Neutral Citation [2012] IEHC 440

THE HIGH COURT

[2011 No. 2448 P]

BETWEEN

SINEAD McDONALD

PLAINTIFF

AND

FROSSWAY TRADING AS BLEU

AND

EAMON O'REILLY TRADING AS BLEU RESTAURANT

AND

(BY ORDER DATED 16TH JANUARY 2012)

STUDIO M ARCHITECTS LIMITED

DEFENDANTS

JUDGMENT of O'Neill J. delivered on the 2nd day of November, 2012

1. The plaintiff was born on 23rd September 1976, is a secondary schoolteacher. She suffered a serious injury to her right ankle at 11.15pm or thereabouts on 3rd October 2009, in the first and second named defendants' restaurant known as '*Bleu*' in Dawson Street, Dublin 2.

2. The plaintiff alleges in the proceedings that her accident was caused by the negligence of the first and second named defendants as occupiers of this restaurant and by the negligence of the third named defendant, a firm of architects who designed the interior of the restaurant in or about 2002 to 2003.

3. On the evening of the accident, which was the first time the plaintiff had been in this restaurant, the plaintiff had arranged to meet six friends of hers to have dinner there. They booked the table for 8.00pm but had a drink in a pub nearby and arrived at the restaurant at 8.10pm. They were seated in a portion of the restaurant which was to the rear, right side, partially behind the bar as shown in the photographs taken by Mr. Romeril, an engineer, who gave expert evidence for the plaintiff.

4. This area of the restaurant was at a higher level than the front portion of the restaurant and to get to it, it was necessary to go up three steps.

5. On the right-hand side of these steps, as one ascends them, there was what appears to be a thin screen which partitioned the steps from the dining area behind it, so as to prevent diners in that area from falling over onto the steps. The screen was in height approximately 1 metre above the top step or floor level of the upper level.

6. On the other side of the steps, there is a low tassle wall which separates the steps from a ramp. This wall is 75mm or 3 inches approximately above floor level at the upper level and 510mm above the floor level at the bottom of the steps and graduates in between, corresponding to each of the risers in the steps.

7. The rise in the top step was measured by Mr. Romeril at 158mm, whereas the rise in the other steps was 143mm each.

8. The bottom and middle step were illuminated, each by a light built into the low wall between the steps and the ramp and these lights were positioned close to the edge or nosing of the steps. The lighting, generally, in the restaurant was described as soft or low and could be dimmed or brightened as required.

9. The two tables in the upper part of the restaurant were pushed together to accommodate the plaintiff's party and the plaintiff was seated on the second chair from the end nearest the bar with her back towards the steps. The plaintiff was adamant that the bar stools shown in Mr. Romeril's photographs were not there when her accident occurred.

10. The plaintiff and her party had starters, main courses, desserts and coffee and drank wine with the meal. During the meal, between courses, the plaintiff left the table once, definitely, and maybe twice to go outside the restaurant to smoke. Needless to say for that purpose, she had to go down the steps and come back up them on her return.

11. At about 11.15pm, as the meal came to an end and the bill was paid, the group had scattered somewhat. One person had gone to the restroom. Three were at the table and the others outside, smoking.

12. The plaintiff decided to join those outside. She rose from her chair, took her handbag in her left hand and moved to the top of the steps. She put her right foot forward intending to place it on the step below the upper floor level. Her evidence was that her right foot overshot the step. She had an immediate sensation of her stomach lurching and she realised she was falling. She put out her right hand to grab something but there was nothing to grab as the low wall separating the steps from the ramp was down at foot level. She appears at that stage to have gone in to freefall and fell over the low wall and came to rest at the bottom of the ramp where a piece of matting is shown in Mr. Romeril's Photograph No. 7. She ended up lodged against the glass partition that separates the ramp from the tables on the other side of the ramp.

13. In this fall, she suffered a very serious fracture of her right ankle. At the time, she described herself as mortified and she was

unable to get up because of her injured ankle which was visibly deformed. In due course, she was assisted by her friends to a chair inside the door and was brought by taxi to St. Vincent's Hospital. Here, her ankle was treated appropriately.

14. The plaintiff claimed that the accident was caused by the negligence and breach of duty of the first and second named defendants in failing to take reasonable care to ensure her safety while in the restaurant and, specifically, in failing to have provided a handrail on the steps and in failing to have provided adequate lighting to illuminate the steps on which she fell, and also in failing to mark or clearly distinguish the nosings of the top and bottom of these steps.

15. The third named defendant was brought into the proceedings on foot of an application by the first and second named defendant to join them as a third party, but on that application the plaintiff applied to join this party as a co-defendant and that was done by order of this court made on 17th January 2012.

