THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 47

RECORD NO. 2014/1084
RECORD NO. 2014/1117
[Article 64 transfer]

PEART J.
HOGAN J.
WHELAN J.

BETWEEN:

SARAH MOLONEY

PLAINTIFF/RESPONDENT

- AND -

TEMPLEVILLE DEVELOPMENTS LIMITED

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 27TH. DAY OF FEBRUARY 2018

1. This is an appeal and a cross appeal from the order of the High Court (Moriarty J.) dated the 25th October 2013 made in these personal injury proceedings whereby having apportioned 70% fault to the defendant/appellant and 30% fault to the plaintiff/respondent, it was ordered that the plaintiff/respondent recover against the defendant/appellant the sum of €30,050 and her costs of the action when taxed and ascertained on the Circuit Court scale with a certificate for senior counsel on the Circuit Court scale.

2. The defendant appeals the finding of liability against it, and the amount of damages awarded. The plaintiff cross-appeals against the finding of contributory negligence against her to the extent of 30%. I will address the question of the defendant's liability first.

The circumstances of the plaintiff's accident

3. On the 7th November 2007 the plaintiff was injured during the course of her employment as a dance teacher/gym instructor at the defendant's fitness centre at Clontarf Road, Dublin. She was on a raised stage area in a large dance area leading a high octane fast and energetic dance class which she described in evidence as "a body attack class" when out of the blue she went over on her ankle and fell to the ground. She sustained a nasty soft tissue injury to her ankle. She was taken to a VHI Swiftcare centre where investigations were carried out. An x-ray showed that there was no fracture of the ankle.

4. The plaintiff alleged that her employer had been negligent in failing to provide a safe floor surface on the stage area where she fell. The burden of proving negligence is on the plaintiff, and she must do so to the civil standard of proof, namely on the balance of probabilities.

5. The first fact that the plaintiff had to prove by evidence in the High Court on the balance of probabilities was what caused her to fall. Once she had proven the cause of her fall, she had then to show that she was caused to fall through some act or omission on the part of the defendant. Thirdly, she had to satisfy the court that the act or omission constituted a breach of the duty of care owed to her by the defendant as her employer to provide her with a safe place of work, and lastly that this breach of duty caused the injury which she sustained.

6. When she made her application to the Personal Injuries Assessment Board for an assessment of damages under s. 11 of the Personal Injuries Assessment Board Act 2003, she stated on the application form that she had "slipped on bumpy floor while teaching a class". In due course she received an authorisation from the PIAB to commence these proceedings. She issued her personal injury summons on the 24th September 2008 in which she pleaded, *inter alia*, that "[she] was caused to slip on the floor of the said premises …". She did not state what she was alleging had caused her to slip. Some time later the defendant's solicitors sought further particulars as to the basis on which she was alleging that the defendant had been negligent. In reply she stated that the defendant was negligent in that it ".. provided a premises for the aerobics class which were not fit for its purpose given the presence of rucking and buckling of the surface of the floor".

7. That statement clarified for the defendant the nature of the allegation of negligence. In order to succeed in her claim, the first fact which the plaintiff had to prove on the balance of probabilities was that there was rucking and buckling of the floor surface at the time of her fall.

8. After the plaintiff was injured, the class was taken over by a member of the class, Ms. Reynolds. She said she saw nothing wrong with the floor and she finished the class without incident. The floor was inspected the following day by Mr Bolger, a manager at the premises, and he found it to be in perfect order. An engineer engaged by the plaintiff to inspect the same floor surface, albeit some years later, Mr Browne, stated that there was no defect in the type of flooring used, and that the particular type of tiling surface used (Pavegym) was not prone to rucking and buckling. The defendant's engineer, Mr Tennyson, stated that he agreed with the plaintiff's engineer that the particular type of flooring that was in place in this premises was entirely suitable for a gym floor, and the particular type of high energy dance class in question. He considered that the tiles in question, which are large and heavy, were too thick to buckle.

9. This Court has had the benefit of an approved note of the trial judge's *ex tempore* judgment. In addressing the question of liability he stated the following:

> "The surface was not found by the engineers to have inherent defects. Mr Kirwan Brown [plaintiff's engineer] was of the view that the floor that he inspected must have been different to that which the plaintiff describes because the floor he examined was in good condition. Mr Bolger was believable that the surface had not been changed, and was adamant that it was a very expensive type of fitting that had been applied. Portion of the floor was available for inspection in Court.

> The unlikely case that then emerged when the plaintiff's case was looking unpromising was that there was a Facebook page for promotion by the plaintiff and that on that there appeared undoubted signs and there was debate about whether, water on the floor was moisture or sweat. It became apparent that buckling could not be sustained. *The focus then changed to the floor being slippery or moist which was the original basis of the claim. It is not an easy case to decide. Whilst I found some of the plaintiff's case was not fully borne out, nonetheless I found her to be a careful and balanced witness. It seems unlikely that she would have fallen for no reason. I have to assess the overall position, and given that something must have caused her to fall over, I am satisfied that some measure of liability has been established.* But the plaintiff has unwarrantedly put the defendant to needless expense in defending the case. I have regard to the plea of contributory negligence on the basis of failing to take sufficient care for her own safety. If there were defects in this stage then she should have had regard to them. I am inclined to discount a finding by 30%. … I am concerned about the manner in which the case was initially run…. ".[Emphasis provided]

