Supreme Court Notes

by Anita Del Medico

NEGLIGENCE - claim for damages for negligence of public authority - Physical injury as opposed to pure economic loss - Exercise of power of inspection by public authority - Duty of care - Reliance test vs Proximity test - Correct test to be applied - whether proximity can be established by other means than by showing reliance.

NT of Australia -v- Deutscher Klub (Darwin) Inc and Boral Gas (Qld) Pty Ltd

03.02.94 COA: Kearney, Thomas, & Priestley JJ

The factual background of this appeal concerned an accident which occurred in the kitchen of the German Club in Darwin in 1982. Gas in the kitchen exploded, injuring 4 people. Once of the victims, though severely injured, survived the explosion and sued the German Club and Boral Gas in proceedings claiming damages for negligence. Boral issued third party notices against 4 third parties, including the NT of Australia, claiming contribution from them pursuant to s12 of the *Law Reform (Miscellaneous Provisions) Act* on the basis that each third party would if sued have been liable to the plaintiff ("P") in respect of the same damage. The case against the NT was based on the actions of 2 Fire Brigade Officers (the "Fire Service").

The main issue before the trial judge concerned the alleged negligence of the Fire Service and other third parties, the German Club and Boral having agreed, several days into the trial that judgment should be entered for P against them for an undisclosed amount. Also relevant was the extent of contribution recoverable from any third party whom the trial judge found would, if sued, have been liable. The trial judge held that in addition to the Club and Boral, the Fire Service, and no other parties, had been guilty of negligence. Responsibility for the damage was so apportioned: the Club 20%, Boral 70%, the Fire Service 10%.

The appeal was in 3 parts: the Fire Service appealed on the ground that the judge erred in finding it had been negligent; Boral cross-appealed on the ground that his Honour's assessment of the extent of its responsibility for the damage to P was appealably excessive and it contested the Fire Service's claim that it was not guilty of negligence; and the Club cross-appealed on the question of costs as well as resisting both the Fire Service and Boral's appeals.

The circumstances leading to the explosion of gas in the German Club kitchen were that an employee of the Club terminated his services and removed his stove ("wok") from the premises by switching off the gas at the main cylinder and by using a hacksaw to cut the gas pipe in the kitchen connecting the cylinder to the wok. This left a hole in the pipe. No note was left by the ex-employee directing people not to turn the gas on. A representative of Boral had been advised by the ex-employee that his account for the supply of gas to the kitchen was to be closed. A Fire Service inspection occurred on the morning after, during which officers inspected the Club premises, including the kitchen. The cut pipe was thought to be a water pipe. There was a waterpipe on the wall which had provided water necessary for the operation and cleaning of the wok. Both Fire Service Officers knew that there was a gas supply during the inspection of it. Both officers had given evidence at the trial that had they known the cut pipe was a gas pipe, they would have required to be plugged. At the end of the inspection both officers made certain requisitions relating to the provision of fire blankets and the like, but none relating to the open pipe. There was no mention of the cut pipe in the Inspection Report signed by the Senior Officer and handed to a member of the Club who had been present at the inspection.

Later that afternoon two employees of Boral went to the Club to take a final reading of the amount of gas in the cylinder. One of the two men (young and inexperienced) noticed that the valve on the cylinder was turned off and switched it on again. He informed the other employee of what he had done; neither took any step to check why the valve had been turned off and what the consequences of turning it on might be. Not long after the 2 Boral employees departed, P and several others who were at the Club, were injured in the explosion. P had climbed through the kitchen servery window to unlock the kitchen door so that he and the three others present could investigate the gas leak which he had smelt.

The trial judge found that the Fire Service had been negligent in that one of its officers had known, when inspecting the kitchen, that a wok had been recently removed and gas supplied to it, and that as there were 2 unplugged pipes in the space where the wok had been; he ought to have known that one of these was a gas pipe and the other a water pipe. One of the Fire Service Officers had acknowledged that the situation prior to the accident had been "highly dangerous". In his reasons, the trial judge rejected the argument on behalf of the Fire Service that no duty of care to P existed, as neither the requisite proximity nor foreseeability had been established. The Fire Service had argued that to establish proximity against a public authority with statutory powers the use of which could have protected P from risk, but which had not by positive conduct created or contributed to the relevant risk, reliance was an important factor; there was no evidence of reliance by P on anything done, said or omitted to be done or said by the Fire Service; reliance on the inspection, given that it was for Liquor Act purposes, even if it could be shown, would not be reasonable; from the point of view of the Fire Service it was not reasonably foreseeable that

Continued Page 15

From Page 14

Supreme Court Notes

by Anita Del Medico

an employee of Boral would switch on the gas cylinder valve and that P would enter a gas-filled room as he did.

