1958
*Dec. 3, 4
1959
Feb. 26

BENJAMIN HILLMAN (*Defendant*) .....APPELLANT;

AND

DOUGLAS MARSHALL MACINTOSH (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Express pick-up man calling at commercial building and falling down elevator shaft—Mechanical safeguards defective—Victim familiar with premises—Liability of building owner—Invitor and invitee—Concealed danger—Defence of independent contractor—Whether breach of statutory duty—The Factory, Shop and Office Building Act, R.S.O. 1950, c. 150.

The plaintiff, a driver for an express company, had been for some time collecting parcels from the tenants of the defendant's commercial building. To collect his parcels, he would stop his truck outside the entrance to an elevator and board the elevator. Normally, the elevator shaft door would not open unless the elevator was opposite it. On November 27, 1951, the plaintiff was discovered at the bottom of the elevator shaft, unconscious and badly injured, with no recollection of what had happened. The evidence disclosed that the locking device ensuring that the elevator was opposite the door before it opened was not in proper working condition, that the shaft door was open, and that the elevator was at the second or third floor. The defendant contended that he had retained the company which had installed the elevator to keep it in order and also had his own engineers make inspections from time to time. Three service calls to repair the interlocking device had been made between the date of the installation, in June 1951, and the date of the accident. The trial judge dismissed the action, and his judgment was reversed by a majority in the Court of Appeal. The defendant-owner appealed to this Court.

Held: The action must be maintained. There was a breach by the defendant, as invitor, of the duty owed by him to the plaintiff, as invitee.

1959

HILLMAN v. MACINTOSH

Per Rand and Judson JJ.: There is no doubt that the plaintiff was an invitee. The door was intended for the use and operation as were actually carried on. The duty of the defendant was one of personal responsibility to see that reasonable care was exercised to maintain in proper condition this potentially dangerous apparatus. The facts disclosed that this duty was not discharged and that a trap was negligently allowed to develop. There was no contributory negligence on the part of the plaintiff.

Per Locke, Cartwright and Martland JJ.: The plaintiff was an invitee. There was a common interest between the defendant and the plaintiff, in that it was to the interest of the defendant that his tenants should be able to obtain the services of express company employees in connection with their commercial activities. *Mersey Docks and Harbour Board v. Procter,* [1923] A.C. 253. There existed, at the date of the accident, an unusual danger. The premises were not reasonably safe and no warning of danger was given to the plaintiff. *Indermaur v. Dames* (1886), L.R. 1 C.P. 274. A *prima facie* case was made that the defendant should have known of the danger existing and this case was not met. There was no evidence of any standing arrangement for periodic inspections to be made. Furthermore, an invitor's duty could not be discharged merely by entrusting its performance to an independent contractor: *Thomson v. Cremin,* [1953] 2 All E.R. 1185. The defendant was not entitled to succeed on the ground that the plaintiff failed to exercise reasonable care for his own safety. The plaintiff was entitled to assume that, when the door opened, the elevator would be there.

Although it was not necessary to so decide here, the plaintiff was within the class of persons protected by s. 58 (1)(*c*) of *The Factory, Shop and Office Building Act* as a "passenger", and a claim might have been founded upon a breach of that statutory requirement.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing the judgment of Barlow J. Appeal dismissed.

C. F. MacMillan, for the defendant, appellant.

H. A. V. Green, Q.C., and *J. A. Wright, Q.C.,* for the plaintiff, respondent.

The judgment of Rand and Judson JJ. was delivered by

RAND J.:—The appellant is the owner of a block in the city of Toronto which is occupied at least in part by tenants engaged in various businesses that call for frequent shipments of packages by express. The practice of the express messengers is to draw up their trucks at elevator entrances to the building and to use an elevator, of which there are three, one passenger and two freight,

[1] [1957] O.R. 284, O.W.N. 187, 8 D.L.R. (2d) 513.

1959

HILLMAN v. MACINTOSH

Rand J.

in order to make calls at the various offices or rooms and to collect parcels which are then taken down by elevator and loaded on the truck. In the case before us such a call was made by the respondent, a messenger employed in the Canadian Pacific Express service, about 4.00 o'clock p.m. on November 27, 1951. Arriving at the eastern side of the building, in the usual manner he backed his truck up to the door opening on the southerly freight open cage elevator, the level of the building floor being approximately that of the truck bottom. The door was in two horizontal sections, the upper of which in opening moved upward and the lower downward. It was operated by a latch and strap mechanism connected with an interlocking device designed to prevent the door from being opened unless the elevator car was at that floor. To open the door the latch would be pulled upward and, with the elevator in proper position, the horizontal sections would be released from the lock, one to be pushed up by hand and the other down by foot by the person opening it. The latter would stand on a ledge in front of the door between 14 and 18 inches in depth. If the door mechanism held fast, indicating that the elevator was not in position, the messenger would be obliged either to go inside the building by means of another door or by calling to some one in the building, to have the elevator brought to where it was required; there were no means outside the building to do that.

