

THE HIGH COURT

[2016 No. 1715 P.]

BETWEEN

DAMIEN JEDRUCH

PLAINTIFF

AND

TESCO IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 19th day of April, 2018**Introduction**

1. This action arises out of an accident which occurred at approximately 07:15hrs on 21st April, 2015, when the plaintiff slipped on the floor in the gent's toilet at the defendant's premises at Donabate Distribution Centre, Co. Dublin. It is the plaintiff's case that having used the toilet in the cubicle, he went over to the wash hand basin, washed his hands and was turning to his left to dry his hands at the adjacent hot air hand dryer, when his right foot slipped backwards on the tiled surface, causing him to fall forward onto his outstretched hands. His hands slid forward across the tiled surface of the floor, until his right hand came to a halt on an AJ cover, the tiled surface of which had been broken. The plaintiff suffered fractures to his right elbow and wrist.
2. It is the plaintiff's case that the defendant was negligent in three respects: firstly, that there was a failure to maintain the area in safe and proper condition, in particular, due to the fact that there was a large accumulation of water and dirt on the floor surface. Secondly, that the tiles used in the toilet were unsafe and dangerous for use in such an area and thirdly, that the floor area was unsafe due to the presence of the broken AJ cover.
3. The defendant denies liability on the basis that the particular toilet had been cleaned by a contract cleaner only minutes before the time of the plaintiff's accident. The evidence of the cleaner and of her supervisor was to the effect that the gent's toilet was clean and dry literally two to three minutes prior to the time that the plaintiff met with his accident. The defendant accepted that when the plaintiff returned to the toilet in the company of two managers, some nine/five minutes after the accident, there was a large spillage of water and dirt in the form of footprints on the floor area. The defendant accepts that the AJ cover was broken at the time of the accident, but denies that the tiles were unsafe or unsuitable for use in a toilet.
4. The defendant further pleaded that the plaintiff was guilty of contributory negligence in that he exposed himself to a risk of injury which he knew or ought to have known and failed to keep any adequate lookout. The defence also put quantum in issue.
5. There was no medical evidence called at the trial of the action. Instead, medical reports were handed in from Mr. Hannan Mullett, Consultant Shoulder and Elbow Surgeon, dated 16th September, 2015, and 9th May, 2017.
6. While liability for any special damages was not accepted, the quantum of special damages was agreed at €20,000.

The Sequence of Events on 21st April, 2015

7. Given the thrust of the defendant's defence, which is to the effect that the particular toilet had been cleaned literally minutes prior to the plaintiff's accident, the timing of events in relation to people entering and leaving the general toilet area, is of some importance. For that reason, I propose to deal with the sequence of timings before coming to the evidence given by the plaintiff and the other witnesses.
8. There was CCTV in the area which showed people entering and exiting the corridor on which the toilets were situated. The CCTV recording was viewed after the accident by Mr. Stewart Ridgway, a supervisor employed by the defendant at the plant. Having viewed the CCTV recording, he made notes of the timings shown thereon, at which people entered and left the toilet area. According to Mr. Ridgway, he then asked the security department to make a copy of the CCTV recording. However, they informed him that they were unable to do so. Subsequently, the original CCTV recording was lost.
9. In these circumstances, senior counsel acting for the defendant very properly did not lead any evidence in relation to the content of Mr. Ridgway's statement when he was bringing the contract cleaner through her evidence in chief. However, in the course of cross examination, senior counsel for the plaintiff put various timings to her, as had been set out in the statement made by Mr. Ridgway. On this basis, his statement as to the timing of events shown on the CCTV recording was put to the witness. Mr. Ridgway was subsequently called to give evidence as to what he had seen when he viewed the CCTV recording. While this may be seen as being hearsay evidence, the plaintiff did not object to such evidence being led, as they accepted the timings which had been recorded by Mr. Ridgway as having been shown on the CCTV recording.
10. In these circumstances, I accept the evidence given by Mr. Ridgway that the CCTV recording showed the following:
 - 07:00hrs The cleaner, Ms. Katarina Malouepsza, is shown entering the toilet area. She places a "Cleaning in Progress" sign across the doorway leading to the toilets.
 - 07.15hrs Ms. Malouepsza leaves and removes the sign. Moments later, the plaintiff is shown entering the toilet.
 - 07.16hrs The cleaning supervisor, Mr. Labude, enters the toilet.
 - 07.17hrs Mr. Labude leaves the toilet.
 - 07.17/07.19hrs The plaintiff is shown leaving the toilet. He immediately reports that he had fallen while in the toilet.
 - 07.19hrs Another employee, Mr. Popiolek, is shown entering the toilet.
 - 07.24hrs Mr. Ridgway, the plaintiff and a manager, Mr. Turnbull enter the toilet. Photographs are taken by Mr. Turnbull.

