

THE HIGH COURT

[2009 No. 4474 P.]

BETWEEN

MARK PONISI

PLAINTIFF

AND

MCD PRODUCTIONS LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Irvine delivered on the 16th day of October 2014

1. The plaintiff, who is a software engineer and resides in Dublin, was born on 24th December, 1978. In these proceedings, he claims damages in respect of personal injuries which he sustained when attending what is commonly known as the Oxygen Musical Festival at Punchestown, Co. Kildare in July 2007. He maintains that he sustained his injuries due to the negligence and breach of duty of the defendant, the company which organised and managed the event.

2. It is common case that the plaintiff broke his ankle at approximately 7pm on Saturday, 7th July, when standing in arena 1, the area in which the main stage for the festival was located.

Summary of the Plaintiff's Evidence

3. The plaintiff travelled by taxi to Punchestown with his friend, Mr. Stephen Keane. They arrived at approximately 3pm on Saturday, the second day of the festival and immediately set up a gazebo in car park 5, where they had planned to meet up with some other friends. By about 6pm, their friends had arrived and they left the car park to make their way into the venue using an entrance to the north of the site depicted on the map which was produced to the court for the purposes of showing the festival compound and surrounding lands. The plaintiff was wearing reinforced industrial Wellington boots, as the weather had been unseasonably wet in the previous weeks. Mr. Keane was wearing runners.

4. The group first went to get a burger at one of the fast food outlets towards the south eastern area of the site after which they each picked up a pint at another location. Having procured their drinks, the plaintiff and Mr. Keane split from their friends and made their way across the compound to arena 1 which was on the westerly side of the site. There, they took up a position to the left of the stage as they were looking at it and approximately 100-150m back from it. The plaintiff's evidence in this regard was somewhat different to that of Mr Culliton, Consulting Engineer who told the court that the plaintiff had identified an area which was about 65m from the front of the stage in the course of an inspection carried out at the 2011 Oxygen Festival.

5. The plaintiff stated that it was not particularly crowded where they were located and people were moving around them in all directions. They were not up at the front as they were not particular fans of the band the Kings of Leon, who were on stage at the time. It was squelchy underfoot and there wasn't much grass to be seen. They were standing in what he described as a muddy or boggy area. The plaintiff stated that they had listened to no more than two songs when he was suddenly and without any warning knocked from behind with such force that he fell forward into the mud. Thereafter, he believes he was kicked and trampled upon by whoever had knocked him down. He felt a searing pain in his left ankle and as he tried to get up, his right foot came free readily enough. However, his left boot remained stuck in the mud.

6. As a result of this incident, the plaintiff, supported by Mr. Keane, went to seek medical help. Ultimately, after receiving some relatively superficial advice regarding the state of his ankle, with Mr. Keane's assistance he hobbled a significant distance in great pain to one of the car parks where he was later collected by his father.

7. Mr. Keane's account of the moments surrounding the incident was much vaguer than that of the plaintiff. He was not sure how the accident had happened but he remembered them both falling over and ending up on the ground. He did not know if he knocked into the plaintiff or if the plaintiff had knocked into him or whether they were knocked down by third parties. However, he told the court that the conditions underfoot were shocking and that the mud came almost to the top of the side of his runners.

8. In the course of cross examination, these witnesses both agreed that they had been able to walk around the venue carrying their drinks without spilling them, although Mr. Keane advised that he had to keep lifting his feet up as he walked due to the depth of the mud prevailing on the site. Both witnesses accepted that anyone looking at the two of them in the moments before the injury was sustained would not have anticipated that any untoward event might occur such as a crowd surge. People were coming and going freely in all directions around them and the area was not very congested.

9. Mr. Culleton, Consulting Engineer, was of the opinion that, having regard to the inclement weather in the weeks running up to this event, the management company had taken insufficient steps to protect the safety of the 80,000 or so fans who were attending the event at a cost of €200 a head. A mesh floor, such as that which had been provided at the Leonard Cohen concert which had taken place at Kilmainham in Dublin should have been laid over the festival site. Further, he was of the opinion that having regard to the underfoot conditions, the defendant had taken insufficient steps to identify particularly hazardous areas and improve the quality of the ground conditions. He told the court that vulnerable areas should have been made safe and that this could have been achieved by rolling in crushed stone or applying other biodegradable products to areas which had broken down.

10. Under cross examination, Mr. Culleton stated that the plaintiff had advised him that he had been knocked over by a crowd surging forward. He agreed with Mr. Fox, S.C., on behalf of the defendant, that having regard to where the plaintiff had been standing prior to his fall, he would not have expected there to have been any crowd barriers present in that area. He also agreed that on the plaintiff's description of what had happened in the minutes preceding his injury, any security personnel looking on would not have had any concerns for his safety.

