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ROYAL COURT
(Samedi Division) 208.

17th November 1997

Before: Sir Philip Bailhache, Bailiff,
and Jurats Le Ruez and Vibert

Between:	Jeffery Knight	Plaintiff
And:	Thackeray's Limited	Defendant

Advocate M. J. Thompson for the Plaintiff
Advocate M. G. P. Lewis for the Defendant

THE BAILIFF:
INTRODUCTION.

On Sunday, 18th September, 1994, the plaintiff visited the nightclub on the Esplanade operated by the defendant. During the course of the evening he suffered a painful injury by dislocating his right knee. He claims that the injury was caused by his shoe sticking to a glutinous patch of beer or other alcoholic drink on the carpet as he turned to say good-bye to a friend. The plaintiff's claim was originally founded in both contract and tort. At the hearing it was conceded that he had paid no entrance fee to the nightclub and counsel for the plaintiff accordingly restricted himself to arguing that the defendant was liable in tort for its negligence.

THE LAW:

The first question for consideration is the nature of the duty owed by the defendant to the plaintiff, if any. The latest authority in this jurisdiction on this point is the case of Macrae v. Jersey Golf Hotels Ltd. (1973) JJ 2313. That was a case where the plaintiff, who was a guest at a hotel operated by the defendant company, slipped in a shower and fell, sustaining a fractured femur, bruising and shock. She actioned the defendant company basing her claim in both contract and tort. In delivering the judgment of the court Ereaut, Bailiff stated at p. 2317:

> *"We now turn, therefore, to the standard of care required in both the cases we have mentioned, that is to say, the extent of the duty owed to an invitee, and the extent of the implied contractual duty.*
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> *In the absence of any local statutory law, the Royal Court has in the past followed the English common law, and in this connection we cite as examples the local cases of Badcock v. French (1900) 220 Ex. 492, Boning v. French (1900) 220 Ex. 495, McCann, femme Louch v. Dolphin Hotel Ltd. (1957) 250 Ex. 331, 550, and Blackwell v. Carter, wife Chapman (1958) J.J. 105.*
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> *In England, until January 1st, 1958, the extent of the duty owed to an invitee, and, as regards contracts entered into before that date, the extent of the implied contractual duty were governed by the common law. As from that date, however, the Occupiers Liability Act, 1957, substituted for both those duties at common law the "common duty of care". Counsel for both parties agreed that that provision, being the creation of a statute which did not apply to Jersey, should not be adopted by the Royal Court, and we concur. We therefore consider the position as it was at English common law.*

For the purposes of the tort of negligence, the extent of the duty owed by an occupier of premises to an invitee was stated by Willes J. in Indermaur v. Dames (1866) L.R. 1 C.P. 274 to be:

> *"... that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know."*

The extent of the duty as defined in that statement was expressly adopted by the Royal Court in Blackwell v. Carter (already cited), and both counsel in this case agreed it."

The test in Indermaur v. Dames has however long ceased to be the law in England and indeed neither counsel invited us to apply it. Unusually, perhaps, we were urged by both parties to declare that the law had moved on and was now represented by a judgment of the Guernsey Court of Appeal in Morton v. Paint (09 February 1996) Unreported Judgments of the Court of Appeal of Guernsey. The Court's attention was drawn to the case of Attorney General v. Hall (1995) JLR 102 part of the headnote of which reads:

> ***(2) The Royal Court had a duty to follow its own previous decision unless it was convinced that the decision was wrong and although it would not depart from such a decision lightly, it would not be slower to do so than would an English court faced with a similar situation merely because Jersey was a small jurisdiction with fewer precedents than existed in England. It would then be for the Court of Appeal to resolve any resulting inconsistencies between the competing Royal Court judgments (page 108, lines 1-15)."***

Counsel submitted that the test applied in Macrae v. Jersey Golf Hotels Ltd. (1973) JJ 2313 should no longer be regarded as good law and that we should depart from it. While a decision of the Guernsey Court of Appeal is of course not binding upon this court there is no doubt that in appropriate cases it should be regarded as of highly persuasive authority. The judges of the Guernsey Court of Appeal are broadly speaking the same judges who constitute the Jersey Court of Appeal. If the law of Guernsey has developed in a particular area along similar lines to the law in this Bailiwick, the pronouncements of the Guernsey Court of Appeal should clearly be carefully considered.

