Neutral Citation [2013] IEHC 79

THE HIGH COURT

[2009 No. 7130 P.]

EILEEN MONAHAN

PLAINTIFF

AND

DUNNES STORES AND DUNNES STORES (ILAC CENTRE) LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Irvine delivered on the 15th day of February 2013

1. The plaintiff was born in October 1958 and lives with her elderly and somewhat dependent mother in Glasnevin, Dublin. She commenced her employment with Dunnes Stores after she completed her Leaving Certificate and was appointed a department manager in 1985.

2. The within proceedings relate to an incident that took place on the defendant's premises at the Ilac Centre on 1st September, 2006, sometime between 5pm and 6.30pm. It is agreed that Mr. Pat Tully, who was the manager of the defendant's store, was assisting Ms. Elaine Hayes with a display of large and rather unstable Christmas gift bottles of olive oil which were on a tiered table when he destabilised the display causing anything between six and ten bottles to come crashing to the ground creating a hazard from broken glass and a spillage of oil that covered an area of approximately 6x10ft.

3. The plaintiff claims that the defendant was negligent in its management of the aforementioned spillage in that it failed to warn her of its presence or protect her from inadvertently walking into the area and that as a result she fell heavily as she approached Mr. Tully to speak to him prior to clocking out of work that evening. The defendant on the other hand maintains that it acted with reasonable care for the plaintiff's safety. It asserts that it immediately set about cordoning off the area and erecting warning signs which it maintains were sufficient to protect both its staff and members of public from injury assuming that they were acting with due care for their own safety. In addition to its denial of negligence, the defendant maintains that the plaintiff was guilty of contributory negligence in failing to heed two oral warnings and a hand signal allegedly given to her by Mr. Tully before she entered the area which she ought, in any event, to have noted had been cordoned off.

4. This is a case which very much depends on the view I take, firstly, as to the extent and nature of any cordon or warning signs that may have been erected prior to the plaintiff's fall and secondly as to what happened in the fifteen or so seconds prior thereto, matters about which there was significant dispute.

5. The plaintiff states that she came out from a storeroom, which is towards the rear of the premises, to speak to Mr. Tully who she then spotted in the distance. She maintains that she zigzagged or weaved her way through the display stands and garment rails moving at all times in his direction. As she approached Mr. Tully she stated that she saw that he was at a display table with his back to her. He appeared to be wrapping cling film around a display table. She did not notice the presence of any warning signs or barriers. Furthermore, there was nothing impeding her approach and she noticed nothing unusual about the area that might have alerted her to the fact that she was approaching an area of danger. She called out to Mr. Tully to get his attention as she approached but he did not hear her. Then, just as she reached him, she slipped and fell heavily to the ground.

6. Under cross examination, the plaintiff denied at any stage receiving one or more oral warnings from Mr. Tully telling her to stay away. She also denied that he put up his arm to indicate to her that she should not continue walking towards him.

7. Mr. Tully stated that the collapse of the display of the oil bottles caused a great commotion in the store and that Mr. Capper arrived on the scene almost immediately. He said that he asked a member of staff to get a bucket and mop and he told the court that Mr. Capper immediately went off to get tension barriers and warning signs. Mr. Tully maintained that before the plaintiff's fall, the area of the spillage had virtually been cordoned off using a combination of four or five moveable clothing rails, four or so tension barriers and five yellow plastic warning signs which had been hinged together.

8. As to the plaintiff's approach, Mr. Tully stated he noticed her when she was about 8ft from the area in which he had placed a number of tension barriers. He said that he told her to stop where she was. When she kept walking he said that he warned her a second time while simultaneously putting his hand out to demonstrate that she should stay exactly where she was. Mr. Tully maintained that regardless of these clear warnings, the plaintiff squeezed through the uprights of two tension barriers which had been placed side by side and slipped almost immediately. He said that he put out his hand to try to save her but was unsuccessful. He also maintained that by the time she fell she had told him that she intended leaving the floor to get a glass of water and had also mentioned something about stock relevant to the night shift.

