

## THE HIGH COURT

[2018 No. 00106CA]

BETWEEN

JEAN FALSEY

PLAINTIFF

AND

DUNNES STORES

DEFENDANT

**Ex Tempore JUDGMENT of Mr Justice David Keane delivered on the 28th November 2018****Introduction**

1. At approximately 3.30 p.m. on 27 June 2014, an accident occurred on the premises of the defendant Dunnes Stores at St. Kieran's Street in Kilkenny City. The plaintiff Jean Falsey, who was employed as a sales assistant by the defendant at that branch of its retail chain, fell off a step-ladder in one of the aisles in the off-licence area while adjusting - or 'facing out' - stock on the shelves. Ms Falsey claims damages from Dunnes Stores for the personal injuries that she suffered as a result of that accident, which she attributes to its nuisance, negligence, breach of duty (including breach of statutory duty) and breach of her employment contract.

2. Pursuant to the terms of s. 38(1)(b) of the Courts of Justice Act 1936, the action was re-tried before this Court on Circuit, sitting in Kilkenny as the venue where the action was originally tried and determined by the Circuit Court.

**Ms Falsey's injuries**

3. The parties broadly agree about the nature and extent of Ms Falsey's injuries.

4. Mr Frank O'Dwyer, the consultant in emergency medicine at St. Luke's Hospital, Kilkenny who examined Ms Falsey almost nine months later on 6 March 2015, noted that immediately after the accident she presented at the Emergency Department complaining of pain in her chest and pelvis, with tenderness over her right thigh and her right side. X-rays did not disclose any bony injury. She was prescribed painkillers and sent home. She suffered headaches and took painkillers. A few days later, she attended her general practitioner who prescribed painkillers and anti-inflammatories. She suffered pain and stiffness in her neck, shoulder and lower back. She underwent nine sessions of physiotherapy. Apart from a brief and unsuccessful attempt to return to work a week later, she did not finally return to work for 13 weeks. At the time of his examination, while Mr O'Dwyer noted Ms Falsey's complaint that she still experienced some discomfort in her left shoulder and a slight niggling pain in her left hip in certain work situations, he found her to have a full range of pain-free motion of her neck, shoulders, lower back, pelvis and hips. His prognosis was for a full recovery, with any residual discomfort to settle within 6 months.

5. Dr Gerard Lynch, Ms Falsey's general practitioner, took a more pessimistic view, in a report he prepared, dated 30 March 2016. Having examined Ms Falsey on that date, he found her to have a full range of neck motion, a mild reduction of back flexion, and tenderness of her right gluteal muscles. Dr Lynch did not anticipate any further improvement in Ms Falsey's condition without further intervention and was concerned that her limitations were likely to persist or worsen, perhaps even leading to premature arthritis. Dr Lynch diagnosed Ms Falsey with shoulder tendonitis in January 2017 and, essentially, repeated the views he had expressed earlier in a further report, which was dated 18 October 2016 but which appears to have been written on 18 October 2017.

6. Mr Michael O'Riordan, a consultant orthopaedic surgeon, examined Ms Falsey on behalf of Dunnes Stores on an unspecified date. In a report of 10 October 2017, he stated that, on examination, he found her to have normal gait and posture, and full range of pain-free normal movement with the exception of a little tenderness over the trapezius muscle on the left-hand side and some slowness and stiffness of active abduction, although passive range was full. Mr O'Riordan concluded that Ms Falsey's prognosis was very good and that the persistence of symptoms for more than three years after her accident was rather surprising. In Mr O'Riordan's view, Ms Falsey should attain a full recovery with no long-term adverse sequelae.

**The accident**

7. In the personal injuries summons that issued on Ms Falsey's behalf on 12 April 2016, she pleads that Dunnes Stores was negligent, in breach of statutory duty, in breach of contract, and guilty of nuisance in the care, management and control of its St Kieran's Street premises by allowing unsafe work practices and by providing a defective ladder there, so that, in the course of Ms Falsey's employment, 'the ladder she was standing on went from under her feet causing her to fall heavily to the ground.' Rather unhelpfully, the particulars provided in support of that claim do not specify which of the various asserted acts and omissions they comprise comes within which of the different categories of unlawful conduct - nuisance, negligence, breach of statutory duty and breach of contract - Ms Falsey alleges against Dunnes Stores. In the course of opening the case, Counsel for Ms Falsey drew specific attention to the allegation that Dunnes Stores provided Ms Falsey with a ladder that was dangerous or defective or both, and the allegation that Dunnes Stores failed to provide Ms Falsey with any, or any sufficient training in the use of ladders; in the risks of such use or of working above ground level; or in the checks to be carried out on ladders before using them.

