21,1958

IN THE PRIVY COUNCIL No. 9 of 1958

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N EWA PERKOWSKI Appellant

- and -

THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF WELLINGTON Respondents

CASE FOR THE APPELLANT

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1. This is an appeal from a judgment of the Court of Appeal of New Zealand (Barrowclough, C.J. and Stanton and Adams, JJ.) delivered on the 12th day of October, 1956, dismissing an appeal from a judgment of the Supreme Court of New Zealand (Hutchison, J.) delivered on the 17th day of November, 1955, whereby in an action brought under the Deaths by Accident Compensation Act, 1952, in respect of the death of the Appellant's husband, the jury having found for the Appellant on the issues and both the Appellant and the Respondents having moved for judgment, it was adjudged that the Appellant's motion for judgment be dismissed and that judgment be entered for the Respondents.

2. On the 31st day of July, 1957 Her Majesty in Council was graciously pleased to grant to the Appellant special leave to appeal in forma pauperis from the above-mentioned judgment of the Court of Appeal.

3. The Appellant's husband died on the 10th day of January, 1954, in consequence of injuries

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suffered on the preceding day, when he dived from a spring-board erected by the Respondents at Worser Bay in the City of Wellington, and, owing to the shallowness of the water, his head struck the bed of the sea. By her amended Statement of pp.2-5 Claim, dated the 28th February, 1955, the Appellant alleged that the diving board was a trap, because at low tide the sea completely surrounded the supports on which it rested, and the board extended to a point at which, in the absence of warning, it could be assumed that the water was deep enough for diving even at low tide, when in fact it was shallow. The Respondents had given a licence to the general public to use the board. She also alleged that the Respondents were negligent in giving such a licence when they knew, or ought to have known, that the board was dangerous, in failing to erect a warning notice, in failing to erect a tide gauge and in failing to instruct their servants to warn people of the danger of diving from the board at low tide. By their Defence, pp.6-8 dated the 7th March, 1955, the Respondents denied that the diving board was a trap and denied the allegations of negligence; they alleged that the death of the Appellant's husband was due to his own negligence in failing to ascertain the depth of the water, or look into it, before diving, failing to notice people standing in shallow water near the board, failing to take reasonable care for his own safety, and diving from the board when aware that the water under it was shallow.

4. The action was heard in the Supreme

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Court before Hutchison, J. and a jury of twelve on the 17th and 18th days of August, 1955. The evidence showed that at Worser Bay certain land immediately above high water mark was vested in the Respondents as a pleasure-ground and that five off-shore rocks were included in the land so vested, so far as they were above high water mark. Off-shore a concrete duck-walk ran to one of these rocks, referred to at the trial as rock No.5. A wooden duck-walk ran from that rock to a concrete platform constructed on concrete supports set in the bed of the harbour. The bed of the harbour was vested in the Marine Department. The spring-board was at the seaward end of the platform and rested on a concrete block. It was not proved at the trial by whom the block was installed. The duck-walks, the platform and its supports were erected by a swimming club. The spring-board was erected by the Respondents at the request of the club in 1941.

pp.74 to 75.

p.42, l.30 to p.43, l.19.

5. The Appellant's evidence was to the effect that in 1953 and 1954 her husband had dived from the board on several occasions without mishap. On the afternoon of the accident, together with a friend and their son, they had lunch at the beach. Afterwards her husband took the boy into the sea. Leaving the boy close to the shore, the deceased climbed on to rock No.5, made his way to the spring-board and dived. Subsequent measurements and other evidence suggested that the depth of water at the time and place of his dive was between two feet (or a little less) and three feet,

p.12, ll.27 to 33

p.12, ll.13 to 27; p.17, ll.2 to 28; p.22, ll.3 to 4

p.21,ll.2 to 10; p.22,ll.12 to 15; p.53,ll.15 to 18.

pp.10 to 11; p.88; p.23, ll.21 to 25; p.55, ll.20 to 23

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because the tide was then low, and that the height of the board above the surface of the water was about seven feet. A witness called for the Respondents, who was on the beach at the time and saw the deceased dive, said that on that particular day the water at the end of the board was waist deep. There was also evidence that at high tide there would be about six feet of water under the board.

p.54, ll.22 to 24.

p.27, ll.13 to 15

6. A member of the swimming club gave evidence that the club had beach patrols, and that, when the patrols saw people going to the board at low tide, they called them down from the board. This witness, who had seen the deceased shortly before his dive, also said that, if he had realised that the deceased was going towards the board, he would definitely have stopped him, as it was low tide. The president of the club gave evidence that formerly there had been a tide gauge in the vicinity of the board, but that it had blown down and not been replaced. He said he thought it was taken for granted that replacement was unnecessary. The custodian of the Respondents' pavilion on the beach at Worser Bay said that, although he had never seen people attempt to dive from the board at low tide, he thought that they did attempt to do so.

p.26, ll.8 to 18.

p.29, ll.31 to 33; p.32, ll.30 to 35.

p.35, ll.24 to 25.

