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*Mar. 13, 14

June 24

CHAPPELL'S LIMITED (*Defendant*) ....APPELLANT;

AND

MUNICIPALITY OF THE COUNTY OF CAPE BRETON (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Negligence—Defendant general contractor employing independent contractor to make particular repair on plaintiff's building—No contract as between defendant and plaintiff to effect repair—Building destroyed by fire because of independent contractor's negligence—Extent of duty owed to plaintiff by defendant.

The defendant contractor was engaged in making certain repairs to a building owned by the plaintiff and instructed an independent contractor to solder a hole in the gutter. While the servant of the independent contractor was proceeding to effect this repair, a fire was caused by the servant's negligent operation of a lighted blowtorch and resulted in the destruction of the building. The plaintiff's claim was, initially, framed as one for breach of contract by the defendant, but no contract by the defendant with the plaintiff to repair the gutter was proved, and the case proceeded to trial solely as a claim that the defendant was vicariously liable for the negligence of the workman in doing that work. The trial judge dealt with the case as being one which involved the issue of liability of the defendant for the negligence of an independent contractor hired by it. He decided that the work done by the servant was not, by its nature, inherently dangerous and consequently that the case was not one in which liability would attach to the defendant in respect of the negligence of the servant of its independent contractor. The Court of Appeal, by a majority, allowed an appeal from this judgment and the defendant then brought an appeal to this Court.

Held: The appeal should be allowed and the judgment of the trial judge restored.

The issue was as to the extent of the duty owed to a claimant by a person who contracts with an independent contractor to do work, not for himself, but for the claimant, at the claimant's request, if the claimant's own property is then damaged because of negligence on the part of the independent contractor who is working on it. The plaintiff had failed to prove any contract between the defendant and itself whereby the defendant undertook to effect the repair of the gutter. The only connection of the defendant with the matter was the actual hiring of the services of the independent contractor and providing him with the staging from which to do the work. In these circumstances, the duty owed by the defendant to the plaintiff was no more than to exercise reasonable care in the selection of a competent independent contractor to perform the work. There was no suggestion in the evidence that the choice made by the defendant was an improper one and, therefore, there was no evidence of a breach of that duty.

*PRESENT: Taschereau, Cartwright, Martland, Judson and Ritchie JJ.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *in banco*[1], allowing by a majority an appeal from a judgment of Parker J. Appeal allowed.

J. H. Dickey, Q.C., and *J. J. Fitzpatrick, Q.C.*, for the defendant, appellant.

C. M. Rosenblum, Q.C., and *G. S. Black*, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This case involves a claim for damages sustained by the respondent as a result of the destruction by fire, on November 12, 1959, of the court-house building owned by it in the City of Sydney. For some days prior to that date, and on that day, employees of the appellant had been engaged in making repairs to the exterior of the building. On that day James Garland, a servant of George Garland who was the owner of a small roofing and sheet metal business in Sydney, went to the top of a scaffolding on the south side of the building, which had been erected by the appellant, for the purpose of repairing a hole in the gutter; this hole was about the size of a fifty-cent piece. He took with him a blowtorch, a soldering iron and other necessary materials. He lit the blowtorch, placed it in the gutter with the flame pointing along the length of the gutter and put the soldering iron on to heat. His reason for placing the torch in the gutter was that there was a wind blowing from the south and he thought that if he left it on the scaffolding it would be blown out. The gutter was made of copper about one-sixteenth of an inch in thickness; it was about ten inches deep; its width at the top was about nine inches and at the bottom about seven inches. The base of the blowtorch was round; it was about six inches in diameter and eight inches in height; when placed in the gutter it went right to the bottom. In the position in which Garland was working nothing inflammable was exposed; the walls of the building were brick; the shingles on the roof were not wood; copper flashing came down from the roof and lapped over the metal of the gutter. The flashing and the gutter were nailed to a wooden fascia board but no part of this board was visible.

[1] (1962), 36 D.L.R. (2d) 58.

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The learned trial judge found that the fire was caused by the heat from the blowtorch passing through the metal of the flashing and the gutter and igniting the fascia board. He found that the fire was caused by the negligence of James Garland and this finding was not questioned before us.

