THE HIGH COURT

[2016 No. 1488 P.]

BETWEEN

KIERAN FAGAN

PLAINTIFF

AND

DUNNES STORES

DEFENDANT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 28th day of June, 2017

1. This is an action for damages for personal injuries and loss arising as a result of an accident which occurred on 29th April, 2014, when the Plaintiff slipped and fell in a vestibule to the grocery section of the Defendant's supermarket premises at Cornelscourt Co. Dublin. A defence was delivered by the Defendant which put the Plaintiff of full proof of his claim and alleged contributory negligence on his part. Subject to that, special damages were agreed between the parties in the sum of €6,672.46.

2. The Plaintiff was born on 12th October, 1960. He is an electrician by trade; however, since 2011 he had been employed by the Defendant as a hygiene operative. At the commencement of his employment he received induction training and subsequently accident prevention training in accordance with the Defendant's shop floor cleaning policy; his training records were discovered and made available to the Court. At the time of the accident the Plaintiff was assigned to the grocery department; he worked shift hours.

Accident locus

3. Substantial structural and internal layout works have been carried out to the department store since the accident which included removal of the vestibule which measured 2.35 metres in depth by 4.53 metres in width and which separated grocery and retail from the goods inwards department. Access and egress was by way of two sets of double doors one set on either side opposing one another.

4. The Plaintiff was provided with cleaning equipment which was kept in a locker located to the left hand side of the vestibule as one entered from the grocery and retail department and where a bin into which the Plaintiff deposited any rubbish encountered while carrying out his inspection and cleaning duties was also located.

5. It was a cleaning system requirement that the Plaintiff had to complete a cleaning/inspection form at the customer services desk by recording and initialling the start and finish time of each cleaning circuit undertaken by him in the grocery department approximately every fifteen minutes. His training incorporated what was described as the 'view as you go inspection system' which involved keeping an eye out for deleterious substances on the floor and the utilisation of a cleaning protocol if such were encountered.

6. Although the Defendant considered that the Plaintiff's area of responsibility included the vestibule no express instruction to that effect was ever given to him, nevertheless, the Plaintiff fairly accepted that as part of the 'view as you go inspection system' he would be keeping an eye on the floor in general and if he had seen any liquid or other deleterious matter on the vestibule floor he would have dealt with it.

7. Both parties retained engineers. At the time of the accident the vestibule floor was constructed of concrete to which red paint or a red resin had been applied; photographs of the floor taken by the Defendant's engineer before the alteration works in connection with a different incident (which did not involve a slip and fall) showed the red coloured material to be in a worn condition consistent with heavy use. The Plaintiff estimated that on any given shift he alone could be in and out of the area 50 to 60 times.

8. As a consequence of the removal of the floor prior to the engineering inspections relating to this accident it was not possible for the engineers to carry out slip resistance tests, however, they were broadly in agreement that a concrete surface in general provides good slip resistance, even when wet.

9. The Defendant maintains CCTV surveillance of its premises and footage from a camera located in the grocery retail section near the entrance to the vestibule material to the accident was retained and viewed by the parties and their engineers. The footage does not show the interior of the vestibule, but does show the Plaintiff, other employees of the Defendant and merchandisers entering and leaving the grocery department through the double doors of the vestibule use of which is restricted to the Defendant's staff and suppliers. The vast majority of goods for sale in the grocery department passed through the vestibule; glass panels had been inserted into the sets of double doors to facilitate visibility of those utilising it and coming in the opposite direction.

The Accident

10. The Plaintiff's evidence was that he had been in the vestibule numerous times between 8am, when he started his shift, and the time when the accident occurred shortly after 10 am. His recollection was that in the ten minutes or so prior to the accident he had been in and out of the vestibule 5 or 6 times; his evidence was corroborated by the CCTV footage.

11. At 10:10:19 he was seen to emerge from the vestibule through the double doors and into the grocery retail department carrying his cleaning equipment and proceeding about his business until he is ultimately seen to return through the double doors at 10:11:18. His evidence was that as soon as he did so he slipped and fell heavily on his back, landing entirely within the vestibule area.

