

## THE HIGH COURT

[2014 No. 455 P]

BETWEEN

VALENTYNA VOLOSHYNA

PLAINTIFF

AND

DUNNES STORES

DEFENDANT

**JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 8th day of June, 2016**

1. The Plaintiff was born on the 10th January, 1974. She is a nurse by profession who works as a healthcare assistant and resides at Cara Dubh, Curryhills Park, Prosperous, Co. Kildare.

2. These proceedings are brought against the Defendant for damages in respect of personal injuries and loss suffered by the Plaintiff as a result of an accident which occurred on the 13th June, 2013 when she was leaving the Defendant's department store in the Mill Shopping Centre, Clondalkin, Co. Dublin.

**Background**

3. On the morning of the accident the Plaintiff drove to the Shopping Centre to do some grocery shopping and parked her car in an adjacent open air car park. She described the prevailing weather conditions in evidence; the day was overcast and it was drizzling. The car park surface was wet. A Met Office Report confirmed that the weather in the area for the morning had been cloudy with showers.

4. The Plaintiff walked from the car park to the shopping centre where she entered the shopping Mall: this was roofed to protect customers from inclement weather conditions. She continued approximately 100 metres along the Mall until she came to the public entrance of the Defendant's department store which she then entered.

5. The layout of the store was such that it incorporated a general grocery supermarket with checkouts; these were located some 15 to 20 metres from the main doorway. The area of the store between the checkouts and the main doorway was utilised for the display of clothing and ancillary products for sale. The floor surface of the supermarket and in that part of the store between the checkouts and the main doorway was made of ceramic tiles except for an area of laminated timber flooring which had been laid in the vicinity of the main doorway and on which the accident occurred.

6. Having completed her grocery shopping, the Plaintiff paid for her purchases which she packed into two shopping bags. Carrying a bag in each hand, she walked towards the main doorway with the intention of going back to her car. Within a stride or so of walking onto the laminated timber floor she fell forward landing heavily on the ground; her left knee took the brunt of the fall. It was just after 10.00 am.

7. The Plaintiff picked her shopping up and got to her feet with the assistance of a male customer who had entered the store; the accident occurred almost immediately in front of him. Having got to her feet the Plaintiff was approached by Mr. Andrew O'Donnell, employed at that time by the Defendant as a store cleaner. He asked the Plaintiff whether she was alright; she replied that she was and then left the store.

8. Although she was aware that she had hurt her left knee, the Plaintiff's evidence was that she was embarrassed by having fallen in so public a place. She made no mention to any member of the Defendant's staff before leaving the store that she had hurt herself nor was any complaint made concerning the cause of the fall. Almost immediately on walking out into the Mall the Plaintiff stopped to rub her knee before walking back to her car. On the next day she returned to report the accident, attributing the cause of the accident to the presence of water on the laminated wooden floor.

8. An integral part of the Defendant's security arrangements was the provision of an in store CCTV system which included a CCTV camera located over the area of the main doorway. CCTV footage from that camera for a period of half an hour before and half an hour after the accident was discovered and admitted in evidence. The footage consists of a timeframe recording with intervals of 1 or 2 seconds between each frame; no image is captured during the time interval between frames. Consequently, while the footage shows the Plaintiff entering the area and shows her having fallen forward on the floor, the actual moment and the mechanism or cause of the accident, which occurred during a time frame interval, was not captured.

9. A security desk was located immediately beside the main doorway and at the time of the accident was occupied a Mr Thompson who was a member of the Defendant's security staff. In evidence the Plaintiff said that it was he who had enquired as to her well being but having seen the CCTV footage she accepted that she was mistaken in this regard and that it was the store cleaner, Mr. Andrew O'Donnell, who had spoken to her.

10. Mr. Thompson gave evidence. He said that he had witnessed the Plaintiff's fall 'out of the corner of his eye'. Mr O'Donnell also gave evidence. He did not witness the accident but was close enough to hear the noise caused by the fall, as result of which he went to investigate what had happened. Neither of these witnesses was in a position to assist the Court as to the cause of the fall. Although Mr. O'Donnell did ask the Plaintiff whether she was alright, neither he nor Mr Thompson made any enquiry of her as to the cause of the accident nor were either of them enlightened about that by the Plaintiff.

11. The principal questions in controversy between the parties are:

- (i) What caused the Plaintiff's fall and,

(ii) Whether the cause was attributable to the breach of statutory duty and negligence alleged against the Defendant.

It is the Plaintiff's case, and it was her evidence, that the cause of the accident was the presence of water on the laminated timber floor. Although she had not seen it beforehand, she gave evidence that having got to her feet she noticed that the front of her left trouser leg was wet from just below the knee to about 2 ½ inches above her ankle. She was also able to see a small quantity of water or clear liquid, as well as what she described as a skid mark, on the floor.

