

THE HIGH COURT

[2008 No. 10310 P.]

BETWEEN

JESSICA MOORE

PLAINTIFF

AND

WESTWOOD CLUB LIMITED AND TEMPLEVILLE DEVELOPMENTS LIMITED TRADING AS BARCODE, FUSION FUN AND FORTUNE

DEFENDANTS

JUDGMENT of Mr. Justice Herbert delivered the 5TH day of February, 2014

1. In this case the evidence established, or it was admitted, that some time after 22.30 hours on the 26th/27th December 2007, the plaintiff and two female friends, having paid an admission charge of €20 were enjoying, - in the company of 900 other persons, - a convivial night out at Barcode, a nightclub located at the Westwood Club in Fairview, Dublin. Later that night the plaintiff was returning from the rest-rooms intending to rejoin a group of other young persons with whom she and her two friends were socialising. She was crossing the floor of a restaurant area and was carrying a glass in her right hand. The glass contained a ready-mixed soft drink containing alcohol known as a "WKD" alco-pop. Her right hand is her dominant hand.

2. During this journey she fell on the floor, landing on the front of her body. Her right hand containing the glass struck the ground. The glass, which was a specially designed "nonics" safety-glass designed to fragment into small pieces, like the shatter-proof windscreen of a mechanically propelled vehicle, broke on impact with the tiled floor. Unfortunately, the plaintiff's right middle finger was cut, most probably by the base which does not fragment like the remainder of the glass. There were also minor cuts to her right thumb and ring finger. The plaintiff asked a security-man who was in the restaurant area for a dressing for the wound. He considered that she required medical attention. He brought her to the security room where the wounds were cleaned and a temporary dressing applied. Despite her anxiety to return to socialising in the club, an ambulance was called by a member of the security staff. Her two female friends were contacted and they accompanied her in the ambulance to the accident and emergency department of the Mater Misericordiae University Hospital. There her wounds were cleaned and dressed. She was given the option, - it was then approximately 02.30 hours on the morning of the 27th December, 2007, - of remaining in the accident and emergency department or of travelling home and returning later that morning at 08.30 hours. She chose the latter. On returning to the hospital she came under the care of Mr. Cronin, a Consultant Plastic, Reconstructive and Hand Surgeon.

3. I am satisfied on the evidence and I find, despite the entry in the background history of the event recorded by Dr. Fergus Cummins in his medical notes, that the plaintiff was pushed to the ground, that the plaintiff in fact fell and was not pushed. Mr. Christopher O'Reilly, at the time general manager of the Restaurant and bar, produced in evidence a most impressive incident book. This book contained a sequential list of time related incidents entered as they were seen by or, were reported to him by the member of the security staff monitoring the security cameras. Mr. O'Reilly told the court that Mr. Colm Carney was the person on duty on the night of the 26th/27th December, 2007. Against the time 01.10 hours, there is an entry as follows:-

"Jessica Moore (address and telephone recorded) finger cut. Fell to the ground with glass in her hand. Claims it was an accident."

4. Ms. Niamh O'Leary-Merriman, who lived at the time very close to the plaintiff, told the court that she was with a group of her own friends in the club in the restaurant area. She saw the plaintiff going past and she tipped her on the shoulder and said "Hi". The plaintiff, she said turned and then fell forwards on her face on the floor. More importantly however, was the evidence of Mr. O'Reilly that the staffing roster showed that eighteen security-men, - in addition to sixteen bar staff, ten floor staff and seven cleaners, - were on duty in the club on the night of the 26th/27th December, 2007. Perusal of the entries in the incidents book and the evidence of Mr. O'Reilly satisfies me that the security staff were well trained, carefully positioned and vigilant and, any persons, male or female acting in an aggressive or insulting manner were immediately escorted from the premises. The evidence, particularly the evidence of the plaintiff herself, established that there was a security man in the restaurant area very close to where she fell. I am satisfied that had the plaintiff been, "pushed to the ground", cutting her hand and losing her drink as a consequence there would have been a noisy disturbance which could not but have attracted the attention of the nearby security man. I am satisfied that this would have been logged in the incident book and, perhaps other action taken.

