a relationship that a customer in an hotel may desire to make use of a lavatory. If so, the plaintiff was as much entitled to expect from the defendant a reasonable care for his safety when he was using the lavatory as when he was in the bar. But it is not necessary that the plaintiff should rely upon this common law right, because by the law of New South Wales every hotelkeeper is bound to provide lavatories for the use of his customers. Sec. 24 of the *Liquor Act* (No. 18 of 1898) provides that "during the continuance of" an hotelkeeper's licence "every" licensed "house shall be provided with at least two decent places of convenience on or near the premises for the use of customers thereof, so as to prevent nuisances and offences against decency." The plaintiff, therefore, was entitled to expect that there would be such places provided by the defendant for the use of customers. In that expectation, he asked the barmaid, who, so far as it appeared from the evidence, was the only person at or near the bar representing the proprietor, where the lavatory was to be found, and she gave him the information. The learned Judges of the Supreme Court thought that her answer to this question ought not to have been admitted in evidence, on the ground that the defendant was not present at the time, and that the barmaid had no authority from him to give the information. I must confess that I have some difficulty in understanding on what ground her answer could be objected to. Some of their Honors seem to have thought that there was something unseemly in asking such a question of a woman, but I am quite unable to sympathise with that view. I can see nothing unseemly in asking the only person on the spot representing the proprietor, where the place was that the proprietor was bound to provide for the convenience of his customers. The proprietor was obliged to provide such a place, and the customer, who could not be expected to know where it was, was entitled to ask the question from the person who represented the proprietor in that part of his business. Giving such information seems to me to be within what I may call the scope of the barmaid's apparent authority. Although there is no actual decision on the point, we are justified in using

our knowledge of what goes on in the world around us. And I take it that it is within the scope of the apparent authority of any person employed in a business to answer any question that might in the ordinary course of business be expected to be put to him. It was contended on behalf of the defendant that the evidence was wrongly received because the barmaid had not in fact authority to direct persons to the place to which she directed the plaintiff. On that point it is enough to say that although an agent exceeds the actual limits of his authority he will yet bind his principal as regards a third person if he acts within the scope of the authority that the principal has allowed him to appear to possess. She had, therefore, *primâ facie*, authority to answer all such questions as might be expected to be put to her by customers.

Again, it is said that she had no implied authority to bind the proprietor under the circumstances of this case, because the particular lavatories to which she intended to direct the plaintiff were not in fact used in connection with the defendant's business nor by his customers. This question of fact was specially raised by the third plea, and, as the jury found generally for the plaintiff, they must be taken to have found this specific fact in his favour. But even supposing that the jury had found that they were not the place provided by the proprietor in the performance of the duty imposed upon him by the Statute, that would not have excused him from liability if the plaintiff was on that part of the premises by his invitation. As I have already pointed out, if it was within the apparent scope of her authority to give the direction, the actual fact would make no difference on the question whether the plaintiff was in the vestibule by invitation of the defendant, though perhaps it might be material on the question of the extent of the duty owed by the defendant to the plaintiff in respect of that part of his premises. For these reasons I think that the barmaid had authority to answer the question, and that her answer was rightly received, and that consequently the learned Judges were wrong in making the rule absolute on this ground.

[His Honor then proceeded to deal with the other points taken by the rule nisi, and held that there was sufficient evidence to warrant the finding of the jury in plaintiff's favour.]

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BARTON, J., and O'CONNOR, J., concurred.

Appeal allowed. Order of the Supreme Court making the Rule Nisi absolute discharged, and Rule Nisi discharged with costs. Respondent to pay the costs of the appeal.

On the application of *Armstrong* the cost of printing the Judge's notes for the purpose of the appeal was allowed.

Solicitors for appellant, *Levy and Fulton.*
Solicitors for respondent, *C. Bull.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

BOROUGH OF GLEBE . . . . . APPELLANTS;
PLAINTIFFS,

AND

LUKEY (AUSTRALIAN GASLIGHT CO.) . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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March 16, 17, 18, 21.

Griffith, C.J., Barton and O'Connor, JJ.

Municipalities Act (*No.* 23 *of* 1897), *secs.* 137, 138, 141, 150, 154, 156—*Gas Company—Liability to pay rates in respect of land occupied by gas mains within the borough.*

The *Municipalities Act* (No. 23 of 1897), by sec. 137, defines "rateable property" as "all lands, houses, warehouses, counting houses, shops and other buildings, tenements, or hereditaments within any municipality," subject to certain exceptions not material. Sec. 138 provides for the annual valuation of "all rateable property," and sec. 141 provides that for rating purposes the annual assessment should be made by assessing all rateable property "at nine-tenths of the fair average annual rental of all buildings and cultivated lands or lands which are or have been let for pastoral, mining, or other purposes," and "at the rate of five per centum upon the capital value of the fee simple of all unimproved lands."