10. It may perhaps first be noted that the trial judge did not say in express terms either what caused the accident or how by reference to the pleadings negligence on the part of the plaintiff had been established. Second, the reference to the Facebook page and to some moisture appearing on the floor in that picture needs some explanation. It is apparent from the agreed note of the evidence prepared by counsel that when giving evidence the plaintiff had referred to a photograph which she had downloaded and printed off from the defendant's Facebook page which showed a picture of the stage area where she had fallen. It was not, of course, a picture of the stage area on the day of her accident. It was a picture taken by the defendant for promotional purposes. In his direct evidence the plaintiff's engineer, Mr Brown was asked by her counsel whether he had any significant comments to make about the photograph. The agreed note shows his answer as follows:

> "There is an area where the floor is different – it looks redder and smoother. There would appear to be a rucking or bubbling. No, that does not look like the floor that I saw when I inspected the premises. This looks different in that there was no discolouration or marking in the floor I examined to suggest rucking."

11. This Court has seen the same photograph, and there is undoubtedly a small area where the red colour appears enhanced, and another much smaller area where there is some shading. No evidence was led from any expert in relation to this photograph. It had simply been printed off the defendant's Facebook page by the plaintiff and brought to court. During the defendant's counsel's cross-examination of the plaintiff's engineer, Mr Brown, he was referred to this photograph and he was asked to agree that there was no buckling shown on the photograph. He said that "it didn't appear to be" and went on to state that "Pavegym is not prone to raise and buckle. If it did, it would be at the interlinking as we agreed". Counsel then said to him: "I have to suggest to you that that is liquid". This was a reference to the colour change on the floor area to which I have referred. Mr Brown said "Yes – it could be liquid. I am surprised to see that on a promotional picture". He was then asked to agree that liquid on a dance floor is temporary to which he answered "Yes".

12. It is this interchange that caused the trial judge to say what he said above in relation to the focus of the case changing from rucking and buckling to moisture on the floor. But the latter had not been pleaded as the cause of the plaintiff's fall, and indeed she had given no evidence that she had slipped on a wet or moist floor surface.

13. The trial judge was satisfied that the plaintiff's claim that she had been caused to fall by reason of rucking or buckling of the floor surface "could not be sustained". He did not make any finding that there was moisture on the floor surface on the day of the accident which caused the plaintiff to fall. He, of course, was given no evidence that this was so, be it in the form of sweat or from liquid on the floor.

14. The trial judge's basis for a finding of negligence on the part of the defendant appears only in the statement that "it seems unlikely that she would have fallen for no reason … something must have caused her to fall over".

15. Counsel for the defendant submits that there was no evidential basis for the trial judge's conclusion that the defendant was negligent. It is submitted that while there was some brief discussion between counsel and Mr Brown as to what the difference of shading on the photograph might be, and that there was surmise that it could possibly be liquid and not rucking, that is not evidence to show that on the day of the accident there was any moisture on the floor which caused the plaintiff to fall. Just as importantly that was not the case on negligence which had been advanced either on the pleadings or in evidence by the plaintiff at any time.

16. Counsel for the plaintiff on this appeal has submitted that the suggestion that the discolouration in the Facebook photograph could be liquid came from the defendant itself through a question put to Mr Brown by counsel in cross-examination, and that the trial judge was entitled therefore to act on foot of the answer given. It is submitted that the defendant, having asked the question of Mr Brown, must accept the answer given in reply. It is submitted that it can be read into the trial judge's remarks that the "something" which he said must have happened should be taken to be the existence of moisture of some kind on the floor on the date of the accident and that this caused the plaintiff to fall.

17. I am afraid I cannot agree with counsel for the plaintiff. The plaintiff never pleaded the case in negligence against the defendant on the basis that she had been caused to slip and fall due to the presence of moisture or liquid on the floor surface on the day of her accident. That case was never made, and neither did she give or lead any evidence in relation to such an allegation. If she had done so, the defendant would have had an opportunity to defend that case and not the rucking and buckling case that was pleaded. The question asked by counsel for the defendant regarding the photograph was, perhaps, an unnecessary question. But its purpose was to confirm that whatever was in the photograph it was not showing any rucking and buckling of the floor surface.

Conclusions

18. In my view the trial judge made no finding that there was liquid or moisture on the floor surface. Indeed, he could not have done so as there was no evidence led in that respect in relation to the day in question.

19. There was therefore no evidential basis for a finding that the defendant was negligent. It is insufficient to state merely that there must have been some reason to cause the plaintiff to fall. While that must undoubtedly be the case, it is not necessarily the case that the fault would lie with the defendant on some unidentified basis akin to what lawyers refer to as *'res ipsa loquitur'* ('the thing speaks for itself'). This is not a *'res ipsa loquitur'* type of case. While I accept that it is unnecessary to specifically plead *'res ipsa loquitur'* in order to avail of it, I nevertheless note that it was not pleaded. Negligence was very clearly pleaded and particularised on the basis that the floor surface was not fit for its purpose given the presence of rucking and buckling of the floor surface. The simple fact therefore is that the plaintiff failed to prove her case, and there was no evidential basis for a finding of negligence against the defendant.

20. While it is clear that the plaintiff suffered a very unfortunate accident which has clouded her ability to perform as a dance

instructor, the plain fact of the matter is that she has been unable to demonstrate any negligence on the part of the defendant.

21. In the light of my conclusion, it is unnecessary to reach any conclusion on the cross-appeal in relation to the finding of contributory negligence, or on the defendant's appeal in relation to quantum.

22. For these reasons I would allow the appeal.