Neutral Citation: [2013] IEHC 360

THE HIGH COURT

[2011 No. 8203 P]

BETWEEN

SHEILA SMITH

PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE

DEFENDANTS

JUDGMENT of O'Neill J. delivered on the 26th day of July 2013

1. The plaintiff in this case sues the defendants, her employers, for damages for negligence and breach of duty including breach of statutory duty in respect of injuries she sustained on 27th July 2010, in the course of her employment with the defendants.

2. The plaintiff, who is a married woman and has two grown up children, has been employed by the defendants for 18 years as a Household Assistant in St. Joseph's, Ferryhouse, Clonmel, County Tipperary. This is an institution which engages in the rehabilitation of boys between the ages of 12 and 18 years. The institution can accommodate approximately 23 boys in four houses or residential units.

3. During the summer break, when the boys are sent home or to another institution, a major cleaning operation is conducted by the household staff. This involves a very thorough cleansing and disinfecting, *inter alia*, of the residential units.

4. On the day of her accident, the plaintiff was engaged in this task. At about 10.00am, she was in the process of cleaning a shower or shower room in one of the residential units. This is not a shower in the ordinary domestic sense, but is a small room which is, in effect, a single shower. All of the walls and floors were tiled and the showerhead was set into the wall opposite the door into the shower room. Entrance to the shower was via a door which was off a corridor, and on the other side of the corridor opposite the door there was a solid wall.

5. The buildings that comprise this institution date back to about 1990 and the door in the shower room was undoubtedly of that vintage.

6. The hinges that supported the door were designed so that in the process of opening, the door was raised up slightly. The purpose of this design feature was to enable the door to self-close once opened. This was achieved by gravity pulling the door down from its slightly elevated position when open to the lower and stable position when closed. Many of the other doors in these residential units have similar hinges.

7. Over time, the self-closing operation of the door into the shower room became inhibited by the accretion of paint. I am satisfied that the door into this shower room had, by this process, lost the capacity to self-close and when open was stable in any opened position. When fully open, it did not go back so as to be flush with the wall from which it was hung because the width of the door brought it into collision with the side wall of the shower, but it could go back to an almost fully opened position.

8. The task the plaintiff had to do was to thoroughly cleanse the walls and floors of the shower room. To do this, she used a long-handled deck brush. The preferred detergent for this task was 'Brillo Degreaser' which came in 5-litre bottles. She had previously gone to the store to get this but none was available and so she was obliged to use the next best available agent which was a 'Bleach'. Because this agent creates unpleasant fumes, it was necessary for her to keep the door of the shower room wide open to ensure adequate ventilation. Although there was a ventilating extractor in place which was operated by the electric light switch, the plaintiff's evidence was, and I accept it, that this was inadequate to deal with the fumes from the Bleach.

9. The plaintiff also needed to keep the door open to its maximum extent to allow her sufficient uninterrupted room within the shower room to scrub the walls of the shower with the long-handled brush.

10. Keeping the door open gave rise to a controversy which dominated the heart of this case. In her evidence, the plaintiff described some difficulty in opening the door to its maximum extent. When examined by Mr. McCormack within 48 hours of the accident, no such difficulty was apparent and I am satisfied that whatever difficulty was perceived by the plaintiff when opening the door, was of no real significance.

11. I am also satisfied that the door did not function properly in terms of the design of the hinges, in that it did not self-close spontaneously.

12. However, I am also satisfied that the plaintiff, being accustomed to the self-closing feature on many of the doors in the residential unit, had reasonable grounds for believing that the door would self-close unless restrained by a doorstopper of one sort or another.

13. It is commoncase that the normal doorstoppers which were readily available would not work on this door because the gap between the bottom of the door and the floor of the shower room was abnormally deep.

14. Two methods of door stopping were, I am satisfied, used by staff of the defendants. The first of these was the placing of a 5-litre bottle of 'Brillo Degreaser' in front of the door, holding it open. This method was not available to the plaintiff because she had looked for 'Brillo Degreaser' and there was none available.

15. The second method and that adopted by the plaintiff was to place the handle of a mop or brush into the jamb of the door with

the head of the brush or mop securely placed in the angle between the doorstep and the opposite side of the doorway. This kept the door open but it resulted in the mop or brush handle straddling diagonally the door opening thereby creating an obvious obstacle in the path of anyone attempting to cross the doorstep to get in or out of the shower room.

16. Having secured the door in the fully open position by using a long-handled mop in this way, the plaintiff proceeded to clean the walls of the shower. She spread the Bleach on the back wall of the shower where the showerhead was located. She used the shower itself as her supply of water and activated the shower by pressing the operating button with the handle of the deck brush she used to scrub the walls. When the shower was discharging water, the plaintiff would back away towards the door to avoid getting wet.

17. Her evidence was that whilst she was scrubbing the back wall with this long-handled mop, using an upward and downward motion, and as she backed away a little bit, her heel came in contact with the doorstep. It is probable that when this happened, the plaintiff was backing away to avoid water being discharged by the shower. It would seem to me that the internal dimensions of the shower were such, and having regard to the length of the brush handle (1,200mms.), her own physical size and the upward and downward scrubbing motion, that she was probably standing well inside the shower room and certainly not close enough to the doorstep to bring her heel into contact with it, except when she turned on the shower and backed away to avoid getting wet.

