[HIGH COURT OF AUSTRALIA.]

COUNCIL OF THE CITY OF ROCKHAMPTON Appellant; Defendant,

AND

RUSSELL . . . . . Respondent. Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. of A. 1931.

Brisbane, *June* 16, 17.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Practice—Findings of jury—Misdirection—Findings consistent with evidence—No objection to misdirection taken at trial—Objection raised on appeal—New trial.

Negligence—Death caused by escape of electricity—Statutory electric authority—Duty of authority—Electric Light and Power Act 1896 (*Q.*) (60 *Vict. No.* 24), *sec.* 41.

At a dwelling of which he was caretaker the plaintiff's husband was killed by electric current which escaped from a leading-in wire of the lighting system. Owing to moisture and swaying, the insulation of the wire had worn where it entered a conduit passing through a galvanized iron roof. In an action for negligence against the electric authority carrying on operations under an order in Council issued pursuant to the *Electric Light and Power Act* 1896 (Q.), the jury found that the leading-in conductor, the conduit and the earthing were constructed with proper care and skill. The lighting system of the dwelling had in fact been installed by the owner's electrician but the installation had been inspected and approved by the defendant authority. The order in Council provided that "the electric authority shall be answerable for all accidents, damages, and injuries happening through the act or default of the electric authority." By sec. 41 of the *Electric Light and Power Act* 1896 it was provided that "no electric wires or fittings shall be fixed on the premises of any consumer nor remain thereon except in accordance with . . . by-laws" issued by the electric authority, and that "if the electric authority is satisfied that the wires or fittings on any premises have not been fixed or are not maintained in accordance with such . . . by-laws as aforesaid, or are in such a condition that it is or would be dangerous to supply electricity to such wires or

fittings, the electric authority may refuse or discontinue the supply of electricity, and may withhold the supply till it is satisfied that the . . . by-laws have been complied with, or that it is no longer dangerous to supply the same." At the trial the jury found also, in answer to a general question, that the death was not caused by negligence of the defendant authority. In relation to this question the plaintiff complained of a misdirection.

Held, by *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Gavan Duffy* C.J. dissenting), that a new trial should not be granted:

By *Starke*, *Dixon* and *McTiernan* JJ., because, there being no evidence that the defendant should have discovered the escape or the worn insulation, the jury could not, consistently with their other findings, have answered that or any other proper question in favour of the plaintiff;

By *Evatt* J., because no objection was taken at the trial to the misdirection and it was manifestly unfair and unjust to allow the point to be raised on appeal for the first time.

Held, further, by *Starke*, *Dixon* and *McTiernan* JJ. that the duty of the electric authority could be stated no higher than to abstain from the supply of electrical current to a consumer's installation which it knew, or, exercising reasonable care and skill, ought to have known, was defective and likely to allow an escape of electricity endangering the safety of persons who came upon the premises.

Decision of the Supreme Court of Queensland (Full Court): *Russell* v. *Rockhampton City Council*, (1931) S.R. (Q.) 183, reversed.

APPEAL from the Supreme Court of Queensland.

Lilian Mary Russell, brought an action in the Supreme Court under sec. 12 of the *Common Law Practice Act* 1867 (*Lord Campbell's Act*), on behalf of herself and her children, claiming damages against the Rockhampton City Council, for negligence in respect of the death of her husband on 20th February 1930. The action was tried before *Brennan* J. and a jury.

The defendant was the electric authority for Rockhampton, being so constituted by an order in Council made in pursuance of the *Electric Light and Power Act* 1896 (Q.), which provided that "the electric authority shall be answerable for all accidents, damages, and injuries happening through the act or default of the electric authority." As such authority the defendant supplied electric current to the residence of one Mrs. Gordon, whose installation was put in at her own expense in October 1926. The husband of the plaintiff, who was acting as Mrs. Gordon's caretaker, met with his death at Mrs. Gordon's residence by electrocution. He came into

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contact with a wire fence, connected with a tank, to which there was a leakage of current from the electric light wires through a galvanized-iron roof. The installation was inspected and approved of by the defendant Council in October 1926, before being connected to the supply mains. In January 1927 there had been a leakage of current to the tank which resulted in electric shocks being received by several persons. This leakage was reported to the Council, who immediately cut off the supply of current until the defects in the installation were remedied by the consumer. The evidence showed that, at the date of death of the deceased, the material which insulated the wires at the point of entry to the house had become frayed and worn by the combined effects of moisture and swaying of the leading-in wires, so that the wires made contact with a metal conduit fixed in the galvanized-iron roof of the house. The roof was connected to the tank, and the tank to the wire fence. The earthing wire had been tampered with and at the time of the accident was not making proper contact.