In putting the "reliance" argument, the Fire Service had referred to the High Court's decision in Sutherland Shire Council -v- Heyman (1985) 157 CLR 424. This case was distinguished by the trial judge on the basis that it had not there been shown that the Council had inspected the footings which caused the damage, whereas the Fire Service had inspected and seen the open gas pipe. P need only satisfy the court of general reliance upon non-negligent performance; such reliance had been established. The Fire Service had been empowered to inspect and give notice to remedy the open gas pipe; this power had been exercised carelessly. There was proximity both of time and place and the event (risk of injury from explosion) was reasonably foreseeable. Thus, a duty of care was established. But for the carelessness of inspection by the Fire Service, and the failure to give notice of the need to plug up the open pipe, the explosion would not have occurred. Negligence against the Fire Service was therefore established.

On appeal, counsel for the Fire Service ("A") reiterated the arguments before the trial judge. The success of A's appeal rested on its interpretation of Heyman (supra). It was put that when the liability of a public authority for negligence is in question, a material factor in deciding whether the authority owed a duty of care in the circumstances is that of reliance. Without showing reliance, a plaintiff could not show proximity or a duty of care. A proper application of Heyman to the facts of the present case meant that P must fail against the Fire Service.

HELD per Priestley J; Kearney and Thomas JJ concurring with his orders and reasons, dismissing the Fire Service's appeal with costs, allowing Boral's apportionment appeal and ordering it to contribute 45%, the Club 45% and the Fire Service 10%, ordering judgment for the first defendant against the second defendant for 45% of P's judgment and vice versa, and dismissing the Club's appeal concerning costs:

[Priestley J examined the four main reasons for decisions in Heyman (Gibbs CJ, Mason, Brennan and Deane JJ) at pp 25 -35 in order to address the main issues before the appeal court as argued by the Fire Service and to rule on the proper approach to be adopted in deciding whether or not a duty of care is present in any particular set of circumstances.]

(1) The Fire Service's submission that it was essential in the present case for P to prove reliance (either general or specific) in order to succeed is rejected. The idea of reliance did not play the significant part in the way Gibbs CJ reached his conclusion (Wilson J agreed with him). Although the remaining three judges did each refer to reliance, only Mason J gave particular attention to the concept. All three did indicate however that if the plaintiffs in Heyman had been able to prove reliance, the result would have been different (ie not in the Council's favour). Nevertheless, "... I do not think..that any of the three indicated that proof of reliance was the only way in which a plaintiff claiming damages for negligence from a public authority could succeed. "(at 36). Although it is possible that the detailed attention Mason J gave to reliance carried a suggestion he might be prepared in later cases to consider whether the reliance notion might not be a better criterion for deciding whether a duty of care existed in a particular case than the proximity notion, he did no more than indicate such a possibility of future consideration. Neither Brennan nor Deane JJ gave any similar indication. Heyman does not have the conclusive effect in favour of the Fire Service which was claimed for it. That is, it is not correct to say that in deciding whether A was negligent, the only way in which the question can be answered is by holding affirmatively that P relied, specifically or generally, upon A in the way previously discussed.

(2) (Per Kearney J, agreeing with the proposition that to establish the relationship of proximity necessary to found a duty of care in the Fire Service, it was not essential for P to establish reliance): Following the reasoning of Mason J in Heyman and agreeing with the trial judge, on the facts of the present case P could rely on the factor of general reliance to establish the necessary relationship of proximity.

(3) The principal decisions after Heyman (preceded by Jaensch -v- Coffey (1984) 155 CLR 549) are: Stevens -v- Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16; Cook -v- Cook (1986) 162 CLR 376 and Gala -v- Preston (1991) 172 CLR 243. Gala is of particular significance because in it a majority of the court (Mason CJ, Deane, Gaudron and McHugh JJ) explicitly adopt the proximity criterion as axiomatic in establishing a duty of care (see: pp 252 - 253). This has the result that the passage from Deane J's judgment in Heyman in which the concept of proximity is discussed (at 497 - 8 and set out at pp 28 - 29 of the present case), should be adopted and applied by Australian Courts in cases to which it is relevant. And further, it follows that the reliance criterion discussed in particular by Mason J in Heyman, and mentioned in other opinions and cases, falls into place as a species of proximity; that is, if reliance can be shown, then it must follow that the relevant requirement of proximity is likewise established. Proximity however can be established by other means than by showing reliance.

