THE HIGH COURT

[2018 No. 10 CAT]

BETWEEN

DANIELLE BUSHER

PLAINTIFF

AND

ALTONA TAVERNS LIMITED

TRADING AS THE OLD FORGE

DEFENDANT

JUDGMENT of Mr Justice Keane delivered on the 7th June 2018

Introduction

1. The plaintiff, Ms Busher, seeks damages from the defendant, Altona Taverns Limited ('Altona'), for personal injuries she sustained in a slip and fall that occurred on 15 December 2012 at 'The Old Forge' public house, incorporating 'The Loft' nightclub, in Wicklow town, County Wicklow. Altona is the owner or operator of that premises. Ms Busher was present there on that date as a patron attending a friend's 21st birthday party.

2. Pursuant to the terms of s. 38(1)(b) of the Courts of Justice Act 1936, the action was re-tried before this Court on Circuit, sitting in Naas, County Kildare, as the appeal town for the County of Wicklow in which the action was originally tried and determined by the Circuit Court.

Background

3. The following facts are not in dispute. On 15 December 2012, Aoíse Killeen, a friend of Ms Busher, was having her 21st birthday party at the Old Forge. The function took place in an upstairs room. Adjacent to that room there was an adjoining flat-roof that had been converted into an external smoking area. To access that smoking area, patrons who came through the door from the interior of the premises then had to walk up a ramp rising to the left of the doorway, with the external wall of the premises on their left and steel railings at the level of the flat roof on their right (to prevent persons on the flat roof from falling onto the ramp). At the top of the ramp, patrons could turn right and come around the railings to the smoking-area, which was furnished with seating and tables.

4. The roof-top smoking area was largely, though not entirely, covered by a combination of its own solid roof (constructed of clear acrylic roofing sheets over timber rafters) and at the far edge of that roof, a canvas awning. Although the timber and acrylic roof covered the length of the ramp, it ended just level with the top of it, so that the part of the flat roof just beyond the top of the ramp was exposed to the elements, being both unroofed and unenclosed on that side.

5. The surface-covering of the ramp was the same as that of the entire roof-top area; a mixture of fibreglass and resin, rolled onto plywood to create a weatherproof seal. There was no hand-rail on either side of the ramp.

6. On the evening in question, Ms Busher arrived at the premises at 8.30 p.m. to assist with the final preparations for the party. At approximately, 8. 40 p.m., Ms Busher accompanied Ms Killeen and Ms. Killeen's boyfriend out into the smoking area. Shortly afterwards, Ms Killeen received a call on her mobile phone, informing her that her father had arrived and was downstairs. Ms Killeen and her boyfriend left the smoking area and Ms Busher followed them down the ramp. As Ms Busher was descending the ramp, carrying a drink in her right hand, her feet slipped forwards, her legs went out from under her, and she fell backwards, landing on her back and striking her head on the ramp. There was a closed-circuit television camera on the wall at the top of the ramp, directed at the smoking area and capturing the left hand side of the descending ramp at the right edge of its field of view. The Court was shown both a recording of the CCTV footage of the incident and various photographic stills taken from that recording.

The negligence or breach of duty alleged

7. In the personal injuries summons that issued on her behalf on 31 January 2014, Ms Busher's case in negligence or breach of duty was, in essence, that Altona had permitted ice to be present on the ramp, had failed to remove it from the ramp or had failed to warn patrons about its presence there, which created a trap (at least, in the technical sense in which tort lawyers use the term).

8. Through her legal representatives, Ms Busher later delivered further particulars of negligence and breach of duty, dated 30 October 2014. In summary, those particulars asserted three new grounds of complaint against Altona: first, that it failed or neglected to put in place reasonable measures to protect the surface of the ramp from the consequences of inclement weather; second, that it caused or permitted the ramp to be worn to the point that it did not provide sufficient grip; and third, that it failed or neglected to equip the ramp with an appropriate handrail on either side.

9. Altona denies each of the grounds of negligence and breach of duty alleged. In the alternative, it pleads in its personal injuries defence, delivered on 17 April 2015, that Ms Busher's own negligent acts or omissions caused or contributed to her accident and the injuries she sustained in that she failed to have adequate regard to her own safety and failed to keep a proper lookout.

