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Court : House of Lords

Decided On : May-10-1951

Judge : LORD PORTER, LORD NORMAND, LORD OAKSEY, LORD REID, LORD RADCLIFFE

Appeal No. : No.

Appellant : Bolto and Others

Respondent : Stone

Judgement :

Lord Porter

My Lords,

This is an Appeal from a judgment of the Court of Appeal reversing a decision of Oliver J. The action under review was brought by a Miss Stone against the Committee and Members of the Cheetham Cricket Club in respect of injuries said to be caused by their negligence in not taking steps to avoid the danger of a ball being hit out of their ground or as the result of a nuisance, dependent upon the same facts, for which they were responsible.

The facts as found by the learned judge are simple and undisputed. On 9th August, 1947, Miss Stone, the Plaintiff, was injured by a cricket ball while standing on the highway outside her house, 10, Beckenham Road, Cheetham Hill. The ball was hit by a batsman playing in a match on the Cheetham Cricket Ground which is adjacent to the highway. She brings an action for damages against the committee and members of the Club—the striker of the ball is not a defendant.

The Club has been in existence, and matches regularly played on this ground, since about 1864. Beckenham Road was constructed and built up in 1910. For the purpose of its lay-out, the builder made an arrangement with the Club that a small strip of ground at the Beckenham Road end should be exchanged for a strip at the other end. The match pitches have always been, and still are, kept along a line opposite the pavilion, which was the mid-line of the original ground. The effect is that for a straight drive—the hit in the case in question—Beckenham Road has for some years been a few yards nearer the batsman than the opposite end.

The cricket field, at the point at which the ball left it, is protected by a fence 7 feet high but the upward slope of the ground is such that the top of the fence is some 17 feet above the cricket pitch. The distance from the striker to the fence is about 78 yards not 90 yards as the learned judge states, and to the place where the Plaintiff was hit, just under 100 yards. A witness, Brownson, who lives in the end house—one of the six at the end nearest the ground and opposite to that of the Plaintiff—said that five or six times during the last few years he had known balls hit his house or come into the yard. His evidence was quite vague as to the number of occasions, and it has to be observed that his house is substantially nearer the ground than the Plaintiff's.

Two members of the Club, of over 30 years' standing, agreed that the hit was altogether exceptional to

anything previously seen on that ground. They also said—and the learned judge accepted their evidence—that it was only very rarely indeed that a ball was hit over the fence during a match.

On these facts the learned judge acquitted the Appellants of negligence and held that nuisance was not established.

In the action and on appeal the Respondent contended as stated above that the Appellants were negligent or guilty of creating a nuisance in failing to take any sufficient precautions to prevent the escape of cricket balls from the ground and the consequent risk of injury to persons in Beckenham Road.

In her submission it was enough that a ball had been driven into the road even once: such an event gave die Appellants warning that a ball might be hit into the road, and the Appellants knowing this must, as reasonable men also know that an injury was likely to be caused to anyone standing in the road or to a passer-by.

The argument was however, as she said, strengthened when it was remembered that a ball had been driven over the fence from time to time even though at somewhat remote intervals. Such an event was known to the Appellants to have occurred, and if they had considered the matter, they ought to have envisaged the possibility of its, repetition.

But the question remains: Is it enough Jo make an action negligent to say that its performance may possibly cause injury or must some greater probability exist of that result ensuing in order to make those responsible for its occurrence guilty of negligence?

In the present case the Appellants did not do the act themselves, but they are trustees of a field where cricket is played, are in control of it and invite visiting teams to play there. They are, therefore, and are admitted to be responsible for the negligent action of those who use the field in the way intended that it should be used.

The question then arises: What degree of care must they exercise to escape liability for anything which may occur as a result of this intended use of the field?

Undoubtedly they knew that the hitting of a cricket ball out of the ground was a possible event and, therefore, that there was a conceivable possibility that someone would be hit by it. But so extreme an obligation of care cannot be imposed in all cases. If it were, no one could safely fly an aeroplane or drive a motor car since the possibility of an accident could not be overlooked and if it occurred some stranger might well be injured. But cases of that kind presuppose the happening of an event which the flyer or driver desire to do everything possible to avoid, whereas the hitting of a ball out of the ground is an incident in the game and. indeed, one which the batsman would wish to bring about.

But in order that the act may be negligent there must not only be a reasonable possibility of its happening but also of injury being caused. In the words of Lord Thankerton in *Bourhill* v. *Young* |1943] A.C**.** 92 at p. 98, the duty is to exercise " such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care ", and Lord Macmillan used words to the like effect at p. 104. So, also, Lord Wright in *Glasgow Corporation* v. *Muir* [1943] A.C**.** 448 at p. 460, quoted the well-known words of Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C. 562 at p. 580: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee "would be likely to injure your neighbour".