The detail circumstances of the accident here are not known. A short while after 4.00 o'clock the respondent was discovered at the bottom of the elevator shaft 20 feet below the floor, stretched out full length, face downward, unconscious and badly injured; and his memory of the events does not go beyond the point of backing the truck up to the door.

An examination disclosed that the locking device was not in good working condition. The fingers of the bolt which apparently engaged another part of the mechanism to bring about the locking were found to be spread which would make the engagement difficult, the lock hard to operate and the door consequently to be opened. In proper condition the cover of the lock was securely held down by screws to the base of the device; but these screws were found loose, a fact easily detectable by ordinary inspection.

With these defects the device was not dependable nor would it work properly and the result might be that the door could be opened when the elevator was at another level. In the opinion of experts the screws must have been loosened in the course of operation or attempted operation of the door over a period. The appellant some time before the accident had known that the door sections could be separated by 2 or 3 inches when the elevator was not at the appropriate level, a condition which should have been given immediate attention but was not. The loosening, in large part at least, was a product, owing to the spread fingers, of necessarily rough usage in working the door which sooner or later would have produced a condition allowing it to be opened on to an empty shaft.

Through a small window in the upper left part of the door a person could look into the shaft and in suitable conditions of light could see whether or not the elevator was at that floor. There was a small electric bulb in the elevator but the respondent who had used the door about twice a day for the six months of the mechanism's installation had never found it alight. If a door leading from the ground floor of the building was open some light would be admitted to the shaft but there was no evidence that, at the time, it was open or closed. The door a few feet north of the southerly elevator door was usually locked and there is no evidence that it was not. The elevator had been installed in the previous June and in that month, August and September on three occasions the difficulty of working the locking device chiefly through stiffness had been such that skilled mechanics had to be called in. There is no evidence of any other specific inspection or test made or work done to or on the elevator between September and the day of the accident, although as mentioned the appellant had known that the door could be opened 2 or 3 inches.

The view of what had happened urged by Mr. Green was that the respondent, reaching the ledge, looked through the window and in the failing light outdoors and none inside, being able to see nothing, pulled the latch, placed his hands on the upper half of the door to push it upward and his foot on the lower part to force it downward, using the force ordinarily required, was able, because

1959

HILLMAN v. MACINTOSH

Rand J.

of the loose screws and the internal condition of the locking device, to open the door and, helped by some slight forward momentum, to step forward into the empty shaft and to fall prone to the bottom. The position of the body when found seems to confirm that that was what happened.

At the conclusion of the plaintiff's case a motion for non-suit was allowed. On appeal[1] this was set aside, Laidlaw J. dissenting, and judgment entered for the plaintiff in the amount of damages found by the trial judge. From that judgment this appeal has been brought.

In the Appeal Court considerable attention was given to the classification of the messenger in relation to the premises: was he an invitee or a licensee? On this I entertain no doubt. The various rooms in the building were let to tenants who would and did carry on business, an essential activity of which at least for some of them, including a company of which the appellant was an officer, was the use of the freight elevators to carry goods in packages or parcels to and from the tenanted premises. Of the fullest knowledge and understanding of this by the appellant there is not the slightest doubt. The elevator had been built for that precise purpose; this facility, including the mode of operating the doors, was placed where it was for that particular use by tenants or persons in the normal course of things giving services to them in their businesses. The door at such a level and so placed and equipped was intended for the use and operation as was actually carried on. How an invitation to use the elevator in the course of contemplated business could have been made more openly than that presented by these physical facts I find it difficult to imagine. There could, of course, have been a formal printed invitation posted at the door or the running announcement of a loudspeaker that all messengers were invited to avail themselves of the elevator; but that would be making audible only what was expressed mutely by the facts themselves. The owner had created them and it never could have entered his mind that the daily routine of express men was not what his tenants had bargained and were paying for. He was interested in providing this convenience as part of the

[1] [1957] O.R. 284, O.W.N. 187, 8 D.L.R. (2d) 513.

accommodation he had undertaken to give them; and the express company and the messenger likewise were interested in completing that feature of the business of the tenants; reasonably safe and expeditious means within the building for the conduct of business was an essential tenant privilege which extended to those persons who would be expected to furnish such services.