The relevant evidence on causation

10. By agreement between the parties, a report dated 8 November 2017, prepared on behalf of Met Éireann, was admitted into evidence without being formally proved. It is entitled *'Estimate of weather conditions in Wicklow Town area Co Wickow on Friday 15th December 2012 between 20:00 and 21:45 hours*.' It states as follows:

> '**Weather** It was partly cloudy and dry for the period and place in question. However, earlier in the day a band of rain crossed the region eastwards, this rain cleared the Wicklow area by 15:00 hours. The odd isolated light passing shower occurred in the area between 18:00 and 20:00 hours. Hence roads and paths could have been wet or damp.
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> **Temperature** Air temperatures were 6 or 7 degrees Celsius. Ground temperatures were 3 or 4 degrees Celsius with no indications of frost.
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> **Wind** Winds were moderate (15 to 25 km/h) from a southwesterly direction.

Visibility The visibility was good (greater than 10 km).'

11. In her evidence to the Court, Ms Busher acknowledged that in a letter dated 9 January 2013 to the claims investigators instructed by Altona's insurers, she had written that she 'slipped on a patch of ice on the ground.' Ms Busher further accepted that, initially, her claim had been pleaded on her behalf solely on that basis. Indeed, Ms Busher conceded that she had given sworn evidence to that effect in the Circuit Court until confronted with the Met Éireann report already described, which had been commissioned on behalf of Altona to assist in the defence of these proceedings.

12. Ms Busher stated in evidence that she had given that prior testimony – and those instructions to her legal representatives – because, when pushing herself up immediately after her fall on the night in question, that was how the texture of the surface of the ramp felt to her, in no small part because she had wrongly assumed in the dim light that the ramp was constructed of concrete, rather than fibreglass and resin. Ms Busher acknowledged, as did her counsel, that her complaints based on the presence of ice on the ramp could not be maintained, since the formation of ice under the weather conditions then prevailing would not have been possible.

13. Mr Lloyd Semple, a consultant forensic engineer, gave independent expert evidence on behalf of Ms Busher. He confirmed that the floor covering at issue comprises a fibreglass and resin membrane with a textured surface. It is of a type widely used to cover flat roofs. At the time of the joint engineers' inspection in September 2014, almost two years after the incident in question, he observed the surface of the roof, and of the ramp, to be worn in places.

14. According to Mr Semple, the maximum gradient generally permissible for ramps in general use is 1 in 20, although a gradient of as much as 1 in 12 may be acceptable over short distances. Mr Semple measured the gradient of the ramp at issue here to be 1 in 7.4. Mr Semple pointed to the absence of a hand rail on either side of the ramp, despite the presence of a guard rail to the left as you descend, the purpose of which was to rail off the ramp from the smoking area at the top of it, rather than to provide any necessary support for persons ascending or descending it.

15. Mr Semple noted the presence of a gully on the guard rail side of the ramp half way down it. Such a gully is designed to allow for the drainage of water from the surface of the ramp. Mr Semple expressed the view that there was a likelihood of rain blowing onto the ramp on the night in question, given the prevailing winds and the unroofed and unenclosed nature of that part of the smoking area just beyond the top of the ramp.

16. Mr Semple expressed the view that either there should have been matting on the ramp to provide additional traction in wet conditions or there should have been a maintenance programme in place that would prevent the textured surface of the ramp from being worn smooth, and hence becoming slippery, through wear.

17. Vincent O'Hara, a consulting forensic engineer, gave independent expert evidence on behalf of Altona. He described the floor covering on the roof-top smoking area as a textured fibreglass surface with a resin element, rolled onto a plywood base. Mr O'Hara expressed the view that the textured surface would give rise to an expectation of good slip resistance.

