OUTER HOUSE, COURT OF SESSION

OPINION OF T G COUTTS, Q.C.,

SITTING AS A TEMPORARY JUDGE

in the cause

GEORGE SCOTT BENNETT (AP)

Pursuer;

O1727/5/97

against

(FIRST) MESSRS J LAMONT & SONS & OTHERS AND (SECOND) FIFE COUNCIL

Defenders:

Pursuer: Wylie, Q.C., Ellis, Balfour & Manson

Second Defenders: Paton, Q.C., Mure, Simpson & Marwick, W.S.

30 September 1999

Introduction

On the evening of 12 December 1994 the pursuer was driving between 50 and 60mph in the dark along the B946 road between Tayport and Newport. At a point on that road approximately .78 of a mile west of its junction with Scotscraig Drive, Tayport, the pursuer collided with one or two cows which were on the carriageway. He sustained very serious injuries. Another driver at or about the same time, at or about the same locus in another motor car died as a result of another incident with the cows. Which accident came first was not averred.

The pursuer in this action sues as first defenders the farmers whose fields adjoin the road at this point and to whom the animals in question belonged and Fife Council as roads authority as second defenders. As between the pursuer and the first defenders a proof before answer has been agreed. The second defenders argued at procedure roll in support of their first plea in law for dismissal of the action.

Averments of fact

In relation to the circumstances of the accident, the pursuer's averments in Condescendence 3 are that both cows had earlier on the day in question been separated from their calves and had been put into five fields (*sic*) belonging to the first defenders lying to the north side of the said road. At a point about 400 yards west of the locus of the accident, the westmost field was bounded by a stone wall which bounded the road. Elsewhere it was bounded by a stob and wire fence erected by the first defenders. For most of the length of the roadside boundary, one and a quarter miles, there was a fence in good condition which was about 3 feet 6 inches high. At the said point 400 yards west of the locus of the pursuer's accident the field was bounded by a stone wall only. At that point, for a length of about 25 feet, the stones on the top of the wall had, over a number of years, fallen down. The height of the wall on the field side at that point was about 2 feet 6 inches but in the field below the grass bank sloped downwards away from the wall. The first defenders knew about the particular circumstances of the separation of the cows from their calves. Fife Council did not. According

to the pursuer's averments, the boundary was inspected every day by one of the first defenders' partners. The pursuer avers that Fife Regional Council, the second defenders' predecessors, knew or ought to have known for a number of years that the wall structure was dilapidated. The basis for that averment was that the second defenders' Roads Engineer gave evidence at a Fatal Accident Inquiry that Fife Regional Council had received complaints from the first defenders generally as to the security of sections of the wall. "The complaints involved (*sic*) concern as to the ability of the structure to maintain stock", is the precise averment thereafter.

The pursuer further avers that any reasonable inspection of the road by the second defenders for the purpose of checking on potential dangers to users of the road would have revealed that the wall was the barrier to keep stock off the road and that it was dilapidated and not stockproof. It was said that it was the practice of reasonable roads authorities to inspect the roads in their area at least once a year, but the pursuer continues "any reasonable inspection carried out by the second defenders within 12 months before the accident would have revealed the dilapidated state of the wall and that it was not stockproof". The pursuer asserts that the field was obviously one which was used for livestock and that Fife Regional Council repaired the wall after the accident. The pursuer gives no date for that repair and denies the second defenders' averment that the repair was on 21 May 1995. The pursuer does not aver and the second defenders do not admit that the repair to the wall which was carried out made that wall the equivalent of a stockproof fence and although the whole basis of the pursuer's case of fault is that the second defenders should have seen to it that the partition between the field and the road at that specific place was stockproof, there is no averment that that is the present situation. Furthermore there is no averment about the ownership of the wall.

Averments of Fault

Although the pursuer's grounds of fault against the first defenders include the particularity of the separation of the cows from their calves, there is no particularity in the averments of fault against the roads authority.

