

THE HIGH COURT

2003 2713 P

BETWEEN

ADIL ESSALHI

PLAINTIFF

AND

ROBERT FALCONER AND TREASA FALCONER

DEFENDANTS

Judgment of Mr. Justice Charleton delivered on 31st day of March, 2009

1. From April, 2002 to early 2003 the plaintiff lived in a flat on the ground floor at 21 Ranelagh Village in Dublin. It is probable that he was injured there or somewhere near there on 29th August, 2002 since the nature of his injury, involving a complex comminuted fracture to his left ankle, was so serious that it is unlikely to have occurred anywhere far from that building. The precise circumstances of how the injury happened, however, are strongly contested. The burden of proof is on the plaintiff to satisfy the court as a matter of probability that he has given credible evidence and that such evidence establishes negligence in the care of the static condition of the premises, such that it led to him being injured.

2. His statement of claim puts his case in this way:-

"On or about the 29th August, 2002, the plaintiff was lawfully descending a flight of stairs to the front door of the defendant's premises when he was caused to trip over a table, which together with other debris had been left by the defendant's servants or agents in the vicinity of Flat No. 3 in consequence whereof the plaintiff suffered severe personal injuries and sustained other loss and damage."

3. As it happens, the plaintiff lived in Flat No. 1 downstairs, and Flat No. 3 was upstairs. This is a simple mistake, and one which I disregard. The allegation, in essence, here is that the defendants as landlords, were renovating Flat No. 3 upstairs from where the plaintiff lived and that they carried all of the relevant furniture out to be dumped, leaving it downstairs in the corridor where it obstructed his way and made him fall. The defence is that the corridor was clear of any such material and that it contained only a small round table in an alcove. The defendants plead in addition that the plaintiff failed to have any regard for his own safety; that he was the author of his own misfortune; that he engaged in an activity which caused an injury to himself; and that he was drunk.

The evidence for the plaintiff

4. I have no doubt that the plaintiff was seriously injured. His injury is such to attract the maximum level of damages indicated by the Personal Injuries Assessment Board on p. 24 of their manual for a serious leg fracture with on-going difficulties. In addition, while the plaintiff has been sentenced to a number of terms of imprisonment since this incident, he is clearly an able and highly intelligent individual who is capable of many forms of work, should he chose to apply himself. His fractured ankle, which required realignment and fixing with surgical screws, is already arthritic at his young age of 28. In addition, he may require further surgery to remove the metal parts and to fix certain portions of his ankle so that the bones are permanently fused together.

5. The circumstances of the accident as described by the plaintiff are that for a couple of weeks prior to 29th August, 2002 he could hear work going on upstairs on the first floor. Debris and other furniture was removed from one of the flats upstairs, there being four in the building as a whole, and moved down into the hallway leading from his flat to the front door. Although he could hear the work going on, he never witnessed the work or saw the workmen carrying materials up and down the stairs which is beside the entrance to this flat.

6. His flat was a small bed-sitting room. It was situated on a straight corridor about a meter wide that began with a front door that opens on to the main street in Ranelagh near, and on the same side as, the Luas station. Inside the front door is a little landing and then six internal steps up to the corridor. Beside the front door there is a pharmacy called Phelan's. Both the pharmacy and the flats are part of the same building. The pharmacy is carved out of 21 Ranelagh Village so that it occupies a portion of the ground floor. It is separate from the flats immediately next door but on the same level, apart from the six steps, as Flat No. 1 on the ground floor where the plaintiff lived. The continuation of the building means that Flats Nos. 2 and 3 occupy the area immediately above the ceiling of the pharmacy. This is an important fact, one to which I will return.

