OUTER HOUSE, COURT OF SESSION

[2018] CSOH 74

PD2358/15

OPINION OF LORD ERICHT

In the cause

CAROLINE ANDERSON BEATON

Pursuer

against

OCEAN TERMINAL LIMITED

Defenders

Pursuer: M Crawford; Thompsons
Defenders: A Crawford; Clyde and Co

13 July 2018

Introduction

[1] On 15 December 2012 the pursuer visited the defenders' shopping centre in Leith. She fell and sustained a fracture to her left ankle.

[2] The pursuer raised an action for damages for personal injury in the Court of Session on the basis that she had stood on a flattened plastic wet floor sign. She averred:

> "As [the pursuer] made her way across the entrance hall directly towards Waterstone's book shop she suddenly slipped and fell heavily to the floor. A plastic 'Wet Floor' sign had been placed on the floor. It was not standing in an upright position so as to be clearly visible to shoppers entering the centre. The sign comprised two sides which were hinged at the top. The sign had collapsed and was lying completely flat on the floor. The pursuer stood on the flattened plastic sign which slipped away beneath her foot and caused her to fall. 'Wet Floor' signs of the type involved in this accident are designed and constructed to stand on their own

> without external support. The defenders were aware that the sign had collapsed and was not capable of standing on its own. A clear Perspex box had been positioned to support the sign. There was nothing to secure the sign or box in place. In the circumstances it was reasonably foreseeable that the sign was likely to further collapse. It was reasonably foreseeable that a collapsed plastic sign in a busy shopping centre entrance would give rise to a slipping hazard."

[3] A proof proceeded before me on liability only, quantum having been agreed at £16,000, net of CRU.

Circumstances of the accident

[4] There was little dispute about the background circumstances to the accident. The incident took place in a circular atrium area immediately inside the entrance to the shopping centre. The area was busy with Christmas shoppers. Santa's grotto had been set up within the atrium area and children were queuing to meet Santa.

[5] There was however a stark conflict of evidence as to the nature of the accident.

Pursuer's evidence

[6] The pursuer gave evidence. She was a dentist, now retired, who at the time of the incident was aged 49. She had gone Christmas shopping with her former brother-in-law, William Wait, and his young son, her nephew. On entering the atrium area, the pursuer parted company from her brother-in-law and nephew. They went upstairs. She then went left. Her evidence was that there was an A-shaped wet floor sign lying flat on the ground. Because it was on the floor she was unaware of it. She slipped on the sign with her right foot, tried to rectify her fall and went over her left ankle onto a Perspex box. She identified the kind of wet floor sign it was from a sign which had been lodged in court. This was the typical yellow plastic sign warning of a wet floor which is in common use in shops, offices

and other premises. It is hinged at the top. When the hinge is opened, it forms a shape like an A and stands on the floor. When the hinge is shut the two sides of the sign lie flat against each other. The pursuer was asked in examination in chief how the sign was lying on the floor. She was shown a sign which was folded shut correctly so that these were parallel to each other. She was also shown a sign where the hinge was broken so that the two sides of the sign splayed out and the sign lay on the floor extended to its full length of both sides. She identified the latter as being the position of the sign at the shopping centre. Her evidence was that the Perspex box was about a metre or half a metre from the sign and she went over the box. Her evidence was that her brother-in-law and nephew had seen the incident from the stairs and came down. She was in a lot of pain and was attended to by members of staff who offered to call an ambulance. She declined the offer as she lived in Glasgow and would prefer to be treated in a hospital in Glasgow to assist with easier follow up. In cross-examination she was very clear that it was the Perspex box which caused the injury. When asked in cross-examination about whether she had taken care to look where she was going, her evidence was that this was difficult as it was so busy. Had the wet floor sign been up she definitely would have seen it but she did not see it because it was lying on the ground. She did not see it. She was looking left. She said that the shops are trying to get your attention by what they put in their windows. She was always careful of where she walks because she had just had a tumour removed from the other leg so she was very careful that she was not going to trip over anything. I did not find the pursuer to be a reliable witness. Her evidence was not consistent with that of Mr Wait and Mr Tucker, whose evidence I preferred.

