United Kingdom House of Lords Decisions

16 April 1943

Muir
v.
Glasgow Corporation

At delivering judgement on 16th April 1943,—

LORD THANKERTON .—This action arises out of an unfortunate accident to six young children on 15th June 1940 in the old mansion house in the King's Park, Glasgow, which belongs to the appellants. At that time the mansion house was being used *inter alia* for the service of teas to visitors to the park and also as a shop for the sale of sweets and ices. The mansion house is now in military occupation. The witness, Mrs Emily Alexander, was manageress of the tea rooms and shop on behalf of the appellants, and the action is based on the alleged negligence of Mrs Alexander, in breach of a duty to take reasonable care of the children. After a proof before answer, the Lord Ordinary, Lord Robertson, on 6th June 1941 assoilzied the appellants, but his interlocutor was recalled by the First Division of the Court of Session, the Lord President dissenting, by interlocutor dated 7th November 1941, and, the amount of damages having been agreed, subject to reservation of the defenders' right to bring the present appeal, decree was given for the agreed amounts by interlocutor dated 2nd December 1941. At the hearing of the appeal the question of liability was alone argued.

About 200 yards from the mansion house, at the top of a hill, there is a shelter, for the convenience of picnic parties and the general public, at the back of which there is a boilerhouse, at which picnic parties can obtain, for a moderate charge, boiling water to make their tea. Weather permitting, the usual practice is for the picnic parties to eat their tea in the field which lies between the shelter and the mansion house. On the day of the accident it had come on very wet in the afternoon, and there were at least two picnic parties which desired shelter. One of these, which came from Rutherglen, was a large one, comprising 650 children and 250 adults; the other party, which came from Milton Street Free Church, consisted of 30 or 40 persons, including George M'Donald, the Church Officer. The larger party having absorbed the accommodation in the shelter, two members of the Church party went down to the mansion house, and got permission from Mrs Alexander to use the tea room in the mansion house for eating their own tea, at

a charge of 12s. 6d. Thereafter the Church party brought their tea urn and their eatables to the mansion house.

It is necessary to give some idea of the space available for the carrying of the tea-urn from the front door to the tea-room, which is shown on the ground plan made and proved by the witness Thomas Lucas. A short flight of steps leads up to the double doors by which entry is obtained to what may be called the entrance hall or passage. On passing through the doors, the passage runs towards the tea-room on the left hand, while immediately opposite, on the other side of the passage, is the counter at which the sweets and ices are sold, and, to the left, in continuation of the line of the counter, there is a showcase. The counter is about 5 feet long and the showcase is over 3 feet long. Between the doorway—ignoring the space necessary for the inward opening of the doors—and the counter the space is nearly 5 feet wide, but, as you turn left-handed to proceed to the tea-room, the space narrows on the left side until, opposite the inmost end of the showcase, there is only 3 feet 3 inches of passageway, at which width the passage continues so far as is material to the present case.

The tea-urn of the Church party was carried so far down the hill by George M'Donald and a boy Murray abreast, the cakes being carried by James Taylor; before they reached the mansion house, Taylor took Murray's place, M'Donald having one handle, and Taylor the other one. At the entrance door, they found it necessary to proceed in single file, Taylor having the front handle and M'Donald the back handle. At the time of their entry there were about a dozen children from the other party, who were buying sweets or ices at the counter. There can be no doubt that, just after Taylor and M'Donald had turned left-handed, M'Donald let go the handle by which he was carrying the urn, that some scalding hot tea escaped from the urn, and injured the six children already referred to, Eleanor Muir, in particular, having sustained serious injuries. It is a remarkable fact that no witness is produced who saw the accident happen. Taylor, although he felt M'Donald let go his handle and was able to get the urn on to its base on the floor before it completely overturned, could give no satisfactory evidence as to why M'Donald let go. The evidence of the witness Jeffrey as to the cause of the accident was equally unsatisfactory. Mrs Alexander, who was serving the children at the counter, had her back turned when it happened, as she was taking ice cream from the freezer. None of the children saw it happen. Neither M'Donald nor Murray was produced as a witness, and no explanation was given of their absence. It is worth noting the averments of the pursuers in condescendence (3) where they state, "the urn, which was at least 2 feet in height, when filled with hot tea was a heavy load, and difficult to carry not only because of its weight but owing to the risk of some of the hot liquid coming in contact with the hand of a person carrying it and so causing him to drop his side of the urn. It is believed and averred that this occurred on the occasion of the accident. The carrying of the said urn with its contents through said shop created a serious danger particularly when being carried as it was through a narrow passage near a crowd of persons including many children. … The said accident was the natural and probable result of the defenders' permitting the said urn to be brought on to their premises in the circumstances condescended on, and of their failure to protect the said children therefrom." The pursuers averred that, for a long time, the defenders had allowed and encouraged picnic parties to bring their urns and food into the tea rooms. It is not now disputed that the present occasion was the first one on which that had occurred. It is also proved, by their own evidence, that the urn in question is about 16 inches high, with an external over-all width of about 18 inches, that its capacity is over 9 gallons, that it is of an ordinary type, and that, if carried carefully, it involves no danger. On the evidence, it appears that, at the time of the accident, the urn was, at the most, not more than two-thirds full.