9. Mr. Capper told the court that when he became aware of the spillage he immediately went to the small storeroom at the front of the store where warning signs and tension barriers are kept. He stated that he brought two yellow A-frame plastic warning signs to the locus and three tension poles. The three poles were placed in position and joined together using two straps making one continuous barrier. This barrier was placed immediately beside approximately four rails of clothes which he said had been positioned in a U-shape formation so as to try to create a cordon of sorts around the spillage. There was a gap in the cordon and he placed the two A-frame yellow warning signs side by side in this area. It was intended that this gap would be used by those involved in the clean up operation as they would need to be able to access the area of the spillage. Mr. Capper said he saw the plaintiff when she was about 12ft away and that he heard Mr. Tully warn her twice not to come into the area. He also said he saw him gesticulate with his hand that she was to stop where she was. Mr Capper said that the plaintiff ignored these warnings and made her way through the cordon entering the area of the spillage between the yellow warning signs and the tension barrier, at which stage she immediately slipped.

10. The onus of proof is on the plaintiff in this case to establish that the defendant was negligent in failing to protect her from the spillage which it had created on the floor of its premises on 1st December, 2006. The extent of the defendant's duty of care, I believe, must be one which is proportionate to the risk generated by the spillage and as to the foreseeability of potential injury. In this regard, I think the following matters are material:-

> (i) The spillage occurred in what is essentially a drapery store. No fluid or liquids are normally sold in the store. The decorative gift bottles of olive oil were only on the defendant's premises as part of its Christmas wears. Accordingly, I

think that the index of suspicion that a member of staff might have as to the possible presence of a spillage of oil on the floor would be very low indeed and that any warnings as to the presence of such a hazard would have to reflect this fact.

(ii) Olive oil or oil of any variety on a floor surface creates a slip hazard which is almost unique. It is never safe to walk on a floor on which such a substance has been spilled. As was heard in evidence, this was a spillage that had to be removed by chemical means in order to render the floor safe for use. The risk emanating from such a spillage cannot, to my mind, be equated with that generated from a spillage of a drink such as coffee, water or a soft drink. Spillages of that nature, once the immediate surplus is removed and the pedestrian warned that the floor remains wet, leaves the floor wet or damp but relatively safe for those who approach using reasonable care. The same cannot be said of a floor where there has been a spillage of oil. Likewise, a floor with an oil spillage is to be contrasted with a floor which remains wet because it has been recently washed and which will not be hazardous provided adequate warning of that fact is given.

11. Having regard to these factors and having considered the evidence given by the consulting engineers on behalf of the parties, I believe the duty of care of the defendant in this case was to cordon off the area of the spillage as soon as was reasonably possible and to do so in a manner such that nobody could unwittingly gain access to it or fail to recognize that the hazard present was such that they were required to stay out of the area. In terms of the defendant's duty of care I am satisfied that if the defendant considered it necessary to leave a small area of the cordon open to allow access for cleaning staff, having regard to the fact that there had been a major oil spillage, I believe it was incumbent on the defendant to have somebody present to monitor that gap to ensure that only those who were essential to the clean up operation were in a position to access the area. To set the standard of care at this threshold is not, I believe a counsel of perfection because of the nature of the hazard created and the foreseeability of consequential injury therefrom.

12. I will now set out my findings of fact and the evidence which I have relied upon for such purpose.

13. I am satisfied from the plaintiff’s evidence and that of Mr. Capper and Ms. Hayes, that the spillage occurred at least six or seven minutes before her fall. Accordingly the defendant had plenty of time, staff and equipment available in close proximity to render the area safe by the erection of a suitable cordon and warning devices and to adequately monitor the area of the spillage in the course of the cleanup operation.