In Morton v. Paint the court examined the duty of care owed by an occupier of premises to invitees and licensees. The facts of that case were shortly as follows. The plaintiff was visiting her boyfriend in a building owned by the defendant. On climbing the stairs she lost her balance and fell through a glass window into the yard below, sustaining severe injuries. In the Royal Court of Guernsey a preliminary point was argued as to the nature and standard of the duty owed to the plaintiff. The Royal Court held that the plaintiff was in the position of a licensee, that the duty owed to a licensee was limited to a duty not to expose the licensee to an unexpected danger or trap, and that the common law of Guernsey had not developed since 1956 and could not be developed further by the Guernsey courts, such being a matter for the legislature.

In the Guernsey Court of Appeal there was considerable argument as to whether the law on occupier's liability could or should be developed by the courts. Southwell JA, in delivering the judgment of the court, decided that question in the

affirmative. He referred with approval to the speech of Lord Lowry in C v. Director of Public Prosecutions [1996] 1 AC 1 where his Lordship stated at page 27:

> *"I believe, however, that one can find in the authorities some aids to navigation across an uncertainly chartered sea. (1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty."*

Southwell JA noted the judicial developments in Commonwealth jurisdictions, particularly in Australia, and (in relation to child trespassers) the development of the law in England by the courts. He stated, at page 11:

"In Australia, as I have said, statutory change was made in some States. Where the common law continued to apply without any intervening statute, the common law was substantially developed in the four cases to which I now refer.

In Southern Portland Cement Ltd. v Cooper [1974] AC 623 the Privy Council in an appeal from New South Wales adopted the duty of common humanity owed to trespassers, following the House of Lords in Herrington.

In Hackshow v Shaw (1984) 155 CLR 614 the High Court of Australia in an appeal from Victoria considered a claim by a person injured when the occupier fired his rifle at a trespasser's car, in which the injured person was sitting. The claim was argued on the footing of both general Donoghue v Stevenson liability and an occupier-trespasser liability based on Southern Portland and Herrington. The majority in the High Court held that the injured person was entitled to succeed against the occupier on the basis of a general duty of care in relation to which the existence of the occupier-trespasser relationship did not by itself suffice to provide the necessary requirement of proximity. Thus Dean J at pp. 662-663 said:

> *"... it is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or other or both of a special duty qua occupier and an ordinary duty of care was owed. All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk. Where the visitor is lawfully upon the land, the mere relationship between occupier on the one hand and invitee or licensee on the other will of itself suffice to give rise to a duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to her or him. When the visitor is on the*

> *land as a trespasser, the mere relationship of occupier and trespasser which the trespasser has imposed upon the occupier will not satisfy the requirement of proximity. Something more will be required. The additional factor or combination of factors which may, as a matter of law, supply the requisite degree of proximity or give rise to a reasonably foreseeable risk of relevant injury are incapable of being exhaustively defined or identified. At the least they will include either knowledge of the actual or likely presence of a trespasser or reasonable foreseeability of a real risk of such presence."*

For present purposes the most important sentence in this statement of principle is the one which I have underlined. This sentence was not necessary for the decision in Hackshaw. But it represented, so far as concerned licensees, a major advance from the previous limited duty imposed under the common law, whether in Australia or in England and Wales, and was the precursor to the establishment of a new common law approach to an occupier's liability to lawful visitors in the subsequent Australian cases.