On a careful consideration of the opinions in the Courts below, it appears to me to be accepted by the parties and by all the learned judges that there rested on Mrs Alexander, as representing the appellants, a duty to take reasonable care for the safety of the children who had come on to the premises to purchase sweets and ices. There was, however, a serious difference between the three learned judges who formed the majority in the First Division, on the one hand, and the Lord President and the Lord Ordinary, on the

other hand, as to the standard of care which the circumstances imposed on Mrs Alexander. I shall state the test by which, in my opinion, the standard of care is to be judged, and this I will do by two quotations from the recent decision of this House in the Scottish case of *Bourhill v. Young* [1943] AC 92 . I take from my own opinion (at p. 83), that the duty is to take "such reasonable care as will avoid the risk of injury to such persons as he [in that case a motorcyclist] can reasonably foresee might be injured by failure to exercise such reasonable care," and from the opinion of my noble and learned friend Lord Macmillan (at p. 88):

> "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."

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. I am unable to agree with Lord Carmont (1942 S. C. at p. 140) that the appellants could be made liable "even if it were proved that the actual damage to the invitees happened through the tea-urn being spilt in a way that could not reasonably have been anticipated." Further, this is essentially a jury question, and, in cases such as the present one, it is the duty of the Court to approach the question as if it were a jury, and a Court of Appeal should be slow to interfere with the conclusions of the Lord Ordinary. 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 or that witnesses in the witness box are prone to express regret, *ex post facto*, that they did not take some step, which it is now realized would definitely have prevented the accident. In my opinion, the learned judges of the majority have made far too much of that which Lord Moncrieff (at p. 134) regarded as an admission by Mrs Alexander. It is not an admission in the sense that it can bind the appellants, though it may be of some evidential value as to what the ordinary person would regard as a reasonable standard of care. For myself, I regard it of little value, in view of what I have said above, in assisting the Court to form its conclusion, as a jury, as to the reasonable standard

of care. I also am of opinion that Lord Moncrieff is not justified in regarding the event as demonstrating the risk, and that, in particular, because there is no evidence as to why M'Donald let go his handle—but I will deal with this aspect of the case later—in other words, what event it was that caused the accident.

The ground of the majority judges, as I understand it, is that Mrs Alexander, while authorizing the transport of the tea-urn through the entrance passage where the sweets and ices were being sold to a large number of children, omitted to remove the children altogether from the passageway so as to avoid a danger which should have been obvious to her. In my opinion, this is to turn Mrs Alexander into something like an insurer against any risk of danger from the tea-urn. On the evidence, it is established, as I have already stated, that, if carefully carried, there was no element of danger to be reasonably anticipated from the operation of carrying the urn. Differing from Lord Carmont, I am clearly of opinion that the standard of care owed by the two persons in charge of the urn to the children was at least as high as that owed by Mrs Alexander. They were even more cognizant than Mrs Alexander of the position in the passageway when they entered it with the urn. Mrs Alexander knew nothing that they did not know, and the point taken by Lord Carmont that they had no authority to make the children stand aside appears to me to be immaterial, as, on failure of the children to stand aside, they had only to ask Mrs Alexander to attend to it, and to put down the urn until sufficient space was cleared, but, on the evidence of the pursuers' witness Taylor, they did ask the children to stand aside and the children had cleared sufficient space to enable him to get comfortably past them. There is no evidence that it was any want of care on the part of M'Donald that caused the accident, or that the children hustled him and caused him to let go.

