

60/82

SUPREME COURT OF QUEENSLAND

THE UNION FIDELITY TRUSTEE COMPANY OF AUSTRALIA LIMITED as executor of the estate of the late BESSIE MAY CHAMBERLAIN v FITZGERALD**Andrews SPJ, Kelly and McPherson JJ**

DAMAGES - NEGLIGENCE - DUTY OF CARE - DEFENDANT ENGAGED IN PAINTING HOUSE - PAINTED SURFACES HAD TO BE BURNED OFF, SANDED AND PAINTED - AFTER SOME BURNING OFF HAD OCCURRED THE WORKERS STOPPED TO HAVE LUNCH - SHORTLY AFTER A FIRE STARTED IN ROOF OF HOUSE - OPERATION OF BURNING OFF PAINT HAZARDOUS - FAILURE BY WORKERS TO REMAIN FOR A SUFFICIENTLY-LONG TIME AFTER THEY STOPPED BURNING - WHETHER EMPLOYER LIABLE.

The measure of care increases in proportion with the danger involved, in the custody or control of an agency potentially harmful. The appellants failed to take a necessary precaution required by the hazardous operation in which they were involved and were properly found to be liable in damages. Stringent precautions were necessary to guard against the risk of fire. The employees failed to take the necessary precaution of surveillance for a sufficient period after the burning off ceased to enable prompt action to be taken in order to deal in the early stages with any fire which might result from that operation.

KELLY J: (With whom Andrews SPJ and McPherson J agreed) This is an appeal from the decision of a District Court Judge in an action for damages for negligence or, alternatively for breach of contract in which he gave judgment for the plaintiff, the present respondent, for \$13,103 together with interest. The respondent's claim arose out of fire damage to a weather-board house which was in the process of being painted by servants of the appellants. Under the terms of the contract between the appellants and the respondent for the carrying out of this work all surfaces showing deteriorated paint work were to be burned off, electrically sanded and painted. Two employees of the appellants were engaged in burning off the paint, one named Petersen working at the front of the house and the other named Lampard working at the rear.

The learned trial judge found that after these two employees had been burning off for some time they stopped work in order to have lunch. Lampard, who was the more senior of the two, came to call Petersen and His Honour found that this was within two minutes of 12 o'clock, one way or the other. When Petersen ceased work he had been working, so the learned judge found, immediately below the sill of a window slightly to the left, looking from the front, of a lamp fitting on the front of the house. Lampard and Petersen went to the rear of the house and while there became aware of the smell of burning. They examined the rear of the house where Lampard had been working and then came to the front, but they saw no evidence of fire. They first became aware of smoke when this was pointed out to them by someone across the road. Petersen climbed on to the roof, smashed a hole in the fibre from where the smoke appeared to be coming and placed a hose into the resulting cavity, but he soon had to leave the roof for his own safety.

The Fire Brigade which had been called by a neighbour arrived at eight minutes past twelve. The learned judge found that the fire had started in the wall cavity close to where Petersen had just been working. Petersen's evidence was that he had switched off his blow torch in the period of from three to five minutes during which he had a discussion with Lampard when Lampard came to call him for lunch.

The learned Judge found that the operation of burning off the paint work was hazardous. He held that it was not necessary to decide whether the duty of the appellants arose out of contract or tort because in either event the duty was one to take reasonable care and that reasonable care in the circumstances was to be interpreted in the light of the risk involved. His Honour found that there was a duty on the servants of the appellants to remain in very close proximity to the area where they had been burning and continue observation for some time, probably something in the nature of half an hour, before leaving the area,

The learned judge concluded, although with some hesitation, that if Petersen had remained at the

front of the house for some time after he stopped burning he would have been aware of the fire quicker than he and Lampard became aware of it from the rear of the house and at that stage he would have been in a position to take effective action to prevent the fire from spreading. On this basis His Honour found that there was negligence on the part of the appellants and that, whilst that negligence was not the cause of the fire starting, the fire had spread due to that breach of duty.

The principle to be applied in determining the degree of care which was required of the appellants when engaged in an operation of this nature is indicated in the following passage from the joint judgment of the High Court in *Swinton v The China Mutual Steam Navigation Co Ltd* (1951) 83 CLR 553 at p566-567. 'The degree of care required is that which is reasonable in the circumstances – 'The degree of care which (the) duty (of care and skill) involves must be proportioned to the degree of risk involved if the duty should not be fulfilled' – Lord Wright for the Privy Council in *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd* (1936) AC 108 at p126. In other words, the measure of care increases in proportion with the danger involved in the custody or control of an agency potentially harmful, that is to say, the danger should the safeguards employed, if any prove insufficient or unsuccessful. 'The degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life.' - per Lord Macmillan, *Glasgow Corporation v Muir* (1943) AC 448 at p456. See further per Lord Dunedin in *Dominion Natural Gas Co Ltd v Collins* (1909) AC 640 at p646 and *Faulkner v Wischer & Co Pty Ltd* (1918) VLR 513.

The learned judge found, correctly in my view, that the operation being undertaken was hazardous and it is apparent that stringent precautions were necessary to guard against the risk of fire. One such precaution indicated by the evidence and which the learned judge from his findings would appear to have regarded as necessary, but which was not observed, was to remain in close proximity to the area in which burning off had been taking place for about half an hour after the burning off had ceased in order to keep the area under observation. Mr Thomson, a fire brigade officer, emphasised the importance of catching a fire at an early stage and he spoke of five minutes as being a very crucial period. Another precaution indicated by the evidence was to have available a hose connected to a tap so that it could be used immediately and the learned judge found that there was such a hose available.

There was a deal of evidence about the effect of the presence of debris as birds' nests in the wall cavity. There was evidence that some material, apparently from a bird's nest, was found after the fire in the area of the front entry porch, but the evidence did not indicate that there was an unusual amount of debris in the area where the learned judge found the fire to have started. There was no specific finding by the learned judge on the matter of debris and, having regard to the state of the evidence on that matter, I would regard that as being quite understandable.

In my view the findings of fact made by the learned judge were supported by the evidence. I would consider that it follows from those findings that the appellants by their servant failed to take a necessary precaution required by the hazardous operation in which they were engaged, namely, surveillance for a sufficient period after burning off ceased to enable prompt action to be taken to deal in the early stages with any fire which might result from that operation. In that regard the appellants were in breach of the duty of care which they owed to the respondent and, while that breach of the duty was not the cause of the fire starting, in my opinion it is more probable than not that it was the cause of the fire spreading as it did in that had at least one of the employees remained in the near vicinity he would have been in a better position to deal with the situation in the crucial early minutes. Consequently I would consider that the appellants were properly found to be liable in damages. I would dismiss the appeal with costs to be taxed.