Papatonakis v Australian Telecommunications Commission & anor. (1985) 156 CLR 7 was a decision of the High Court of Australia on appeal from the Northern Territory. The occupier, Northern Research Pty. Ltd., the second defendant, had inserted a length of weak telephone line in the stronger line placed by the first defendants. The plaintiff linesman when climbing a ladder up one of the telephone poles was injured due to the weaker line snapping. The majority in the High Court found in favour of the plaintiff, but on three different bases: Wilson J on the basis of the duty of care owed by an occupier to its invitee; Brennan and Dawson JJ on the basis of a general duty of care arising apart from any occupier's duty; and Deane J on the basis of an occupier's general duty of care. The dissentient, Mason J, though differing on the facts, held that the relevant duty was the duty of care owed to an invitee. Dean J repeated his view as expressed in Hackshaw at p.657 that the duty owed to an invitee is no more than one instance of the duty of care arising under the general law in the circumstances of the relevant category of case (Papatonakis at pp. 32-33), and stated that the liability of the occupier to Papatonakis was not to be determined by a rigid formula applied without more to everyone falling into the category of "invitee".

In Australian Safeway Stores (Pty) Ltd. v Zaluzna (1987) 162 CLR 479, an appeal from Victoria, the majority (Mason, Wilson, Deane and Dawson JJ) held that the view expressed by Dean J in Hackshaw and Papatonakis represented the common law as applied in Australia. In the headnote the ratio of their judgment was clearly summarised:

> *"It is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or both of a special duty qua occupier and a general duty of care was owed. It is necessary to determine only whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the entrant or to the class of person of which the entrant is a member. The measure of the discharge of the*

duty is what a reasonable man would do in the circumstances by way of response to the foreseeable risk."

In so deciding the High Court set aside the specific limited duties previously established in the common law as owed to invitees, licensees and trespassers respectively, held that to each an occupier owes (if he owes any duty) the general duty of care established by Donoghue v Stevenson, and rejected the search for fine distinctions between such a general duty and the previous specific duties owed to different categories of entrant onto or into land or buildings (see Zaluzna at pp. 486-488).

In so deciding the High Court reached a position not materially different from that established by statute in England and Wales (by the 1957 and 1984 Acts), in Scotland (by the 1960 Act), and in some of the Australian States by their legislation."

Adopting those principles the Guernsey Court of Appeal decided that it would not be appropriate to leave Guernsey law in the state reached by English law 40 years before which had been justly criticized as requiring urgent reform. The court held that the duty of care owed by the defendant to the plaintiff "should be declared to be a duty to have done what a reasonable man would have done in the circumstances by way of response to the risk, in so far as foreseeable, in accordance with the Donoghue v Stevenson principles of the law of negligence."

Both counsel urged us to declare in similar vein that the law of Jersey had moved on. We note in passing that part of the passage from the Court's judgment in Macrae v Jersey Golf Hotel Ltd. to which we have referred was cited in the judgment of Southwell JA in Morton v Paint. It seems likely therefore that the arguments which persuaded the Guernsey Court of Appeal in that case would equally find favour with the Jersey Court of Appeal. We do not presume however to anticipate that court. In our judgment there is no justifiable reason for perpetuating outmoded distinctions which have been swept away by one means or another in every commonwealth jurisdiction to the law of which we have been referred. We say nothing of duties in contract where different obligations may have been mutually agreed. But with respect to the law of tort where, like Guernsey, common law principles have been generally applied for many years, we hold that the duty of care does not depend exclusively upon whether the plaintiff is to be categorized as an invitee, licensee or trespasser. The question is whether under all the circumstances the defendant owed a duty of care under the classic Donoghue v. Stevenson (1932) A.C 562 HL (Sc) principles of negligence to the plaintiff. In order to establish such a duty there must be the necessary degree of proximity of relationship. Such a relationship will exist if the risk of injury to the plaintiff was reasonably foreseeable. The extent of the duty is to do what is reasonable in response to the foreseeable risk.