18. However, Mr O'Hara stated that neither he nor Mr Semple carried out any of the appropriate tests in that regard because, at the time of the joint inspection, it was understood that Ms Busher's claim was that she slipped on ice on the ramp, rather than that she slipped on the ramp because its surface was innately slippery. Mr O'Hara said that there are three relevant tests for measuring slipperiness or 'the co-efficient of friction'. The first is a 'slip alert' test, which would not have been appropriate because it requires a longer, more uniform surface than the ramp provided. The second is the use of a pendulum meter, which can be effectively applied to a surface length of as little as five inches. The third is the use of a roughness meter, which can be applied to a surface length of just one inch.

19. Mr O'Hara went on to express the view that the limited wear that was apparent when the floor was the subject of a joint engineers' inspection in September 2014, suggested that the surface had been laid relatively recently, that is to say within the preceding four years. Further, Mr O'Hara expressed the view that the wearing of the fibreglass and resin surface did not render it more slippery *per se*, reiterating that none of the appropriate tests had been administered that would allow the degree of slipperiness to be characterised as of low, moderate or high potential. Mr O'Hara stated that, in his opinion, any issue with the traction of the floor would have become obvious to management and patrons of the premises if one had existed.

20. Under cross-examination, Mr O'Hara accepted that, according to the applicable building regulations or technical guidelines, a handrail should have been present on each side of the ramp.

Conclusions on causation

21. Counsel for Ms Busher conceded at the outset of the trial before this court that no claim could be maintained concerning the presence of ice on the ramp.

22. Ms Busher's second ground of complaint is that Altona failed to put in place the appropriate measures to deal with inclement weather. That, of course, implies that Ms Busher's accident was caused by the effect of inclement weather on the ramp. There was some suggestion on behalf of Ms Busher that the ramp may have been damp or wet from rain. Mr Semple expressed the view that rain might have been blown onto the ramp by the prevailing winds. The presence of a rainwater gully halfway down the ramp suggests that such an eventuality was plainly contemplated at the time of its construction. According to the Met Éireann report, a band of rain had crossed the region earlier in the day but had cleared the area by 3 p.m. The odd isolated shower had occurred in the area between 6 p.m. and 8 p.m., which could have left roads and pavements damp.

23. However, Ms Killeen, who was called as a witness on behalf of Ms Busher, could not recall if the ramp was wet that evening. Rory Moles, a barman on duty at the premises, who was called as a witness on behalf of Altona, gave evidence that the ramp was 'bone dry' when he inspected it after Ms Busher's fall. While it was put to him on Ms Busher's behalf that the ramp could not have been completely dry immediately after the incident as Ms Busher had spilled her drink (though she had held on to her glass) as a result of her fall, Mr Moles remained adamant that there was no rainwater on the ramp when he inspected it. Mr Moles went on to testify that, during his long service as a barman at the premises, he had never seen the ramp wet, despite the presence of a rainwater gully on it. Melissa Carroll, the managing director of Altona, also gave sworn evidence on her company's behalf that she had never seen snow or rainwater on the ramp.

24. Having carefully considered the evidence, I cannot be satisfied on the balance of probabilities that the ramp was wet on the night in question. It follows that I cannot be satisfied that Ms Busher's accident was caused by the failure of Altona to put in place appropriate measures to deal with rainwater on the ramp, even if there was any such failure, upon which I express no view.

25. Ms Busher's third ground of complaint is that Altona was negligent or in breach of duty in permitting the surface of the ramp to be worn to the point that it did not provide sufficient grip to prevent persons from slipping on it. Mr Semple expressed the view that the patches of wear on the floor when he inspected it in September 2014 suggested to him that the ramp was likely to have been slippery in places at the time of Ms Busher's accident in December 2012. In Mr Semple's opinion, patches of reflected light on the ramp evident in the stills from the CCTV footage taken on the night could well represent worn patches that would have constituted a slip risk.

26. However, Mr O'Hara disagreed with Mr Semple's opinion on the significance of the patches of reflected or refracted light on the ramp. Mr O'Hara did not accept that they represented worn patches. Further, Ms Carroll gave evidence that the floor surface had been laid just one month prior to the accident and no wear was then evident on it.

27. Even if there had been wear on the surface of the ramp at the material time, Mr Semple and Mr O'Hara were in fundamental disagreement about whether that would have rendered it slippery. As noted earlier, Mr O'Hara conceded that he had not conducted any test to determine the slipperiness, or 'co-efficient of friction', of the ramp surface.

