Set I

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M. No. 367/84

BETWEEN AORANGI SHEEPSKIN PRODUCTS LIMITED a duly incorporated company having its registered office at 77 Riccarton Road, Christchurch and carrying on business as manufacturers and retailers of sheepskin products

Appellant

A N D CHRISTCHURCH MEDIA CLUB INC. a Society incorporated under the Incorporated Societies Act 1908 having its registered office at 26 Chancery Lane, Christchurch, Social Club

Respondent

Hearing: 1 November 1984

Counsel: T.J. Twomey for Appellant
T.C. Weston for Respondent

Judgment: 15 NOV 1984

JUDGMENT OF QUILLIAM J

This is an appeal against a decision of the District Court in an action concerning damage caused to shop premises.

There was little dispute about the facts. The appellant company occupied a shop on the ground floor of a building in Chancery Lane, Christchurch. Immediately above were the premises of the respondent club. Some time during

the night of 26/27 May 1982 beer leaked from a keg which was on the club's premises and seeped through to the appellant's shop causing damage in respect of which the appellant commenced a claim for $1,451.59.

The claim proceeded on the basis of three causes of action. The first was an allegation of negligence incorporating a plea of res ipsa loquitur; the second alleged a non-natural use of the land; and the third alleged nuisance. The District Judge rejected all three causes of action and entered judgment for the respondent.

The only evidence as to the cause of the leak from the respondent's premises was that of an insurance assessor, Mr Wise. He was not able to make an inspection for some three weeks after the incident but he was then shown the connector unit which had been attached to the beer keg. The keg was an 18 gallon one and the beer in it was under pressure. Mr Wise was able to see that there had been an area of brazing or welding near an elbow joint at the top of the connector and this had split. Whether that had occurred because of a knock or some other impact, or because the pressure inside had caused a crack to appear, Mr Wise was unable to say, although as one might expect he considered that the leak would have been obvious the moment it started and so the probability was that the crack had been caused by the pressure in the keg. There seems little doubt that the moment the crack appeared the beer would have sprayed out from it in a continuous stream.

With regard to the plea of res ipsa loquitur, the District Judge observed that it was a reasonable conclusion that there was no leakage when the connector unit was installed in the keg prior to being placed in the refrigerator and so the inference was the fault occurred overnight by the failure in the weld when the pipe split

under pressure. The District Judge concluded that the appellant had not established any negligence on the part of the respondent. The argument on this aspect of the appeal was that the District Judge failed to apply correctly the doctrine of res ipsa loquitur. The way in which this argument was developed indicated that it was based on the proposition that there had been raised a prima facie case of negligence and so the onus had passed to the respondent to show there had been no negligence, and that the respondent had failed to call evidence establishing that. This argument suggested a misapprehension as to the effect of a plea of res ipsa loquitur although, in the end, this may have amounted to no more than a confusion in the various terms which have been used in the cases.

Having regard to the view I have formed of the case it is unnecessary for me to deal at length with the doctrine of res ipsa loquitur. The law in New Zealand has, as far as I know, been accepted as correctly summarised by Beattie J in Hawke's Bay Motor Co. Ltd v Russell [1972] NZLR 542. That is conveniently referred to in the headnote in this way:

> " When a plea of res ipsa loquitur is raised by a plaintiff the burden of proof does not shift from the plaintiff and there is no 'presumption of negligence'. The plaintiff must prove an accident from which negligence can properly be inferred or he must prove particular acts of negligence. "

In the present case it seems clear that the appellant proved an accident from which negligence could properly be inferred because the beer keg was under the control of the respondent and in the ordinary course a beer keg does not leak. To this extent an evidentiary burden to provide some explanation consistent with a lack of negligence lay on the respondent. That explanation was

given and was accepted by the District Judge, namely, that the crack in the connector unit must have been caused by pressure from inside the keg and so could not have been detected or anticipated by the respondent. The possibility of the crack having been caused by a knock or blow of some kind was rejected by the District Judge and is plainly unrealistic. By reason of the pressure any fracture must have been at once apparent. I can therefore see no incorrect application by the District Judge of the doctrine.