16. The case made against the third named defendant by the plaintiff is that they were negligent and in breach of duty in failing to design the interior of this restaurant so that it had a handrail at the side of the steps, had adequate lighting to illuminate the steps and in failing to ensure that the nosings of the top and bottom steps were adequately or properly marked or distinguished so as to be clearly visible in poor light.

17. I am satisfied that the plaintiff's fall was not caused by a lack of visibility of the steps. It is clear that when she put her right foot forward to step onto the step below the floor level from where she had been, she did know the step was there. She had gone up and down these steps probably three times before her fall. In her evidence, she said she presumed she was looking at the step. When she attempted to put her foot on it, she described her foot as overshooting the step. It is not at all clear what was the precise cause of this happening. It might have been the fact that the rise between this step and the upper level was 15mm greater than the rises between the lower steps, which could explain why her foot overshot. This is what happens when there are significant differences in the risings between steps in the same flight of steps. It may simply have been a momentary loss of concentration or inattention which would be quite understandable at the end of a long meal, in the ambience of normal conviviality in a busy restaurant.

18. At all events, I am satisfied that the plaintiff was not caused to fall because she did not know these steps were there or could not see them. Her evidence satisfies me that indeed she could see the step, notwithstanding the rather poor level of light illuminating them and also the absence of clear distinguishing markings on the nosings of the top and bottom steps and also the predominantly dark colouring of the steps.

19. The real problem, so far as the plaintiff was concerned, was the absence of a handrail. Had this been there, I am quite satisfied that even if the plaintiff had missed her first step, and indeed a handrail would have made that event much less likely in the first instance; the handrail would have confined her mishap to a harmless stumble and prevented it becoming a dangerous freefall resulting in the injury she suffered.

20. I am quite satisfied that had there been a handrail at the steps, the plaintiff would not have suffered the injury she did.

21. The question to be decided in these proceedings is whether there was any negligence or breach of duty on the part of the defendants in failing to have provided a handrail at this location.

22. Mr. Romeril was of opinion that the absence of a handrail here was in breach of the relevant provisions of the Building Regulations and/or Technical Guidelines and also, apart from these altogether, a handrail was an essential requirement to clearly identify the presence of the steps and where they began and to assist someone who might miss their footing on the steps.

23. Mr. Noonan, an architect called for the third named defendant, while disputing that a handrail was required in this location by the Building Regulations or Technical Guidelines, nonetheless accepted that a handrail would have reduced the risk of someone stumbling on the stairs.

24. I am of opinion that anyone, lay or expert, who considered the relevant features of the location of the stairs, namely, in a busy city restaurant, in an ambiance where the lighting was relatively low, the rather dark colouring of the stairs, the absence of any clear markings on the nosings of the stairs, the normal noise, hubbub and conviviality that one would expect in a restaurant of this kind late at night, the fact that diners at that time of night would be enjoying themselves and may have consumed some alcohol, the constant movement around the restaurant of patrons and staff; these features would, I have no doubt, brought about a realisation there was a high level of risk that a diner late at night would miss their footing on the steps and stumble. Once a stumble occurred on these steps, there was nothing to prevent that stumble becoming a freefall as happened to the plaintiff.

25. Handrails are a common item of internal architecture and encountered in almost all places and buildings to which the public have access and where steps must be negotiated. In my opinion, it must have been readily foreseeable to the first and second named defendants, as experienced restaurateurs, that the absence of a handrail on these steps would result in someone having a bad fall resulting in serious injury.

26. I have come to the conclusion that the first and second named defendants failed in their duty to take reasonable care to ensure the safety of the plaintiff while in this restaurant in not having a handrail at this location and are liable to the plaintiff accordingly.

27. The next question is whether the third named defendant was negligent in not designing in a handrail at the steps. The third named defendant denies negligence on the basis that they designed this aspect of the restaurant to meet the requirements of the Building Regulations and these do not require a handrail.

28. I accept that the Building Regulations in force in 2002-2003 did not require a handrail at this location because there were only three risers.

29. That, of course, is not the end of the matter. In this location, in addition to the other features mentioned earlier, there is a low wall *i.e.* at foot level one side, and on the other, a thin screen which would not afford any support to someone who had moved onto the steps in the event of a stumble because the edge of the screen would be almost certainly either out of reach altogether or very difficult to grasp in order to prevent or control a stumble.

30. As I have said earlier, any person, lay or expert, giving due consideration to all of these features of the location could not but realise the dangers posed by the absence of a handrail.

31. I am quite satisfied that an architect offering an expert service, *a fortiori*, could not but have realised the necessity for a handrail

in this location. Placing total reliance on the Building Regulations in circumstances where the absence of a handrail was a glaring and obvious omission does not afford the third named defendant a defence.