5. I am satisfied on the evidence and I find, that the plaintiff did not fall or trip by reason of intoxication. If there had been any concern as to the concentration of alcohol in the plaintiff's blood on the occasion, I am confident that this would have been noted and, probably tested, by the staff of the Accident and Emergency Department of the Mater Misericordiae University Hospital. If the plaintiff had been intoxicated at the time when she fell I have no doubt but this would have been noted by the security man whom she first approached and by the other security staff in the security room where she was seated awaiting the arrival of the ambulance and would have been recorded in the incident book. In addition, the plaintiff's evidence and that of her friend Ms. Louise Lynch was that the plaintiff had taken no drink at home or at the house of Ms. Suzanne O'Neill on the 26th December, 2007. The plaintiff gave evidence that her mother was at work on the 26th December, 2007, and she had to look after her sister until her mother returned from work at 18.00 hours. I have no reason to doubt the plaintiff's evidence that prior to the incident she had drunk no more than four alco-pops, (4% alcohol content: 1.1 alcohol units). Ms. Louise Lynch gave evidence that she was drinking her fourth drink when the incident to the plaintiff occurred.

6. I am satisfied on the evidence and I find that the footwear worn by the plaintiff on the occasion did not cause her to fall or contribute in any manner to the fall. Her evidence was not challenged and I accept that she was wearing on the occasion suede ankle boots with a sole of some man-made compound, like black rubber and with a separate 2½inch block heel. The plaintiff and Ms. Niamh O'Leary-Merriman both gave evidence that at the time of the fall the plaintiff was walking, - not running, dancing, or moving excitedly or erratically in any way, - and this evidence was not challenged or discredited.

7. I find on the evidence that the floor of the restaurant area where the plaintiff fell was made up of ceramic or similar floor tiles of good slip resistant value, - R.10, rating. Ms. Flood, managing director of Templeville Limited, the owner of the Club told the court that these tiles were laid in 2000. She told the court that she had chosen these tiles for the particular location on the advice of Mr. Kevin Kelly, managing director of Tubs and Tiles and of Ms. Helen Broderick, an interior designer. These were flat rather than profiled tiles. Ms. Flood told the court that these tiles felt coarse when rubbed with the fingers. In 2004, she became concerned about the effect of wear on the tiles and a possible consequential impairment of the slip resistant value of the tiles. She contacted two companies specialising in assessing and reducing the risk of slippage on floor surfaces, - Safestride Limited and Slipstop (Ireland) Limited. In January 2005, the floor area where the plaintiff had fallen and other adjoining floor areas were treated with a product called "Slip-Stop" by the latter company. A letter dated the 19th January, 2005, from Slipstop (Ireland) Limited to Ms. Flood was produced in evidence by her which confirms this and describes the treatment as follows:-

"The SLIPSTOP anti-slip treatment has caused a chemical reaction with the floor, creating millions of microscopic "U" shaped pores, each sealed internally. The action of the foot on a treated surface displaces water/grease and the pores act like tiny suction cups preventing the foot from slipping."

This letter then continues as follows:-

"To maintain the full effect of the treatment, it is important that you do not allow a build-up of deposits in the pores. Usual sources for such deposits are: grease that has been allowed to dry on the surface, calcium from water, liquid cleaning products that leave a film on the floor, or powdered detergents, which leave a calcite film on the floor.

To avoid any build-up in the pores, simply follow the Cleaning Guidelines (enclosed) this will ensure that your floor will remain slip-resistant for a time in excess of our five year guarantee period."

8. Ms. Flood told the court that despite this five year guarantee period the relevant floor was in fact treated four times with "Slipstop" anti-slip treatment by that company between 2002 and 2010. Ms. Flood and Mr. O'Reilly gave evidence that the floor was cleaned regularly with special electric scrubbing and buffing machines using a special high quality floor cleansing liquid supplied by Shearwater Distribution Limited. Ms. Flood and Mr. O'Reilly told the court that Mr. Kevin Polly, managing director of that company and Mr. O'Reilly, had conducted a cleaning training programme for the Club staff. Mr. O'Reilly gave evidence that the floor had been cleaned in this manner on Sunday, 23rd December, 2007. He gave evidence that the Club was not open on the 24th or the 25th December, 2007. Friction tests carried out by Slipstop (Ireland) Limited after it had been treated by "Slipstop" anti-slip treatment showed that the floor rated as "good". I am satisfied that the floor in the restaurant area where the plaintiff fell, as maintained by the first defendant, provided a safe standing and walking surface for users, including the plaintiff, when dry.