14. I am satisfied that when the plaintiff approached Mr. Tully that she did not receive any warning not to proceed into the area of the spillage and that neither did he gesture with his hand so as to make it clear to her that she should stop in her tracks. I reach this conclusion regardless of the fact that Mr. Tully’s account of these events was supported by Mr. Capper. In this regard, I find it difficult to accept that the plaintiff would twice disobey the directions of her store manager. As far as I am aware, the plaintiff holds a position of significant responsibility within the defendant's organisation. I have heard no evidence to suggest that she has anything other than a flawless record in terms of her work practices. Furthermore, it appears that she was not the subject matter of any complaint by her manager in the aftermath of what, on his account of events, would have amounted to a significant breech of discipline and safety procedures. Also, if it was Mr. Tully’s belief that the plaintiff had deliberately ignored two if not three warnings in the moments prior to her fall, I think it highly unlikely that he would have failed to record those facts when he completed the incident report form three days after the events in question, particularly in light of the fact that he was the party who had generated the spillage in the first instance and that by the time he did so, he knew that the plaintiff had sustained a very serious injury.

15. I reject the evidence of Mr. Tully as to the number and nature of the warning signs in place at the time of the plaintiff’s fall. Indeed, having observed and listened carefully to Mr. Tully give evidence, I have to say that he was a remarkably poor witness and I found his evidence was inconsistent on a wide range of important issues. At best, I believe there may have been two yellow a framed warning signs in the vicinity of the spillage. Mr. Tully said in evidence that five large plastic yellow warning signs of the variety that are shaped like men with their arms extended had been interlinked to form a semi-circular barrier to provide part of a cordon which was completed using tension barriers and clothes rails. However, the incident report form which he completed after the event referred only to the creation of a cordon simpliciter and made no reference whatsoever to the presence or positioning of any warning signs. Furthermore, his evidence as to the presence of a group of linked signs was not supported by any other witness. Ms. Hayes, who at the time was employed by the defendant, said that she felt that there may have been one or two warning signs erected after the spillage. Even Mr. Capper, contradicted Mr Tully’s evidence in this regard. He told the court that after the spillage occurred he collected two of the standard A frame warning signs from the store room. He said that they deliberately left a gap in the makeshift cordon so as to allow the cleaning staff access the spillage and that he had placed these two yellow warning signs side by side in that gap.

16. I further reject the evidence of Mr. Tully and that of Mr. Capper as to the nature and extent of the cordon that each of them says had been erected by the time the plaintiff came on the scene. Firstly, I am not satisfied on the balance of probabilities that clothes rails were moved in a purposeful fashion so as to include them in what was intended to be a cordon. Ms. Hayes, who was the only independent witness to give evidence, said that she thought that two warning signs and a couple of tension barriers had been put in place after the spillage but she did not remember clothes rails having been used as part of any cordon. Further, there is no mention of clothes rails having been used for such purpose in the pleadings where the components of the cordon were stated at para. 3(d) of the defence to have been made up of “warning signs, ropes and mats”. Even if I am incorrect in relation to this issue and clothes rails were moved with this objective in mind, I am satisfied that these were not positioned such that, without warnings in front of them, it would have been obvious to somebody who managed to note their somewhat unusual position that they were part of a cordon intended to keep people out of a designated area which was hazardous to the point that it was unsafe for them to enter.

17. I am satisfied as a matter of fact that as the plaintiff approached Mr. Tully, he was, as she advised, shrink wrapping a display table and that it was reasonable for her to believe that he was doing this as a precursor to moving a display unit as was standard practice and that she had no reason to apprehend that she was entering a hazardous area. I am satisfied that whatever efforts may have been made by Mr Tully and Mr Capper to erect a make shift cordon failed and that it was not evident to someone approaching along the plaintiff’s path of travel that the area in which Mr Tully was positioned was out of bounds and dangerous. Thee may have been two A frame warning signs somewhere in and about the area of the spillage but I am satisfied that they were not within the plaintiff’s line of sight as she approached the area. Indeed, it is worth noting that Mr. Tully and Mr. Capper were not in agreement as to how the plaintiff managed to access the area of the spillage. Mr. Tully stated that she entered between two unconnected tension barriers and Mr. Capper said that she made her way between the two yellow warning signs and one of the uprights of the tension barriers allegedly used to create a partial blockade.