18. The evidence of both engineers established that the doorstep at the entrance to the shower was 2.5 inches in height above the level of the floor in the shower room. When the plaintiff's heel came in contact with the doorstep, I am satisfied that this caused a backward trip. Immediately, the back of her leg came in contact with the handle of the mop, and because it was caught in the doorjamb it presented a solid obstacle which, I am satisfied, prevented the plaintiff regaining her balance after her initial backward trip and probably turned a backward stumble from which she could have righted herself into an uncontrolled freefall backwards out into the corridor.

19. Her fall was broken by colliding with the wall on the opposite side of the corridor. Her left shoulder impacted the wall before she fell to the ground. It is apparent that the plaintiff collided heavily with this wall and as a consequence suffered a serious injury to her spine, namely, a wedge fracture of one of the vertebrae of her thoracic spine. She was unable to rise from the floor. Help arrived and in due course she was removed by ambulance to South Tipperary General Hospital.

20. In these proceedings, the plaintiff sues the defendants, as her employers, for negligence and breach of their duty to her, including breach of statutory duty, namely, sections 8 and 19 of the Health and Safety at Work Act 2005 (the Act of 2005). The negligence and breach of duty so alleged comes down to three specific criticisms that the plaintiff makes of the defendants' system of work under which she operated when she had her accident.

21. The first of these relates to the height of the step into the shower room. Mr. Fogarty, an engineer called for the plaintiff, said in evidence that this step was much higher than it needed to be, to achieve its purpose, namely, to prevent water flowing from the shower room into the corridor. He said a 1 inch step would have been sufficient and would have been much less hazardous to somebody doing the job the plaintiff was doing when she had her accident and, generally, people going in and out of the shower room.

22. I am unable to agree with this criticism. Even if the step was only 1 inch in height, as recommended by Mr. Fogarty, it would still have been a serious tripping hazard and in all probability would have caught the plaintiff's heel in exactly the same way as occurred. In addition, the 2.5 inch step is significantly more visible than a 1 inch step would be in this location, and hence, in my view, a 1 inch step was likely to be a greater hazard to employees of the defendants than the 2.5 inch step that is there.

23. I am satisfied that this allegation of negligence and breach of statutory duty fails.

24. The next criticism raised was to the effect that a warning should have been given to the plaintiff by the defendants as to the hazard posed by this step to employees working in the shower room or in going in and out of the shower room.

25. In my view, such a warning was entirely unnecessary. The plaintiff had been working in these premises for the defendants for 14 years prior to this accident. She was very familiar with the physical layout of the premises and all its individual features. She was herself a mature married lady with her own house and family and was fully competent to discharge the entire range of domestic household functions which is what she was employed by the defendants to do, as a Household Assistant. Pointing out this step to her and her colleagues of similar experience and telling them that it posed a hazard and to be careful to avoid it, would, I am quite sure, have been an exercise in tokenism and very unlikely to have impressed anything on the recipients of the message other than a very understandable sense of irritation.

26. The fact is, the step was readily visible. On the day of her accident, the plaintiff crossed it several times and went to the trouble of placing the mop head on top of it in the course of placing the handle in the jamb of the door.

27. It would be completely unreal to suggest that her employers could have done anything more, realistically, to convey to the plaintiff the potential risks posed by this step and I am satisfied that it was wholly unnecessary for the defendants to have given or provided a warning of the potential hazards associated with this step which was readily visible to adult, competent employees including the plaintiff.

28. I am satisfied that this ground of negligence and breach of statutory duty fails also.

29. This brings me to the third, and as it turned out in the trial, the real battleground between the parties. This was the plaintiff's contention that the defendants, over many years, condoned the practice of securing doors in the open position by placing the handle of a long mop or brush into the jamb of the door and securing the other end or head of the mop or brush into the angle between the doorstep and the other side of the doorway. The plaintiff contended that the practice was a dangerous one which led to the creation of an obstacle that was likely to be a tripping hazard to the unwary as happened in the plaintiff's case.

30. The defendants agreed that this practice was a dangerous one but made the case that not only was it not condoned by the defendants, but that if it did take place this was entirely unknown to the defendants who would have prohibited it if they had known about it.

31. Evidence was given by several of the defendants' employees. From this, I am quite satisfied that this practice was regularly and continuously used over a long period of time to prop open doors. Specifically, the unchallenged evidence which emerged from the defence witnesses was that the front doors to two of the residences were regularly kept open by the use of a broom handle. Also, the back door of the kitchen was regularly kept open in this way.

32. I am quite satisfied that this practice had been in use on a regular and frequent basis in the defendants' premises and was seen by the staff, and in particular the plaintiff, as a recognised, effective and acceptable method of keeping a door open. It is absolutely clear that the defendants at no stage did anything to prohibit this practice, and I am satisfied on the balance of probability that the management grade in St. Joseph's must have been aware of it, or at the very least, having regard to the longevity and prevalence of the practice, they ought to have been aware of it.

33. This conclusion gives rise to an issue of law. Is the adherence to this practice, which both parties acknowledged was a dangerous one, to be properly treated as a failure of duty on the part of the defendants, as employers, and/or mainly or wholly as contributory negligence on the part of the plaintiff.

34. Before embarking upon this issue, it is necessary to consider, in the first instance, whether or not the condoning by the defendants of this practice and their failure to have prohibited it when they said they knew or ought to have known of it was a breach of statutory duty on their part.