9. Mr. Barry Tennyson, B.E., C.Eng. (etc.), chartered engineer, who gave expert evidence in the case for the plaintiff, told the court that under wet conditions, this floor would suffer a significant decrease in slip resistance. During the course of his evidence, Mr. Tennyson referred to a 2006 Article from the Construction Industry Research and Information Association ("C.I.R.I.A."), authors, Carpenter, Lazarus and Perkins, entitled, "Safer Surfaces to Walk On; reducing the risk of slipping", dealing with slip resistance of flat and profiled ceramic tiles in a shopping mall context. Mr. Tennyson did not have an opportunity of inspecting the particular floor on which the plaintiff fell or of carrying out roughness, friction, pendulum or other tests on that floor. His evidence was based on the fact that he had seen this particular floor on the 5th October, 2009, when he had advised the defendants in an action relating to an alleged fall on broken glass on an adjoining dance floor, and on his stated familiarity with the characteristics of micro-rough floor surfaces of this type. It was his evidence that the continued safe level of slip resistance of such a floor depended on ensuring that deposits did not build up in the pores/surface roughness valleys which hold and thereby neutralise the impact of any wetness on the floor. This is the conclusion of the authors of the 2006 C.I.R.I.A. article and is the advice given in the passages which I have cited from the letter dated the 19th January, 2007, from Slipstop (Ireland) Limited to Ms. Flood.

10. I am satisfied on the evidence of Ms. Flood and Mr. O'Reilly that there were seven cleaners on duty in the Club on the night of the 26th/27th December, 2007. The evidence established that six of these cleaners were stationed at pre-designated locations each intended to cover a particular area of the Club. The seventh cleaner moved continuously through the restaurant, bar and dance floor areas and was in radio communication with the eighteen security men. These were also tasked to look out for breakages and spillages. I am satisfied on the evidence of Mr. O'Reilly that on the night of 26th/27th December, 2007, one cleaner was stationed in the restaurant area where the plaintiff fell and two security men were assigned to patrol that area and the immediately adjoining dance floor area. The evidence established that each cleaner had ready access to a nearby cleaning station. Each cleaner was equipped with a floor mop which had a detachable and replaceable head. The cleaning stations were equipped with "wet-floor" signs, stacks of dry mop heads, drying cloths and other cleaning equipment.

11. Mr. O'Reilly gave evidence that each member of the cleaning staff received training from him and also from Mr. Kevin Polly of Shearwater Distribution Limited in cleaning and maintaining the floor and in dealing with breakages and spillages on the floor. The evidence established that the duty of the ten floor staff was to clear tables of empty bottles and glasses and return these to a cleaning station behind the bar area. They were also instructed to report any breakages or spillages in the area to a roving cleaner or to a security man. Mr. O'Reilly told the court that he had instructed the floor staff and the security staff that if they observed a breakage or spillage they should remain at the scene until the area or the roving cleaner arrived. The cleaners were instructed to sweep up any broken glass, mop up any spillage, clean the immediate and adjoining floor area and leave a bright yellow triangular hazard sign at the location until satisfied that the floor was dry. I find that this floor together with this system of care and maintenance, provided of course, that the system was in operation on the occasion, - constituted a full and effective discharge by the defendants of the duty of care owed by them to the plaintiff.

12. The plaintiff gave evidence that the floor in the restaurant area generally on the particular night was wet and slippery. She described it as being, "real messy". After she had fallen she noticed that the floor area on which she fell was wet, like water was on it, but she assumed that it was spilled drink. She also noted that there was brown colour on the floor, which she said resembled muddy water carried on shoes. In cross examination, the plaintiff said that when she felt the tip on her shoulder, she turned to her left and then immediately fell flat out and slid along the floor for a bit on her stomach. She did not notice what became of the glass she had been holding in her right hand.

13. Ms. Niamh O'Leary-Merriman told the court that a good bit of the floor in the restaurant area, but not all of it, was wet. She said that she had slipped, but not fallen on the same floor some time earlier, near enough to where the plaintiff had subsequently fallen. She saw persons spilling drink on the floor and said that one of her own friends had done so. She saw no attempt made to clean up the spillage or to dry the floor. She had tipped the plaintiff with her finger on the shoulder as the plaintiff was walking past. She said that she had employed no force at all. She recalled that a number of persons had gone to the assistance of the plaintiff after she had fallen but the plaintiff got up quickly and walked away.

14. Neither Ms. Flood nor Mr. O'Reilly were in a position to give any evidence at all to the court of the actual performance by the cleaners or other staff members of their duties on the night of the 26th/27th December, 2007. No other witnesses were called to supply this information. The plaintiff's own evidence established that at least one of the security men was present in the designated restaurant area on the occasion and, this was the person to whom she went after her fall, seeking a bandage. Mr. O'Reilly identified this security man as Mr. Pablo Sergio. He did not give evidence, nor, did the other security man who Mr. O'Reilly told the court was also on duty in the restaurant area on that night. No cleaner or member of the floor staff gave evidence. Mr. O'Reilly gave evidence that he had come on duty at 20.00 hours that night and remained present and in overall control of the club for the whole of that night. He told the court that he saw and spoke to the plaintiff after she was brought by Mr. Sergio to the security room. He had heard Mr. Sergio reporting over the radio that there was a lady in the back of the restaurant whose fingers had been cut.