11. Mr. Ridgway stated that the reason why he could not be certain as to the time when the plaintiff actually left the toilet, was due to the fact that there was a slippage on the CCTV recording lasting two minutes from 07:17hrs to 07:19hrs.

Evidence on behalf of the Plaintiff

12. The plaintiff is 35 years of age having been born on 20th October, 1982. He is a Polish national. He worked with the defendant for eight years prior to 2015 at the defendant's warehouse premises at Donabate, Co. Dublin.

13. On 21st April, 2015, the plaintiff was working on the 06.00hrs/14.00hrs shift. He stated that shortly after 07:00hrs, he went to use the gent's toilet in the Goods In section of the warehouse. There was no cleaning barrier sign across the doorway. The plaintiff stated that he entered through the door and proceeded across the floor and entered the middle cubicle to the right of the toilet area, as shown in photograph No. 3 of the photographs taken by Mr. Culleton. The toilet is also shown in photograph No. 2 of the set of photographs taken by Mr. Turnbull. Those photographs had been taken at 07:24hrs on the morning of the accident.

14. The plaintiff stated that he did not notice anything about the condition of the floor surface when he entered the male toilets. Having finished in the cubicle, he proceeded straight across and washed his hands in the centre hand basin. Having washed his hands, he shook off the excess water into the hand basin. He then turned to his left, with the intention of proceeding down the hand basins to use the first electric hand dryer, which is also visible in photograph No. 3 of Mr. Culleton's photographs.

15. The plaintiff stated that as he moved off, his right foot shot backwards and he was thrown forward onto his outstretched hands. He stated that on hitting the floor, his hands slipped forward, until his right hand came into contact with the broken tile on the AJ cover, as shown in photograph 5 of Mr. Turnbull's photographs, at which time it came to an abrupt halt.

16. The plaintiff stated that when he had slipped onto the floor, he noticed that the floor was very wet. There was a considerable amount of water on the floor, which was still visible at the time that Mr. Turnbull took his photographs at 07:24hrs. He stated that he also noticed that the floor was quite dirty. He stated that on the day in question he had been wearing his company issue work boots, which were heavy boots with a ridged sole. The plaintiff accepted that the floor surface as shown in Mr. Turnbull's photographs represented the condition of the floor when he had slipped on it some nine/five minutes earlier. However, he stated that he had not noticed the wet or dirt on the floor on entering the toilets. It was only after his fall that he noted the condition of the floor.

17. The plaintiff was asked about the yellow warning sign which was shown in both the Culleton and Turnbull photographs. The plaintiff stated that the yellow sign as shown in Culleton photographs 3 and 4 was permanently in that position. For that reason, he had not noticed it when he entered on the morning in question. He denied that the yellow sign was in the position as shown in Turnbull photograph 2. He stated that if it had been in that position, he would have seen it.

18. In cross examination, the plaintiff accepted that Turnbull photograph 7 showed a considerable amount of water and the presence of boot marks on the floor surface. He thought that a similar amount of water had been on the floor surface, as shown in that photograph, at the time when he fell. He accepted that the amount of water and the footprints to the left of the broken tile, was more than would be made from a splash of water from the hand basin in the course of washing one's hands. He agreed that one could not describe the floor in that condition, as being clean or dry. It was put to the plaintiff that the cleaner employed by the defendant and her supervisor, would say that the gent's toilet floor had been clean and dry literally minutes before his fall at 07:15hrs and 07:16hrs. The plaintiff was adamant that the water which had been on the floor as shown in Mr. Turnbull's photographs, was the same as had been on the floor at the time of his accident. He was asked if that was so, why he had not noticed it. He stated that he could only say that he did not notice the condition of the floor prior to his fall.

19. It was put to the plaintiff that in a question and answer interview, which he had had with his manager, Mr. Karl Turnbull, on the day after the accident, he had stated as follows:-

"Q. Was the floor wet when you went in?"

DJ Yes.

KT How wet was it, was it just freshly cleaned or was it wet that it had to be cleaned?

DJ It was wet that it had to be cleaned."

20. It was put to the plaintiff that he had changed his answer prior to signing that interview, by insertion of the following:-

"Damien wants to change this, as he is not sure about the state of the floor."

21. The plaintiff accepted that he had initially said that the floor was wet and dirty, such that it looked like it had to be cleaned, but he had changed that to say that he was not sure about the state of the floor. He stated that he was somewhat confused at that meeting. He had felt under pressure as he was being interviewed by his manager. He reiterated that when he went into the toilet, he did not notice the state of the floor, but there was water and dirt on it when he fell.