The plaintiff set out, in par. 5 of the statement of claim, the following particulars of negligence :—(a) The conduit through which the leading-in conductors passed was made to penetrate the galvanized-iron roof, and no safety fuse was placed before the point of entrance to the house of the electric supply. (b) The positive leading-in conductor was not constructed with proper care and skill, in that it was not sufficiently taut to resist air movements, whereby the insulation on the conductor became worn through by friction at the mouth of the conduit. (c) The conduit at the point of entry was not turned down to protect the mouth thereof from the entrance of dirt and moisture and other things injurious to the insulation. (d) No proper earthing was constructed to ensure the safe discharge of electric energy, and the defendant Council made no proper test or inspection of the installation prior to connecting it with the main supply or at any time thereafter. (e) The Council supplied electric current to the house when it was dangerous to do so, and continued the supply after being warned of the escape thereof and without taking proper precautions to prevent it, and made default in not exercising the powers conferred on it by sec. 41 of the *Electric Light and Power Act* 1896.

The questions put to the jury and their answers were as follows :— (1) Did Albert George Russell die as the result of electrocution on the premises of Mrs. Gordon on 20th February 1930 ? Yes. (2) Was the conduit through which the leading-in conductors passed made to penetrate the galvanized-iron roof without a safety fuse being provided before the point of entry ? Yes. (3) Was the defendant guilty of negligence by reason thereof ? No. (4) Was the positive leading-in conductor constructed with proper care and skill ? Yes. (5) If no, was the defendant Council guilty of negligence by reason thereof ? [No answer]. (6) Was the conduit at the point of entry constructed with proper care and skill ? Yes. (7) If no, was the defendant Council guilty of negligence by reason thereof ? [No answer.] (8) Was a proper earthing constructed ? Yes. (9) If no, was the defendant Council guilty of negligence by reason thereof ? [No answer.] (10) Was the death of Albert George Russell caused by the negligence of the defendant ? No. (11) What damages ? [No answer.]

On these findings judgment was given by *Brennan* J. for the defendant.

From this judgment the plaintiff appealed to the Full Court of Queensland, which allowed the appeal and ordered a new trial on the following grounds: (1) by *Macrossan* S.P.J., that the jury should have been directed that " the direct cause of the accident and so much of the surrounding circumstances as was essential to its occurence cannot be said to have been within the (effective) control and management of the defendants so that it is not unfair to attribute to them a prima facie responsibility for what happened " ; (2) by *Webb* and *Henchman* JJ., that the jury had been misdirected by the trial Judge in the following passage in his direction : " You may find that there was certain negligence on the part of the Council, that is to say, negligence for not doing their work properly. If there was an insulation defect in the wire itself that was not visible to the Council, then the other negligence on their part would not have been responsible for the death of Russell. The Council has no possible explanation to offer ; they say it is beyond them and it has them beaten. In spite of the negligence

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of " the conduit " not being properly drooped, was the cause of Russell's death due to negligence ? " :—*Russell* v. *Rockhampton City Council* (1).

From this decision the Council, in pursuance of leave, now appealed to the High Court on the following grounds : (1) There is no ground upon which a new trial should be ordered ; (2) all necessary questions were submitted and answered by the jury ; (3) there was no misdirection by the trial Judge ; (4) there was no substantial wrong or miscarriage of justice by reason of any direction or misdirection by the trial Judge ; (5) The said judgment is contrary to law.

McGill, for the appellant. For the plaintiff to succeed in the action it was necessary for the jury to find that the death of the deceased had been caused by the negligence of the defendant. At the trial the evidence was not directed to the cause of death so much as to negligence. The defendant had taken every reasonable precaution. The installation had been inspected before electric current was supplied. The current was cut off in January 1927, when a leakage was reported, and was not supplied again until the defect was remedied. On the evidence the defendant was not aware of the escape of electricity at the time of the death of the deceased, and was not in the position of continuing to supply current knowing of a leakage. If there was any misdirection it did not have the effect of influencing the jury ; consequently there could be no miscarriage of justice. [He was stopped.]

Larcombe and *Allen*, for the respondent. The evidence shows that the defendant was guilty of negligence in the construction of the electric light wires and in their supervision of the supply. Clauses (d) and (e) in par. 5 of the statement of claim were not put to the jury in the form of questions, because question 10 was in the nature of a drag-net question to cover negligence not raised by the other questions. The defendant was under a statutory duty to use care not only in respect of the supply of current, but in all matters connected with the service. Moreover, in January 1927,

(1) (1931) S.R. (Q.) 183.

