Supreme Court of New South Wales

Sharp v Stephen Guinery t/as Port Kembla Hotel and Port Kembla Rsl Club [2001] NSWSC 336 (23 April 2001)

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NEW SOUTH WALES SUPREME COURT

CITATION: Sharp v Stephen Guinery t/as Port Kembla Hotel & Port Kembla RSL Club [2001] NSWSC 336

CURRENT JURISDICTION: Civil

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PARTIES:

Marlene Sharp (Plt)

Port Kembla RSL Club (2nd Def)

JUDGMENT OF: McClellan J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:

P Semmler QC/M Heath (Plt)

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CATCHWORDS:

Judgment on application for verdict by direction

negligence action

whether plaintiff precluded from putting a case in negligence to jury

whether evidence of breach of duty

whether evidence which could establish that the taking of any step would have eliminated risk of plaintiff's injury

whether evidence before the jury that the risk of injury from tobacco smoke was reasonably foreseeable

whether rule in Browne v Dunn has application

s 23(4), s 42(1) Factories, Shops & Industries Act 1962

ACTS CITED:

Factories, Shops & Industries Act 1962, s 23(4), s 41(2)

DECISION:

Paras 33 and 38

JUDGMENT:

THE SUPREME COURT Ex tempore

OF NEW SOUTH WALES

COMMON LAW DIVISON

McCLELLAN J

MONDAY, 23 APRIL 2001

20956/96 - SHARP v STEPHEN GUINERY t/as PORT KEMBLA HOTEL & PORT KEMBLA RSL CLUB

JUDGMENT: - on application by second defendant for verdict by direction.

1 **HIS HONOUR**: At the close of evidence the second defendant moved for a verdict by direction. That there is power in the court to give such a direction is not in issue.

2 The plaintiff brings a case in common law negligence and also claims breaches by the second defendant of its statutory duties. The alleged negligence is particularised in the following manner:

(a) Exposing the plaintiff to tobacco smoke, nicotine, tobacco tar noxious fumes and carcinogenic agents having their origin in tobacco while she was engaged in her work.

(b) Failing to provide adequate ventilation so as to ensure that the plaintiff was not exposed to the said fumes.

(c) Failing to take any or any adequate precautions for the safety of the plaintiff while she was engaged in her work.

(d) Requiring the plaintiff to work in enclosed areas where the smoke and other carcinogenic agents were concentrated.

(e) Exposing the plaintiff to a risk of injury of which the defendants knew or ought to have known and which could have been avoided by the exercise of reasonable care.

(f) Failing to implement by mechanical means or otherwise an effective and efficient system of expelling air containing the tobacco smoke and carcinogenic agents from the plaintiff's work place.

(g) Failing to implement mechanical means by which the air in which the plaintiff worked was clean and free from carcinogenic agents.

(h) Failing to devise, institute, maintain and enforce a system whereby the plaintiff was not exposed to the fumes and carcinogenic agents mentioned above.

(i) The plaintiff relies on the abovementioned breaches of statutory duty as evidence of negligence.

The second defendant submitted that because the plaintiff has not expressly particularised the remedy for any breach - said by the plaintiff to be either to ban smoking entirely in the club, to confine smoking to areas removed from the immediate bar area where the plaintiff served drinks, or to maintain the exhaust fans in constant operation, or otherwise to ensure that the air conditioning unit functioned efficiently - she is precluded from putting a case in negligence to the jury.

When opening the plaintiff's case, Mr Semmler said:

"Now, in this case the plaintiff says that this company which operated the Port Kembla RSL Club was negligent. The company failed to take reasonable care for her safety by exposing her to an unnecessary risk which, unfortunately, became a reality when this tumour appeared. There were simple measures we say that could have obviated this risk which should have been taken but were not. We say that the company should have provided a better work environment, a safer work environment, better atmosphere in the area where this woman had to work day in and day out, and if they couldn't do that by whatever mechanical means were available then they should have prohibited smoking in her work area, a very simple measure that would have eliminated completely, we say, the risk that this woman would end up as she is today having suffered a very serious illness and at risk of a further very serious illness with continuing disabilities."