35. It was submitted for the plaintiff that the condoning by the defendants of the practice of propping open self-closing doors with the handle of a brush or mop was a breach of s. 8 of the Safety Health and Welfare at Work Act 2005. The relevant portion of this section is as follows:

> *""8.—(1) Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees.*
>
> *(2) Without prejudice to the generality of subsection (1), the employer's duty extends, in particular, to the following:*
>
> *(a) managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees; . . ."*

36. In addition, the plaintiff submits that there was a breach of s. 19 of the Act, insofar as the defendants, in their risk assessment, failed to mention or deal with the practice of propping open doors with brush or mop handles. The relevant portion of this section reads as follows:

> *"19.—(1) Every employer shall identify the hazards in the place of work under his or her control, assess the risks presented by those hazards and be in possession of a written assessment (to be known and referred to in this Act as a 'risk assessment') of the risks to the safety, health and welfare at work of his or her employees, including the safety, health and welfare of any single employee or group or groups of employees who may be exposed to any unusual or other risks under the relevant statutory provisions . . ."*

37. I am of opinion that the condoning by the defendants of this practice and their failure to have prohibited when they know or ought to have known of its prevalence cannot be regarded as anything other than a failure by the defendants as contemplated by s. 8(2)(a) of the Act of 2005, namely, a failure in the managing and conducting of the work activities so as to ensure, as far as was reasonably practical, the safety and health at work of the plaintiff. Thus, I have come to the conclusion that the defendants were in breach of this statutory duty to the plaintiff and there is a direct causative link between that failure and injuries suffered by the plaintiff.

38. It is commoncase that the defendants' various risk assessments which, although they do deal with "*slips, trips and falls*" and a variety of potential hazards associated therewith, no mention at all is made of the practice of propping open doors with brush or mop handles, in that context. Mr. Hayes, an engineer called on behalf of the defendants, justified such omission on the basis that he would not expect that kind of detail to be included in a risk assessment. However, in a risk assessment dated 9th June 2010, relating to the Bawnard Residential Unit, quite considerable detail is set out relating to the risk of slips, trips and falls from wet floors in bathrooms, kitchens and stairways. I would be of opinion that having regard to the longevity and prevalence of this practice, it should have been addressed and the risks associated with it considered as part of the obligation of the defendants to carry out risk assessments. I am satisfied that the failure to have so done was a breach of the defendants' statutory duty under s. 19(1) of the Act of 2005.

39. I should add that the condoning by the defendants of this practice and their failure to have prohibited it was also a breach of the defendants' common law duty of care to the plaintiff as her employer and was negligent.

40. This brings me to the question of negligence or contributory negligence on the part of the plaintiff and breach of statutory duty on her part, namely, a breach of s. 13 of the Act of 2005, which reads as follows:

> *"13.—(1) An employee shall, while at work—*
>
> *(a) comply with the relevant statutory provisions, as appropriate, and take reasonable care to protect his or her safety, health and welfare and the safety, health and welfare of any other person who may be affected by the employee's acts or omissions at work. . . ."*

41. For the defendants, it was submitted that as the plaintiff had herself devised and implemented the method of propping open the door by the use of a mop handle, insofar as this practice was a causative feature of her injuries, it was not the result of any inadvertence or heedlessness on the part of the plaintiff, but was her own deliberate and conscious act and therefore she was wholly responsible for the consequence of adopting this dangerous practice and, necessarily, it followed that she was 100% contributory negligent in respect of her own injury.

42. For the plaintiff, it was submitted that where a breach of statutory duty on the part of an employer was established, an entirely different standard with regard to contributory negligence by the employee was applicable, namely, that mere inadvertence or heedlessness would, in the face of a primary breach of statutory duty, not amount to contributory negligence.

43. In this regard, the plaintiff cited the following passage from McMahon & Binchy (3rd Ed.) at p. 606 under the heading of 'Contributory Negligence':

> *"(21.52) The courts have consistently held that the term 'contributory negligence' has 'a different meaning' in an action for breach of statutory duty and in an action for common law negligence. In Stewart v. Killeen Paper Mills Ltd, 112, Maguire C.J. stated that there is:*

'An essential difference in the nature and quality of the acts of the plaintiff which would amount to contributory negligence in the one case and in the other. The distinction is very fine. It is nevertheless well established'.

(21.53) The care required of a plaintiff in an action for breach of statutory duty is less extensive than in actions for common law negligence. The court must take into account 'all the circumstances the work in a factory . . . it is not for every risky thing which a workman in a factory may do in his familiarity with the machine that a plaintiff ought to be held guilty of contributory negligence'113

(21.54) It has been stated that:

'The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which, though trivial in itself, threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the injury'. 114

(21.55) The essential difference between breach of statutory duty and common law negligence seems to be that, in respect of breach of statutory duty:

'(a) An error of judgment, heedlessness or an inadvertence on the part of a workman does not amount to contributory negligence'. 115

Whereas in respect of common law negligence:

'(a) An act of inadvertence, even though momentary, if it is an act which a reasonably careful workman would not do, will in a common law action amount to contributory negligence' 116

(21.56) In Stewart v. Killeen Paper Mills Ltd.117 Kingsmill Moore J. stated:

'Where the injury could not have occurred but for a breach of statutory duty on the part of the master, a jury, in considering whether the conduct of the workman in all the circumstances amount to contributory negligence, are entitled to take into account that the action was taken by the workman in furtherance of the interests of his master and that zeal may have dulled the edge of caution; that the action was one undertaken to meet a situation where if anything effective was to be done it had to be done rapidly and without deliberation; and that, if the act was one which was customarily performed, the master ought to have been aware of the practice and its danger and ought to have taken steps to forbid it. Where it can be shown that a regular practice exists unchecked it is difficult to convict of contributory negligence a workman who follows such a practice'.