28. On the basis of the evidence just described, I cannot be satisfied that Ms Busher's accident was caused by any wearing of the ramp surface. I found Ms Carroll to be a credible witness. To draw any conclusions from the reflection or refraction of light on the ramp surface as shown in the stills from the CCTV footage would be to engage in conjecture. There are many possible reasons why light reflections are visible on the fibreglass and resin floor surface as shown in those still pictures. For example, it may be the result of the position of the CCTV camera lens relative to the various outdoor lights illuminating the smoking area, reflected by the resin and fibreglass floor surface. Alternatively, it may be the result of that effect heightened by irregularities in the texture of the floor surface or the positioning of other objects in the smoking area. I cannot be satisfied that, on the balance of probabilities, it must be the reflection of light from worn patches on the floor surface.

29. Even if I could be satisfied on the balance of probabilities that there were worn patches on the floor surface of the ramp, I still could not be satisfied that this would have made the floor surface more slippery. No tests were carried out on the flooring at issue. No scientific research was identified on the effects of wearing on the co-efficient of friction of resin coated fibreglass flooring of the type at issue. I do not believe it would be safe to base any conclusion adverse to Altona solely upon Mr Semple's expression of opinion, bearing in mind Mr O'Hara's opinion to the opposite effect on precisely the same point.

30. Ms Busher's final ground of complaint was that Altona had acted negligently or in breach of duty by failing to install a handrail on each side of the ramp. Mr Semple and Mr O'Hara agreed that a handrail should have been fitted under the applicable building regulations or technical guidelines.

31. In considering this ground, I derive considerable assistance from the judgment of O'Neill J in *McDonald v Frossway t/a Bleu* & Ors [2012] IEHC 440. The plaintiff in that case sustained personal injuries in a slip and fall that occurred when she was attempting to descend a short flight of three steps in the defendant's restaurant premises. The plaintiff claimed that the defendant had been negligent in not providing a handrail on those steps. O'Neill J concluded that he could not be certain on the evidence presented of the cause of the plaintiff's fall, just as I have concluded in this case. However, he then continued (at para. 19):

> 'The real problem, so far as the plaintiff was concerned, was the absence of a handrail. Had this been there, I am quite satisfied that even if the plaintiff had missed her first step, and indeed a handrail would have made that event much less likely in the first instance; the handrail would have confined her mishap to a harmless stumble and prevented it becoming a dangerous freefall resulting in the injury she suffered.'

32. While the mechanics of the fall in this case were different, since Ms Busher fell backwards rather than tumbled forwards, I have come to broadly the same conclusion. If there had been a handrail on the left-hand side of the ramp, Ms Busher's slip would have been that much less likely, since she could have used it for support. Had the slip occurred anyway, the handrail could have assisted Ms Busher in arresting her fall and preventing the injury she sustained. Counsel for Altona submitted that Ms Busher had failed to prove that the absence of a handrail had caused her injuries, since it is possible that she would not have used it or would not have grasped it to arrest her backwards fall. Of course, anything is possible. But, for the reasons I have given, I am satisfied on the balance of probabilities, just as O'Neill J was in *McDonald*, that had there been a handrail at the *locus in quo*, the plaintiff would not have suffered the injury she did.

33. In *McDonald* there was a disagreement between the relevant expert witnesses concerning whether a handrail was required in the relevant location under the applicable building regulations or technical guidelines. No such disagreement exists in this case. Both experts agree that a handrail was required on each side of the ramp.

