SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 32
PD490/22

Lord Justice Clerk
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

(1) RODERICK FINLAYSON, (2) INGRID SIEGLINDE MERRETTIG and
(2) STEPHAN MARTENKA

Pursuers and Reclaimers

against

(1) ALBAN WINE LIMITED and (2) ANDREW SCOTT JOHNSTONE

Defenders and Respondents

Reclaimers: Conway, sol adv; Conway Accident Law Practice
Respondents: Clyde & Co, LLP
Second Respondent: Hennessy, sol adv; Keoghs Scotland LLP

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9 October 2024

Introduction

[1] On 26 September 2020, Katrin Martenka died following an accident occurring at the Green Room wine bar in Edinburgh, on 24 September 2020, when a non-load bearing wooden structure, intended to be used as a drinks tray, is said to have collapsed under the combined weight of herself and the second respondent, Mr Andrew Johnstone. The

deceased's partner, her mother and brother seek compensation from the operators of the wine bar, the first respondent, and also from the second respondent. Proof before answer was fixed in respect of the action as directed against the first respondent, although we were advised at the outset of the reclaiming motion that the claim against the first respondent had now been settled. The Lord Ordinary dismissed the action as directed against the second respondent, following debate on the Procedure Roll on the pleas of the second respondent. That decision is challenged in this reclaiming motion.

The reclaimers' pleadings

[2] The reclaimers aver that the wine bar had an outside area on the plat with tables and chairs. The occupier, using steel struts and hinges had fixed a wooden shelf to the railing, in such a way that it extended over the gap above the staircase leading to the basement area. It could be folded down when not in use. The shelf was intended to be used as a drinks tray, and was not intended for sitting on, which would be dangerous, all of which was known to the second respondent.

[3] On the evening of 23 September 2020, the deceased and a friend were socialising in the Green Room. They started up a conversation with the second respondent, who was a shareholder of the first respondent and a frequent visitor to the bar. The deceased had also visited the bar in the past, but was not familiar with the layout of the plat, incorporating the tray.

[4] At around 1am, the deceased and the second respondent went outside to smoke. It was dark at that time and the outside lighting had been extinguished. The reclaimers contend that the second respondent raised himself up onto the shelf, sat there for around a minute before moving along the shelf in the direction of the entrance door "to leave a space

such as to accommodate" the deceased. The deceased hitched herself up onto the shelf one leg at a time. As she sat back, the shelf immediately gave way, and she fell onto the concrete steps, suffering a fatal injury. The second respondent was able to prevent himself from falling backwards over the drop.

[5] The reclaimers maintain that the second respondent had a duty to take reasonable care to avoid acts or omissions which he could reasonably foresee might cause injury. The deceased was proximate to him in time and space. From his general familiarity with the premises he knew or should have known that the shelf outside was not meant for sitting upon, that it was suspended over a drop and that sitting on it was dangerous. By his actions he invited the deceased onto a trap. He should not have sat on the shelf, nor should he have invited the deceased to join him, either explicitly or implicitly. He should have foreseen that the deceased might follow his example. He also had a duty to prevent or at least discourage the deceased from joining him on the shelf. He created the risk of the accident which eventuated. He invited her from a place of safety into a place of danger, which should have been known to him, but could not have been obvious to her, having regard to the state of lighting and other factors.

[6] At debate the second respondent criticised the reclaimers' pleadings on the basis that it was not made clear how far the assertions therein were based on inference. Further, it was maintained that there were no relevant averments from which a duty of care on the part of the second respondent could be derived.

The Lord Ordinary's decision

[7] The Lord Ordinary considered that the reclaimers' averments, taken *pro veritate*, and reasonably construed, amounted to the averment of an invitation by the second respondent

to the deceased to join him on the shelf. He also accepted that the averments were sufficient for the purposes of establishing the foreseeability of injury arising from such an act on the part of the second respondent. In his view, however, this was not sufficient to establish the existence of a duty of care, even when coupled with knowledge of the danger. Comparisons could be drawn with, for example, a scenario where one pedestrian follows another over the road and is hit by a car. Even if the first pedestrian shouted "Follow me!" no duty would arise. These were circumstances of obvious danger, where no duty would arise, unless in the case of some particular averment of proximity, such as parent and child.

[8] In the event of a danger that was not obvious, there would require to be averments of special knowledge of the danger, which was absent, or of circumstances averred which could amount to an assurance to the deceased that the shelf was safe, which the deceased could rely upon. An argument that the second respondent had "made matters worse" was rejected on the basis that the circumstances were not akin to a situation such as a botched rescue attempt which ended up depriving a drowning man of his last chance of survival. The deceased was not unable to do anything about the situation, she retained the opportunity to assess the situation for herself and decide whether or not to follow Mr Johnstone's example.

[9] The Lord Ordinary applied the tripartite test in *Caparo* v *Dickman* [1990] 2 AC 605. Only foreseeability had been addressed in the averments, and this alone was insufficient to establish a duty of care. No relationship between the deceased and second respondent was averred, the only proximity being in terms of space and time. Imposing a duty of care in the present circumstances would risk opening the floodgates. A person who placed himself at risk was entitled to expect that he would not be held liable to a third party who followed his

example, unless he had assumed responsibility for their safety. The second respondent had not created the source of danger.

Submissions for the reclaimers

[10] The Lord Ordinary erred in applying *Caparo*. The present case was not novel and no issue of public policy arose. Following *Robinson* v *Chief Constable of West Yorkshire Police* [2018] AC 736 (Lord Reed at para 27), the Lord Ordinary ought to have compared the circumstances of the present case with the decided cases and existing common law to determine whether there was an established category of negligence within which they would fit. The facts were unusual, but no novel proposition in law arose (*Bourhill* v *Young* 1941 SC 395, Lord Aitchison at 437). This was a standard personal injury case where death had resulted. It could be accommodated within existing principles. It was a case of foreseeable physical damage caused by a positive act.