15. I accept Mr. O'Reilly's evidence that the plaintiff was brought to the security room at 01.10 hours on the morning of the 27th December, 2007, and was removed to hospital by ambulance at 01.30 hours. I am satisfied that the plaintiff, Ms. Niamh O'Leary-Merriman and Ms. Louise Lynch were all mistaken in their recollections as to the time at which the plaintiff had fallen. I find however, that this does not cast a doubt on the remainder of their evidence. Mr. O'Reilly told the court that at about 01.45 hours, he inspected the location near the back of the restaurant area where he believed the plaintiff had fallen. He could not say that anyone had marked the actual place where this had occurred. He found the area clean, dry and glass free. He assumed that the area had been cleaned and any glass removed by the cleaners. He did not recall if he had made any inquiry as to who had carried out the work. He produced in evidence a statement which he had personally written and signed at the time.

16. I find on the balance of probabilities that the cleaning and maintenance system so carefully set up by the defendants failed to operate effectively on the night of the 26th/27th December, 2007. Ms. Flood told the court that the maximum number of persons permitted on the premises was 1,300. Mr. O'Reilly gave evidence that, as counted by a "clicker" machine, there were 900 persons on the premises on the night of the 26th/27th December, 2007. I believe that the description given by the plaintiff furnishes an accurate picture of the pressure on staff and services on that night. She said, "the place was crowded all over with people. There was a long queue to get in, a long queue at the bar and a long queue at the ladies toilet". Whether the cleaning and maintenance system failed under this pressure or for some other reason, I cannot ascertain. However, there was no evidence at all as to how or how well it operated on the relevant night and no evidence to gainsay the evidence of the plaintiff and Ms. Niamh O'Leary-Merriman as to the condition of the floor in the restaurant area at and before the time the plaintiff fell. I find that the valleys in the micro-rough surface of the floor tiles that held liquid and, therefore, controlled slipping, in the area where the plaintiff fell, had become filled and blocked by a build-up of particles of matter or precipitates from fluids or contaminated water permitted to lie and be trodden about on and into the surface of the floor. This, I am satisfied, had the effect of compromising the slip resistance of the floor in this area. I find the plaintiff's reference in her evidence to noting a brown colour on the floor where she fell to be most significant in this regard. Perhaps indeed, this was muddy water as she surmised. The fact that the plaintiff had turned to her left, - the movement she mimed in the witness box was pivoting her upper body to the left at hip level, - most probably meant that both her feet were no longer planted evenly on the ground, with probably greater weight being transferred to her left foot may well, in combination with the impairment of the slip resistance of the floor in that area have contributed to her fall. This could not amount to contributory negligence on her part or to a failure, under the statute, to take reasonable care for her own safety. I find therefore that the defendants, in the circumstances, were guilty of a breach of the duty of care owed by them to the plaintiff.

17. Three medical reports were admitted into evidence, - Mr. John McInerney, 22nd April, 2008; Mr. Kevin Cronin, 19th December, 2008, and the 17th February, 2012.

18. Mr. McInerney and Mr. Cronin were agreed that the plaintiff suffered a division of the flexor digitorum profundus tendon and of a digital nerve of the middle finger of her dominant right hand and an injury to the nail of that finger. She also suffered a laceration of her right thumb and right ring finger, but without deep damage. An x-ray of the hand was normal. The damage to her right middle finger was repaired under general anaesthesia. She was hospitalised for two days and then discharged home with a splint to the right hand which she wore for six weeks. She had several sessions of hand physiotherapy.

19. On the 22nd April, 2008, (four months post incident), Mr. McInerney noted on clinical examination that the plaintiff had a 2cm pink scar running from the right middle distal interphalangeal joint into the distal pulp with paraesthesia around the scar and hypersensitivity with a thickening of the flexor sheath. He noted a loss of five degrees extension and flexion of the distal interphalangeal joint and also a reduction in grip strength as compared with the left hand. The plaintiff had a 1cm pink scar on the pulp of her right thumb and a scar of similar size and colour in the distal interphalangeal joint area of her right middle finger with a ridged proximal nail with 3 holes. Mr. McInerney considered that the scars would fade to pale scars over a period of eighteen months. He considered that the plaintiff would have permanent flexor sheath thickening and some restriction of movement. He advised that there was no risk of osteoarthritis.