It is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken.

It must be remembered and cannot too often be repeated that there are two different standards to be applied when one is considering whether an appeal should be allowed or not. The first is whether the facts relied upon are evidence from which negligence can in law be inferred; the second, whether, if negligence can be inferred, those facts do constitute negligence. The first is a question of law upon which the judge must actually or inferentially rule ; the second, a question of fact upon which the jury, if there is one, or, if not, the judge, as judge of fact, must pronounce. Both to some extent, but more particularly the latter, depend on all the surrounding circumstances of the case.

In the present instance the learned trial, judge came to the conclusion that a reasonable man would not anticipate that injury would be likely Ho result to any person as a result of cricket being played in the field in question and I cannot say that that conclusion was unwarranted. In arriving at. This result I have not forgotten the view entertained by Singleton L.J. that the Appellants knew that balls had been hit out of the ground into the road, though on very rare occasions — I think six were proved in 38 years — and it is true that a repetition might at some time be anticipated. But its happening would be a very exceptional circumstance, the road was obviously not greatly frequented and no previous accident had occurred. Nor do I think that the Respondent improves her case by proving that a number of balk were hit into Mr. Brownson's garden. It is danger to persons in the road not to Mr. Brownson or his visitors which is being considered. In these circumstances I cannot say that as a matter of law the decider of fact, whether judge or jury, must have come to the conclusion that the possibility of injury should have been anticipated. I cannot accept the view that it would tend to exonerate the Appellants if it were proved that they had considered the matter and decided that the risks were very small and that they need pot do very much. In such a case I can imagine it being said that they entertained an altogether too optimistic outlook. They seem to me to be in a stronger position, if the risk was so small that it never even occurred to them.

Nor am I assisted by any reliance upon the doctrine of "*res ipsa loquitur".* Where the circumstances giving rise to the cause of the accident are unknown that doctrine may be of great assistance, but where, as in the present case, all the facts are known, it cannot have any application. It is known exactly how the accident happened and it is unnecessary to ask whether this accident would have happened had there been no negligence; the only question is, do the facts or omissions which are known and which led up to the injury amount to negligence.

I may add that the suggestion that it would have been a wise precaution to move the pitch to a position equally between the north and south boundaries to my mind has little force. I do not think that it would have occurred to anyone that such an alteration would make for greater safety or that there was any danger in allowing things to remain as they were. The golf club case *(Castle v. St. Augustine's Links* (1922) 38 T.L.R. 615) rested upon a different set of circumstances in which a succession of players driving off alongside a road might be expected from time to time to slice their ball over or along the road and, therefore, the possibility of injury to those using the highway was much greater. The quantum of danger must always be a question of degree. It is not enough that there is a remote possibility that injury may occur: the question is, would a reasonable man anticipate it. I do not think that he would, and in any case, unless an appellate body are of opinion that he clearly ought to have done so, the tribunal upon whom lies the duty of finding the facts is the proper judge of whether he would or not. I need not discuss the alternative claim based upon nuisance, since it is admitted on behalf of the Respondent that in the circumstances of this case nuisance cannot be established unless negligence is proved.

'My Lords, for the reasons I have given I am of opinion that the Appeal should be allowed, the judgment of the learned judge in the Court of first instance should be restored, and the Respondent should pay the costs in your Lordships' House and in the Court of Appeal.

Lord Normand

My Lords,

It is not questioned that the occupier of a cricket ground owes a duty of care to persons on an adjacent highway or on neighbouring property who may be in the way of balls driven out of the ground by the batsman. But it is necessary to consider the measure of the duty owed. In the Court of Appeal Jenkins, L.J. said that it was a duty to prevent balls being hit into Beckenham Roadso far as there was any reasonably foreseeable risk of that happening. There can be no quarrel with this proposition, but one must not overlook the importance of the qualification "reasonably". It is not the law thatprecautions must be taken against every peril that can be foreseen by the timorous. In Glasgow Corporation v. Muir, 1943, S.C.3 [19431 A.C. 448, the decision turned on the standard of care, and Lord Thankerton held that a person is bound to foresee only the reasonable and probable consequences of his failure to take care, judged by the standard of the ordinary reasonable man. He observed that the question whether a defender had failed to take the precautions which an ordinary reasonable man would take is essentially a jury question, and that it is the duty of the Court to approach the question as if it were a jury and that a Court of Appeal should be slow to interfere with the conclusions of the trial judge. Lord Macmillan ([1943] A.C. 457) agreed that the standard of duty was the reasonable man of ordinary intelligence and experience contemplating the reasonable and probable consequences of his acts. What ought to have been foreseen is the test accepted by Lord Wright ([19431 A.C. 460), who quoted Lord Atkin's words in Donoghue v. Stevenson ([1932] A.C. 562, 580): "You must take "reasonable care to avoid acts or omissions which you can reasonably fore- "see would be likely to injure your neighbour ". Lord Clauson ([1943] A.C. p. 19) stated as the test whether the person having the duty of care ought, as a reasonable person, to have had in contemplation that, unless some further precautions were taken, such an unfortunate occurrence as that which in fact took place might well be expected.