These considerations are sufficient in my opinion to satisfy any test laid down as necessary to the relation of an invitee. The duty of the appellant was one of personal responsibility to see that reasonable care was exercised to maintain in proper condition this potentially dangerous apparatus. That it was not discharged the facts disclosed sufficiently indicate; what was negligently allowed to develop was a trap. That was the view reached by the Court of Appeal which found also that there was no contributory negligence. I am quite unable to say that either of those findings was wrong.

I would, therefore, dismiss the appeal with costs.

The judgment of Locke, Cartwright and Martland JJ. was delivered by

MARTLAND J.:—The facts of this case have been fully reviewed in the judgment of my brother Rand and it is unnecessary to repeat them here. The claim is for injuries sustained by the respondent while on premises occupied by the appellant and the legal question is as to the duty owed by the latter to the former and whether there has been any breach of it.

The first question is as to the legal category in which the respondent should be placed; that is, whether he was a licensee or an invitee on these premises at the time and place of the accident. A number of authorities was cited on this point. The appellant relied upon *Fairman v. Perpetual Investment Building Society*[1], which held that a person who lodged in a flat in an apartment house with her sister, the wife of the tenant of the flat, was not an invitee of the owner of the building when walking on a stairway which was under the owner's control, but was only a licensee.

[1] [1923] A.C. 74, 92 L.J.K.B. 50.

1959

HILLMAN v. MACINTOSH

Martland J.

Reference was made to *Jacobs v. London County Council*[1], in which the House of Lords reviewed the effect of the judgments in that case and followed it.

The appellant's argument is that the respondent's position in relation to the appellant, the owner of the office building, was similar to that of Mrs. Fairman, because his business was with the appellant's tenants and not with the appellant himself.

Consideration must, however, be given to the case of *Mersey Docks and Harbour Board v. Procter*[2], which was heard by the House of Lords shortly after judgment had been delivered in the *Fairman* case and which is also cited in the *Jacobs* case. Lord Sumner, at p. 272, said:

> The leading distinction between an invitee and a licensee is that, in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none.

In *Mersey Docks and Harbour Board v. Procter* the deceased husband of the plaintiff was a boilermaker who was working for a contractor on a ship lying in a floating dock owned by the defendant board. Immediately following the passage above cited, Lord Sumner says: "The common interest here is that ships in the docks should, when necessary, be able to employ boilermakers on board of them", though subsequently he held that the invitation did not extend to that part of the premises to which the plaintiff had strayed when he met his death.

In my view there was a common interest in this case as between the appellant and the respondent. The tenants in the appellant's building, including a company of which the appellant was the president, regularly made use of the services of both the Canadian Pacific Express, which employed the respondent, and the Canadian National Express. Every tenant requested these services and the appellant was aware that the employees of the express companies entered the freight elevators from the laneway entrance to perform them. This use of the freight elevators was made with the appellant's full consent. Part of the function of these elevators was their use by the express company employees. I think there was a common interest

[1] [1950] A.C. 361, 1 All E.R. 737.
[2] [1923] A.C. 253, 92 L.J.K.B. 479.

in that it was to the interest of the building owner that his tenants, carrying on business on premises leased from him, should be able to obtain the services of express company employees in connection with their commercial activities. This being so, the relationship between the appellant and the respondent was that of invitor and invitee.

The appellant, therefore, owed to the respondent, in relation to his use of the freight elevators, a duty the classic definition of which is that of Willes J. in *Indermaur v. Dames*[1]:

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

The exact scope of the duty thus defined has been considered in a number of cases. Three views of it were outlined by Lord Reid in *London Graving Dock Co. Ld v. Horton*[2], where he says:

> I think that in this case there was a duty in respect of the danger which caused the accident and that the real question is what was the nature and extent of that duty. Three views have been suggested. In the first place it has been said that the duty of an invitor is to make his premises reasonably safe (at least in so far as that is practicable). Secondly it can be said that the invitor has the option to make his premises reasonably safe or to give to his invitee adequate notice of the danger, and that if he adopts the latter alternative his duty is at an end. Or thirdly his duty can be said to be to use reasonable care to prevent damage to his invitee.

The second interpretation was the one favoured by the majority of the House of Lords in that case.