There may have been some cause, such as a physical failure on M'Donald's part, which he—and still less Mrs Alexander—could not possibly have foreseen. I am not prepared to find that the careful carriage of the tea-urn past the dozen or so of children in the wider end of the passage involved such an obvious danger as would have been foreseen as a natural and probable consequence of such carriage by an ordinary reasonable person which would lead him to clear the children out of the passage, but, further, let me make it quite clear that, even on the contrary view, I would hold that the respondents must fail here as they have not proved what the event was that caused the accident. If the truth were that the accident was caused by some unexpected physical failure on M'Donald's part, it is not enough for the pursuers to say that, if the children had been removed, the accident could not have happened. That would be to make Mrs Alexander, on behalf of the appellants, an insurer. Though I have expressed the tests of the standard of duty in my own way, I agree substantially with the opinions of the Lord President and Lord Robertson. It follows that the appeal should be allowed, that the interlocutors of the First Division should be recalled, and that the interlocutor of the Lord Ordinary dated 6th June 1941 should be restored. The appellants should have the costs of this appeal and their expenses in the Inner House. I move accordingly.

LORD MACMILLAN .—The degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life. It is, no doubt, true that in every act which an individual performs there is present a potentiality of injury to others. All things are possible, and, indeed, it has become proverbial that the unexpected always happens, but, while the precept *alterum non lædere*requires us to abstain from intentionally injuring others, it does not impose liability for every injury which our conduct may occasion. In Scotland, at any rate, it has never been a maxim of the law that a man acts at his peril. Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation. "The duty to take care," as I essayed to formulate it in *Bourhill v. Young*, "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." This, in my opinion, expresses the law of Scotland, and I apprehend that it is also the law of England. The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.

With these considerations in mind I turn to the facts of the occurrence on which your Lordships have to adjudicate. Up to a point the facts have been sufficiently ascertained. They have been recounted by my noble and learned friend, Lord Thankerton. The question, as I see it, is whether Mrs Alexander, when she was asked to allow a tea-urn to be brought into the premises under her charge, ought to have had in mind that it would require to be carried through a narrow passage in which there were a number of children, and that there would be a risk of the contents of the urn being spilt and scalding some of the children. If, as a reasonable person, she ought to have had these considerations in mind, was it her duty to require that she should be informed of the arrival of the urn, and, before allowing it to be carried through the narrow passage, to clear all the children out of it in case they might be splashed with scalding water? The urn

was an ordinary medium-sized cylindrical vessel of about fifteen inches diameter and about sixteen inches in height made of light sheet metal with a fitting lid, which was closed. It had a handle at each side. Its capacity was about nine gallons, but it was only a third or a half full. It was not in itself an inherently dangerous thing and could be carried quite safely and easily by two persons exercising ordinary care. A caterer, called as a witness on behalf of the pursuers, who had large experience of the use of such urns, said that he had never had a mishap with an urn while it was being carried. The urn was in charge of two responsible persons, M'Donald, the church officer, and the lad, Taylor, who carried it between them. When they entered the passage way they called out to the children there congregated to keep out of the way, and the children drew back to let them pass. Taylor, who held the front handle, had safely passed the children, when, for some unexplained reason, M'Donald loosened hold of the other handle, the urn tilted over, and some of its contents were spilt, scalding several of the children who were standing by. The urn was not upset, but came to the ground on its base.

In my opinion, Mrs Alexander had no reason to anticipate that such an event would happen as a consequence of granting permission for a tea-urn to be carried through the passage way where the children were congregated, and, consequently, there was no duty incumbent on her to take precautions against the occurrence of such an event. I think that she was entitled to assume that the urn would be in charge of responsible persons (as it was) who would have regard for the safety of the children in the passage (as they did have regard), and that the urn would be carried with ordinary care, in which case its transit would occasion no danger to bystanders. The pursuers have left quite unexplained the actual cause of the accident. The immediate cause was not the carrying of the urn through the passage, but M'Donald's losing grip of his handle. How he came to do so is entirely a matter of speculation. He may have stumbled, or he may have suffered a temporary muscular failure. We do not know, and the pursuers have not chosen to enlighten us by calling M'Donald as a witness. Yet it is argued that Mrs Alexander ought to have foreseen the possibility, nay, the reasonable probability of an occurrence the nature of which is unascertained. Suppose that M'Donald let go his handle through carelessness. Was Mrs Alexander bound to foresee this as reasonably probable and to take precautions against the possible consequences? I do not think so. The only ground on which the view of the majority of the learned judges of the First Division can be justified is that Mrs Alexander ought to have foreseen that some accidental injury might happen to the children in the passage if she allowed an urn containing hot tea to be carried through the passage, and ought, therefore, to have cleared out the children entirely during its transit, which Lord Moncrieff describes as "the only effective step." With all respect, I think that this would impose on Mrs Alexander a degree of care higher than the law exacts.

