

## THE HIGH COURT

[Record No. 2012/9571 P]

BETWEEN

KEVIN POWNEY

PLAINTIFF

AND

BOVALE DEVELOPMENTS, BARINA CONSTRUCTION LTD., MAYESTON HALL MANAGEMENT CO. LTD. AND FISHER PROPERTY MANAGEMENT LTD.

DEFENDANTS

**JUDGMENT of Ms. Justice Creedon delivered on the 7th day of July, 2017****Background**

1. The plaintiff was born on 31st December, 1986 and lives with his partner and children in Lusk, Co. Dublin. He is currently unemployed.
2. The plaintiff brings these proceedings in negligence against the named defendants arising from an accident alleged to have occurred on 18th January, 2011 at Mayeston Square Apartment Complex, St. Margaret's Road, Finglas, Dublin 11.
3. At the time of the accident, the plaintiff was a visitor at the apartment complex within the meaning of the Occupiers' Liability Act 1995.

**The Plaintiff's Case**

4. The plaintiff gave evidence that on the date of the accident he was visiting his friend Lee Clinton at the complex. He stated that he visited the complex frequently, at least twice weekly over the preceding year and a half.
5. He stated that he was carrying an empty fish tank through a common entrance doorway at the apartment complex accompanied by his friend Lee Clinton and partner Nadia Bell. He further stated that he was aware that the closing mechanism on the door was not functioning correctly and that Lee Clinton went ahead of him and put his foot against the door to keep it open as the plaintiff passed through. He stated that Mr. Clinton received a call on his mobile phone and took his foot from the door. The plaintiff stated that this caused the door to slam back against the fish tank causing the tank to break resulting in the injuries to the plaintiff.
6. Photographs were provided to the Court of the door taken by the plaintiff on the 24th May, 2011 showing the broken closing mechanism
7. Mr. Clinton in his evidence confirmed the circumstances of the accident as outlined by the plaintiff. He also gave evidence that the closing mechanism had been broken for a prolonged period of time prior to the accident and particularly, remembered it being an issue for him over Christmas. Ms. Bell was some distance behind and was not able to confirm the details of the circumstances of the accident. She did give evidence of attending the Emergency Department of Beaumont Hospital with the plaintiff after the accident.
8. Agreed Medical Reports of Mr. Brian Kneafsey were provided to the Court.
9. A joint inspection by Consulting Engineers was carried out on 17th December, 2015. At that time the closing mechanism on the door had been repaired. A report on behalf of the plaintiff was provided by Consulting Engineer Pat Culleton who also gave evidence.

**The Defendant's Case**

10. It was contended by the defence that the accident did not happen in the manner described. This contention centred on the medical records from the Emergency Department of Beaumont Hospital and the evidence of Dr. Kelada.
11. Dr. Kelada confirmed the contents of his notes and in particular the description of the circumstances of the accident recorded by him as being as a result of an argument at home. He had no specific memory of the plaintiff or the case. In his evidence in relation to the nature and location of the injury, he stated that the injury was caused by glass but could not say whether this was more likely to have been caused in the manner outlined by the plaintiff or in any other manner.
12. Arising from the joint inspection referred to earlier, a report on behalf of the defendant was provided by Sean Walsh Consulting Engineer who gave evidence.
13. Joanne Fleming Director of Fisher Property Management gave evidence as to the system operated by the company for inspection, repair and maintenance of the properties they manage including the location of the incident the subject matter of these proceedings. It was her evidence that a janitor would be present at the property for a couple of hours each day and that over the course of a week/10 days a full inspection of all the blocks in that development would take place.
14. She stated that complaints could be made to them through this janitor. She further stated that, at the time of the accident, no complaints had been received by the company in respect of the closing mechanism of the door. She stated that complaints had been received in respect of the lock on the door and that issue had been remedied.
15. This evidence was confirmed by Richard O'Brien Maintenance Supervisor with Fisher Property Management.

**Evidence arising under cross examination**

16. The plaintiff, Mr. Clinton and Ms. Bell all strenuously denied that the injuries had been sustained in any manner other than that set out by them in their evidence.
17. While Fisher Property Management asserted that the first notification they had of the matter was a letter received from the Personal Injuries Assessment Board (PIAB) in April 2012, it emerged under cross examination that the plaintiff's solicitors had written to Fisher Property Management as early as 18th March, 2011. While this correspondence had initially been sent to the wrong address, an acknowledgement of receipt of the correspondence was sent by the company to the plaintiff's solicitors in March, 2011.

