

**THE HIGH COURT**

**[2017 No. 7926 P.]**

**BETWEEN**

**EDINA NEMETH**

**PLAINTIFF**

**V.**

**TOPAZ ENERGY GROUP LIMITED**

**DEFENDANT**

**EX TEMPORE JUDGMENT of Mr. Justice Robert Eagar delivered on the 18th day of March 2020**

1. In this case, the plaintiff claimed damages for negligence, breach of duty, breach of statutory duty, nuisance and breach of contract in relation to her employment in the Topaz Service Station, Clonshaugh, Dublin 17 in which she suffered personal injury, loss and damage.
2. The plaintiff was born on the 13th February 1975 and was 41 years of age at the time of the incident. The plaintiff commenced employment in October 2016 at Topaz Service Station in Clonshaugh.
3. On the 28th January 2017, she was the Trainee Assistant Manager and the person who had most responsibility in the shop at that time. She started work at 3pm. She was carrying out stock-taking of newspapers and magazines which she stated took one and a half hours. Over the course of this she served several customers. She said she started in the newspapers and magazines in the front of the shop. She then turned her attention to the magazines behind the serving counter. The magazines were located in a lower cupboard behind the serving counter. She said she squatted and put her right knee on the ground for 15 minutes. She felt significant pain in her knee cap as she attempted to stand up. She was helped to a chair in a nearby corridor where she rested. She contacted her superior who said she should not ring for an ambulance as there was not sufficient cover to replace her. She waited for an hour and called an ambulance. Her superior arrived at the same time as the ambulance.
4. The medical reports have been agreed on both sides, therefore become relevant evidence in the case.
5. At Beaumont Hospital she was seen by the Senior House Officer in Emergency Medicine. She had an X-ray on her knee which showed no fracture. She was discharged to see her GP. She attended Dr Andrew Jackson, who was the general practitioner she attended at the Meridian Clinic in Ongar Village and Clonee. Dr Jackson sought an MRI scan which was subsequently done on 5th February 2017. The MRI Scan identified a bucket-handle tear on the plaintiff's lateral meniscus with a flick fragment identified within the intercondylar region. The report is dated the 28th February 2017 and he records that the injuries sustained were a bucket – handle tear and the lateral meniscus and the posterior horn of the lateral meniscus completely displaced. On the finding of the MRI scan Dr. Jackson referred the plaintiff to the Orthopaedic Surgery Department of Connolly Hospital in Blanchardstown on the 7th February 2017. She was told that she might be a number of

months waiting to see an orthopaedic specialist and she decided to return to Hungary. She attended Dr. Gyula Szikova at the Robert Karoly private hospital in Budapest. Prior to travelling to Budapest she had two visits to a physiotherapy at the family clinic on the Navan Road.

6. She had been an active hill walker, she attended a gym and walked her dog before the injury but could not take part in these activities for some time after the injury. The plaintiff has not yet returned to hill-walking.
7. She attended Dr Abel Wakai who examined her on the 9th May 2017. In his report, he confirms the medical history and noted that she had no previous right knee problems. He said that on inspection of the right knee, the joint was swollen and there were two small anterior scars. He noted there was tenderness on the latter aspect of the right knee and the active right knee flexion is limited to approximately 75% of the normal range due to pain on the anterolateral aspect of the right knee. He said the injury was consistent with the incident. The plaintiff had described the incident as squatting while stock-taking
8. The plaintiff had seen Dr Robert McCulloch on 3rd April 2018 on behalf of the Defendant.
9. The plaintiff gave evidence that she returned to work on the 17th July 2017 to Topaz but at a different shop and worked until December 2017. She left work for three weeks because her knee was very swollen and stopped working in January 2018. She started working in a catering company which she is currently working. Mr McCulloch also noted that she had underlying osteoarthritis in the knee joint.
10. She was seen on the 13th December 2019 by Mr. Sharif for a medico-legal report on behalf of the plaintiff. She told him that she was squatting and she twisted her right knee which became very painful and she could not get up. He noted that she had physiotherapy which did not seem to be helping her much. She said she had approximately ten visits. The history of the accident accords with the plaintiff's evidence. At the time she could not straighten her leg fully and walked with a limp. Mr Sharif requested another MRI scan on the 12th July 2019. The MRI scan confirmed that there was no further tear and that there is previous substantial partial lateral meniscectomy done. He suggested swimming on a regular basis and needed intensive physiotherapy and the gym to strengthen the muscles. He suggested steroid injections to ease the pain.
11. The plaintiff was seen by Dr James O'Flanagan on 13th December 2019. His report of the accident noted that she had sustained the injury while squatting at work. The court was drawn to the conclusion and prognosis of Dr. O'Flanagan who said: -

*"This lady sustained a bucket handle tear of the lateral meniscus while squatting at work on the 28th January 2017. The mechanism of injury described is quite classical for such an injury"*

12. She had received manual handling and health and safety training when she started at Topaz. This took place on the 8th April 2016 and was completed by the plaintiff. It

consisted of questions relating to health and safety. She completed a manual handling questionnaire which emphasised the issue relating to heavy loads and body positions to avoid when moving and handling loads. She indicated that the two muscle groups that are important for manual handling were calves and abs. In relation to the eight principles of moving and handling the plaintiff noted, bend the knees, keep the back straight, keep the load close to the body. There were no specific questions arising in relation to squatting or kneeling.

