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Product liability-“private use” and “proximity” present problems

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The author reviews the law on product liability both at common law and under the Consumer Protection Act 1987 with a particular focus on the recent decision in Renfrew Golf Club v Motocaddy Limited [2015] CSOH 173.

Introduction

Donoghue v Stevenson 1932 S.C. (H.L.) 31, 1932 S.L.T. 317, which is undoubtedly the most celebrated case in the law of delict, was a case which arose in the context of product liability. While, at a general level, the case is famous for Lord Atkin’s formulation of the neighbourhood test in respect of the duty of care analysis (the “broad” ratio), at a more specific level *Donoghue* established that a manufacturer of a product owes a duty of care to the end user in circumstances where the product is intended to reach the end user in the form in which it left the manufacturer and where there is no opportunity for intermediate inspection. This “narrow” ratio is stated by Lord Atkin in the following terms (1932 S.C. (H.L.) 31 at 57, 1932 S.L.T. 317 at 331):

“[B]y Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.”

The common law on product liability, as set out in *Donoghue*, has not been free from difficulty. It has been stated that “[t]he principal and obvious shortcoming of the traditional *Donoghue v Stevenson* cause of action is the need to prove fault.” (JF Clerk & WHB Lindsay, *Torts* (21st edn, A Dugdale, M Jones and MA Simpson eds, Thomson/

Sweet & Maxwell, 2014) at para.11-45). The learned authors do state however that this shortcoming should perhaps not be overplayed given that the difficulty in many product liability cases is not so much proof of fault as proof of causation.

Nonetheless, proof of fault is not always easy to establish. Where there are two possible wrongdoers and the pursuer cannot establish which one is at fault, his action is bound to fail. This problem can arise in relation to a complex product which is comprised of components made by several persons. In *Evans v Triplex Safety Glass Co Ltd* [1936] 1 All ER 283 the plaintiff was injured when he was showered with glass, the windscreen of his car having disintegrated. The manufacturer of the car had fitted the windscreen but the windscreen itself had been manufactured by the defendant. The plaintiff's action was dismissed as he was unable to establish whether the incident resulted from careless fitting of the windscreen (by the car manufacturer) or whether it resulted from negligence on the part of the manufacturer of the windscreen.

The deficiencies of the common law of negligence in this field were perhaps most starkly highlighted by the thalidomide tragedy. It was alleged that use of the drug resulted in deformities in some babies born to women who had taken it during pregnancy. Although the various claims in the UK were ultimately settled extra judicially, it is widely thought that the claimants would have experienced considerable difficulty in establishing fault against the manufacturer of the drug.

In many (but not all) cases involving product liability the need to prove fault has now been removed as a result of the Consumer Protection Act 1987 Pt 1. The Act introduced a statutory scheme of strict liability in respect of defective products. The impetus for the legislation came from Europe in the shape of EC Directive No 85/374/EEC. The 1987 Act implements that Directive and s.1(1) of the Act provides that the Act should be interpreted to comply with the Directive. The 1987 Act came into force on 1 March 1988. Its provisions have been described as "hideously complex" (J Thomson, *Delictual Liability* (Bloomsbury, 5th edn, 2014) at p.180) and only a brief overview is given here. (For a more detailed account of the law, see the discussion by Professor McManus in Thomson, ed. *Delict* (SULI/W Green, 2007), Ch.16.)

Primary responsibility under the Act is imposed upon the producer of the product. Section 2(1) of the Act provides that where any damage is caused wholly or partly by a defect in a product, every person to whom s.2(2) applies shall be liable for the damage. Section 2(2) goes on to identify those persons as:

“(a) the producer of the product;
(b) any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product;
(c) any person who has imported the product into a member State from a place outside the member States in order, in the course of any business of his, to supply it to another.”