7. The plaintiff claims that the work on one of the flats upstairs resulted in a broken table, a broken chair, an electrical appliance, a number of bags of rubbish and a small round table being placed in the ground floor corridor between the front door and his flat door. This rendered it, as he put it, as an obstacle course. On 29th August, 2002 he finished work at 2.30 p.m. He was paid and he changed his cheque into cash. He then said that he went and had four pints, describing that as "a maximum of", or "approximately", from the way home in a licensed drinking establishment called the Pod. He said he left there at between 4 p.m. and 6 p.m. as he was going home to go out. On getting home he immediately went into the shower, washed and changed. He was then alone. He heard nothing going on while he in the shower, he said, because the shower was an electrical one and was noisy. When he turned it off and got out and dressed, he heard banging. This was caused, he said, by the hall door banging and by the vacuum it created causing his own door to bang a little too. He had previously seen people sneaking in and out, and had once found a street person asleep in the corridor. He had a belief that his own flat had been the subject of an attempted burglary at some stage in the past, and while he was living there, because his own door, while it locked, no longer shut tight. He went out and he saw the front door banging. He thought to himself that it was an intruder and he ran the length of the corridor, about eight metres. He was wearing Nike runners and a tracksuit. He says that he tripped over what he believed was a table and blacked out. When he came to, he saw a bone from his ankle sticking out through the flesh of his leg, which itself was at an unnatural angle of 45 degrees. His body was then half on the steps leading down to the hall door and half on the ground. He was in serious pain. He attributed the accident to what he saw in the hall, namely the broken furniture which was being stored there, as he believed it, to be later dumped. He had tripped over the leg of table or the leg of a chair, he could not be certain. When he fell, he said there was a leg of a table beside him on the ground. He then crawled out through the open door, not needing a key, and into the chemist's shop next door. He spoke to "a young attractive woman" and asked her to ring for an ambulance. One of the women working in the shop came with him back to his flat, which journey he claims to have managed by hopping and crawling. Then a friend of his arrived with drinks. At the time the ambulance arrived, he said that the girl from the chemist shop, together with another woman, whom I am satisfied, was Claire Woods, whom I will continue to call under her maiden name as she was then unmarried, and who is the pharmacist working in the chemist's.

8. He then described an extraordinary scene. He said the ambulance men came. By this stage, according to himself, he had taken no extra drink. I note, however, that the plaintiff admits that in the history notes taken by staff in the hospital that he had told the doctors on arrival that he had consumed "eight pints". At his home, in the presence of the ambulance men, he demanded whiskey from his friend. The ambulance men were, naturally aghast at this development since alcoholic and general anaesthetics are well

known to be a dangerous combination. Notwithstanding their protests, the plaintiff said that he then drank half a bottle of whiskey. His reason was that the ambulance men had given him some gas to relieve his pain, but that it was ineffective. The half bottle of whiskey that he then proceeded to drink "killed the pain a little", as he put it. He accepted that he was aggressive "a bit" with the doctors when he arrived at the hospital and then tried to leave. His reason was that he didn't like hospitals and he didn't like having to fast overnight in order to recover from the effects of the drink, prior to being operated on in the morning. He got word to his mother and his then girlfriend who came to the hospital. Each of them went out to the flat, one after the other, using the same key in a relay, and they each gave evidence of the cluttered nature of the corridor. Photographs were taken by his girlfriend that day and by another friend some days later. These all showed a date of development one month after the alleged accident. The photographs provide some support for the contention of the plaintiff that if he had been running down the corridor after an intruder, that it was easy enough for him trip. It is expressly put to one of the witnesses that the photographs was arranged deliberately. I am making no decision on that issue. What seems to me to be crucial in this case is whether the plaintiff's account of how he met with his injury is credible.

9. The plaintiff's account of what he said was an accident was barely credible. Most worrying, however, about the plaintiff's presentation of these events is his underlying sense of bitterness towards his former landlord, his alcoholism, and his claim that he has had a change of personality since the accident occurred.

