Neutral Citation Number: [2011] IEHC 232

THE HIGH COURT

2009 9731 P

BETWEEN

AILEEN DUNLEAVY

PLAINTIFF

AND

SWAN PARK LIMITED TRADING AS HAIR REPUBLIC

DEFENDANT

JUDGMENT of O'Neill J. delivered on the 27th day of May, 2011

1. The plaintiff in this case was born in 1971. She is a married woman, but separated, and has three children. The defendant is a hairdressing salon trading under the name of 'Hair Republic'.

2. On 28th March, 2007, the plaintiff went to the defendant's hair dressing salon by appointment for a "*cut and colour*". She did this regularly, about once every five weeks. At the time, her hair was in length to the nape of her neck and was coloured blonde. The job to be done was to colour that part of the hair that had grown out since the previous colour treatment and then to cut the hair to the desired length and style. There was nothing unusual in this in any way. The plaintiff had all of that done by the defendant previously on 1st February, 2007, and on 1st March, 2007.

3. It is commoncase that the outcome of the treatment on 28th March, 2007, was a disaster. As a result of damage done to the plaintiff's hair, it immediately began to break off and fall away. This became apparent to the defendant when her hair was being shampooed and to the plaintiff herself when it was being blow-dried. She saw her hair blowing around, as she put it, "*like snowflakes*".

4. Although the defendant accepts that all of this happened, it, nonetheless, seeks to ascribe some, if not all of the blame for it, to the plaintiff, on the basis that they advised the plaintiff not to have the treatment done because it was too soon after the previous treatment, with the consequent risk that insufficient hair length had grown to enable the brushing in of the bleach to the roots to be done safely, without overlapping on the hair which had been bleached in the previous treatment.

5. The basis for the defendant's contention in that regard is that the stylist who carried out the treatment would have given that advice. This person was not called to give evidence; apparently, she is in Australia.

6. The plaintiff emphatically denies that any such advice was given to her, ever, by the defendant. Moreover, she said that the colouring was done twice because the stylist was not happy that the first attempt achieved the right colour.

7. I am completely satisfied that the plaintiff is to be believed in this regard. I have no doubt that this advice was not given, nor was it ever likely to be given. It is hard to imagine that any woman would undergo such a routine hairdressing treatment if they knew such dire consequences could so easily ensue.

8. It is clear that the damage was caused by excessive application of bleach to that part of the plaintiff's hair that had already been coloured on the previous occasion. It would seem highly improbable to me that this could have been the result of doing the treatment four weeks after the previous treatment, as distinct from five weeks, and the more likely cause of the damage was that the second application of the colour on 28th March, 2007, by an inexperienced stylist, insufficiently skilled or insufficiently experienced in understanding the potential risks involved.

9. I am quite satisfied that the defendant is wholly to blame for the damage done to the plaintiff's hair and liable to compensate her for her loss and damage. It is commoncase that the damage done to the plaintiff's hair occurred about one inch out from the scalp where overlapping occurred with the result that her hair, at that point, was rendered very brittle, and it commenced to break off from that point. As a consequence of this, her entire crop of hair began to fall away from this point outwards. This process began immediately after the treatment and continued over the next six weeks. During that time, the defendant tried a number of times to stem the damage to the hair by the application of nutritional-type preparations which involved also colouring the hair to a much darker colour.

10. It is clear that all of this failed to reverse the damage, and by 12th May, 2007, it must have been obvious that the plaintiff's crop of hair, could not be salvaged. Thus, on 12th May, 2007, the defendant cut the hair to remove all the remaining damaged hair that had not fallen away at that point. The result of this cutting is to be seen in the two photographs which have been put in evidence and shows her hair to be very close cropped and a dark colour. This was obviously a total contrast to the blonde hair that fell to the nape of the plaintiff's neck before she had the treatment on 28th March, 2007.

11. The plaintiff described herself as devastated and greatly distressed from the time in the salon when she realised what had happened. I have no doubt at all that she did not exaggerate in any way her reaction in this regard. The vast majority of women, I believe, would have had similar feelings in response to such an experience.

12. The plaintiff, in her evidence, described withdrawing from social activities such as golf and tango dancing because of her inability to cope with these situations because of her sense of embarrassment, and she also described lacking energy and motivation to continue with or reengage with her social activities. She said that as a result of all this, she was unable to continue or develop her career as an artist for about eighteen months, as a result of which she suffered a loss of income because she did not paint during this time.

13. The plaintiff acknowledged, in her evidence, that by December 2008, she had recovered from the physical, emotional and psychological effects of the damage to her hair. She said it took about eighteen months for the hair to grow back to where it had

been before the 28th March, 2007.