A supplier may incur liability where he fails to identify the producer or his own supplier within a reasonable period following a request to do so (s.2(3)). Liability under the Act is strict: “defectiveness, not fault, is the criterion of recovery” (JF Clerk & WHB Lindsell, *Torts, supra*, at para.11-48). Strict liability is imposed “where any damage is caused wholly or partly by a defect in a product” (s.2(1)). A “product” is defined (in s.1(2)) as “any goods or electricity” and, importantly, includes components and raw materials which are part of a complex product (thus obviating the difficulty which was encountered in *Evans* above- both the car and the windscreen would now be viewed as products under the Act.) “Damage” is defined as “death or personal injury or any loss of or damage to property (including land)” (s.5(1)). Recovery is therefore excluded in respect of pure economic loss. A product is defective if its safety “is not such as persons generally are entitled to expect” (s.3(1)). In other words, a “consumer expectation” test applies-see *Abouzaid v Mothercare (UK) Ltd* [2001] TLR 136; *A v National Blood Authority (No 1)* [2001] 3 All ER 289 (members of the public were entitled to expect that blood transfused to them would be free from infection). Liability under the Act is not absolute. Indeed, the Act sets out a number of defences upon which the defender may seek to rely (see s.4) including the somewhat controversial “development risk” defence (s.4(1)(e)). Section 6(4) makes separate provision for the defence of contributory negligence.

The Act is not comprehensive in its scope. Damage to certain types of property is excluded from its ambit. Among those exclusions are

damage to the defective product itself (s.5(2)) and property damaged or lost as a result of the defective product, where such loss or damage does not exceed £275 in value (s.5(4)). Of particular significance to the present discussion is a further exception stated in s.5(3), that being property damaged or lost as a result of a defective product where the property damaged or lost *is not for private use*. Professor Thomson provides the following example: “[I]f A produces a defective vacuum cleaner, the Act will apply if the cleaner damages the carpet in B’s home but not if it damages the carpet in B’s office or factory.” (J Thomson, *Delictual Liability* (Bloomsbury, 5th edn, 2014) at p.182). If the Act has no application on account of the fact that the property damaged is not for private use, the pursuer must instead rely on the common law, which will of course require him or her to establish that a duty of care is owed in respect of the loss suffered and also that that loss has been caused by *fault* on the defender’s part.

***Renfrew Golf Club v Motocaddy Limited* [2015] CSOH 173- the alleged facts**

Against that background, attention is now turned to the alleged facts in the recent case of *Renfrew Golf Club v Motocaddy Limited* [2015] CSOH 173. The club raised an action of damages against Motocaddy Limited, a company which both imports and supplies electric golf trolleys. The company markets the trolleys under its own name in the United Kingdom. The pursuer sought £558000 in damages. The losses were said to arise from extensive damage caused to the pursuer’s clubhouse in the early hours of 24 July 2010, when a Motocaddy S1 electric golf trolley caught fire. The trolley had been left in a locker room by a club member, Darryn Grant, on the previous evening after he had used it during a round of golf. He left it with the rocker switch - which controlled the power supply - in the "on" position, meaning it was still energised. Mr. Grant had owned the trolley for more than two years. He had replaced the original battery (which had been supplied with the trolley) with a 36-hole battery because the original battery had stopped working. The most probable seat of the fire was the trolley. The most likely cause of a fire within an energised trolley was an electrical fault in the wiring or wired connections to the trolley proximate to the battery. The club framed its action against Motocaddy Limited both under the Consumer

Protection Act 1987 and in negligence. The defender stated a plea to the relevancy of the pursuer's pleadings in respect of both grounds of action and the case came to debate on the procedure roll before Lord Philip. Following debate, Lord Philip dismissed the action. How then did his Lordship reach his conclusion?

