Neutral Citation Number: [2005] IEHC 15

THE HIGH COURT

Record Number; 2001 No. 10998P
Between:
Angela Muckley
Plaintiff

And

West Lodge Hotel Limited trading as Westlodge Hotel, and
The County Council of the County of Cork
Defendant

Judgment of Mr Justice Michael Peart delivered on the 25th day of January 2005:

On the 21st June 2000 the plaintiff was attending function at the Westlodge Hotel. It was organised in relation to the commemoration of those who tragically lost their lives in the Air India plane disaster.

The function included a performance by some Indian dancers in the function room of the hotel. It is the evidence that those taking part in the dance part of the evening had earlier in the day requested that some form of screening or partition be provided for the dancers so that when they came up a stairs to the side of the dance area and before they would come out into that area, they would be screened off from the view of the audience.

It appears that the hotel itself did not have anything suitable for that purpose, and the County Council, who were assisting in the organising and promotion of this event, arranged to get some suitable materials from their stock. Mr Murphy of the County Council arranged for two polling booths of the type with which all who vote at election time will be familiar. They are timber framed items about six feet high and

about three feet wide, and have an inbuilt shelf over which there is a sheet of timber to enable a vote to be cast in privacy. At any rate two of these booths were placed in the appropriate position side by side to create a screen about six feet tall and just over six feet in width. For additional screening purposes the hotel provided some fabric which was draped over each screen – a separate piece for each screen. I should say that the witnesses for the plaintiff and the plaintiff herself do not agree that polling booths are what provided the screening. These witnesses say that the screens were flat screens and not the sort of timber structures which have been described and which had fabric draped over them. However I shall return to that later.

The dance performance appears to have been a great success. After it was over a large number of the audience were standing around chatting as often happens, although the evidence is that many people were also exiting the function room at the other end.

However the plaintiff was among a group of people quite near the stage area and the area in front of the stage on which the dancers had performed. She states that she was standing talking to three people just in front of and with her back to the screens when, out of the blue, she says there was a loud noise and one of the screens fell forwards hitting her on her right shoulder and right flank area and knocked her to the ground, pinning her underneath. One of her shoes was knocked off her foot during all of this. She found it after she was helped up.

She states that she was helped up by three men, who picked up the screen which had fallen on top of her. She also states that the Manageress of the hotel, Ms. Eileen O'Shea (who also gave evidence) was standing eight or nine feet away, but that she did not come over to her. Neither did the plaintiff go over to Ms. O'Shea to tell her what had just happened. The plaintiff stated that a friend of hers, Mrs Vernon also came over to her after this had happened. Mrs Vernon has given evidence also.

I do not propose to detail all the evidence which I have heard. A note of the evidence has been taken which can be referred to if needs be at a later stage. But it will suffice to say that there are conflicts of evidence in this case both as to the precise nature of the screen used on this occasion by the County Council, and also the fact of the plaintiff being knocked to the ground in the manner she has described. I am not so concerned with the conflict of evidence as to the nature of the screens used. Whether they were flat screens of the flat panel variety described by the plaintiff and her witnesses, or whether they

were polling booths as stated by Mr Murphy is neither here nor there really. Whatever type of screen was used ought to have been suitable for the purpose, and should not have fallen over and injured the plaintiff.

In relation to that particular conflict, I have heard expert evidence as to the construction of the polling booths and the way they are assembled and fold away when not in use. I am satisfied on the balance of probabilities and in the light of the Mr Murphy's evidence and his demeanour generally, that what was used was the polling booths. His evidence is categoric in this regard. My own view is that in the act of falling the booth fell apart in some way so that when it was lifted off the plaintiff it appeared to be a flat object rather than an object with a shelf on one side. This is the only explanation that for the plaintiff, Mrs Vernon and Dr Pulle stating that the screen lifted off the plaintiff was flat. However, as I have said, the precise nature of the screen is not of critical importance in this case.