[11] A prior or special relationship between the parties was not necessary. The deceased was, in law, the second respondent's neighbour. His invitation to her to sit on the shelf was a positive act and it was reasonably foreseeable that his carelessness in issuing it might cause the deceased physical injury (*Donoghue* v *Stevenson* 1932 SC (HL) 31). He had caused or contributed to the damage which ensued.

[12] An inquiry into the facts was necessary to determine the nature and extent of the danger. Only then, given the deceased had fallen in hours of darkness, could it be said whether the hazard was obvious. The Lord Ordinary appeared to rely on the *volenti* defence, the requirements for which were stringent, and could only be determined after proof.

Submissions for the second respondent

[13] The Lord Ordinary was correct to apply *Caparo*. There was no directly analogous precedent. His conclusions in relation to the tripartite test, applied to the present circumstances, were correct. It was not the case that the Lord Ordinary concluded that there was sufficient for foreseeability.

[14] *Esto* the facts of the present case could be accommodated by existing principles, the second respondent still did not owe a duty of care. The averments did not establish foreseeability in that they did not disclose the necessary knowledge on the part of the second respondent (*Donoghue v Stevenson*, Lord Atkin at 44). There was no particular knowledge averred which would have alerted him to the existence of danger, ie inherent weakness in design/construction of the shelf. The only averments of proximity were physical and foreseeability of harm alone could not create proximity (*Caparo*, Lord Jauncey of Tullichettle at 655).

[15] Both duties contended for concern liability for omissions. The first, that the second respondent should have avoided sitting on the shelf or inviting the deceased to join him, when properly analysed, was an omission. There was no positive action which created the danger or made it worse. The danger pre-existed. The second respondent was akin to a bystander at the time the deceased sat on the shelf. She made an autonomous decision informed by the same knowledge as the second respondent. The second, that he should have prevented or discouraged her from joining him, was a pure omission (*Mitchell*, Lord Hope of Craighead at paras 14-16; Lord Scott of Foscote at para 39).

[16] There was no factual basis for the assertion that the deceased would not have suffered injury and death but for the second respondent's invitation. She voluntarily sat on the shelf. She may well have chosen to do so alone.

Analysis and decision

[17] This case may be somewhat unusual on its facts, but it is not complex in terms of legal analysis. It is a relatively straightforward claim for damages for personal injury based on an alleged positive, but negligent act, which created a foreseeable risk of injury to the deceased, which injury eventuated. There may be formidable obstacles in the reclaimers' path in terms of proving the claim, but that was not the test for the decision of the Lord Ordinary nor is it for this court. It seems likely that the matter has become unduly obfuscated, or complicated, by a lack of focus in the pleadings in identifying the true nature of the case against the second respondent. The pleadings are replete with averment of evidence, calls for further averment of evidence (a point which had even formed the second respondent's first argument before the Lord Ordinary), averments of beliefs of third parties and other matters which appear to be of, at best, peripheral relevance. The confusion created by the pleadings cannot have been assisted during the debate before the Lord Ordinary by reference to *Caparo.* A focus on that case, rather than *Robinson*, appears to have led the Lord Ordinary into error.

[18] It was submitted for the second respondent that the Lord Ordinary had not concluded that there was enough in the pleadings to raise a relevant case of foreseeability. It is difficult to accept that, having regard to the Lord Ordinary's comment that he rejected the submission that the invitation, "coupled with knowledge" was sufficient to establish a duty of care, and that his reasons for doing so related to the second and third parts of the *Caparo* test, not foreseeability. In any event, in our view the averments of the reclaimers do contain sufficient in terms of foreseeability, in terms of the nature and degree of the risk, the second respondent's knowledge thereof, and the invitation. Having accepted that the averments were such that they might relevantly be construed as indicating a positive act by the second

respondent, and assuming that he concluded, as is the case, that there was enough in the pleadings from which reasonable foreseeability of injury might be demonstrated, the Lord Ordinary nevertheless dismissed the claim on the basis of *Caparo.*

[19] However, this case is not presented as one involving novel legal issues. It is not even based on mere omission; or assumption of responsibility. And whilst there was an argument advanced that the second respondent "made matters worse", repeated before this court, this is clearly not a case where such an issue arises: the Lord Ordinary was right to consider that any attempt to equiparate the case with failed rescue cases or the like was not tenable. At heart the case is presented on the basis that the second respondent had a duty to take reasonable care to avoid acts or omissions which he could reasonably foresee might cause injury to persons who might be affected by those acts or omissions. It is advanced on entirely traditional grounds which are, or should be, well understood. In these circumstances the tripartite test in *Caparo* has no place.

[20] Nor do the examples given by the Lord Ordinary advance matters. The example of crossing the road appears to be a very clear case of a free and voluntary assumption of risk in the full awareness of the degree and nature of that risk, and no possibility of a lack of understanding of the dangerous character of the situation. The case against the second respondent may yet perish on such a rock, after proof, but that matter cannot be determined in the absence of evidence. The test, at this stage of proceedings, is whether, on the averments, the reclaimers' case against the second respondent is bound to fail. Only in rare and exceptional cases will it be appropriate to dismiss a personal injury action on relevancy grounds (*Miller* v *South Scotland Electricity Board* 1958 SC (HL) 20). This is not such a case.

The reclaiming motion must succeed, and the case be remitted for proof.