7. In his evidence the Respondents' Director of Parks and Reserves put forward the view that the board was not the responsibility of the Respondents but of the swimming club or the Marine Department. He also said, however, that in 1949 at the request of the Club the coconut matting on the board was

p.50, ll.14 to 20; p.48 ll.2 to 25

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replaced by the Respondents, after he had inspected the board, because the old matting was in a slippery condition, the renewal being for the purpose of making the surface safe. On assuming office in 1947, he inspected all beaches under the control of the Respondents, including Worser Bay. At Worser Bay he inspected the whole of the buildings and the diving board and platform. Before the accident he had been on to the board about a dozen times, "but not with the purpose of inspecting it necessarily". p.44, ll. 11 to 17. p.43, ll. 28 to p.44, l.10 p.50, ll.8 to 14.

8. During the trial the jury had a view of the scene of the accident, and in his summing up the learned Judge indicated that they were entitled to take this into account in their findings on the facts. p.58, l.1

9. The issues put to the jury and their answers were as follows:

1. (a) Was the defendant Corporation occupier of the premises comprising the spring-board? Answer: Yes.

   (b) If yes, did the spring-board constitute a concealed danger at low tide? Answer: No.

   (c) If yes, ought the defendant to have maintained a warning notice board or tide-gauge? Answer:

2. Was the defendant negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide-gauge? Answer: Yes.

3. Was the deceased negligent in a manner causing or contributing to the fatality? Answer: Yes.

4. Damages (total).

   Special £41. 5s.
   General £5,250. Total: £5,291. 5s.

5. If both the defendant and the deceased

were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that the total damages be reduced having regard to the share of the deceased in the responsibility for the fatality? Answer: 80 per cent.

The jury added the following rider:

We, the jury, are concerned at the lack of interest shown by the Corporation and the Swimming Club in the conditions existing at Worser Bay. The Swimming Club in particular have been aware of the conditions existing in the vicinity of the diving board for a number of years and no effort had been made by either party to warn the public of the danger of diving from the board at low water.

(Signed) L.R. Buchanan
Foreman

10. Both parties having moved for judgment, Hutchison, J. held that judgment should be entered for the Respondents, on the grounds that the jury had found that the Respondents were occupiers of some part, at any rate, of the structure of which the spring-board was, for the purposes of this case, the important part; that the jury had found that the spring-board did not constitute a concealed danger; and that, hne deceased having been a licensee only, the latter finding concluded the case against the Appellant, in so far as the case was based on the duty of the Respondents as occupiers. As to the jury's finding on the second issue, the learned Judge held that to put the case on the basis simply of a general duty of care, it would have been necessary to deny any occupancy by the Respondents.

p.82, ll. 7 to 16.

p.85, ll.24 to 25

11. The Appellant's appeal from the decision of Hutchison, J. came on for hearing before the Court of Appeal on the 23rd and 24th days of April, 1956. On the conclusion of the arguments for the

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Appellant, the hearing was adjourned sine die. On the 12th day of October, 1956, after receiving further submissions in writing on behalf of the Appellant and without calling upon counsel for the Respondents, the Court dismissed the appeal.

12. The learned Judges in the Court of Appeal reached the following conclusions in their judgments:

(a) Barrowclough, C.J. held that, though an occupier might owe to visitors on his premises duties which were in addition to the occupier's duty in respect of the condition of the premises, and though, in particular, he might owe the duty defined in Donoghue v. Stevenson [1932] A.C. 562, the latter duty had no relation to injuries which resulted only from the dangerous condition of the premises or structure. If the Respondents were held to be occupiers, there was no evidence which would justify a finding of negligence on the second issue. The danger inherent in a structure was not limited, the learned Chief Justice said, to its want of repair and so forth. The danger could arise out of situation, design and position. A footbridge might be in perfect order but be dangerous because it was narrow. The spring-board in the present case was dangerous because it was positioned over shallow water. He knew of no authority declaring that the doctrine under consideration applied to some kinds of danger only and not to others. The question was simply: Was the structure dangerous?

[1957] N.Z.L.R. p.60, l.54 to p.61, l.38.

[1957] N.Z.L.R. p.61, ll.6 to 15.

(b) Stanton, J. concurred in the result

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arrived at by the Chief Justice and Adams, J. The deceased, he said, was rightly regarded as a licensee, and, the jury having found that there was no concealed danger, it could not be said that the Respondents as occupiers had failed in any duty they owed to the deceased. The further finding of the jury that the Respondents were negligent in not maintaining a warning notice or tide-gauge was ineffective to impose any liability on the Respondents. It was the position of the spring-board as a structure attached to and forming part of the realty that constituted the danger (if any): /1957/ N.Z.L.R. p.64.

