

BETWEEN**SAMANTHA GRIFFIN****PLAINTIFF****AND****BELLWAY LIMITED TRADING AS THE LAURELS****DEFENDANT****JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 28th day of July, 2017.**

1. This is an action brought by the Plaintiff for damages for personal injuries and loss arising as a result of an accident which occurred in the early hours of the 8th December, 2013, when the Plaintiff fell while dancing with other patrons in the Defendant's licensed premises known as the 'The Laurels', Main Street, Clondalkin, County Dublin. The Defence delivered puts the Plaintiff on full proof of her claim and incorporates a plea of contributory negligence.

2. The accident was recorded on CCTV. Footage from the camera for a half hour period, commencing at 2.30 am, was retained and admitted into evidence; the relevant portions have been viewed by the parties and by the Court. The time recorded for the accident is 2.44 am when the Plaintiff is seen to fall heavily onto the floor in a backwards motion. A pillar positioned between the camera and the Plaintiff obscures a clear view of her at the moment when she started to fall; consequently, the mechanism for the fall, whether by slipping, tripping, loosing balance or otherwise is not visualised.

3. First and foremost, amongst the controversies between the parties is the cause of the Plaintiff's fall. Her case is that she slipped and fell due to the presence of liquid on the floor, a claim hotly contested by the Defendant who contends that the floor was dry and that the fall was attributable to other factors which provide a more likely explanation for what happened.

4. The Plaintiff was born on the 5th October, 1970. It was not in dispute that she sustained a serious injury to her left ankle which involved a fracture of the distal shaft of the tibia with minimal displacement and a severely comminuted fracture of the distal shaft of the fibula; the fractures required open reduction and internal fixation surgery with bone grafting. This was performed on the 9th December, 2013, by Mr Hamid Khan, Consultant Trauma and Orthopaedic Surgeon.

5. Post operatively the fractures were managed in a full cast non-weight bearing until the 31st January, 2014, when she was reviewed. At review the full cast was removed, an air cast boot was applied and toe touch weight bearing was permitted with gradual progression to partial weight bearing over a period of approximately six weeks until April 2014 when full weight bearing was tolerated.

6. The Plaintiff is a social worker by occupation currently employed by Tusla but at the time of the accident she was employed by the Peter McVerry Trust which she joined in 2012, an employment she particularly enjoyed given a special interest in addiction issues and working with the homeless. A significant part of her duties involved the inspection of Trust properties, many of which were multi story old buildings with corresponding flights of stairs.

7. The Plaintiff lives in a bungalow. Due to the seriousness of her injuries she had a prolonged period of rehabilitation. On return to work she was accommodated by assignment to administrative duties which she managed without difficulty until she attempted to recommence full duties. She found that she was unable to cope with using flights of stairs as doing so aggravated the underlying condition in her injured ankle, a continuing problem which ultimately compelled her to resign her position with the Trust. Thereafter she sought out and ultimately secured employment with Tusla which accommodates the functional limitations imposed by her injuries.

8. Prior to the accident the Plaintiff enjoyed a very active sporting life which included marathons and running for charity. Although she has returned to the gym for rehabilitation purposes and her desire to remain physically fit, she has been unable to return to running and is limited in the type of exercises which she can carry out in the gym. The Plaintiff is very conscious of the post operative scarring and persisting swelling in her left ankle which is stiff in the morning when requires to be mobilised. She walks for exercise but this activity, which she loves, provokes pain in the injured ankle.

9. Due to ongoing sequelae, the Plaintiff was referred for further management of the injuries to Mr. Brendan J. O'Daly, Consultant Trauma and Orthopaedic Surgeon, who carried out medical examinations on her and prepared reports for these proceedings in which he sets out the history of the injury, the medical diagnosis made, the treatment offered and prognosis for the future; he also gave evidence at the trial.

10. The Plaintiff's symptoms have several causes; metalwork which was used to fix the fractures at the time of the original operation is the source of anteromedial tibial pain, the other is peroneal tendonitis which was secondary to the comminuted fracture of the distal fibula. Mr. O'Daly anticipated that removal of the plate would result in a partial amelioration of the anteromedial symptoms; some benefit might also be derived from removal of her fibular plate. An osteotomy may improve the peroneal symptoms.

