HAROLD HANNEN GILMOUR *(Defendant)* ..... APPELLANT; *May 16, 17 *Jun. 20 1951

AND

MARION L. MOSSOP *(Plaintiff)* .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Master and Servant—Negligence—Safety of premises—Housekeeper tripped over dog on stairway—Duty of employer.

The respondent had been employed for a month as housekeeper in appellant's bungalow when, on her way to the basement, she fell to the bottom of the stairway after stepping on a dog belonging to appellant and which was lying on the top step of the basement stairway. Appellant owned two dogs who, when indoors, were either in the basement or in the house itself. Respondent, informed by appellant's daughter that the dogs were fond of lying on the top step of the basement stairs, never complained about that. Appellant who was aware of this habit of the dogs did not warn respondent of

*PRESENT: Kerwin, Rand, Estey, Locke and Cartwright JJ.

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any possible danger and was unaware that his daughter had done so. The trial judge and the majority in the Court of Appeal for British Columbia maintained the action.

Held, reversing the judgment appealed from and dismissing the action, that the claims that the lighting of the stairs was inadequate and that appellant knowingly permitted the dog to occupy the stairway were not borne out by the evidence; the appellant, as was his duty, provided premises that were reasonably safe for the carrying on of the work for which the respondent as housekeeper was employed and there was no evidence of any actionable negligence on his part.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming, Smith J.A. dissenting, the maintenance of the plaintiff's action.

J. W. de B. Farris K.C. for the appellant.

H. L. Harkley for the respondent.

KERWIN J.:—The duty of an employer is to supply and install proper equipment for his employee's work and a proper system of work so far as care and skill can secure these results: *Marshment* v. *Borgstrom* (2). He is also, of course, liable for any personal negligence. These rules are applicable to household work. The circumstances in the present case appear elsewhere and I am unable to find in them that the appellant failed in his duty in any respect.

Apparently the stairway was well constructed and there was no necessity of having any railing. The claim that the appellant knowingly permitted the dogs to be on the stairway is not borne out by the evidence because, as Mr. Justice Sidney Smith (1) points out, when the appellant found either of his two dogs on the stairway he "kicked them off." The respondent had been warned by the appellant's daughter that the dogs liked to sleep on the stairs and she knew of this propensity.

On the last point, I am of opinion that the stairs were properly lighted. If they could have been better illuminated by the ceiling light in the kitchen nearest the stairs, that was something that could, and should have been done by the respondent. On the evidence she was not forbidden to use this light but merely directed to turn out all unnecessary lights. In view of the respondent's position

(1) [1951] 1 D.L.R. 440. (2) [1942] S.C.R. 374.

in the household and her knowledge of the habits of the dogs, I can come to no conclusion other than that the occurrence was an unfortunate accident.

The appeal should be allowed and the action dismissed with costs throughout.

The judgment of Rand and Locke JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) dismissing the appeal of the present appellant from a judgment for damages, for personal injuries sustained by the respondent during the course of her employment as a housekeeper in the appellant's home in Vancouver. Sidney Smith, J.A. dissented and would have allowed the appeal and dismissed the action.

The facts, in so far as they appear to me to be relevant, are as follows:—The respondent entered the service of the defendant on December 1, 1948, her duties, as described by her, being those of housekeeper which included cooking, washing and keeping the house generally in order. The appellant's home is a bungalow with a stairway leading from the basement into the kitchen. At the time of the commencement of the employment and throughout its duration the appellant owned two small dogs, one a black Scotch terrier and one referred to by the respondent as a white Highland terrier. These animals were apparently house dogs who spent their time when indoors either in the house itself or in the basement. According to the respondent, the appellant's married daughter lived in the house during the first two weeks of the employment, apparently with the view of explaining the respondent's duties to her, and during this period informed her that the dogs were "rather fond of lying on the basement stairs" and said further that they had "quite a habit of staying on the top step of the basement stairs" and pointed out that this was dangerous. The respondent admitted that she knew that the dogs slept on the top step occasionally. She apparently was fond of the dogs and allowed them, at least at times, to sleep in the kitchen while she was doing her work: the weather had been cold around Christmas and she said that the black dog was usually

(1) [1951] 1 D.L.R. 440.

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lying under the kitchen range and the white dog in front of the kitchen register. About the middle of December the appellant's daughter left, leaving the respondent in charge of the housework. It is clear that during this period she frequently went to the basement in carrying on her duties. The stairway was carpeted with a dark coloured carpet and was some nine steps in length, and from the ceiling at the bottom there was suspended a light which could be turned on by a switch located on the wall immediately to the right of the entrance to the stairway. In addition to this, the doorway led directly from the stairway into the kitchen and there were two lights in the ceiling in this room, one at least of which when turned on would materially improve the lighting at the head of the stairs. There was no handrail on either side of the stairway.

On the evening of the accident when the appellant, his son and the respondent had sat down to dinner, the latter discovered that she had forgotten some food and got up from the table to proceed to the basement to procure it. According to her evidence she had turned out one of the lights in the kitchen, in accordance with general instructions received by her from the appellant to turn off the lights when the room was not in use. On approaching the entrance to the stairway she switched on the basement light and then stepped on the black dog, which was apparently lying on the top step, falling down the stairs and sustaining injuries. This dog, she said, had been lying under the kitchen range all that afternoon and had attempted to follow her into the dining room, presumably when she went in to dinner. She had ordered him back and she concluded that he had gone back to sleep under the stove where it was warm. She said that when she had last seen him he was sitting at the dining room door trying to get in.

