THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 115

Record No. 2017/000228

Peart J.
Whelan J.
McGovern J.

BETWEEN/

LAURA GREENE

PLAINTIFF/

RESPONDENT

- AND–

DUNNES STORES

DEFENDANT/

APPELLANT

JUDGMENT of Mr. Justice McGovern delivered on the 27th day of March 2019

1. This is an appeal from a judgment of Hanna J. delivered ex tempore on the 2nd May, 2017 wherein he found in favour of the plaintiff in a personal injury action and awarded her damages and costs.

2. At all material times the respondent was employed by the appellant at its shop premises in Rathmines, Dublin.

3. The respondent was employed as a checkout operator at the appellant's supermarket. On the 20th September, 2011. At approximately 5.30 p.m. she left her checkout position to exchange two bottles of a beverage which had been selected in error by a customer. As she entered the beverage aisle her foot went from under her and she fell backwards onto some shelves and thereafter to the ground. She suffered injuries to her right arm, shoulder and elbow.

4. It appears that the respondent slipped as a result of stepping on a wrapper of the type which would have been wrapped around a roll of refuse bags for sale.

5. The respondent said that these refuse bags are not sold individually but come in a roll containing a number of bags. She gave evidence that when carrying out cleaning duties supervisors would take the bags off the shelves and would take the wrappers off them and throw them in the bag. She said "they used to use the bags to empty the bins underneath the checkouts into the rubbish when we were cleaning up in the afternoon". She did not know where the wrapper on which she slipped came from.

6. Mr. Tony Tate, a security manager employed by the appellant, was working in the store on the day of the accident but he did not witness it. He gave evidence that his duties involved walking the floor of the store both in a security capacity and a hygiene capacity. He said that he would do this every fifteen minutes and it would normally take about five minutes to walk around the whole store. He stated that five minutes before the accident he had walked through the area where it occurred and there was nothing on the floor. He handed into court a floor cleaning inspection record signed by him in support of his evidence. While he was cross examined by counsel for the plaintiff, he was not challenged on this point.

7. The respondent was the only witness to give evidence in support of her claim. Specifically, she did not call any evidence from an engineer. However, the appellant called Mr. Donal Terry, an engineer, who informed the court that the wrapping on which the respondent slipped was conspicuous and would have been seen by a person keeping a proper lookout. He also described the cleaning and inspection system operated by the appellant as "first class". He was not challenged on those two issues. He readily accepted that the presence of the wrapper on the floor did constitute a hazard.

8. In giving his judgment the trial judge stated:-

> "Firstly, with regard to the possible cause: I am satisfied that the probable cause of its presence was its use by a member of the defendant's staff, probably the cleaning staff, who would, as was a practice accepted and acknowledged, use a roll of plastic sacks or bags to carry out cleaning functions. And it seems to me that the most likely source of this wrapping was a member of the defendant's staff who having utilised the plastic sacks in the course of his or her employment then discarded it out of place, as it were, in the drinks section because this is not the sort of thing that one would expect to find there, one would expect presumably to find it in the homeware section. It is possible that this may have been a case of Homer nodding as far as Mr. Tate is concerned in carrying out his inspection but I think it is safer at this stage to find as a matter of fact, and as a matter of probability in this case that it had been discarded wrongly by a member of staff carrying out their duties at a time at which Mr. Tate was not in a position to identify it, or any other member of staff. It should not have been put there by a member of staff and having been put there it created a hazard. And the person responsible for this is the person who threw or discarded this particular piece of wrapping. And that fault finds its way therefore vicariously in the direction of the defendant, they (sic) must bear the responsibility for the hazard which was created by this discarded wrapper there being no issue but that this caused a hazard. And in those circumstances the plaintiff was in the same position as anybody else lawfully using this aisle, she was entitled to walk up

and down the aisle safely and not be exposed to a hazard or danger of a slipping hazard on that aisle." (Transcript 2nd May, 2017, pp 49-50)

Discussion

9. In assessing the judgment delivered in the High Court, this court cannot supplant the trial judge's findings of fact with its own views. See Hay v. O'Grady [1992] 1 I.R. 210.

10. At p. 217 McCarthy J. said:-

> "If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority."

11. What is clear from this statement of the law is the requirement that the findings of fact made by the trial judge are supported by credible evidence. It is necessary to analyse the findings of the trial judge on the basis of the evidence in this case. Two important pieces of evidence were not disputed at the trial. The first was the evidence of Mr. Tony Tate who said that he examined the area where the accident occurred approximately five minutes beforehand and there was nothing on the floor. The second was the evidence of Mr. Donal Terry who described the cleaning and inspection system operated by the appellant as "first class".