There is a passage in Mrs Alexander's evidence on which reliance is placed by Lord Moncrieff (1942 S. C. at p. 134) and Lord Carmont (at p. 139) as tantamount to an admission on her part of a failure of duty, but the answers which she gave with creditable candour to the leading questions of cross-examining counsel are, in my opinion, quite natural expressions on her part of wisdom after the distressing event. She says that, if she had been told of the arrival of the men with the urn, as she expected she would be, she "certainly would have got them [the children] away from the entrance at the doorway." That is just what M'Donald and Taylor evidently did. I do not think that Mrs Alexander's evidence amounts to an admission of negligence on her part, and, in any case, it is not an admission binding on the defenders. No special point arises from the circumstance that the injured children were invitees on the defenders' premises. They were entitled to rely on not being exposed while on the premises to any risk occasioned by the negligence of the defenders or their servants. As, in my opinion, no negligence has been established, I agree with what I understand to be the view of all your Lordships that the appeal should be allowed, and the judgment of the Lord Ordinary restored.

LORD WRIGHT (read by Lord Clauson).—It is impossible not to feel a desire that the children, by or on behalf of whom these proceedings have been taken, should be compensated for the injuries sustained by them. It is true that the accident could not have occurred but for the action of Mrs Alexander, the

appellants' manageress, in giving permission that the tea-urn should be carried through the short but narrow passage in which the children, about a dozen in number, were waiting as customers at the appellants' sweet counter to buy ices or sweets, but, to establish liability, the Court has to be satisfied that the appellants owed a duty to the children, that that duty was broken, and that the children were injured in consequence of the breach.

That the appellants owed a duty to the children is not open to question. Your Lordships are not, therefore, on this occasion exercised by the problem which was presented recently in *Bourhill v. Young*, which was whether the person injured came within the limits of foreseeable harm from the dangerous acts complained of. Here the children were on the appellants' premises in full view of Mrs Alexander, the appellants' responsible servant, and were plainly liable to be injured, if the place in which they were was rendered dangerous to them by Mrs Alexander's act in consenting to the urn being carried through the place. The question thus is whether Mrs Alexander knew or ought to have known that what she was permitting involved danger to the children. The same criterion applies in this connection as applied in the kindred problem in *Bourhill's* case, that is to say, the criterion of reasonable foreseeability of danger to the children. It is not a question of what Mrs Alexander actually foresaw, but what the hypothetical reasonable person in Mrs Alexander's situation would have foreseen. The test is what she ought to have foreseen. I may quote again as in *Bourhill's* case Lord Atkin's words in *Donoghue v. Stevenson* :

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

On this occasion the children were "the neighbours." The act or omission to be avoided was creating a new danger in the premises by allowing the church party to transport the urn. If that issue is decided against the appellants, they must be held responsible in the action.

The issue can be stated on the general principles of the law of negligence without any reference to the special rules relating to the position of those who come as invitees upon premises. The children were clearly invitees within the rules laid down in *Indermaur v. Dames*, because they were customers at the appellants' shop, but that authority does no more than lay down a special subhead of the general doctrine of negligence. Indeed, in *Heaven v. Pender* Lord Esher, M.R., would have decided the case simply on the general principles of negligence. He anticipated the language used in *Donoghue v. Stevenson* when he enunciated the principle:

> "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

This is a wider rule than that laid down in *Indermaur v. Dames* and places the duty on a wider basis than is there postulated. The duty in *Indermaur's* case is limited to occupiers, or persons in control, of "premises," a wider term which embraces places and structures of all sorts on which persons may be invited to come, and has reference to the safe condition of these premises from the standpoint of the invitees. Many cases have been decided on "invitation," and many sub-rules and distinctions have been evolved, as, for instance, in *Robert Addie & Sons (Collieries), Ld. v. Dumbreck*, with which may be contrasted *Excelsior Wire Rope Co., Ld. v. Callan*, which the House, ignoring problems of the rule of invitation (indeed, there was there no "invitation") decided on the short and simple ground stated by Lord Buckmaster (at p. 410):

> "It was therefore well known to the appellants that when this machine was going to start it

was extremely likely that children would be there and, with the wire in motion, would be exposed to grave danger."

This decision was based on the same principle as that stated by Lord Esher and Lord Atkin in the passages I have quoted. The House did not consider whether the appellants there were occupiers or whether the children were invitees (that is persons who came on the premises on business of mutual concern to them and the appellants) or bare licensees or trespassers. It was enough that a danger to the children was created by the act of the appellants in that case and that they either knew or ought to have known of the danger. That simple principle is enough to decide the present appeal, subject to the question of fact whether there was the creation of an obvious danger. The complications which have centred round the doctrine of invitation are absent in this case. I do not ignore or dispute that the simple principle, like other simple principles, may be subject to many qualifications which have limited, or, perhaps, sometimes obscured, its correct application, or that the principle may have come into real or apparent conflict with prevalent rules in other spheres of law. It may be possible to put the principle of negligence in a nutshell, but difficult to keep it there, but all this may, I think, be disregarded in deciding the present appeal.

Before dealing with the facts, I may observe that in cases of "invitation" the duty has most commonly reference to the structural condition of the premises, but it may clearly apply to the use which the occupier (or whoever has control so far as material) of the premises permits a third party to make of the premises. Thus, the occupier of a theatre may permit an independent company to give performances, or the person holding a fair may grant concessions to others to conduct side shows or subsidiary entertainments, which may, in fact, involve damage to persons attending the theatre or fair, and in such and similar cases the same test of reasonable foreseeability of danger may operate to impose liability on the person authorizing what is done. The immediate cause of damage in such cases is generally the action of third parties who are neither servants nor agents of the defendant, but are mere licensees or concessionaires for whose acts as such the defendants are not directly liable. If the occupiers are held liable for what is done, it is because they are in law responsible in proper cases at an earlier stage because of the permission which they gave for the use of their premises. This is the cause of action against them. Thus, in the present case the appellants are not primarily concerned with the manner in which the members of the church party carried the urn as they would have been if these members had been servants or agents. The two men were mere licensees in the matter. The appellants were not directly responsible for their acts. If they are to be held responsible, it must be because, by the permission which Mrs Alexander, their manageress, gave to the members of the church party, they created an unusual danger affecting the invitees, in particular, the children. The breach of duty (if any) may thus be stated to have been that in granting the permission they did not use reasonable foresight to guard the children from unusual danger arising from the condition or use of the premises. If the tea-urn had been upset by the negligence of the appellants' servants, the appellants would have been liable in negligence. Whether or not they would have been liable as invitors in the alternative would depend on other considerations. The cause of action in invitation is different, because it depends primarily, not on what actually happened (except in the sense that what actually happened would be essential to complete the cause of action by showing damage), but on whether the invitor (it is convenient to use the word) knew or ought to have known that the invitee was being exposed to unusual danger. Where the unusual danger was due to structural defects, the question can be stated to be whether the invitor knew or ought to have known of the defects. In a case like the present the question is whether it can be said of Mrs Alexander that she either knew or ought to have known that the children would be exposed to unusual danger by reason of the uses to which the premises were put by her permission for the tea-urn to be carried into and down the passage. It is not, of course, a question of what she actually thought at the moment but what the hypothetical reasonable person would have foreseen. That is the standard to determine the scope of her duty. This involves the question: Was the operation of carrying the tea-urn something which a reasonable person in Mrs Alexander's position should have realised would render the place in which it was

performed dangerous to the children in the circumstances? This is the crucial issue of fact and the acid test of liability. On this crucial issue I agree with the Lord President. He said (1942 S. C. at p. 145):

> "I find myself unable to assent to the proposition that anything was authorised by the defenders or their servant in this case which obviously involved a danger which could not be avoided by the care of the men who carried the urn. The respondents [*i.e.*, the defenders] were not bound to take precautions against dangers which were not apparent to persons of ordinary intelligence and prudence."