The statutory ground of action

The pursuer asserted that the defender, having held itself out as producer of the trolley and in its capacity as importer of the trolley was liable for the damage caused by the trolley in terms of s.2(2)(b) and (c) of the Consumer Protection Act 1987. The trolley was "defective" as there was no over-temperature cut-off to prevent power transistor failure and no short circuit protection. The defender submitted, however, that in view of s.5(3)(a) and (b) of the 1987 Act, it was not liable for the pursuer's loss, since the property damaged could not be described as property ordinarily intended by the pursuers for private use, occupation or consumption, nor was it intended by the pursuers mainly for their own private use, occupation or consumption. Rather, the clubhouse was used for economic activity. The pursuer submitted that liability was not excluded by s.5(3). It contended that the clubhouse *did* constitute private premises and was the equivalent of residential property. The fact that the club permitted visitors to use its facilities did not make the club an economic entity, but simply indicated a desire to boost club income. It is useful here to set out the terms of s.5(3) of the 1987 Act:

"A person shall not be liable under section 2 ...for any loss of or damage to any property which, at the time it is lost or damaged, is not—

- (a) of a description of property ordinarily intended for private use, occupation or consumption; and
- (b) intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption."

In addressing the arguments, Lord Philip emphasised (at para.15) that the pursuers would only be entitled to succeed if their pleadings demonstrated that *both* limbs of the above test were satisfied. (Clerk and Lindsell (*supra*) describe them as "cumulative requirements" at para 11-81). Acknowledging that the parties were clearly in dispute as

to the correct meaning of the term “private”, Lord Philip declared that he was not prepared to hold that the use made of the clubhouse was “private” in terms of s.5(3) simply because it was owned by the members of a club. Instead, the actual use to which the clubhouse was put required to be examined. His Lordship observed that a member could introduce guests to play golf and to use the clubhouse facilities. In addition, members of the public could play golf for a fee, use the clubhouse, and patronise the bar and the catering facilities. Although the catering facilities were franchised to a local business, the club benefitted from the profits from the licensed bar. The lounge and dining area were available for social functions which were not necessarily related to the club. Bookings for such functions required to be made by a member and a fee was charged for such bookings. The club’s action for damages included claims in respect of business interruption, loss of green fees, and loss of profit from bar takings.

His Lordship stated (at para.18):

“In the light of these facts it is clear from the pursuers’ averments that the clubhouse, in common with many golf clubhouses, was used for a material amount of economic or commercial activity. Moreover, I am unable to accept that Parliament intended that a building, the use of which was available to seven hundred members as well as others, could be described as being subject only to private use. In these circumstances I do not consider that the clubhouse was of a description of property ordinarily intended for private use or occupation.”

Given that both legs of the test in s.5(3) required to be satisfied, Lord Philip’s conclusion that the first leg of the test was not satisfied was sufficient to allow him to dispose of the pursuer’s statutory case as irrelevant. His Lordship did observe, however, that the pursuer’s argument in favour of private use under the second part of the test (namely that the clubhouse was *intended* by the pursuer mainly for its own private use and occupation) was stronger than the argument in respect of the first limb.

The common law ground of action

Having thus disposed of the pursuer's statutory case, Lord Philip turned his attention to the common law ground of action. In this connection it was averred that the defender had failed in its duty to carry out a "reasonable examination" of the trolley, which would have included a visual inspection and an electrical inspection to ensure that the trolley incorporated adequate protection against incendive electrical faults. This aspect of the case raised the issue of the scope of the defender's duty of care to the pursuer. His Lordship observed (at para.19) that "[t]hat issue essentially falls to be determined by the application of the tripartite test set out in *Caparo Industries Plc v Dickman* [1990] 2 AC 605." The tripartite approach in *Caparo* requires an analysis of issues of foreseeability, proximity and policy (the third issue involves asking whether it is fair, just and reasonable to impose a duty of care on the defender).

Taking each one of the three elements of the tripartite test in turn, and dealing first with the question of foreseeability, counsel for the defender submitted that the pursuer had failed to aver sufficient foreseeability. While counsel accepted that it was foreseeable that if a trolley caught fire some damage might be caused, he submitted that in this case it was not foreseeable that damage to any third party would be involved. Counsel for the pursuer, however, contended that the foreseeability of the trolley catching fire was a matter for evidence. In the event, Lord Philip did not find it necessary to express a concluded view on foreseeability in light of the view which he adopted on the question of proximity.