What is important is whether the incident happened at all as described by the plaintiff. The plaintiff has described exactly what happened and in some detail. Dr Pulle gave very credible evidence, as did Mrs Vernon. On the other hand, Ms Eileen O'Shea has also given evidence that she was near where the plaintiff was standing about 20 minutes after the performance ended. She said most of the people were still in the room at the time, standing and chatting while they got ready to return home. She says she was standing about six to eight feet from the screen in question, but had her back to the screen. She says that she heard a noise, immediately turned around and saw the screens fallen the ground. She saw a group of people with the plaintiff and she says she went over and asked was everybody alright and that she was told that everybody was fine and that there was no problem. She thinks that both screens had fallen, and stated that on seeing what had happened she was grateful and relieved that nobody had was near them when they fell. In fact she stated that the plaintiff herself stated to her that everyone was fine. She knows the plaintiff very well and for twenty years or so and was certain that she had said this to her. She was asked whether she had seen the plaintiff lying on the floor under the screens on top of her, when she had turned around after hearing the noise. She stated that she had not seen her. She said that if she had seen her on the floor in that way she would have been concerned to deal with the matter as manageress of the hotel, and assist her and call for medical help if that was required. As far as she is concerned, there was nobody near the screens immediately after she turned around after she heard the noise.

When she was cross-examined she was asked who had actually picked up the screens, and she responded that she could not say exactly. She also said that the screens were still on the ground when she went over ands asked if everyone was okay. The plaintiff, of course, says that Ms. O'Shea did not come over as she has described in her evidence. She said there was in fact no need to pick up the screen because there was nobody near it. But she was asked whether she would have left the screen lying on the ground, and she stated that she had them picked up by people from the County Council who were near her. Dr Pulle had stated in his evidence that in fact he picked up the screen, but Ms O'Shea said that there were a lot of people around at the time and she could not recall Dr Pulle doing so.

Ms O'Shea stated that when she first turned around, the plaintiff was standing up, and the screen was on the floor. It was put to her that Dr Pulle had given evidence of picking the screen off the plaintiff before the plaintiff was able to get to her feet again. But she stated that she could only say what she saw on the night. She also did not recollect any amplification equipment being knocked from the stage, whereas Dr Pulle had stated that the fall of the equipment created more noise that the falling of the screens themselves. Ms. O'Shea was pressed as to whether she was saying positively that the sound equipment was not knocked to the ground or whether she was saying she did not recollect it being knocked. She stated that she "didn't notice it knocked" and she also said she did not remember it being knocked.

Dr Pulle to whom I have referred is a mathematician by occupation and lives in Scotland and he was in attendance at this function. The function was apparently part of a fundraising effort for a scholarship being arranged as part of the commemoration of the Air India disaster. He was assisting in the organisation of the fundraising. He said that after this concert he was standing talking to the plaintiff and she was speaking to two other people. He stated that there was some commotion going on behind that group and he then saw the screen falling on the plaintiff, and that he and two other people helped her up. He was specifically asked if he had seen the screen fall on her and he said he did. Now I have to refer to the fact that his evidence about the number and nature of the screen cannot be correct if, as I do, I accept the evidence of Mr Murphy that there were only two polling booths used as the screen. Dr Pulle said there were three or four screens in line, which were each about one and a quarter inches thick. One might expect a mathematician to be that precise perhaps! But I have absolutely no reason to believe that Mr Murphy is not being truthful about personally bringing the polling booths to the hotel for use. I think in the confusion of the incident Mr Pulle's recollection and that of the plaintiff and Mrs Vernon is incorrect. But I have no reason to think that Dr Pulle, who impressed me greatly as a genuine and truthful witness, is either mistaken or untruthful when he says that he picked the plaintiff up after the screen fell on top of her.

That is not to say that Ms O'Shea is being deliberately untruthful, but her evidence was not as clear about seeing the incident happen. She had her back to the incident and some small amount of time must have passed before she saw what was going on, otherwise she would have to have seen at least the act of picking the plaintiff up so well described by Dr Pulle.