34. But leaving aside the requirements of the applicable building regulations or technical guidelines as they did or did not apply to short flight of three steps at issue in that case, O'Neill J went on to consider the extent to which the installation of an appropriate handrail might be considered a requirement of the quite separate duty of care that the owner or operator of such a premises owes to its patrons (at paras. 24-26):

> **'24.** I am of opinion that anyone, lay or expert, who considered the relevant features of the location of the stairs, namely, in a busy city restaurant, in an ambiance where the lighting was relatively low, the rather dark colouring of the stairs, the absence of any clear markings on the nosings of the stairs, the normal noise, hubbub and conviviality that one would expect in a restaurant of this kind late at night, the fact that diners at that time of night would be enjoying themselves and may have consumed some alcohol, the constant movement around the restaurant of patrons and staff; these features would, I have no doubt, brought about a realisation there was a high level of risk that a diner late at night would miss their footing on the steps and stumble. Once a stumble occurred on those steps, there was nothing to prevent that stumble becoming a freefall as happened to the plaintiff.
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> **25.** Handrails are a common item of internal architecture and encountered in almost all places and buildings to which the public have access and where steps must be negotiated. In my opinion, it must have been readily foreseeable to the first and second named defendants, as experienced restaurateurs, that the absence of a handrail on these steps would result in someone having a bad fall resulting in a serious injury.
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> **26.** I have come to the conclusion that the first and second named defendants failed in their duty to take reasonable care to ensure the safety of the plaintiff while in this restaurant in not having a handrail at this location and are liable to the plaintiff accordingly.'

35. Although the facts in the present case are not identical to those in *McDonald*, the similarities are more striking, and more

compelling, than the differences. This was an area of a public house premises where the ambient lighting was relatively low and there were no markings on the ramp. It follows that, in failing to provide a handrail on the left-hand side of the descending ramp, Altona was negligent and in breach of its duty to Ms Busher and is liable to her in respect of her injuries accordingly. Altona has failed to make out its defence of contributory negligence and Ms Busher is therefore entitled to recover the full amount of her assessed damages.

Injuries and damages

36. Ms Busher was 19 years old at the time of this incident and the mother of a one-year old daughter.

37. After her fall, Ms Busher experienced increasing pain or soreness during the evening and left the party shortly after midnight. She was unable to attend an after party at Ms Killeen's home, where it had originally been planned she would stay the night. Instead, Ms Busher's mother collected her from Ms Killeen's home at approximately 12.15 a.m. Ms Busher suffered headaches and back pain throughout the night and attended an out of hours GP service the following day. They referred her to the Accident & Emergency Department at St Columcille's Hospital, Loughlinstown, where an x-ray was taken that disclosed no fracture and she was advised to consult her own general practitioner, having been prescribed painkillers.

38. By agreement between the parties, the contents of four medical reports were admitted into evidence without the need for formal proof. Two were written by Ms Busher's general practitioner, Dr Sinead Sheehan.

39. Dr Sheehan's first report is dated 13 March 2013, approximately three months after the incident. In it, Dr Sheehan records Ms Busher as having suffered a neck sprain and back sprain and her present complaints as being thoracic and lumbar spine pain, radiating down her left leg, requiring analgesia (that is to say, pain relieving medication) every day. Concerning the effects of her injury, Ms Busher said that she was unable to pick up her daughter or change her nappy; that her intimate relations with her partner had ceased due to the pain in her back; that her activities in studying social care were restricted; and that driving for long periods was difficult. Dr Sheehan was unable to offer a prognosis at that time for Ms Busher's back pain.

40. Ms Busher's solicitor referred her to Mr Robert F. McQuillan, a consultant in emergency medicine. Mr McQuillan examined Ms Busher on 22 June 2015, approximately two and a half years after the incident, and produced a report dated 30 June 2015. Ms Busher presented as having no prior history of back pain. She complained of continuing lower back pain every day, such that bending or lifting caused discomfort, with occasional acute symptoms lasting a day or so. On examination, her lumbar spine contour was normal; there was tenderness overlying the lumbar spine in the mid-line maximal over the lumbosacral junction; there was slightly reduced forward flexion and moderately reduced extension; straight leg raising was associated with discomfort at 60° on the left side with no definite sciatica; muscle strength was normal; and reflexes were brisk.

41. Mr McQuillan's opinion was that, while Ms Busher's complaints would suggest a discogenic element, her clinical examination was satisfactory from that point of view and her MRI scan had confirmed that there was no significant nerve involvement. Mr McQuillan's prognosis was that, with treatment comprising intensive back therapy with strengthening and with adequate exercise, he would expect Ms Busher's symptoms to gradually improve with no long term complications.