There did exist, on the date of the accident, an unusual danger in that it was possible to open the door of the freight elevator at the lane without the elevator itself being at that floor. The respondent was found, following the accident, at the bottom of the elevator shaft. The elevator was then at the second or third floor and the lane door to the elevator was open. On the morning after the accident the lane door of the elevator could be opened,

[1] (1866), L.R. 1 C.P. 274 at 288, 35 L.J.C.P. 184.
[2] [1951] A.C. 737 at 777, 2 All E.R. 1.

1959

HILLMAN v. MACINTOSH

Martland J.

even though the elevator itself was some distance below the door. The respondent had no notice from the appellant of the existence of this danger.

The respondent testified that he had never known the elevator not to be at the right floor when the door was opened. He had been using the elevator regularly in the course of his duties as an expressman, visiting the premises practically every day.

The witnesses who opened the elevator door at the lane on the morning following the accident discovered that the screws holding the cover on the interlock of the elevator door were loose, and also those attaching the device to the wall of the elevator shaft. One of the expert witnesses testified that the lock with the cover loose is not dependable; it would be possible that a person would be able to open the door when the elevator was not there.

There was, therefore, an unusual danger. The premises in question were not reasonably safe and no warning of the danger had been given to the respondent.

The next issue is as to whether the appellant should have known of the danger. Did he use reasonable care to prevent damage to the respondent?

Reference has already been made to the condition of the elevator door at the time the accident occurred. The appellant, on examination for discovery, stated that it was his information that the screws of the interlock device were loose at the time of the accident. Other answers also made on discovery establish that the elevator in question was installed in June 1951. The accident occurred on November 27 of that year. Following its installation the Turnbull Elevator Company Limited effected repairs to the elevator on three occasions: once about two weeks after installation, then on August 28 and again on September 6. The work done was necessitated by the fact that the interlocking mechanism was not operating properly. The appellant stated that it was stiff.

He further stated that on occasions the outside door of the elevator could be opened about two or three inches when the elevator was not at the floor in question. The appellant was asked what inspection he made to determine

whether any repairs were necessary. His answer was: "None." When asked whether he had standing instructions to an employee or employees to make periodic inspections, his answer was: "Our engineer, Mr. Hills, looked after that."

There is no evidence as to what, if any, inspections were, in fact, made, as the appellant did not call any evidence at the trial, having applied for a nonsuit at the end of the respondent's case. The appellant could not say how long the condition of the loose screws had existed.

The position is, therefore, that this elevator had caused difficulty, in respect of its interlocking mechanism, such that repairs had had to be made on three occasions in 1951 following its installation. There is no evidence of actual inspections after the repairs were made on the last occasion; that is, September 6, 1951. There is evidence of loose screws on the interlocking mechanism at the time of the accident and that this door could be opened without the elevator being at the proper floor. I think the respondent made a *prima facie* case that the appellant should have known of the danger which existed on the day of the accident and this case has not been met.

The appellant contends that he entrusted the care of the elevator to the Turnbull Elevator Company Limited, an independent contractor, and that, by so doing, he took reasonable care for the safety of those premises. He relies upon the case of *Haseldine v. Daw*[1]. In that case, however, the defendant had retained the services of a competent firm of engineers to make periodic inspections of the lift in question, to adjust it and to report upon it. There were also quarterly inspections by the insurance company's engineer. In the present case there is no evidence of any standing arrangement with the Turnbull Elevator Company Limited for periodic inspections. All we know is that they returned to make repairs after the initial installation because of the faulty mechanism. There is no evidence of any inspections thereafter.

Furthermore, the authority of *Haseldine v. Daw* may be somewhat shaken by the judgment of the House of Lords in *Thomson v. Cremin*[2]. In that case it was held

[1] [1941] 2 K.B. 343, 3 All E.R. 156.
[2] [1953] 2 All E.R. 1185.

1959

HILLMAN v. MACINTOSH

Martland J.

that an invitor's duty to his invitee is personal in the sense that it could not be discharged merely by entrusting its performance to an independent contractor.

The next point is as to whether the respondent used reasonable care for his own safety. The learned trial judge and Laidlaw J.A., in the Court of Appeal, have held that he did not. The majority of the Court of Appeal held that he did.

On this issue counsel for the appellant relies upon two decisions: that of the Court of Appeal in England in *Kerry v. Keighley Electrical Engineering Co., Ltd.*[1], and that of the Supreme Court of Newfoundland (on appeal) *in Newfoundland Hotel v. Lucy Amminson*[2].