It is important that the precise averments of fault against the road authority in the circumstances be examined with care. These appear in Condescendence 7 and are as follows:-

"It was the common law duty of Fife Regional Council as Roads Authority to take reasonable care to keep the B946 road safe for road users such as the pursuer as a result of the statutory duty incumbent upon them in terms of section 1(1) of the Roads (Scotland) Act 1984. It was their duty to take reasonable care to avoid danger to road users from reasonably foreseeable hazards that could arise on the road from adjacent land and its use. It was their duty to take reasonable care to carry out inspections of the roads in their area at least once a year for the purpose *inter alia* of checking on potential dangers to users of the roads. They knew or ought to have known that the presence of cattle or other livestock on the road would be a danger to road users. They knew or ought to have known that livestock including cattle were likely to be kept in the field which had a boundary of the broken down wall as aforesaid. They knew or ought to have known that there was a risk of cattle escaping onto the road at a point where the wall was broken down as aforesaid. They knew or ought to have known that the wall was the barrier to cattle obtaining access to the road. In the circumstances it was Fife Regional Council's duty to take reasonable care to see to it that livestock, including cattle, could not escape onto the road. It was Fife Regional Council's duty to take reasonable care to see to it that said wall was maintained in such a condition as to obviate danger to road users. It was Fife Regional Council's duty in the circumstances to see to it that there was a barrier at said section of wall at a height sufficient to prevent cattle or other livestock escaping onto the said road. In each and all of said duties Fife Regional Council failed and thus caused or at least materially contributed to the pursuer's accident".

Argument of parties

The Court was favoured with and obtained great assistance in the difficult matter posed by this action from the carefully researched submissions from both sides of the bar. Senior counsel felt able to adopt their junior's arguments in total when it came to their turn to speak and accordingly it is possible to outline each party's argument without specifically making an attribution of portion of it to senior or junior counsel.

Second defenders' argument

Counsel for the second defenders conceded that if there was a duty owed to the pursuer by the second defenders, the essential test of proximity in a case based upon omission as in the case here was satisfied in the averments of the present case. It was contended however that the averment failed to meet the requirements (1) that the harm suffered by the pursuer was the reasonably foreseeable consequence of the Council's omission; (2) that there was a breach of duty; (3) that there were sufficient averments of causation of harm and finally (4) that in all the circumstances there was insufficient averment to establish that in all the circumstances it was fair, just and reasonable to impose a duty of care on the Council of the scope contended for. Although the cause of injury was clear, being the presence of cows on the roadway, there was insufficient to show that it was a reasonably foreseeable consequence of the Council's alleged omission to perform a duty, which must be to keep the cows off the roadway and that injury would be sustained by the pursuer.

There was no averment that the Council was ever involved with cows. There were no averments relating to the ownership of the walls or fences and no averment that the Council had ever erected any stockproof fence anywhere or indeed that the Council had or ought to have had knowledge of stockproof fences. There were no averments of any specific complaints about the particular section of the wall the cows surmounted. There were no averments that any animals had previously escaped, no previous incidents and no averment that any particular inspection would have revealed that the wall was not a stockproof barrier within the parameters averred, i.e. one year. The wall was a retaining wall and a boundary. It was not adequately averred that the second defenders knew or ought to have known that that particular field would be used by a farmer for livestock which were liable to escape from it, never having done so before, as opposed to any other purpose. Specifically on the facts of the present accident, there was no averment that, without the particular circumstances appertaining to these cows, cattle would escape or would be liable to attempt to escape from a field.

In relation to the duties averred by the pursuer, the second defenders contended that the broad statement that the defenders required to take reasonable care to avoid danger to road users from reasonably foreseeable hazards that could arise on the road from adjacent land and its use was too wide when one had regard to the averred irregular land use by an independent third party. Further the averment that it was the Council's duty to take reasonable care to see to it that livestock could not escape on to the road was again too wide and the averment that the Council had a duty to see to it that the wall was maintained in such a condition as to obviate danger to road users again had no particularity to the present case. The culmination of the various duties alleged to arise in terms of a road authority's obligation was averred to be that the Council had a duty to see to it that there was a barrier in said section of the wall at a height sufficient to prevent cattle escaping on to the road. The argument that that was a wholly unreasonable demand, unfair, unjust and unreasonable was deployed at a later stage.