A distinction has been drawn in some cases between things intrinsically dangerous or dangerous *per se* and other things which are not dangerous in the absence of negligence. The correctness or value of that distinction has been doubted by eminent judges. I think, however, that there is a real and practical distinction between the two categories. Some things are obviously and necessarily dangerous unless the danger is removed by appropriate precautions. These are things dangerous *per se*. Other things are only dangerous if there is negligence. It is only in that contingency that they can cause danger. Thus, to introduce, not a tea-urn, but a savage animal, such as a lion or a tiger, into the passage way would have been of the former class. Another illustration of the same class may be afforded by the performance in a circus on the flying trapeze. The occupier who permits such a performance owes a duty to the members of the audience to protect them by sufficient netting or otherwise against the obvious risk of the performer missing his hold. The present case, however, in my opinion, falls under the other category. It was not, in my opinion, *per se* dangerous. I do not think that the safe carriage of the tea-urn presented any reasonably foreseeable difficulty. The urn was about sixteen inches high and about fifteen inches in diameter. It was a cylinder of metal about one eighth of an inch thick with a lid which was in position. It weighed at most about one hundred pounds with the quantity of tea it contained. The handles for carrying it were about eighteen inches apart. Two men should have had no difficulty in carrying it safely, even if one had to go in front and one behind because of the narrow space, as the men actually did. There is no explanation of how the accident happened. At the moment when one side of the urn was dropped, M'Donald was at the handle at the back which he dropped, Taylor being at the front. It might have been easier for the two men to carry the urn side by side, but, having regard to its size and the closeness of the two handles to each other, I cannot see any difficulty in carrying it as the two men were doing. M'Donald was not called. It is left to pure conjecture how he came to lose hold of the handle. It may have been a momentary physical faintness or a sudden stumble. Perhaps some hot tea may have splashed on his hand, but that is not likely with the urn only about half full and the lid on even if not screwed down. There is no evidence and no probability that children pushed against him and caused him to lose his grip. Any defect in the floor is excluded. There seem to be only two possible alternatives, either a mere accident or negligence. In my opinion, neither hypothesis could impose liability on the appellants. As to negligence, the two men were not their servants. They were not responsible for their acts. That the men should be negligent in so simple an operation was not likely to happen. It was a mere possibility, not a reasonable probability. The men, if negligent, were, no doubt, responsible for their own negligence, but from the standpoint of the appellants the risk of negligence was a mere unlikely accident which no reasonable person in Mrs Alexander's position could naturally be expected to foresee. The same is true of an accidental slip or loss of grip. To hold the appellants liable on either basis would be to make them insurers, which under the authorities they are not. In my opinion, no breach of duty or negligence by the appellants to the respondents has been established.

Notwithstanding the number of cases dealing with invitation it is not easy to find authorities covering the exact circumstances of the present case, but *Cox v. Coulson* is an illustration of a danger created by a licensee or concessionaire. The trouble arose, not from any structural defect in the premises, but from the use of the premises made by licensees under a permission or licence given by the defendants. The premises were a theatre and the plaintiff was a member of the audience who had bought a ticket. The position, therefore, depended on the express or implied terms of the contract. These might impose either

a greater or a less burden on the contractor than the general law of invitation or of negligence imposes on the invitor. In *Cox v. Coulson* the Court of Appeal treated the terms to be implied in the contract as in substance imposing a duty identical with that between invitor and invitee. The performers were an independent theatrical company not in the employment of the occupiers of the theatre. The Court of Appeal held that the relationship of the parties raised the same duty as that between invitor and invitee. Bankes, L.J., said (at p. 191):

> "It seems to me obvious that the duty of the invitor in a case like the present is not only confined to the state of the premises, using that expression as extending to the structure merely. The duty must to some extent extend to the performance given in the structure, because the performance may be of such a kind as to render the structure an unsafe place to be in whilst the performance is going on, or it may be of such a kind as to render the structure unsafe unless some obvious precaution is taken."