There is really no dispute between the parties as to these habits of the dogs. The appellant was aware that they slept on the basement stairs at times and said that "we all knew it." The black dog, he said, would very often lie on the top step looking into the kitchen through the open doorway. There was no complaint made to him by the respondent and he did not warn her of any possible danger and was unaware that his daughter had done so.

The plaintiff's claim is founded in negligence and the particulars pleaded are:—

(*a*) The stairway was unlighted and very dark and there was no lighting or means of lighting provided.

(*b*) There was no handrail.

(*c*) The defendant knowingly permitted his dog to occupy the stairway without providing adequate lighting for the protection of those using the stairway.

Coady, J. by whom the action was tried, found as a fact that the respondent had been advised when she came to work that the dogs were in the habit of lying on the stairway and, while she had not observed them lying there at any time before the accident, she knew that they were from time to time to be found there. Considering, however, that the defendant knew that the dogs were from time to time to be found lying there and that he knew or ought to have known the danger which this would create for anyone using the stairway, unless "precaution was observed to determine before stepping on the stairway that the dog was not there", he found there was a breach of duty unless the doctrine *volenti non fit injuria* applied or the employee was guilty of contributory negligence. The learned judge was not satisfied that the respondent had freely and voluntarily, with full knowledge of the nature and extent of the risk she ran, impliedly agreed to incur it: as to contributory negligence he considered there was none. While finding that had the respondent hesitated at the top of the stairway when she put the light on and peered down at the first step the lighting was sufficient to enable her to see the dog there, he did not think this was a failure on her part to exercise reasonable care for her own safety. On the appeal O'Halloran, J.A., considering that the trial judge had neither misapprehended the evidence or erred in the application of appropriate legal principles, held that the appeal failed. Robertson, J.A. agreed with the learned trial judge that there was no contributory negligence and no volens. Finding that the appellant had never warned the respondent of any danger while knowing that her duties required her to go several times a day to the basement, he considered that the appellant was under a duty to take steps to guard against the danger she ran of stepping

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on the dog and falling. The fact that the respondent was well aware that the dogs at times lay on the steps and had been warned of the danger by the appellant's daughter is not noted.

While neither the judgment at the trial nor the reasons of the majority of the Court of Appeal appear to support the verdict on any of the three grounds of negligence pleaded, the matter should not, I think, be disposed of on this footing. The absence of the handrail does not appear to have been considered as affecting the matter by any of the learned judges who have considered the case. As to the lighting, the learned trial judge, as stated, found that it was sufficient to disclose the presence of the dog, had the plaintiff looked before starting down the stairway. There was no evidence to support the contention that the appellant knowingly permitted the dog to occupy the stairway and that he was aware of the dog's presence there. The respondent's case must, therefore, rest upon the ground that in the circumstances disclosed the appellant owed a duty to her to guard her in some manner against such risk as was inherent in the fact that the dogs were permitted to be in the house and at times on the basement stairs, with the risk of falling to which this might subject the respondent.

In my opinion, the judgment appealed from cannot be sustained. I agree with Mr. Justice Sidney Smith that the evidence does not disclose a cause of action. An employer who has a housekeeper or domestic servant is bound at common law to provide premises that are reasonably safe for the carrying on of the work for which the employee is engaged. As in the case of other employers he must not expose his servant to unreasonable risks. With great respect for the opinion of the learned trial judge, I think the principle upon which such cases as *Baker* v. *James* (1), where the liability sought to be established was on the ground that the employer had supplied the injured employee with a defective motor car, has no application to the present matter. *Smith* v. *Baker* (2) and *Wilsons and Clyde Coal Company* v. *English* (3), are the leading cases in which liability was sought to be established on the basis

(1) [1921] 2 K.B. 674. (2) [1891] A.C. 325.
(3) [1938] A.C. 57.

that there was some defective system of work or defective machinery and plant. There was nothing of this nature in the present case unless, indeed, the system of lighting was insufficient and I think the evidence does not support any such view. It cannot be contended on the evidence that the appellant's house was other than a reasonably safe place to carry on the duties with which the respondent was charged. The stairway to the basement was that usually found in houses of this nature and afforded a proper and safe means of access to the basement to any person exercising ordinary care. The common law infers that when a person enters into a contract of service he takes on himself the ordinary risks incident to such work as is lawfully carried on upon the master's premises. It is common place to find in private houses in Canada where housekeepers or servants are employed small house pets such as dogs and cats. The habits of these small animals of sleeping on the floor in various places throughout dwellings and as well upon stairways is a matter of common knowledge and, in my opinion, it is an implied term of such contracts of employment that any slight risk that this may involve is assumed by the employee. I regard that as being in the same category as other risks ordinarily involved in doing housework, the assumption of which I consider also to be implied. If such risk was increased by a failure to supply proper lighting, other considerations would arise but here it is plain from the evidence that the light available to the respondent from the basement light provided was adequate to enable her to see the dog: if further light had been required it was available from the overhead light in the kitchen, which she failed to turn on. To hold that in these circumstances the appellant is liable is, in my opinion, to make him an insurer of the safety of his servant.

The appeal should be allowed and the action dismissed with costs throughout.

ESTEY J.:—I agree that this appeal should be allowed and the action dismissed. The defendant is entitled to his costs throughout.

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CARTWRIGHT J.:—There does not appear to be any dispute as to the relevant facts in this case. Such facts are fully set out in the judgment of my brother Locke.

In my view there is no evidence that the injuries suffered by the plaintiff were caused or contributed to by the breach of any duty owed by the defendant to the plaintiff. I think that her injuries were the result of an unfortunate accident.

The appeal should be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *L. St. M. Du Moulin.*

Solicitor for the respondent: *Harold L. Harkley.*