12. He did not see what had caused him to slip and wasn't sure what had happened but he was aware of being in a lot of pain. He also recalled his clothes were wet to such an extent that he thought he had soiled himself and recalled being attended to by members of the staff as well as by ambulance crew who had been called to assist at the scene.

13. Between 10 am and 11 minutes past 10 the CCTV footage records 36 traffic movements by individuals some with and some without goods and with some pushing or pulling trolleys. In the final minute immediately before the accident which occurred at just after 10.11.18, there were seven journeys through the vestibule by members of staff or merchandisers, the last of which occurred as the Plaintiff entered and another employee or a merchandiser is seen to emerge.

14. The Plaintiff's evidence was that before he left the vestibule, a minute before the accident, he did not see anything on the floor but if there had been he would most certainly have dealt with it. Of the seven journeys during the last minute a cage and an empty stock trolley are seen being taken into the vestibule and a loaded stock trolley and vegetable crate are seen being taken out.

15. There was no evidence that in the 10 minutes and in particular the final minute before the accident that any employee or merchandiser, other than the Plaintiff, had encountered any difficulty while traversing the vestibule floor. The evidence of the Defendant's engineer, Mr. Terry, was that if the Plaintiff's clothes were wet to the extent described then that would be indicative of an extensive area of spillage; the description given by the Plaintiff of what happened to him once he went into the vestibule was a classic description of a slip and fall consistent with something slippery being on the ground. Having regard to the nature of the concrete floor surface he considered it unlikely, for reasons given, that the substance on which he stepped would have been a liquid such as milk, water or juice rather it had to be viscous such as vegitable oil. Under cross-examination he agreed that, apart from something like vegetable oil, a squashed fruit, a vegetable or spilt yoghurt could also cause such a slip.

Conclusions with regard to the accident circumstances
16. That the Plaintiff slipped and fell on the floor of the vestibule is not in controversy. As already stated, both engineers were in agreement that in general concrete, even when wet, provides good slip resistance. I accept the Plaintiff's evidence that when he went through the double doors into the vestibule he slipped in the way and manner described, that he landed heavily on his back and that his clothes were wet to the extent that he thought he had soiled himself.

17. I accept the evidence of Mr. Terry that the Plaintiff's description was consistent with stepping onto a slippery substance which, having regard to the nature of the floor surface, had to be viscous and that as a matter of probability, having regard the his clothes being wet as described, that he stepped onto a viscous liquid rather than a crushed piece of fruit, vegetable or yoghurt. Pertinent to these conclusions I pause to observe that the accident report form records the Plaintiff's accident as one involving a slip and quite properly it was not suggested to him that it was attributable to some other cause.

18. Further to the foregoing it seems to me to be highly likely, and the Court so finds, that the liquid on which the plaintiff slipped was deposited on the floor in the minute subsequent to the Plaintiff's final exit from the vestibule before the accident and most likely in the moments before he re-entered. I accept his evidence that the floor of the vestibule was most likely clean when he left since had there been an extensive viscous spillage on the floor sufficient to wet the clothes of anyone who was unfortunate enough to stand and slip on it I consider it unlikely that so many people would have been able to pass and re-pass without difficulty in the minutes before the accident as captured on the CCTV footage.

Liability
19. This is an action brought by the Plaintiff against the Defendant in negligence and for breach of statutory duty; the thrust of the allegations is that the Defendant failed to provide a safe system and place of work and was thus guilty of negligence as well as being in breach of the Safety, Health and Welfare at Work Act 2005 and the (General Application) Regulations 2007.

The Law
20. Put at its simplest the duty which an employer owes is to take reasonable care for the employee's safety in all the circumstances of the case. This case, in common with every claim by an employee against an employer, is concerned with the duty of care as between the particular employer and the particular employee. By way of example, age, knowledge, experience, expertise, physical or mental disability, training, information and instructions are all factors which may be taken into consideration in the determination of the duty of care owed in the particular circumstances of any given case. See *McSweeney v. McCarthy* (18th January, 2000, Supreme Court).

21. The provision of competent co-employees, proper appliances and work equipment together with a safe system and place of work are the categories most commonly involved in the assessment of the duty of care and whether or not there has been a breach of that duty. There is no controversy between the parties as to the law applicable to the circumstances of this case.