after the leakage had been removed there should have been another inspection by the Council before again connecting up the supply. If an inspection had been made, the cause of the leakage would have been ascertained. It was the duty of the Council, when there was an escape of current, to ascertain the cause and prevent a repetition. Although misdirections may be followed by corrections, the jury are likely to be misled and there is likely to be a miscarriage of justice. The cumulative effect of misdirections, even though corrected, operates unfairly to the parties, and a new trial should be ordered. The misdirection may have confused the jury (*Nash* v. *Cunard Steamship Co.* (1); *Wilkinson* v. *Graves* (2)). On a question of law it is the duty of the trial Judge to direct the jury even on a point not raised by a party (*Hartney* v. *Higgins* (3); *Holford* v. *Melbourne Tramway and Omnibus Co.* (4)). The onus is on the appellant to show that the misdirection did not cause a miscarriage of justice (*Anthony* v. *Halstead* (5)). The fact that some children had tampered with the earth connection would not break the chain of causation (*Cofield* v. *Waterloo Case Co.* (6); *Dixon* v. *Bell* (7); *Salmond's Law of Torts*, 7th ed., p. 176). The doctrine of *res ipsa loquitur* applies.

McGill, in reply. No exception was taken at the trial to the misdirection now raised on appeal. The doctrine of *res ipsa loquitur* does not apply (*Wing* v. *London General Omnibus Co.* (8)). The jury found that every precaution which could be taken was in fact taken (*Rickards* v. *Lothian* (9)). At the trial the respondent should have seen that all necessary questions were put to the jury (*Seaton* v. *Burnand* (10)).

[EVATT J. referred to *Banbury* v. *Bank of Montreal* (11).]

The following written judgments were delivered:—

GAVAN DUFFY C.J. In my opinion the appeal should be dismissed.

(1) (1891) 7 T.L.R. 597.
(2) (1893) 9 T.L.R. 464.
(3) (1880) 6 V.L.R. (L.) 65, at p. 67; 1 A.L.T. 161.
(4) (1909) V.L.R. 497; 29 A.L.T. 112.
(5) (1877) 37 L.T. 433.
(6) (1924) 34 C.L.R. 363, at p. 375.
(7) (1816) 5 M. & S. 198.
(8) (1909) 2 K.B. 652, at p. 663.
(9) (1913) A.C. 263, at p. 273.
(10) (1900) A.C. 135.
(11) (1918) A.C. 626.

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Starke J. Dixon J. McTiernan J.

STARKE, DIXON AND MCTIERNAN JJ. In the Supreme Court *Webb* and *Henchman* JJ. considered that there ought to be a new trial because, in their opinion, a misdirection had been given in relation to the tenth question submitted to the jury, and *Macrossan* J. concurred in ordering a new trial because issues had not been submitted to the jury upon which he thought they might have found for the plaintiff. We think that the misdirection relied upon by their Honors could not have influenced the jury's answers to the remaining questions and we do not think that those answers should be set aside for any of the reasons advanced by counsel. With those answers standing, we think the jury could not, consistently with the evidence, have answered the sixth question or any other question which might properly have been submitted to them in favour of the plaintiff. It appears to us that the defendant's duty can be stated no higher than to abstain from the supply of electrical current to a consumer's installation which it knew, or, exercising reasonable care and skill, ought to have known, was defective and likely to allow an escape of electricity endangering the safety of persons who came upon the premises.

The answers of the jury establish that the defendant neither knew nor ought to have known of any such defect in the installation when the contractor put it in in 1926 or when he repaired it in 1927, because, as they found, it was not then left in an improper condition.

No evidence was given that the defect existed before January 1930 allowing the escape of electricity, which led to Russell's death on 20th February 1930, and we can discover no evidence upon which the jury could find that an electrical undertaker in the circumstances ought reasonably to have taken precautions which the defendant omitted, and by which the defendant ought to have become aware that electricity was escaping.

We therefore think that the grounds upon which the Supreme Court ordered a new trial fail and the appeal should be allowed.

EVATT J. The only ground upon which the judgment entered by *Brennan* J. was successfully attacked before the Full Court, was the presence of an alleged misdirection of law in a portion of

the summing-up of the learned trial Judge. The direction dealt with a question to be answered by the jury. But no objection whatever was raised by counsel to the direction; indeed the questions to be answered by the jury seem to have been arrived at by actual agreement between counsel.

In my opinion, had objection been taken to the criticized portion of the charge, the Judge could, and probably would, have made a sufficient direction or asked "a further or different question" (1).

Adopting the language of Lord *Parker of Waddington* in *Banbury* v. *Bank of Montreal* (1), I am of opinion that it was "manifestly unfair and unjust to allow the point to be raised for the first time" on appeal.

In all the circumstances, therefore, the Full Court should not have ordered a new trial.

For this reason the appeal should be allowed.

Appeal allowed.

Solicitors for the appellant, *Walsh & McLaughlin*, by *Fitzgerald & Walsh*.

Solicitors for the respondent, *T. J. Hally*, by *O'Shea, O'Shea, Corser & Wadley*.

B. J. J.

(1) (1918) A.C., at p. 705.