It is therefore not enough for the Plaintiff to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road; she must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence.

Among the facts found by Oliver, J. are:—(1) that a house substantially nearer the ground than the place where the Plaintiff was injured had been hit by a cricket ball driven out of the ground on certain occasions (vaguely estimated at 5 or 6 by a witness) in the previous few years ; (2) that the hit which occasioned the Plaintiff's injury was altogether exceptional; and (3) that it was very rarely indeed that a ball was hit over the fence between the road and the ground. It is perhaps not surprising that there should be differences of opinion about the Defendants' liability even if the correct test is applied. The whole issue is indeed finely balanced. On the one side there are, as we were told, records of much longer hits by famous cricketers than the drive which caused the injury to the Plaintiff and it is, of course, the object of every bats-man to hit the ball over the boundary if he can. Again, the serious injury which a cricket ball might cause must not be left out of account. But on the other side the findings of fact shew that the number of balls driven straight out of the ground by the players who use it in any cricket season is so small as to be almost negligible, and the probability of a ball so struck hitting anyone in Beckenham Road is very slight. The issue is thus one eminently appropriate for the decision of a jury, and Oliver, J. dealt with it as a jury would and gave his decision without elaborating his reasons. I think that the observations of Lord Thankerton in Glasgow Corporation v. Muir are apposite and that it is unfortunate that the Court of Appeal should have reversed the decision.

I do not think that the change which took place in 1910, when Beckenham Road was made and a small strip next to it was taken from the ground in exchange for a strip at the other end, has much relevance. That change was made 37 years before this accident, and the evidence about the infrequency of hits out of the ground is directed to the period since 1910, and is a sufficient basis for a judgment on the degree of risk and on the duty resting on the Defendants. It was said by Singleton, LJ. that the Defendants might have escaped liability if in 1910 they had considered the matter and decided that the risks were so small that nothing need be done, but that since they did not consider it at all they must bear the consequences. I am not with respect disposed to agree with this reasoning. We are concerned with the practical results of deliberation, and the consequences of failing to consider the risk and of considering the risk but deciding to do nothing are the

same. The precautions suggested by the Plaintiff, being either the moving of the wickets a few steps further away from the Beckenham Road end or the heighteningof the fencing, would have had little or no effect in averting the peril. The only practical way in which the possibility of danger could have been avoided would have been to stop playing cricket on this ground. I doubt whether that fairly comes within paragraph (c) of the particulars of negligence,— "failure" to ensure that cricket balls would not be hit into the said road". That seems to point to some unspecified method of stopping balls from reaching the road while a game is in progress on the ground. But whatever view may be taken on these matters, my conclusion is that the decision of Oliver, J. should have been respected as equivalent to a verdict of a jury on a question of fact.

I agree that the appeal should be allowed.

Lord Oaksey

MY LORDS,

I have come to the conclusion in this difficult case that Mr. Justice Oliver's decision ought to be restored.

Cricket has been played for about 90 years on the ground in question and no ball has been proved to have struck anyone on the highways near the ground until the Respondent was struck, nor has there been any complaint to the Appellants. In such circumstances was it the duty of the Appellants, who are the Committee of the Club, to take some special precautions other than those they did take to prevent such an accident as happened? The standard of care in the law of negligence is the standard of an ordinarily careful man, but in my opinion an ordinarily careful man does not take precautions against every foreseeable risk. He can, of course, foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are reasonably likely to happen. Many foreseeable risks are extremely unlikely to happen and cannot be guarded against except by almost complete isolation. The ordinarily prudent owner of a dog does not keep his dog always on a lead on a country highway for fear it may cause injury to a passing motor cyclist, nor does the ordinarily prudent pedestrian avoid the use of the highway for fear of skidding motor cars. It may very well be that after this accident the ordinarily prudent (committee man of a similar cricket ground would take some further precaution, but that is not to say that he would have taken a similar precaution before the accident. The case of *Castle v. St. Augustine's Links Ltd.* (1922) 38 T.L.R. 615, is obviously distinguishable on the facts and there is nothing in the judgment to suggest that a nuisance was created by the first ball that tell on the road there in question.