12. In his evidence, Andrew O'Donnell said that he had twice inspected the area where the accident had occurred, once immediately after the Plaintiff left the store and again shortly afterwards at the request of Mr. Thompson. On neither occasion was he able to see anything which might have explained the accident. He did not see water or the skid mark described by the Plaintiff nor did he have to clean the floor afterwards.

13. Special damages claimed in the sum of €4,027.76 were agreed subject to liability. There was no material controversy concerning the Plaintiff's injuries. A medical report dated the 16th July, 2013 prepared by Dr. Jean O'Sullivan, Emergency Consultant, and medical reports dated the 22nd October, 2013, 30th June, 2014 and 11th September, 2015 prepared on behalf of the Plaintiff by Mr. Fergal McGoldrick, Consultant Orthopaedic and Hand Surgeon, together with a medical report dated 7th July, 2015 and letter dated 6th August, 2015 prepared on behalf of the Defendant by Professor Michael Stephens, were admitted in evidence. It is not proposed to recite the content of these reports here; suffice it to say that they have been read and considered by the Court.

14. In summary, as a result of the fall the Plaintiff suffered a left medial meniscal tear for which she required an arthroscopy. This was performed on the 18th July, 2013 during which Mr. McGoldrick resected a posterior horn tear in the medial meniscus. The Plaintiff had a good result from this procedure but subsequently developed chondromalacia patella which caused residual left anterior knee discomfort consistent with residual mild quadriceps weakness. No long term sequelae were expected by Mr. McGoldrick.

#### **Cause of the Accident.**

15. Under cross examination the Plaintiff rejected any suggestion that there was nothing on the floor which had caused her to fall. She also rejected the suggestion that she may have tripped or stumbled. Her evidence was that she had slipped on water or a clear liquid.

16. The area of the fall was the subject matter of a joint engineering inspection at which a slip resistance test was carried out by Mr. Kirwan-Browne, Consulting Engineer, retained on behalf of the Plaintiff. He took photographs, prepared reports for the assistance of the Court and gave evidence at the trial. Expert evidence was also given by Mr Kevin Roche, Consulting Structural Engineer, retained on behalf of the Defendant.

17. It was Mr Kirwan Browne's evidence that the slip resistance of the laminated wooden floor when dry was excellent but that even with the smallest quantity of water, which he quantified as a few drops, it would be equivalent to that of walking on ice. There was no material difference of opinion between the engineers in relation to the slip resistance properties of the floor either when wet or dry.

18. Documentation in relation to the Defendant's cleaning system had been discovered and had been considered by Mr Kirwan Browne. From his perusal of this documentation and from his own visits to the store, it was his opinion that there was no proper or safe cleaning system in operation for the area between the checkouts and the main doorway which included the area where the accident had taken place. In his view the Defendant's cleaning system, such as it was, did not extend beyond the supermarket area; a conclusion that he considered was corroborated by the CCTV footage taken both before and after the accident.

19. Mr. Kirwan-Browne accepted that the risk of water being tracked into the store from trolleys or by umbrellas or rain coats was low for a combination of reasons principal of which were the weather conditions prevailing on the day and the length of the covered in Mall. He also accepted that, from his viewing of the CCTV footage, there was no convincing evidence of a source of water on the floor such as customers coming into the store prior to the accident with dripping umbrellas, rain coats or jackets.

20. Nevertheless the presence of water on the floor could not be ruled out and there were other possibilities to explain how it may have got there. Moreover, he continued to be critical of the cleaning system and in this regard noted that in the half an hour before and after the accident there was no evidence of any inspection or cleaning by the Defendant's cleaning staff of the area where the accident had occurred. However, he also accepted that during the half hour immediately before the accident approximately 85 people had crossed the locus in quo without mishap.

21. When asked by Counsel for the Defendant about the amount and extent of the spill that would be required to cause the Plaintiff's left trouser leg to be wet in the way indicated by her and yet to have left some water and a skid mark visible on the floor he fairly conceded, I thought, that there would have had to have been considerably more than a few drops of water. Mr Roche quantified the necessary amount as being equivalent to a small glass of water.

22. With regard to the mechanics of the accident and acknowledging that the Plaintiff had fallen forward, Mr. Kirwan- Browne gave evidence that having regard to the ordinary mechanics of ambulation in forward motion, which involved a heel to toe action, 90% if not more of slip and fall cases on a wet surface would result in the person falling backwards though the possibility that a person could fall forwards could not be completely discounted. He did not accept that without going down on his hands and knees the cleaner would necessarily have been able to see the skid mark and the small quantity of water on the floor especially as the cleaner did not know what he was looking for.

