OUTER HOUSE, COURT OF SESSION

[2023] CSOH 94

A164/21

OPINION OF LORD YOUNG

In the cause

JON WILLIAM DAVIE

Pursuer

against

(FIRST) POWERTEAM ELECTRICAL SERVICES (UK) LIMITED

(SECOND) VINCI ENERGIES UK HOLDING LIMITED

Defenders

Pursuer: J Brodie KC, C Oliver; Jones Whyte LLP
Defenders: L Shand KC; BTO LLP

19 December 2023

[1] This case came before me on the procedure roll on the joint motions of both defenders. The first and second defenders seek dismissal of an action of damages for personal injuries raised by the pursuer.

The pursuer's pleadings

[2] The pursuer sustained a catastrophic injury in the early hours of 29 September 2017 in Charlotte Street, Aberdeen when he was 28 years of age. The pursuer had been socialising on the previous evening with friends in a pub. He had been drinking alcohol. On his way home, he came across a temporary construction site in Charlotte Street. This site

was under the control of the first defenders and it related to construction works being carried out on a nearby electrical substation. These works had commenced on about 16 November 2016. The pursuer followed a pedestrian route which ran through the construction site. Towards the northern end of the site, the pedestrian route ran passed two portacabins positioned on the carriageway with one being positioned on top of the other. Plastic barriers and traffic cones separated the pedestrian path from the lower portacabin.

[3] Access to the upper portacabin was provided by virtue of a metal stairway which led from ground level to a landing in front of the upper portacabin. A guardrail ran around the landing area at a height of about 1 metre above the landing itself. The roof of the upper portacabin was about 2 metres above the landing. The guardrail provided a means by which to climb up onto the roof of the portacabin. The nature of the stairway's construction was that it constituted a "climbing frame" leading to the roof.

[4] At ground level, heras fencing on the north side of the site extended into a gate which could be swung across the access to the stairway. When the pursuer got to the portacabins, he found that the gate was not closed over the entrance to the stairway with the consequence that the stairway was openly accessible. The pursuer wanted a quiet place to sit and think, and he decided that the roof of the upper portacabin was a good place to do so. He climbed the stairway before gaining access to the roof of the upper portacabin using the guardrail. After sitting for a period of time, he decided to descend from the roof and make his way home. In doing so, he lost his footing and/or grip and fell to the ground. The pursuer fell approximately 18 feet to the road and sustained a C4/C5 unstable fracture resulting in tetraplegia.

[5] The pursuer's case is pled under both common law and the Occupiers' Liability (Scotland) Act 1960. At debate, senior counsel for the pursuer acknowledged that the case

stood or fell by reference to the 1960 Act alone and I was not addressed on the common law by either party. In terms of the specific ground of fault, it is averred that the defenders ought to have had an effective barrier preventing access being taken to the stairway from which further access was gained to the roof of the portacabin. It is averred that the first defender ought to have known that the site constituted an attraction and allurement to members of the public; that it was known that licensed premises were in the locality; and that the stairway and guardrail provided a ready climbing frame and means of access to the roof of the portacabin. The pursuer also makes extensive reference to parts of the Health & Safety Executive's document HSG151, 2009 which is incorporated *brevitatis causa* into the pleadings.

Statutory Provisions

[6] The Occupiers' Liability (Scotland) Act 1960 provides:

> "1(1) - The provisions of the next following section of this Act shall have effect, in place of the rules of the common law, for the purpose of determining the care which a person occupying or having control of land or other premises (in this Act referred to as an 'occupier of premises') is required, by reason of such occupation or control, to show towards persons entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which he is in law responsible.
>
> 2(1) - The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger."