(21.57) In drawing a distinction between common law negligence and breach of statutory duty so far as the contributory negligence of an employee is concerned, the courts have been engaged in the formulation of robust policy making for which there is no express warrant in the Civil Liability Act 1961. Echoing the approach of the American courts, 118 our judges have taken the view that social policy requires that legislation prescribing safety standards in industry should not too easily be diluted by the doctrine of contributory negligence. . ."

44. As is apparent from the foregoing summary of the authorities, where a breach of statutory duty is established as a primary cause of a plaintiff's injury, mere inadvertence or inattention on the part of the employee as distinct from positive conscious deliberate action will not amount to contributory negligence.

45. It thus becomes necessary to closely analyse what the plaintiff did immediately prior to her accident to ascertain whether, as is submitted by the defendants, the causative actions were conscious and deliberate on the part of the plaintiff or whether any culpable activity on her part should be fairly regarded merely as inadvertence or inattention.

46. It would seem to me that the activity of the plaintiff can be divided into two parts. The first was the undoubted deliberate and conscious adoption by her of the practice of propping the door open with the mop handle. Having done that, she then proceeded with the cleansing of the back wall of the shower. During that operation, probably in order to avoid water being discharged by the shower, the plaintiff backed away and inadvertently brought her heel into contact with the doorstep and the back of her leg into contact with the mop handle.

47. Thus, the immediate and proximate cause of the plaintiff's fall was that of coming into contact initially with the doorstep and then, the mop handle which, in my view, could only be characterised as the result of inadvertence or a lapse of attention on her part.

48. Insofar as the plaintiff adopted the practice of placing the mop handle in the jamb of the door, she was merely following what was the well established practice condoned over a lengthy period of time for propping open self-closing doors in this way. Therefore, in my view, this part of the conduct or activity of the plaintiff is properly to be characterised as the defendants' breach of statutory duty rather than as contributory negligence on the part of the plaintiff. On the other hand, the action of the plaintiff in backing away and catching her heel and leg in the step and mop handle is properly to be characterised as inadvertence, inattention or carelessness on the part of the plaintiff which, following the aforementioned authorities, should not amount to contributory negligence as it was merely inattention or inadvertence whilst adhering to a practice or system of work that was established or condoned by the employer.

49. I use the word "should" above advisedly for the simple reason that in all of the consideration given in the aforementioned older cases, there is no mention of and no consideration of the effect of s. 13 of the Act of 2005. It would seem to me that this section, imposing, as it does, a specific statutory duty on the part of employees, requires a reconsideration of the treatment by the courts of contributory negligence on the part of an employee in the context of an established breach of statutory duty on the part of the employer.

50. The legislative history behind s. 13 of the Act of 2005 goes back to s. 125(1) of the Factories Act 1955, which is in the following terms:

> *"125(1) - A person employed in a factory or in any other place to which any provisions of this Act apply shall not wilfully interfere with or misuse any means, appliance, convenience or other thing provided in pursuance of this Act for securing the health, safety or welfare of the persons employed in the factory or place, and where any means or appliance for securing health or safety is provided for the use of any such person under this Act, he shall use the means or appliance.*
>
> *(2) A person employed in a factory or in any other place to which any provisions of this Act apply shall not wilfully and without reasonable cause do anything likely to endanger himself or others."*

As is apparent from this, the statutory duty imposed upon employees for their own safety or that of their fellow employees was extremely restrictive.

51. A significant change in the general duty of employees was brought about by s. 8 of the Safety in Industry Act 1980, which replaced sub-section (1) of s. 125 of the Factories Act 1955, and is in the following terms:

> *"8.— Section 125 of the Principal Act is hereby amended by the substitution of the following subsection for subsection (1):*
>
> > *'(1) The following provisions shall apply to a person who is employed in a factory or in any other place to which any of the provisions of the Safety in Industry Acts, 1955 and 1980, apply, namely,*
> >
> > *(a) he shall take reasonable care for his own safety and health and that of any other persons who may be affected by his acts or omissions while at work . . .'"*

52. Sub-section (1)(a) above clearly expand the statutory general duty of care owed by employees to more or less correspond with the well-established common law duty of care owed by employees for their own safety.

53. Section 9(1) of the Safety, Health and Welfare at Work Act 1989, extended the statutory general duty of care to all "*places of work*" as defined in s. 2 of that Act, and is in the following terms:

> *"9.—(1) It shall be the duty of every employee while at work—*
>
> *(a) to take reasonable care for his own safety, health and welfare and that of any other person who may be affected by his acts or omissions while at work . ."*

54. The duty, as expressed here, is in almost exactly the same terms as in s. 8 of the Safety in Industry Act 1980, save that "welfare" is also included in addition to safety and health.

55. Finally, the latest statutory expression of this duty is contained in s. 13(1)(a) of the Safety, Health and Welfare at Work Act 2005, as quoted above. Insofar as the general statutory duty of employees is concerned, there does not appear to me to be any material difference between the duty as expressed in s. 13(1)(a) of the Act of 2005, and as expressed in s. 9(1)(a) of the Safety, Health and Welfare at Work Act 1989.

56. The cases relied upon by the plaintiff in support of the submission that mere carelessness, inattention or inadvertence would not amount to contributory negligence were decided before the enactment by the Oireachtas of a general duty of care on the part of employees as set out above, and hence, these cases do not consider that current general statutory duty of care on the part of employees.

57. Thus, it is necessary that there would be a reconsideration of the treatment of contributory negligence on the part of an employee in the light of the statutory duty now imposed on employees.