11. Notwithstanding these treatments, if carried out, he expected that the Plaintiff would continue to experience pain in the region of her peroneal tendons and that she is at a long-term risk of developing post traumatic osteoarthritis because the fibula was badly comminuted and was abutting the syndesmosis joint.

12. Using the Webber classification and having regard to the severity and the location of the comminution, Mr. O'Daly categorised the injury as a Webber B fracture. Although he would attempt to achieve correct anatomical positioning of the fibula during remedial surgery it did not necessarily follow that the normal axial rotation of the joint would be obtained.

Conclusion in relation to the injuries

13. I accept the evidence of Mr. O'Daly that while some reduction of symptoms is anticipated following the remedial surgery which he has offered, the Plaintiff is unlikely to experience a full resolution of her symptoms and in the long term she will remain at risk of developing post traumatic osteoarthritis in the injured ankle from which, in my view, it follows that the injuries may properly be categorised as serious and permanent.

14. There is one final observation which I wish to make which may be of some significance in relation to the controversy concerning the cause of the fall. In evidence Mr. O'Daly said that the injuries sustained by the Plaintiff were consistent and were generally associated with a high energy impact.

Liability

15. The entitlement of the Plaintiff to recover damages for her injuries and loss is dependant on the outcome of the issues on liability. At the outset, it may safely be stated on any view of the evidence that the Defendant permitted patrons to bring glasses of drink onto the floor of the premises where patrons were dancing. That this practice occurred both before, at and after the time of the accident is consistent with the admitted absence of a policy to prevent it.

16. In these circumstances, there was a foreseeable risk that drink would be spilt by patrons crossing or, as the Plaintiff was, dancing on the floor with drink in hand, a risk which was heightened where patrons were permitted to dance in proximity to one another. This practice was clearly evident to the Defendant's staff, charged as they were, with the responsibility to carry out inspections, to keep an orderly house and to maintain the surface of the floor in such a way that it was reasonably safe for use by those lawfully on the premises, employees and patrons alike.

17. The Court is satisfied on the evidence that there was provision made for dealing with and cleaning up any spillages that might have occurred in this manner or otherwise; the Defendant's bar and supervisory staff were under a duty to keep a lookout for and to deal with anything on the floor as might likely cause a person to fall whether by tripping or slipping. That there was supervision and inspection of the relevant portion of the premises in the period immediately before and after the accident is evident from the retained video footage.

18. The question of whether the Defendant's system of supervision, inspection and cleaning was sufficient to satisfy the common law and statutory duty to take reasonable care to ensure that the premises was reasonably safe for use by the Plaintiff arises and only falls to be considered in circumstances where the accident giving rise to the injuries and loss arose as a result of a danger or hazard, created or permitted by the Defendant its servants or agents.

19. On the pleadings and in the evidence given by and on her behalf, the hazard or danger identified was the presence of liquid on the floor which rendered it unsafe and on which the Plaintiff slipped, a state of affairs caused or created by the Defendant in permitting drink to be brought on to and/or to be consumed on a floor the surface of which provided inadequate slip resistance.

The Plaintiff's account

20. The Plaintiff was on a night out; she went to the Laurels, arriving at 10 pm, where she met a friend. They were familiar with the premises and knew that there was music upstairs on a Saturday night. By the time of the accident, which she had mistakenly thought had happened around midnight until she saw the CCTV footage, the Plaintiff had consumed 4 to 5 alcoholic drinks, one of which may have been a spirit, the rest were pints.

21. The Plaintiff was out dancing on the floor with other patrons at the time of the accident. Momentarily before it occurred a man, who was dancing close to but not with her, passed what she described as an inappropriate remark, a term by which I understood her to mean a remark which she found offensive. No sooner than this happened she slipped and fell backwards onto the floor, she did not see what had caused her to slip, however, despite being in severe pain and shock she was aware that her skirt and underwear was wet. Apart from several members of staff who immediately came to her assistance, the Plaintiff was also attended to by her friend with whom she had spent the evening. Whether or not her friend saw anything on the floor immediately after the accident is unknown; she did not witness the accident and did not give evidence.

The Defendant's account.