As an instance of the latter, the Lord Justice instanced the case of a tight rope dancer. There the obvious precaution which must be taken is the provision of a net, in the absence of which the premises could not be said to be reasonably safe, but the Court emphasized that the occupier does not warrant the security of the premises nor does he warrant that there shall be no negligence or want of skill on the part of the persons to whom he grants the licence or concession to use the premises in the particular manner.

In the present case, as I have stated, as the permitted operation was intrinsically innocuous, I do not think any obligation rested on Mrs Alexander to attempt to supervise how it was carried out. As a reasonable person, not having any ground for anticipating harm, she was entitled to go on with her proper work and leave the church party to do what was proper. There might, of course, be circumstances in which, because there was an obvious risk, a duty might rest on the occupier to supervise the actual conducting of the operation if the permission was given. I do not see what Mrs Alexander could have done in that respect unless she had seen that all the children were removed from the passage when the urn was being carried through. That might be her obligation if the operation she permitted had been intrinsically dangerous, but it was not so in the circumstances as I apprehend them. No doubt, some difficult questions of fact may arise in these cases. In the present case, however, as I think that there was no reasonably foreseeable danger to the children from the use of the premises which the appellants permitted to be made, I think the respondents' claim cannot be supported. In my judgment the appeal should be allowed.

LORD ROMER (read by Lord Thankerton).—The question to be decided on this appeal is whether the accident that befell the children on 15th June 1940 was due to a breach of a duty owed to them by the appellants. That there was such a duty is not and cannot be denied. For the children were present in the place where the accident occurred as the appellants' invitees. Nor can there be any serious doubt as to what the nature of that duty was. It was the duty to take through their agents and employees all proper precautions to ensure that the children, while on the premises of the appellants, should not be subjected to any unusual risk that would have been within the contemplation of any reasonable person. If any such risk had materialized and caused damage to the children or any of them, the appellants would undoubtedly have been liable. Had it, for instance, been proved that the accident was due to the jostling of M'Donald by the children as the urn was being carried to the tea rooms along the passage where the children were, or to M'Donald tripping over some irregularity in the floor of the passage of which Mrs Alexander, the manageress of the tea rooms, knew or ought to have known, the appellants would properly have been held liable for the damage sustained by the children. The risk of these things happening should have been within the contemplation of Mrs Alexander; but, unfortunately for the respondents they failed to show how it came about that M'Donald lost control over the urn. It being thus unknown what was the particular risk that materialized, it is impossible to decide whether it was or was not one that should have been within the reasonable contemplation of Mrs Alexander or of some other agent or employee of the appellants, and it is, accordingly, also impossible to fix the appellants with

liability for the damage that the children sustained. For, with all respect to Lord Carmont, I am unable to agree with the opinion that he expressed (1942 S. C. at p. 140) to the effect that, if it were the duty of the appellants to see that the children were not in the passage way in order to prevent the children being subjected to a risk that should have been within the contemplation of the appellants, "there would be no escape from liability even if it were proved that the actual damage to the invitees happened through the tea-urn being spilt in a way that could not reasonably have been anticipated." I cannot think, for instance, that, if the accident had been occasioned by a portion of the ceiling falling down on M'Donald owing to a defect in it of which they neither knew nor ought to have known, the appellants could have been made liable, even if it had been their duty (and I see no reason to suppose that it was) to remove the children altogether from the passage to avoid the risk of Taylor and M'Donald being jostled as they carried the urn along. In such a case the breach of this last-mentioned duty would not have been the cause of the accident to the children. It might have been a *causa sine qua non*. It certainly would not have been the *causa causans*. In my opinion, the appellants can only be fixed with liability if it can be shown that there materialized a risk that ought to have been within the appellants' reasonable contemplation. As this has not been shown, the appeal should, in my opinion, be allowed.

LORD CLAUSON .—The crucial question in this matter appears to me to be whether Mrs Alexander ought as a reasonable woman 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. For myself, I find it quite impossible to answer this question in the affirmative. I appreciate that to some minds it would appear proper to answer this question in the affirmative, but those to whom it so appears would, in my humble judgment, be applying a standard of foresight not to be expected, in the world as it stands, in the ordinary reasonable man. I, accordingly, find myself unable to do otherwise than concur with my noble friends whose opinions have already been delivered in advising your Lordships that this appeal ought to be allowed, and that the judgment of the Lord Ordinary ought to be restored.

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