OUTER HOUSE, COURT OF SESSION

[2022] CSOH 34

PD206/19

OPINION OF LORD ERICHT

In the cause

A

Pursuer

Against

B LIMITED

First Defenders

C COUNCIL

Second Defenders

Pursuer: McKenzie QC, Gardner; Digby Brown LLP
First Defenders Pugh; DWF LLP
Second Defenders: Springham QC, Rolfe; Morton Fraser LLP

27 April 2022

[1] The first defenders operate a residential care home. The second defenders are the local authority. Notwithstanding a report which assessed him as high risk, the first defenders allowed a 16 year old resident, X, unsupervised leave. During that unsupervised leave, X raped and sexually assaulted a child. The issue in this case is whether the defenders

are liable in negligence for the criminal acts of X. The victim's grandmother raised this action against the defenders on the victim's behalf for damages for personal injury at common law. The cause called before me for debate on the issue of whether the defenders owed a duty of care to the pursuer.

Factual circumstances

[2] The factual circumstances averred by the pursuer, and consequently taken as *pro veritate* for the purposes of the debate, were as follows.

[3] In April 2011, the children's hearing made a supervision requirement in respect of X in terms of Section 70 of the Children (Scotland) Act 1995. The second defenders were responsible for implementing the supervision requirement.

[4] X had resided in the first defender's residential care home since 25 May 2017. He had a history of sexualised behaviour. Records note *inter alia* allegations that when he was nine he had full sex with a girl aged 11 and in March 2016, he was alleged to have touched a young boy in the school toilet.

[5] In April 2016 there was an allegation that in a forest he had touched a boy's genitals and he was accused on at least four occasions over the course of 2016 of touching other young children inappropriately. A risk assessment dated 9 May 2017 noted he was at a high risk of sexualised behaviour: there had been reports of him filming himself masturbating in the local community and in placement and of him inappropriately touching younger boys at school, a younger girl in a youth club and a boy in a lane near the youth club. In June 2017 he was excluded from school following sexualised behaviours with another child. He indecently assaulted a vulnerable teenager with a mental age of 12 on 4 November 2017 at the home as a result it was decided that he would be made subject to the second defenders'

Vulnerable and Young Person ("VYP") procedures. The defenders' records noted that he had accessed pornography and child pornography on the internet in December 2017. On 9 February 2018 the defenders were advised about incidents at the college he attended in which he had touched another young person on the hand and leg before asking them to go to the bathroom with him. On 19 February 2018 he was assessed as a high level of risk management. At a VYP meeting on 23 February 2018 it was noted that he appeared to be targeting vulnerable young people and exposing them to sexual risk and the pattern appeared to be escalating and there was real concern about the risk he posed to others. Due to more allegations of sexually inappropriate behaviour at college he was no longer allowed to attend college. A risk assessment dated 10 March 2018 noted that he had stolen a tablet device and sent explicit pictures to other young people and had recently begun to display violent behaviour. In a risk assessment dated 22 April 2018 the defenders assessed his risk of sexualised behaviour and of offending behaviour as high and advised that carers were to be within eyesight of him at all times when out in the community or with other young people, and that he was not to be allowed any independent activity. In a personal action plan dated 18 May 2018 the defenders assessed his risk of violence and of absconding as medium. He absconded again on 21 May 2018, during which incident he threw a brick at the windscreen of a car containing his carers, shattering it, kicked in an office door and threatened his carers with a knife. The record of the further absconding on 23 May 2018 noted that he was a high risk due to his risk assessment and to displaying sexual behaviour. A report dated 24 May 2018 recommended that he remained subject to VYP due to there being no reduction in risks and even an escalation.

[6] At a meeting on or about 24 or 25 May 2018, the defenders decided to allow him unsupervised leave. The reason for their decision was that he had turned 16 and they

erroneously noted that he had not displayed any sexualised behaviour during the 3 months leading up to the meeting.

[7] Further to another incident on 5 June 2018, it was decided that his project worker would wear an alarm during sessions, all sharp knives would be removed from the kitchen and the team leader would sit immediately outside sessions.