14. The defendant's response to the assessment of the plaintiff's damage has been to launch an attack on the plaintiff's character and integrity, claiming that she concealed vital information during the preparation of the case, both in relation to her social activities and the computation of her income and in relation to her prior psychiatric history and also a road traffic accident which occurred in August 2008, in which she suffered neck and back injuries. This culminated in an application by the defendant to dismiss the plaintiff's claim under s. 26 of the Civil Liability in Courts Act 2004, based on a submission by Mr. Marcus Daly S.C. that the plaintiff was guilty of gross misrepresentation designed to mislead the defendant and the court.

15. I have had the opportunity to listen to and observe the plaintiff giving her evidence over a day and a half, and I am quite satisfied that she is an honest person who gave truthful evidence and endeavoured to give an accurate portrayal of how the damage to her hair actually affected her and the impact it had on her life in every way and I accept her evidence in that regard, including her very fair acknowledgement that by December 2008, she had recovered from the ill-effects of the hair incident.

16. I am of the view that when this incident happened to the plaintiff, because of ongoing marital difficulties, she was probably in a more vulnerable and fragile state of mind than she may have realised herself, and was a poor candidate for the type of insult which the damage to her hair inflicted on her.

17. The plaintiff was examined by two psychiatrists, Dr. Lorna Mannion for PIAB, and Dr. Damien Mohan for the defendant. Both agreed that the plaintiff suffered an adjustment disorder as a result of her experience.

18. I think it is probable that coming at that time in her life, when she was in the throes of martial separation, both the severity of the disorder and its duration were magnified significantly, and explain, convincingly, to my satisfaction, the impact on her life in terms of the social withdrawal she described and the loss of motivation and energy which exacerbated her social withdrawal and deprived her of her normal artistic inspiration and industry. But, of course, the defendant challenged the fact of her social withdrawal on the basis of her golf club records and, in particular, her winning of a competition in May 2007, and being photographed accepting the prize.

19. In her evidence, the plaintiff said she continued to play some golf at the behest of a friend who encouraged her to go out, and occasionally, she did play with this friend, who, in fact, played with her when she won the competition in question. The photograph would have been an uncontrollable consequence of accepting the prize, and to have avoided it, would, undoubtedly, have exposed the plaintiff to more embarrassment than permitting it to happen. In fact, the golf club records demonstrate a huge reduction in the plaintiff's participation in golf competitions and appear to me to be substantially consistent with the plaintiff's evidence in regard to her withdrawal from golf club activities.

20. The plaintiff acknowledged that the injuries she suffered in a road traffic accident in August 2008, did also impact on her golfing activity. The defendant also relied heavily on a condition in the plaintiff's lower back as being the true reason for her withdrawal from golf and other social activities in 2007. The plaintiff emphatically rejected this, saying she had had this condition since the birth of her last child in 2001, and as an athletic person, she managed it well.

21. In 2007, in response to an episode, she decided to ascertain the exact cause of the condition and had an MRI, following which she had consultation with Mr. Stephen Young, an orthopaedic surgeon, and discussed an implant procedure which she ultimately declined in favour of back exercises, done initially in a gym for approximately a year and after that at home, which have kept her lower back trouble-free since.

22. I am quite satisfied that the plaintiff's explanation in this regard is truthful and I accept it. The plaintiff had a lifelong history of success in sports, in particular, athletics, and then golf, and like all committed, enthusiastic sportspeople, she was adept at managing injury to minimise its effect and impact on participation in the sport, and I am quite satisfied that the plaintiff's lower back problem did not stop her playing golf to any significant extent.

23. The defendant contends that the plaintiff failed to disclose to the psychiatrists who examined her or to them a history of depression which, they say, was evidenced by the plaintiff's GP notes which disclosed that three antidepressant medications had been prescribed for her.

24. The plaintiff said she did not disclose a history of depression because she did not think she had one. She acknowledged that she had been on antidepressant medication prescribed by her GP some years previously for approximately three months, but she said this was in response to a very difficult episode in her marital relations associated with very serious mental health problems suffered by her husband. She did not see herself as the mentally ill person, but rather, as the coping person under great strain, and in that regard, she said the only attention she got was from her GP, and in response to advice, she attended Al-Anon and AWARE for a short time.

25. The plaintiff, in giving her evidence, came across to me as a very composed, collected person, who perceived herself as competent and assured. I have no doubt her life's experience in all respects, vocational, recreational and domestic, justified that perception of herself. I am satisfied she may not have fully appreciated the extent to which the difficulties she was experiencing were making inroads into her own wellbeing and the fact that she may have had an episode of depression requiring medication did not convey to her that she was a person who suffered from depression.