(4) In Deane J's judgment in Heyman at 512 (see p 35), it is clear that his Honour's conclusion that no relevant duty of care had been owed by the Council in that case would not necessarily be applied in a case

Continued Page 16

Supreme Court Notes

by Anita Del Medico

From Page 15

brought against a public authority claiming damages for physical injury following collapse or partial collapse of a building due to inadequate foundations. (Deane J had taken the view that the plaintiff's claim in Heyman was for pure economic loss - at 504.) It would appear to follow then that in a case of physical injury of whatever kind, allegedly caused by a public authority, the question whether the authority owed the plaintiff a duty of care would turn on whether one or more of the kinds of proximity described by Deane J at 497 - 8 of Heyman were thought by the court to have been shown. The question thus would be whether there had been shown one or more of: physical proximity in the sense of space and time, circumstantial proximity such as on overriding relationship of some kind and causal proximity in the sense of the closeness or directness of the causal connection between the government authority and the injury. A finding of physical proximity of space and time is not merely a question of fact. An evaluative step by the court is necessarily involved. In deciding whether this kind of proximity exists, the court must have in mind what is fair and reasonable and considerations of public policy. An evaluatived element is also present in deciding whether there is causal proximity. That Deane J referred to the notion of causality in formulating the proximity criterion points to the connection between the first and third classic elements for establishing negligence: duty of care, breach of duty and damage flowing from the breach. In the general run of negligence cases, the court is always examining the question whether D should pay for what D did, where P has suffered damage and D has been connected with it.

March -v- Stramare Pty Ltd (1991) 171 CLR 506;

Fitzgerald -v- Penn (1954) 91 CLR 268;

Bennett -v- Minister of Community Welfare (1992) 66 ALJR 550, referred to.

The necessary proximity (in the sense of space and time) was present in this case to found a duty of care - both in the factual sense and "as a matter of judgment", taking into account the notions of fairness, reasonableness and public policy referred to by Deane J. (His Honour examined the powers of the Fire Service contained in the Fire Brigades Act and the Places of Public Entertainment Act and concluded that the Fire Service, in carrying out the inspection was under a duty to do so with reasonable care, such duty being owed to the club and to the class of persons who would in the ordinary course of affairs be upon the club premises. This class included P).

(5) In relation to the issue of breach of duty, although it is correct to say that the club had contributed to the continuance of the dangerous situation by not telling the Fire Service Officers of the nature of the pipe, this does not answer the claim that the officers were careless in their failure to enquire about the nature of the pipe. Nor does it answer the claim to say that had the officers enquired further, they would only have arrived at the same state of knowledge of the situation in the kitchen as that already possessed by the Club. Both officers had given evidence that they realised the pipe was a gas pipe and they would have seen to it that the gap was plugged. Although the officers had no power to compel the plugging of the pipe, it is highly probable that had the representatives of the Club been told that the pipe needed to be plugged, something would have been done about it. The club had been anxious to obtain a favourable report from the Fire Service in order to have its licence restored; a specific request by the officers to plug the pipe would have had the double effect of making the club immediately and specifically aware of safety requirement and of giving the Club an immediate incentive to do so in order to satisfy the officers. Allowing for the advantages of hindsight, it would have been "...no more than ordinary prudence to ask for an explanation of the open pipe." The failure to ask this question rendered the inspection a careless one.

(6) The careless inspection of the kitchen was in the legal as well as merely physical sense, a contributing cause to the explosion. Although the action of the Boral employee in turning on the gas and the subsequent actions of the Club in dealing with the gas-filled kitchen were more directly causative of P's damage, it seems probable that the damage would not have occurred had there been a reasonably careful inspection by the fire officers. The novus actus interveniens rule has limited application. This was succinctly stated by Mason CJ in March (supra): "These days courts readily recognise that there are concurrent and successive causes of damage on the footing that liability will be apportioned as between wrongdoers." (at 512). This approach seems to required by ss12(4) and 13 of the Law Reform (Miscellaneous Provisions) Act, and is appropriate in the present case.

[The remainder of the judgment concerns Boral's apportionment appeal and the Club's costs appeal and does not call for reporting.]

APPEAL against judgment for damages for negligence by a public authority.

T I Pauling QC, with R J Webb instructed by the Solicitor for the NT for the appellant.

O W Downs instructed by Mildrens for the 1st respondent.

G E Hiley QC, with T F Coulehan, instructed by Waters James McCormack, for the 2nd respondent.

BALANCE

Published by
The Law Society of the NT
GPO Box 2388
DARWIN NT 0801
Ph: (089) 815104
Fax: (089) 411623