10. I am satisfied that the plaintiff left his flat early in the New Year of 2003 owing approximately €2,500 in rent. He had withheld rent and had claimed that his numerous complaints as to the state of the premises, and in particular his own flat, had been ignored. On one occasion he had brandished a knife, which he kept under his pillow, at the agents of his landlord. Although he claims to have developed trouble with alcohol, resulting in crimes committed under its destructive influence and a couple of terms of imprisonment after these events occurred, no reasonable view of the evidence could ignore that difficulties were apparent before the accident occurred. These difficulties, including the fight to which I will refer, and his immediate reaction to turn to intoxicating liquor in the face of pain, simply cannot be overlooked. In addition there is his general credibility. During the course of his own evidence, it emerged that the plaintiff had attended a vocational rehabilitation assessor at the request of the defendant's insurer. This was an important appointment as its purpose was to define the plaintiff's working capacity into the future. He turned up drunk. His hands were scarred and he told the assessor that he had been fighting. He was asked about his family history, a normal and unexceptional question: he announced his father had died five days before. During the hearing of this case, his father, clearly a concerned man determined to look out for his son's welfare, sat at the back of the court. He looked in good health. The plaintiff explained that he had been drinking before the interview. No reasonable person could see this as an excuse. My view of the plaintiff's evidence was that no judge could hold for him. He was the only witness to this alleged accident. He did not have sufficient credibility to establish his case as a probability. The modern practice of the courts is to search for the truth. The courts also hear the defence case to see if it might supply the necessary proof that might establish a claim for personal injuries.

Defence Case

11. Claire Woods worked in Johnson's pharmacy for some years before and after August, 2002. She therefore worked, in effect, in the same building as that in which the plaintiff resided. She formed a poor impression of the plaintiff before these events. This was not because of some irrational hunch but because, through the pharmacy window, she saw him engaged in fist fight on the street. She described a succession of blows being exchanged with another man and then the affray continuing by rolling on to or over a parked car. When asked what she thought of the plaintiff, she told the court that he was not a man "that one would like to meet in a dark alley". Much has been made of this phrase. It is, however, a phrase that is commonly used in Dublin. It merely conveys an apprehension about a person. It does not go further by way of denoting any form of fixed judgment. In addition, Claire Woods struck me as an intelligent, careful, controlled and reasonable witness who did everything possible to give a truthful and accurate account of events. But for her duty to the court, she clearly had no wish to be called in testimony and she clearly has no feelings towards the plaintiff beyond what she observed.

12. Claire Woods told me that after 5 p.m. on this day, the second pharmacist working in the shop left for home. Some time after that, "this almighty noise started above our heads". At first she thought it was furniture being moved around, but then a bashing sound began but with no drilling or hammering sounds that are indicative of builders at work. She believed it would go away. But then wood started falling through the suspended ceiling of the pharmacy. She and the customer felt unsafe. The ceiling was shaking and "the noise was horrific". She went out and turned left to the front door immediately beside the pharmacy. She rang all four bells on the front doorway of all the flats. She waited for about five minutes to allow someone to come. Then she went back into the store. The "wrecking and smashing" sounds continued. Because the pharmacy and the flats have the same landlord, and because the electrical circuits are shared, the pharmacy stores a key. It is kept in an envelope in a special drawer. This is occasionally used to go into the flats to turn off the fire alarm, if it comes on accidentally due to a trip switch flipping. The noise went on. She went out again with the key and rang the door bells again. This time, in distinction to the first time, the noise stopped. She waited for a couple of minutes. Then she pressed the bells for the third time. She waited but no one came. She was apprehensive that the noise might start up again so she opened the door. I believe that she felt that a problem had occurred and that it was her responsibility to solve it. The plaintiff had said that the door was open when he chased after the intruder that he apprehended was there, hence the banging doors, but Claire Woods was clear that the door was not open. Only the Chubb lock worked on the door, though a Yale lock, which did not engage, was also there. She unlocked the Chubb lock and went in. She did not lock the door behind her because she did not want to be locked in. This was understandable in the circumstances. She had been in the flats about three or four times previously, at very infrequent intervals, and had never known the door to stick so that it might close and yet be unlocked. She was apprehensive as to what might happen because of the noise that had drawn her into the flats. She walked upstairs to the two flats up there. As she passed by the plaintiff's door, on the ground floor, it was closed. She knocked on all the doors but there was no reply. There was no furniture present in the corridor when she went in. There was no sign of anybody present in the top flats and there was no more noise. She came down the stairs again and, as she again passed by the plaintiff's door, it was now wide open. He was in the flat and was reclining on some kind of a couch or bed. His posture reminded her of someone relaxing at home in a tired-out state watching television on a Sunday afternoon. The flat was very messy. There were beer cans all over the floor. Within reaching distance of the plaintiff on his couch, there was a pint of beer in a glass on the floor. The plaintiff did not look distressed and she saw no blood. Specifically, he was not grimacing or showing any signs of injury or pain. She asked him two questions: "did you here the noise?" and "did you see any one?". To both these questions the plaintiff answered "no".