I will not set out all the evidence which I heard. But I am satisfied on the balance of probabilities that a screen of some description, probably of the polling booth variety, fell upon the plaintiff having being disturbed by some activity behind it – possibly the falling of the sound equipment, and that it was not stable enough to withstand whatever force came against it. I have heard evidence as to the weight of the screen and how little force was required to knock it over. I have also heard evidence that the weight of the screen falling on the plaintiff should not have been sufficient to cause her the injuries which she suffered. However, the fact of the matter is, as far as I am concerned, that the screen fell on the plaintiff, and that she fell to the ground as a result, and that while she was able to be helped to her feet and continue to the conclusion of the evening, she suffered symptoms following upon this incident which became apparent some three to four days later. She stated that at first after it happened she was a bit sore, and was bruised. She self-medicated with some Arneka oil and Panadol. The pain was in her right shoulder and right side of her back in the mid to low back region. By the 1st July 2000 she said she was in dreadful pain, with muscle spasm, which she described as being like getting a cramp when swimming. She went to Casualty and was given painkiller and an injection. The following day she was given a further injection and x-rays were taken. She was generally sore and stiff. She found the injections gave her only short-term relief. By the 10th July 2000 she was being advised to go for physiotherapy and was prescribed Brufin and distalgesic medication. She found the medication made her unwell so she came off that around the end of August 2000. She had a very bad day of pain at the end of August 2000 apparently and visited her GP's practice.

During the autumn months of 2000 the plaintiff tried a number of different avenues of treatment, such as heat treatment, therapeutic massage, and even a faith healer, but with no great success. She continued with physiotherapy. By the end of January 2001 she was sleeping badly. By February 2001 she saw Surgeon Cashman who prescribed some medication and injected her again. She was having trouble with muscle-locking and aches. If she was lying down or sitting for long periods she would have back pain. This was intermittent at this time. She was also continuing with massage.

In March 2001 she tried to ease back to work. She was offered some training work with FAS but found the driving involved very troublesome and had to give it up. She did some other work relating to a training manual. She found she had to dictate to another person because she could not sit and type it herself.

In April 2001 she had acupuncture treatment with Ann Miller, but found it too painful to persevere with. She had further injections from Mr Cashman, as well as continuing with her physiotherapy. In July 2001 an MRI was carried out on her shoulder. This revealed evidence of Rotator Cuff Impingement and Bursitis. Dr Nial O'Donovan, a Consultant Radiologist stated that there were degenerative changes in the shoulder but that the accident in June 2000 had made it more prone to pain and discomfort. He stated that it may settle down depending on the level of treatment. He stated that without the trauma there would have been progression, but that it would have been slower, and not have become evident for some years.

There is no need to set out in detail the modest progress she made during the years between that and now. She has stated that by the end of 2004 she was really starting to feel a bit better. She now knows what she can and cannot do and lives her life accordingly. She continues with physiotherapy. She thinks that her shoulder is much better but still she is unable to perform strenuous tasks at home, such as hovering. She has a housekeeper once a week, and sometimes twice. She still gets back aches, and still has difficulties driving for long periods. This difficulty has given rise to difficulties pursuing some of her hobbies, such as playing bridge or going to classical music concerts, because of the length of time she has to spend seated. She misses these activities.

Apart for the question of general damages, the plaintiff's claim is made up principally of a claim for loss of earnings from a business which she had just set up in 1999, and she was in only her second year of trading. She says that as a result of this accident she was unable to continue the business and that it ceased because she was unable to service her clients to the level she would wish. This was a Tourism Consultancy Business, which, simply put, meant that owners of certain types of holiday accommodation would have their business promoted and advertised through the plaintiff's firm, which also had a centralised booking facility. There was also a website attached to the business to which the clients had access. The plaintiff would be paid a fee annually for the use of these promotional and booking services and she would also receive a commission on all bookings made. This business required the plaintiff to attend trade fairs at which her clients' interests would be promoted and this necessitated a good deal of travel up and down the country to various tourism trade fairs and exhibitions. The plaintiff states that while the footwork for the business for 2000 was done in 1999, she was unable in the second half of 2000 to travel to the trade shows because of her injuries and she was unable to give her customers the level of service required and so she returned a number of subscriptions she had taken, and ceased the business. She gave quite an amount of evidence about how this business operated and my brief summary is just that.