8. In her evidence in chief, Ms Falsey testified that, when she was coming down the ladder, having straightened a box containing a bottle of Middleton Reserve Whiskey on the top shelf of one of the aisles in the off-licence, she felt it 'just give way.'

9. In cross-examination, Counsel for Dunnes Stores put it to Ms Falsey that the various accounts that she had given of her fall from the ladder, while broadly consistent with one another, could not be reconciled with the footage of the accident captured by a nearby closed-circuit television camera. That CCTV footage was recorded at an approximate rate of one frame per second. It was shown in court. It depicts Ms Falsey standing on, and subsequently falling from, a step-ladder comprising two steps below a top platform surmounted by a handrail.

10. Ms Falsey acknowledged that, while she is seen to fall to the floor in those images, the ladder on which she had been standing does not move at all. Ms Falsey accepted that, in the account of the accident she provided in the application form she submitted to the Personal Injuries Assessment Board; in her initiating letter; in her personal injuries summons; in her replies to particulars; and in her evidence in chief, she had consistently alleged that the ladder 'gave way' or that it went from under her. Further, Ms Falsey conceded that - at a joint engineers' inspection of the ladder at the *locus in quo* on 31 August 2016 - she had provided an account of that accident to those engineers in which, depending on which of their reports you read, the ladder fell either before she did or at the

same time.

11. Jodie Moher was called as a witness by Dunnes Stores. Ms Moher was a security manager on duty at the St Kieran's Street branch of Dunnes Stores at the time of the accident and was called to the scene immediately afterwards. She testified that Ms Falsey said to her: 'I was coming down off the ladder. It was my own fault. I don't know what happened.' Ms Moher said that another sales assistant named Delia Walsh asked Ms Falsey the same question and received the same answer. Ms Falsey denied that she had made any such statement and Ms Walsh also denied that she had the exchange with Ms Falsey described by Ms Moher. Ms Moher gave evidence that she completed an accident report form on the same day as the accident. That form was produced in evidence. It records the statements attributed to Ms Falsey by Ms Moher.

12. Delia Walsh was called as a witness by Ms Falsey. She testified that Ms Falsey did not speak the words attributed to her by Ms Moher. She stated that Ms Falsey was badly shaken and talked only of her concern about collecting her son from school. Under cross-examination, Ms Walsh acknowledged that she had signed a statement concerning her recollection of the circumstances of the accident at the request of Dunnes Stores on 30 June 2014. That statement was produced in evidence. In it, Ms Walsh states, in material part: 'At approximately 3.30 I heard a bang and I turned my head to the right and saw Jean lying on the floor. I went over to her and she said she fell off the ladder....'

13. Alex Dunne was working in the Goods Inwards Department of the St Kieran's Street branch of Dunnes Stores on the day of the accident and was called to the scene as a trained first-aider. Mr Dunne was called as a witness by Dunnes Stores. In her evidence in chief, Ms Falsey said that, while administering first aid, Mr Dunne told her that he had fallen off the same ladder the previous week. In her evidence, Ms Walsh supported Ms Falsey's testimony in that regard, although Ms Walsh's evidence was not corroborated by her own broadly contemporaneous statement. Mr Dunne testified that he had, indeed, told Ms Falsey that he had fallen from a ladder like that the previous month, but not that he had fallen from the same ladder the previous week. Mr Dunne stated that there were eight or ten such ladders on the premises that were not easy to tell apart. His accident had occurred in the stock room, where the shelves are three or four feet higher than those in the off-licence aisles. In attempting to access a high shelf, he had climbed onto the handrail at the top of a step-ladder from which he had then fallen. Mr Dunne testified that he had not been injured by the fall and, since he considered it his own fault (higher ladders were available on the premises), he had not reported it.