Submissions for the defenders

[7] Senior counsel for the defenders adopted her note of argument. The principal submissions for the defenders can be summarised as follows:

a) The 1960 Act required a linear approach. In considering the relevancy of the pursuer's case, the first question is whether a relevant danger has been averred (*Heary* v *Phinn t/a Phinn Parts* 2013 SLT (Sh Ct) 145, per Sheriff McGowan at paras [192], [193] & [195]). It was submitted that this approach was in accordance with *Dawson* v *Page* [2013] CSIH 24 at paras [11] and [13]. If premises did not present a danger in themselves, the misuse of those premises by the pursuer could not render them dangerous for the purposes of the 1960 Act. The stairway and the portacabin did not present a danger in themselves. The pursuer had failed to aver facts which, if proved, could establish that there was a danger on the site. Intoxication on the part of the pursuer could not turn something which was not dangerous into a danger for the purposes of the 1960 Act.

b) The duty owed by an occupier under section 2(1) of the 1960 Act is an objective one (*McGlone* v *British Railways Board* 1966 SC (HL) 1 per Lord Guest at p16). The occupier requires to take account of the age and state of knowledge of the type of persons who can reasonably be expected to enter onto the premises with the consequence that more exacting precautions may be required for children than for adults (*McGlone* v *British Railways Board* per Lord Reid at page 13; *Titchener* v *British Railways Board* 1984 SC (HL) 35 per Lord Fraser of Tullybelton at p55; and *Devlin* v *Strathclyde Regional Council* 1993 SLT 699 per Lord Coulsfield at p703C).

c) Even if the linear approach is not correct, the authorities show that whether the occupier has failed to exercise the appropriate degree of care will depend on the

age and state of knowledge of the pursuer as well as whether the danger is an obvious one or a hidden one (*Titchener* per Lord Fraser of Tullybelton at p55). The authorities demonstrated that there is no general duty to fence off dangerous parts of premises where the danger is well known to the pursuer and there is no risk of inadvertently coming into contact with the danger. The pursuer was an adult who must have been fully aware of the risk of falling from the roof. He came to be on the roof after taking a deliberate decision to walk up the stairway and then manoeuvre himself via the guardrail up and onto the roof. The pursuer had failed to aver facts that if proved would establish that the accident was caused by any failure in reasonable care on the part of the defenders. The pursuer's averments were incapable of establishing that it was reasonably foreseeable to these defenders that an adult would climb up on this portacabin at this site such that an inaccessible barrier required to be provided in the exercise of reasonable care.

d) The fact that, with hindsight, something could have been easily done (ie securing or locking the gate in place) which would have prevented the pursuer getting access to the landing and then onto the roof, does not mean that there is a breach of duty for failing to take that additional precaution. The duty of exercising reasonable care does not require the taking of such precautions as would repel a deliberate invader, (*McGlone* v *British Railways Board* per Lord Guest at p15). The occupier is bound to do no more than fulfil its statutory duty and is not to be faulted if it has failed to take an additional easy precaution beyond the scope of that duty, (*McGlone* v *British Railways Board* per Lord Reid at p13).

e) At the debate, senior counsel went through the various sections of the HSE guidance documentation. The broad submission being that the guidance was wide

ranging and general in nature. Much of it was irrelevant to a site of this nature and size. The document was said to be of no real relevance to the specific circumstances of this accident involving an adult obtaining access to the roof of a portacabin.

f) Although the pursuer avers that the site was an attraction or allurement to the public, there are no averments of previous incidents involving members of the public accessing the area within which the portacabins were located, or of accessing the roof of the portacabins. The use of the term allurement in previous cases has been confined to situations where the premises amount to a trap to a child but would not be such to an adult. The description of the staircase and portacabin as being a "climbing frame" is a characterisation by the pleader but the guardrail which the pursuer misused was a standard guardrail around a landing area.

g) This was a highly unusual case on the facts averred. The test set out in *Jamieson* v *Jamieson* 1952 SC (HL) 44 per Lord Normand at p50 was met in that, even if the pursuer proved all his averments, the action would necessarily fail. There was no advantage in sending this case to proof which would involve expending time and expense on a fruitless inquiry, (*Mitchell & Another* v *Glasgow City Council* [2009] UKHL 11 per Lord Hope of Craighead at para 12).

h) Regardless of the above, the case against the second defenders was irrelevant as there was no averment that the second defenders were occupiers of the site. It was averred that the second defenders had overall control of the first defenders' operations but that the first defenders were the occupiers of the site.