THE FACTS:

The plaintiff's evidence was that on the evening in question he had been to a birthday party at the Bella Napoli restaurant with a group of about 20 people. He had consumed approximately three to four glasses of wine. After the meal he had been about to go home but was persuaded by a friend Paul Brown and others to go to the nightclub operated by the defendant for a "night-cap". At first he had gone to the downstairs area which had been crowded with a noisy and boisterous atmosphere. Then he had gone to the upstairs area which also had a bar and dance-floor. There had been, he estimated, between 30 and 50 people present and the atmosphere had been relatively more subdued. It had been possible to talk, and he spoke to a young woman with whom he was acquainted. They had danced and subsequently were

standing at the edge of the dance-floor on a carpeted area. She had begun talking to a flat-mate while the plaintiff waited to resume his conversation with her. He had then noticed his friend Paul Brown waving to indicate that he was leaving with a girl whom he had met. The plaintiff lifted his arm to acknowledge the farewell and in so doing turned his body to the right. His right foot had however remained in position stuck to some glutinous substance on the carpet. He felt his knee-cap shoot out of its socket and he immediately fell to the floor. He remained there in shock and in great pain. Mr. Brown came over and gave him a chair lift to the far side of the dance-floor near the stairwell. The plaintiff stated that the nightclub manager, Martin Gibson, had approached and summoned an ambulance on his mobile telephone. Subsequently Mr. Brown carried him downstairs to the entrance. There was no sign of the ambulance and Mr. Brown had placed him in a waiting taxi in which he was transported to the hospital. This evidence was essentially supported by Mr. Brown. Mr. Brown is now a drug and alcohol counsellor but he had been employed between 1989 and 1993 as a manager of nightclub premises. He knew the plaintiff well and confirmed that he was not drunk. He had himself consumed only two or three glasses of wine at the Bella Napoli restaurant. He said that he had been standing about six feet away when he saw the plaintiff fall. He had been told that the plaintiff's foot had stuck to the carpet. He had seen a broken beer bottle on the floor nearby and had noticed that the area was wet from spilt drink. He had testified to the common practice of employing glass-collectors to gather up glasses and bottles, but stated that he had seen no such staff in the upstairs area that night.

The court heard evidence from medical experts called by both parties but it is unnecessary to describe that evidence in detail. The plaintiff's expert was Dr. Govind Naidu who is the associate surgeon in orthopaedics and trauma in the Accident and Emergency department of the General Hospital, a post which he has held for three years. The defendant's expert was Dr. George Alexander Carss who is a consultant in emergency medicine at Queen Alexander Hospital in Portsmouth. Dr Naidu's evidence was that the plaintiff had suffered a dislocated patella, that the extent of force required on twisting could be quite minimal, and that the injury was consistent with the history given by the plaintiff. Dr. Carss's evidence was that the injury suffered by the plaintiff was unlikely to have occurred in the manner alleged. To wrench the kneecap required considerable muscular traction and was more likely to have occurred during dancing. He conceded however that it was not impossible that it occurred in the way described by the plaintiff. We do not find it necessary to resolve this conflict, such as it is, because we accept the plaintiff's evidence that he twisted his knee as he turned and that the dislocation of the patella resulted. We shall return to this finding in our conclusion.

The defendant called three witnesses as to the systems employed in the nightclub to ensure the safety of customers.

The first was Antonio Manuel Galiau who had worked for the defendant between 1993 and May 1997. He was no longer employed by the defendant and at the date of the trial was living in Portugal. Mr. Galiau stated that there were regular weekly meetings on points of safety. He was the head glass-collector and it was his job every evening to check the toilets, fire escapes and floors for glass before any customer was admitted. There were usually four glass-collectors on each floor circulating and gathering up bottles and glasses. It was also their task to wash the glasses although this only involved placing them in a machine in an adjacent small room. Mr. Galiau was on duty on the evening in question but he had not seen the plaintiff collapse. As his job involved moving between ground floor and first floor areas it was possible however that he had been downstairs at that time. He had received no report about the injury from other staff which he found surprising. He told the court that staff were alert to the possible dangers to customers arising from the condition of the floor. He described the system for guarding against such

dangers. The glass-collectors allocated to the area would circulate collecting glasses and bottles left on the floor. If there was a serious spillage they would clear it up. This was particularly important on the wooden dance-floor but applied also to the carpeted areas. One glass-collector would use a bucket and mop while another kept customers at bay. So far as general cleaning was concerned the carpet was vacuum-cleaned every morning. Every two weeks specialist carpet-cleaners would come in to wash the carpet and to remove chewing-gum and any other stains. The carpet was of high quality and had been installed in April 1994. It would take a heavy spillage to make it soaked. He conceded that liqueurs and other sweet drinks would, if spilled, make the carpet sticky.