22. In brief, the Plaintiff's case is that there was a failure on the part of the Defendant to provide a safe system and place of work as particularised in the pleadings. Specifically, the Defendant was responsible for causing or permitting the deleterious liquid to be deposited on the floor of vestibule and in failing to give any warning; there was an inadequate system of inspection, cleaning and/or removal of the danger in question. The floor of the vestibule should have been specifically incorporated into a designated cleaning area to which an employee/employees ought to have been assigned. Furthermore, it was not sufficient that the Defendant considered the Plaintiff to be responsible in circumstances where the vestibule had not been incorporated into the grocery area of the department store to which the Plaintiff had been assigned. There was no evidence that the vestibule had been incorporated into any other area or that another employee had been assigned with responsibility to inspect maintain or look after it.

23. The essence of the Defendant's case was that the Plaintiff had been properly trained in what was a safe system of work; the area to which he had been assigned included a space where his cleaning materials and utensils were kept together with the bin into which he was required to dispose of any rubbish or substances found on and removed by him from the floor of the store; he was responsible to keep an eye out for spillages and his failure to see or clean up the spillage in the vestibule amounted to a want of care on his part. It was submitted that to find the Defendant guilty of negligence in circumstances where it was likely that the spillage had occurred within a minute of the Plaintiff leaving the vestibule would amount to finding that the Defendant was an insurer in all circumstances for the safety of the Plaintiff on the premises; that is not the law. In the event that the Court were to find that there was a deficiency in the Defendant's system of work, that which the Plaintiff contended ought to have been in place, would not have prevented the accident.

Conclusion on Liability
24. While no risk assessment particular to the vestibule had been carried out there was no evidence led of any complaint of a slip or fall or of circumstances which might have given rise to a slip or fall or of such an accident there and as to the absence of which I accept the evidence of Mr. Finglas, who had been employed as the Defendant's grocery store manager for approximately ten years. In my view, this is significant in the context of the high volume of traffic through the vestibule since it bears out the opinion of the Defendant's engineer, which I accept, that a high volume of traffic over the concrete floor of the vestibule is not to be equated with a high risk of a slip and fall accident.

25. Insofar as the failure to carry out a risk assessment of the vestibule, to incorporate the vestibule into the grocery department and to so instruct the Plaintiff and other hygiene officers amounts to a breach of duty of care and breach of statutory duty, I am not satisfied that such was causative of the accident.

26. Accepting his evidence as to the average number of times he would visit the vestibule in a shift, that he did not see anything on

the floor before he left the vestibule for the last time before the accident, that had he done so he would have dealt with it in accordance with his training and in circumstances where the spillage most likely occurred within a minute of the Plaintiff leaving the vestibule, to find the Defendant guilty of negligence and in breach of statutory duty would, in my judgment, be tantamount to finding that the Defendant was an insurer for the Plaintiff's safety and thus strictly liable; that is not the law.

27. Having due regard to the reasons given and the findings made, the Court is not satisfied that the Plaintiff has discharged the onus of proof required by law to establish his case on the balance of probabilities, accordingly, it is unnecessary to consider the issue of contributory negligence raised in the Defence nor does an assessment of damages in respect of the Plaintiff's injuries arise. However, for the sake of completeness suffice is to say that had it been necessary to do so, and though the medical reports were agreed, I found the Plaintiff to be a poor historian concerning his injuries.

28. Under cross examination he accepted that in March, 2016 at a meeting with his employer to explore a possible return to work that he probably gave information concerning his medical status which was inconsistent with advice which he had by then received from his consultant orthopaedic surgeon, Mr. Morris, and to whom, I am also satisfied, notwithstanding his evidence to the contrary, he did not disclose neurological problems for which had been extensively investigated in 2010. In the event, although there was disagreement as to the degree, it was accepted by both parties at the end of the trial that the Plaintiff's injuries were of a soft tissue nature only.

29. Having due regard to the conclusions reached in relation to the issue of liability the Plaintiff's claim must be dismissed. And the Court will so order.