22. The Defendants General Manager, Mr. Long, the Assistant Manager, Mr. O'Sullivan and the Area Supervisor, Mr. McCarthy, all gave evidence on behalf of the Defendant. They attended the Plaintiff immediately after the accident. She did not make any complaint to them that she had slipped nor did she mention that there was anything on the floor or that her clothes were wet. All they knew was that she had fallen and was complaining of being in severe pain. The floor where the Plaintiff had fallen was inspected but nothing was seen or found.

23. Mr McCarthy passed over the floor close to where the Plaintiff was lying no more than a couple of minutes before the accident; he had noticed nothing untoward on the floor which might cause someone to slip or to trip; when the area of the floor where the fall had taken place was inspected immediately after the accident nothing, particularly nothing deleterious, which might explain the why accident had happened was found; the floor was 'bone dry', moreover, no remedial action to deal with anything on the floor was required and none was taken.

24. Mr McCarthy's passage over the floor in very close proximity to the place where the Plaintiff fell only minutes before the accident and the absence of any remedial action to deal with a spillage either before or after the accident is corroborated by the CCTV footage.

Hospital Notes and Records

25. The Plaintiff was removed to hospital by ambulance. References in the medical notes and records relevant to the cause of the fall were canvassed during the cross examination of the Plaintiff. After triage, the Plaintiff was medically examined by the SHO on call; Dr. Tierney, who gave evidence and proved her medical notes. With regard to the cause of the injuries she made a note which reads "*fell over in high heels in pub. Appeared intoxicated C2H5OH on arrival to ED*" [Emergency Department]. An entry in the nursing notes made at 4.30 am which had been given to Dr Tierney before or at the time of her examination reads "*admits to large C2H5OH intake tonight.*"

26. The footwear worn by the Plaintiff at the time of the fall was captured on photographs taken in the premises within a short time of the accident but before the Plaintiff was removed to hospital. She confirmed that these were hers; they are evidently high block heel shoes. References in the hospital notes to high heels as well as to alcohol intake and effect are consistent with the shoes worn by the Plaintiff and her admitted alcohol consumption on the night. Significantly, no reference to a slip or to slipping on a wet floor as the cause of the injuries is anywhere recorded in the hospital notes.

First reference to slipping

27. Prior to retaining the solicitors on record for the Plaintiff in these proceedings, the Plaintiff had previously consulted and instructed two other firms of solicitors to act on her behalf. Both firms wrote letters intimating a claim; the first dated 25th February and the second dated the 3rd November, 2014, followed by a Form A application to the Injuries Board signed by the Plaintiff and dated 11th February 2015. No reference to a slip or to slipping or to the presence of wetness or liquid causing the Plaintiff to slip and fall is made

in the correspondence or in the completed Form 'A'; Reference to a slip or to slipping on liquid or wetness on the floor as being the cause of the accident is first identified in these proceedings.

The Floor and Engineering evidence.

28. Both parties retained engineers, Mr. Kirwan Brown on behalf of the Plaintiff and Mr. Vincent O'Hara on behalf of the Defendant. A joint engineering inspection of the floor was arranged with the Defendant and took place at 4.30 pm on Monday 10th October, 2016. Unknown to the engineers the floor involved in the accident had been removed and replaced with a new floor as part of refurbishment, renovation and extension works carried out in 2015.

29. This information only emerged as a result of a careful forensic cross examination undertaken by senior counsel for the Plaintiff, Mr Condon S.C. without which it appears that the engineers called to give expert testimony to assist the Court and the Court itself would have been left none the wiser and allowed to proceed to judgment on evidence which although given bona fide was based on wholly false premise thus creating the potential for a serious injustice to occur.

30. Indeed, as this revelation only emerged during the case for the defence it follows that the evidence given by Mr Kirwan Browne was founded in the honest belief that the floor which he inspected and on which the slip resistance tests had been carried out was the same floor on which the accident had occurred and in respect of which he had prepared his report, expressed his opinion and given evidence concerning its safety and suitability for use by the Plaintiff. And so too Mr O'Hara until he became aware of the truth during the cross examination of a defence witness. In these circumstances, it follows that the slip resistance tests carried out as they were on the replacement floor and the opinions of the engineers in relation to those and to their inspection are of no direct assistance to the Court in resolving the matters in issue.