The Defendant's Evidence

11. Mr. Michael Slattery, the principal of Slattery and Associates, Fire, Safety and Security Experts, told the court that his firm had been involved in planning the annual Oxygen Festival since 2004. Planning customarily started six months in advance and this included consideration and attention being paid to how the ground conditions would be managed during the festival. The event management plan which had been used to obtain the license for the 2007 event advised that ground covering would be used immediately in front of the main stage area in arena 1 and also in any other areas where the ground surface would be vulnerable to damage due to heavy pedestrian traffic or adverse weather conditions.

12. In the weeks prior to the festival, because of bad weather conditions, several inspections of the site had taken place in conjunction with the planning officer and chief fire officer. They had daily meetings in the preceding ten days. Mr. Slattery told the court that vulnerable areas were identified and plans put in place to deal with them. The location where the plaintiff was injured was not such an area and in general, the drainage on the site was good. Straw and bark mulch was on hand to put down in any areas which were or might become hazardous. As for arena 1, he had walked this area with three members of his safety team in the hours before it was opened to the public for the first time at 12 noon on the Saturday. He considered that the arena was safe for the events that were due to take place that afternoon and evening. Thereafter, he remained in constant communication by radio with the safety team staff to deal with any evolving problems. He was not made aware of any particular difficulties with the surface of the arena prior to the plaintiff's fall.

13. Under cross examination, Mr. Slattery agreed that at certain venues, such as the Aviva Stadium and Croke Park, the grass is always covered for concerts. However, he emphasised that while this gave patrons a better and safer surface to walk on, the principal reason for covering the grass was to protect the surface of the sports pitch concerned. He said that Oxygen, like Glastonbury and so many other festivals, was a green field event and people knew that they would have to deal with consequences of the prevailing weather conditions. Accordingly, most festival goers arrived prepared for coping with such complications.

14. Mr. Slattery told the court that the defendant had always provided plastic matting for the first 40m of ground spanning out in front of the main stage. That was the area which would be subjected to the greatest levels of pedestrian traffic and movement. It was also an area where crowd control barriers were required to ensure the safety of fans who would congregate there in large numbers. He did not accept the evidence tendered on behalf of the plaintiff that people were up to their ankles in mud in arena 1 notwithstanding the plaintiff's assertion that he was three inches deep in mud when he was knocked over.

15. Mr. Tony Killeen, an Independent Contractor who specialises in event management and who was the deputy leader of the event control team for Oxygen 2007, told the court that it was one of his responsibilities to look after arenas 1 and 2 on the Saturday of the plaintiff's injury. He had been involved with Mr. Slattery and the site manager in the weeks leading up to the festival. He was on site full time for the nine days prior to the festival and had walked the site most days. Those involved in planning for the event were, he told the court, familiar with the movement patterns of those attending the festival and accordingly had identified areas likely to need special attention such as the area immediately to the right of the stage which was prone to ponding because of the prevailing slope. Likewise, the toilets and merchandising areas where it was anticipated there would be large amounts of pedestrian traffic, were also given special attention. Some areas were treated by rolling in crushed stone and applying straw or mulch in advance of the event. Further, extra woodchip and straw was ordered and deposited at various locations over the entire venue so that it could be easily accessed to deal with areas noticed to be hazardous in the course of the day. Golf type buggies were on hand to transport these materials if and when required.

16. Mr. Killeen advised that on the Saturday morning, he remembered being in arena 1 before it opened as he had certain safety checks to make, one of which included an installation not far from where the plaintiff was injured. He felt that the arena was in relatively good condition. Further, he advised the court that eight teams of four people had been assigned to arena 1 to respond to any safety issues that might arise during the day. These staff members were responsible for monitoring ground conditions and ensuring that any areas which had become obviously hazardous would be attended to.

17. In the course of cross examination, Mr. Killeen said that it was not practical or safe to cover the entirety of the ground area of arena 1, which was 40,000sqm, with the type of matting which had been advised by Mr. Culleton. There was a gradient running from left to right as one looked at the stage and to cover it with matting would have created an alternative hazard for patrons i.e. that of potentially slipping on it. He said they had adequate supplies of materials appropriately located to deal with areas of ground that might deteriorate. He felt the ground should not have been very bad where the plaintiff had positioned himself. He was positioned on ground that was slightly elevated as he was standing to the left of the stage as you face it and he told the court that the ground slopes away from that point to the right hand side of the stage. Further, the plaintiff was a significant distance back from the stage in an area where pedestrian traffic would not have been that busy.

