79/76

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

VIAL v HOUSING COMMISSION OF NSW

Moffitt P, Glass and Mahoney JJA

19 May 1976 — [1976] 1 NSWLR 388

CIVIL PROCEEDINGS – PERSON SLIPPED ON WET CONCRETE STEPS AND WAS INJURED – WHETHER PERSON WAS AN INVITEE – BREACH OF DUTY TO INVITE – UNUSUAL DANGER – MEANING OF 'UNUSUAL' – KNOWLEDGE BY OCCUPIER OF DANGER – WHETHER OWNER OF BUILDING VICARIOUSLY LIABLE IN DAMAGES.

V., a tenant of the Housing Commission, lived on level three of a Housing Commission building. Whilst descending to pay the rent at the office on a lower floor, she slipped on the concrete stairway which was wet with soapy water left by an independent cleaning contractor. This occurred between levels three and two; she again slipped under the same circumstances between levels two and one. There was no lift in the building – she had to use the first stairway, but had an alternate egress via a stairwell after level two.

The Court held that her behaviour in continuing down the wet staircase after the first fall was mere thoughtlessness or inadvertence falling short of any contributory negligence (per *Sungravure Pty Ltd v Meani* [1964] HCA 16; (1964) 110 CLR 24 at 38). The cleaning contractor was held liable for injuries in not exercising proper care by leaving soapy water on concrete without hosing it away. As to liability of the occupier – Housing Commission, it was argued that there was breach of duty to her as an invitee; that the condition of the stairs presented an unusual danger; and that that condition should have been known by the occupier. The majority held that the occupier was liable for reasons given by Glass JA.

HELD:

1. The plaintiff was on this occasion an invitee for the reason that she was engaged on a visit to the rent office in which mission the first defendant had a material interest. The defendant did not seek a new trial if the evidence would have empowered the jury to treat her as an invitee. The evidence which justified such a conclusion was based the situation of a customer that the change was not right. If the master instead of returning himself were to send his servant, the latter would be entitled to the same consideration as his master. By this process of reasoning, the jury would have been entitled to assimilate the plaintiff's position to that of her husband.

Willes J in *Indermaur v Dames* (1866) LR 1 CP 274 at 287-8; (1867) LR 2 CP 311, applied.

2. In relation to the submission that the danger was not unusual because it was known to the plaintiff, 'unusual' is to be understood in an objective sense and is not to be construed subjectively so as to mean unexpected by the particular invitee. The mere fact that a plaintiff knows of a danger does not render it usual. Additionally, there was evidence to justify a conclusion that the presence on the steps of water containing detergent constituted an unusual danger.

3. No doubt it is true that tenants must expect that stairways will be washed down from time to time. Accordingly, stairways which are still wet with water as a result of recent cleaning do not constitute a usual danger. However, the jury would have been at liberty to take the view that water containing soap or detergent which had the effect of making the stairs exceptionally slippery did constitute an unusual danger. The quality of exceptional slipperiness could have been deduced from the evidence given by the plaintiff. It could have been inferred that after one fall, she would for that reason be inclined to show more than usual caution. Having taken a firm grip she nonetheless slipped a second time on the top step of the flight commencing at the second floor. The circumstantial evidence of the degree of slipperiness was stronger in the present case. An abnormal increase in slipperiness can be held to constitute an unusual danger.

***Donoghue v St. Luke's Hospital Pty Limited* (1968) 12 FLR 164; (1968) 70 SR (NSW) 203; [1969] 2 NSWR 647 at 655, referred to.**

4. Upon the evidence called for the plaintiff, a jury instructed in accordance with the relevant legal principles would have been entitled to find that cleaning is a non-technical activity and that the contractor's failure by his servants to prevent injury from the unusual danger of which he ought to have been aware rendered his employer liable for breach of its duty as invitor.