The occurrence of the accident was not caused by anything omitted to be done by the Council but by the fact that the first defenders in their knowledge of the condition of the wall, had put the particular cattle into a field from which they could escape. The Council's actions or omissions were not causative.

Counsel then reviewed the provisions of the Roads (Scotland) Act 1984 and the relevant authorities dealing with the duties of roads authorities and the authorities on stray animals. The pursuer's case suggests, it was said, that a local authority has a duty to step in where the farmer has failed to provide a stockproof fence, but there is no such common law duty on the roads authority. The powers which are given under the Roads (Scotland) Act 1984 are all discretionary and at no stage did the pursuer aver a failure to act properly within those discretionary powers. There is no requirement on the Roads Authority in the Act to fence a road.

No general duty of care is owed by a roads authority and under reference to *Caparo Industries plc* v *Dickman & Others* [1992] A.C.605, *X (Minors)* v *Bedfordshire County Council* 1995 2 A.C.633; *Marc Rich & Co AG* v *Bishop Rock Mrine Co Ltd & Others* [1992] A.C.211; *Stovin v Wise* & *Norfolk County Council* [1996] A.C.923 and *British Telecommunications plc* v *James Thomson & Sons Engineers Ltd* 1999 S.L.T.224 it was

argued that it was not fair, just or reasonable to impose a duty of care on a roads authority in the circumstances.

Pursuer's response

The pursuer's argument commenced with the usual warning to the Court about dismissing an action without hearing evidence under reference to the well known dicta in *Jamieson* 1952 S.C.(H.L.) 44 and *Miller* v *SSEB* 1958 S.C.(H.L.) 20. In the present case it could not be said that the pursuer was bound to fail against the roads authority.

There were sufficient averments to indicate that the wall was under the control of the second defenders since it was admitted that it was repaired. The wall, it was said, could be regarded as part of the road. It was a retaining wall but had a dual function. It could not be said that the pursuer would necessarily fail on the facts as a matter of pleading. The pursuer accepted that the concept of fair, just and reasonable was the appropriate standard with which to test the averments of any duty alleged to be incumbent upon the second defenders. It is well recognised that a common law duty can arise in a performance of a statutory function and the duty which is averred in the present case is a type of duty which has been recognised for 200 years in that it has always been recognised that a roads authority has to take reasonable care. The present case was not a matter of failure to exercise a statutory power. The present case is concerned with the way in which a common law duty is recognised because the roads authority has a duty to manage and maintain the road.

The traditional recognition of the duty to keep roads safe for users also applies to dangers which arise off the road. Reference was made to a line of authority beginning with *Innes* v *The Magistrates of Edinburgh* 1798 M1318 & 9; and proceeding through *McFee* v *Police Commissioners of Broughty Ferry* 1890 17R 764; *Barrie* v *Kilsyth Police Commissioners* 1F 194; *Laing* v *Paull & Williamsons* 1912 S.C.196; *Brierley* v *Midlothian County Council* 1920 S.L.T. 80 and 1921 1 S.L.T.192; *Mackie* v *Dunbartonshire County Council* 1927 S.C.(H.L.) 99; *Morrison* v *London, Midland & Scottish Railway Co Ltd* 1929 S.C.1; *Rush* v *Glasgow Corporation* 1947 S.C.580; *Gordon* v *Inverness Town Council* 1957 S.L.T.(Notes) 48; *Black* v *Glasgow Corporation* 1959 S.C.188; *Smith* v *Middleton & Others* 1971 S.L.T.(Notes) 65; *Murray* v *Nicholls* 1983 S.L.T.194 to *Grant* v *Lothian Regional Council* 1988 S.L.T.53. This line of authority vouched that there was a duty on the roads authority to take reasonable care to protect road users from dangers and it did not matter how these dangers arose as long as they were foreseeable. There was no requirement that it needed to be a permanent fixture which required to be avoided; the touchstone was the likelihood of danger. In any event the broken wall was a permanent feature.