The circumstances which led to James Garland being present at the building on that day were as follows: An employee of the appellant, who had been engaged in replacing copper moulding on the building, had noticed the hole in the gutter. He brought this to the attention of a Mr. Carmichael, the County Clerk, who had previously requested the employees of the appellant to advise him as to the condition of the building. Subsequent to Carmichael's receiving this advice, a Mr. MacInnis, the appellant's foreman, attended at the shop of George Garland.

The only evidence as to the arrangement which was made for the repair of the gutter to be done by James Garland is that which James Garland gave at the trial. Neither Carmichael nor MacInnis gave evidence. James Garland testified that he overheard a conversation between his father, George Garland, and MacInnis, in which the latter wished to have James Garland go up and solder the gutter. MacInnis told James Garland where the hole was which he was to repair and James Garland went to examine it. The staging was not high enough for him to reach the hole and, in consequence, the appellant's employees increased the height of the staging from which James Garland worked. James Garland went to do the work upon the instructions of his father.

The respondent commenced action against the appellant, claiming in contract, alleging that:

> On or about the 1st day of November, A.D. 1959, the Defendant entered into a contract with the Plaintiff pursuant to which the Defendant undertook to effect certain repairs to the Court House building aforesaid and it was a term of the said contract, express or implied, that the Defendant would use reasonable care and due diligence, and would see that reasonable care and due diligence was used by others employed by it, in and about and during the performance of the said work, for the safe performance thereof and the preservation of the Plaintiff's property.

This was followed by an allegation that on November 12, 1959, the servants or agents of the defendant, while engaged in the performance of the work included in the contract, negligently set fire to the building. Particulars of the neg-

ligence were then given. The appellant, in its statement of defence, denied that it was under contract to do this work, or that its servants or agents negligently set fire to the building.

Had the respondent been able to establish the contract which it pleaded and that the repair of the gutter was included in the work which the appellant had contracted to perform, the respondent would have been entitled to succeed against the appellant, irrespective of whether James Garland was a servant of the appellant or a servant of an independent contractor hired by the appellant to do that work. By contracting to do the work the appellant would have been under an obligation to the respondent to do the work itself, or to ensure that it was done, carefully. In such a case the appellant could not have evaded its contractual duty by delegating the performance of the work to someone else.

However, the respondent was apparently unable to prove such a contract. There was no evidence led to establish its existence and counsel for the respondent at the trial stated that he was basing his claim solely in negligence.

The learned trial judge dealt with the case as being one which involved the issue of liability of the appellant for the negligence of an independent contractor hired by it. He said:

> In my opinion, what the evidence shows is that James Garland was at all relevant times the servant of his father, George Garland. The legal relationship between the defendant and George Garland was that of a general contractor and an independent subcontractor.

He decided that the work done by James Garland was not, by its nature, inherently dangerous and consequently that the case was not one in which liability would attach to the appellant in respect of the negligence of the servant of its independent contractor.

From this decision the respondent (at that time the appellant) appealed to the Court of Appeal. The case was dealt with in that Court upon the same basis. MacQuarrie J., who delivered the reasons of the majority of the Court, said:

> With deference, in my opinion, . . . the matter comes to this, that it is reasonable to conclude on the whole of the evidence that the work that was done by George Garland and James Garland in connection with soldering the hole in the copper gutter, was done by George Garland engaged by Mr. MacInnis to do work in connection with the Court House

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repairs as an independent contractor working for the respondent and by James Garland as the servant of George Garland.

He went on to hold, however, that:

> In my opinion, considering all the circumstances in the present case, the respondent ordered the doing of work, which, if done by the usual method, would create a danger of fire to the appellant's building, and it thereupon came under a duty either to provide that the dangerous method be not used or to provide that, if it were used, all necessary precautions against fire be taken, and it could not escape liability for the non-performance of such duty by delegating its performance to George Garland.

MacDonald J. dissented and, for the reasons which he stated, agreed with the conclusion reached by the learned trial judge that "it cannot be said that such work was by its nature inherently dangerous."