GLASS JA: On the authority of *Fairman v Perpetual Investment Building Society* (1923) AC 74

and *Jacobs & Anor v London County Council* (1950) AC 361 it was argued that the plaintiff can only be classified as a licensee. It was then submitted that having regard to the propositions laid down in *Public Transport Commission of NSW v J Murray-More (NSW) Pty Ltd* [1975] HCA 28; (1975) 132 CLR 336; (1975) 6 ALR 271; 49 ALJR 302 we should apply these decisions since there is no authority to the contrary in the High Court. It is true that there is no recent decision of the High Court directly in point. If it became necessary to confront the question, there is some force in the view that the abrogation of the English decisions by the *Occupier's Liability Act* (1957) would induce the High Court to take a more liberal view of the rights of those living with or visiting tenants (*The Law of Torts*: Fleming 4th Ed. 386). However, the evidence that the plaintiff was on her way to pay the rent due from her husband permits the decision of her status to be founded on narrower considerations. The English authorities are, after all, no more than decisions of fact that the visitor or lodger or spouse of a tenant as such has no business on the premises in which the landlord has a material interest. They would in no way preclude a finding of fact that the plaintiff was on this occasion an invitee for the reason that she was engaged on a visit to the rent office in which mission the first defendant had a material interest. It is true that the judge instructed the jury on her status and did not leave it for their decision.

However, the defendant does not seek a new trial if the evidence would have empowered the jury to treat her as an invitee. I believe that the evidence did justify such a conclusion. I base this view upon remarks of Willes J in *Indermaur v Dames* (1866) LR 1 CP 274 at 287-8; (1867) LR 2 CP 311. He refers to the situation of a customer that the change was not right. He observes that if the master instead of returning himself were to send his servant, the latter would be entitled to the same consideration as his master. By this process of reasoning, the jury would have been entitled to assimilate the plaintiff's position to that of her husband.

The next submission on behalf of the first defendant was that the danger could not be unusual because it was known to the plaintiff. No authority was cited. Indeed, the cases establish the contrary proposition. 'Unusual' is to be understood in an objective sense and is not to be construed subjectively so as to mean unexpected by the particular invitee (*London Graving Dock Co Ltd v Horton* (1952) 1 KB 741; [1951] AC 737 at 745; [1951] 2 All ER 1; [1951] 1 TLR 949; [1951] 1 Lloyds Rep 389. The mere fact that a plaintiff knows of a danger does not render it usual (*Edmonds v The Commonwealth of Australia* 61 SR (NSW) 527; 78 WN (NSW) 334). Additionally, there was, in my opinion, evidence to justify a conclusion that the presence on the steps of water containing detergent constituted an unusual danger.

No doubt it is true that tenants must expect that stairways will be washed down from time to time. Accordingly, stairways which are still wet with water as a result of recent cleaning do not constitute a usual danger. However, the jury would have been at liberty to take the view that water containing soap or detergent which had the effect of making the stairs exceptionally slippery did constitute an unusual danger. The quality of exceptional slipperiness could, in my view, have been deduced from the evidence of the plaintiff previously quoted. It could be inferred that after one fall, she would for that reason be inclined to show more than usual caution. Having taken a firm grip she nonetheless slipped a second time on the top step of the flight commencing at the second floor. In *Beaumont-Thomas v Blue Star Line Ltd* (1939) 3 All ER 127 at 129 it was indicated that the rubber surface of a ship's deck recently scrubbed with soap and water could be regarded as an unusual danger to passengers. The circumstantial evidence of the degree of slipperiness was stronger in the present case. An abnormal increase in slipperiness can be held to constitute an unusual danger (*Donoghue v St. Luke's Hospital Pty Limited* (1968) 12 FLR 164; (1968) 70 SR (NSW) 203; [1969] 2 NSWR 647 at 655).

The first defendant's last submission was that there was no evidence the defendant ought to have known of the unusual danger and thereupon failed to take care to prevent injury. I do not think that this submission should succeed. It fails on an evidentiary and also on a legal ground. There was evidence to support an inference that it was the regular practice of the contractor to leave the steps covered with water containing detergent instead of hosing them down immediately. This could have been regarded as an unusual danger which by the exercise of care on the part of the defendant landlord could have been discovered and by appropriate instructions remedied. The second answer is to be found in a line of authority which makes an occupier liable to an invitee for the defaults of his independent contractor in circumstances where the work performed by the latter involves no technical knowledge or experience. This was the precise basis of the decisions

in *Woodward v Mayor of Hastings and Anor* (1945) KB 174 and *Bloomstein v Railway Executive* (1952) 2 All ER 418. The principle was further explained in *Green v Fibreglass Ltd* (1958) 2 QB 245 at 250 where the following passage appears:-

> 'Those were cases – as were *Pickard v Smith* and *Wilkinson v Rea Ltd* – where the safety of the invitee depended upon the careful performance of some act which called for no technical knowledge or experience but upon acts which the courts held that the invitor could and should have done himself and which he neglected to do. In such cases, the invitor is liable for his neglect to do the act. It is no excuse for his failure to do that act, that, for the purposes of his own, he chooses to employ an independent contractor who has neglected to perform the act or to perform it carefully.'