42. Dr Sheehan's second report is dated 5 October 2017, almost five years after the incident. It records that Ms Busher had attended Dr Sheehan's surgery on approximately 16 occasions for low back pain. However, it also discloses that Ms Busher had first attended the surgery with low back pain towards the end of her pregnancy in December 2011, one year before the incident, although she was certified as fit and well in October 2012, two months prior to it. In October 2017, Ms Busher presented with ongoing low back and neck pain, reporting that she had learned to adapt to her symptoms; had received physiotherapy and massages and had done yoga to manage her pain; was avoiding heavy lifting; and, despite constant discomfort, was avoiding analgesic medication because of concerns about dependence.

43. Ms Busher further specifically reported to Dr Sheehan that she avoided lifting her daughter; did not wear high heel shoes; limited her driving to short distances; could not do painting in her home; found sweeping the floor difficult; had been unable to resume playing camogie; and had been obliged to give up a particular job working as a children's residential care assistant as her symptoms prevented her from physically restraining a child whenever that was necessary.

44. Dr Sheehan expressed the view that Ms Busher may continue to suffer intermittent low back and neck pain, and may require physiotherapy during flare ups.

45. The most recent medical report before the court was that of Professor J.P. McElwain, a consultant orthopaedic surgeon who examined Ms Busher on behalf of Altona on 13 November 2017 and whose report is dated the following day. Professor McElwain records a history broadly consistent with that provided to both Dr Sheehan and Mr McQuillan.

46. Professor McElwain states that, on examination, Ms Busher could move around and put on her socks normally; had no neurology in her lower limbs; and could sit up and reach her distal tibia, which I take to be the bottom of her shin. However, Ms Busher complained that straight-leg raising caused her pain at about forty-five degrees and hip flexion did so at about sixty to seventy degrees. Ms Busher reported forward flexion as painful and extension as less painful, with more pain on flexion or rotation to the right than to the left, and some tenderness in the midline of her lower lumbar spine.

47. Professor McElwain concluded his report by expressing the following opinion:

> 'This lady sustained a soft tissue injury to her lower back when she fell on 14 December 2012. It is approaching five years now since the accident and she still has back pain. She has had only six sessions of physiotherapy over a five-year period. I believe that if this lady has physiotherapy, does her own exercises, attends to good back care, avoids precipitating factors and perhaps has some hydrotherapy then her back pain will improve considerably. She has some changes in her lumbar spine as seen on MRI scan, but there is no evidence whatsoever of any nerve root compression and this also manifests itself clinically in that she has no tension signs.
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> I do think this lady's symptoms are a little bit out of proportion to the injury she sustained. Certainly her signs are out of proportion, particularly in relation to flexion of her hips causing severe back pain at about sixty to seventy degrees. Overall, I feel that if this lady has proper treatment then her symptoms will improve quite significantly. I do not think that she needs to have any surgical intervention but certainly if she does her exercises and follows the rehabilitation regime outlined above then her symptoms will improve and further her recovery. No long terms problems should result following the soft tissue injury to her back. This has been going on for a long time now and there are a lot of inappropriate symptoms and signs.'

48. In evidence, Ms Busher was obliged to acknowledge that several photographs taken between September 2013 and June 2014 had appeared on Facebook, depicting her engaged in a variety of more or less strenuous physical activities. Although the court was not shown those photographs, which were never proved in evidence, Ms Busher acknowledged that she was shown ice-skating on two separate occasions during that period, and carrying her daughter without evident discomfort in June 2014. Ms Busher's comment on those activities was that she had good days and bad days. However, that is not very easy to reconcile with her unqualified complaints to each of the medical attendants who examined her of the debilitating effect of the constant discomfort and continuing lower back pain that she was experiencing every day.

Conclusion

49. Viewing this evidence in the round, I conclude that the appropriate sum to compensate Ms Busher for past and future pain and suffering and loss of enjoyment of life is €19,500. I will therefore award that sum in general damages. There is no claim for loss of future earnings. Special damages are agreed between the parties in the sum of €250. Hence, I grant judgment to Ms Busher in the sum of €19,750.