There are many footpaths and highways adjacent to cricket grounds and golf courses on to which cricket and golf balls are occasionally driven, but such risks are habitually treated both by the owners and committees of such cricket and golf courses and by the pedestrians who use the adjacent foot-paths and highways as negligible and it is not, in my opinion, actionable negligence not to take precautions to avoid such risks.

Lord Reid

My lords.

It was readily foreseeable that an accident such as befell the Respondent might .possibly occur during one of the Appellants' cricket matches. Balls had been driven into the public road from time to time and it was obvious that, if aperson happened to be where a ball fell, that person would receive injuries which might or might not be serious. On the other hand it was plain that the chance of that happening was small. The exact number of times a ball has been driven into the road is not known, but it is not provedthat this has happened more than about six times in about thirty years. If I assume that it has happened on the average once in three seasons I shall be doing no injustice to the Respondent's case. Then there has to be considered the chance of a person being hit by a ball falling in the road. The road appears to be an ordinary side road giving access to a number of private houses, and there is no evidence to suggest that the traffic on this road is other than what

one might expect on such a road. On the whole of that part of the road where a ball could fall there would often be nobody and seldom any great number of people. It follows that the chance of a person ever being struck even in a long period of years was very small.

This case therefore raises sharply the question what is the nature and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway. Is it that he must not carry out or permit an operation which he knows or ought to know clearly can cause such damage, however improbable that result may be, or is it that he is only bound to take into account the possibility of such damage if such damage is a likely or probable consequence of what he does or permits, or if the risk of damage is such that a reasonable man, careful of the safety of his neighbour, would regard that risk as material?

I do not know of any case where this question has had to be decided or even where it has been fully discussed. Of course there are many cases in which somewhat similar questions have arisen, but generally speaking if injury to another person from the Defendants' acts is reasonably foreseeable the chance that injury will result is substantial and it does not matter in which way the duty is stated. In such cases I do not think that much assistance is to be got from analysing the language which a judge has used. More assistance is to be got from cases where judges have clearly chosen their language with care in setting out a principle, but even so, statements of the law must be read in light of the facts of the particular case. Nevertheless, making all allowances for this, I do find at least a tendency to base duty rather on the likelihood of damage to others than on its foreseeability alone.

The definition of negligence which has perhaps been most often quoted is that of Alderson, B. in *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Ex. 781, "Negligence is the omission to do something which a reasonable man guided upon these considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reason able man would not do. I think that reasonable men do in fact take into account the degree of risk and do not act on a bare possibility, as they would if the risk were more substantial.

A more recent attempt to find a basis for a man's legal duty to his neigh-bour is that of Lord Atkin in *Donoghue* v. *Stevenson* [1932J A.C. 562. I need not quote the whole passage: for this purpose the important part is You must take reasonable care to avoid acts or omissions which you can reason ably foresee would be likely to injure your neighbour. Parts of Lord Atkin's statement have been criticised as being too wide, but I am not aware that it has been stated that any part of it is too narrow. Lord Atkin does not say which you can reasonbly foresee could injure your neighbour: he introduces the limitation would be likely to injure your neighbour, Lord Macmillan said in *Bourhill v. Young* [1943] A.C. 92, The duty to take care is the duty to avoid doing or omitting to do anything the doing " or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed. Lord Thankerton in *Glasgow Corporation* v. *Muir* [1943] A.C. 448, after quoting this statement said, In my opinion, it has long been held in Scotland that all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man. . . . The Court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened. The law of Scotland does not differ in this matter from the law of England.

There are other statements which may seem to differ but which I do not think are really inconsistent with this. For example in *Fardon* v. *Harcourt Rivington,* (1932), 146 L.T. 391, Lord Dunedin said, This is such an extremely unlikely event that I do not think any reasonable man could be convicted of negligence if he did not take into account the possibility of such an occurrence and provide against it ... People must guard against ' reasonable probabilities but they are not bound to guard against fantastic possibilities. I doubt whether Lord Dunedin meant the division into reasonable probabilities and fantastic possibilities to fee exhaustive, so that anything

more than a fantastic possibility must be regarded as a reasonable probability. What happened in that case was that a dog left in a car broke the window and a splinter from the glass entered the Plaintiff's eye. Before that had happened it might well have been described as a fantastic possibility and Lord Dunedin did not have to consider a case nearer the border line. I do not think it necessary to discuss other statements which may seem to be at variance with the trend of authority which I have quoted because I have not found any which is plainly inconsistent with it; and I have left out of account cases where the defendant clearly owed a duty to the plaintiff and by his negligence caused damage to the plaintiff. In such cases questions have arisen as to whether damages can only be recovered in respect of consequences which were foreseeable or were natural and probable, or whether damages can be recovered in respect of all consequences whether foreseeable or probable or not: but remoteness of damage in this sense appears to me to be a different question from that which arises in the present case.

