THE HIGH COURT

CIRCUIT APPEAL

[2015 No. 617 C.A.]

BETWEEN

CORINNE DONNELLY

PLAINTIFF

AND

DUNNES STORES

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 8th day of May, 2019

Is employer liable for employee injured putting hand into a cardboard box?
1. This is a case where the plaintiff/respondent ("Ms. Donnelly"), of Shannonbanks, Corbally, County Limerick, was injured putting her hand into a cardboard box to take t-shirts out of that box and putting them on a shelf in the premises of the defendant/appellant ("Dunnes Stores"), as part of her employment with that company. She lent too close to the box and her eye came into *'inadvertent contact'* (to quote her engineer) with the corner of the flap of the cardboard box. She received bruising to her cornea which necessitated her attending hospital as an outpatient, but thankfully, her eye was, for all intents and purposes, fully recovered within a week.

2. The cardboard box was a standard cardboard box familiar to most people in this country. Putting one's hands into a cardboard box to retrieve an item is a very uncomplicated task and is a task that is performed daily without incident in homes, schools and workplaces throughout this country. Indeed, in her evidence to this Court, Ms. Donnelly accepted that she herself had unpacked thousands of boxes during her 13-year career with Dunnes Stores in Harvey's Quay, Limerick, without incident. However, she blames her employer, Dunnes Stores, for the bruising which occurred to her eye on this occasion.

3. If this accident had happened at home, it is likely that it would be regarded as an unfortunate accident arising from Ms. Donnelly's lack of attention to her task because she was rushing or otherwise pre-occupied. Indeed, in such a scenario, Ms. Donnelly might have blamed herself for the accident.

4. However, because the accident occurred in the workplace, Ms. Donnelly seeks to place legal responsibility for this accident on her employer. She seeks to do so by claiming that it was the pressure of work, due to understaffing and her being overworked at Dunnes Stores, which caused her inadvertence and therefore was the 'legal cause' of the accident. On this basis, she seeks damages from Dunnes Stores and she was awarded general damages of €19,000 for pain and suffering in the Circuit Court, with approximately €12,000 in out-of-pocket expenses/special damages, a total of approximately €31,000.

Expert engineer report on taking t-shirts out of cardboard box
5. While it may seem somewhat surreal to a layperson, in order to substantiate her claim for damages, Ms. Donnelly adduced 'expert' evidence from a civil engineer on the taking of t-shirts out of a cardboard box and the duties of an employer to an employee in this regard, on the basis presumably that civil engineers are experts in this area.

Common sense principles applicable to manner in which injury incurred
6. However, it is clear from the Court of Appeal decision in *Byrne v. Ardenheath* [2017] IECA 293, which binds this Court, that when the High Court, Circuit Court or District Court is dealing with alleged negligence in a field of activity which is not complex or specialist, and in this Court's view taking t-shirts out of a cardboard box is the epitome of an activity which is not complex, the Court is obliged to bring ordinary common sense to bear on what amounts to the exercise of reasonable care by a plaintiff/defendant. In doing so, it seems clear that this Court can give precedence to common sense over alleged 'expert' evidence adduced on behalf of the plaintiff on alleged breaches of duty.

7. While the *Ardenheath* case was not an employer's liability case, as in Ms. Donnelly's claim, it is nonetheless this Court's view that this common-sense principle is equally applicable to cases regarding employees who are injured at work as a result of the alleged negligence/breach of duty of their employers, as it is to an occupier's liability case such as in *Ardenheath* in which a claim, by a person who slipped when walking on a wet grassy bank in unsuitable footwear, was dismissed by the Court of Appeal.

Caution when dealing with 'expert' reports paid for by one of the parties
8. In addition to applying common sense to expert opinions on matters which are non-technical and non-specialised, it is also the case that this Court must apply some caution to expert opinions where the expert is retained by a plaintiff/defendant with a financial interest in obtaining a report in their favour, since the expert's view will, inter alia, be informed by the facts which are provided by the party retaining them. This is because, although experts are supposed to be completely independent and owe a duty to the Court, more often than not, expert opinions will correspond favourably with the interests of the paying client. As noted by Irvine J., at para. 31 of *Byrne v. Ardenheath* [2017] IECA 293:

> "It was my experience as a trial judge that the effectiveness of the assistance offered by expert witnesses in almost all disciplines, whether that evidence was in respect of the standard of care proposed or a party's compliance therewith, was frequently compromised by the fact that, all too often, their opinions all too often appeared to correspond too favourably with the interests of the parties who retained them. I continue to remain of that view as an appellate court judge where the transcript may lead one to the conclusion that a given expert had become so engrossed in their client's position that they were clearly incapable of providing truly independent guidance for trial judge."

It follows from Irvine J.'s statement that caution needs to be exercised by this Court in relying on opinions from experts who have been retained by one of the parties to litigation.