18. In preferring the creditability of the plaintiff’s evidence to that of Mr. Tully and Mr. Capper, I believe it is of some significance that for the purposes of these proceedings she sought discovery of all CCTV camera footage covering the period material to her fall, a step I think she would have been reluctant to pursue if she believed there had been an obvious cordon present which she had breached or that she had been given several warnings including a hand signal not to enter the area.

19. I am also marginally influenced in favour of the plaintiff's account of events by the fact that, notwithstanding the defendant's protocol relating to the manner in which an investigation into such an incident should be conducted, Mr. Tully as the party responsible for conducting that investigation, did not himself seek to ascertain if there was any relevant CCTV footage and neither did he request Mr. Capper to do so. Also, while it is not a matter to which I have attached any weight, I find it hard to accept Mr. Capper's evidence that he checked all of the footage available from the three video cameras which might potentially have captured this incident and that all of cameras happened to be facing in directions such that they failed to record any evidence of relevance to this spillage, such as the movements of the plaintiff, Mr. Tully and himself, the movement of clothing rails or the retrieval and position of the various warnings signs and tension barriers.

20. In addition to the aforementioned matters I found Mr. Tully's evidence as to what happened in the lead up to the plaintiff's fall to be inconsistent with the case made to the court during the plaintiff's cross examination. The plaintiff was cross examined by Mr. McCarthy, S.C., on the basis that Mr. Tully would say that he saw the plaintiff when she was 20 ft away and Mr. McCarthy confirmed that those were his instructions. However, when Mr. Tully came to give his evidence he said that only saw the plaintiff when she was 6-8 feet away. Regrettably, I have come to the conclusion that the change in his evidence on this issue in all probability was as a result of an observation that I had made in the course of the plaintiffs cross examination to the effect that I found it difficult to fathom how, if Mr. Tully saw the plaintiff approach from such a distance and she ignored his first warning he simply did not step forward to the tension barrier that he said was between himself and the Plaintiff and which was only two feet in front of him so as to make sure she didn't enter upon the area of the spillage.

21. Claimant's all too often, in what I will describe as "slip and fall" type cases, seek to make other parties liable for their failure to take reasonable care for their own safety. With ever increasing frequency those who are injured in such circumstances try to shift or transfer their own personal responsibility to an occupier or employer often relying on standards of care that are entirely artificial and amount to a demand that others act in a manner that amounts to a council of perfection when all that is required of them by law is that they take reasonable care. This however is not such a case. Here, because of the nature of the hazard and the foreseeable consequences for anyone who might mistakenly access an area upon which oil had been spilt, I am satisfied that the defendant failed to act with reasonable care for the plaintiff's safety.

22. Having reached the aforementioned conclusions, it goes without saying that I am satisfied that the defendant is liable for the plaintiff's injuries. Furthermore, on the facts found I do not believe that there is any basis for a finding of contributory negligence.

Injuries
23. As a result of her fall, the plaintiff was taken by her son to the Swiftcare Medical Clinical at Dublin City University where x-rays taken revealed a fracture to the greater tuberoscity of the left shoulder. She was treated with a sling for a period of six weeks and that was followed up with physiotherapy between January 2007 and March 2007.

24. As a result of ongoing symptoms which included discomfort and difficulty lying on her side, an MRI scan was performed which diagnosed the presence of rotator cuff syndrome. As a result the plaintiff was referred to Mr. Kevin Mulhall, Consultant Orthopaedic Surgeon. On examination, the range of movement of the shoulder was poor with abduction and rotation being significantly restricted.

25. On 18th May, 2007, the plaintiff's shoulder was injected with limited benefit. In August 2007, her shoulder was manipulated under general anaesthetic and an arthroscopy was performed in the course of which a partial tear of the rotator cuff was identified. In January 2008, the plaintiff's shoulder was again injected and her range of movement found to be improved but still substantially impaired. Accordingly in March 2008, the plaintiff underwent a further arthroscopy of her shoulder and arthroscopic release following which she had extensive physiotherapy.