#### **Training in the use of step-ladders**

14. In her evidence in chief, Ms Falsey also stated that, while she had received health and safety training on matters such as safe-lifting technique and the prevention of spillages, trips and falls, she did not get any training on the use of ladders.

15. Ciara Hogan was called as a witness by Dunnes Stores. Ms Hogan testified that, at the material time, she was a human resources manager with the company. In that capacity, she had been assigned to work in its St Kieran's Street branch for seven or eight months from January 2012. Ms Hogan was primarily responsible for all staff regulatory compliance training, although there were times when she would fill in as a store manager, during which she would call store assistants to assist at check-outs. She remembered doing that on different occasions with both Ms Falsey and Ms Walsh, each of whom she remembered clearly. In her evidence, Ms Walsh had insisted repeatedly not merely that she did not recall Ms Hogan working as a human resources manager at the St Kieran's Street branch in 2012 but that Ms Hogan did not work there then. Ms Falsey had testified that she had never met Ms Hogan.

16. Ms Hogan gave evidence that she was responsible for the training administered to staff at the St Kieran's Street branch of Dunnes Stores on 17 July 2012. A certificate of training in manual handling and safe lifting techniques, dated 17 July 2012, was produced in evidence, certifying that Ms Falsey had attended and successfully completed that course, which covered legislation, anatomy, handling techniques, an instructional DVD and practical demonstrations. Both Ms Falsey and Ms Hogan acknowledged their respective signatures on that certificate.

17. A Dunnes Stores training film had been shown to the court and Ms Hogan testified that it was the same one, contained on the instructional DVD, that had been shown to staff, including Ms Falsey, on 17 July 2012. That film contains a segment demonstrating the safe use of a step-ladder closely similar to the one that Ms Falsey fell off.

#### **Ms Falsey's use of the step-ladder**

16. In the course of his evidence. Jack O'Reilly, the expert engineer retained on behalf of Ms Falsey, accepted that, in the CCTV footage, it was there for all to see that the plaintiff had put herself at risk by the manner in which she had used the step-ladder *i.e.* by placing it in a position diagonal, or almost parallel, to the shelving concerned, instead of one perpendicular to it. This meant that, in placing her own body perpendicular to the shelving, her feet were diagonal - and not perpendicular - to the steps she was using on the step-ladder. Mr O'Reilly acknowledged that Dunnes Stores could only be to blame in those circumstances if the court accepted Ms Falsey's assertion that she had never been shown the appropriate instructional film (to which it might have been added that the court would also have to accept that the safe and prudent method of ascending and descending a step-ladder was not simply a straightforward matter of common sense in either event).

#### **Supervision of Ms Falsey and inspection of equipment**

17. Ms Moher gave evidence that it was part of her function as security manager to supervise the adherence of staff to the company's health and safety policy and that, had she seen Ms Falsey using the step-ladder in the manner depicted in the CCTV footage, she would have intervened. Ms Moher also testified that her responsibilities included accident investigation and that, in that context, she had examined the step-ladder after the accident but could find no problem with it.

18. In the course of her evidence, Ms Falsey acknowledged that, on 23 November 2009, she had signed a document acknowledging that she had been trained in and had read and understood the company's policies and procedures on health and safety and confirming that she would follow those procedures at all times. That document contains a section headed 'Use of Equipment', which includes the statements:

'Use only suitable items for goods stored at high levels e.g. steps, footstools etc.

...

If there is a fault in equipment/machinery, do not attempt to fix it - report it to your manager instead.'

#### **Was there a material defect in the step-ladder?**

19. In his testimony to the court, Mr O'Reilly expressed the view that there was a material defect in the step-ladder at the time of

the accident because, when he inspected it on 31 August 2016 with Donal Terry, the expert engineer retained on behalf of Dunnes Stores, there was a slight asymmetry between its four legs whereby, when the rubber feet of three of its four legs were touching the ground on a flat surface, there was a gap between the fourth rubber leg and the floor of 4.5mm. This meant that, when the step-ladder was unladen, the handrail at the top of the step-ladder was capable of rocking sideways a distance of up to 1 cm. The lateral movement of the platform and the steps would be necessarily less than that.