Stovin v *Wise* [1996] A.C.923 if properly considered could not be relied on to exclude a duty of care but only to show a trend, and it was of no assistance in defining the scope of care. It can be distinguished in the present case because here the wall was under the control of the Council and was part of the road. In England there was no common law power given to a local authority, whereas Scots law recognised the liability of a roads authority for omissions in the management and maintenance of roads.

There was no reason why there should not be two parties, each with a duty of care in the circumstances averred and each could be causative of the injury to the pursuer. The Roads (Scotland) Act gives powers to a road authority to act where otherwise it could not. There is a large body of examples of the duty of care and there is nothing in the Act which determines the scope of those duties. The definition of a road in section 151 is wide enough to include the wall. Section 93 contains wide powers in relation to dangers adjoining land. The local authority is required by the Act to be aware of off-road dangers. Provision is made in section 98 in relation to the detention of stray animals. Straying animals are foreseeable.

For present purposes without evidence it is not possible to say that the duty sought to be imposed is not fair and reasonable. If the duty is sufficiently wide to include dangers off the road, then the same principle could cover a duty of the scope contended for and even if it were the case that there is no precedent for such a duty, and it extends the duties incumbent on local authorities, that is a modest extension. A report of the Law

Reform Committee considering liability for animals in 1963 did not seem to think that there was any difficulty in imposing a duty of reasonable care on a roads authority in the circumstances.

Decision

(a)Test to be applied when considering whether a duty of care is owed

Lord Hamilton in *Gibson* v *Orr*, a case involving the duties of policemen after a bridge collapsing left a roadway dangerous, after a comprehensive review of the authorities and in particular *Caparo Industries PLC* v *Dickman*; *Coleridge* v *Miller Construction* 1997 S.L.T.485, *Forbes* v *City of Dundee District Council* 1997 S.L.T.1330 and *British Telecommunications plc* v *James Thomson & Sons (Engineers) Limited* 1999 S.L.T.224 stated that the three element tests referred to in *Caparo* fell to be applied in Scotland in personal injuries actions based on a duty of care as well as in other actions of damages so based. That three element test, foreseeability, proximity and considerations of fairness, justice and reasonableness fall in my view to be applied in the present action and the contrary proposition was not advanced by the pursuer with any force in this case. In my view also the matter can be determined on the pleadings and is a matter of law arising therefrom as, for example, was done even in England in *Marc Rich & Co AG* v *Bishop Rock Marine Co Ltd and Others*. I do not consider that in the present case inquiry is necessary to determine the question of whether it would be fair, just or reasonable to impose the duties of care desiderated by the pursuer upon the second defenders.

Of the three elements of the tripartite test above noted, the matter of proximity was conceded. It was bound to be. The injured pursuer was using a road which the second defenders had an obligation to maintain.

