

SCOTLAND / JUDGMENT

Hand v. North of Scotland Water Authority

[2002] ScotCS 51 (22nd February, 2002)

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[2002] ScotCS 51, 2002 SCLR 493 [New search] [Help] Hand v. North of Scotland Water Authority [2002] ScotCS 51 (22nd February, 2002) OUTER HOUSE, COURT OF SESSION A1403/01
OPINION OF LORD WHEATLEY in the cause ELIZABETH MAY BERNADETTE RATTRAY
LYON HAND (AP) Pursuer; against NORTH OF SCOTLAND WATER AUTHORITY Defenders:

Pursuers: Stewart; Robson McLean, W. S. Defenders: Weir; Simpson & Marwick, W. S. 22 February 2002 The pursuer is the tenant of the Ladywell Tavern, which is situated in Victoria Road, Dundee. She leases the premises from a firm of brewers in terms of a formal lease and related writs. The geography of the area is fully described in the pleadings, but for present purposes it is sufficient to note that in about 1990 the Dundee Inner Ring Road was under construction, and in the course of the associated building works the Wellgate Free Church, which lay to the north of the Ladywell Tavern, was demolished. During the course of the demolition the pursuer avers that the Tavern suffered ingress of water by seepage through the toilets which are to the rear and on the north side of the premises. The pursuer further avers that thereafter episodes of water penetration occurred coincidentally with the onset of rainfall, and it appears from her pleadings that this continued for a considerable period of time. The pursuer says that she complained to the landlords of the premises, who in terms of their lease had the responsibility of keeping the premises wind and watertight. Further, the pursuer avers that in early 1991 she met with an employee of the defenders' predecessors and complained to him about the ingress of water at the public house. Thereafter, it is said, investigations into the cause of the water ingress were made. However, despite an inspection of the site by engineers and works carried out in 1993, the problem of water ingress persisted. The pursuer now avers in particular that the penetration of water is caused by the perforation and blocking of a sewer immediately to the north of the tavern. The sewer is a collector pipe which receives flows of both

roof water and waste water from adjoining premises. In these circumstances the pursuer seeks damages from the defenders on the grounds of nuisance and also by virtue of the terms of the Sewerage (Scotland) Act 1968. The defenders are the relevant water authority as statutory successors of Tayside Regional Council who were the sewerage authority for the area in terms of the 1968 Act at the time of the construction works concerning the Inner Ring Road and the subsequent works to the sewer. The damages sought by the pursuer consists in lost revenue which she attributes to the unsatisfactory condition of the premises caused by the water ingress. She also seeks solatium . In these circumstances the case came out at debate and the defenders moved to have the case against them at the pursuer's instance dismissed in terms of their first plea-in-law, which is a general preliminary plea to the relevancy and specification of the pursuer's averments. The defenders' submissions were grouped under four headings. The first submission put forward by defenders' counsel in support of his plea was relatively minor. He argued that the averments on record concerning the demolition of the church and the construction of the Inner Ring Road were irrelevant because the pursuer had not indicated in her pleadings that there was any causal link between those events and the entry of water into the premises. Accordingly, these averments should be excluded from probation. In response, pursuer's counsel argued that there was a temporal connection between the events described and the onset of the water penetration. It was specifically not said that the defenders were responsible for the blockage in the sewer. The pursuer was merely indicating the time when her difficulties began. I agree that there is no particular reason to exclude these averments, as they appear simply to form part of the narrative of events, and in particular of the occasion when water penetration was first noticed by the pursuer. Accordingly, even although they add nothing to the case of fault against the defenders, I do not propose to delete these averments at this stage. The defenders second argument was more substantial. In terms of both the statutory and common law cases of fault (which were essentially similar) the pursuer avers a duty upon the defenders to take reasonable care to inspect, maintain, repair and where appropriate renew the sewer. This, it was argued, was fundamentally a failure in a duty of care to detect the flaw in the pipe before it burst. There were however no averments as to what kind of system of inspection or maintenance was appropriate or possible in respect of this particular sewer. There were no averments that the defenders knew or ought to have known that the pipe was defective; there was no specification of the nature of the defect in any system of inspection, and there was no description of the defect which was responsible for the ingress of water. In particular, nowhere was it averred at what point in time the sewerage authority became aware, or ought to have become aware, that there was a defect in the sewer, and was thus the cause of water penetration into the pursuer's building. There was no specification of what steps the defenders' predecessors might have taken to avoid the failure of the sewer. Finally, there were no averments by the pursuer that the defenders had acquired any knowledge of a defect in the sewer prior to the damage being done. In support of his submissions, counsel for the defender relied heavily on the case of *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SLT 381. In response, counsel for the pursuer argued that there was no dispute that the terms of the Sewerage (Scotland) Act 1968 applied to the defenders. The defenders were therefore under a duty to take reasonable care to discharge their statutory duties. The present case was distinguishable from