The second witness was Mr. Paul Chatterley who is currently employed as a tanker operator. Between 1989 and 1996 he had been employed by the defendant as a doorman and had towards the end of that period been head doorman. He could not be sure that he was working on the evening of 18th September, 1994. His duty as a doorman, he said, was to keep order and to keep drunkenness to a minimum. Drinks were not permitted on the dance-floor. Mr. Chatterley thought that the floor was kept very clean considering the amount of traffic on it. He had not been aware of the plaintiff's injury until long after the event and had never heard of any other customer injuring himself in the way alleged by the plaintiff, that is as a result of a shoe sticking to the carpet. He stated that there were usually a minimum of four doormen in the upstairs area. He agreed that there were not many places where one could leave glasses other than the shelves around the perimeter. He also agreed that bottles and glasses did get broken but he asserted that customers did not generally leave drinks where they could be spilt and wasted because they were expensive.

The third witness was Mr. John Leapingwell who had been a part owner of the club in September 1994. At the time of the trial he was a sales executive employed by a local garage. Mr. Leapingwell confirmed the evidence of the systems employed to collect glass and to clear up spillages described by Mr. Galiau. He said that the lighting in the club was not overly bright, and that it was difficult to spot small spillages on the carpet. He did not know what improvements could have been made to the systems in place. He did concede however that a greater number of tables on which drinks could be placed might have reduced spillages.

CONCLUSION

Mr. Thompson submitted that the plaintiff had gone to the defendant's premises, expecting them to be safe, and had suffered through no fault of his own a dislocated knee. We have already stated our finding that the plaintiff did dislocate his knee when turning to say farewell to his friend. On a balance of probabilities we find that his shoe did stick to some glutinous substance on the carpet, thus causing a degree of traction sufficient to cause the dislocation. Did the defendant owe the plaintiff a duty of care to guard against such an injury? It seems clear from the evidence that the defendant did contemplate as a foreseeable danger the risk of injury to its customers from the condition of the floor. The defendant might not have foreseen the precise type of injury suffered by the plaintiff. It did however foresee the risk of some injury from abandoned glass or spilt liquids. In our judgment the defendant did owe the plaintiff a duty to ensure that the state of the floor was reasonably clear and safe for customers at the nightclub. Was the defendant in breach of that duty? We accept the evidence of Mr. Galiau as to the systems employed to guard against the foreseeable risks of injury to customers. It is true that neither the plaintiff nor Mr. Brown noticed any glass-collectors in the first floor area but it is likely that their attentions were directed elsewhere at the time. We find on a balance of probabilities that the defendant has proved that employees were on duty at the relevant time collecting glasses and ready to deal with serious spillages. Should they therefore have noticed and dealt with the particular spillage which

caused the injury to the plaintiff? In our judgment it would place an unreasonable burden on the defendant to expect that every spillage should be noticed and cleaned up forthwith. Spillages are inevitable in a busy nightclub. It would simply not be possible for the glass-collectors to scrutinize every square foot of floor throughout the hours of opening. Counsel for the plaintiff acknowledged this hurdle in the way of his client; he submitted that a larger number of tables should have been provided for the use of customers so that spillages could be reduced. However, even if this argument were accepted, and we are not persuaded that it should, the inevitability of some spillages would remain. The fact of the matter, in our judgment, is that the plaintiff would have suffered his injury no matter what degree of care the defendant had taken. It was, in common parlance, an unfortunate accident. The plaintiff's action accordingly fails.

Authorities

Macrae -v- Jersey Golf Hotels, Ltd (1973) JJ 2313.

Indemaur -v- Dames (1866) L.R.I.C.P.274.

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