Privy Council Appeal No. 9 of 1958

Ewa Perkowski - - - - - - - - - - *Appellant*

v.

The Mayor Councillors and Citizens of the City of Wellington - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH OCTOBER, 1958

Present at the Hearing:

VISCOUNT SIMONDS.
LORD MORTON OF HENRYTON
LORD KEITH OF AVONHOLM.
LORD SOMERVELL OF HARROW.
LORD DENNING

[*Delivered by* LORD SOMERVELL OF HARROW]

This is an appeal from a judgment of the Court of Appeal in New Zealand dismissing an appeal from a judgment of the Supreme Court. The action was tried by Hutchinson, J., with a jury. There was argument after verdict on the findings of the jury each side moving for judgment. Hutchinson, J., entered judgment for the defendants the present respondents. The plaintiff appellant was granted special leave to appeal in forma pauperis by an Order in Council dated 31st July, 1957.

The plaintiff's husband died on 10th January, 1954, as a result of injuries suffered on the day before when he dived from a spring board at Worser Bay in the City of Wellington. The claim was brought under the Deaths by Accident Compensation Act, 1952.

The jury were asked first whether the defendant Corporation was the occupier of the premises comprising the spring board. The defendants were admittedly occupiers of the land above high water mark and certain off-shore rocks but submitted that they were not occupiers of the spring board. The board was on a platform at the end of a wooden duck walk, the platform being on a concrete support set in the harbour bed. The defendants relied on this and also on the fact that they had put up the board at the request of a Swimming Club. The jury found that the defendants were the occupiers of the premises comprising the spring board and neither side challenge that finding. The deceased had bathed in Worser Bay and dived from the board on a number of previous occasions. The plaintiff put her case on the basis that the deceased was a licensee. The learned judge accepted this and so directed the jury. No exception was taken by counsel to that. It was conceded that if the board constituted a concealed danger the defendants had knowledge of it.

The jury were asked as question 1 (2) whether the spring board constituted a concealed danger at low tide? They answered, no. There was ample evidence on which they could so find. Some of the plaintiff's own witnesses said that the water was clear and its shallowness at low tide apparent.

At the trial the plaintiff submitted that the defendants if not occupiers would have been under a duty as erectors of the board to take reasonable care for those who might use the board and that that duty was broken by a failure to put up a warning notice or a tide gauge. The learned judge was doubtful at the time when he summed up as to whether there would if the defendants were not occupiers be such a duty. He formulated however the following three questions which on his summing up did not arise if the jury answered the first question as to occupancy as they did.

> 2. Was the defendant negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide gauge? Answer, Yes.
>
> 3. Was the deceased negligent in a manner causing or contributing to the fatality. Answer, Yes.
>
> 5. If both the defendant and the deceased were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that the total damages be reduced having regard to the share of the deceased in the responsibility for the fatality? Answer 80 per cent.

If the only liability on the defendants was to warn against concealed dangers these findings do not avail the plaintiff, and counsel for the appellant agreed that the appeal must fail. It was however submitted that for differing reasons the defendants were under a general duty to the plaintiff and that the finding could be relied on as establishing a breach of that duty.

It was submitted for the defendants that the answer to question 2 was one which should be disregarded as perverse and inconsistent with the answer to question 1 (2). It was further submitted that as the finding in answer to question 2 was on the basis that the defendants were not occupiers it could not avail the plaintiff (the defendants having been found to be occupiers), even if she succeeded in establishing some general duty of care owed to the deceased. It is unnecessary to consider these submissions because for reasons which will be given the plaintiff fails to establish a general duty of care.

The authorities on the duty of occupier to licensee were considered by Farwell, L.J., and Hamilton, L.J., in *Latham* v. *R. Johnson & Nephew, Ltd.* [1913] 1 K.B. 398. Farwell, L.J., quotes with approval a statement by Williams, J., in *Hounsell* v. *Smyth* (1860) 7 C.B. (N.S.) 731, adopted by Wightman, J., in *Binks* v. *South Yorkshire Railway Co.* (1862) 3 B. & S. 244, 252. "No right is alleged: it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business to go upon the waste without complaint—that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be perils". One recognised exception to this principle is that the occupier must warn the licensee of a danger of which he knows which is in the nature of a trap. "A trap", said Hamilton, L.J., (*loc cit.* 415), "involves the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger". This exception led to the second question put to the jury. If there are no further applicable exceptions the plaintiff fails on the basis that the deceased was a licensee.