31. As if this state of affairs was not bad enough, no satisfactory explanation for the failure of the Defendant to provide the correct information to the engineers, the solicitors or counsel for the parties was proffered to the Court, which is left to complete the task without the benefit of direct engineering evidence relevant to the matter under consideration, evidence which had clearly been considered necessary and appropriate by the parties for that purpose.

The floor on which the Plaintiff fell.

32. Apart from the CCTV footage, as already mentioned earlier, photographs were taken of the floor where and on which the Plaintiff fell shortly after the accident and before the Plaintiff was removed to hospital. These photographs are said to show that the floor was bone dry at the time. However, on my view of the photographs, having carefully examined them before as well as after enlargement, the definition is of insufficient quality to warrant such a conclusion though is sufficient to establish that the floor was extensively worn.

33. Consistent with the appearance of being heavily trafficked, it transpired in the course of the Defence evidence that the last time the floor had been sanded and varnished prior to the accident was in 2004. I accept the evidence of Mr O'Hara that the discolouration of the floor surface which predominates in the photographs is consistent with and attributable to the varnished coating having completely or almost completely worn away through use thus causing the wood to appear darker or dirty looking when compared to the lighter honey colour seen where some varnish finish remains.

34. Parts of the replacement floor laid in 2015 were already showing discoloration through wear at the time of the inspection in October 2016. It is hardly a surprise therefore, that the varnish coat applied in 2004 to what was a heavily trafficked floor would have worn to the extent shown in the photographs taken after the accident which raises the question; when wet was the floor reasonably safe for use by the Plaintiff?

35. In regard to this question the opinions of the engineers given in relation to the slip resistance of the replacement floor are not wholly redundant or irrelevant. They were in broad agreement that that floor had a good slip resistance when dry but fell into a risk category variously described as moderate, medium or cautionary when wet. However, given that an allowance had to be made for the wear that would have occurred on the varnish between the date of the accident and the date of the inspection in 2016, Mr Kirwan Browne's opinion was that at the time of the accident the floor would likely have fallen into the high-risk category since the slip resistance would have been less because the varnish on the wood would have been less worn at the time.

36. The significance of this evidence in terms of the slip resistance of a varnished wooden floor when wet is that it is the surface provided by the varnish coat not that of the underlying wood on which the liquid sits which is directly relevant; absent the varnish or significant areas of varnish it follows as a matter of probability that the slip resistance offered by the areas of the exposed wooden surface will be greater and thus safer.

37. Referring to the photographs, Mr O'Hara explained that the light brown colour seen on the floor indicates the presence of a varnish coat of sufficient depth to protect the wood from contamination; where the staining and darkened or dirty appearance of the wood is seen the varnish coat has been lost, usually by wear. It is clear from the photographs that the darker appearance predominates against the light brown colour of the wood over a significant portion of the floor surface where the Plaintiff fell, however, in the absence of direct expert evidence touching the slip resistance of the incident floor it would be wrong to conclude in these circumstances that it was safe for use when wet.

Cause of the Plaintiff's fall; Was the Floor Wet

38. That there was an interaction between a male patron and the Plaintiff a moment before she fell is corroborated by the CCTV footage. As observed earlier, the Plaintiff's evidence was that the man passed an inappropriate remark to which she took exception. The Plaintiff is seen to move out of camera shot to the far side of the pillar, most likely in response to the remark but as she does so her right arm is seen to emerge into shot with her hand extended moving in the direction of the man until it appears that her hand makes contact with the upper left side of his chest as a result of which he is seen to move backwards, one or two steps, in a manner which seems more consistent with a push rather than an act of avoidance. The Plaintiff's arm is then seen to rapidly withdraw out of view; followed immediately by her emergence into shot from the left side of the pillar moving in a backwards but falling motion until she disappears out of shot onto the floor.

39. It is apparent from this footage that these actions represent a continuous inter connected action reaction sequence, however, the footage is not conclusive evidence that there was no liquid or wetness on floor where the Plaintiff fell. The Plaintiff's evidence was that immediately after the fall she became aware that her skirt and underwear were wet.