[8] On 14 June 2018, he attended a children's hearing. The children's hearing decided that, despite turning 16, he should remain subject to a compulsory supervision order. He was unhappy with the decision.

[9] On the evening of 14 June, the defenders had allowed him two hours unsupervised leave. He went to an area around a primary school which was approximately 10 minutes from the residential care home. The victim, a boy, was playing with friends on and around the school's grounds. X pretended to be a policeman and lured the victim to a graveyard near the school. He orally raped the victim, and chocked him and ejaculated on him. Subsequently X pled guilty in the High Court to rape, contrary to section 18 of the Sexual Offences (Scotland) Act 2009 and to sexual assault, contrary to section 2 of the 2009 Act and was sentenced to 28 months detention.

The pursuer's averments on duty of care

[10] The pursuers averred as follows:

> "The defenders had a duty to compile care plans, support plans and risk assessments in relation to [X]. The defenders knew or ought to have known that [X] had a history of sexualised and violent behaviour. The defenders knew or ought to have known about the allegations and incidents of violent and sexualised behaviour involving [X] as hereinbefore condescended upon. All of these allegations and incidents were contained within the defenders' records. The defenders knew or ought to have known that he posed a real and immediate risk to young boys whom he would encounter while on unsupervised leave. Until the defenders' decision on or about 24 or 25 May 2018 [X] had no unsupervised leave. By deciding to allow him

> unsupervised leave et separatim by failing to impose an adequate control mechanism, the defenders breached their duty of care to [the victim]. They failed to have adequate regard to [X's] history of sexualised behaviour. They failed to have adequate regard to the risk posed by him to young boys. They failed to have adequate regard to the evidence that [X] would take advantage of even very short periods without supervision to assault young boys. They failed to have adequate regard to the (correct) conclusion of [the] report dated 24 May 2018 that there had been 'no reduction in risks and even an escalation'. They failed to undertake an updated risk assessment after the incidents on 21 and 23 May 2018 hereinbefore condescended upon. There is no record of the defenders having sought advice from the HALT project on the proposed amendments to [X's] risk management plan discussed at the meeting on 24 or 25 May 2018. It is believed and averred that they did not do so. They failed to seek the advice of a psychiatric expert in the management and treatment of sex offenders on the risks he posed to children and whether it was safe to allow him unsupervised leave in the community. It would have been usual practice to have done so. Had they undertaken an updated risk assessment or had they obtained the advice of such an expert the only reasonable conclusion that could have been reached was that (a) [X] remained a high risk to young children in the local community, and (b) continued control mechanisms were required. Even without undertaking an updated risk assessment or obtaining such expert advice, such conclusions were or ought to have been obvious to the defenders given the serious and very concerning conduct of [X] as hereinbefore condescended upon. Such control mechanisms (which were or ought to have been obvious to the defenders) ought to have included that (i) he should not have unsupervised leave in the community, (ii) he should remain in sight of his carers at all times, and (iii) he should not enter play parks or play grounds or otherwise interact with young children. As a young boy residing in the vicinity of [the residential care home], [the victim] belonged to a class of persons who were at a distinct or special risk of harm as a result of the defenders' acts and omissions in allowing [X] unsupervised leave. The defenders failed to take steps to minimise the risk posed by [X]. They failed in their duty to take reasonable care to avoid causing unnecessary risk of harm to children in the community from the actions of [X]." (Statement 6)

Submissions for the first defenders

[11] Counsel for the first defenders submitted that the first defenders owned no duty of care to the victim. The existence of a duty of care was a matter of principle and could be decided at procedure roll (*Mitchell* v *Glasgow City Council* 2009 SC(HL) 21 at paras [10]-[12]). The first defenders provided residential care support and supervision for X. The victim's only connection to the first defenders was that he was the victim of X's wrongdoing. No duty was owed to the victim because he was a young child who lived in the vicinity of the