22. Evidence was given on behalf of the plaintiff by Mr. Pat Culleton, Consulting engineer. He had inspected the locus on 10th February, 2017. He made the following observations: firstly, in relation to the tiles in the toilet, he stated that these were 8 inch smooth ceramic tiles. He stated that having carried out a test in relation to the risk of slipping when the tiles were wet, the reading given was literally off the scale for such tests. His conclusions was that the tiles were "treacherous" when wet. He considered them highly unsafe and inappropriate for use in a toilet, which would be used by workers in a factory or warehouse setting.

23. He stated that the account given by the plaintiff that his foot slipped backwards, was indicative of the extremely slippery nature of the surface, similar to the type of slip that one may encounter when walking on ice. This was consistent with his finding in relation to the slipperiness of the tiles when wet. In his opinion, the tiles were unsafe and inappropriate for use at the locus. There was no reason why the defendant could not have put in slip-resistant or non-slip tiles in the toilet. Given that a toilet area is a place where there are likely to be spillages of water to a greater or lesser extent, these tiles should not have been used in such an area.

24. He stated that in a toilet or public bathroom, it is almost impossible to prevent the floor becoming wet, hence the need to use non-slip tiles. It only required a small film of water to render these smooth ceramic tiles unsafe. Accordingly, after the floor had been washed or mopped, this floor surface would have been unsafe until the tiles became completely dry, which would have taken approximately 15 minutes.

25. In cross examination, Mr. Culleton stated that these smooth ceramic tiles could be found in domestic bathrooms, but they were not suitable for use in public bathrooms, such as in pubs or other public buildings. It was put to the witness that smooth tiles were better for achieving cleanliness. He stated that this was not a locus such as a hospital which would require extreme hygiene. Where there were concrete floors throughout the warehouse, it was not good practice to have very smooth tiles in a toilet area; the defendant should have used non-slip tiles. He accepted that the condition of the floor surface as shown in Turnbull photographs 4, 5 and 6 showed that the tiles were very dirty and wet.

26. Mr. Culleton also stated that the broken tile on the AJ cover, should have been repaired. It was bad practice to have a broken tile. In this case, the plaintiff had slipped and his hands were then moving forward across the smooth tiled surface, when his right hand came into contact with the broken tile, it was caused to stop abruptly. He was of opinion that this sudden stopping movement had probably contributed to the injuries suffered by the plaintiff.

27. Mr. Culleton was of opinion that the provisions of the Safety, Health and Welfare at Work Act 2007 and the Regulations made thereunder, imposed a statutory obligation on an employer to provide a floor which would not be slippery when wet so far as practicable. As this was a place which was likely to be wet, it was practicable for the employer to reduce the slippery nature of the surface when wet, by using non-slip tiles.

Evidence on behalf of the Defendant

28. Ms. Katarina Malouepsza, was employed as a cleaner by a company called OCS, who were retained by the defendant to provide cleaning services at the Donabate Warehouse. Her shift was from 06.00 hrs to 14.00 hrs. She had to clean the toilets in each area of the warehouse on three occasions per shift. She indicated that the standard operating procedure for such cleaning operations was as follows: first, she would place a sign across the corridor leading to the male and female toilets as shown in Culleton photos 1 and 2. She would clean the male toilet first, as it was generally more dirty, given that there were more male than female employees. She thought that there were probably approximately 300 employees in total. She would start by cleaning the mirrors, the basin, the walls, followed by the urinals, the bowls and lastly the floors. She stated that she would mop outwards towards the door of the male toilet. She would then go across to the female toilet and carry out the same procedure there. However, as there were much fewer female employees, very often this toilet did not require much cleaning.

29. When she finished cleaning the female toilet, she would then clean the small driver's toilet which was nearby. She would leave the cleaning sign across the doorway while she was doing that, as that was what she had been taught in her training and due to the fact that the floor would still be wet. When she was finished cleaning the driver's toilet, she would check the toilet floors in the male and female toilets. She would ensure that the area was clean and ready for use. When she had finished the cleaning, she would sign the cleaning roster, which was kept in a frame attached to the door. She would enter the time onto the cleaning sheet.

30. Ms. Malouepsza stated that the cleaning operation could vary in length depending on the time of day. This was due to the fact that the toilets were usually more dirty in the early morning, as there was no cleaning carried out during the night shift. She stated that on the day of the accident, she had been asked about what cleaning she had done that day approximately one hour later, at approximately 08.00 hrs.

31. On the day of the accident she had cleaned the male toilet as normal. There were no puddles or spillages on the floor. She stated that it had taken her approximately ten to fifteen minutes to clean the toilet. If there had been an unusual spillage on the floor, she would have called her supervisor, or the site service department. She would also have closed the toilet until the spillage had been attended to. If there was a leak causing the spillage, she would report it, so that the necessary repairs could be carried out. She stated that the toilet had been in a good condition when she left that area.

32. The witness stated that the floor in the main toilet had not been in the condition which was shown in Mr. Turnbull's photographs, when she had left the toilet. In those photos there was more dirt and more water than would normally be found on the floor surface at the end of the night shift. She stated that she would not have been doing her job properly if she left the toilet in that condition.