There is, however, a different aspect of the case which I have found of greater concern. This relates to evidence given on behalf of the appellant concerning the condition of the refrigerator in which the keg was stored. That evidence, which was given by a Mr Roberts, a director of the appellant, is recorded in this way:

> " We found that there was a leak inside the refrigerator, that there was a beer keg that was running into the bottom of this refrigerator. I knew it was beer before I went up because there was a big pool on the counter. I tasted it and it was very sticky. I am satisfied that it came from the defendant's premises. We saw it running out of the keg, into the bottom of the refrigerator, through the cracks in the bottom of the refrigerator and on to the floor below. .... The refrigerator was an ordinary refrigerator but inside the refrigerator where the beer kegs had been rolled in and slid in, all the floor of the refrigerator was cracked, in the tray of the refrigerator. Instead of being one piece, it was all cracked round there, round the seams. It could not be sealed because of all the cracks. Anything that spilt in the refrigerator would run straight out. "

There seems to me to be little doubt that this establishes a breach of the duty of care which the respondent owed to the appellant whose premises were

situated immediately below. It is plain that any liquid which was introduced into the refrigerator was bound to escape from it and, if in sufficient quantity, to penetrate through the floor to the appellant's premises. The argument offered for the respondent was that the condition of the refrigerator did not mean that there had been any causative negligence. This was because if the tray of the refrigerator had been intact there was nothing to suggest that it would have held the beer from the keg without any overflow. This does not appear to me to be realistic. The respondent chose to store its beer kegs in a refrigerator. The fact that the kegs contained a liquid meant that the possibility of spillage or accident was a normally foreseeable one. The fact that no such spillage could be contained within the refrigerator but would in all probability escape on to and through the floor means that there was a duty not to allow this state of affairs to continue. I accordingly conclude that there was uncontradicted evidence of negligence on the part of the respondent which was causative of the damage to the appellant's premises.

There remains the question of whether the appellant was entitled to a finding on the basis of that evidence, having regard to the fact that negligence in this respect was not expressly pleaded. Paragraph 4 of the amended statement of claim alleges, "The matters aforesaid were caused by the negligence of the Defendant its servants and agents." Then follows the heading Particulars of Negligence, but the only particular given is contained in paragraph 6 which alleges, "That without prejudice to the allegations contained in paragraph 4 hereof the Plaintiff prays in aid of his claim the doctrine of res ipsa loquitur." There is accordingly no particular pleading directed to negligence in respect of the condition of the refrigerator.

I do not consider that this precluded the appellant from relying on that evidence. Rule 77 (1) of the District Court Rules 1948 provides:

> " A statement of claim shall specify particulars of the claim which the plaintiff seeks to establish, including such particulars of time, place, names of persons, dates or instruments, and other circumstances as may suffice to ensure that the Court and the opposite party are fully and fairly informed of the cause of action. "

This is in substantially the same terms as Rule 136 of the Code of Civil Procedure. There is, however, no rule in the District Court Rules corresponding to R 140 of the Code, which provides:

> " Distinct causes of action and distinct grounds of defence founded on separate and distinct facts shall be stated as nearly as may be separately and distinctly. "

Even in respect of proceedings in the High Court the absence of a particular pleading will by no means necessarily be fatal. What is required is that the other party should be fairly informed of the basis of the claim. Here that was done. The main facts were alleged and there was then a general pleading of negligence. The evidence offered in support of that pleading contained detailed reference to the condition of the refrigerator and the effect which this produced. It was open to the respondent to call evidence on the same topic but it chose not to do so. Moreover, it has not, so far as I am aware, been contended at any stage that the condition of the refrigerator was a matter on which the appellant was not entitled to rely.

The conclusion which should follow from the evidence as to the refrigerator is not a matter depending upon any assessment of credibility and so I am in as good a position as the District Judge was to draw an inference from the facts. I am satisfied that the proper inference is that the damage to the appellant's premises was caused by negligence on the part of the respondent. Having arrived at that conclusion it is unnecessary for me to deal with the argument in respect of the other two causes of action.

The appeal is accordingly allowed and the judgment entered in the respondent's favour in the District Court is vacated. In view of the fact that no finding has been made as to the quantum of damages, and that the amount claimed was not agreed upon, I am unable to direct the entry of judgment for a particular amount. It may be that agreement can now be reached on this but in case not the matter is remitted to the District Court for determination of the damages and entry of judgment. The appellant will also be entitled to costs in the District Court according to scale in that Court, together with disbursements and witness's expenses as fixed by the Registrar of that Court. The appellant is also entitled to costs on the appeal which I fix at $120 and disbursements.

Solicitors: Purnell, Creighton, McGowan & Co., CHRISTCHURCH, for Appellant

Weston Ward & Lascelles, CHRISTCHURCH, for Respondent

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