An accountant, Mr David Hyland gave evidence of how he has assessed the losses which the plaintiff has suffered as a result of closing down this business. I do not propose to set out that accountancy evidence in full detail. In her first year of business she had a nett profit of about £2000. Her sales were €37,623, but being her first year of trading she had expenses involved ion setting up, and she states that this accounts for the fact that her profit was so low in that first year. In the second year she lost about £20,000 of the business of the first year because some of her clients left the tourism business in

favour of providing accommodation for asylum seekers and they did not require her services. That made a large hole in her business for 2000 but if the injury had not happened she maintains that she would have been able to increase her efforts and go out and get substitute business to make up the deficit caused by the loss of those clients. She had commenced trying to make up this loss by the time the accident happened. As it happened she incurred a loss of some £23,000 in 2000, and furthermore was unable to go to shows and trade fairs in order to promote her business for 2001 and she refunded some clients their subscriptions for 2001 as she could not provide the service to them.

I have looked at Mr Hyland's figures and taking the lower of the bases he has used for estimated losses for the years 2000/01, 2001 and 2002 he arrives at a post tax figure of approximately €15000 per year. That is a rough summary from his report. In cross-examination, it was suggested that following the events of September 11th 2001 there was a serious downturn in tourism business from the USA and that her income would have dropped in any event, but Mr Hyland was of the view that 9/11 was the very reason why her business would have increased since in a time of tourism difficulties, accommodation owners would be likely to redouble their efforts to bring in business and that this would have lead to more such owners availing of the plaintiff's services and paying her a subscription for her services.

Trying to guess what might have happened to a business of this kind inevitably involves the Court in an element of guesswork, influenced by the expert evidence adduced as well as taking into account the likelihood of the plaintiff succeeding in her ambitions given her particular skills, energy, motivation and business acumen and track record. Having heard this plaintiff in the witness box, I have been left with the impression of a very determined and talented lady who is capable of devoting a great deal of time energy and not a small amount of talent and skill to whatever she turns her hand to. I have a hunch that she would have carried on successfully at least for five years. She would accept I am sure that she was not a young woman at the time of this accident. That notwithstanding I am sure she would have been fully active and energetic for at least another five years and it is probable that she would have made up the ground lost by the removal of some lodges from her books, and that she would have probably improved her profit as well as wiping out the deficit which arose unexpectedly in 2000. Nevertheless, the Court must be careful not to be too optimistic in its forecast into the future. Running one's own business is a risky business. Things can happen over which there is no control, as she had already found out in 2000.
But doing the best I can, and taking the case in the round, I believe it is reasonable to assess a loss to the plaintiff of €6500 for 2000, and €13000 for each of 2001, 2002, 2003 and 2004. That sum comes to **€58500.** For this I have taken a figure which is less that the lowest figures put forward by the plaintiff's accountant.

I do not propose running that figure forward into subsequent years. I have great faith in this plaintiff's abilities to pursue gainful employment. She has struck me as a most capable, determined and highly motivated person who can succeed at anything she devotes her talents and energy to. I have little doubt but that there will be employment she can get in the immediate future even if she does not try and set up in business again on her own account. She has valuable skills and I am sure it is reasonable to expect that she will use them as she has done in the past now that she is feeling substantially recovered from this unfortunate accident.

In addition to this item, there are agreed special damages in the sum of **€5500.**

As far as general damages are concerned, I believe that a sum of **€35000** is reasonable for past pain and suffering and that a further sum of **€10,000** is appropriate for pain and suffering in the future.

In these circumstances, there will be judgment in favour of the plaintiff against the second named defendant in the sum of **€109,000.**