33. Initially in cross examination, the witness stated that she had left the toilet area and had completed the cleaning operation by 07.00 hrs, as she had signed the cleaning sheet to that effect. It was put to her that in a statement which she had made for the defendant, she had stated that she had gone into the male toilet at 07.00 hrs. Ms. Malouepsza stated that that had been a mistake on her part, because she had made her statement without seeing the time that she had entered on the cleaning sheet. The cleaning sheet had been taken away by her manager, when she made her statement. She was satisfied that she had left the male toilet at 07.00 hrs, because that was what she had written on the cleaning sheet.

34. When it was put to the witness that the CCTV had apparently shown her entering the toilets at 07.00 hrs and leaving the area and removing the cleaning sign at 07.15 hrs, she accepted that the CCTV recording must be correct. She stated that within that 15 minute period she cleaned both the male and female toilets. She spent approximately 10/13 minutes in the male toilet and the remainder of the time in the female toilet.

35. In relation to removal of the cleaning sign from the doorway, she stated that she could not recall when she removed the barrier across the doorway. Sometimes she would remove this on leaving the area and sometimes she would remove it when she checked the area to see if it was dry. She could not recall if she had checked if the area was dry that morning.

36. It was put to the witness that on the timings given on the CCTV and on her evidence in relation to the length of time that she spent in the male toilet, it appeared that she removed the sign approximately two minutes after she had cleaned the male toilet. She stated that she assumed that the floor was dry when she had removed the sign. It was possible that she had not had to wash the floor on the female toilet on that morning. It was put to her that she did not check the floors on that particular morning before removing the sign. The plaintiff stated that that was not correct that they had procedures which they had to follow and they had to check that the floors were dry. It was put to her that the plaintiff had entered the toilet at 07.15 hrs literally seconds after she had removed the sign. She accepted that that was correct. She was asked whether she was suggesting that the water and the dirt had been put onto the floor within a matter of seconds. The witness stated that she was not suggesting that. All she could say was that she had cleaned the floor on the morning in question. It was put to her that it was impossible for the degree of wetness and dirt to have accumulated in such a short period of time after she left the area and before the plaintiff entered. The witness stated that they did not know how many people had gone into the toilet prior to the photos being taken by Mr. Turnbull. There could have been a number of people in the toilet during this period.

37. It was put to the witness that the CCTV showed her supervisor, Mr. Labude entering the toilet at 07.16 hrs and leaving at 07.17 hrs, at which time he said that the floor was clean and dry, which would mean that there was only seven minutes between that time and the taking of the photographs by Mr. Turnbull in which the floor could become wet and dirty as shown in his photos. The plaintiff

stated that she was glad that her supervisor stated that the floor was clean and dry when he saw it.

38. Evidence was given by Mr. Andrej Labude, the manager employed by OCS Cleaning. He stated that on the morning in question, he had inspected the male toilet at 07.16 hrs, at which time the floor was dry and clean. He stated that he did not check the cleaning sheet on the back of door, he just looked around the toilet area.

39. He stated that the condition of the floor as shown in the Turnbull photos numbers 3 and 4, was not the usual condition of the floor. If he had seen it in that condition, the toilet would have to be closed for cleaning. He was asked about the footprints which were shown in photograph 6, in respect of which he said that he would not have been happy with such condition of the floor after cleaning. He stated that normally after the night shift, the floor would be in a better condition than that shown in those photographs. He stated that Ms. Malouepsza was a good worker.

40. In cross examination, Mr. Labude stated that he had not seen the CCTV recording. It was put to him that on his evidence and on the basis of the CCTV recording, it would appear that between the 07.17 hrs and 07.19 hrs a floor which according to him had been clean and dry, became very dirty and wet and nobody else had entered in the interim. Mr. Labude stated that he could only say that the floor was clean and dry when he had gone in to do his inspection. He stated that the plaintiff had been in the toilet area at that time. One would have to ask the plaintiff about how the floor became dirty and wet.

41. Mr. Stewart Ridgeway gave evidence in relation to his viewing of the CCTV recording, which has been outlined earlier in this judgment.

42. Mr. Ridgeway stated that after the incident had been reported by the plaintiff, he went to the toilet area with the plaintiff and Mr. Turnbull at approximately 07.24 hrs. Mr. Turnbull had taken his photographs at that time. The plaintiff had demonstrated where he had fallen, as shown in photograph number 8. The plaintiff had stated that the floor had been wet at the time of his accident. Mr. Ridgeway noted the time at which the floor had been recorded as having been cleaned, as per the cleaning sheet. In cross examination it was put to him that Ms. Malouepsza had stated in her evidence that she had left the toilet area at 07.00 hrs, but that was clearly incorrect according to the CCTV recording. The witness agreed with this. It was further put to him that the cleaning sheet indicated that she had signed out having completed the cleaning at 07.00 hrs and that that was also incorrect. The witness agreed.