(c) Adams, J. held that, as between occupier and licensee, the question was simply whether there was or was not a concealed danger, there being no need to inquire whether the danger was classified as one arising from a structural defect. There was not now a general duty of care in respect of acts of commission. The liability of public authorities, at any rate in regard to parks, recreation grounds and the like, was, the learned Judge held, governed by the rule applicable to occupiers and licensees, and not by any general duty to take reasonable care to make the premises reasonably safe. Members of the public using the premises of a public authority by its permission were in all cases licensees, except where special circumstances existed, and the view to the contrary expressed by Dixon J. in Aiken v. Kingborough Corporation (1939), 62 C.L.R. 179, 190, and the decision of Herron, J. in Vale v. Whiddon (1949), 50 S.R.N.S.W. 90 went beyond and conflicted with

/1957/ N.Z.L.R. p.67, ll.19 to 28.

/1957/ N.Z.L.R. p.65, l.54 to p.66, l.44

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the English authorities. He was unable to accept a passage in the judgment in Slater v. Clay Cross Co. Ltd. (1956) 2 Q.B. 264, 269, to the effect that the distinction between invitees and licensees had been virtually abolished by the decisions of the Courts and reduced to vanishing point, and that the duty of the occupier is "to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them". That passage was an obiter dictum which was in conflict with established principles.

[1957] N.Z.L.R. p.68, l.41; p.69, l.4

13. The Appellant, while not challenging the jury's finding that the damages must be reduced by 80 per cent. by reason of contributory negligence on the part of the deceased, submits that judgment should be entered for her because of the jury's finding of negligence against the Respondents in answer to the second issue. It is submitted that Hutchison, J. correctly directed the jury as to the Respondents' duty to the deceased by stating in connection with this issue :

> "The question would be : When the board was put up, was there a reasonable foreseeability of there being a danger to persons using the board that ought to be met by putting up a warning notice or something of that sort? You must not fall into the error...of judging the question from the standpoint that a fatality has occurred, and that it would not have occurred if something else had been done. We don't look at it like that - but looking at it from the time of the accident, was there negligence, was there absence of ordinary care that an ordinary reasonable man would observe, was there absence of that care in not putting up a notice or tide-gauge or something of the sort at that time and maintaining it there".

p.66, ll.7 to 18

14. In the view of the learned trial Judge, the foregoing passage in his summing-up was not a correct statement of the Respondents' duty if they

p.58, l.7 to p.59, l.12.

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were occupiers of the spring-board; and the second issue was submitted to the jury in case the Respondents were found not to be occupiers. The Appellant submits, however, that the passage rightly stated the Respondents' duty, whether or not they were occupiers, and that the jury's answer to the second issue, coupled with their rider, establishes that the Respondents were in breach of that duty. The duty arose, in the Appellant's submission, because the Respondents, having erected the board for the use of the public and being in control or occupation of it, were bound to take reasonable care to guard against dangers which reasonable persons in their position would have guarded against.

15. As to the jury's answer to issue 1 (b), that the spring-board did not constitute a concealed danger at low tide, it is submitted that, in the light of the summing up, there is no inconsistency between this and their answer to the second issue. The jury were in effect directed to answer No to issue 1 (b) if they found the deceased guilty of contributory negligence. No such direction was given with regard to the second issue, so that the Appellant submits that the jury rightly considered that issue on the footing that if such accidents were foreseeable the Respondents were bound to take care to guard against the danger, whether or not the deceased was also negligent; and that under the Contributory Negligence Act, 1947 - which is the New Zealand statute corresponding to the Law Reform (Contributory Negligence)

p.64, ll.6 to 22

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Act, 1945, of the United Kingdom - contributory negligence of the deceased was only a ground for reducing damages.

16. The Appellant respectfully submits that the judgment of the Court of Appeal of New Zealand should be reversed, with such costs as are proper in the case of an appeal to Her Majesty in Council in forma pauperis, and that judgment be entered for the Appellant in the Supreme Court for the sum of £1,058. 5. 0. and costs, but that, in accordance with an agreement reached between the parties by reason of the Appellant's poverty, no order be made as to costs in the Court of Appeal, for the following among other

R E A S O N S

(1) BECAUSE the jury found that the Respondents were negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide-gauge.

(2) BECAUSE the above-mentioned finding of the jury and their rider established that such accidents were reasonably foreseeable and that at low tide the conditions existing in the vicinity of the board constituted a danger which reasonable persons in the position of the Respondents would have guarded against.

(3) BECAUSE the Respondents owed to the deceased a duty to take reasonable care to guard against the danger, since they

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were in occupation or control of the board.

(4) BECAUSE the Respondents owed such a duty to the deceased since they had erected the board.

(5) BECAUSE the Respondents owed such a duty to the deceased since the position of the board amounted to an indication by the Respondents that there was a proper depth of water in which to dive.

(6) BECAUSE the Respondents owed such a duty to the deceased since the board was a facility provided out of public monies for the use of the public by the Respondents in performance of their functions as a local authority.

(7) BECAUSE the judgment of the Court of Appeal is erroneous.

B. MacKENNA
J.G. LE QUESNE
R.B. COOKE

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CASE FOR THE APPELLANTS

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