23. Mr Roche disagreed. In his opinion if water and a skid mark were visible to the Plaintiff as described by her then so too would it have been visible to anyone inspecting the floor, particularly a trained cleaner such as Mr O' Donnell so soon after the event; the CCTV footage showed that he had inspected the correct area of the floor on 2 occasions within minutes of the accident.

24. Mr O'Donnell gave evidence in relation to the Defendant's cleaning and inspection system. He was then an employee of the Defendant with responsibility for inspection and cleaning in the supermarket as well as the area between the checkouts and the main doorway where the accident had occurred. The cleaning inspection record, which was completed by him at regular intervals, was kept at the security desk beside the main door. He gave an explanation as to why he would leave his cleaning equipment at the check out area before proceeding to carry out an inspection of the area between the supermarket and the main door. He rejected any suggestion that there was an inadequate system of cleaning and inspection in that area, on the contrary, it was swept by him and kept under inspection by himself and other members of staff. He also explained the procedure which was followed in the event of spillages or other deleterious substances or materials being observed by staff or otherwise being identified on the floor.

25. While he readily conceded that when he spoke to the Plaintiff he had not asked what had caused the fall, he was also quite sure that she had not make any complaint to him about there being anything on the floor which had caused her to fall nor did she mention that she had injured herself in any way or that her trousers were wet.

Although he was unaware as to what had caused accident when he carried out his inspections within minutes of the event, he was aware of when and where it had happened; on neither inspection had he seen anything on the floor.

26. Mr Roche had viewed the CCTV footage for the ½ hour before the accident. There was nothing evident from that to explain the presence of water or other clear liquid on the floor. If there was a quantity of water on the floor sufficient to wet the Plaintiff's left trouser leg, leave a skid mark and a small amount of water on the surface as described by the Plaintiff, then his expectation was that that would have been 'problematic' for anyone encountering it. Indeed, even after the accident, if a small quantity of water or other clear liquid remained on the floor that too would have been expected to cause a problem to anyone stepping onto it. I took this evidence to mean that he was in general agreement with the Plaintiff's engineer that even a few drops of water on the floor would be sufficient to make it slippery and therefore unsafe.

### **Decision**

27. I have carefully considered the evidence adduced in this case, including the CCTV footage and stills taken from it which were admitted. I accept the evidence of Mr. Kirwan Browne concerning the slip resistance of the laminated wooden floor in the Defendant's Store. I find as a fact that the slip resistance when wet would be equivalent to that of ice.

28. There is no evidence from the CCTV footage or otherwise lead in the case to explain the presence of water or other clear liquid on the floor where the Plaintiff fell. Whilst her engineer did suggest a number of possibilities none of these were evident from the CCTV footage. Moreover, he fairly accepted that having regard to the prevailing weather conditions and the length of the covered in Mall it would be unlikely that water would be tracked into the store. Furthermore, there was no evidence from the CCTV footage in the half hour before the accident of customers entering the store with umbrellas or wearing raincoats or otherwise providing a potential source to explain the floor being wet to the extent described in the evidence of the Plaintiff or otherwise .

29. There was no material difference of opinion between the engineers as to the quantities of water required to be present on the floor in order to cause the Plaintiff's left trouser leg to be wet in the way described by her and yet to leave a small quantity of water and a skid mark after the fall nor was there any material difference of opinion in relation to the slip resistance of the floor when wet. Significantly, the Plaintiff's engineering evidence was that 90% or more of cases involving a slip and fall by a person walking forwards result in the person falling backwards, precisely the opposite of what happened to the Plaintiff; no plausible engineering evidence was advanced to explain why, contrary to what would be expected to happen as a result of a slip, the Plaintiff fell forwards.

30. The CCTV footage and the stills taken from it record the Plaintiff walking into view of the CCTV camera at 10.01.12. The time of the next picture frame is 10.01.14 in which she is seen to have fallen forwards on the floor. The picture frame recorded at 10.01.17 shows the Plaintiff picking up her shopping and being helped to her feet by a male customer. Frames recorded at 10.01.47 and 10.01.51 show Mr. O'Donnell inspecting the area of floor where the accident occurred.

31. The stills taken from the CCTV footage recorded at 10.01.20 show the Plaintiff, and the male customer who had come to her aid, looking down at the floor where she had fallen. The frame recorded at 10.01.23 and identified as still L shows the same customer looking down at the floor and proceeding to walk across that part of the floor where the Plaintiff had fallen.

32. There is no evidence of any complaint or statement having been made after the accident by the male customer, who had assisted the Plaintiff, to any member of the Defendant's staff, nor is there any record of anyone making a complaint to a member of the Defendant's staff before the accident about there being anything on the floor at or near where the Plaintiff fell. Indeed, there is no evidence of a spillage having occurred and having to be cleaned up in the area during the half an hour before or after the accident.