43. The witness agreed that the floor area appeared quite dirty in Mr. Turnbull's photographs. It was put to him that that dirt was probably done by more than one person. The witness stated that it was hard to know how many people it would take to make that level of dirt. He stated that he had taken a statement from the plaintiff on the morning of the accident. The plaintiff had said that the floor was very wet on entering the bathroom. He accepted what he had been told. The witness stated that he was unable to explain how the floor became that dirty. He could not state what may have gone on during the two minutes when the CCTV recording skipped between 07.17hrs and 07.19 hrs.

44. Evidence was given by Mr. Karl Turnbull, who is a section manager and on occasions an acting shift manager in the defendant's plant at Donabate, County Dublin. He stated that Mr. Ridgeway had told him about the accident. He met Mr. Ridgeway at the toilets and took the photographs at 07.24 hrs. Photograph 1 was taken before the plaintiff walked on the floor.

45. On the following day, he took a further statement from the plaintiff in the form of a Q & A interview. When the interview had concluded and was read over to him, the plaintiff asked him to put in the amendment which was written in at the side of the page. The plaintiff then signed the statement.

46. In cross examination, Mr. Turnbull stated that the amendment to the statement related to the question: "*Was the floor wet when you went in?*" He did not change his subsequent answer in which he agreed with the proposition that "*The floor had not been cleaned yet*" at the time of his accident. Mr. Turnbull stated that he could not state whether the condition of the floor as shown in his photographs, indicated that the floor had not been cleaned prior to that time. He did agree that pools of water on the floor would not represent a high standard of cleanliness. He stated that photograph number 11 was his photograph of the cleaning sheet taken at 07.24 hrs.

47. Finally, evidence was given by Mr. Cathal Maguire, consulting engineer. He stated that the reading for the slip resistance of the tiles when wet, indicated that the tiles were slippery when wet. He stated that this would be the most common finding for tiles in use in bathrooms in Ireland. Smooth tiles were often used in such locations as they were easy to clean properly. The use of ridged tiles makes them harder to clean and more difficult to maintain looking well. A smooth ceramic tile is typical of those used in toilets and bathrooms. They need regular monitoring and cleaning to ensure that the area can be used safely.

48. In relation to the cleaning system in use in the premises, he stated that the cleaner had described cleaning the floor and leaving it clean and dry. This had been confirmed by her supervisor. In such circumstances, the floor would have been safe if it was clean and dry. The incident appears to have occurred within minutes of the cleaning operation. Cleaning three times during a shift was a good cleaning system and it seemed to have been implemented on the day of the accident.

49. In cross examination, Mr. Maguire accepted that there was no cleaning during the night shift. He accepted that there was a sizable workforce in the warehouse, although he did not know the exact number of people employed there. He agreed that the Turnbull photographs showed that there had been considerable usage of the area, due to the extensive number of footprints shown therein. Mr. Maguire agreed that the photographs suggested that people had been walking through a considerable accumulation of water on the floor. This was consistent with people walking through a puddle and leaving dirt and footprints on the floor surface. In relation to the number of people who had been in the room after the cleaner left, Mr. Maguire understood that the plaintiff and another man had been in the toilet area and that subsequent to that the plaintiff and two managers had returned to the scene. This could explain the state of the floor. The condition of the floor was certainly caused by people wearing boots and walking in the puddle.

50. In relation to the tiles, he accepted that ceramic tiles were slippery when wet. He agreed that non-slip or slip resistant tiles are used in newer buildings, but smooth tiles were still being used in buildings throughout the country. He stated that smooth tiles were perfectly safe when dry. The employers had put in a system for keeping the tiles in the toilet area clean and dry. He accepted that when wet, the tiles were slippery even with a small amount of water on them. Mr. Maguire accepted that his finding on the slip resistance test was 0.1 and that values less than 0.2 constituted a high risk of slipping. Accordingly there was a high risk of slipping, when these tiles were wet. He stated that he did not know the cost of retiling this toilet area. He accepted that it was not a large area.

51. He accepted that the tile on the AJ cover was broken. It should have been repaired. While the tiles were slippery when wet, he would not describe them as being "treacherous" when wet. He did not agree that smooth tiles could only be used safely in a domestic situation. He stated that they were commonly found in both domestic and commercial situations. He accepted that the floor surface should be dry when people were allowed to re-enter an area after cleaning.