12. It was not in dispute that, if the respondent slipped on the wrapper which she described that this would have amounted to a hazard. But the evidence was also to the effect that the wrapper would have been quite conspicuous and this was not challenged. There was no evidence as to who caused the wrapper to be on the floor at the beverage section of the store. Mr. Terry gave evidence that apart from the general hygiene inspections and monitoring of the floor in the store during opening hours, cleaning generally is conducted outside business hours. The respondent gave evidence that supervisors would take the bags off the shelves and use them to empty the bins underneath the checkouts when they were cleaning up in the afternoon. It is not clear from the evidence whether this was part of the general cleaning carried out outside business hours referred to by Mr. Terry. Nor did the respondent or any other witness give evidence that such cleaning took place around the checkout area shortly or immediately before the accident. The respondent said she started her shift at around 2 p.m. and the accident occurred just after 5 p.m. She gave no evidence of cleaning taking place at the checkout area during that time. At the conclusion of the evidence there were a number of possibilities as to how the wrapper may have found itself on the floor. It could have been caused by a customer or an employee. Having regard to the evidence of Mr. Tate that he examined the floor approximately five minutes before the accident and that there was no hazard present, it seems just as likely that the wrapper could have come from a customer's trolley or basket as from another member of staff. In fact, the trial judge recognised that when he said that the source of the piece of paper was not entirely clear. In circumstances where one of the above causes was as likely as the other, the trial judge fell into error in holding that the probable cause of the presence of the wrapper on the ground was its disposal by a member of the appellant's staff.

13. But even if the wrapper had been dropped at the accident location by an employee it does not follow, *ipso facto*, that the appellant is liable. The appellant's common law duty is to take reasonable care for the safety of the respondent as an employee. Its statutory obligation under the provisions of the Safety, Health and Welfare At Work Act 2005 is to ensure, so far as is reasonably practicable, the safety, health and welfare at work of the respondent, (see s. 8(1)). Under the same legislation in s. 13, the respondent has a duty to comply with the relevant statutory provisions as appropriate and take reasonable care to protect her safety, health and welfare and that of others who might be affected by her acts or omissions at work.

14. The unchallenged evidence is that the wrapper described by the respondent was a conspicuous item which would have been seen on the floor. The only inference that can be drawn from this is that the respondent ought to have seen the wrapper. Similarly, this evidence suggests that Mr. Tate would have seen it if it was there when he inspected that area approximately five minutes before the accident. While the trial judge states: "it is possible that this may have been a case of Homer nodding as far as Mr. Tate is concerned in carrying out his inspection…", there is no evidence to support this conclusion. In fact, it is entirely against the weight of the evidence because Mr. Tate was not challenged on his evidence that there was nothing on the floor in that area when he inspected it.

15. In those circumstances the only reasonable inference that the trial judge could have come to was that a wrapper was dropped in the area after Mr. Tate's inspection and, therefore, very shortly before the accident.

16. Since it was accepted by the appellant that a wrapper on the floor would constitute a hazard this required the appellant to show that it had a good system in place designed to prevent such accidents. The un-contradicted evidence of Mr. Terry was that the appellant had a first class system of cleaning and inspection. In the course of his ex tempore judgment the trial judge fails to engage with this issue and there is no reference to the training which the respondent received or the system of cleaning and inspection put in place by the appellant. In my view, it was necessary for the trial judge to engage with this issue before he could determine whether or not there was a breach of duty either at common law or by statute on the part of the appellant. In *Bradley v. C.I.E.* [1976] I.R. 217 at 223, Henchy J. said:-

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

17. The statutory duty imposed on the appellant is to take such steps as are reasonably practicable to ensure the safety, health and welfare of its employees. A proper analysis of the evidence establishes that both these duties were met. In *Martin v. Dunnes Stores (Dundalk)* [2016] IECA 85, Irvine J. reiterated the principle that the duty of an employer to its employee is not an unlimited one and the employer is not to be taken as an insurer of the welfare of its employees.

18. The appellant had trained the respondent and other employees, emphasising the need for good housekeeping and that employees should clean as they go, which would involve picking up any items from the floor which might represent a hazard. In order to minimise the risk of injury to customers and staff the appellant had put in place a perfectly adequate system of cleaning and inspection which operated at the time of the accident.

Conclusions

19. While the evidence established that the wrapper which caused the respondent to slip could have come to be on the shop floor as a result of the actions of employees or shoppers, there was no evidence to support the trial judge's finding that, as a matter of probability, it was caused to be there by a member of staff.

20. The appellant does not have an absolute duty to ensure the safety of the respondent. The evidence of Mr. Tate that approximately five minutes prior to the accident he had inspected the area concerned and that there was no paper wrapper or other hazard on the floor was not challenged. The trial judge's conclusion that Mr. Tate may have missed this in carrying out his inspection is not supported by the evidence and is against the weight of the evidence.

21. The cleaning and inspection regime employed by the appellant was stated to be "first class" and this was not challenged. The only proper inference that could be drawn from those facts was that the appellant had fulfilled its common law and statutory duty to the respondent as it had taken all such steps as were reasonably practicable to ensure her safety.

22. The trial judge failed to engage with the issue as to whether or not the appellant had fulfilled its common law and statutory duty to the respondent and in so doing failed to apply the proper legal test in assessing liability.

23. I would therefore allow the appeal. As the trial judge should have dismissed the claim on the basis of the evidence and the correct application of the law, I would not direct a re-trial.

24. I would add one further comment. Although liability was very much in issue, the trial judge directed a payment out as a condition for granting a stay in the event of an appeal. While the amount was reduced by this court when the matter came into the list, that decision was made without the benefit of a full hearing of the appeal and without all the issues being canvassed before the court. I would repeat the views I have already expressed on another occasion that where liability is an issue, the trial judge should not direct the payment out of any sum as a condition for granting a stay in the absence of special circumstances. Having reviewed the transcript of the trial in the High Court, no special circumstances were indicated to the trial judge. The court will hear counsel as to what is to be done in respect of the monies paid out to the respondent.