13. In cross-examination Mr. Conlon noted that the plaintiff was employed as a trainee assistant manager at Clonsaugh. He suggested in the report of Dr Jackson there was no reference to kneeling. She was cross-examined on the amount of times she had been to physiotherapy. Eventually, it emerged that she had attended physiotherapy in Hungary and Ireland.
14. Mr. Condon arranged to play two items of CCTV footage. The first showed the plaintiff at the front of the shop squatting down at the bottom row of the newspapers and magazines and this was in the front of the shop. She spent about four minutes squatting there. She then went behind the counter and started working on the newspapers which were in a shelf beside the fire extinguisher in the photograph. At that stage she partially squatted on one leg and put her knee on the ground. She was there approximately one minute and thirty seconds. She then attempted to stand up. It is clear that the injury sustained occurred at this time.
15. The court is satisfied that the plaintiff had suffered a serious injury to her knee which in the court's opinion (in the context of quantum) is the equivalent to a moderate fracture of the knee patella.
16. The court will now deal with the evidence in respect of the defendant's liability for this injury.
17. On 11th September 2018, the plaintiff attended Topaz in Clonsaugh with Mr Conlon, consulting engineer for the plaintiff and Mr Sean Walsh, consulting engineer on behalf of the defendant. She stated to Mr Conlon that she was quite active and measured 1.72m tall. The plaintiff told Mr Conlon that she was carrying out a stock check which was done every week. It took about an hour and a half for one person to complete the task. She said that she started the stock check at the display shelf inside the door. She did this for around 30 to 40 minutes. Some of the newspapers and magazines were displayed close to the ground she had to squat down to carry out the task. She reports that she had squatted down about five or six times in a 30 to 40 minute period. The court notes that the CCTV does not identify this description. Subsequently, she did a stock take of the newspapers and magazines behind the serving counter which are stored on a low shelf inside the cupboard. She reports that while she was doing this she squatted down for about five to ten minutes counting the newspapers and magazines. She said that the area was quite congested. The CCTV captured contradicts the plaintiff in relation to her squatting. She was partially squatting, partially kneeling and the court noted that the CCTV showed it for two minutes and no more than that.

18. Photographs were taken by both parties which was helpful to the court. At the time of these photographs the serving counter was not congested. Although it is noted that there was no one serving during the time the photographs were taken. The cupboard was on the right underneath the counter. Both shelves contained cleaning products and cleaning paper. There were no newspapers or magazines.
19. Mr. Conlon indicated that there were many publications on upper limb disorders but there was limited information on lower limb disorders. He produced a document entitled European Agency for Safety and Health at Work, E – Facts 42, a checklist for the prevention of lower limb disorders. The E – Fact document emphasises that the main risk factors of work related to lower limb disorders include squatting, kneeling, pushing on pedals and prolonged standing or walking. The checklist concerns hazards for injury or development of disorders to the lower limbs and is targeted at people engaged in workplace hazard identification. It then identifies how to use a checklist and notes that a checklist is only a first step in carrying out a risk assessment.
20. The court notes particularly, part B of E-Facts 42 entitled "*Checklist for the Prevention of LLDs*" where there is a note below the heading stating "*Answering 'YES' to the following questions indicates a need for improvements to be made in the workplace*". There is reference to kneeling and squatting which asks "*occurs continuously (at one location) for at least half an hour and; occurs intermittently (at two or more locations) for more than 2 hours a day.*"
21. In Part C of the E-Facts 42 document, entitled "*Examples of Preventative Measures*" makes suggestions with the view to reducing the chance of lower limb injury which include the following:
  - a. "*Arrange that the work can be done in a standing position by changing the tools used or the working methods;*
  - b. "*Redesign tasks requiring manual handling while kneeling or squatting or when the knees are considerably flexed;*
  - c. "*Arrange the pathways and surfaces so that the risks of slipping or falling will be reduced;*
  - d. "*Avoid or reduce the amount of time spent in kneeling or squatting work positions;*
  - e. "*Avoid or reduce the number of times and/or duration that work is done with the knees considerably flexed;*
  - f. "*Avoid or reduce the number of times and/or number of flights that workers need to climb up or down stairs/ladders. Change working processes or use appropriate lifting devices.*"
22. The report also suggests assistive devices:

- a. *"Use appropriate knee protection while kneeling on hard floor surfaces"*
- b. *Use an appropriate device for support of the buttox/thigh when considerably flexed knee positions must be adopted*
- c. *Use assistive devices in manual material handling"*

It also notes the following in regard to organisational training:

- i. *"Ensure that workers are educated (well informed) about the hazards for injury to the lower limb from the work done"*
- ii. *Ensure that workers are well trained in the tasks they perform*
- iii. *Ensure that workers are able to work as normally as possible with little time pressure"*

23. No measures appear to have been addressed in the training which the plaintiff undertook with regard to lower limb injuries apart from the lifting of heavy loads.