13. Having done whatever investigation she could, with all due propriety, she went out the door and she locked it behind her. She put the key back in it proper place. The conclusion that anyone would reach was that the plaintiff had been making the noise that had drawn her into the flats. The manner in which she described her trip to the flats and her carefully descriptive language lead me to conclude that her account is highly reliable. Less than five minutes later, she told me, the plaintiff limped into the pharmacy and asked for an ambulance. One of his legs was bloodied and he was lame. Between her and her assistant in the shop, an ambulance was called. Her assistant went to render assistance to the plaintiff. The ambulance came very quickly. The plaintiff, as far as she could see, remained outside on the street, sitting on a ledge outside the pharmacy and flats. She did not know, however, as to whether he might have gone into the flats again. At no time did she betray any desire to structure her evidence in any particular way. When the

ambulance came, loud voices began. This was not pleasant: "It was a fracas", she said. She heard, after a time, one of the ambulance men saying "if you don't calm down, I'm not taking you" and then the plaintiff was taken away.

14. To this account I add that of Robert Falconer, who is the first named defendant and the owner of this building. The portion of his evidence which I regard as important is his account of the evening of these events. After he had gotten a call, he drove down to the pharmacy and flats on the same day. He went into the pharmacy and got the key to the flats. He used the key to get in. He had never seen the door open. He went upstairs. The carpet was up then on the corridor. It had been taken up in order to replace it, when one of the flats was being redecorated. The corridor was not cluttered. The small table that is pictured in one of the photographs, but shown in the corridor in a neat way at the bottom of the steps near the door, was normally kept in an alcove near the plaintiff's flat on the ground door and this is where it was, in so far as the witness can remember, on that day.

15. The crucial part of his evidence is, to my mind, that concerning his visit to Flat 2, which is upstairs and immediately above the pharmacy. He went into the flat and found it smashed up with some of the walls pushed in and a panel split asunder.

16. There is no evidence that there was anybody other than the plaintiff in the flats at the time when these events occurred. Whereas it might be possible that this damage had occurred at a time prior to the day that gives rise to this claim, the probabilities indicate otherwise.

Result

17. I cannot regard the plaintiff's account as being credible. I cannot regard the support that he offers for his evidence as being sufficient to establish his case. I do not believe that the plaintiff met with his serious injury in the manner in which he describes it. The court is not a tribunal that seeks to uncover and declare the truth in relation to a matter of public importance. Instead, the court operates on the basis of accepting those claims that are proven to the standard of probability that the law of evidence requires. The court awards damages where, on that standard, a credible claim has been made that an injury has resulted from the negligence of another party. The court cannot award damages for injuries that occur by mere accident or in a way that leaves the court without the ability to infer fault on the part of a named defendant. In respect of this claim, the extraordinarily severe nature of the plaintiff's injury to his ankle as arising from a trip in a corridor is difficult to believe, though it is possible. His account of racing after an alleged intruder whom he had never even seen and who had not interfered with him in any way is highly improbable. Even without any defence evidence, the account of the plaintiff was highly questionable and carried the air of being unlikely. During questioning on behalf of the defence he destroyed any reasonable possibility that a court could hold for him. In addition to those factors, the unexplained noise and the wrecked state of the flat upstairs from the pharmacy leave me with no option but to dismiss this claim.