Counsel for the Respondent in this case had to put his case so high as to say that, at least as soon as one ball had been driven into the road in the ordinary course of a match, the Appellants could and should have realised that that might happen again and that, if it did, someone might be injured; and that that was enough to put on the Appellants a duty to take steps to prevent such an occurrence. If the true test is foreseeability alone I think that must be so. Once a ball has been driven on to a road without there being anything extraordinary to account for the fact, there is clearly a risk that another will follow and if it does there is clearly a chance, small though it may be, that someone may be injured. On the theory that it is foreseeability alone that matters it would be irrelevant to consider how often a ball might be expected to land in the road and it would not matter whether the road was the busiest street, or the quietest country lane: the only difference between these cases is in the degree of risk.

It would take a good deal to make me believe that the law has departed so far from the standards which guide ordinary careful people in ordinary life. In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial. Of course there are numerous cases where special circumstances require that a higher standard shall be observed and where that is recognised by the law. But I do not think that this case comes within any such special category. It was argued that this case comes within the principle in *Rylands v. Fletcher,* L.R. 3. H.L. 330, but I agree with your Lordships that there is no substance in this argument. In my judgment the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the Appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger. In considering that matter I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck: but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all. I think that this is in substance the test which Oliver J. applied in. this case. He considered whether the Appellants' ground was large enough to be safe for all practical purposes and held that it was. This is a question not of law but of fact and degree. It is not an easy question and it is one on which opinions may well differ. I can only say that having given thewhole matter repeated and anxious consideration I find myself unable to decide this question in favour of the Respondent. But I think that this case is not far from the border line. If this appeal is allowed, that does not in my judgment mean that in every case where cricket has been played on a ground for a number of years without accident or complaint those who organise matches there are safe to go on in reliance on past immunity. I would have reached a different conclusion if I had thought that the risk here had been other than extremely small, because I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small.

This case was also argued as a case of nuisance, but counsel for the Respondent admitted that he could not succeed on that ground if the case on negligence failed. I therefore find it unnecessary to deal with the

question of nuisance and reserve my opinion as to what constitutes nuisance in cases of this character. In my judgment the appeal should be allowed.

Lord Radcliffe

MY LORDS,

I agree that this appeal must be allowed. 1 agree with regret, because I have much sympathy with the decision that commended itself to the majority of the members of the Court of Appeal. I can see nothing unfair in the Appellants being required to compensate the Respondent for the serious injury that she has received as a result of the sport that they have organised on their cricket ground at Cheetham Hill. But the law of negligence is concerned less with what is fair than with what is culpable: and I cannot persuade myself that the Appellants have been guilty of any culpable act or omission in this case.

I think that the case is in some respects a peculiar one, not easily related to the general rules that govern liability for negligence. If the test whether there has been a breach of duty were to depend merely on the answer to the question whether this accident was a reasonably foreseeable risk, I think that there would have been a breach of duty: for that such an accident might take place some time or other might very reasonably have been present to the minds of the Appellants. It was quite foreseeable, and there would have been nothing unreasonable in allowing the imagination to dwell on the possibility of its occurring. But there was only a remote, perhaps I ought to say only a very remote, chance of the accident taking place at any particular time, for, if it was to happen, not only had a ball to carry the fence round the ground but it had also to coincide in its arrival with the presence of some person on what does not look like a crowded thorough fare and actually to strike that person in some way that would cause sensible injury.

Those being the facts, a breach of duty has taken place if they show the Appellants guilty of a failure to take reasonable care to prevent the accident. One may phrase it as " reasonable care " or "ordinary care" or "proper" care "—all these phrases are to be found in decisions of authority—but the fact remains that, unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breach of legal duty. And here, I think, the Respondent's case breaks down. It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the Appellants did: in other words, he would have done nothing. Whether, if the unlikely event of an accident did occur and his play turn to another's hurt, he would have thought it equally proper to offer no more consolation to his victim than the reflection that a social being is not immune from social risks, I do not say, for I do not think that that is a consideration which is relevant to legal liability. I agree with the others of your Lordships that if the Respondent cannot succeed in negligence she cannot succeed on any other head of claim.