On that second element of the tripartite approach, (namely proximity) the defender again submitted that the pursuer's common law case was irrelevant owing to a failure to aver sufficient proximity. The pursuer sought to take liability for property damage beyond the consumer of the product and this was a leap, counsel submitted, which the court was not obliged to take. There was a great distance between the defender's alleged failure and the fire. Lord Philip acknowledged that the proximity aspect of the duty enquiry presented "greater difficulties" for the pursuer. His Lordship stated: (at para.20): "[T]here were a large number of factors leading to the fire over which the defenders had no control. It is averred that the fire was caused as the result of the rocker switch being left in the "on" position. The precise mechanics of the cause of the fire are however uncertain. It is

not averred that the wires were actually damaged prior to the fire, merely that they could have been. The defenders had no control over the maintenance of the trolley, or over the use of the trolley in the three years since it came into the owner's possession. The owner had changed the battery to a 36 hole battery. The capacity of the previous battery is not averred. The defenders had no control over the place where the trolley was left on the night in question. The pursuers do not aver from whom the owner obtained the trolley."

His Lordship continued (at para.21):

"As Lord Hodge pointed out in *ICL Tech Limited v Johnston Oils Limited* [2013] SLT 1090 at 199:

"In *Donoghue v Stevenson* Lord Atkin famously emphasised the concept of direct effect in his definition of proximity. He spoke of 'such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his act.'"

He went on to cite Lord Hoffmann in *Sutradhar v Natural Environment Research Council* [2006] UKHL 33 where he spoke of the need for the person on whom a duty of care was imposed to have "a measure of control over and responsibility for the potentially dangerous situation" and for "a proximate relationship with a source of danger".

In relation to this aspect of the duty enquiry, Lord Philip expressed agreement with the defender's submission that there was "a great distance" between the defender's alleged failure and the fire. His Lordship concluded that the pursuer had not succeeded in averring sufficient proximity between the defender and pursuer.

On the third aspect of the *Caparo* tripartite approach, the defender submitted that it would not be fair, just or reasonable to impose a duty of care of the kind averred as that would involve the imposition of liability to anyone whose property happened to be adjacent to the defective product. Accordingly, the defender's duty would be to check the product for the benefit of the world, creating a risk over which it had no control. Lord Philip, "taking a general view of the entire circumstances" and for the same reasons which he had expressed in relation to his rejection of the proximity criterion, concluded (at para.21) that it would not be fair, just and reasonable to impose a

duty of care on the defender in the instant case. Accordingly, the action was dismissed.

Conclusion

When the Consumer Protection Act 1987 came into force on 1 March 1988 it addressed one of the key shortcomings of the common law of negligence in that it dispensed with the need to prove fault in relation to certain product liability claims. Although recovery under the 1987 Act is “uncomplicated by the need to prove negligence” (McManus, *Delict* (SULI/W Green, 2007), *supra*, at para.16.29), it must be remembered that the Act is not comprehensive in its scope. Liability in respect of property damage under the Act is restricted in a number of important ways. Thus, recovery is precluded under the strict statutory regime in respect of property damage claims of under £275 in value and in respect of damage to property which is not for “private use”. *Renfrew Golf Club* provides an illuminating discussion of the latter restriction and, in so doing, serves as a reminder of the limited ambit of the 1987 Act. The statutory scheme cannot therefore be regarded as a universal panacea. Reliance may still require to be placed in some cases upon the common law of negligence, where proof of fault remains fundamental. Although the pursuer in *Renfrew Golf Club* did advance a common law case (in addition to its statutory case) that too was destined for failure on account of the club’s inability to demonstrate that the defender owed it a duty of care. Pivotal in sealing the pursuer’s fate on that front was the lack of proximity between the parties to the litigation. The Lord Ordinary also took the view that the imposition of a duty would not, in the circumstances, be fair, just and reasonable. The common law therefore proved impotent to plug the gap left by the Consumer Protection Act in the circumstances of this particular case with the result that Renfrew Golf Club was ultimately denied a remedy. Golf clubs across the country should take note of this important decision.