SHERIFF APPEAL COURT

[2024] SAC (Civ) 50
PIC-PN337-23

Sheriff Principal S F Murphy KC
Appeal Sheriff R D M Fife
Appeal Sheriff P Mann

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL S F MURPHY KC

in the appeal in the cause

TRACY THOMSON

Pursuer and Respondent

against

ICELAND FOODS LTD

Defender and Appellant

Pursuer and Respondent: A Smith KC, Black; Slater and Gordon Scotland Limited
Defender and Appellant: Milligan KC; Hennessey (sol adv); Keoghs Scotland LLP

18 December 2024

Introduction

[1] Ms Thomson was shopping at the Iceland store in Alexandria on 20 September 2021. After paying for her shopping at the checkout, she walked towards the exit. Adjacent to the store exit was a large mat. The edge of that mat was raised above the level of the shop floor. When Ms Thomson reached the mat, she tripped over the raised edge and injured herself.

[2] Ms Thomson raised the present action against Iceland and offered to prove that they were in breach of: (i) section 2(1) of the Occupiers' Liability (Scotland) Act 1960; and (ii) the

common law. Notwithstanding those pleadings, at the outset of the proof Ms Thomson's counsel advised that the action could only succeed if the sheriff accepted that the maxim of *res ipsa loquitur* applied. That maxim was described by the Lord President (Carloway), as follows:

> "…*res ipsa loquitur* is not a legal principle. It is a presumption of fact, whose force depends on the circumstances of each case. When it applies, the defender must demonstrate that the accident occurred without fault on his part. It is not enough to proffer a possible alternative non-negligent explanation. The defender must establish facts from which it is no longer possible to draw the *prima facie* inference." (*Woodhouse* v *Lochs and Glens (Transport) Limited* 2020 SLT 1203 at paragraph [35]).

[3] Ms Thomson led her evidence. Upon the conclusion of her case, Iceland elected not to lead any evidence. Iceland did not consider Ms Thomson had led sufficient evidence to engage the maxim. Having considered parties' submissions, the sheriff held that the maxim applied. As Iceland had not offered an explanation to displace the inference of negligence, the sheriff found for Ms Thomson and granted decree in her favour for the sum of £9,500.

[4] Iceland now appeals on a narrow point: was the sheriff correct to find that *res ipsa loquitur* applied?

The sheriff's judgment

[5] While Ms Thomson's evidence had been, at times, difficult to follow with respect to the mechanism of her accident, the sheriff considered her evidence was that: (i) she tripped over a raised part of the mat; (ii) the part of the mat she tripped over was shown in photographs taken by her partner shortly after the accident; and (iii) she did not know what distance the edge of the mat was raised above the level of the shop floor.

[6] The sheriff considered that Ms Thomson's inability to state how high the edge of the mat was raised above the shop floor was understandable. She had been unable to move after the accident and had then been taken straight to hospital.

[7] Both Ms Thomson and her partner Dennis Carr were asked whether the mat ought to have been screwed down during evidence-in-chief. The photographs taken by Ms Thomson's partner showed a screw holding down the mat. However, it also showed a hole in the mat. Ms Thomson's partner thought the hole would have been for another screw. Ultimately, it was not clear to the sheriff whether or not the mat ought to have been screwed down. As such, it was not clear why the edge of the mat was raised above the floor level.

[8] The sheriff determined that Ms Thomson did not know the exact cause of the accident. Whilst she knew that she had tripped on a raised edge of a mat, she did not know: (i) how far the edge of the mat was raised above floor level; (ii) how long the edge of the mat had been raised above floor level prior to her tripping on it; (iii) whether the edge of the mat should have been fixed to the floor; (iv) whether a screw ought to have been where the hole was shown in the photograph taken by Ms Thomson's partner; or (v) the cause of the edge of the mat becoming raised. The sheriff did not consider Ms Thomson could reasonably be expected to know the exact cause of her accident.

[9] Ms Thomson had not expressly averred that the store was under Iceland's management and control. She averred that she was shopping at Iceland's store and that was admitted by Iceland. There was also evidence that Iceland's staff were working at the store and Iceland had also made averments about the operation of the store that had not been denied by Ms Thomson. The sheriff considered that it could be inferred from both the pleadings and the evidence that Iceland had exclusive management and control of the store.