26. As a result of the second procedure, the plaintiff's range of shoulder movement has improved but some restriction remains. She enjoys one hundred degrees of elevation, abduction of ninety degrees and external rotation of sixty degrees. In particular, the plaintiff has difficulty raising her arm when it is out in front of her and has difficulty carrying out any heavy manual work which would include lifting or using the arm in an overhead position. This restriction is now permanent.

27. As a result of her injuries, the plaintiff was out of work until April 2011. The plaintiff had sought on many occasions following her accident permission from her employers to return to work but was unsuccessful. The defendant was reluctant to take her back without a certificate stating she was fit for all types of work. However, following an appointment with the defendant's orthopaedic consultant, Mr. Martin Walsh, in early 2011, her employers appeared to take a different view of her capacity to work and took her back putting her in a job which is free of any heavy lifting or pulling. The plaintiff has stated that she is very well supported by her manager who makes sure that she does not have to become involved in any physically arduous tasks.

28. In terms of her day to day activities, the plaintiff is still somewhat restricted. She finds it less easy to manage her elderly mother who she helps with a wide range of personal activities. She is also much more nervous as a result of her fall and has substantially reduced the extent to which she will walk anywhere, given that she is fearful that is she were to fall she would be at significant risk of doing irreparable damage to her already vulnerable shoulder. The Plaintiff continues to experience ongoing pain in her shoulder for which she takes over the counter medication. The restriction of her shoulder movements, although not very significant, will be permanent and she has a number of very minor scars from her arthroscopic procedures. Taking all of these factors into account I will award a sum of €50,000 in respect of general damages to date and a sum of €20,000 into the future.

Special Damages
29. The plaintiff claims loss of earnings between the date of her accident and April 2011, when she returned to full time employment with the defendant. The sum claimed in respect of loss of earnings, less the agreed social welfare deductions, amounts to a sum of €135,187.97. It may be that there is some dispute between the parties in relation to this figure and if necessary I will hear submissions from the parties in relation to the same. In this regard, it is important to note that at all times, the plaintiff remained an employee of the defendant.

30. A legal issue arose in the proceedings as to whether or not certain payments made by Dunnes Stores to the plaintiff during the period when she was out of work are to be deducted from her loss of earnings claim. Those payments were made by the defendant to the plaintiff pursuant to the plaintiff's membership of what is described as the "Dunnes Stores Management Pension and Life Assurance Scheme" ("the scheme").

31. The following facts about the scheme are not disputed:

> (i) Since very early on in her employment with Dunnes Stores, the plaintiff has been a contributor to and a member of the scheme. An employee who is not a member of the scheme, if they are disabled for an extended period, must fall back on

social welfare payments in the event of their absence from work.

(ii) Every member is obliged to pay 4% of their salary into the scheme which provides them with certain benefits. Those contributions are invested in their Retirement Account. The employer contributes 6% of the employee's salary and also meets the costs of the administration expenses in running the scheme.

(iii) The scheme, which provides for certain retirement and death benefits, also provides all its members with separate Income Continuance cover in the event of them becoming disabled. All members of the scheme qualify for the benefits provided by this Income Continuance Plan, subject to meeting any medical requirements imposed by the insurer and the scheme provides that those benefits are intended to compliment the pension and death benefits under the scheme.

(iv) The employer meets all of the expenses of the separate Income Continuance Plan and its benefits are provided separately by means of a contract between the employer and the relevant insurance company. The scheme provides that an employee's entitlement to benefit from the Income Continuous Plan arises if they become disabled through sickness or accident and are unable to take up their normal occupation. Their entitlement to benefit under the plan commences after 26 weeks of continuous disablement and it is stated at clause 12.2 that "the sum will be paid by the company, at its discretion, to you as salary and will, therefore, qualify for the normal tax reliefs under the PAYE system".