58. The above authorities reveal that the benign treatment of contributory negligence on the part of an employee in the face of a primary breach of statutory duty by the employer was to ensure that the policy underpinning the statutory provision would not be diluted by a reliance upon the doctrine of contributory negligence. If, however, the duty of an employee to take reasonable care for their own safety is elevated to the status of a statutory duty, it would seem to me that the exculpation of inadvertence and inattention from the ambit of contributory negligence must be reconsidered given that both employer and employee are now bound by statutory duties to take reasonable care.

59. This approach appears to have been adopted by the Supreme Court in the case of *Coffey v. Kavanagh* [2012] IESC 19, in which the judgment of Quirke J. in the High Court was overturned to the extent that a finding of contributory negligence to the extent of 25% was made by the Supreme Court where the primary duty of care on the part of the employer was found but where the employee had tripped and fallen as a result of the untidiness of her work environment, where she had some responsibility herself to keep the area where she fell, tidy.

60. In *Quinn v. Bradbury & Bradbury* [2012] IEHC 106, Charleton J., in reducing the plaintiff's damages by 30% , referred to s. 13(1)(a) of the Act of 2005, commenting that:

> *"The sub-section of itself maintained the responsibility of an employee at common law to take reasonable care. In principle, an employee is not required or entitled to completely surrender control over his or her welfare while at work to an employer".*

Further on, the learned judge said the following at para. 21:

> *"21. Having found that the responsibility for this accident rested with the employers of Robin Quinn, the court is concerned with the issue of contributory negligence. Under s. 13(1)(a) of the Act of 2005 there is a duty on an employee while at work to protect his safety, health and welfare. Other requirements are also made which are not relevant here. That subsection, of itself, maintains the responsibility of an employee at common law to take reasonable care. In principle, an employee is not required or entitled to completely surrender control over his or her welfare while at work to an employer. . ."*

61. In short, therefore, it must be said that in light of the statutory duty as imposed on employees, inattention, inadvertence, heedlessness or carelessness on the part of an employee can no longer be regarded as outside the ambit of contributory negligence,

in circumstances where it is established that there was a primary breach of statutory duty on the part of the employer, assuming causative links between the breach of statutory duty by the employer, in the first instance, and contributory negligence of the employee, to the injuries actually suffered.

62. It is fair to say that the duty imposed on employers under s. 8(1) of the Act is undoubtedly of a more onerous order being expressed as being "*shall ensure so far as is reasonable practicable the safety, health and welfare at work of his or her employees*", whereas the statutory duty imposed on employees under s. 13(1) of the Act is to "*comply with the relevant statutory provisions, as appropriate, and take reasonable care to protect his or her safety and health and welfare . . .*"

63. I would be of opinion, firstly, that a liability must attach to the plaintiff in respect of what may fairly be regarded as her negligence in bringing about this accident by backing into and falling over an obstacle which she had placed in her own pathway only moments earlier. Secondly, reflecting the higher or heavier duty resting upon the employer under s. 8(1) with regard to managing the system of work, a significantly greater proportion of liability must attach to the defendants for having condoned and permitted the practice of propping open doors with brush or mop handles to have continued uninhibited over a long period of time. In my view, the appropriate apportionment of liability between the plaintiff and defendants is 75% against the defendants and 25% against the plaintiff.

64. The plaintiff, in falling backwards, collided heavily with the wall on the other side of the corridor opposite the door into the shower room. She undoubtedly suffered a serious injury to her thoracic spine and also, I am satisfied, to her left shoulder. Neither side called any medical experts to give evidence concerning the plaintiff's injuries and these are dealt with comprehensively in the medical reports which were admitted into evidence by agreement between the parties. These comprise a medical report from Mr. Benny Anto Padinjarathala, the Orthopaedic Surgeon under whose care the plaintiff came in Waterford Regional Hospital after she had been transferred there from South Tipperary General Hospital; the report of Mr. George F. Kaar, Consultant Neurosurgeon dated 24th October 2012; a report of Dr. Kenneth W. Patterson, a Consultant in Anaesthesia, dated 4th March 2013; two reports of Dr. Sean J. McCarthy, specialist in general injuries, sports injuries and exercise medicine, dated 4th April 2011 and 12th June 2013; the reports of Dr. Coleman Walsh, the plaintiff's General Practitioner, dated 18th April 2011 and 24th May 2013; the report of Dr. James Morrison, Consultant Psychiatrist, dated 12th April 2011, 18th October 2012 and 31st May 2013. For the defendants, three medical reports were submitted by agreement, namely, two reports of Mr. Frank McManus, Orthopaedic Surgeon, dated 1st March 2013 and 29th April 2013, and the report of Dr. Richard Horgan, a Consultant Psychiatrist, dated 10th February 2012. All of these reports reveal that the main injury suffered by the plaintiff following what was a heavy fall, resulting in a severe impact with the wall in question, was a wedge fracture of the 6th thoracic vertebra. The treatment for this was conservative, namely, a period of immobilisation in hospital for a number of days followed by the wearing of a brace continuously for in excess of three months thereafter. This fracture healed, leaving a slight deformity, namely, a 15 degree Kyphus in the plaintiff's spine at that level.

65. As a result of her injury, the plaintiff suffered considerable pain, particularly down her left side radiating into her lower limb.