residential home in which X resided. Such a duty of care would fall foul of established principle and alternatively would be a novel contention and not a permissible extension of law of negligence (*Robinson* v *Chief Constable of West Yorkshire* [2018] AC 736 at para 27). The pursuer's case was closely analogous to *Thomson* v *The Scottish Ministers* 2013 SC 628. The pursuer's pleadings disclosed no special relationship of the sort required by *Thomson*. In respect of its alternative argument, counsel submitted that a duty of care could not be established purely on foreseeability, and a relationship of proximity is required and the imposition of a duty of care must be fair, just and reasonable. The age, sex and geographical location of the victim would not create a relationship of proximity by reason of the victim being special risk (*Hill* v *Chief Constable of West Yorkshire* [1989] 1 AC 53 at page 62, *Thomson* at para [51]). The offence did not occur in the course of escaping but as an incident of the general risk posed by X when unsupervised (Dorset *Yacht Co* v *The Home Office* [1970] AC 1004).

Submissions for the second defenders

[12] Senior counsel for the second defenders submitted that an offer to prove that the victim was a child at school in the vicinity of the residential care home at the material time was insufficient to ground proximity between the pursuer and the second defenders in the absence of an averred "special risk" (*Mitchell* v *Glasgow City Council*, *Thomson* v *Scottish Ministers*, *Hill* v *Chief Constable of West Yorkshire*). If the court did not consider that the pursuer's case fell within the established principles of the laws of negligence as set out in *Thomson*, it would fall to be decided on the basis that it was a novel case (*Robinson* v *Chief Constable of West Yorkshire* [2018] AC 736), which case there was no basis in the pleadings from which a relevant relationship of proximity between the victim and the second

defenders could be established, nor any averments from which a court would find that it would be fair, just and reasonable for the second defenders to owe a duty of care to the victim. To impose such a duty would entail the second defenders owing a duty of care to all those who might be harmed by any child in respect of whom the second defenders have statutory duties or responsibilities: such a duty would be novel, too wide and too onerous.

Submissions for the pursuer

[13] Senior counsel for the pursuer's primary submission was that a proof before answer should be allowed with legal issues being resolved after the facts had been established.

[14] His secondary submission was that if the legal issues could be resolved at debate, the pursuer had pled a relevant case. On the facts of the case there was both foreseeability of harm and proximity such that a duty arose on the part of the defenders to take reasonable care for the safety of the victim and to avoid causing him unnecessary risk harm. The foreseeability of harm arose from X's history of sexualised behaviour, violence and absconding. Proximity arose because the victim was (i) physically or geographically proximate to X and (ii) in a special class or category of persons (ie young boys) who were at particular risk from X's actions: X posed a distinct risk to the victim due to both physical proximity and class of victim, with the result that the requirement for proximity was satisfied. The present case was not lawful and was in the category of case exemplified by *Home Office* v *Dorset Yacht* concerning the liability of negligent public custodians for the criminal acts of third parties in their care. It was fair, just and reasonable for a duty of care to be imposed. The action should not be dismissed unless it must necessarily fail (*Jamieson* v *Jamieson* 1952 SCHL 44). In claims of damages for alleged negligence it could only be in rare

and exceptional cases that an action could be disposed of on relevancy (*Miller* v *South of Scotland Electricity Board* 1958 SC (HL) 20).

Analysis and decision

[15] In this case a child member of the public was raped and sexually assaulted by a person who was subject to a supervision order but had been granted unsupervised leave. These factual circumstances are very similar to those in *Thomson* v *Scottish Ministers*, where an adult member of the public was murdered by a prisoner who had been released on short leave.

[16] In *Thomson* the Inner House held that there was no proximity between the victim and the Scottish Prison Service, and dismissed as irrelevant an action for damages brought by the victim's mother in respect of her daughter's death. The history of the development of this area of the law authorities were considered in detail in *Thomson,* and there is no need to repeat that task here. The court held that in order to succeed, the pursuer must establish a special relationship which exposed the victim to a particular risk of damage as a result of negligence by the defenders in the context of that relationship or, put in another way, that the victim was subject of a special or distinct risk as a consequence of the defender's actions (para [56]). The court was not satisfied that that high test was met (para [57]).