The Court of Appeal permitted the respondent to amend its pleadings so as to plead, in addition to the allegation of negligence on the part of the appellant, its servants or agents, which it had previously pleaded, an additional allegation of negligence on the part of its independent contractor.

With the greatest respect for the conclusions reached in the Courts below, I find it difficult to see how the relationship of contractor and subcontractor could have existed as between the appellant and George Garland, when there is no evidence of a main contract, as between the appellant and the respondent, involving any responsibility on the part of the appellant to repair the gutter. On the evidence in this case it cannot be said that the appellant contracted with the respondent to do that work and consequently it was under no duty to the respondent to perform it. It is not possible to infer such a contract from the conversation between MacInnis and George Garland without any additional supporting evidence. It must be recalled that the evidence shows that the hole in the gutter had been disclosed to Carmichael. There is no evidence to establish what instructions were thereafter given by Carmichael to MacInnis. I do not see how it is possible to infer that MacInnis undertook, as a matter of contract with the respondent, that the appellant should undertake that work merely because later he requested George Garland to have that work done. Carmichael might have requested that the

appellant undertake that work as a matter of contract. On the other hand, he might equally well have requested MacInnis to arrange that someone should do the work. The respondent failed to prove any contract between the appellant and itself whereby the appellant undertook to effect the repair of the hole in the gutter.

The absence of such a contract is of great importance, not only because the appellant cannot be held liable in contract in respect of the damage which occurred, but also because it has a very important bearing in determining the question as to whether the appellant became vicariously responsible for the negligence of George Garland's employee James Garland. How, in the absence of such a contract, is the rather scanty evidence given by James Garland to be construed in determining the legal relationship between the appellant and George Garland? In my opinion there is no more reason for construing the conversation between George Garland and MacInnis as leading to the inference that MacInnis made a contract with George Garland to do the repair work on behalf of the appellant than there is for construing the evidence as leading to the inference that MacInnis requested George Garland to do the work for the respondent. If the appellant was not obligated by contract to do this work itself, why should it enter into a contract with George Garland that he do the work in question on behalf of the appellant? If the second of the above inferences is drawn, then that is an end of the matter, for, in that case, George Garland was never an independent contractor of the appellant's and consequently there could be no vicarious liability on its part for the negligence of George Garland's servant. As the onus rested upon the respondent to establish the relationship between the appellant and George Garland, I would think that we are not entitled to adopt the first inference.

But, in any event, even if that inference were to be drawn, I do not see how it can lead to liability on the part of the appellant, in the absence of the existence of a main contract between the appellant and the respondent whereby the appellant undertook to do that work. It is necessary to define the extent of the duty owed by the appellant to the respondent, on which the respondent seeks to make the appellant vicariously responsible for the negligence of

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the servant of an independent contractor. It is, I think, of the utmost importance to remember that, even adopting the first inference, the services of the independent contractor were retained by the appellant, not to perform work which the appellant was itself obligated to perform, but solely to do work which the respondent required to be done.

This is not the usual case in which the claimant is a person who has suffered damage as a result of activities being carried on by another person who has delegated their performance to an independent contractor. Nor does the respondent claim against the appellant in contract on the basis that it undertook to perform the work in question for the respondent and delegated that performance to the independent contractor. This being so, the issue must be as to the extent of the duty owed to a claimant by a person who contracts with an independent contractor to do work, not for himself, but for the claimant, at the claimant's request, if the claimant's own property is then damaged because of negligence on the part of the independent contractor who is working on it. The only connection of the appellant with the matter was the actual hiring of the services of the independent contractor and providing him with the necessary staging from which to do the work. What duty, in these circumstances, does the appellant owe to the respondent?

In my opinion, that duty was no more than to exercise reasonable care in the selection of a competent independent contractor to perform the work. There is no suggestion in the evidence that the choice made by the appellant was an improper one and, therefore, there is no evidence of a breach of that duty.

For the foregoing reasons, in my opinion, the appeal should be allowed and the judgment of the learned trial judge restored, with costs to the appellant throughout.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Parkinson, Gardiner, Roberts, Anderson, Conlin & Fitzpatrick, Toronto.

Solicitor for the plaintiff, respondent: G. S. Black, Halifax.