Submissions for the pursuer

[8] Senior counsel for the pursuer also adopted his note of argument and proceeded to develop his submissions as follows:

a) The pursuer had previously offered a proof before answer which offer was renewed.

b) With reference to *Jamieson* v *Jamieson* and *Miller* v *SSEB* 1958 SC (HL) 20, per Lord Keith of Avonholm at p33, I was reminded that the action could only be dismissed if it was bound to fail. Actions of reparation would rarely be capable of being determined without evidence being led. It was of some significance that the authorities relied upon by the defenders based on the 1960 Act had all been decided after proof. What amounted to reasonable care in an occupiers' liability case is largely a question of fact, (*McGlone* v *British Railways Board* per Lord Guest at p15)

c) While senior counsel for the pursuer did not see huge differences between the parties on the law, he did take issue with the linear approach advanced by the defenders. Breaking the issue down in the way suggested would, as a matter of relevancy, preclude any claim which proceeded on the misuse of premises since the inquiry would end after answering the question is there a danger arising from the premises alone. That was not the approach adopted in Scots law and drew no support from the Inner House in *Dawson* v *Page*.

d) The pursuer had relevantly averred that the temporary site was an allurement to members of the public; that access to the roof could be gained through the staircase and the "climbing frame" at the landing area; and that it was reasonably foreseeable that any person obtaining access in this way could fall and be injured. This risk could have been removed if the defenders had secured the gate across the

access into the stairwell. There was no reason to limit "allurements" to such premises that children were drawn to. The averments based on the HSE publication also went to demonstrate that the construction industry was aware that members of the public could misuse the temporary construction site and that external fencing to the site required to be secure. In reply to a question why owners of static caravans would not also owe a duty to erect a barrier across steps leading up to any landing outside their caravan, senior counsel suggested that it was the temporary nature of the portacabins which acted as the particular allurement necessitating such additional precautions.

e) The averments of the pursuer's alcohol consumption were not intended to suggest any additional duty being owed to him. These averments were to bring home that it was foreseeable that members of the public drawn to the premises could include persons who had been drinking alcohol.

Decision

[9] In my opinion, this is one of those rare and exceptional cases in which an action for personal injuries falls to be dismissed. Senior counsel for the pursuer was correct to point out that all of the occupiers' liability cases which were under discussion at the debate were determined only after evidence was led. It is indeed rare to identify an occupiers' liability case dismissed at debate although an example can be seen in *Graham* v *East of Scotland Water Authority* 2002 SCLR 340. Given the heart breaking injuries suffered by the pursuer, there is a strong temptation simply to allow a proof before answer restricted to liability. However, I have ultimately come to the view that there is nothing to be gained from the leading of

evidence in this case and that the pursuer's claim is bound to fail even if he proves all of his averments.

[10] Before turning to the defenders' submissions which I do accept, I need to say something about certain submissions which I was not persuaded by. I was not persuaded by the defenders' submission based on *Heary* v *Phinn* and *Dawson* v *Page* that the approach to section 2(1) necessitated a staged approach in which the first question to be answered is "what danger arises from the premises". Rather, it seems to me that the Inner House in *Dawson* at para [13], while finding it unnecessary to determine this question, favoured a synthesised approach. Although I was not addressed to any significant extent on the law of England, this approach of asking "what danger arises from the premises" is one which appears to have developed in English law at least in terms of the Occupiers' Liability Act 1984 (*Tomlinson* v *Congleton Borough Council* [2004] 1 AC 46 per Lord Hoffmann at paras [26]-[29]. Given the unhappy history of the interaction of Scots and English law in this area, I am reluctant to look south of the border for assistance in relation to the 1960 Act.