(b)Foreseeability

In the absence of specific averments about ownership of the allegedly defective wall and despite the somewhat vague averments about the measure of control that the second defenders had over it, I nonetheless approach the matter as if it were fully established that the second defenders could, either at their own hand or through that of others, arrange for repairs to the wall. The critical question is whether it can be said as a matter of law to be reasonably foreseeable that the pursuer would sustain injury due to the condition of the wall at the roadside. The fact that a farmer's cows were able to get on to this roadway in the hours of darkness, is in my view insufficient to make the necessary link between the condition of the wall and the accident. There are, in my view, insufficient averments to vouch the proposition that the defenders ought to have known as a matter judged upon the balance of probabilities that the farmer whose, no doubt valuable, beasts these were, would fail to keep them properly secured within the boundaries of his farm. The fact that repairs were made to the wall thereafter does not assist in that regard since, once the events had occurred there might be difficulty maintaining that it was unforeseeable that the first defender would allow his cattle to escape. It is however the duty of the keeper of the animal to keep it under control . He commits an offence under section 98(1) of the Roads (Scotland) Act 1994 if he allows it to stray on to a road running other than through unenclosed countryside, although by the Animals (Scotland) Act 1984, sections 1 & 5, the keeper is not subject to strict liability from the mere fact that an animal is on a road. An animal on the road would now, however, call for some explanation from its keeper to negative fault. It is further significant that no cattle had escaped on any previous occasion and further that the cattle which did escape on the occasion of the accident were somewhat special in that they had been deprived of their calves that very day, a circumstance which might cause them some agitation.

One effect of the tripartite test has in my opinion been to emphasise that foreseeability is not just as has been done in this case a matter of piling one matter which is said to be known or ought to be known upon another, but requires to be looked at from the end result. Otherwise one too easily enters into the situation of the kingdom being lost for the want of a horseshoe nail. The end result in the present case was an accident due to the presence of two cows on the highway at night. Are the Council to be blamed for that? There was in my judgment nothing pled about which the Council knew or ought to have known which made them aware of a danger or grave risk of road users being affected by the condition of the wall. Nor do I consider that the

averment that the Council knew or ought to have known that livestock were likely to be kept in the field which had a broken down wall is supported in any material respect. There is no relevant averment that they knew that one of the farmer's fields was inadequate (and it would have to be obviously inadequate) for the retention of cattle. In that situation I do not see why it should be assumed by the Council that cattle would be put in to it by the farmer. The matter does not end there however, because there was no previous record of any cattle having escaped from the first defender's farm either via the broken down wall or otherwise and certainly no suggestion that cattle not in the state of excitement of the cows in question did or could so escape. In addition, this event arose from a matter unconnected with the road or its maintenance, even assuming that the wall was part of the verge of the roadway.

(c)Are the duties sought to be applied to the second defenders fair, just or reasonable

Throughout the long list of authorities canvassed at the debate there was no case directly in point. Even if, said junior counsel, the present circumstances extend the duties on a road authority, it is a modest extension. With that observation I disagree. The extension sought is considerable and onerous. There is no case in which the straying animal of a third party has fixed liability upon a local authority. There are many illustrations of liability where there is a permanent danger on the road itself, whether by way of a pit (*Innes*) a low bridge (*McFee*), a rotten tree (*Brierly, Mackie*) or defective underfoot condition on a footway (*Laing*, *Rush, Black*), by way of snow and ice, (*Gordon, Grant*) or bad design and construction (*Smith*). It is in my judgment quite another matter to expect a roads authority having regard to the maintenance of the roads within its area to take steps to prevent a farmer's animals being on the roadway. No doubt, as suggested in *Morrison* if a public road runs close to some natural feature, such as a ravine, the local authority might be bound to provide whatever fencing is required, but there is no comparable natural feature in this case. There are still many miles of unfenced road within Scotland adjacent to which sheep or cattle may graze and deer may roam. Not only stockproof but perhaps even deer fencing might be required. Furthermore, even if the presence of cows on the roadway was foreseeable, the *dictum* of Lord Stott in *Murray* v *Nicholls* 1983 S.L.T.194 is apposite; "while foreseeability is necessary to found a duty it does not follow from the mere fact of foreseeability that a duty will necessarily arise". Power given to do something does not imply a duty to do so. By the same token a power to deal with an off road danger does not imply a duty to do so. The question of failure to exercise a statutory power does not arise on the present pleadings. In my judgment the extension sought of the duties of roads authorities in the present case is neither fair, just nor reasonable.

Accordingly I sustain the second defenders' first plea-in-law and dismiss the action so far as is laid against them.