Conclusions

52. In coming to my conclusions on the liability aspects of this case, it is appropriate to start with the areas in which there is really no dispute between the parties. Firstly, although the CCTV recording itself has been lost, the timing sequence as shown therein, as recorded by Mr. Ridgway in his statement, was accepted by both parties. This shows the following: Ms. Malouepsza entered the general toilet area and erected the cleaning barrier in the hallway at 07.00hrs. She emerged, having completed the cleaning process and removed the cleaning barrier sign at 07.15hrs.

53. The plaintiff entered the area literally moments later, also at 07.15hrs. Mr. Labude entered the area at 07.16hrs and exited at 07.17hrs. Due to the slippage in the CCTV recording, it is not clear at what exact time the plaintiff left the toilet area, but it would appear that he did so at some time between 07.17hrs and 07.19hrs. It appears that another employee, Mr. Popiolek entered the toilet at 07.19hrs. Unfortunately, we do not know when this man left the toilet area, nor whether any other persons entered the toilet after the plaintiff had left and prior to the time that he returned there in the company of Mr. Ridgway and Mr. Turnbull at 07.24hrs. However, given that this was early in the morning and that it was in the Goods-In area, I think it is reasonably safe to assume that a large number of persons did not enter the toilet in the five minute period between 07.19hrs and 07.24hrs.

54. The other area on which there is very little dispute is that there was considerable water and dirt in the form of boot marks and footprints on the floor surface at the time that Mr. Turnbull's photographs were taken at 07.24hrs. All parties were agreed that that amount of water could not have been caused by the ordinary usage of the wash hand basins.

55. The defendants have resolutely defended the action on the basis that the toilet floor was in a clean and dry condition when Ms. Malouepsza concluded her cleaning of the area at 07.15hrs. They have candidly said that they cannot say how the significant amount of water and dirt came to be on the floor surface that was shown in Mr. Turnbull's photographs. However, the defendant states that it was not due to any negligence, or want of care on the part of it, its servants or agents. The defendant does not make the case that the water was put on the floor by the plaintiff. Such an assertion was neither pleaded in its defence, nor put to the plaintiff in the course of cross examination. Having regard to the decisions in *Browne v. Dunn* (1893) 6 R 67 H.L. and *McDonagh v. Sunday Newspapers Ltd.* [2017] IESC 46, if the court was going to be invited to make such a finding against the plaintiff, such an assertion would have had to have been put to the plaintiff for comment in the a course of cross examination.

56. Even if the court was to overlook the fact that it was neither pleaded nor put to the plaintiff that he had caused the water to be on the floor surface, I do not think that such a proposition is established on the evidence. It was agreed by all parties that the quantity of water on the floor was in excess of that which could have occurred from a normal use of the wash hand basin. This leads to the inference, that if the floor was clean and dry at 07:15hrs as alleged by Ms. Malouepsza and in the absence of any leak being discovered in the area, the water could only have been put on the floor by the actions of the plaintiff. It is difficult to conceive how the plaintiff could have put this quantity of liquid onto the floor accidentally. Accordingly, it seems to me that the only inference that could be drawn is that the plaintiff deliberately placed the water on the floor so as to stage a fraudulent accident.

57. However, when one looks at the plaintiff's conduct immediately after the accident, that is not consistent with him having engaged in any such activity. From the statement which he made to Mr. Ridgway, which appears in the defendant's discovery at Tab 6(a), it appears that immediately after the fall, he left the area and had a drink of water. He then met a fellow employee, Mr. Anthony Wade and told him what had happened. Mr. Wade apparently told the plaintiff that he should report the accident to Mr. Ridgway, which he did. Having been seen in the first aid department, the plaintiff then returned to the toilet with Mr. Ridgway and Mr. Turnbull for the purposes of their investigation of the incident. According to the statement made by Mr. Ridgway, which appears at Tab 7 of the defendant's discovery, the plaintiff did not seem to make any great issue about his injuries. He indicated that he would no longer be in a position to work the rest of his shift and felt that he might have to get his elbow checked "as he felt something was wrong with it". According to Mr. Ridgway, the plaintiff wanted to make his own way home and go and see his own doctor later that day. However, management made the decision, correctly as it transpired, that the plaintiff should be seen in hospital and to this end, they sent him by taxi to Beaumont Hospital. It seems to me that if the plaintiff had engaged in setting up a fraudulent accident, the very least that he would have done was that he would have reported the matter immediately to management and would have made considerably more of his injuries and insisted that he be seen by a doctor immediately. The plaintiff did none of these things. Taking all of the evidence into account, including the evidence given by the plaintiff himself, I am satisfied that there is no basis on which it could be held that this was a fraudulent, or staged accident.

