

BETWEEN**ANDREW LARKIN****PLAINTIFF****AND****CARLINGFORD COMMUNITY DEVELOPMENT COMPANY****DEFENDANT****Ex tempore JUDGMENT of Mr Justice David Keane delivered on the 22nd May 2019****Introduction**

1. On 12 July 2016, the plaintiff Andrew Larkin was playing indoor football at the Foy Centre, Carlingford, which is a sports hall and community centre that is occupied and controlled by the defendant Carlingford Community Development Company, a company limited by guarantee.
2. In the course of that activity, Mr Larkin suffered an injury to his left leg and knee, which he claims was caused when the sole of the sports shoe on his left foot came into contact with some sticky residue on the wooden floor of the sports hall, left behind by duct tape that had been used to secure temporary carpeting for the purpose of a prior event.
3. Mr Larkin seeks damages from the company for the personal injuries that he suffered as a result of that accident.
4. In the personal injuries summons that issued on his behalf on 16 March 2018, Mr Larkin alleges that the accident was caused by the negligence of the company in causing or permitting that sticky residue to be present on the floor of the sports hall or by failing to warn him of its presence there.
5. As a result of the accident, Mr Larkin sustained a fracture to the upper part of his left tibia (or shinbone), where it meets the knee bone, leaving bony fragments there, together with a hyperextension injury, including the rupture of the posterior cruciate ligament. Mr Larkin spent six weeks with his left leg in a cast and several weeks after that with his knee in a supporting frame. The injury has caused Mr Larkin considerable pain, stiffness and soreness.
6. As a result, Mr Larkin, who is a firefighter, was out of work for three months following the accident and spent some months restricted to light duties upon his return to work. Mr Larkin was prevented from engaging in a range of domestic responsibilities and in his usual leisure and sporting activities for some considerable time after the accident and his involvement in sports is still significantly curtailed, due to his lack of confidence in the strength or resilience of the knee joint. Happily, in the most recent report of his orthopaedic consultant, dated 13 February 2019, Mr Larkin is described as having made tremendous progress with his recovery and as being back in active service as a firefighter. While he still experiences some pain and stiffness in his left knee when bending, lifting heavy objects and climbing stairs, he is expected to make a full recovery, subject only to the risk of some post-traumatic osteoarthritic changes to that joint in the future.
7. The company delivered a personal injuries defence on 19 December 2018. It amounts to a broad traverse of Mr Larkin's claims, with the single exception of an affirmative plea that Mr Larkin was involved in a tackle when the accident occurred. It also contains what is in substance a plea that Mr Larkin caused or contributed to his own injury by not taking appropriate care, one of the particulars of which is that Mr Larkin failed to pay attention to, or make allowance for, the condition of the surface on which he was playing.

The evidence*i. the plaintiff's case*

8. Mr Larkin's evidence was as follows. He is 35 years of age. He has been with the fire service as a firefighter since June 2012. At the time of the accident, he had been renting out the hall in the centre for approximately 11 months for twice-a-week indoor football sessions. He had been dealing with John McKeivitt on behalf of the centre about the availability of the hall on the Tuesday and Thursday nights when he wanted to use it.
9. On the evening of the accident, he was playing in a game of indoor football in the hall. He was on the left wing in the attacking part of the pitch running for a ball with an opposition player, although they did not make physical contact. When the ball was kicked in another direction, Mr Larkin tried to stop. Usually, when doing so, his sports shoes would slide a little on the polished wooden surface of the sports hall floor. But on this occasion, his left foot stopped dead, causing him to fall awkwardly. There was a clear sticky residue on the floor, which he had not noticed until he fell. He pushed himself over to the wall of the hall and, using it for support, was able to get upright, although he was hobbling badly.
10. About two or three weeks after the accident, at the end of July or start of August, he went back to the centre, where he took a photograph of the floor in the sports hall, using the camera on his phone. He was still on crutches and did not go to, or photograph, the specific area where the accident happened. The photograph that Mr Larkin took was produced in evidence. It depicts what appears to be a long segment of duct tape adhering to the wooden floor in, what he acknowledged, is an area of hall to the left of the main entrance. Mr Larkin testified that, when he went back to the centre some months after that, the fragment of duct tape that he had photographed was still there, and so he took another photograph of it.
11. Mr Larkin gave evidence about the nature and extent of his injuries. That testimony was largely consistent with the medical reports that were admitted in evidence on his behalf by agreement between the parties. He did not undergo surgery, as it was decided to treat his injury conservatively. He was in plaster from groin to toe for six weeks. Then, he was fitted with a hinged knee brace. The hinge was locked for the first two to three weeks and then unlocked to enable him to begin using the knee to support his weight again for another couple of weeks before it was removed. He attended a physiotherapist at the hospital for three months and another physiotherapist for four months after that.
12. Mr Larkin was due to undergo his quinquennial medical examination in the fire service in April 2017 and this served as a focus for his recuperation. He returned to work in September 2016, though undertaking only light duties. That meant that he was unable to

perform duties involving the use of breathing apparatus, ladders or the heavy cutting gear employed at the scene of road traffic accidents. However, spurred on by his pending medical examination he was able to make tremendous progress with his recovery. He took Nurofen whenever necessary for the pain associated with his injury.