33. If there was a quantity of water on the floor as described by the Plaintiff, which Mr. Roche quantified as being equivalent to a small glass of water, I find as a fact on the evidence of both engineers that that would have been problematic in terms of causing a slip to anyone stepping on to it. Approximately 85 people walked across the area of the floor where the Plaintiff fell in the half hour before her accident. There is no evidence of anyone slipping or falling or otherwise encountering any difficulty with maintaining balance or ambulation at the locus in quo consistent with there being a slippery floor.

34. Mr O'Donnell no longer works for the Defendant. I had the opportunity to observe his demeanour whilst he gave his evidence. He impressed me as a reliable witness giving credible evidence in a straight forward manner; his evidence was also corroborated by the CCTV footage.

35. The Court finds as a fact that within minutes of the accident he inspected the laminated wooden flooring at the place where the Plaintiff fell and that he did so with a view to ascertaining whether or not there was anything present on the floor to account for the fall. I am quite satisfied on the evidence that if there was a small quantity of water and a skid mark on the floor as described by the Plaintiff and visible to her, then this too would have been visible to Mr. O'Donnell, particularly as he was a trained cleaner and had arrived at the scene almost immediately after the accident.

36. I accept his evidence that, on his inspections of the floor, there was nothing to be seen and particularly nothing of the sort described in the evidence of the Plaintiff. Had there been anything visible to him, particularly of the sort described by the Plaintiff, it is highly improbable that that would not have been attended to Mr. O'Donnell, an activity that would have been captured on the CCTV footage. Nothing of the sort was recorded nor was any difficulty seen to be encountered by other customers stepping on to the same part of the floor either before or after the accident.

37. The circumstantial evidence is of little or no assistance to the case made by the Plaintiff. Apart altogether from the absence of any evidence to explain the presence of water or other clear liquid on the floor both before and at the time of the accident, or any evidence of difficulties having been encountered by other customers crossing the same area of the floor, I consider it unlikely, even allowing for her embarrassment at the time, that if there had been a spillage of the size sufficient to have wet the Plaintiff's trouser leg and to have left a small quantity of water visible to her when she stood up, and that this was the reason why she had fallen resulting in an immediate injury to her left knee that the Plaintiff would not have mentioned any of these matters to Mr. O'Donnell when he spoke to her so quickly after the accident.

38. The law does not require the Defendant to offer an explanation or otherwise to explain the cause of an accident. Save in certain circumstances where, for example, the facts are such as to attract the doctrine of *res ipsa loquitur*, there is no rule of law that requires the Defendant to provide an explanation for or otherwise prove how an accident giving rise to the proceedings occurred.

Rather, the law places on the Plaintiff the onus of proving those matters pleaded which have been put in issue by the Defence. The burden of proof which the Plaintiff carries in a civil action such as the present is to establish her case on the balance of probabilities. As a general rule it is from the establishment of a prima facie case by the Plaintiff that the potential liability of the Defendant arises and not otherwise.

39. First and foremost in the circumstances of this case is the requirement that the Plaintiff must satisfy the Court, on the balance of probabilities, as to what it was that caused her to fall. Until that is done, consideration of the sufficiency or otherwise of the Defendant's system of cleaning and inspection is premature. In the circumstances of this case, the occurrence of the fall is not of itself sufficient to trigger that enquiry or require the Defendant to go into evidence to provide an exculpatory explanation.

40. Whilst the Court cannot altogether discount the possibility that the Plaintiff fell forward as a result of a slip, accepting the evidence of her own engineer as to the mechanics of a slip and fall, it is a matter of high probability, approaching near certainty, that if the Plaintiff had stepped onto a quantity of water or other clear liquid as contended by her she would in all likelihood have fallen backwards. Quite evidently that did not happen. Furthermore, no satisfactory explanation was advanced to explain why, instead of doing so, she fell forward onto her knees.

41. The Court is cognisant that the Plaintiff suffered injuries and loss as a result of the fall and about which there is no dispute of any material significance. Nevertheless, these aspects of the Plaintiff's case only fall for consideration once there has been a finding of liability on the part of the Defendant. As to that question, it was not the fact but rather the cause of the fall which was in issue and was the first fence which the Plaintiff was required to cross; to fall there would be fatal to her claim. On the evidence and for the reasons given I am satisfied that the Plaintiff has failed to discharge the onus of proof in this regard. Accordingly, the question of the Defendant's liability and the adequacy or otherwise in law of its system of cleaning and inspection does not arise for consideration.

### **Conclusion**

42. The Plaintiff having failed to discharge the onus of proof as to the cause of her fall, the Court will make an order dismissing these proceedings.