that of the Argyll & Clyde Health Board v Strathclyde Regional Council. In the present case the pursuer's averments were concerned with the ingress of water over a period of time. In these circumstances the specification of duties of care both at statute and common law required to be different from the duties of care which applied in Argyll & Clyde Health Board and the other cases cited by the defenders. In short, the duties of care cited in the present case are said to cover a period of time following on from the ingress of water, and do not relate to a single incident against which steps might have been taken. The pursuer's case is not based on the state of the sewer before or at the time of the burst but on what happened afterwards. In Argyll & Clyde Health Board v Strathclyde Regional Council a water main running under the surface of a field burst and flooded the pursuers' premises, causing loss and damage. The pursuers raised an action against the local authority as owners of the pipe and claimed that although they were not able to specify the cause of the burst, the defenders had a duty to see that the pipe was properly laid and maintained. In these circumstances it was claimed that if the pipe had been properly laid and maintained it would not have burst and the damage would not have been caused. There were however no averments as to what kind of maintenance would have been appropriate or even possible in the circumstances, and accordingly the pleadings were held to be irrelevant and the action was dismissed. Counsel for the defenders sought to equate the present case with what happened in Argyll & Clyde Health Board , but I agree with pursuer's counsel that the present circumstances are distinguishable in one important respect from the line of authorities cited by defenders' counsel. Although it is correct to say that the pursuer's averments in this matter are not precisely focused, it is I think a reasonable conclusion, having regard to all of the averments on record, that in essence the pursuer's case of fault against the defenders both at common law and at statute is not one of inspection but of repair. The pursuer's failure to give detailed specification of their case against the defenders in respect of the duty of maintenance and inspection is therefore of little importance. It is I think of significance that all the cases cited by defenders' counsel in support of his submissions were concerned with what appeared to be the immediate aftermath and consequence of an unexpected incident concerned with some utility or another. In Argyll & Clyde Health Board for example, the damage was a direct result of the burst of a water main which flooded the pursuer's premises. The same was true in the case of R. H. M. Bakeries (Scotland) Limited v Strathclyde Regional Council 1985 SLT 214 . In Dynamco v Holland & Hannan & Cubitts (Scotland) Limited 1971 SC 257 the loss and damage was again associated with a sudden event, namely the severance of an electric cable by the alleged negligence of a third party operator. In the present case however, the position is different. The pursuer has relevantly averred a case of fault against the defenders on the basis that a sewer for which they are responsible has burst and has thereafter caused continuing damage to the premises occupied by the pursuer. The specification of this duty of care was not criticised by the defenders. As the pursuer avers that she gave due notice of this problem to the defenders, there is clearly an arguable case that the loss and damage which she suffered thereafter as a result of the alleged failure by the defenders to discharge their common law and statutory duties in respect of the repair and renewal of the sewer was foreseeable. In these circumstances, despite the lack of focus in the pursuer's pleadings, I am satisfied that the essential parts of a relevant case of fault has been made out against the defenders. The defenders' third argument was concerned with the

nature of the economic loss claimed by the pursuer. Defenders' counsel submitted that there was a long established pragmatic rule against the recovery of damages arising out of interference with economic expectations in certain circumstances when loss followed damage to that property. The pursuer's economic loss in the present case was not direct or primary, but secondary or relational loss. The principal loss was sustained by the owners of the property. Reference was made to *Cattle v The Stockton Waterworks Co*, 1874 1 QB 543 at p.457 and also to *Simpson & Co & Ors v Thomson & Ors*, 1877 5 R HL 40. In particular it was argued that these cases and the line of authority which followed them established that damages for injury could not be claimed for injury or loss suffered by parties other than the owner of the property or by persons in a comparable position to the owner. In other words, persons without any possessory right in the subjects damaged cannot claim for any loss suffered to those subjects. The kinds of possessory right other than ownership which were in contemplation were some kind of security such as a lien or hypothec (see Lord Penzance in *Simpson & Co & Ors v Thomson & Ors* at p.46). Reference was also made to *Allan v Barclay* 1864 2M 873, *Reavis v Clan Line Steamers* 1925 SC 725 and *Dynamco Limited v Holland & Hannan & Cubitts (Scotland) Limited* 1971 SC 257. In *Necap Limited v Moffat Plant Limited* 1987 SLT 221, the pursuers were laying a pipeline on behalf of a third party when it was damaged by the plant hire firm who was laying the pipe, and the pursuer sought to recover from the plant hirer the cost of making good the damage to the pipeline. It was held that the pursuers could not recover damages in respect of the pipeline, in which they had neither a possessory right or title. It was emphasised that a distinction required to be drawn between ownership or a right of possession similar to that of an owner on the one hand and, on the other hand, mere contractual rights to have the use of services of the property concerned for certain limited purposes. Reference was made with approval to the statement of the law in this matter by Lord Brandon of Oakbrook in the case of *Leigh & Sullivan Limited v Aliakmon Shipping Co Ltd*