In the former case the plaintiff stepped from a lift to the landing of an upper flat, remained for a few seconds on that landing, during which the lift door closed, and then, according to his own evidence, while keeping his back to the lift, stretched his hand backwards, opened the lift door and stepped backwards through it. The lift was not there and he fell down the shaft, sustaining injuries. At the trial Atkinson J. stated that everybody of intelligence knows nowadays that automatic lifts, which operate without the necessity for an attendant, are supposed to be so constructed that the door will not open unless the lift is there. He thought the public today have a right to expect, and to take for granted, that, if the door of a lift opens, the lift will be there.

He relied upon a statement of Lord Wrenbury in the *Fairman* case at p. 96:

> The owner must not expose the licensee to a hidden peril. If there is some danger of which the owner has knowledge, or ought to have knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it. If the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable. But something must be said as to the meaning of "obvious." Primarily a thing is for this purpose obvious if a reasonable person, using reasonable care, would have seen it. But this is not exhaustive unless the words "reasonable care" are properly controlled. There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see them when if he had been on the alert and had looked he could have seen them. For instance: if one step in a staircase or one rung in

[1] [1940] 3 All E.R. 399.

[2] (1949), 23 M.P.R. 194, 4 D.L.R. 520.

a ladder has been removed in the course of the day and a man who had used the staircase or the ladder in the morning comes home in the evening finding the staircase or ladder still ostensibly offered for use, and comes up or down it without looking out for that which no one would reasonably expect—namely, that a step or rung has been removed, he has nevertheless suffered from what has generally been called a "trap," although if he had stopped and looked he would have seen that the step or rung had been removed.

On appeal, MacKinnon L.J. said at p. 403:

For my part, I do not think that it is possible to assimilate the expectation of a reasonable person that a staircase will have all its stairs in position, or that a ladder will have all its rungs in position, and not have a dangerous gap in it, for which he must look, to a suggestion that, if one opens a door to a lift, one is entitled to assume that the lift is opposite to that door.

As between these two views regarding the effect of Lord Wrenbury's statement, it is, I think, significant in the present case that the law of Ontario contains a statutory provision in respect of the duty regarding elevators in office buildings. Paragraph (*c*) of subs. (1) of s. 58 of *The Factory, Shop and Office Building Act,* R.S.O. 1950, c. 126, provides as follows:

58. (1) In every factory, shop, bakeshop, restaurant and office building,

* * *

(*c*) every gate or door opening on to an elevator hoistway shall be connected to the machinery operating the elevator by an interlocking device which shall prevent the elevator car from moving until such gate or door is closed, and which shall prevent such gate or door from being opened unless the elevator car is in the proper position in relation to such gate or door to permit the safe movement of passengers or freight from the landing or floor to the platform of the elevator car;

Further, there is in this case the respondent's own evidence as to his prior experience in the use of this elevator, during which the elevator had always been there when the door opened. There was no such evidence in the *Keighley* case.

1959

HILLMAN v. MACINTOSH

Martland J.

The facts of the *Newfoundland* case are completely different from the present. The deceased husband of the plaintiff in that case had improperly used the elevator in question and in a manner contrary to the rules of the defendant hotel. Further, the elevator there in question was not subject to the regulations regarding electrical safety devices.

It is my view that the respondent was entitled to assume that, when the door opened, the lift would be there. I do not think that the appellant is entitled to succeed on the ground that the respondent failed to exercise reasonable care for his own safety.

Having reached this conclusion, that there was a breach by the appellant, as invitor, of the duty owed by him to the respondent, as invitee, on the appellant's premises, it is not necessary to decide whether the respondent was entitled to succeed against the appellant on a claim for breach of a statutory duty imposed upon the appellant by para. (*c*) of subs. (1) of s. 58 of *The Factory, Shop and Office Building Act,* previously quoted. I am inclined to think that that paragraph did create a duty involving legal responsibility beyond the liability to the money fine imposed for its breach by the section. I think the respondent was within the class of persons protected by this paragraph, i.e., "passengers", and that, in the light of the judgment of the House of Lords in *Millar v. Galashiels Gas Co.*[1], a claim might have been founded upon a breach of that statutory requirement.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Richardson & MacMillan, Toronto.

Solicitor for the plaintiff, respondent: J. A. Wright, Toronto.

---

[1] [1949] S.C. (H.L.) 31, A.C. 275, 1 All E.R. 319