13. Mr Larkin was sure that he had mentioned the cause of his accident to John McKeivitt, when he ran in to him at some point after the accident. It was not until sometime in January 2017 that he spoke to a solicitor about the accident. He was prompted to so because he was worried about his impending medical.

14. Mr Larkin confirmed that he attended an inspection of the sports hall as the *locus in quo* with Robert Burke, the expert engineer retained on his behalf, on 22 February 2019.

15. Under cross-examination, Mr Larkin confirmed that he is back running and completed a 5k event last week. He reiterated that his accident did not result from physical contact with another player or from a tackle in which he came off worst. He had described the sticky residue that he observed just after the accident as 'dirty clear' because it seemed to him to be a clear substance that had become contaminated with fluff and dirt. He confirmed that he had not noticed the mark of the residue, which he described as about a foot and a half in length, before the accident because the wooden floor was light in colour and he had not been in the habit of walking the floor or closely inspecting it before each use of the hall.

16. Mr Larkin confirmed that he organised the five-a-side sessions that he participated in, which were for local youths. He arranged the hire of the hall at €2 a head and charged each of the youths attending €3 because several did not pay at all and he also gave out free sessions as prizes to incentivise participation. Before each session he would take a quick '360°' look around the hall. Any exercise equipment, tables or chairs left in the hall would be moved out into the lobby, but he did not inspect the floor of the hall. He certainly missed the residue that was on the floor that night.

17. Under further cross-examination, Mr Larkin accepted that he should have drawn the problem to the attention of someone in charge of the centre but did not do so.

18. Mr Larkin did not accept that the first Mr McKeivitt heard of the accident was when the company received a letter of claim, dated 1 February 2017, from his solicitor, testifying that he spoke to Mr McKeivitt 'within weeks' when he ran into him locally. Mr Larkin accepted that he should have picked up the phone to notify someone at the centre of the problem that had caused his accident but did not do so. Mr Larkin could not say whether he had run into Mr McKeivitt before or after he visited the centre again at the end of July or beginning of August to take a photograph of the floor of the sports hall.

19. When asked why he had gone to the hall then, Mr Larkin said that he went there to see if anything had happened about the condition of the floor. He did not go into the hall during that visit but, presumably from the doorway, took the photograph - captioned 'Image B', for the purpose of these proceedings - with the camera on his phone. It depicts part of the floor on the left of the sports hall about 15 steps from the doorway. A strip of duct tape stuck to the floor there is plainly visible in it. However, that strip of duct tape is not located in the part of the hall where Mr Larkin's accident occurred. That was at the other end of the hall where the temporary stage used for occasional events is erected between the two emergency exits located there.

20. Mr Larkin reiterated that he had attended at the sports hall again in January or February 2017 because he was aware that someone else had begun organising five-a-side football matches there and he wanted to see what was going on. He took another photograph on his phone depicting the same portion of floor that he photographed in July or August of the previous year, but this time as part of a longer shot that also depicted persons playing five-a-side football in the background. In the foreground is what appears to be the same strip of duct tape, stuck to the same part of the floor. That photograph was captioned 'Image A' for the purpose of this case. Mr Larkin accepted that he did not tell anyone of any concern he had about the condition of the floor at that time, although he acknowledged that he should have.

21. Mr Larkin had attended a school play in the sports hall with one of his children in December 2015 and could recall temporary carpet installed there 'from skirting board to skirting board.' Mr Larkin did not accept that there was a one metre gap between the edge of the carpeting and the wall on each side of the hall, as well as a one or two-metre-wide uncovered aisle running up the centre of the hall when that temporary carpet was in place.

22. It was put to Mr Larkin that the temporary carpet had not been used for any event between a pantomime in December 2015 and a concert by 'Ireland's Three Tenors' on 6 August 2016 and that, in depicting a relatively fresh looking strip of duct tape, the photograph designated 'Image B' must have been taken after that date. Mr Larkin did not accept that proposition.