3 The second defendant submits that it did not understand these remarks, and the court should not interpret them, as raising for consideration whether it was reasonable for the second defendant, in discharging its duty of care, to have banned smoking in the club or to

have taken other less drastic measures. In these circumstances the second defendant submits that there are two ingredients missing from the plaintiff's case.

4 Firstly, it is submitted that there is no evidence of breach of duty by the second defendant in the evidence or properly available to be relied upon by the plaintiff from the evidence.

5 Secondly, the second defendant says there is no evidence which could establish that the taking of any step by the second defendant would have eliminated the risk of the plaintiff's injury. This is submitted in the context of the trial where counsel for the plaintiff did not put to any witness of the second defendant any questions relating to the possibility of banning smoking in the premises.

6 The second defendant submits that the rule in **Browne v Dunn** (1894) 6R67 precludes the plaintiff from having the common law count go to the jury. As I understand the submission, he says that the rule provides a useful statement by which the rules for a fair trial can be defined. Fairness, it is submitted, requires the plaintiff to have put its case to the second defendant's witnesses.

7 In the circumstances of this case the second defendant says the plaintiff should have put to the second defendant's witnesses that harm to the plaintiff might have been avoided by prohibiting smoking in the club, by modifying the ventilation system or by confining the areas in which people smoked. As this was not done, it is submitted by the second defendant that, being deprived of the opportunity to respond, the obligations of basic fairness have been breached.

8 For that submission the second defendant relies upon the statement by Hunt J in **Allied Pastoral Holdings Pty Limited v Commissioner of Taxation** [1983], 1 NSWLR 1 at 16 where his Honour said,:

"It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in Browne v Dunn (1894) 6 R 67".

9 Further support is said to be gained from the decision in **Payless Superbarn (NSW) Pty Ltd v O'Gara** (1990) 19 NSWLR, 551, which was another case involving the application of the rule, as was **Seymour v Australian Broadcasting Commission**, (1990) 19 NSWLR 219. The latter case makes plain, with respect to issues where the rule may apply, that it is not always necessary to put the matter directly to a witness. Fairness depends upon the circumstances of each case.

10 In my opinion the present is not an occasion for the application of the rule in **Browne v Dunn** for there is no relevant factual matter in dispute which fairness demands should have been the subject of cross-examination. There is no dispute that a ban on smoking in the club

would have removed all risk to the plaintiff. It is also open to the jury to find that a modification to the operation of the exhaust fans or limitation of areas in which smoking was permitted may have diminished the plaintiff's exposure to smoke and the risk to her health.

11 It was further submitted that the common law count should not be allowed to go to the jury because the plaintiff has failed to bring any evidence of negligence.

12 The submission was supported by reference to the joint judgment of Gleeson CJ and McHugh J in **Schellenberg v Tunnel Holdings Pty Ltd** [2000] HCA 18; (2000) 200 CLR, 121 at 134, where their Honours said that in that case, the doctrine of res ipsa loquitur having no application:

"The question then became whether the plaintiff has proved that the separation of the hose from the jamec coupling occurred in circumstances of negligence. The relevant occurrence in the present case was the accident - the detachment of a hose, carrying compressed air, swinging around and striking the plaintiff in the face. If accidents of that kind do not occur if those who have control of the hose and its attachments use proper care, the plaintiff was entitled to rely on res ipsa loquitur to make out a prima facie case of negligence and it was then for the judge to hold whether the occurrence constituted negligence having regard to all the other circumstances of the case. But once the cause of the occurrence was proved, the principle could play no part in the proceedings."

13 In my opinion that case was concerned with the application of the principle of res ipsa loquitur, their Honours pointing out that the principle only operated in circumstances where an unexplained event itself bespoke negligence. However, if more is known about the event than the simple fact that it happened, a plaintiff would not normally be able to rely on res ipsa loquitur to make out a prima facie case. Once the cause is known, the principle has no role to play.