20. On the 19th December, 2008, (one year post incident), Mr. Kevin Cronin, who examined the plaintiff at the request of her solicitors, noted on clinical examination that she had a well healed scar at the tip of her right middle finger and a minor scar on her ring finger. He found that she lacked ten degrees of full extension at the distal interphalangeal joint of her right middle finger. Mr. Cronin stated that this was of no clinical significance. He found that the plaintiff had good sensation in the distribution of the radial nerve, but abnormal sensation in the distribution of the ulnar digital nerve. He considered that the plaintiff had made an excellent recovery and had an excellent range of motion and a very good recovery of sensation in the right middle finger. He considered that she was likely to have ongoing difficulty with shooting pain due to neuroma formation at the nerve repair site. He considered that the cold intolerance which she was experiencing in the tip of the finger would improve slowly over time as would the subjective feeling of numbness in the finger tip.

21. The plaintiff was most recently reviewed by Mr. Cronin on the 17th February, 2012, (four years and two months post incident). He noted on clinical examination that she now had objectively regained a full range of movement in her right middle finger and an excellent recovery of sensation in that finger. Though the right middle finger sat more flexed than the others, he was satisfied that the plaintiff could correct this actively at will. Subjectively the plaintiff remained troubled by cold intolerance which she stated was her principal problem. She complained of shooting pain when she tapped the top of her right middle finger on some hard object and experienced numbness and dysaesthesia in the same finger tip. She also complained of a diminished range of motion in her right middle finger due to an abnormal flexion of that finger which she claimed would not straighten like the other fingers. Mr. Cronin considered that the altered sensation in the tip of her right middle finger was likely to be permanent.

22. The plaintiff in evidence claimed that she could not straighten her right middle finger fully and that it looked curved compared to the other fingers of that hand. I am satisfied on the evidence that she can in fact straighten the finger fully, but keeps it in a slightly inwardly curved position. There is no objective basis for this. She gave evidence that she could not quite touch the palm of her right hand with the tip of her right middle finger. It is unnecessary to determine whether or not there is some objective reason for this. The gap is so infinitesimal that it could cause no possible functional or cosmetic impairment. This slightly curved profile of the right middle

finger and the fact that the tip of the finger cannot touch the palm of her right hand are not observable, and certainly not a conversation distance, unless attention is specifically drawn to them. I am satisfied that they represent no cosmetic blemish. There are very faint white linear marks on her right middle finger and the nail of that finger, though entirely intact and undeformed, is slightly discoloured in places and the surface of the nail is not as smooth and even as the nails on the other fingers of her right hand. These are not cosmetic blemishes at conversation distance, but I accept that the nail damage, however minor, could well be something of which a young woman might be somewhat self conscious. There is undoubtedly some thickening of the right middle finger. This is very minor and is scarcely noticeable at conversation distance unless one focused very much on her right hand. Despite this minor thickening, I observed that the plaintiff had no difficulty in wearing a ring on her right middle finger.

23. The plaintiff gave evidence that in cold weather the tip of her right middle finger becomes, "sort of dead or numb and is painful". She accepted in cross examination that wearing a glove helped, but did not eliminate the pain. She told the court that if she strikes the tip of her right middle finger on some hard object it causes pain. This she said caused her difficulty when typing. Mr. Cronin in his report of the 17th February, 2012, states that while objectively the plaintiff has made an excellent recovery of sensation in the right middle finger, this is not normal and will probably never fully return to normal. In his report of the 19th December, 2008, he considered that her problem with cold intolerance in the tip of the finger would probably improve slowly over time as would hopefully the subjective feeling of numbness in the tip of the finger.

24. The plaintiff is 29 years of age. Prior to the incident on the 26th/27th December, 2007, she was employed at a ladies hairdressing salon where she cut and coloured hair. She gave evidence that she returned to her employment six weeks after the incident because she needed money, but worked only as a receptionist. She told the court that she experienced some pain when typing if she struck a key too hard with the tip of the middle finger of her dominant right hand. She had a concern that if she returned to cutting and colouring hair, she might experience difficulty in cutting due to numbness in the tip of her right middle finger, or that the finger might be damaged by the bleaching and developing agents used in hair colouring. This was a personal concern only and she was not so medically advised. In August or September 2008, she became a sales person in a well known fashion house in Dublin. She told the court that she had no difficulty in carrying out her work and she remained employed in this business at the date of the hearing of this action. She told the court that she had given birth to a child three years prior to the hearing. She said that her right middle finger had not caused her any difficulty in managing her infant.

25. For pain, suffering and embarrassment to date the Court awards the plaintiff €36,000. For pain, suffering and embarrassment into the future the Court awards the plaintiff a further sum of €20,000.