[17] In my opinion the current case cannot be distinguished from *Thomson* and the action falls to be dismissed for the reasons set out in *Thomson*.

[18] *Thomson* falls within the category of the liability of public custodians for the criminal actions of those in their care (*Thomson* para [49]). The current case also falls within that category, as X had been granted unsupervised leave.

[19] In *Thomson* the court held that the pursuer did not set out a relevant case that the deceased and the Scottish Prison Service were in a "special relationship" with each other such that the SPS's actions in relation to the prisoner place her at a greater risk than that to which the general public were exposed. She did not aver any facts from which it could be said that the deceased, or a class of persons of which she was a member, was at any special or distinctive risk as a result of the SPSs actions relative to the prisoner's leave (para [57]). There was no basis on the factual averments upon which it could have been inferred that SPS should have considered that (a) any person was at immediate risk of harm beyond the risk which as a habitual and occasionally violent criminal, he posed to the general public during his periods at liberty or (b) the deceased or a class of person would be a particular target of his violence (para [58]). The averment that he posed a danger to persons with whom he would have dealings during his leave said nothing more than that any person with whom he came into contact could potentially be at risk from him because of his underlying recidivism (para [58]).

[20] The current pursuer, too, fails to set a relevant case on these matters. The pursuer avers that the defender knew or ought to have known that X posed a real and immediate risk to young boys whom he would encounter while on unsupervised leave, and that by deciding to allow him unsupervised leave the defenders breached their duty of care to the victim. She further avers that as a young boy residing in the vicinity of the residential home, the victim belonged to a class of persons who were at a special risk of harm as a result of the defenders' acts and omission in allowing X unsupervised leave, and that the defenders failed in their duty to take reasonable care to avoid causing unnecessary risk of harm to children in the community from the actions of X. These averments say little more than that any child member of the public with whom X came into contact during his unsupervised

leave could potentially be at risk from him because of the potential for him to commit criminal acts. As is set out in *Thomson*, being a member of the public is not enough to constitute a distinct and specific class. In my view excluding adult members of the public makes no difference. The pursuer in *Thomson* could not have turned her irrelevant case into a relevant case by narrowing down the class by excluding child members of the public and only including adult members of the public: merely being members of the public (whether the adult public or the child public) does not found a special relationship between the defender and the victim. It makes no difference that the victim attended a primary school close to the residential home and the offence took place near the school. There are no averments of a specific duty to pupils of that school, and in any event the offence took place out of school hours. There is a lack of clarity in the pleadings as to whom the pursuer is saying are members of the class. The averment that the defenders "failed in their duty to take reasonable care to avoid causing unnecessary risk of harm to children in the community from the actions of X" would appear to be defining the class as child members of the public, and is irrelevant for the foregoing reasons. However the class is defined differently in the averment that "as a young boy residing in the vicinity of the [residential home], [the victim] belonged to a class of persons who were at a distinct or special risk of harm." It is difficult to see why the class is defined as boys when X's behaviour shows a pattern of offending against girls as well as boys. However even if there were amendment to enlarge the class to young boys or girls living in the vicinity of the home, that would not make it a relevant distinct and specific class. The location of where the victim resides is not a logical criterion for defining the class. On that criterion, the class would include a child who lived beside the residential home who was attacked 10 miles away, but would not include a child who lived 10 miles away but was attacked just outside the residential home. The logical class is child

members of the public whom X might come across during leave, and that is not a specific and distinct class giving rise to a duty of care.

[21] As this case falls within an existing category, it is not necessary for me to consider the fairness, justice and reasonableness of the situation, but if it were I would have found that there was no liability for reasons similar to those in para [58] of *Thomson*: to leave the owners of a home and the local authority open to claims from any person who became a victim of someone released on unsupervised leave would have potentially serious consequences for the care and rehabilitation of young person's subject to supervision orders and to society as a whole.

[22] In my view it is appropriate, as was done in *Thomson*, to decide this case at procedure roll rather than allowing it to go to proof before answer. The pursuer has failed to set out a relevant case and is bound to fail. The defenders are not responsible for the criminal acts of X. I shall dismiss the action.