26. I accept that, when dealing with the two psychiatrists or instructing her solicitor, she genuinely did not see herself as a person with a prior psychiatric history and, hence, did not therefore intentionally mislead in any way in that regard.

27. The defendant relies on the inclusion in a document described as a Schedule of Income dated 25th August, 2010, of the following figures:

€10,930	2003
€11,130	2004
€10,250	2004

as income in respect of "*various paintings*", when, in fact, it was established, in the evidence given by Ms. Georgina Fahey, that this income was the plaintiff's wages as an employee in the hotel owned by her husband's family.

28. The plaintiff, when challenged on this, said that prior to her separation in 2005, her tax affairs were looked after by her husband and she gave to him all of her invoices in relation to her paintings. She had no records relating to her income prior to 2006, when

preparing for the case, and in order to answer queries as to income, she obtained from the Revenue Commissioners a letter dated 9th September, 2008, which gave these figures as her income for the periods in question. She based the information in the Schedule of Income on the information given in the letter from the Revenue, as she had no other records available to her, and assumed this income related to the sale of paintings.

29. It is quite clear from the evidence of Ms. Georgina Fahey, that the plaintiff's assumption in this regard was incorrect and that these figures relate solely to her earnings as an employee of the company that owned the family hotel. However, the information given to her in the letter of 9th September, 2008, does not at all indicate that the source of the income was her former employer, and indeed, the absence of any indication of such, in my view, could only have encouraged a belief that it was her personal income derived from artistic activity.

30. The addition of the two €480s for paintings for which she had records tends to persuade me that she had a genuine belief as to the source of the income set out. I am satisfied the plaintiff did not, by this obvious error, set out to mislead in order to enhance her claim.

31. The defendant contends that the pleadings in the case were contrived to mislead the defendant and the court. Undoubtedly, as the case progressed in preparation, anomalies and inconsistencies emerged, but when the process of pleadings, discovery and professional examinations was completed, the defendant had, in its possession, full and substantially accurate information relevant to the issues in the case. The defendant chose to construe all this material as evidence of misrepresentation on the part of the plaintiff and to run its case accordingly. Needless to say, the defendant was entitled to do that, but I cannot but observe the heavy handedness with which it was done. Apart from the full frontal attack on the personal integrity of the plaintiff, the plaintiff's estranged husband and his mother were included in the Schedule of Witnesses and were present in court throughout the trial until very close to the end and during all of the plaintiff's evidence when, from this Bench, I observed a virtual continuous display of expressions and gestures apparently in response to the evidence being given by the plaintiff.

32. The reason for their presence was explained, in the case of the husband; to prove a photograph taken from a family computer; there was no objection to its admission, and in the case of the mother-in-law, to deal with the plaintiff's wages from the hotel in respect of which evidence was given, not surprisingly, by the bookkeeper, Ms. Georgina Fahey. For the plaintiff, there is no doubt this must have made the process of giving her evidence an unusually arduous ordeal.

33. I am quite satisfied that the plaintiff has not misrepresented her case. I found her evidence truthful and reliable. Her evidence and that of the psychiatrists and of her GP persuade me that the plaintiff had an experience which, for any woman, would be devastatingly distressing, but for the plaintiff, it is clear that she suffered an adjustment disorder or considerable severity and length and which caused her a great deal of suffering during that period.

34. In my view, the appropriate sum to compensate the plaintiff for this, by way of general damages, is the sum of €30,000.

35. I am satisfied, from the evidence, that the plaintiff is a person of considerable artistic talent and that she had developed a valuable career as a painter prior to 28th March, 2007. Her sales of paintings in 2006, alone, demonstrate this.

36. I am satisfied that as a result of the hair incident, her artistic inspiration and motivation were temporarily destroyed and she was unable to pursue her painting in any kind of a meaningful way during the currency of her disorder. In effect, the fruits of her artistic talent and endeavour, which should have been there during that period, were lost forever.

37. It is, of course, very difficult to assess in monetary terms the extent of that loss. It cannot be known what paintings she would have created during that period and what the value of these would have had. In order to do justice to the plaintiff, it would seem to me that I must make an award of general damages to her under this heading. Thus, I would award her the sum of €15,000 for the loss of the fruits of her artistic creativity during the period in question, making a total award of €45,000.

38. Finally, I wish to observe that s. 26 of the Civil Liability and Courts Act 2004, is there to deter and disallow fraudulent claims. It is not and should not be seen as an opportunity to seize upon anomalies, inconsistencies and unexplained circumstances to avoid a just liability. Great care should be taken to ensure, in a discriminating way, that clear evidence of fraudulent conduct in a case, exists before a form of defence is launched which could unjustly do grave damage to the good name and reputation of a worthy plaintiff.