

SCOTLAND

Martin Hogg

AJ Allan (Blairnyle) Ltd v Strathclyde Fire Board

THE FACTS & THE PLEADINGS

- The pursuer owned a farmhouse which caught fire. The fire brigade extinguished the fire. However, in the early hours of the following morning, the fire reignited and burned down the farmhouse.
- The pursuer raised an action in damages against the Fire Board, arguing that the fire brigade owed it a duty of care, and that they had negligently breached this duty: once the fire appeared to have been extinguished, the fire brigade should have used a thermal imaging camera to locate any remaining questionable areas.
- The firefighters should also have maintained a regular check on the farmhouse to make sure that the fire had been truly extinguished.
- The defenders accepted that they owed a limited duty of care to the public at large, but argued this duty was limited to taking reasonable care not to make matters worse through their conduct.

THE FACTS & THE PLEADINGS

- At **first instance**: the judge allowed the pursuer a proof before answer (that is, a trial of the facts before a debate on the law). The defenders appealed against this decision.
- On appeal: the appeal court **allowed the appeal** and dismissed the action against the fire board.
- They held that public bodies might be held liable for negligence only if they made matters worse or if they had assumed a responsibility to a specific party.
- The Appeal Court gave a number of reasons in support of its decision:
- (1) the fire service, in attending calls, should not be taken to have assumed a responsibility to householders – rather, they are carrying out their statutory functions and public duty;

JUDGMENT OF THE APPEAL COURT

- (2) public policy mitigated against the imposition of a duty of care, including the consideration that it might encourage a more defensive approach by the fire brigade to the conduct of its business;
- (3) a fire brigade owes a duty to the public at large, not just the individual property owner, as fire may spread to other properties;
- (4) there is no common law duty on the fire brigade to attend a fire, and it would therefore be unprincipled to create a duty in circumstances where the brigade did so attend a fire;
- (5) it would be unfortunate were the Scottish courts to adopt a different approach to that which was well established in English law; and
- (6) the fire brigade had not by its omission caused the fire to reignite.
- Did the court get it right?

CRITIQUE OF THE COURT'S REASONING

- (1) The appeal court thinks Scots law should follow the no liability approach of English law - see *Capital and Counties plc v Hampshire County Council* (and later cases) - rather than certain first instance Scottish judgments reaching the opposite conclusion.
- Lady Paton: "It is my opinion that the carefully developed, policy-based, more restrictive approach currently approved and adopted by the UK Supreme Court must be followed by the Scottish courts (contrary to the views expressed in the Outer House in *Duff, Gibson v Orr*, and *Burnett*, but in keeping with a recent opinion of Lord McEwan in *Mackay v Scottish Fire and Rescue Service ...*".
- So the court is keen to develop a restrictive, UK-wide approach to this question.

CRITIQUE OF THE COURT'S REASONING

- (2) **CAUSATION:** The appeal court judges point out that previous House of Lords judgments have emphasised that there *is* a distinction to be drawn between avoiding causing harm to others and failing to prevent harm being caused by some other agent.
- That view led one judge, Lord Drummond Young, to treat the question of the fire board's potential liability as one of causation: "If loss is caused by the acts of third parties or the forces of nature, a public authority such as the board cannot be said to have caused the loss".
- This is questionable reasoning. The conduct of the fire brigade was undoubtedly a cause-in-fact of the destruction of the building, though not the only one: but for its failure to ensure that the fire was entirely extinguished, the building would not have been destroyed. There may be good reasons for deciding not to attribute liability to this cause-in-fact, but presenting that decision as one of causation oversimplifies the matter.

CRITIQUE OF THE COURT'S REASONING

- (3) **UNPRINCIPLED EXTENSION:** Another justification – that there is no common law duty on the brigade to attend a fire, and it would therefore be unprincipled to create a duty in circumstances where the brigade did so attend a fire – also seems suspect.
- There are surely many circumstances in which a party may have no duty to act but where, if it chooses to do so, liability may arise in relation to how it acts (e.g. where a professional person chooses to act for a client).
- (4) **SOUNDER JUSTIFICATIONS?** The better reasoning is the policy-based justification, i.e. that a finding of liability might encourage a more defensive approach by the fire brigade to the conduct of its business.
- That seems a defensible policy in relation to the provision of publicly funded fire services (*cf* private fire services) where there is no indication that the provision of the service was intentionally sub-optimal (*cf* where there is deliberate sub-optimal performance of the sort in *General Engineering Services v Kingston & St Andrew Corp*).

CRITIQUE OF THE COURT'S REASONING

- The other main justification – that the defenders had not “assumed a duty” to the pursuer – is really just the conclusion of the court (that no liability *ought* to be imposed) dressed up as a reason for the decision. The language of “assumption of responsibility” masks the underlying policy reasons which substantively justify the court’s decision.
- A remaining problematic issue: the divergent approach in ambulance cases (where liability more readily arises). Explained on the basis that “once a call has been accepted by an ambulance, the service undertakes to deal with, indeed to treat if necessary, a named individual at a specific address. The relationship which is thus created has been described as “highly personal”.” (see Lady Dorrian, para 56).
- This is a questionable distinction. A fire brigade is attending a specific address to deal with a specific building/site. Why can’t that be capable of being personal, albeit relating to a person’s property rather than their health?