14 In the present case the principle of res ipsa loquitur has never been suggested as playing any part. It is undoubted that the plaintiff was exposed to tobacco smoke on the second defendant's premises. The question is whether the second defendant was relevantly negligent in allowing that exposure to occur.

15 The plaintiff submits that it is entitled to have the common law count go to the jury. She submits that the duty is undoubted, the issue for the jury being whether, by the exercise of reasonable care, the risk of injury to the plaintiff should have been foreseen and avoided: see **Rae v The Broken Hill Proprietary Company Limited** [1957] HCA 33; [1957] 97 CLR 419.

16 It is submitted that there is evidence before the jury that the risk of injury from tobacco smoke was reasonably foreseeable.

17 As to the means of obviating that risk, it is submitted that the proposition that smoking could have been banned is so obvious as to require no evidence.

18 It is further submitted as a matter of commonsense that the club could have, short of banning smoking entirely, confined it to areas removed from the bars where the plaintiff generally worked: see **Neill v NSW Fresh Food and Ice Pty Limited** [1963] HCA 4; [1962] 108 CLR, 362 at 368. It is submitted that there is evidence that smoking was banned in the dining room, giving force to the proposition that it could have been banned in the whole club. It is further submitted that the evidence discloses a failure in the club to adequately maintain the air conditioning system and ensure the constant operation of exhaust fans, thereby

allowing more smoke to remain in the premises than would otherwise have been the case.

19 In my view the plaintiff's submission, but for one matter, should be accepted. The particulars of negligence in the second amended statement of claim provide the essential foundation for the claim that the second defendant maintained premises in which the plaintiff was exposed to tobacco smoke. It was not necessary in my view to particularise the means of obviating the risk beyond the matters referred to in the pleadings.

20 With respect to any issue of fairness, I am satisfied that the second defendant should have been under no misapprehension but that the plaintiff was going to submit to the jury that either by modification of the air conditioning or changes in rules relating to smoking, including the banning of smoking in the club, the plaintiff could have been protected from injury. Complete elimination of risk could only mean a total ban on smoking in the rooms of the club where the plaintiff was required to work. In any event, in my opinion the proposition is self-evident.

21 I am satisfied that it is appropriate to allow the common law count to go to the jury. The jury could come to the view that it was practicable for the second defendant to consider banning smoking entirely or in some parts of the club and could have constantly operated the exhaust fans.

22 With respect to the air conditioning system there is evidence that it failed from time to time. However, there is no evidence as to any practicable steps which could have been taken to improve its performance either by modifying the unit or improving the level of maintenance. In those circumstances in my opinion the plaintiff cannot address the jury with respect to the alleged failure of the air conditioning system.

23 Whether or not the failure (if found by the jury) to take any of these measures to eliminate or reduce smoke shows a lack of reasonable care by the second defendant raises different issues. However those are for the jury which will give effect to its own view about the level of safety reasonably required. The matter is not one for which evidence is essential: see **Chugg v Pacific Dunlop Limited** [1990] HCA 41; , (1990) 170 CLR, 249 at 260.

24 Furthermore there is no reason why the second defendant could not have brought evidence going to those issues: see **McLean v Tedman & Anor** [1984] HCA 60; [1984] 155 CLR 306. In my opinion the plaintiff was not required to put the matters I have identified to any of the defendant's witnesses.

25 The plaintiff seeks to sustain two statutory counts. The first is pleaded as a breach of s 23(4) of the **Factories, Shops and Industries Act** 1962 provides:

"23(4) Suitable atmospheric conditions shall be maintained in workrooms, by natural or artificial means, to avoid insufficient air supply, stagnant or vitiated air, harmful draughts, excessive heat or cold, sudden variations in temperature and where practicable, having regard to the nature of the process carried on, to avoid excessive humidity or dryness, and objectionable odours.

26 The plaintiff says the air in the club was both stagnant and vitiated. The Macquarie Dictionary provides the following meaning of the adjective "vitiated":

"Spoiled; corrupted; rendered invalid".