The allusion to acts which 'the invitor could and should have done himself' contemplates performance by the invitor himself or by his employees for whose conduct he is vicariously responsible. In such cases the invitor is not excused for failure to perform his duty to the invitee merely because he has entrusted its performance to an independent contractor (*Thomson v Cremin* (1956) 1 WLR 103 at 110). The unusual dangers in respect of which the contractor's default may be charged against his employer include those created by the contractor no less than those with which he is employed to deal (*ibid*). On the other hand there is a parallel line of authority which lays down that where the delegated performance does call for special knowledge and experience the occupier's duty is fulfilled by employing a qualified expert (*Haseldine v CA Daw & Son Ltd* (1941) 2 KB 343).

No convincing reason has been assigned for the irresponsibility of the employer where the contracted work involves technical features. It has been said that the distinction may require reconsideration (*Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* (1961) AC 807 at 879. In *Voli v Inglewood Shire Council* [1963] HCA 15; (1963-64) 110 CLR 74 at 98; [1963] ALR 657 the High Court expressly approved the decision in *Woodward v Mayor of Hastings & Anor* (*supra*). It also adopted the general principle enunciated in *Thomson v Cremin* (supra) while acknowledging that its area of application remained undetermined:

> 'The observations by their Lordships about the inescapable duty of an inviter thus remain important. They may not be of general application, but in some kinds of cases they are definitive.'

Indeed the decision upheld the liability of an invitor in circumstances which went beyond the type of case discussed in *Woodward v Mayor of Hastings & Anor* (*supra*). Having regard to the special statutory provisions binding the defendant council, it was held liable to an invitee for the negligence of its architect in the performance under contract of service undeniably technical in character.

Upon the most tentative incursion into this field, one becomes immediately aware of a litigious battleground over which are strewn the results of many struggles in the past. Some of these results are mutually irreconcilable. Two contradictory doctrines are ranged in opposition.

The defendant's banner proclaims the tenet that an employer is not vicariously responsible for the torts of his independent contractor. On the plaintiff's banner is inscribed the legend that a party may not delegate the performance of a personal duty. A more accurate formulation is that liability will be incurred for failure to perform a personal duty notwithstanding its delegation to an independent contractor. The manner in which the two propositions interact is still unresolved.

On one view, the latter is a broad principle which largely negates the former (*Liability for Negligence of Contractors*, Chapman 50 LQR 71). On another view, the latter is an unjustifiable extension of the special rule in *Wilson & Clyde Coal Co Ltd v English* [1937] UKHL 2; [1938] AC 57; [1937] 3 All ER 628; *Liability for Independent Contractors*, Glanville Williams 1956 CLJ 180). A view intermediate between these two positions has also been advanced (Atiyah: *Vicarious Liability*). How to define personal or non-delegable duties in a way which avoid circularity is another problem. Some of the uncertainty is connected with the still unresolved debate concerning the nature of vicarious liability viz. the question whether it rests in theory upon the master's tort or the servant's tort (Glanville Williams *Vicarious Liability* 72 LQR 522).

There are *dicta* to be found in High Court judgments favouring each view and disclaiming any view (*Tooth and Company Limited v Tillyer* [1956] HCA 49; (1956) 95 CLR 605 per Dixon CJ

at 617; [1956] ALR 891; *Darling Island Stevedoring and Lighterage Company Limited v Long* [1957] HCA 26; (1957) 97 CLR 36 per Fullagar J at 57, Kitto J at 61, Taylor J at 70; [1957] ALR 505; *Parker v The Commonwealth of Australia* [1965] HCA 12; (1964-65) 112 CLR 295 per Windeyer J at 301; [1965] ALR 1094; (1965) 38 ALJR 444; *Ramsay v Pigram* [1968] HCA 34; (1967-8) 118 CLR 271 per Barwick CJ at 278; [1968] ALR 419; 42 ALJR 89).