20. In the report that he prepared after that joint inspection, Mr O'Reilly recorded Ms Falsey as including in the narrative of the accident that she provided in the presence of both engineers on that date, the assertion that, as she descended from the platform to the step below on the step-ladder, 'the ladder wobbled to the side' and '[a]s a result, she lost her balance and fell to the right onto the tiled floor.' Thus, the notion that a wobble in the ladder caused Ms Falsey's fall entered the case for the first time after the joint engineer's inspection. It was then included in updated particulars of negligence furnished on 5 October 2016.

21. But when, in the course of his evidence at trial, Mr O'Reilly read out his contemporaneous note of the narrative of the accident that Ms Falsey had provided to him, first privately before the joint inspection and then in the presence of Mr Terry during that inspection, the assertion that the step-ladder wobbled was not recorded there. In his report, Mr Terry did not record any assertion by Ms Falsey in her narrative that the step-ladder had wobbled, causing her to fall. Nor did Ms Falsey give that evidence at trial.

22. In his evidence at trial, Mr Terry pointed out that any potential instability in the step-ladder when unladen, due to the slight asymmetry between its legs, is eliminated as soon as the ladder is weighted by the person using it. That is due to the inherent flexibility of its aluminium construction. Mr Terry indicated that he carried out an experiment on the day of the joint inspection by asking a female member of staff smaller than Ms Falsey to stand on it, with the result that the step-ladder became perfectly stable while bearing that staff-member's weight. Mr O'Reilly responded in his report and in evidence that the transfer of weight as Ms Falsey descended the step-ladder would magnify the underlying instability of its legs. Mr Terry rejected that theory. There was no underlying instability when Ms Falsey's weight was on the step-ladder and wherever she chose to place one or both of her feet on the steps or platform, it continued to bear her weight while she remained on it.

23. Quite separately, Mr O'Reilly suggested in his report and in his evidence that the design of the step-ladder is defective because the handrail at the top is not high enough to be used effectively by a person, such as Ms Falsey, standing upright at the platform level. Mr Terry rejected that view, pointing out that this particular design of step-ladder is in general use throughout the entire industrialised world. Even if there were merit in Mr O'Reilly's abstract criticism of the design of the step-ladder (and I am not persuaded that there is), it would not be material to the present case because I am quite satisfied from viewing the CCTV footage and the stills taken from it, that Ms Falsey was standing on the second step (and not the top platform) of the step-ladder and holding the handrail, which was comfortably within her grasp, just before she fell.

### **Analysis**

24. I found Ms Moher, Mr Dunne and Ms Hogan to be forthright, consistent and, hence, credible witnesses. Unfortunately, the direct conflict between Ms Falsey's unwavering insistence that the step-ladder went from under her or, at the very least, fell with her, and the CCTV footage, which shows that she fell from it while it was completely stationary, has fundamentally undermined the credibility of her testimony. Nor can I accept the testimony of Ms Walsh, whose evidence I cannot reconcile with that of Ms Moher, Mr Dunne and Ms Hogan, or with her own prior written statement. On each of the issues of opinion in controversy between Mr O'Reilly and Mr Terry, I find myself persuaded by the evidence of Mr Terry.

25. For those reasons, I have come to the following conclusions on the balance of probabilities. First, the proximate cause of the accident was that Ms Falsey missed a step while descending the ladder. I accept Mr Terry's opinion to that effect, not least because it seems to me to accord most closely with what is evident from the CCTV footage. Second, Ms Falsey did receive training in the proper use of step-ladders on 17 July 2012 as the certificate she signed suggests and as the evidence of Ms Hogan confirms. Third, although it is not necessary to decide the point, for my part I would tend to doubt that the provision of such training was part of any applicable statutory duty or duty of care on the part of her employer, since its contents appear to me to represent no more than the dictates of common sense. Fourth, Ms Falsey put herself at risk in the manner in which she used the step-ladder, as Mr O'Reilly acknowledged in his evidence. Fifth, there was no failure to properly supervise Ms Falsey as, on the evidence before me, her use of the step-ladder was the result of a spontaneous impulse on her part and there was no suggestion that she had ever used it in the same inherently risky way in the presence of management previously. And sixth, I do not accept that there was any material defect in the step-ladder because I prefer the evidence of Mr Terry on the point to that of Mr O'Reilly.

### **Decision**

26. Ms Falsey's claim against Dunnes Stores is dismissed.