Discovery Documentation

18. It was accepted that the documentation discovered by the defendant showed that a number of festival goers sustained injuries as a result of falls due to mucky conditions on 7th July, 2007. However, to my mind, this documentation was of somewhat limited value as in many instances the reports concerned did not reveal the type of footwear that was being worn by the individuals concerned. In this regard, it was clear from the oral evidence that, notwithstanding the advice that patrons come prepared for adverse weather conditions, a substantial number of people, such as Mr Keane, had arrived in footwear which was unsuitable for attending a green field festival taking place in the aftermath of several weeks of wet weather. Further, only one of these incident report forms referred to a concert goer who was injured in mud in arena 1. Indeed, many of the incidents reported involved patrons who were drunk or injured in circumstances unconnected with those in issue in this claim.

Decision

19. It is against the aforementioned evidential background that I must decide the issues of causation, negligence and quantum. In order to deal with these issues, I will firstly make a number of findings of fact which are material to my conclusions.

20. I am satisfied that the ground conditions at the festival site at approximately 7pm on Saturday, 7th July, 2007, were, by reason of extremely bad weather in the preceding weeks; some small amount of additional rain earlier in the day and the movement of 80,000 patrons, muddy and slippery. However, I do not accept that the overall condition of the ground surface was anything like as bad as that made out by Mr. Keane in the course of his evidence when he said the conditions were "disgraceful". He was wearing runners and while he described having to lift his feet in and out of the mud, he never suggested that it was so deep that it was actually coming into his shoes. Further, both himself and the plaintiff had been able and willing to walk around the site to get food and drink and had managed to walk about carrying their respective pints without any apparent difficulties. Neither mentioned having slipped or lost their footing in the hours leading up to the injury.

21. I am also satisfied that having regard to the level of staffing in arena 1, that if any significant area of ground had become

particularly hazardous that this would have been noticed and dealt with by the staff having regard to all of the measures that I am satisfied had been put in place to cater to such an occurrence.

22. As to the circumstances surrounding the plaintiffs fall, I accept his evidence that in the moments prior to his injury he was standing about 100m back from the stage in an area where lots of people were coming and going. I also accept his evidence that for reasons which are unknown to himself and Mr. Keane he was suddenly and with force knocked to the ground from behind by one or maybe more than one other festival goer who then proceeded to barge over him and trample upon him. I am not, however, satisfied that the plaintiff was knocked over in the course of any sudden crowd surge as he had told Mr. Culleton. The plaintiff and Mr. Keane were agreed that nothing had happened on or off stage at that time to warrant such an occurrence. The Kings of Leon were part way through their performance when he was knocked over. His injury did not occur at the time some new band had come on stage or had just finished a performance, times at which one might anticipate sudden movements within an audience. Further, the evidence established that they were standing in an area a long way back from the stage which was not particularly crowded.

23. I readily accept that the plaintiffs Wellington boots may have sunk into a patch of muddy ground in the seven to ten minutes that he was standing watching the performance and that when he was knocked over his left boot remained stuck in the mud beneath him. However, I am not satisfied that merely because the plaintiffs boot became stuck in the mud having remained in one position for seven to ten minutes that this means that the area per se was hazardous for the normal activities that might have been anticipated to occur at that location at that time. If it was obviously hazardous, I think it highly unlikely that the plaintiff and Mr. Keane would have decided to locate themselves in that area and I also believe it probable that one or more of the 32 members of staff designated to maintain safety in arena 1 would have noticed and dealt with the hazard.

Causation

24. From a causation perspective, it is important to state clearly that the plaintiff's injuries were not sustained in what is commonly described in the litigation arena as a "slip and fall" scenario. The plaintiff had managed to maintain a safe footing from the time he arrived at the festival until, without any forewarning, he was pushed over and allegedly kicked and trampled upon by some other festival goer or goers who must, in my view, be considered to have been behaving irresponsibly and recklessly.

25. If the plaintiff had not been pushed over, he would not have sustained any injury, regardless of the presence or absence of any mud underfoot. Further, I am not satisfied that I can conclude, as a matter of probability, that it was the fact that the plaintiffs boot was retained in the ground at the time he was mowed down that caused his injury. The evidence that was tendered to the court was that he was pushed forcefully from behind by probably more than one festival goer after which he was trampled upon or kicked whilst on the ground. Further, the court heard no medical evidence as to the biomechanics of the plaintiffs injury such that would allow it to conclude as a probability that but for the retention of the plaintiffs left boot in the mud, he would have avoided injury altogether or sustained a lesser type of injury.