In the field of employer-employee relations, the position appears to be settled. The failure to provide premises, plant or a system of work which are reasonably safe involves the employer in personal liability (*Wilson & Clyde Coal Co Ltd v English supra* at pp83, 88; *Staveley Iron & Chemical Co Ltd v Jones* (1956) AC 627 at pp639, 646; [1956] 1 All ER 403). If the default is that of an independent contractor, no excuse appears (*Paine v Colne Valley Electricity Supply Co Ltd* (1938) 4 All ER 408; 55 TLR 181; 160 LT 124; 83 Sol Jo 115; 37 LGR 200; *Sumner v Lions Ltd* (1964) 1 QB 450; [1963] 2 All ER 712; [1963] 1 WLR 823). The failure, however, to conduct current operations with due care involves the employer in vicarious liability. A liability of this kind cannot, generally speaking, be visited upon him by reason of the default of his independent contractor (*Coceia v Australian Iron & Steel Pty Limited*, 12th June 1975, unreported). It may well be thought that the duty owed by an occupier to his invitee is personal in the same way as the duty of an employer to his employee with respect to his premises. The view is one which commands the approval of Lord Wright (*Thomson v Cremin* (1956) 1 WLR 103 at 110).

If so, this would provide a doctrinal foundation for those decisions in which liability has been imposed on the occupier. But, in any event, it constitutes no warrant for refusing to apply a relevant legal rule that it is not possible, as the law now stands, to accommodate it within a framework of coherent doctrine governing a wider field. Notwithstanding the uncertainty regarding some other employers, the decisions affecting occupiers who employ independent contractors for non-technical work embody a pertinent line of authority which has received the imprimatur of the High Court.

Upon the evidence called for the plaintiff, a jury instructed in accordance with such principles would have been entitled to find that cleaning is a non-technical activity and that the contractor's failure by his servants to prevent injury from the unusual danger of which he ought to have been aware rendered his employer liable for breach of its duty as invitor.

[The minority view of Mahoney JA differed only as to knowledge of the danger by the occupier:-]

MAHONEY JA: Whether it be necessary for the plaintiff to show that the Housing Commission at the time of the accident knew or ought to have known of the actual existence of the danger, or merely of the existence of facts tending to create or likely to create danger, I do not think that the plaintiff has made out the appropriate case: cf. *Swinton v China Mutual Steam Navigation Co Ltd* [1951] HCA 54; (1951) 83 CLR 553; *Donoghue v St. Luke's Hospital Pty Limited* (*supra*) at p654.

It was suggested in argument that there was, perhaps, a duty upon the Housing Commission to supervise the cleaning contractor in his cleaning of the stairs. Even if it be accepted that there was such a duty in general, there was, in my opinion, no evidence that appropriate supervision would have conveyed to the Housing Commission, knowledge of the danger or the relevant facts here in question, i.e. that reasonable supervision would have done so, so as to enable it to prevent the plaintiff being injured.

The plaintiff's argument upon this issue was put in a different way. Mr E Lewis, Counsel for the plaintiff, submitted that the Housing Commission was liable to the plaintiff because the cleaning contractor was negligent in the carrying out of a duty which the Housing Commission itself owed to the plaintiff. He cited *Woodward v The Mayor of Hastings* (1945) 1 KB 374, and *Thomson v Cremin* (1953) 2 All ER 1185 at p1191, as apposite.

I do not think that this submission is correct. First, the danger here in question was not of the type which created such a dangerous situation as imposed upon the Housing Commission a personal obligation in respect of its removal. It was a danger which arose merely from the manner in which a normal cleaning operation had been carried out by the cleaning contractor. Where one has, as in the *Woodward case*, premises which are subject to a danger which, is one which (let it be assumed) the occupier should remove, it may be accepted that he does not avoid liability by the mere delegation of that duty to an independent contractor. But such is not the present danger.

Second, the point of the cases to which Mr Lewis referred is not that facing the plaintiff in the present proceeding. That which the plaintiff must establish is knowledge by the Housing Commission of the danger or the relevant facts. The cleaning contractor was not its agent or employee, such that notice to it was notice to the Housing Commission. The cleaning contractor is not constituted such an agent or employee by establishing (let it be assumed) that delegation of particular tasks to him did not divest the Housing Commission of its duty of care to the plaintiff in respect of that task.

It was not argued, nor in my opinion could it have been, that the cleaning contractor was not an independent contractor but the servant of the Housing Commission for any purpose here relevant. In my opinion, therefore, the plaintiff, relying solely upon the claim that she was an invitee of the Housing Commission, has not established the basis of the conclusion that the Housing Commission knew or ought to have known of the danger so as to render it liable.
