High Court Finds on Appeal for Nightclub Following Slipping Accident

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The appeal decision of Julian Knowles J in *Après Lounge Limited v Wade* [2023] EWHC 190 (KB) (judgment here) provides a useful reminder that the courts must not impose a counsel of perfection on defendants, who are required only to exercise reasonable care.

The First-Instance Decision

The Claimant brought a claim against the Defendant for injuries sustained when she slipped on some liquid (almost certainly a spilt drink) on the wooden floor of the Defendant's bar as she was getting ready to leave the premises at about 12:30 am on 16 June 2019.

The Claimant brought her claim in negligence and under s. 2 of the Occupiers' Liability Act 1957 ('1957 Act'), alleging amongst other things, a failure by the Defendant to "*devise, institute and/or maintain any or any adequate*" regime for the inspection of the floor.

It was alleged that the circumstances of the accident gave rise to a *prima facie* case of negligence against the Defendant, thus placing an evidential burden on the Defendant to show that it had in place a proper and adequate system. For a review of the legal framework and the circumstances in which such an evidential burden can arise see Thomas Herbert's blog *Slipping Claims and Evidential Burdens*, which can be found here.

Evidence was given on behalf of the Defendant by the nightclub's assistant manager, Ms Osborne, who explained the Defendant's system for keeping the floor clear of spillages; namely a manager, a supervisor and two additional members of staff continually walking around the nightclub looking for spillages and safety issues. Although no set intervals for inspection were identified, it was estimated that each area in the nightclub was checked *at least* every 10 to 15 minutes by reason of the continual walking.

The staff who were said to have been implementing the system on the night of the Claimant's accident were not called to give evidence. Furthermore, there was no evidence as to how long the spillage had been present for prior to the accident.

The trial judge found that the liquid represented a danger and that the Claimant had made out a *prima facie* case of negligence. He therefore went on to consider whether the Defendant had displaced that *prima facie* case.

The trial judge found as a fact that the system described by Ms Osborne was being operated by the Defendant on the

night in question. Nonetheless he went on to find that the Defendant had breached its duty under s. 2 of the 1957 Act.

Grounds of Appeal

The four grounds of appeal on which permission was granted were as follows:

- Ground 1: the trial judge was wrong in law to find that checking the floor every 10-15 minutes was not sufficient to discharge the duty of care owed to the Claimant, and thereby misapplied the 1957 Act.

- Ground 2: the trial judge wrongly imposed an unreasonably high burden upon the Defendant and thereby erred in law.

- Ground 4: the trial judge failed to state what system, in his judgment, the Defendant ought to have been operating, and how this system, if operating, would have prevented the Claimant's fall, on the balance of probabilities.

- Ground 5: it was unjust for the trial judge to find that the system the Defendant was operating at the material time was not sufficient in circumstances where: (a) it was not argued before him that more frequent inspections were reasonably required; and (b) the trial judge did not invite the Defendant to address him on this point.

Julian Knowles J allowed the appeal on grounds 1 and 2, rejected ground 4 and did not decide ground 5.

Grounds 1 and 2

Julian Knowles J found at [35] that:

the Judge fell into error when he held that the Defendant's system of inspection, as described by Ms Osborne, had not been reasonable in all the circumstances to keep the Claimant reasonably safe, as required by s 2(2) of the 1957 Act.

In relation to the Defendant's system, Julian Knowles J found the judge had erred in his factual finding and held at [54]

that:

the evidence established that the Defendant's system had been one of continuous monitoring by continual walking, with the result that every area was checked at least every 10 to 15 minutes, as staff carried out their inspections. That is not the same as that which the judge found. I think the judge erred, in the sentence with Mr Hill identified, when he said the system of inspection was every 10 to 15 minutes. Every area would have been checked at least with that frequency, but there was continuous monitoring. No doubt if the staff, as they carried out their continuous walking checks in what was a reasonably compact bar, saw a drink being spilt, they would have reacted straight away to deal with it in accordance with their training.

As to the reasonableness of this system established by the evidence, Julian Knowles J held at [52]:

Turning to the present case, here – unlike I think in Ward *and* Dawkins *– there was direct and detailed evidence of the system which was being operated in the bar that night. Having regard to the realities of running a late night bar, the system of floor inspections by several members of staff as described by Ms Osborne – and which the judge accepted was being done - was sufficient to fulfil the statutory duty lying upon the Defendant. Its system was proactive and not reactive. It was one of continuous monitoring.*

Julian Knowles J further stated that the too-high standard imposed by the judge amounted to a counsel of perfection. He found at [55] that:

a system which in the judge's view would have complied with s 2(2), would effectively have placed the Defendant under a duty to have had in place a system of continuous surveillance and monitoring, so that no spilt drink could ever be present on the floor at all … It would, for example, have required many more members of staff, with each person simultaneously being responsible for the continuous monitoring of separate patches of floor (eg, one square meter each across the two floors, as well as in the garden and on the stairs) and instantaneously reacting to spilt drinks. That, I consider, would have gone far beyond that which was required by s 2(2) of the 1957 Act and its doubly qualified duty.

Ground 4

In respect of ground 4, the Defendant's argument was that the decision in *Laverton v Kiapasha* [2002] EWCA Civ 1656 at [20] made it incumbent on the judge to consider causation and that, in failing to consider whether any other system would have made a difference, the judge obviated the need for the Claimant to prove causation. Julian Knowles J disagreed that *Laverton* was authority for such a proposition.

Julian Knowles J confirmed that it is always for a claimant to prove causation but went on to state at [69]:

I do not consider that the judge was required to conjure up for himself a different inspection regime that he thought would theoretically have satisfied s 2(2), and then asked himself whether, on that basis, the Claimant could still prove causation on the basis it would have prevented the accident.

Julian Knowles J observed that in this case "*causation was not seriously in issue".* The principal issue was whether the Defendant could evidence that it had taken reasonable care, thus negating the Claimant's *prima facie* case on negligence. Julian Knowles J went on to state at [69]:

It was not the Defendant's case, for example, that the Claimant could have still slipped even if it had had the sort of continuous monitoring I described earlier (for example) … If it had *set up a* Ward *causation defence then the judge would no doubt have had to have addressed it.*

Comment

This appeal decision is a useful refresher on the correct approach to the doubly qualified duty of reasonableness in the 1957 Act. Helpfully, Julian Knowles J's judgment at [36]-[51] provides a summary of pertinent decisions on the question of what constitutes a reasonable system in the context of slipping accident claims, which merits reading by practitioners working in this area.

Likely noteworthy for practitioners is the trial judge's finding that the Defendant's system was implemented at the material time, having only heard evidence from Ms Osborne. None of the staff members responsible for operating the system on the night in question gave evidence at trial. The evidence was nevertheless sufficient in the judge's mind to discharge the evidential burden on the Defendant to show that it had implemented a reasonable system of care.

At first blush, this finding is at odds with the seemingly clear conclusion of Pill LJ in *Dawkins v Carnival plc* [2011] EWCA Civ 1237 at [28] that:

in the absence of evidence from members of staff claimed to be implementing the system, the judge was not entitled to infer from the existence of a system that the spillage which led to the fall occurred only a few seconds, or a very short time, before the accident.

However, Ms Osborne was at work on the night in question and therefore was able to give evidence as to the system was being implemented, despite not being one of the employees who implemented it. In the writers' view, therefore, some direct evidence from defendants as to the implementation of their reasonable system is likely to still be required to discharge the evidential burden however, that evidence need not to come from the person or persons who actually implemented the system at the relevant time.