18. Fisher Property Management was not able to confirm the date of the repair of the closing mechanism of the door in question. They were unable to counter the plaintiff's evidence that the closing mechanism had been faulty for up to six weeks before the incident and had remained unrepaired on 24th May, 2011.

### **Credibility & Causation**

19. The Court takes a very serious view of false or misleading claims being put before the courts and has carefully considered the contention by the defendants that the accident occurred in circumstances other than those set out by the plaintiff. The plaintiff gave evidence of the manner in which he sustained his injuries at the Mayeston Square Apartment complex on the 18th January 2011 and was supported in this evidence by Mr. Clinton and Ms. Bell. The plaintiff initiated correspondence in respect of the matter as early as the 18th March 2011. In that correspondence he sets out the circumstances as set out by him in court. These are also the circumstances outlined at the joint engineering inspection. The plaintiff, Mr. Clinton and Ms. Bell all strenuously denied that the injuries had been sustained in any manner other than that set out by them in their evidence.

20. Dr. Kelada gave evidence to confirm the circumstances of the injury as that recorded by him in his notes. He had no specific memory of the plaintiff or the case and with regard to the nature of the injury, he confirmed that it was caused by glass but could not counter the evidence that it was caused in the manner alleged by the plaintiff.

21. On balance, the Court finds that the accident occurred as set out by the plaintiff.

22. Fisher Property Management Limited being responsible for the repair and maintenance of the door at the centre of these proceedings owe a duty of care to the plaintiff within the meaning of the Civil Liability Act 1961.

23. The evidence establishes that, on the balance of probabilities, the closing mechanism on the door was not functioning correctly on the date of the incident.

24. The evidence further establishes that on the balance of probabilities the mechanism was not functioning correctly for some time before the incident, and at least up to the 24th May 2011, up to two months after Fisher Property Management limited was made aware of the matter.

25. It was reasonably foreseeable and a probable consequence that this defect would cause damage or injury.

26. The plaintiff was frank in his admission that he was aware that the closing mechanism in the door was broken. Despite this knowledge he chose to embark on a dangerous manoeuvre by carrying a glass fish tank through the faulty door resulting in his injuries. Liability for the incident should be apportioned between the plaintiff and the defendant.

### **Injuries**

27. The injuries are as set out in the agreed medical reports. In summary, the plaintiff sustained a deep, complex laceration on the dorsal aspect of his right hand with division of several extensor tendons to include the two main tendons into the thumb and one of the smaller tendons into the index finger. He was admitted that day for surgery that was carried out the next day. The extensor tendon to the thumb was repaired and the plaintiff was placed in a plaster cast. He came back to hospital two weeks later when it became apparent that the tendon repair had ruptured. This required further surgery to re-repair. Further repair proved impossible and the tendon was reconstructed using a tendon graft. He was once again placed in a plaster cast. The most recent report dated the 10th January 2017 confirms that the plaintiff has some sensation of discomfort and tightening after long use of his hand as well as a slightly reduced range of motion of his thumb but this is not causing him major functional problems. He has now been assessed as essentially having normal functioning. He does have obvious scars on the back of his hand. The scar measures approximately 13 cm in length and is permanent. Now, some six years after the accident, no change in this position is expected

### **Conclusion**

28. Given the plaintiff's knowledge of the defect and the level of control that he had when embarking on the manoeuvre, I find that the defendant was 20% responsible for this accident and the plaintiff was guilty of 80% contributory negligence.

29. In assessing damages in this case, I have had regard to the helpful guidelines set down by the Court of Appeal in *Payne v. Nugent* [2015] IECA 268, *Nolan v. Wirenski* [2016] IECA 56 and *Shannon v. O'Sullivan* [2016] IECA 93. In the course of her judgment in the latter case, Irvine J. stated that it has been long accepted that awards of damages must be:-

- “(i) fair to the plaintiff and the defendant;
- (ii) proportionate to social conditions, bearing in mind the common good; and
- (iii) proportionate within the scheme of awards made for other personal injuries.”

30. Taking all of these matters into account, I measure damages in the sum of €65,000, for pain and suffering to date with €10,000 for future pain and suffering and special damages measured at €3020.82. On apportionment this gives an award to the plaintiff of €15,604.16