Liability

26. Lest I be in error in reaching my conclusions on the causation issue, I should state that even if I was satisfied, which I am not, that the plaintiffs injuries were probably caused due to the fact that his boot was caught in mud as he was knocked over, I am not satisfied that the plaintiff has established negligence as against the defendant. The obligation on the defendant was not that of an insurer, it was to take reasonable care for the safety of the plaintiff in all of the circumstances.

27. Having regard to the evidence of Mr. Slattery and Mr. Killeen, both of whom I considered to be careful and knowledgeable witnesses, I am satisfied that the defendant did all that could be reasonably expected of it both prior to and during the currency of the festival to protect those attending from the risk of injury due to poor ground conditions generated by weather conditions in the weeks leading up to the event.

28. In particular, I am satisfied that in planning for the event, which was carried out in association with a number of authorities, the defendant took all reasonable care to ensure that the surface of the venue would be as safe as was reasonably practicable for festival goers. The defendant continually monitored the underfoot conditions on the site in the days and weeks leading up to the event and identified and treated in advance those areas where it was anticipated the ground was likely to become vulnerable and unstable. Further, the defendant discharged its obligations to the plaintiff and other festival goers not only by ensuring that arena 1 was in good condition when opened to the public at 12 o'clock on the day of the plaintiffs injuries but in continuing to provide high levels of staffing in that arena to monitor and, if necessary, treat any areas of ground that might foreseeably place patrons at a risk of injury. In this regard, it is important to note that neither the plaintiff nor Mr. Keane felt that they were standing on a particularly hazardous surface for the purposes of enjoying the concert and in these circumstances it is hard to fault the defendant's staff for not noticing what they themselves had chosen as an acceptable vantage point.

29. The simple fact of the matter is that the plaintiff sustained his injuries as a result of some recklessly robust behaviour on the part of one or more concert goers who for some reason suddenly and without any warning knocked him to the ground and proceeded to trample over him and causing him to be kicked in the process. It is not just or fair for the plaintiff to now seek to render the defendant company liable for his injuries when they were not aware either of the intended actions of these individuals or the allegedly hazardous nature of the underfoot conditions.

30. It is regrettable that the plaintiff sustained a serious ankle injury at this particular festival. However, unfortunately it is cases such as this one which put at risk the holding of the type of large outdoor events which give so much pleasure to so many people. Organisers of these events can only do what is reasonable in order to provide for the safety of those who attend. It is simply not possible to expect a company seeking to organise festival such as Oxygen, against a backdrop of poor weather conditions, to provide a site that will remain mud free for 80,000 people over a weekend against a backdrop of six weeks of bad weather.

31. To conclude, I am satisfied that the Oxygen Festival for 2007 was planned and managed in a manner which was reasonable in all of the circumstances for the purposes of seeking to protect the safety of festival goers from injuries that might occur due to poor underfoot conditions. I do not believe that the defendants can be considered to have been negligent merely because there may have been some area in arena 1 at 7pm on 7th July, 2007, which had a few inches of mud present and with which patrons should, in all normal circumstances, be expected to be able to cope satisfactory.

Quantum

32. For the sake of completeness, I have decided to deal with the sum of money which the plaintiff might have been expected to recover by way of damages had he been successful in establishing negligence on the part of the defendant.

33. The court had the benefit of the plaintiffs own evidence in relation to his injuries and also two reports from Mr. Seamus Morris, Consultant Orthopaedic Surgeon.

34. Following his accident, the plaintiff was initially seen at Naas General Hospital where a fracture to the left distal fibula was diagnosed. He was later transferred to the Adelaide and Meath Hospital in Tallaght where he was taken to theatre. There, under general anaesthetic the plaintiff underwent an operative fixation of his fracture. A plate and a number of screws were inserted. The fracture did not involve an articular surface and accordingly, Mr. Morris expressed him satisfied that the plaintiff is not at risk of developing arthritis.

35. On 17th August, 2007, the plaintiffs cast was removed. As of 18th October, 2007, he was mobilising well and was found to have a full range of movement of his left ankle with no evidence of any neurovascular deficit. He undertook approximately six sessions of physiotherapy.

36. When reviewed for medical legal purposes on 2nd July, 2014, the plaintiff's only complaint was of difficulty carrying out strenuous activity. In this regard, he told the court that he had given up indoor five aside soccer and running on a treadmill as these activities provoked discomfort in his ankle. As to the future, Mr. Morris advised that the plaintiff was likely to experience some discomfort if undertaking strenuous physical activities.

37. In the foregoing circumstances, I believe that an appropriate award for pain and suffering to date would have been a sum of €40,000. Having regard to his young age and the interference with his ability to take part in strenuous activities in the future, I believe that an additional sum of €20,000 would have been appropriate in respect of pain and suffering into the future.