[10] In all the circumstances, the sheriff considered that the maxim applied. As Iceland did not lead any evidence, it had failed to offer any explanation consistent with the absence of fault on their behalf. The sheriff held that Ms Thomson had established a breach of duty by Iceland.

Submissions for the appellant

[11] Senior counsel stated the question for the court was whether the mere fact that a person tripped within Iceland's store was sufficient to infer negligence on the part of Iceland. No challenge was made to the sheriff's findings in fact. The challenge was against the inference of negligence the sheriff made from the findings in fact, which were sparse and did not create an inference of negligence. Negligence only arises where the projection is reasonably foreseeable. When an appellate court is reviewing inferences based on primary facts made at first instance, it has more latitude to reverse the inference made at first instance, especially one which has not involved a finding of credibility or reliability (*Woodhouse (supra)* at para [33]).

[12] In order for the maxim to apply, one essential precondition is that the accident would not have occurred if a defender had taken proper care. Ms Thomson failed to establish this requirement, because she could have tripped without any fault on the part of Iceland. There had to be findings in fact as to: (i) what was the height of the raised edge of the mat; and (ii) whether or not the raised edge of the mat amounted to a reasonably foreseeable hazard (*McClafferty* v *British Telecommunications Plc* 1987 SLT 327 at 328H-I; *Palmer* v *Marks and Spencer Plc* [2001] EWCA Civ 1528 at para [27]; and *Shackleton* v *M-I Drilling Fluids UK Ltd* 2016 Rep LR 96 at para [17]). Neither finding had been made. The sheriff had found that the height of the raised edge was unknown (finding in fact [10]).

[13] Even if the sheriff had made such a finding in fact, the sheriff erred in fact and law in holding that the alleged defect could have amounted to a reasonably foreseeable tripping hazard. There are a number of ways that Ms Thomson could have established reasonable foreseeability on the part of Iceland. In such a case as this, it is usually done by reference to prior complaints or accidents or, in the case of tripping hazards, the size of the hazard. Nonetheless, in this action, there was an absence of any evidence about: (i) any previous accidents or complaints; (ii) how long the defect had existed; and (iii) the size of the defect. While the cause of the raised edge of the mat may have been unknown, it was not unknowable.

[14] Although Iceland had a further ground of appeal challenging the sheriff's finding that Iceland had exclusive occupation and control of the premises, senior counsel accepted that was an inference the sheriff was entitled to make on the evidence led and did not pursue the point further.

Submissions for the respondent

[15] The question for the court was whether the sheriff was correct in making the findings in fact about which he heard evidence. On those facts, was the sheriff entitled to make a finding of liability?

[16] The sheriff made a number of primary findings in fact, which led to the inevitable inference of a *prima facie* case of negligence against Iceland. The mat was at the entrance to the store. There was a high volume of pedestrian traffic, with people carrying items in and out of the store. Ms Thomson's foot caught the raised edge of the mat, causing her to fall forward into a doorframe and to the ground. In the circumstances of this case, the height of the raised edge of the mat and the length of its existence were incapable of proof by

Ms Thomson, beyond the generalisation that the raised edge of the mat was sufficient for her to trip. Ms Thomson was reasonably entitled to expect the floor would not have a hazard which trips them up. The circumstances were apt for the application of the maxim of *res ipsa loquitur* and called for an explanation by Iceland. The sheriff did not require to separately address reasonable foreseeability. The sheriff considered that the raised edge of the mat posed a *prima facie* reasonably foreseeable tripping hazard.

[17] The purpose of the maxim was that by inverting the normal onus of proof it would avoid a denial of justice to those whose rights depend on facts incapable of proof by them, but which were within the knowledge of their opponent (*Elliot* v *Young's Bus Service* 1945 SC 445 at 456; and *Binnie* v *Rederij Theodoro BV* 1993 SC 71 at 87).