[11] While I do not agree that an initial exclusory question of "what danger arises from premises" falls to be asked, that does not mean that it is an irrelevant question in the round. So, in the present case, the fall from the roof was not caused by the state of the roof itself such as by a slippery surface or part of the roof surface giving way. There was no defect in the roof itself. The relevance of this is that the defenders' own actions have not created a danger on the roof. Nor has there been an omission such as a failure to maintain or inspect the state of the portacabin roof, which has created a danger. If the defenders' acts or omissions had directly contributed to the creation of a dangerous roof, that is likely to have relevance when considering whether the accident was reasonably foreseeable to the occupier. In the present case, the danger of falling from the roof was created solely by the

pursuer climbing onto the roof. It is also of some relevance that the specific duty founded upon by the pursuer, namely to prevent access to the stairway, is neutral in relation to the risk of falling from the roof. So, for example, the presence of a suitable barrier around the edge of a roof will minimise the risk of a person falling from the roof, but a barrier at the stairway entrance does not alter the risk of falling once the person is on the roof. Again, this observation may have some relevance to reasonable foreseeability as an occupier considering whether to secure a barrier in place at the entrance to the stairway will primarily be focussed on whether there is a desire to prevent access to the stairway or to the portacabin itself, rather than access to the roof of the portacabin.

[12] The pursuer has no averments of previous incidents at this construction site involving members of the public gaining access to the roof of the portacabin. Nor is it averred that the defenders had experienced particular issues with members of the public accessing the portacabin area in general. There are no averments of reported falls from portacabin roofs on other sites, which the defenders knew or ought to have known about. While it can no doubt be said in general terms that adult members of the public could seek to gain access to the roof of a portacabin on a construction site (or indeed almost any building), the pleadings do not set out a basis on which these defenders ought to have reasonably foreseen this risk on this site. The extensive references to an HSE document do not assist the pursuer's case beyond the general proposition that construction sites present numerous dangers to both workers and members of the public such that perimeter security needs to be carefully considered. By its very nature the HSE document is in general terms and has multiple aims. It does not assist on the issue of whether it is reasonably foreseeable that adult members of the public will gain access to the roof of this portacabin, and what a reasonable occupier should do, if anything, to mitigate against that risk.

[13] I agree with the observation made by senior counsel for the defenders that descriptions of premises as being an "allurement" tend to feature in cases involving injuries to children. There is no doubt an interesting historical basis for the regular use of this term in occupiers' liability pleadings. It seems likely to derive from the former distinctions between invitees, licensees and trespassers, with a licensee being owed a duty only if lured into a trap (*Donald* v *William Dixon Ltd* 1936 SLT 429 per Lord Robertson at p431). The 1960 Act has done away with such categorisations and, with that, the importance of making averments of both an "allurement" and a "trap". Nonetheless, the description of aspects of premises as being a particular allurement to the public is still a relevant averment under the 1960 Act and it may relate to an adult pursuer as well as to a child (see *Fegan* v *Highland Regional Council* 2007 CSIH 44 at paras 10 and 17). In fact, I do not think that anything turns on the use of these words in the pursuer's pleadings. The averment is that the construction site, including the portacabins and stairway, was an allurement (article 6). It is also averred that the top of the portacabins afforded a viewpoint into the substation works and provided the only accessible point of height in the area (article 4.7). However, if the roof of the portacabins was an allurement for adult members of the public, I would expect that the pursuer would be able to make averments of incidents when others were enticed to climb upon the portacabins in the 10 month period since the works commenced, or at least, averments of similar incidents within the construction industry on other sites. I do not understand why a temporary construction falls to be considered more of an allurement than a permanent one. The risk of an adult getting unauthorised access to the roof of a structure does not seem to me to increase or decrease depending on the classification of the structure as being temporary or permanent in nature.