(v) It is also accepted that this is what may be described as an "all or nothing" scheme. The employee who opts to contribute to the scheme automatically gets a range of benefits in addition to their pension and death benefits and has no option to elect to avail of only one type of benefit or another.

32. The plaintiff maintains that the monies which were paid to her by her employer which it had earlier recovered from Friends First by reason of her disability is a payment which is not deductible from her loss of earnings claim by reason of the provisions of s. 2 of the Civil Liability (Amendment) Act 1964. That section provides as follows:-

> "In assessing damages in an action to recover damages in respect of a wrongful act (including a crime) resulting in personal injury not causing death, account shall not be taken of –
>
> (a) any sum payable in respect of the injury under any contract of insurance,
>
> (b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury."

33. On the plaintiff's behalf it was submitted that the payment which she received was payable by Friends First in respect of the injury which is the subject matter of wrongful act in the present proceedings and is a payment that was paid under a contract of insurance. Accordingly, this is a sum which is not deductible by virtue of the provisions of s. 2(a) of the Act.

34. The plaintiff submitted that it was irrelevant that she had not directly contributed to the premium paid in respect of the Income Continuance Plan. Neither did it matter that she was personally not a party to the contract of insurance pursuant to which the money was paid or that the money was first paid by the insurance company to her employer who then remitted it to her by virtue of her membership of the scheme. The plaintiff relied on the fact that the words of the section refer to "any contract of insurance" and do not specify that the beneficiary must be a party to that contract or a contributor to the premium. Furthermore, given the plain language of s. 2, Counsel submitted that it was irrelevant that if the monies concerned were not deducted from the loss of earnings claim that the plaintiff would end up receiving a net income in excess of that which she would have received had she not been out of work as a result of injury.

35. The plaintiff relied on the decision of Geoghegan J. in *Greene v. Hughes Haulage* [1998] 1 ILRM 34, a case in which he considered the wording of s. 2 of the Act. In that case the plaintiff's employer, Elan Corporation, had an Employee Benefit Plan in place designed to provide its employees with certain pension, early retirement and death in service benefits. The Employee Benefit Plan also entitled its members to certain income benefits in the event of prolonged disability. The latter benefit, which was described as the "Disability Benefit Plan", was operated by way of separate arrangement from the other benefits under an Employee Benefit Plan and was governed by a policy of insurance made between Elan and Irish Life. Geoghegan J. decided that the payments made under the Disability plan were not deductible against the plaintiff's loss of earnings claim and that it was immaterial that she had not been a party to the contract. It was a contract that had been made for her benefit and was therefore to be considered as part of her overall remuneration such that she should be considered to have indirectly contributed to the premium.

36. On the defendant's behalf it was submitted that the monies which it paid to the plaintiff and which it had received from Friends First on foot of the Income Continuance Plan should be deducted from the plaintiff's loss of earnings claim. It had paid for that plan to be put in place and was the contracting party with Friend's First. None of the 4% of the plaintiff's salary paid as a term of her membership of the scheme had been used by the defendant to defray the costs of providing the benefits available under the Income Continuance Plan.

37. The defendant relied heavily upon the decision of Hamilton J. in *Dennehy v. Nordic Cold Storage* (ex tempore 8th May, 1991). The facts in that case were however quite different from the facts in *Greene* as was observed by Geoghegan J. in the course of his judgment in that case. Unfortunately, there was no written judgment in *Dennehy* and the ruling of Hamilton P. in relation to the deductibility of certain payments under the provisions of s. 2 of the Act seems to have been given on an ex tempore basis in the course of the trial. Geoghegan J. certainly appeared to be of the view that the contract of insurance in *Dennehy* was a contract which had been taken out by the employer for its own benefit and was one designed to indemnify it in respect of a liability which it had voluntarily assumed in respect of its employees. Accordingly, he considered that the contract of insurance concerned was not one which was covered by s. 2 of the Act.