Evidence of William Wait

[7] A different account of the accident was given by the pursuer's former brother-in-law Mr Wait. The pursuer did not lead him in evidence so he was called by the defender. His evidence was that after he parted from the pursuer and was going up the stairs he heard a crash. He returned to the pursuer within seconds of the crash. He did not see the accident. His evidence was that the yellow wet floor sign had fallen over because the pursuer had walked into it. His evidence was that the sign had fallen over in its folded state and had not collapsed to its full elongated length. He did not recall seeing a Perspex box. I found Mr Wait to be a credible and reliable witness. He gave his evidence in a straightforward and even-handed manner, and his evidence was consistent with that of Mr Tucker.

Evidence of John Tucker

[8] John Tucker, aged 49, was currently security manager at the shopping centre and had been so for almost five years. In December 2012, he was a supervisor who had worked with the defenders for 15 years. His evidence was in accordance with the incident report to which he was referred and which had been entered on the database on 16 December 2012.

[9] He received a radio call about the accident and attended immediately. He spoke to Mr Wait and the nephew. His understanding was that they were the pursuer's partner and child. Although this is erroneous, in my view it does not detract from the credibility and reliability of the remainder of his evidence as it easy to understand how such a misunderstanding might have arisen: they were together and the pursuer and Mr Wait were of a similar age. Mr Wait told him the pursuer had fallen. Mr Tucker's evidence was that when he arrived Mr Wait had said that the pursuer had walked into the sign because

she did not see it. This is consistent with the evidence Mr Wait gave in the witness box and so enhances the credibility and reliability of Mr Wait and Mr Tucker.

[10] Mr Tucker's evidence was that there was no Perspex box. Mr Tucker gave evidence that the pursuer told him that she had fallen on a fallen wet floor sign that was over a Perspex box and that she did not see them because they were lying on the floor. The pursuer's words were recorded in the incident report. There would have been no reason for Mr Tucker to invent the reference in her statement to the Perspex box and include it in the official incident report if she had not said that to him. I accept that this statement was made by the pursuer to him. This statement reflected badly on the pursuer's reliability as it was not consistent with her evidence in the witness box about the location of the Perspex box.

[11] Mr Tucker went on in his evidence to explain that he went back to the atrium area and picked up a yellow A-frame sign and took it to the cleaning cupboard. He was asked in detail about the sign. He identified that the hinge was not broken. His evidence was that if it had been broken, he would not have put it back in the cleaning cupboard.

Findings

[12] I accept the pursuer's evidence that she fell and suffered injury. However, I did not find her account of her fall to be reliable in its details.

[13] I find that the pursuer's averment that a Perspex box had been positioned to secure the Wet Floor sign has not been proved. Even on the pursuer's evidence taken at its highest this was not the case. On her own evidence the Perspex box was a metre or half a metre away from the sign. There was evidence from two other witnesses whom I found to be credible and reliable, Mr Wait and Mr Tucker, that there was no Perspex box. It is clear that some sort of bucket or receptacle had been placed to collect the drip, but that does not form

part of the pursuer's case, which is very specific as to the sign having been propped up against a box because the sign was broken and could not stand independently.

[14] I find that the pursuer's averments that the sign had collapsed and was lying completely flat on the floor, and that the defenders were aware that the sign had collapsed and was not capable of standing on its own, have not been proved. The pursuer's case was predicated on the sign being broken and not being capable of standing on its own. The pursuer was clear in her evidence that the sign was broken and was flat out on the floor with both sides splayed out and was not folded on the floor with both sides parallel to each other. I do not find the pursuer to be a reliable witness on this matter. I prefer the consistent evidence of two other witnesses Mr Wait and Mr Tucker to the effect that the sign was not broken. Mr Tucker gave evidence that he folded up the sign and put it away in the cupboard. Mr Wait gave evidence that the sign was folded. It is clear from the sample signs which were lodged in court that if the sign were broken it could not be folded. A broken and unbroken sign were both produced to the court and the mechanism was demonstrated by various witnesses. It was clear from the demonstration that when the hinge is broken there are two results: firstly the sign will not stand in an A shape, and secondly it will not fold so if it were on the floor it could only be in an elongated flat out position. It was equally clear from the demonstration of the unbroken sign that firstly it does stand in an A shape and secondly it is not possible to open it fully into an elongated flat out position, and accordingly if were on the floor it could only be in a folded parallel shape.

Submissions

[15] The pursuer sought reparation under section 2 of the Occupiers Liability (Scotland) Act 1960 which provides as follows:

> "The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger."

The pursuer referred to *Phee* v *Gordon* [2013] CSIH 18 and paragraphs 26 to 29 and *Dawson* v *Page* [2012] CSOH 33 as giving guidance on how to apply the Act.