66. As time went on, the plaintiff began to experience considerable pain and discomfort in her left shoulder and neck region. An MRI scan of the left shoulder on 18th October 2012, demonstrated a partial tear of the Supraspinatus tendon, bone oedema of the humeral head suggesting trauma and degenerative changes with some impingement. This was associated with considerable limitation of movement in the plaintiff's left shoulder and weakness due to pain in the left shoulder. An earlier MRI done on 9th December 2011, showed degeneration and a moderate broad base posterior disc protrusion at the C5/C6 intervertebral disc which was distorting the Thecal sac and encroaching on the emerging bilateral C6 nerve roots. There was also disc degeneration at the C4/C5 level as well.

67. It is apparent that the plaintiff had degenerative disc disease in her neck prior to this accident but I am satisfied all of this was asymptomatic prior to her accident.

68. It is not surprising that the fall which the plaintiff experienced did significantly affect this already existing degenerative disease in her neck rendering it significantly symptomatic thereafter. There was, in addition, evidence of traumatic injury to the left shoulder in the MRI of 18th October 2012. As the more acute injury, namely, the fracture of her thoracic vertebra progressed towards recovery, the difficulty she was experiencing with her left shoulder and neck became more prominent, and as time went on, a dominating problem for her.

69. I am quite satisfied that since this accident, the plaintiff has had a great deal of pain and discomfort, particularly down the left side of her body and that all of this pain and discomfort had had a very debilitating effect on her life, particularly as it has, in a significant way, disrupted her normal sleep pattern leaving her tired, irritable and moody, which in turn has developed into a serious depression which has required continuous treatment since the early days of her recovery after this accident. In addition, she has suffered from flashbacks and nightmares relating to the circumstances of her accident which has been described by both psychiatrists as Post Traumatic Stress Disorder, but I would be reasonably satisfied that with the passage of time, these have diminished in intensity and frequency.

70. Although she went back to work relatively soon after this accident, after about four months, I am quite satisfied that the return to work was driven by financial necessity and her ability to cope at work was sustained by the goodwill and cooperation of her supervisor, Ms. O'Flynn, and her co-workers who assisted with or relieved her of the more onerous tasks.

71. The plaintiff, though considerably improved, particularly so far as the injury to her thoracic spine is concerned, nonetheless still has ongoing significant pain at this stage, mainly due to her shoulder problem and her psychological upset is still continuing and she remains on medication for her anxiety and depression.

72. In my view, the appropriate sum to be assessed in respect of her pain and suffering to date is the sum of €45,000.

73. For the future, I think it probable that the effects of this fall on her underlying degenerative disease in her neck will, as time goes on, diminish, and as her physical condition improves, so also in all probability, will her psychological status. Accordingly, in my view, the appropriate sum to be assessed in respect of her future general damages is the sum of €30,000, making a total of €75,000 for general damages.

74. At the close of the case, Mr. Maher S.C. for the defendants applied to the court to dismiss the plaintiff's case under the provisions of s. 26(1) and (2) of the Civil Liability in Courts Act 2004. This section, which bears the side heading '*Fraudulent Actions*' is in the following terms:

> *"26.—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—*

(a) is false or misleading, in any material respect, and

(b) he or she knows to be false or misleading,

the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that—

(a) is false or misleading in any material respect, and

(b) that he or she knew to be false or misleading when swearing the affidavit, dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court . . .”

It is well settled, that in making an application of this kind, a defendant bears the onus of proving on the balance of probability the various elements set out in section 26.

75. In this case, the defendants make the case that when the plaintiff swore her affidavit of verification on 14th November 2011, verifying the content of a reply to a notice for particulars which was dated 30th September 2011, the reply being dated 11th November 2011, that she knew that the reply to requests numbers 16 and 18 of the request for particulars were false and misleading.

76. The requests in question read as follows:

“16. Has the plaintiff ever suffered any injuries in any accident either prior to or subsequent to the incident which is the subject matter of these proceedings? If so, provide the following particulars in respect of each and every injury:-

(a) Date and place sustained.

(b) Detailed description of the nature of the injury.

(c) The names and addresses of any hospitals or medical institutions rendering treatment or consultation.

(d) The names and addresses of all physicians, surgeons or other medical practitioners attended.

(e) The nature an extent of recovery and if any permanent disability was suffered, the nature and extent of such permanent disability.

(f) If the plaintiff was compensated in any manner for the injury, please state the names and addresses of each an every person or organisation paying such compensation and the amount thereof.

(g) Please furnish copies of all medical reports pertaining to any such claim for compensation . . .

18. Please state if the plaintiff has any illness, sickness, disease, handicap, surgical operation or medical complaint, physical or otherwise prior to or subsequent to the accident which is the subject matter of these proceedings, if so, please advise:-

(a) The date and place sustained.

(b) The details of symptoms.

(c) The names and addresses of any hospital or medical institution rendering treatment or consultation and the names and addresses of all or any physicians, surgeons, medical practitioner rendering treatment or consultation.”

The reply to those requests, as contained in the reply dated 11th November 2011, is as follows:

“16. The plaintiff has not suffered from any other accident or injury of relevance to the injuries complained of in these proceedings other than a brief period of low back pain in or about 2005 that was treated by her GP, Dr. Coleman Walsh, with manipulation and did not reoccur . . .

18. None relevant save the history set out at 16. above.”

In the course of the proceedings, discovery was sought by the defendants by way of a notice of motion dated 20th February 2013. The discovery sought, which appears to have been conceded and complied with by the plaintiff, was in relation to the plaintiff’s medical history and was extraordinarily extensive. As a result, all of the records relating to the plaintiff’s, it would appear, entire medical history, going back to 2004, were discovered.