38. The facts in *Greene* seem to me to be pretty much on all fours with those in the present case save that it is not entirely clear from the judgment of Geoghegan J. that the plaintiff in *Greene* had contributed a percentage of her salary as a term of becoming a member of the Employee Benefit Plan or whether her membership of that plan automatically entitled her to the benefit of monies paid on foot of the disability plan as is the situation in the present case. What is clear, however, is that the plaintiff in this case is certainly in no weaker a position than Ms. Greene when it comes to applying the facts of her case to the reasoning of Geoghan. J as to the proper interpretation of s. 2 of the Act. In both cases the employer entered into arrangements with an insurance company to provide certain payments to qualifying employees should they experience an extended period of disability. The only major difference between the case under consideration and *Greene* is that under the Elan Scheme, the plaintiff received her benefit directly from the insurance company under the policy to which, incidentally, she was not a party, whereas in the present case the payment was made to Dunnes Stores in the first instance and then paid out to the plaintiff. However, integral to both schemes is the fact that the policy

was taken out for the benefit of the employee who might become disabled. Accordingly, I see no reason not to apply the principles outlined in *Greene* to the present case. In doing so, I should say that I agree with Geoghegan J's interpretation of s. 2 of the Act by reference to the earlier statutory provisions contained in s. 50 of the Civil Liability Act 1961 which provided for equivalent non-deductions in fatal injury claims.

39. The only matter of real concern to me on this issue emanates from clause 12.2 of the scheme which provides that the disablement benefit "will be paid by the company, at its discretion, to you as salary and will, therefore, qualify for the normal tax reliefs under the PAYE system". However, I am not convinced that the aforementioned provision which purports to give discretion to the company as to whether it will pay the monies received from the insurance company to it's disabled employee and if it does so to designate it as salary, materially changes the nature of the underlying agreement such as to take the payment outside the provisions of S.2. Having regard to the Plaintiff's membership of the scheme and her automatic entitlement as a result to benefit from the Income Continuance Plan, it would be hard to imagine the type of circumstances in which her employer, having received monies in reliance upon her disability could exercise its alleged discretion, and keep those funds for its own benefit. Further, even though the clause states that in such circumstances the monies will be paid as salary, the monies are not company monies but monies which have come into its possession solely as a result of their employee's disability and the existence of a contract of insurance covering that eventuality.

40. Notwithstanding the provisions of clause 12.2 it seems to me that the contract under consideration is one which was taken out by the defendant for the benefit of an employee such as the plaintiff who, in return for contributing a substantial percentage of their salary to become a member of the company's pension and life assurance scheme, was guaranteed certain income payments or benefits in the event of their becoming disabled for the required period. This being so, I believe the plaintiff's right to the sums paid out to her employer in respect of her disability should in fact be considered to form part of her overall package of remuneration and that she should be deemed to have indirectly contributed to the costs associated with the provision of the income continuance cover. In these circumstances, the payment out by Dunnes Stores to the plaintiff of the money received on foot of the income continuance policy, I believe, cannot be considered to be a matter within its discretion and is a benefit to which she was entitled by reason of her membership of the scheme.

41. For all of the aforementioned reasons, but particularly because of the decision of Geoghan. J in *Greene*, I am satisfied that the sum which the defendant seeks to deduct from the loss of earnings claim is one which falls within the provisions of S. 2 of the Act. The sum was paid to the plaintiff in respect of the injury the subject matter of this claim and is one that was paid under a contract of insurance within the meaning of that provision. The sum paid can also be considered to amount to a benefit payable to the Plaintiff in consequence of the injury sustained.

42. I accordingly invite the parties to agree all items of special damage in light of my ruling in relation to s.2 of the Civil Liability (Amendment) Act 1964 and bearing in mind that the Disablement benefit received by the Plaintiff over the five year period immediately following her accident must be deducted from her claim for past loss of earnings. As already stated in the course of the proceedings, regardless of the hopes of the Plaintiff that following her formal retirement date and in the absence of injury, she might have enjoyed the prospect of a further period of employment with the defendant, I am not satisfied that there is any basis, in the absence of any contractual right to such employment, which could entitle her to any additional damages in that regard.