58. Having regard to the timings given in the CCTV recording and having regard to the evidence given by Ms. Malouepsza, I have come to the conclusion that her recall of events is open to question. Initially in her evidence, she stated that she had finished the cleaning operation at 07.00hrs, as she had signed the cleaning sheet to that effect. When it was put to her that in a statement which she had made for the defendant, she had stated that she had entered the toilet area at 07.00hrs, she explained that mistake as being due to the fact that she did not have sight of the cleaning record when she made her statement. I am not sure that that can be correct. She stated that she had made her statement at approximately 08.00hrs. While it is true that Mr. Turnbull's photograph shows the last entry on the cleaning sheet as having been made by the witness at 07.00hrs, it does not appear that the sheet was actually removed at that time, as in the discovery documentation a different version of the same sheet was given, wherein the witness had made further entries on the sheet for later the same day. Thus, it appears that the sheet was not removed from the back of the door until later in the day. This means that it would have been available for the witness at the time that she made her statement. Thus, her explanation for the mistake in her statement may not be correct.

59. However, even her initial evidence in relation to the time that she concluded her cleaning of the area, which she said was based on her entry on the cleaning record, was itself shown to be incorrect by the CCTV recording, which showed her entering the area at 07.00hrs and leaving the area at 07.15hrs. Thus, one has to approach the evidence of this witness with some care.

60. In fairness to the witness, I think that she has done her best to tell the truth. I accept that she did clean the floor on the morning in question. I accept her evidence that in the 15 minute period, she probably spent approximately 10/13 minutes cleaning the male toilet and the remainder of the period cleaning the female toilet. She then left the area and removed the cleaning barrier from the doorway.

61. In the course of cross examination, she candidly stated that she did not recall at what time she removed the barrier. She stated that sometimes she would remove it on leaving the area and sometimes she would remove it when she had checked if the area was dry. She did not recall if she had checked if the area was dry on that particular morning. When it was put to her that the cleaning

sign appeared to have been removed approximately 2 minutes after the floor of the male toilet had been cleaned, she stated that she had assumed that the floor was dry when she removed the sign.

62. I am satisfied on the basis of the CCTV recording, as reported by Mr. Ridgeway and on the basis of the answers given by the cleaner, that on the balance of probability she did wash or mop down the male toilet area, but removed the cleaning sign from the doorway when the floor itself was still wet from the cleaning process. This would explain the considerable amount of water which was on the floor surface at the time of the plaintiff's fall and at the time of the photographs taken by Mr. Turnbull.

63. The existence of the boot marks or footprints on the floor surface as shown in Mr. Turnbull's photographs supports this conclusion. If the footprints had been caused during the night shift, when the area was not subject to any cleaning, they would have been removed if the area had been properly cleaned by Ms. Malouepsza between 07.00hrs and 07.13hrs. It seems to me that the fact that the footprints are clearly visible in Mr. Turnbull's photos, is more consistent with there being water recently applied to the floor surface and persons wearing boots walking on the wet floor in the period immediately preceding the time when Mr. Turnbull took his photographs. I accept the evidence of Mr. Maguire that given that the plaintiff and another man had been in the toilet after the cleaning process had been carried out and that the plaintiff and two managers from the defendant company had been in the toilet at the time that Mr. Turnbull took his photographs, the presence of the footprints is probably more explicable by the fact that the footprints were caused by these people walking on the wet floor subsequent to the cleaning operating having been carried out by Ms. Malouepsza.

64. The position of the yellow warning sign as shown in Turnbull photo 2, can only be explained in one of two ways. Either it was taken out from its usual position, which was beside the bin and tucked in at the end of the washbasins as shown in Culleton photos 3 and 4, by the cleaner at the end of the cleaning process, or it was pulled out and put in situ by Mr. Turnbull, or Mr. Ridgeway. Neither of them stated that they had done so. While the plaintiff himself denied that the sign had been in that position when he entered the bathroom, I am satisfied that on the balance of probabilities it probably was in the position as shown in Mr. Turnbull's photograph at the time of his accident. This implies that the floor had been mopped and left in a wet condition by the cleaner, who had left the yellow sign out in that position. As it does not appear that she returned to the area after having cleaned the driver's toilet, to check that the floor area was dry, this would explain the presence of the sign in that position at the time of the inspection by Mr. Turnbull and Mr. Ridgeway. This supports the proposition that the floor had been left in a wet condition by the cleaner.

65. I did not find the evidence of Mr. Labude to be convincing. On the CCTV recording it would appear that his inspection of the male and female toilets was perfunctory at best, lasting less than 1 minute. I am not satisfied on the basis of such an inspection that one can make the finding that not only had the floor been cleaned, but more importantly, that it was dry at the time that he left the area at 07.16hrs.

66. In the circumstances, I am satisfied that this floor was in a dangerous and unsafe condition due to the presence of a considerable quantity of water on the floor surface following the cleaning process, which was present at the time that the plaintiff met with his accident. Unfortunately Ms. Malouepsza washed the floor, but removed the cleaning barrier before it was dry. This meant that the floor was left in an unsafe and dangerous condition. As such, the defendant must bear liability for the injuries sustained by the plaintiff.