[16] The pursuer made two submissions and I take each in turn.

Whether harm was reasonably foreseeable due to the state of the premises

[17] The pursuer submitted that the roof of the building had been deficient and leaking for a year prior to the accident. The leak created a foreseeable risk of injury: namely, the presence of water, and the presence of articles required to address the presence of leaking water (containers, signs etc). The pursuer submitted that in the exercise of reasonable care the defenders ought to have repaired the roof prior to the accident. The failure to repair a leaking roof, below which millions of pedestrians may walk in a shopping centre for a year, was, in the words of Lord Dunedin in *Morton* v *William Dixon* Ltd 2009 SC 807 "a thing so obviously wanted that it would be folly in anyone to neglect to provide it" or "a precaution which the reasonable and prudent man would think it was obvious that it was folly to admit it". But for the defenders' omission, the Perspex container and sign would not have been required and the accident would not have occurred.

[18] The defenders argued that they had a system in place for dealing with the leak, namely a maintenance contract with a contractor. They also argued that the leak was too

remote as her case was that she fell on a wet floor sign rather than a wet floor itself: the leak was not the dominant or effective cause (*Galoo Ltd* v *Bright Grahame Murray* 1994 WLR 1360).

[19] I heard evidence about the leak from the manager of Ocean Terminal Shopping Centre, Denis Jones. He was aged 59 with extensive experience in shopping centres, having got into the shopping centre business when he was aged 23 and having worked in a number of shopping centres in the United States and England before taking up his current position at Ocean Terminal when it opened in 2001. His evidence was that a leak had been discovered a year or so before the incident. He explained that there are 30 smoke vents in the top of the skylight in the building, 28 metres in the air. When there is a leak, it is difficult to track it down. The defenders have a maintenance contract for the smoke vents. If the contractors find a leak they seal it then flag it up in their maintenance reports, but they did not see the source of this leak. They were asked to look for anything wrong with the smoke vents but they were not able to identify where the specific leak was coming from. His evidence was that once in the building water can run, and a leak can move around and is difficult to track down.

[20] In my opinion, this submission by the pursuer fails. I accept the unchallenged evidence of Mr Jones as to the efforts which the defenders and their contractors had made to trace the leak. In my opinion he exercised reasonable care in attempting to rectify it. In any event, if the incident was caused by the defenders, it was caused not by leaking water, but by the methods taken to alert customers of the leak. It is that to which I now turn.

Reasonably foreseeable harm due to the use of A-frame wet floor warning sign and container

[21] Counsel for the pursuer submitted that the leaking water was addressed by two items: a container to catch the drips (which he suggested was the Perspex box) and an A-frame wet floor warning sign. The danger created by the presence of leaking water was replaced by the hazards presented by each of these items. The container itself was a tripping hazard. It was not secured or cordoned. It was small, it could be moved easily and it moved with the water leaking onto the floor. The use of an A-frame sign was a potential hazard. The likelihood of it becoming a dangerous article increased on the hard floor and the pedestrian traffic. It was particularly high where there were a large number of children in the vicinity visiting Santa's grotto: *Taylor* v *Glasgow Corporation* [1922] 1 AC 44. The sign could be moved in which event it failed to serve its intended purpose of warning of the presence of the bucket. It could be collapsed or toppled if bumped and it was reasonably foreseeable that the sign could be intentionally moved or toppled in the presence of a high number of children. In particular, the use of an A-frame sign which is capable of collapsing fully created a new inevitable and significant hazard. The likelihood of it collapsing, as it did, was very high.

[22] Counsel for the defenders submitted that the pursuer had failed to prove (a) that the defenders knowingly used a broken wet floor sign (b) that the sign was broken (c) on a hypothesis that the sign had fallen over prior to the accident, when it fell over and for how long it had been in that condition and (d) that the system of equipment and inspection in place was unreasonable.

[23] My findings on the circumstances of the accident are set out in paragraphs [13] and [14]. The consequence of these findings is that the pursuer's case fails.

[24] In any event, the defenders operated a reasonable system. I accept the evidence of Mr Tucker and Mr Jones, supported by their written risk assessment form to which they spoke in evidence that the defenders operated a system as follows. In the event that a leak from the roof or other water spillage was identified by the public, the public safety officer would radio cleaners and stand by the hazard. Cleaners would mop up any liquid. In the event of a leak, cleaners would place out a bucket to contain the water, together with a warning sign indicating that the floor was wet. The locus would be patrolled every 15 to 20 minutes by public safety officers. If they noticed that the sign had fallen over, they would remedy that. In addition, cleaners would inspect the locus twice an hour. Centre staff would not use a broken sign, nor prop a sign against a box. The centre had a plentiful supply of signs and there would have been no reason to use one that was broken. In my opinion that constituted a reasonable system for dealing with the possibility that a wet floor sign may have fallen over.