[14] For these reasons set out in paragraphs 11-13 above, I accept the defenders' submission that the pursuer's averments, even if all proved, cannot establish that the defenders ought to have reasonably foreseen that an adult member of the public would climb onto the roof of the portacabin on this site.

[15] Alternatively, in my opinion it cannot be said that the scope of any duty owed by the defenders to the pursuer could ever extend to ensuring that there was an effective barrier on the stairway. Questions as to the scope of a duty of care are questions of law, (*Mitchell* v *Glasgow City Council* [2009] UKHL 11, as per Lord Hope of Craighead at para [11]. The crux of the pursuer's case is that a secure barrier ought to have been in place to prevent him gaining access to the stairway from which he then gained access to the portacabin roof. The authorities referred to by the defenders establish that the exercise of reasonable care does not require an occupier to fence off a danger on his land where that danger is obvious to the pursuer. Thus, in *Titchener* v *British Railways Board* per Lord Fraser of Tullybelton at p55, where the 15 year old pursuer was aware of the danger presented by the railway line and there was no risk of her straying onto the railway line unawares, there was no duty to repair gaps in the fencing or indeed, to provide any fencing at all. In *McGlone* v *British Railways Board*, Lord Reid at page 11 stated that it would be "quite unreasonable" to insist that a highly dangerous object (in that case an electrical transformer) brought onto land where children were known to play, had to be placed behind an impenetrable fence. In *Devlin* v *Strathclyde Regional Council* at p702I-J, following the death of a 14 year old school boy, Lord Coulsfield dealt with the proposition that the Council's duty was to prevent children getting onto the school roof by altering the rhone pipes used for access or by otherwise making the roof inaccessible. Lord Coulsfield stated that there was an obvious risk of a pupil falling and being seriously injured if they gained access to the school roof, but he held

that the Council were under no duty to make the roof inaccessible since there had been no accidents from the roof of the school building over the years. In *Graham* v *East of Scotland Water Authority* 2002 SCLR 340 at para 18, Lord Emslie dismissed an action of damages, in part, on the basis that the danger presented by a low wall running alongside the edge of a reservoir was such an obvious hazard that there was no duty to fence a section of the wall. It was said that, in the absence of a history of accidents or complaints, the danger alleged would require to be unusual, unseen, unfamiliar or otherwise special to warrant a duty to erect fencing.

[16] The features of this case which are important to the specific duty pled are (i) the pursuer is an adult without any special vulnerabilities at the time of the accident, (ii) the pursuer came onto the site uninvited (*McGlone* v *British Railways Board* per Lord Reid at p10), (iii) the portacabin roof presented no danger in itself and it was the pursuer's own activity which created the danger, (iv) the portacabin roof was not designed or intended to be used for the pursuer's activity, ie as a place to sit, (v) the pursuer consciously gained access to the roof and so no question of inadvertent exposure to risk arose (*Titchener*), (vi) the activity of climbing up, sitting and descending from the roof while intoxicated presented obvious risks which the pursuer must have been aware of at the time (*Titchener*; *Graham*), (vii) to get onto the roof itself, the pursuer improvised a means of access (i.e. by using the guardrail) which was not intended for use in that way, (viii) the defenders had not been put on notice that members of the public were accessing the roof of the portacabin on this site at any previous time, and (ix) there are no averments of previous similar accidents known to the defenders or which they ought to have been aware of (*Devlin*). Each of these features appear from the pursuer's own pleadings or, at least, there is no basis in the pursuer's pleadings to allow evidence to be led to contradict the features as set out. In line with the authorities discussed,

the scope of any duty owed to the pursuer in the averred circumstances cannot extend to a duty to provide a barrier to prevent him engaging in his own dangerous activity. There is accordingly no benefit to be obtained from hearing evidence in this case.

Disposal

[17] I shall sustain the first pleas-in law for each defender and dismiss this action. I was not addressed by the parties on the issue of expenses and so I shall reserve them meantime. If parties are unable to agree on the question of expenses in the light of my decision, the matter can be put out by order.