67. I am further satisfied on the evidence of Mr. Culleton that the use of smooth ceramic tiles in a toilet, which is used by a large number of employees, there being a total of three hundred employees in the warehouse, was unsafe and dangerous, given the high risk of slipping on these tiles when wet. Had the defendant taken reasonable care for the safety of its employees, it would have used slip-resistant or non-slip tiles in the toilet area. While the owners or occupiers of a hotel premises, may not like using such tiles in a bathroom area, due to the fact that it is harder to clean these tiles and keep them looking well, such considerations do not apply in a factory or warehouse. It seems to me that there is no good reason why an occupier would not use slip-resistant or nonslip tiles in a bathroom which is going to be frequented by a large number of people. Accordingly, I find that the defendant was negligent in the choice of tiles that it used at this locus.

68. Furthermore, I am satisfied that given the broken condition of the tile on the AJ cover and given that the plaintiff's right hand came into contact with this tile, that the existence of such broken tile contributed to the causation of his injuries. The defendant was negligent in failing to repair and/or replace the broken tile on the AJ cover.

69. In relation to the issue of contributory negligence, the presence of liquid on a tiled surface, is particularly difficult to see. It is for that very reason that in shopping centres and bathrooms to which the public have access, cleaners always use warning signs both during and after the cleaning process, so that persons using the area may be aware of the dangerous condition of the floor surface. However, the presence of such a sign does not absolve the defendant of all liability, nor does it imply that a plaintiff must use the area at his peril. While I am satisfied that the yellow warning sign was in the position as shown in Turnbull photograph 2, I am satisfied that due to the fact that such sign was permanently in the toilet area, the efficacy of the sign was largely diluted. If a sign is permanently in an area, it really serves no purpose at all to warn persons commonly using that area. Accordingly, I do not find the plaintiff guilty of contributory negligence in this case.

Conclusions on Quantum

70. The plaintiff in this case did not try to exaggerate his injuries in any way. Initial x-rays at Beaumont Hospital revealed an undisplaced fracture of the radial head of the right elbow. That was treated by analgesia, a sling and early mobilisation. The plaintiff also complained of right wrist pain. An MRA scan performed on 22nd May, 2015 revealed an un-united fracture at the basis of the hamate bone with associated bone oedema. There was also osteochondral damage, involving the lunate bone with early proximal cyst formation. The plaintiff had suffered a previous injury to his lunate bone in 2011, when he had caught his wrist in the door of a car causing a fracture of the lunate bone. However, he had managed to return to his pre-accident employment subsequent to that injury.

71. After this accident, the plaintiff, who is right hand dominant, was out of work for a period of 44 weeks. He received an image guided injection to his wrist, which helped his symptoms. When reviewed on 3rd May, 2017, some two years and one month post-accident, he had some discomfort in the elbow, but it was not limiting. He was able to enjoy running, cycling and tennis. On examination there was a full range of movement of the elbow and wrist. He had minor discomfort over the hook of the hamate on the volar aspect.

72. Mr. Mullet, consultant orthopaedic surgeon, is of the opinion that the prognosis for the plaintiff's elbow injury is good. There was no increased risk of arthritis. He noted that the plaintiff had suffered a previous injury to the lunate bone. At the time of this accident he suffered an injury to the hamate bone. He is of the opinion that this was separate to the previous injury to the lunate. The plaintiff's symptoms are currently manageable. He did not recommend any further treatment. He expected that the plaintiff would have some ongoing discomfort in relation to the hamate injury when dressing and when doing press-ups. However, the long term

prognosis was good.

73. The plaintiff stated that in relation to his hobbies of cycling and badminton, he had not been able to play or pursue these after the accident, but he was able to do them at the present time. His main problem was in relation to his wrist. At present, he experiences intermittent numbness when holding certain objects. He still had some issues with his wrist. The injection which he had received in December 2015 had been helpful. He had been able to return to work approximately one month later. He confirmed that he was not seeing any doctor in relation to his injuries at the present time.

74. In reaching an assessment of the appropriate level of general damages in this case, the court has been assisted by the guidelines set down by the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56 and *Shannon v. O'Sullivan* [2016] IECA 93 and in particular to the criteria set down by Irvine J. at paras. 43 and 44 thereof. The court has also had regard to the dicta of the Court of Appeal in *Fogarty v. Cox* [2017] IECA 309. In the light of these judgments, this Court has had to somewhat recalibrate its approach to the assessment of general damages in personal injury cases.

75. Having regard to the evidence of the plaintiff in relation to his injuries down to the present time, which I accept, and having regard to the medical reports furnished by Mr. Mullett, I award the plaintiff the sum of €45,000 for general damages. To this must be added the agreed sum for special damages of €20,000, given an overall award in favour of the plaintiff in the sum of €65,000.