Application of common sense and caution to the facts of this case
9. Thus, caution and common sense are therefore key considerations in this type of case. This Court will now make reference to the

expert report adduced by Ms. Donnelly in support of her claim for damages. In this Report, Mr. Alan Conlan, Engineer stated that:

> "In my opinion, Dunnes Stores managers should have taken note of the complaints made by the plaintiff in assigning tasks to her. In my opinion, by allowing a situation to continue where Corinne Donnelly had an excessive workload put her at risk."

However, it is clear from this Report that Mr. Conlan jumped from Ms. Donnelly's view that there was a *'shortage of staff and that is why she was under work pressure' to his conclusion that 'it is likely [Dunnes Stores] did not meet their statutory obligations'* and thus are liable in damages to Ms. Donnelly. This is because the only evidence of understaffing and pressure at work are Ms. Donnelly's assertions to that effect. She claims in her evidence that she mentioned being under stress at work to certain managers of Dunnes Stores but this is denied by those Dunnes Stores managers in their evidence.

10. As implicitly acknowledged by Mr. Conlan in his Expert Report, in order to substantiate a claim of understaffing and over-working, evidence would have to be provided by, for example, comparing monetary turnover and number of staff employed, particularly as Ms. Donnelly claimed that it was only during the last two years of her 13 years in Dunnes Stores that she was overworked due to understaffing. In this regard, he states:

> "It may be possible to compare the monetary turnover of the shop to the number of staff employed and establish how this varied over the period."

However, much more is needed to establish negligence/breach of duty than an assertion by the plaintiff that she was overworked. Despite making this statement that other evidence would be needed to support such a claim, none was provided. Nonetheless, based only on the assertions of Ms. Donnelly, the expert engineer felt able to reach his conclusion, that *'it is likely'* that Dunnes Stores was negligent/breached its duty.

Even if plaintiff felt under time-pressure, still no liability for Dunnes Stores

11. Of more significance is that even if Ms. Donnelly felt under time pressure at work to complete tasks this is not necessarily enough to shift legal blame for the accident from Ms. Donnelly to her employer. This is because many employees will feel under some time pressure at work, since this is the very nature, not just of employment, but also of studies, domestic chores and life generally. However, employers do not become legally responsible for the failure of their employees to take due care in the workplace merely because the employees are under some time pressure at work.

Recent extra-judicial comments on personal injury claims

12. It is important to note that in this Court making its determination as to whether a plaintiff such as Ms. Donnelly is entitled to damages for her personal injuries, and indeed the amount of any such damages, this Court cannot rely on comments made extra-judicially by judges in recent times.

> For example, in the recent *Report of the Personal Injuries Commission* which was chaired by Mr. Nicholas Kearns, former President of the High Court, it is stated that certain personal injury awards in Ireland are 4.4 times higher than those in England and Wales and that there was a need for a *'rebalancing and recalibration of Irish awards'* (at page 7).

13. Similarly, in a recent media interview (Irish Independent, 29th September, 2018), Clarke C.J. stated in relation to this Report, that this *'report has to be taken seriously'* and that *'if damages are significantly higher in Ireland than they are for like cases in many other countries, that has consequences for competitiveness and jobs'*. The Chief Justice also stated that *'I don't think we necessarily have to have a race to the bottom and have the same level of damages as the country with the least, but I think we need to be in the ball park.'*

14. It is important to note that these comments of former President Kearns and Clarke C.J. were extra-judicial and thus, while undoubtedly of huge significance because they come from the current Chief Justice and from a former President of the High Court, they cannot be directly relied upon by this Court in reaching its decision in this case. This Court is restricted to relying on statements of principle made by judges while sitting as such. In this regard, reference can be made to the comments of Hardiman J. in *O'Keeffe v. Hickey & Ors*. [2009] 2 I.R. 302.

Judicial comments on 'chilling effect' of claims & effect on cost on insurance

15. As noted by Hardiman J. in *O'Keeffe v. Hickey & Ors*. [2009] 2 I.R. 302 at 317:

> "A finding of liability for perhaps very serious or gross injuries is not a light thing and has an effect quite separate from its consequences in damages. The fact or risk of such a finding may have a "chilling effect", even on State, private or charitable initiatives and will certainly have an effect on the cost of insurance."

In that same judgment, Hardiman J. also referred to the social cost of the desire to compensate every injured person.