[25] The pursuer led evidence from an expert, Stanley Johnson. The defenders objected to his evidence on the basis that he did not satisfy the test for expert evidence under *Kennedy* v *Cordia (Service) LLP* [2016] UKSC 6. I heard his evidence under reservation. However, having heard his evidence, I am satisfied that it was relevant and met the requirements of *Kennedy* v *Cordia.* He holds a BSC in engineering. He is a chartered engineer and a member of the Chartered Institute of Civil Engineering, the Chartered Institute of Water and Environmental Management and, the Chartered Institute of Building Services Engineers. He is also a specialist member of the International Institution of Risk and Safety Management and a member of the Environmental Auditor Registration Association. Having worked nationally as an engineer, he had started his own partnership in around 1990 doing both engineering work and health and safety work. In 2008 he gave up engineering to

concentrate on health and safety. He produced a report and gave evidence based on this, about the general principles of health and safety and also about the particular situation of this case. I found that all the requirements of *Kennedy* v *Cordia* were satisfied in respect of this witness. In particular, I found his specialised knowledge and experience to be of assistance in the proper resolution of the dispute, and that the subject matter of his evidence was necessary for the proper resolution of the dispute.

[26] While I found Mr Stanley's evidence of general principles to be useful and acceptable, I did not however accept his evidence on the question of what measures should have been put in place by the defenders. His conclusion was as follows:

> "Suitable arrangements to minimise the risks created by the leaking roof would likely and could be creation of a cordoned-off 'no-go' area on the floor beneath the leak. Within this cordoned-off area the defenders could have safely deployed rain receptacles as needed and 'Wet Floor' signs to warn pedestrians of the danger."

[27] In his oral evidence he elaborated on what was required. In his view, there should have been a number of cones placed around the site of the leak. A tape should have been stretched from the top of each cone so that the entire area around the leak was cordoned off. A bucket should have been placed within the cordoned off area to catch the drips. A wet floor sign should have been placed within the cordoned off area.

[28] In my opinion, it would no doubt have been possible to provide such an arrangement. Indeed, the Centre manager Mr Jones gave evidence that such a cordoning off arrangement was put in place where there was a major hazard, such as construction works. However, a sense of proportion must be applied when deciding whether a defender has taken reasonable care. The hazard in this case was a wet floor. The defenders dealt with the hazard by placing a bright yellow sign to warn of the wet floor. In my opinion, in doing so the defenders exercised reasonable care. These kinds of signs are in daily use to warn of wet

floors in shops, offices and other buildings all over the country. The solution proposed by Mr Johnson of placing the yellow wet floor sign within an enclosed barrier was disproportionate. I find that the defenders exercised reasonable care.

[29] In my opinion the pursuer's second submission fails also.

Contributory negligence

[30] As the pursuer has failed to establish negligence, the question of contributory negligence does not arise.

[31] However, as I heard submissions on this, I set out my views on it in any event.

[32] The defenders submitted that any award ought to be reduced by 50% in terms of contributory negligence. The pursuer had a duty to take care for her own safety and where she was placing her feet. The warning sign was bright yellow and had a warning message on it and its entire purpose was to warn of hazards. It was designed to be clearly visible. Even in a collapsed state it ought to have been obvious to a person keeping a proper look out and looking where they were placing their feet. Counsel for the defenders drew my attention to *Preston* v *Grampian Health Board* [1988] SLT 435 and *McClafferty* v *British Telecommunications Plc* [1987] SLT 327.

[33] The pursuer submitted that in the event that the court considered that the pursuer ought to have taken greater care, a reduction of 15% to 20% would have been appropriate. The centre was very busy. There was distraction of shops and pedestrian traffic, all to the benefit of the commercial activities of the defenders. The sign was out of eyesight. The pursuer had been taking care following recent treatment to her other leg.

[34] Had I required to make a finding on contributory negligence I would have fixed it at 50%, for the reasons given by the defenders.

Order

[35] I shall assoilzie the defenders and reserve all questions of expenses in the meantime.