77. In the course of a lengthy cross-examination of the plaintiff, Mr. Maher S.C. for the defendants drew attention to and challenged the plaintiff on the following entries in her medical records.

78. The first of these was an entry dated 27th September 2004, in the records of her General Practitioner, Dr. Coleman Walsh, and it reads as follows:

"subjective symptoms: severe pain left hip

subjective findings: pain on hip flexion, internal and external rotation

assessment: The pain was so severe I wonder had she developed a fracture

procedure: injection intra muscular difene 75 mgs im stat

plan of action: referral hospital Waterford Regional

drug prescription: (new) DIFENE 50MG CAPSULE EC retarded caps, 1 caps TDS, 10 day(s), 30 caps."

The following entry in the GP notes dated 28th September 2004, is in the following terms:

"date of examination: 28/09/2004

hospital: Waterford Regional - A 270511

diagnosis [M]: Trochanteric bursitis"

It is apparent from a perusal of the plaintiff's records that the complaint recorded above was as described in the records diagnosed as a bursitis, was treated and is not ever again mentioned in the plaintiff's records. When challenged on this in cross-examination, the plaintiff's evidence was that she had no recollection whatsoever of this complaint and had completely forgotten about it, and even when challenged on it, still could not remember it.

79. The next entry in the plaintiff's medical records to which Mr. Maher drew attention was in the GP records of Dr. Walsh dated 27th October 2005, and it reads as follows:

"subjective symptoms: neck pain

objective findings: tenderness left neck

plan of action: advised to do the McKenzie neck exercise programme

drug prescription: (new) DISTALGESIC 32/325 TABLET tabs, 2 tabs TDS, 30 day(s), 100 tabs

drug prescription: (new) ANXICALM 2MG TABLET tabs, 1 tabs daily, 7 days), 7 tabs."

80. As is apparent from the medical records, there is no mention of this complaint again. In the reply to particulars dated 11th November 2011, as quoted above, the plaintiff mentions a brief episode of low back pain in about 2005 that was treated by her GP, Dr. Coleman Walsh. There is no mention whatever of such a complaint in the GP records and I would infer that the reply to particulars was probably a mistaken attempt based on the plaintiff's faulty memory of the neck complaint she actually had in 2005.

81. When challenged on the subject of neck pain on the left side in October 2005, the plaintiff's evidence, having apparently discussed the matter with her husband overnight, acknowledged that she had a once-off episode of neck pain then which she said was caused by leaving a window open, either a bedroom or car window, and she insisted that it was a once-off episode and that she had forgotten it until it was brought up by Mr. Maher in cross-examination.

82. The next matter to which attention was drawn derived from a note in the General Practitioner's records dated 27th November 2006, where the plaintiff made a complaint of right hip pain (severe). She was referred in respect of this complaint to a Dr. Brian Mulcahy and it is apparent from the records that her complaint was fully investigated in Shanakiel Hospital, the conclusion of which was diagnosis of degenerative changes in the plaintiff's right hip joint. The plaintiff, in her evidence, acknowledged this complaint and said that this complaint had not given her trouble since, until the recent past, when it began to trouble her again and that she might require surgery for it.

83. The next record referred to by Mr. Maher was a record of South Tipperary General Hospital and although the record is undated, it can be said to have related to a consultation between 31st July 2008 and 11th August 2008. The content of the record would suggest that the plaintiff was attending the hospital with regard to significant health issues entirely unrelated to the injuries of which she complains in this accident. As part of what would appear to have been a fairly extensive history taken from the plaintiff, the following is recorded:

"SR: Pain (L shoulder → L arm no neck discomfort)"

84. It is quite clear that this complaint was not the reason why she was in South Tipperary General Hospital on that occasion and there is no mention of it whatsoever thereafter. It seems to have arisen only as part of the taking of a comprehensive history and it does not appear to have given rise to any concern on anybody's part. It did not receive any further attention and was not mentioned again.

85. The plaintiff's evidence on this topic, when challenged on her evidence to the effect that she had not experienced neck or shoulder pain prior to the accident the subject matter of these proceedings, was that she could not remember this complaint in July 2008 at South Tipperary General Hospital.

86. Finally, Mr. Maher raised a complaint of low back pain made by the plaintiff to her General Practitioner on 9th February 2009, as disclosed by the GP records. It is apparent from the GP records that followed this date, that this complaint was extensively investigated and was related to fibroids and led, later in 2009, to the plaintiff having a hysterectomy performed. The plaintiff's evidence in this regard was to the effect that the pain which she suffered, she described as being a year before the accident the subject matter in this case, was caused by fibroids and that when she had her womb removed, this pain disappeared.

87. As discussed above, the injuries which the plaintiff suffered in the accident the subject matter of these proceedings were a wedge fracture of the 6th thoracic disc and an injury to her left shoulder region, both of which are entirely consistent with the nature of the fall she had. The medical reports of the various doctors who treated the plaintiff in respect of those injuries and their *sequelae*

were admitted by agreement into evidence. Also admitted to evidence were medical reports from the defendants, in particular Mr. Frank McManus, who unfortunately did not have an opportunity to see the MRI of the plaintiff's left shoulder and therefore reserved his position with regard to that injury.