The plaintiff submitted that the defendants although occupiers were under a general duty to the plaintiff to take all reasonable steps for his safety having regard to the fact that they had some years before erected the board. If this is right it has always been wrong to say that the plaintiff must take the land as he finds it. He has to take the land on this argument as he would have found it when the occupier went into occupation. In respect of changes made by the occupier the latter's duty to a licensee on this argument is different and greater. Reliance was sought to be placed on *Slater* v. *Clay Cross Co. Ltd.* [1956] 2 Q.B. 264. In that case the plaintiff was a licensee on the defendant's land which included a railway line and a tunnel. The learned judge found that the accident was due to the negligent driving of a train on the line. The

danger did not arise out of the line or the tunnel but out of negligent driving. If an occupier negligently drove a motor car into a licensee, the principle that the licensee must take the land as he finds it would clearly have no application. Reliance was also placed on a further suggested exception. In *Mourton* v. *Poulter* [1930] 2 K.B 183, the plaintiff, a boy of ten, was injured when a tree, which was being cut down, fell. The boy was a trespasser and the defendant was a contractor not the occupier. Scrutton, L.J., dealt however with the position of an owner. " The liability of an owner of land to trespassers does not arise where there is on the land a continuing trap, such as that which was considered in a case in the Supreme Court of the United States of an innocent looking pond which contained poisonous matter. *United Zinc and Chemical Co.* v. *Britt* [1922] 258 U.S. 298. There as the land remains in the same state, a trespasser must take it as he finds it and the owner is not bound to warn him. That, however, is a different case from the case in which a man does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that people are standing near. In each of these cases he owes a duty to these people even though they are trespassers to take care to give them warning " (*loc cit.*, p. 191). In an earlier decision referred to in *Brock* v. *Copeland* (1794) 1 Esp. 203 the same principle was applied to a case in which the defendant having encouraged the public to go through his close was liable when damage was done by a bull which he had later put there without warning (see *Latham* v. *R. Johnson and Nephew, Ltd.* [1913] 1 K.B. 398 at p. 406, 7) see also *Corby* v. *Hill* 4 C.B. (N.S.) 556, 563 and *Excelsior Wire Rope Co. Ltd.* v. *Callan* [1930] A.C. 404). Such cases have no application to the present case. The spring board had been erected for years. The argument, unsupported by authority, fails in principle. The licensee must take the land as he finds it and there could be no logic in drawing a distinction between its state when the occupier went into occupation and its state when changes had been made by him.

It was further submitted that the law as between licensor and licensee had no application because (1) there was no defect in the diving board as such and therefore it could not be regarded as a trap as there was no physical defect in the state or condition of the land and (2) the danger from its use or misuse at low tide was in the sea outside the area occupied.

No authority was cited for the argument that different principles are applicable if the danger arises from the use of a part of the land not defective in itself. In principle it would involve a fine, and, in their Lordships' opinion, an illogical distinction. A trap as defined by Hamilton, J., may consist in an invitation to use a non-defective appliance in a way which turns out to be dangerous. If a door opens over a big drop, it may be a trap if it looks as if it led into the next room. A bridge may be a perfectly good bridge though unsuited to carry more than a ton. If so it may be a trap for a vehicle over a ton if there is no warning.

On the second point the fact that the concealed danger is that of injury outside the occupied area, whether in the sea or on a highway or in adjacent property on principle would not seem to prevent the application of the rule. In *Latham v. Johnson,* Farwell, L.J., gives as an obvious illustration, the owner of cliffs by the sea who would not be bound to fence them off (*loc cit.*, p. 405).