27 And of the verb "vitiate":

"To impair the quality of; make faulty."

28 There can be no doubt that it is open to the jury to find that, by reason of the presence of the tobacco smoke, the air was vitiated. Furthermore, there is evidence that the club premises, having no windows, were entirely dependent upon air conditioning for ventilation. There is evidence that the system suffered multiple breakdowns but the plaintiff was still required to work.

29 It follows that there is also evidence upon which the jury could find that the air in the club was stagnant. Whether the condition of the air caused or contributed to the plaintiff's illness is another matter.

30 The plaintiff also pleads a count based on s 41(2) of the Act which reads as follows:

"41(2) Where in connection with any process carried on in a factory there is generated or given off any fume of such a character and to such an extent that the inhalation thereof would be likely to be injurious or offensive to persons employed in the factory, or any substantial quantity of dust of any kind, effective measures shall be taken to prevent the accumulation in any workroom of such fume or dust and to protect such persons against the inhalation thereof.

Where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the fume or dust, so as to prevent it from entering the air of any workroom."

31 It is agreed that the second defendant's premises are a factory within the meaning of the Act, the relevant process being those related to the storage and dispensing of food and drink in respect of which mechanical power is used. The plaintiff submits that, the premises being a factory, the cigarette smoke is generated by patrons and guests present in connection with the process carried on in the club. In this submission the process is said to be the overall process of providing recreational facilities.

32 In my opinion this submission faces insuperable difficulties. Accepting, as the plaintiff submits, that the legislation, being remedial in nature, should be liberally construed; see Pearce's "Statutory Interpretation in Australia", 4th edition, 222, the construction contended for must nevertheless be fairly open: See **Khoury (M&S) v Government Insurance Office** (1984) 54 ALR, 649. In my opinion, whatever be the processes which justify the conclusion that the club premises are a factory, it is not possible to describe the provision of recreational facilities as a relevant process. The tobacco smoke is generated by the smoking activities of patrons and guests, and not created by any relevant process and, accordingly, in my opinion s 41(2) does not apply.

33 It follows that the application by the second defendant fails with respect to the challenge to the common law count. It succeeds in relation to the statutory count based on s 41(2) of the Act.

34 I should also formally record that the plaintiff pleaded a breach of s 15(1) of the **Occupational Health and Safety Act** but this has now been abandoned. The plaintiff also submitted that, although the matter has not been approached in this manner in Australia, I should accept a submission that a breach of the **Factories, Shops and Industries Act** without more constitutes evidence of negligence. The position is explained by Professor

Fleming in the Law of Torts (Ninth Ed), page 138, and as therefore set forth is not without attraction. However, the matter has not been fully argued and, in light of the ruling I have made the plaintiff has indicated that she withdraws that submission.

35 One further matter has been argued. The plaintiff claims for loss of past and possible future earnings. She ceased employment with the second defendant upon the discovery of the cancer, although she had intended to work until age 65. She is now aged 62. There is evidence that she has been advised that, if she seeks employment, this should be in a smoke-free environment. Although she says that she does not now feel fit for work, she says she has sought work on occasions without success, believing that employers would prefer someone younger.

36 There is evidence from the second defendant's witnesses that the plaintiff is fit for work. However, it is accepted by the second defendant that the jury could find an entitlement for damages for past economic loss to some extent. In my opinion, the extent of that loss and whether, because of the employer's negligence, the loss extends up to age 65 is a matter for the jury.

37 If the cause of her being unable to work in the future - being either unfit or unsuccessful in finding work - is, in the opinion of the jury, caused by the negligence of the second defendant, the plaintiff may be entitled to damages for that loss identified as a future economic loss.

38 Accordingly, in my opinion, although the matter will have to be carefully explained, the plaintiff is entitled to seek a verdict from the jury for any past loss occasioned by the negligence of the second defendant and any future loss which, in the opinion of the jury, flows from that negligence.

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