88. In my opinion, it would have been readily apparent to the defendants that the left hip complaint from 2004 was of a minor and transient nature and of no relevance at all to the injuries sustained by the plaintiff, the subject matter of these proceedings. Similarly, the complaint of left neck pain in October 2005 was also a minor event of a transient nature with no bearing on the injuries sustained by the plaintiff in July 2010, almost five years later. The problem of degenerative change in the plaintiff's right hip discovered in 2006 similarly had no connection with the injuries in respect of which the plaintiff claims damages from the defendants. The complaint in South Tipperary General Hospital in late July 2009, of left shoulder pain and going down her arm with no neck discomfort was clearly isolated and not perceived to be of any significance at the time and the plaintiff could not remember it and I accept her evidence in that regard. It is readily apparent that this complaint, or anything similar, did not emerge again until after her accident in July 2010. Finally, the complaint of lower back pain in 2009 was explained in the medical records by the presence of fibroids and cured by the hysterectomy and had nothing whatsoever to do with the injuries suffered by the plaintiff in her fall in July 2010.

89. In light of all of the information disclosed to the defendants in the plaintiff's medical records and bearing in mind that there is little or no dispute concerning the injuries suffered by the plaintiff in this accident, save to the relatively minimal extent revealed in the defendants' medical experts reports, the forensic assault on the plaintiff to set up an application under s. 26 of the Act of 2004, can only be seen as wholly unjustified and an opportunist attempt to evade their liability to the plaintiff by a misconceived invocation of section 26.

90. It is obvious that reply number 16 to the request for particulars is inaccurate, but I am quite satisfied that this was the result of the plaintiff having completely forgotten about the minor hip and neck complaints she had in 2004 and 2005, and believing, in my view, rightly, that her right hip problem and her fibroids problem had no relevance to the claim she was making.

91. I am absolutely satisfied that when this reply to particulars was made, the plaintiff had no intention whatsoever of misleading anybody. I have had the opportunity of listening and observing the plaintiff give her evidence in the course of a lengthy examination and cross-examination and in the course of the latter, having to endure a searching examination, which clearly impugned her integrity. I am quite satisfied that she gave her evidence, so far as accuracy was concerned, to the best of her ability and recollection and at all times, honestly. I reject the submission or suggestion that she was attempting to mislead the court.

92. I have no hesitation in dismissing the defendants' application under s. 26 of the Act of 2004. I would like to add that this section is there to deter and disallow fraudulent claims. It should not to be seen as an opportunity to prey on the frailty of human recollection or the accidental mishaps that so often occur in the process of litigation, to enable a concoction of error to be assembled so as to mount an attack on a worthy plaintiff in order to deprive that plaintiff of the award of compensation to which they are rightly entitled. There is a world of difference between this plaintiff's case and the fraudulent claims that have been exposed in the cases that were opened to this court in dealing with this s. 26 application, namely:

(i) *Folan v. Ó Corraoin & Ors.* [2011] IEHC 487, Murphy J.

(ii) *Rahman v. Craigfort Taverns Ltd.* [2012] IEHC 478, O'Neill J.

(iii) *Montgomery v. Minister for Justice, Equality and Defence & Anor.[*2012] IEHC 443, O'Neill J.

(iv) *De Cataldo v. Petro Gas Group Ltd. & Anor.* [2012] IEHC 495, O'Neill J.

(v) *Salako v. O'Carroll* [2013] IEHC, 17, Peart J.

(vi) *Ludlow v. Unsworth & Anor.* [2013] IEHC 153, Ryan J.

It behoves defendants to use prudent discernment before taking the very serious step of making a s. 26 application.

93. Before leaving this topic, I would also observe that the situation that was confronted by the court in this case was brought about, it would seem to me, firstly, by the extension of the demand for particulars, far beyond its legitimate scope, a practice which, hopefully, following the judgment of Hogan J. in the case of *Armstrong v. Sean Moffatt and Thomas Moffatt t/a Ballina Medical Centre and Maureen Irwin*, in which judgment was delivered on 28th March 2013, will be curtailed or else condemned in the future.

94. Secondly, and here I do not make any criticism of the defendants because it would seem apparent that the plaintiff conceded the discovery sought, but discovery in this case extended far beyond what was relevant to the issues in the proceedings as raised on the pleadings. The mere fact that somebody makes a claim for damages for personal injuries does not entitle defendants to discovery of a plaintiff's entire medical history. In the first instance, it is not right that plaintiffs should have these aspects of their personal lives disclosed in this way, when they bear no relevance to the issues in the case, and the availability of irrelevant medical records frequently gives rise to extending the length of trials because of the inevitable exploration of these records in cross-examination.

95. Mr. Treacy S.C. for the plaintiff, brought up the subject of aggravated damages because of the unjustifiable manner in which a s. 26 had been invoked by the defendants, but having considered the matter further, did not make an application for aggravated damages. He did ask the court to award additional general damages to the plaintiff to compensate her for the upsetting experience of having her reputation and good name unjustly impugned by the defendants in the pursuit of the s. 26 application, all under the protection of absolute privilege.

96. It would seem to me that if any damages were to be awarded to the plaintiff because of the manner in which the defence was conducted, these could only be awarded under the heading of either aggravated or exemplary damages. In these proceedings, the plaintiff claims damages arising from the negligence and breach of statutory duty of the defendants in respect of the system of work adopted. In my view, it could not be said that the upset of the plaintiff, caused by the unjust attack on her in the course of the defence of the proceedings was a foreseeable consequence of the defendants' original negligence and breach of statutory duty. Accordingly, general damages in respect of that upset cannot be awarded in these proceedings.

97. The special damages in the case are agreed at €5,000 making a total of damages of €80,000.

98. Accordingly, there will be judgment for the plaintiff for the sum of €60,000 being 75% of the total damages.