Social cost of human tendency to wish that an injured person be compensated

16. In *O'Keeffe v. Hickey*, at pp. 319 to 320, Hardiman J. noted that while there is a human tendency to wish that in all cases of injury to an innocent person that the person should be compensated, if this was to be done, it would come at a considerable social cost, including an effect on the cost of insurance:

> "In all cases where there is a serious injury to an innocent person, there is a human tendency to wish that that person should be compensated. But the social and economic consequences of providing a law so flexible that it can be used to provide compensation in the absence of liability in the ordinary sense is addressed by Henchy J. in [*Moynihan v. Moynihan* [1975] I.R. 192] at pp. 202 to 203:- [……]
>
> No doubt there are many who would be happy to see, even at the cost of some "stretching" of the law, a situation in which the public purse or a vast insurance company, would have to pay compensation to an innocent party. They would not, perhaps, be so willing to accept this situation if the paying party is an ordinary householder who may not always be insured, or adequately covered, or if the effect of making the public purse an insurer of all, or almost all, forms of misfortune, is hugely to increase the cost of insurance to the point where it has an effect on the macroeconomic position of the State, with obvious consequences to the individual taxpayer."

Hardiman J.'s comments are, in this Court's view, as relevant today as they were when he made them in 2008.

Relevance of Hardiman J's comments to this case
17. Thus, while one can of course feel sympathy for Ms. Donnelly for the genuine and unfortunate injury suffered by her, in pursuit of financial gain for her employer, the job of this Court is to decide matters based on the law, rather than, to quote Hardiman J, a desire to compensate for every personal injury suffered. In this regard, it seems to this Court that if employers were to be liable for injuries to employees who say they felt under time pressure at work, it would have, to quote Hardiman J., a *'chilling effect'* for small businesses throughout this country as well of course for large businesses such as Dunnes Stores.

18. In this case, in the Circuit Court, Ms. Donnelly was awarded €31,385 and combined with the payment of two sets of legal costs and outlay on medical and engineering expenses, the total cost to her employer would have been likely to be between €40,000 and €50,000. It seems to this Court that if an employee, such as Ms. Donnelly, was to be entitled to fix her employer, whether a multi-national company or an employer of just one or two people, with liability for her lack of due care in emptying a cardboard box, at a cost of up to €50,000 by claiming she felt under pressure at work, this could have a 'ch*illing effect'* on small and large businesses throughout the country by virtue, inter alia, of its effect on insurance costs, as noted by Hardiman J. In the Supreme Court case of *Kearney v. McQuillan* [2012] IESC 43, MacMenamin J. made similar comments at para. 27 where he stated:

> "The resources of society are finite. Each award of damages for personal injuries in the courts may be reflected in increased insurance costs, taxation, or perhaps a reduction in some social services."

Conclusion on liability
19. In conclusion regarding liability therefore, this is a case where this Court has not been convinced, on the evidence, that Ms. Donnelly was under such pressure and stress at work that, on the balance of probabilities, this was the legal cause of her accident. A bald assertion by a plaintiff that she felt under pressure at work followed by an assumption by her expert engineer of negligence/breach of duty is not sufficient to support a claim for damages.

20. Indeed, even if Ms. Donnelly subjectively felt under time pressure on the day in question, the taking of t-shirts out of a cardboard box is the most mundane of tasks. It did not involve heavy weights, complex machinery or sharp instruments and common-sense dictates that her inadvertence in doing this task, even if she was doing it quickly, was her own fault. It was not her employer's fault that she did this task inadvertently and bruised her eye in the process.

Payment out of part of the award before Court stays order pending an appeal
21. Finally, it is to be noted that the Circuit Court made an award of damages of €31,385 which appears to have been made up of general damages of €19,000 and special damages of €12,385. By Order dated the 16th March 2018, the Circuit Court ordered Dunnes Stores to pay out €20,000, out of the total award of €31,385, to Ms. Donnelly in the event that Dunnes Stores wished to appeal the Circuit Court award.

22. That Order appears to have issued prior to the recent clarification issued by the Court of Appeal regarding the inappropriateness of a trial judge obliging a defendant to make a payment of damages to a plaintiff, where the defendant intends to appeal his liability to pay any damages, save in special circumstances. The recent Court of Appeal decisions in Keegan v. Dunnes Stores [2019] IECA 88 and Greene v. Dunnes Stores [2019] IECA 115 make clear that trial judges, when making awards of damages that are subject to appeal on liability, should not order pay-outs of part of the awards save in special circumstances. At para. 33 of the Keegan case, McGovern J. stated:

> "The trial judge directed the payment of €15,000 by way of damages and €5,000 in respect of costs as a condition of granting a stay for the purpose of this appeal. In my view, where liability is in issue, the judge at the end of a trial should not make an order for payment out except in special circumstances."

23. It seems clear that, as the High Court, Circuit Court and District Court are bound by this rule, that in this case the Circuit Court should not have made an order for the part-payment of the award by Dunnes Stores, where the matter was under appeal on liability. Accordingly, this Court, as well as dismissing the plaintiff's claim, concludes that the Circuit Court should not have ordered the payment by Dunnes Stores of €20,000, out of the €31,385 award, to Ms. Donnelly, *albeit* that it must be acknowledged that the Circuit Court judgment in this case was made prior to the handing down of the judgments in the said Court of Appeal cases.