Cause of Wet Clothing

40. In answer to a question as to why she believed that she had slipped on liquid when she hadn't seen anything on the floor, the Plaintiff's response was that her skirt and underwear were wet. I accept her evidence and have little doubt that the Plaintiff believes

she slipped on a wet floor a belief fortified by the wetness of her clothing. Accordingly, it is necessary to examine the likely source of the wetness and whether that had any part to play in the fall.

41. Shortly before the accident the Plaintiff is seen dancing on the floor holding a glass containing drink in her left hand; she fairly accepted that she would not have been holding an empty glass. Shortly after the accident Mr. O'Sullivan is seen picking up a similar glass from the area of the floor where the Plaintiff ended up lying; the glass is empty. Having viewed the video footage on a number of occasions and having regard to the evidence of Mr O'Sullivan, it is highly likely that this was one and the same glass which the Plaintiff was holding when she fell.

42. Having regard to the clothing which the Plaintiff was wearing on the evening, it is evident from the way she fell and where she ended up lying that her skirt could not have been in contact with the floor at the same place where her feet would have been at the commencement of the fall; there is no evidence that liquid or an area of wetness was found on the floor where she was dancing. On my view of the evidence the most probable explanation for the source and reason for the wetness of her clothes is the drink from her own glass which most likely spilled as she put her arms back to save herself from the fall, an entirely natural and spontaneous reaction.

Conclusion

43. For the reasons already given, the slip resistance of the floor on which the Plaintiff fell is unknown but by virtue of the absence of a varnish coat to the extent evident in the photographs it is likely to have been better than the floor inspected by the engineers. As already stated the photographs and inferences that may be drawn from them are not conclusive on the question of whether the floor offered an adequate slip resistance when wet, however, other evidence was led by the Defendant which supports such conclusion.

44. Firstly, in the decade before the accident during which the defence witnesses had worked in the premises it was accepted that spillages had occurred on occasion, however no slip and fall accidents had occurred or were any reported. Secondly, and perhaps most persuasively, the CCTV footage shows the Plaintiff and other patrons crossing and/or dancing, sometimes quite vigorously, on the floor where she fell without experiencing any apparent difficulty or mishap during the captured time before the accident. Had there been drink on the floor and the slip resistance of the surface was less than adequate it is unlikely that this would not have manifested itself.

45. Furthermore, although glasses of drink are seen to be brought onto the floor by patrons, including the Plaintiff, a spillage in the vicinity of the accident locus is not captured on the footage which corroborates Mr. McCarthy's evidence that he was keeping the area under surveillance and had walked over the floor keeping an eye out as he went, something he did within 2 minutes of the accident. On his evidence, there was nothing to be seen on the floor at that time or on the floor where the Plaintiff fell immediately after the accident. I accept that evidence.

Decision

46. The law casts on the Plaintiff the onus of proof to establish on the balance of probability the existence of the hazard or danger rendering the floor unsafe for use absent which other matters concerning liability do not fall for consideration. The Plaintiff's rearward fall occurs almost instantaneously after the evident interaction between herself and the patron who made an inappropriate comment to her. She fairly admits to having consumed a considerable quantity of alcohol. Having regard to this and the content of the proved medical notes and CCTV footage, I am satisfied and find that the quantity consumed had significant inebriating effect on her.

47. I accept the evidence of Mr. Kirwan Browne that if what is seen in the video is a push and not just a stepping back out of the way, that action would have resulted in resistance being experienced by the Plaintiff. On my view of the evidence the reaction of the man and the almost instantaneous reaction of the Plaintiff is more consistent with a push than with stepping back to avoid contact and that this inter reaction combined with the extent of inebriation consistent with the admitted level of consumption corroborated by the medical notes best explains and is the probable cause of the accident rather than slipping on a wet floor.

48. Whilst I have sympathy for the Plaintiff having regard to the consequences of injuries sustained, for the reasons given, on the findings made and the conclusions reached, the Court is not satisfied that the onus of proof has been discharged by the Plaintiff to establish that there was liquid or wetness on the floor which rendered it unsafe causing her to slip and fall, accordingly, the law requires that the proceedings be dismissed. The Court will so order.

49. I will discuss with counsel the consequential orders to be made having regard to the failure of the Defendant to inform the engineers that the floor had been completely replaced the year before the joint engineering inspection was arranged to take place, a failure for which no satisfactory explanation has been proffered.