24. Mr Conlon referred to the relevant statutory obligations at the time of the incident which are contained in the Safety Health and Welfare at Work Act 2005 and the General Application Regulations SI 299/2000.

25. Section 10(1)(c) of the Act of 2005 states:

*"(1) Without prejudice to the generality of section 8 and having regard to sections 25 and 26, every employer shall, when providing instruction, training and supervision to his or her employees in relation to their safety, health and welfare at work, ensure that -*

- c. *"In relation to any specific task assigned to an employee, that his or her capabilities in relation to safety, health and welfare are taken into account"*

29. Mr Walsh gave evidence that having seen the CCTV that nothing therein establishes any definitive work practice that was deficient. He describes the plaintiff as stock taking of a light nature and some kneeling was required to reach items. He noted that it would be a huge onus on an employer if it was required of them to take account of an incident as described by the plaintiff.

30. In *Bradley v CIE* [1976] IR 217 Henchy J stated:-

*"the law does not require an employer to ensure in all circumstances the safety of his workmen. He will have discharged his duty if he has done what a reasonable and prudent employer would have done in the circumstances".*

It must be shown that the injury was foreseeable and that the defendant failed to take reasonable care. An employer is under a duty to take reasonable care to ensure that

proper appliances are provided and maintained in a proper condition so as not to subject those employed to unnecessary risk and to provide such personal protective equipment or clothing as is necessary for the employee to carry out duties safely.

26. Section 8(1) of the Safety Health and Welfare at Work Act 2005 states:

*"Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees"*

27. Section 9(1) states:-

*"Without prejudice to the generality of section 8 , every employer shall, when providing information to his or her employees under that section on matters relating to their safety, health and welfare at work ensure that the information—*

*a. is given in a form, manner and, as appropriate, language that is reasonably likely to be understood by the employees concerned, and*

*b. includes the following information—*

*i. the hazards to safety, health and welfare at work and the risks identified by the risk assessment,*

*ii. the protective and preventive measures to be taken concerning safety, health and welfare at work under the relevant statutory provisions in respect of the place of work and each specific task to be performed at the place of work*

31. The court notes that the risks identified by the risk assessment did not deal with lower limb injuries which were likely to be caused by squatting or kneeling.

32. In cases claiming negligence, the test to be employed is that the injury must have been reasonably foreseeable and the employer must have failed to take reasonable care. In this case the mechanism of injury was classical as reported by Dr Flanagan. The court is satisfied it has been well established that kneeling or squatting can cause lower limb disorders (LLDs) such as the one sustained by the plaintiff. Therefore, it is foreseeable. The court notes that any risk was not adequately assessed by the employer as required by them under s. 9. The court is satisfied that the employer failed to carry out their duties to identify risks for the task of stock taking at a height or level that requires kneeling, squatting or a combination of both. The court is also satisfied that the employer did not provide appropriate equipment to prevent the potential injury.

33. Preventative guidelines are outlined in Schedule 3 of the Act of 2005 entitled "*General Principles of Prevention*". In particular, the court notes paragraph 4 and 8 of the preventative guidelines which states:

*"(4) The adaptation of work to the individual, especially as regards the design of places of work, the choice of work equipment and the choice of systems of work, with a*

*view, in particular, to alleviating monotonous work and work at a predetermined work rate and to reducing the effect of this work on health*

...

*(8) The development of an adequate prevention policy in relation to safety, health and welfare at work, which takes account of technology, organisation of work, working conditions, social factors and the influence of factors related to the working environment.”*

34. In the court's view, the employers current use of the cupboard is an acknowledgement that this was not an appropriate place to store newspapers and magazines which require a regular stock take. The court is of the view that the employer is liable on the basis that the task required an employee to kneel or squat - positions which are known to cause Lower Limb Disorders – which is the type of injury sustained by the plaintiff. The employer could have taken steps to prevent the injury by introducing preventative measures such as; mechanical aids, seating, shift rotation, foam mats, knee pads or equipment most appropriate for the task. Preventative measures can be identified at the assessment stage of employers statutory requirement to assess risks in the workplace.
35. In all the circumstances, the plaintiff has established on the balance of probabilities that there is liability on the part of the employer. The court in assessing damages takes in to account the medical report by Dr Flanagan in respect of the degenerative changes which were likely to have predated the accident. The court also takes in to consideration the various accounts given by the plaintiff which was not helpful to the assessment of the damage by the various doctors and the engineers.
36. The plaintiff has recovered well and is currently in employment and is enjoying most of the social activities she engages. The court proposes to grant general damages in the sum of €40000 in addition to the agreed special damages of €13682.95.