Finally the plaintiff sought before the Court of Appeal in New Zealand and before their Lordships to base her claim on a submission that the deceased was not a licensee but either an invitee or a person to whom the defendant as a Local Authority owed a general duty of care. The principle invoked was adopted and applied by the Court of Session in *Plank* v. *Stirling Magistrates,* 1956, S.C. 92. The pursuer, a child of two and a half, was injured by falling from a chute erected by a Local Authority in a playground in a public park. The Court held that the Local Authority was liable in damages on the ground that the child was an invitee and the danger was an unusual one of which the Authority

ought to have known. This was the ratio of the majority. Lord Mackintosh based his decision on the ground that the child was there as of right, and therefore entitled to rely on the chute being in a reasonably safe condition.

The question whether in principle persons who are on premises provided by a Local Authority for the use of the public can or should, apart from authority, be treated as invitees has been discussed in a number of English cases (*Purkis* v. *Walthamstow Borough Council* (1934) 151 L.T. 30, 34. *Ellis* v. *Fulham Borough Council* [1938] 1 Q.B. 212, 221. *Baker* v. *Borough of Bethnal Green* [1945] 1 All E.R. 135, 139. *Pearson* v. *Lambeth Borough Council* [1950] 2 Q.B. 353). Their Lordships were also referred among other cases to *Aiken* v. *Kingborough Corporation*, 62 C.L.R. 179, *Burrum Corporation* v. *Richardson*, 62 C.L.R. 214, 379, and to the *American Restatement of the Law of Torts*, Vol. II, para. 347.

The Court of Appeal in New Zealand decided that the point not having been taken at the trial could not be taken on appeal. Barrowclough, C.J., said, " She ", the plaintiff, " accepted that he was a licensee: and if she had not accepted it no doubt an issue somewhat differently framed would have been put to the jury ". Adams, J., after considering certain cases, said: " Quite apart from the considerations already mentioned, this present case was pleaded and fought, and put to the jury on the footing that the deceased was a licensee, and for my part I do not see how the appellant could now be permitted to place her case on a different footing ".

In *Connecticut Fire Insurance Coy.* v. *Kavanagh* [1892] A.C. 473, Lord Watson, in delivering the judgment of their Lordships' Board after referring to the raising of points of law in an Appellate Court on facts admitted and proved beyond controversy said, " But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plea ".

A similar statement will be found in Lord Herschell's speech in *Owners of Ship Tasmania & Owners of Freight* v. *Smith & others*, 15 App. Cas. 223, 225.

In an appeal in a case tried with a jury the Appellate Court must also consider whether further questions would have been left to the jury, their answers to which remain uncertain.

Apart from this principle the matter is one of discretion for the Appellate Court and their Lordships would be loth to interfere with the discretion as exercised by the Court of Appeal in the present case.

There is a further consideration referred to by Lord Chancellor Birkenhead in *North Staffordshire Railway Company* v. *Edge* [1920] A.C. 254, 263. " The appellate system in this country," said Lord Birkenhead, " is conducted in relation to certain well known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the Courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case, is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the Courts below ". These observations should be read subject to the qualification stated in the speeches of Lord Atkinson and Lord Buckmaster in the same case, but they appear to their Lordships to apply with great force to the present appeal. For it is clear that points which would have plainly arisen if this point had been taken remain in doubt. Was this a public park to which the deceased had access as of right. The learned judge in his summing up on the issue of occupancy says that the defendants had the " right of stopping people going there ". The board was not apparently put up on the instructions of the defendants to attract the public but at the

request of a swimming club to replace a previous board. If the deceased was to be considered as an invitee one would have expected a question put to the jury as to whether the danger of shallow water at low tide was an unusual danger. It is not certain how this question would have been answered.

The reasons given for dismissing the appeal are in substance those given by the Court of Appeal. Their Lordships thought it right to deal with the issues in some detail having regard to the full arguments addressed to them on each side.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed.

(39499) Wt. 8021—25 100 10/58 D.L.

In the Privy Council

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DELIVERED BY
LORD SOMERVELL OF HARROW

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