23. Robert Burke gave evidence as an expert engineer on behalf of Mr Larkin. He confirmed that he conducted an inspection at the sports hall on 22 February 2019 in the presence of Mr Larkin and a solicitor for the company. Mr Burke found the floor to be highly polished with no tape fragments or marks visible on it. However, Mr Burke expressed the view that the photographs captioned Image A and Image B clearly show an adhesive tape residue on the sports hall floor, which was likely to have changed the co-efficient of friction of the floor at that point significantly and, for players, unexpectedly, thereby constituting a hazard of which the defendant company knew, or ought to have known.

24. Under cross-examination, Mr Burke accepted that if a duct tape fragment of the kind visible in the photographs taken by Mr Larkin was present on the floor of the sports hall at the time of the accident, then it would have been there for all to see.

25. Colm Farrell, one of the youths who was playing indoor football at the time of the accident was called as a witness on behalf of Mr Larkin. He was at the back left of the pitch from Mr Larkin's perspective. He saw Mr Larkin running up the left wing after the ball, with another player, Alex Woods, in close proximity. He did not see a tackle or any physical contact between them. As they approached the ball, they were about an arm's length apart. A pass was made, prompting both to attempt to stop and change direction. Mr Larkin fell forward. Mr Farrell stated that, although he was at the back left of the hall and Mr Larkin was at the top left, he had a clear view.

ii. the defendant's case

26. The defendant company called Joe Dunne as a witness. He is from Carlingford and was another of the youths who had been playing indoor football that night. He saw Mr Larkin and Alex Woods running towards the ball and going for it. Mr Larkin came out the worst and fell down. Under cross-examination, Mr Dunne accepted that he had not been asked to make a statement until sometime after the incident and that he had not used the word 'tackle' in his evidence.

27. The next witness called by the defendant company was Marie Higgins. Ms Higgins lives in Omeath and has been using the sports hall in the centre for fitness classes for about ten years. She gives those classes five mornings and two evenings a week. At present, she has about 10 or 15 people at her classes, although in 2016 she would have had about 15 to 20 persons at each class. As an instructor, Ms Higgins inspects the floor before each class because she does floor work in those classes, which is to say she uses the floor a lot. At the time, she was using the sports hall almost daily and would have checked the hall every day. She had never witnessed sticky residue on the floor there.

28. Ms Higgins first heard about Mr Larkin's accident at the centre a few months prior to the trial of the action.

29. Under cross-examination, having been shown the strip of duct tape on the floor visible in Image B, Ms Higgins stated that she had never seen it.

30. Michael McGuinness, a member of the committee that manages the Foy Centre, gave evidence. Together with John McKeivitt, he was involved in fundraising for the construction of the centre, which was built in 2005. For the purposes of this action, he had created a spreadsheet listing the various events that took place in the sports hall between 12 April and 30 June 2016.

31. Mr McGuinness confirmed that a play was put on at the centre on 17 December 2015 to raise funds to pay for its insurance. Because of the acoustics in the hall, temporary carpeting is installed for such events. The temporary carpeting consists of four strips, each four metres wide, that run the length of the hall up to, and under, the stage. In the current configuration, the carpeting stops a metre short of the wall on each side and leaves a two-metre-wide aisle running up the middle of the hall, to permit easy access for prams and wheelchairs. At the end of the carpet nearest to the main door, single sided duct tape is used to secure it to the floor, to eliminate or reduce any tripping hazard. The persons involved in these arrangements are Mr McGuinness, Mr McKeivitt and Thomas Keenan, the caretaker at the centre. After such an event, the temporary stage and temporary carpeting are removed.

32. Mr McGuinness was not aware of any expression of concern about the surface of the floor of the sports hall. He became aware of Mr Larkin's complaint when he received the letter of claim from Mr Larkin's solicitor, seven months after Mr Larkin's accident, because the post for the management committee is sent to his house.

33. Under cross-examination, Mr McGuinness stated that duct tape would be used on the joins, and edges of the carpeting and, sometimes, on ripples in it. Mr McGuinness had no idea how the duct tape shown stuck to the floor in Image B had got there.

34. The penultimate witness called on behalf of the defendant company was its chairman John McKeivitt. He stated that, in 2015 and 2016, he was endeavouring to increase the usage of the hall at the centre. To that end, he made various arrangements with persons for the use of the hall but tended not to write the details down. He was happy when Mr Larkin approached him about using the hall for indoor football, once he could be satisfied it would not impinge on existing activities of other users such as Ms Higgins. Mr Larkin would drop the money for the hire of the hall in an envelope through the letterbox of Dan's Café in Carlingford, where Mr McKeivitt would collect it.