[18] The fact that Ms Thomson tripped over a raised surface at the entrance of Iceland's store was eloquent of negligence and called for an explanation. It was open to Iceland to lead evidence to demonstrate that the raised edge of the mat was *de minimis* or that it had not been present for long enough to have been detected in the exercise of reasonable care, to displace the *prima facie* inference of negligence. They failed to do so. In the absence of evidence from Iceland demonstrating the accident had not occurred through any failure to exercise reasonable care, the inferences to be drawn from such evidence as Ms Thomson was capable of leading were those which were most favourable to her (*Binnie* (*supra*) at 87). As a matter of law, the sheriff was correct to consider that *res ipsa loquitur* applied, that Iceland had not displaced the inference of negligence, and that the sheriff was entitled to make a finding of liability against Iceland.

Decision

[19] This appeal raises a narrow but important point on the application of the maxim *res ipsa loquitur*. It is a presumption of fact depending on the facts and circumstances of each case.

[20] As stated by Professor E Reid in *The Law of Delict in Scotland* (2022) at paragraph 10.60:

> "For *res ipsa loquitur* to apply, the pursuer is required to show that:
> (i) the thing which caused damage was under the defender's management; and
> (ii) the accident was of a type that does not ordinarily occur if proper care is taken.
> The inference of negligence is then accepted only if the defender can offer no explanation consistent with absence of fault on the defender's part."

[21] The appellant makes no challenge to the sheriff's findings in fact. The key findings in fact are:

> "8. A large mat was located within the store in front of the entrance/exit doors.
>
> 9. The pursuer walked towards the mat and the entrance/exit doors, carrying shopping bags in both hands with her head up.
>
> 10. At the point when pursuer first reached the mat, her right foot tripped on a part of the edge of the mat that was raised an unknown distance above the floor level. The raised edge of the mat was not easy to see.
>
> …
>
> 12. As a result of tripping on the raised edge of the mat the pursuer fell forward into a display beyond the opposite side of the mat, dropping the shopping bag in her right hand as she did so. During the fall the pursuer struck her left arm on the entrance/exit door. The pursuer ended up face down on the store floor with her legs stretched out on the mat and the rest of her body beyond the opposite side of the mat in the location of the display that she fell into."

[22] In the course of the appeal, senior counsel for the appellant accepted the sheriff was entitled to draw an inference that Iceland had exclusive occupation and control of the premises, which satisfied the first element of the maxim of *res ipsa loquitur.*

[23] The sheriff considered that it was understandable that Ms Thomson could not say the distance the mat was raised, or the exact cause of her accident. The appellant submitted

that Ms Thomson could have tripped without any fault on the part of Iceland. In this case, there was a large mat close to the entrance doors of the store. The mat was not level with the floor. The mat had a raised edge, as shown in the photographs taken by Ms Thomson's partner shortly after the accident. The mat should not ordinarily have a raised edge if proper care were taken. A raised edge of the mat close to the store entrance would give rise to the risk of injury to customers depending on the circumstances. The defect in the mat caused the accident. The sheriff considered that the CCTV evidence supported the pursuer's account of the manner that she tripped on the mat and clearly showed her forward momentum being arrested as she reached the edge of the mat. The CCTV footage and the pursuer's evidence formed the basis for findings in fact 8, 9, 10 and 12.

[24] Cases of tripping on local authority pavements are not comparable with tripping on a mat in a supermarket store. The circumstances in *McClafferty*, *Palmer* and *Shackleton* relied on by Iceland were fundamentally different and did not assist.

[25] In respect of the second element, the sheriff was entitled to reach the conclusion on the evidence he accepted that the accident was of a type that does not ordinarily occur if proper care is taken. Accordingly, the two elements for *res ipsa loquitur* to apply were satisfied.

[26] Iceland averred on record that they operated proactive and reactive systems of maintenance and inspection. Iceland had the opportunity to lead evidence to prove the defence that they complied with any duty of care incumbent upon them, but decided not to do so. Iceland did not offer any explanation to rebut the inference of negligence. In the particular circumstances of this case, the sheriff has not erred in finding that *res ipsa loquitur* applied and that a breach of duty by Iceland had been established.

Disposal

[27] We refuse the appeal and adhere to the sheriff's interlocutor of 19 June 2024. We find the defender and appellant liable to the pursuer and respondent in the expenses of the appeal. We sanction the employment of senior and junior counsel for the purposes of the appeal.