32. The first and second named defendants cannot excuse their failure by saying they engaged an independent expert contractor when the danger posed by the absence of a handrail in this location must have been readily foreseeable to them as experienced restaurateurs. They did not need the advice or assistance of an expert to appreciate such an obvious risk.

33. The third named defendant, likewise, cannot excuse their failure to have designed in a handrail by a misplaced reliance on the Building Regulations when the danger posed by the absence of a handrail at this location must have been glaringly obvious to them had they given the matter due consideration.

34. I have come to the conclusion that the first, second and third named defendants were all liable. I am satisfied that the fairest apportionment of fault between them is 50% to the third named defendant and 50% between the first named defendant and the second named defendant.

35. I should say, before concluding on this aspect of the case, that I do not think that the shoes the plaintiff was wearing are a relevant contributory feature to the plaintiff's accident. The shoes in question, although they have an elevated platform sole and heel, are not particularly high by modern standards and are a type of footwear commonly worn by young women in social situations including dining in restaurants.

36. I do not accept that there was any contributory negligence on the part of the plaintiff in wearing these shoes, nor is there any other evidence of any contributory negligence on the part of the plaintiff in failing to take due care for her own safety.

37. I am satisfied that the plaintiff is entitled to recover the full amount of her assessed damages.

38. As a result of this accident, the plaintiff suffered a serious injury to her right ankle. She was taken to St. Vincent's Hospital and there an X-ray demonstrated a trimalleolar fracture dislocation of the right ankle. She was kept in hospital overnight and the following day, Sunday 4th October, she had an open reduction and internal fixation carried out with a screw inserted across the medial malleolus, a plate over the lateral malleolus and a plate over the posterior malleolus which achieved an anatomical reduction. She was kept in hospital for three days and discharged in plaster of paris and on crutches. She was in a plaster of paris for six to eight weeks and on crutches. After the plaster of paris was removed, she continued to use either a crutch or stick until January 2010. She returned to work at the beginning of February 2010. She had had a considerable amount of physiotherapy and her ankle remained painful and swollen, particularly after standing or walking for a considerable period of time.

39. She continues to suffer pain in her ankle, particularly after standing or walking for lengthy periods. Her walking tolerance is no more than 45 minutes. She describes currently three types of pain in her ankle, firstly, a pain which occurs at the end of the day from tiredness and that is across the top of the foot. The second pain is at the back of the foot and occurs after periods of immobility and can be relieved by mobilising the ankle. The third is a sharp or darting pain into the knuckle of the ankle which occurs regularly but relatively infrequently. She continues to do ankle exercises on a daily basis to minimise pain and discomfort in her ankle and maximise her mobility.

40. It would appear that the surgery to her ankle gave her a good anatomical result, but there remains a risk of post-traumatic degenerative change. It is described by Mr. Sean Dudeney, the orthopaedic surgeon who carried out the surgery, as a "*possibility*".

41. Mr. Dudeney's conclusion is expressed as follows:

> "*This lady had a very significant ankle fracture with dislocation of the talus requiring internal fixation of the medial malleolus, collateral malleolus and posterior lip of the tibia. She has gone on to do well. Her X-rays are satisfactory with no evidence of post-traumatic degenerative change. Prognosis is guarded, however, in view of the severity of her injury. She is for further review in one year's time with up to date X-ray. She is currently functioning very well. There is a chance, however, that she may develop post-traumatic arthritis in the future*."

42. In my view, the appropriate sum to compensate the plaintiff by way of general damages for her pain and suffering to date is the sum of €45,000.

43. It is clear that she is going to continue having considerable limitation of the normal use of this ankle. Her walking tolerance, it would appear, will remain limited, and it would appear she will continue to have to do exercises on a daily basis to maintain the mobility of the ankle and to keep pain and discomfort to a minimum. There are surgical scars on both sides of her ankle, which are permanent but not of much cosmetic significance. The metal work in her ankle appears to be a permanent fixture and the screws are both visible and palpable under the skin.

44. The major risk for the future is of the development of degenerative change in the ankle, but this has not happened yet and is described by Mr. Dudeney as only a possible eventuality. Thus, in assessing her compensation for the future at this point in time in this regard, what she has to be compensated for is merely the existence of this risk rather than the eventuality itself.

45. Bearing all of this in mind, in my opinion, the appropriate sum to compensate the plaintiff by way of general damages for her future pain and suffering is the sum of €50,000. Thus, the total award for general damages will be €95,000. Special damages are agreed at €2,000 and consequently there will be judgment for €97,000.