[1986] 2 WLR 902 at 908. The need for such a policy was emphasised in the speech of Lord Fraser of Tullybelton in *Candlewood Navigation Corporation Limited v Mitsui O. S. K. Lines Limited*

[1986] AC 1. This rule of pragmatic policy was applied even where liability was strict, as in the case of *Landcatch Limited v International Oil Pollution Compensation Fund* 1999 SLT 1208, and no distinction was made between heritable or moveable property (*East Lothian Angling Association v Haddington Town Council* 1980 SLT 213). In the present circumstances defenders' counsel submitted that the pursuer did not have any possessory right or title to the property which would justify their claim to be excepted from the general policy. This was underlined by the fact that the pursuer's position on record was that her landlord was responsible for keeping the premises wind and watertight as part of their subsisting contractual relationship. In reply, pursuer's counsel contended that in essence the nature of a lease established that the pursuer had a possessory right or title to the property which was sufficient to justify her claim. In *Fleming v Gemmell* 1908 SC 340 the tenant of a farm was held entitled to interdict a third party from polluting a stream which flowed through the land which he leased and where he watered his cattle. The Court

held that, as the landlord's assignee, the pursuer had the same interest as the landlord, and accordingly had a title to sue. In *North Scottish Helicopters Limited v United Technologies Inc* 1988 SLT 77 a finance company leased a helicopter which they owned to the pursuers and the terms of the lease placed all responsibility for keeping the helicopter operational upon the lessees. The pursuers had unrestricted use of the helicopter and were bound by the lease to comply with statutory maintenance and safety requirements and to indemnify the finance company against destruction of or damage to the helicopter. After the helicopter was damaged it was held that the pursuers had a possessory and not merely a contractual right to the helicopter at the time of the damage and accordingly had title to sue. In other words the nature of the possession owned by the pursuers in that case satisfied the test outlined in *Necap Limited v Moffat Plant Limited*. In the present circumstances I was satisfied that the pursuer in the present case was entitled to raise the present action. While the test is clearly a high one, the pursuer has established a possessory right to advance a claim for economic loss against the party whom she holds responsible for the damage which she has suffered. This possessory right is sufficient to allow departure from the policy considerations in respect of economic loss described in the cases cited by defenders' counsel. The pursuer has possession of a heritable right of lease registered in the General Register of Sasines, which in my view plainly constitutes a property right and one which is not only close to ownership but which is in many respects identical to the interests of that ownership. I do not think that the contractual obligation owed by the pursuer's landlords to keep the premises wind and watertight have any particular relevance to the present issue. The nature of such an obligation has no connection with the responsibilities of a water authority to maintain and repair sewers; the responsibility for keeping a building wind and watertight is quite different from the responsibility for carrying away surface or waste water. The Sewerage (Scotland) Act 1968 differentiates between drains and sewers and whatever responsibilities the pursuer's landlords have, they cannot include the restoration of a broken collector sewerage pipe some distance outwith the curtilage of the building. That responsibility appears to lie upon the defenders. In any event, I have no doubt that the heritable rights enjoyed by the pursuer must be superior, for example, to rights in security of the sort described by Lord Penzance in *Simpson & Anr v Thomson & Ors*. Short of ownership, I can think of nothing that might indicate possessory title or interest in property with such certainty as a heritable lease. In all of the cases such as *Necap*, *Leigh & Sullivan* and *Candlewood* it was stressed that a possessory title avoids the public policy considerations bearing upon economic loss. In particular it seems to me that if Lord Davidson was right in the case of *North Scottish Helicopters Limited v United Technologies Corporation Inc* in holding that the lease of moveable property (in that case a helicopter) could convey sufficient possessory rights to justify a title to sue, then the case of a heritable lease is a fortiori of that. In all the circumstances, I think the pursuer has therefore made out a case that she can claim for the economic loss which she says she has suffered as a result of the defenders' failure to take reasonable care to repair the broken sewer. Finally, defenders' counsel submitted that the pursuer's averments of loss were insufficient. These averments

proceeded on the basis of a comparison between the returns earned by the business before and after 1991. Various figures of net profit are averred but no consistent level of profit is claimed. The pursuer also avers that measures were taken to decrease the costs to make the operation more profitable but it is unclear whether this is intended to be merely explanatory or a further measure of loss. I agree that the pursuer's claim has not been as clearly quantified as one would wish, particularly as to whether the measure of loss is to be ascertained by looking at the gross as opposed to the net levels of profit. However, I think that sufficient notice of the claim for economic loss has been given, and that there is enough material to allow the defenders to identify the appropriate measure of loss in the circumstances. Although I have not sustained the defenders' submissions in principle, I am satisfied by counsel's secondary submission that even if I did not sustain his preliminary plea, that plea should not be repelled at this stage. The issues which have been discussed at debate are not so clear cut as to justify repelling the plea-in-law at this time. Accordingly I shall allow a proof before answer with all the present pleas remaining on the pleadings. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2002/51.html>

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