35. The removable carpeting for the hall in the centre was acquired about 6 or 7 years ago to improve the acoustics of plays and concerts performed there. The people involved in its installation would be Mr McKeivitt, Mr McGuinness and Mr Keenan, the caretaker. They would roll it up to the stage and sometimes to the side walls. But when it was used for school plays, pantomimes and so on, a gap was left at the sides and along a centre aisle. Duct tape was always used to fix the carpet to the floor of the hall at the end closest to the entrance. On one occasion the carpet had been stapled to the floor, but it had been very hard to remove the staples and it was not done again. When there were ridges or ripples evident in the carpet, the committee would ensure that elderly or vulnerable people were escorted to their seats. After use, Mr McKeivitt and Mr McGuinness would roll the carpet up and ensure that the floor was cleaned with soap and water and, if necessary, a scraper, like a paint scraper.

36. Mr McKeivitt confirmed that there had been a Christmas play and a pantomime in the hall in December 2015 and that Ireland's Three Tenors had performed there on 6 August 2016.

37. Mr McKeivitt testified that he was quite clear that Mr Larkin had never approached him about his accident in the hall and that the first he had heard of it was when Mr McGuinness came to him with the letter of claim from Mr Larkin's solicitor in February 2017.

38. Mr McKeivitt reiterated that duct tape was used for joins, edges and ripples in the carpet, to provide a more secure platform for it on the floor of the sports hall. The duct tape was acquired by Mr Keenan, the caretaker, from a local business named Flagstaff Supplies.

39. The final witness called was Debbie Hamilton. Ms Hamilton lives in Carlingford and has been a management committee member at the Foy Centre since the summer of 2016. Since then, her responsibilities have included taking bookings for the use of the hall. In that context, she introduced a booking system, which involves the use of a diary that she maintains. She confirmed that Ireland's Three Tenors performed a concert in the hall on 6 August 2016. She further testified that she had noticed Mr Larkin in and around the centre in January 2017 on at least two occasions, although at that time she did not know who he was, prompting her to raise it at a committee meeting.

40. That concluded the evidence.

Analysis

41. There is no doubt that Mr Larkin suffered a serious injury in the sports hall at the Foy Centre on 12 July 2016. The questions in this case are essentially twofold; first, 'what caused it?'; and, second, if the answer to that question is that the proximate cause was the presence of a sticky residue or substance on the floor there, 'was there some negligence or breach of duty on the part of the defendant company as occupier or manager of that premises in causing or permitting that to be so?'

42. In that context, there are, in substance, two strands to Mr Larkin's case. The first is his uncontroverted, though uncorroborated, evidence that, in the immediate aftermath of his accident, he noticed a sticky residue on the floor at the point where he fell. The second is that the sticky residue in question came from the remains of duct tape that had been used on some prior occasion to secure temporary carpeting on that floor.

43. On the first strand of Mr Larkin's case, it is striking that neither his own witness Mr Farrell nor the company's witness Mr Dunne, each of whom was present in the sports hall at the time of the accident gave any evidence concerning a sticky residue on the floor. To that extent, the conflict between the evidence of those two young men is immaterial. Whether Mr Larkin's fall came about in the course of a sudden change of direction or in the course of a tackle, the real issue is whether the proximate cause of that fall was the

presence of a sticky residue on the floor for which the company is responsible. I have no doubt about the honesty and sincerity of each of those witnesses. But the accident occurred suddenly and without warning during inherently frenetic sporting activity and, more fundamentally, neither witness appears to have been asked to provide his recollection of events for some time after the accident occurred.

44. The second strand of Mr Larkin's case involves some necessary inference or conjecture, depending on the view one takes of the evidence. Mr Larkin took two photographs on his mobile phone, one in late July or early August 2016, the other in January 2017. Each depicts another part of the floor of the sports hall with what appears to be a segment of duct tape stuck to it. However, no such segment of duct tape was present when Mr Burke conducted his inspection on 22 February 2019.

45. Nonetheless, Mr Larkin invites the court to conclude from those photographs that there was masking tape present on the floor of the sports hall between July/August 2016 and January 2017 and, from that proposition to infer (or conjecture) that, on the balance of probabilities, there was some residual masking tape present on the part of the floor where Mr Larkin fell on 12 July 2016, creating the sticky residue that he says was present there.

46. However, two other pieces of evidence militate against that inference or conjecture. First, there is the evidence of Ms Higgins, who I found to be an honest and direct witness, that she inspected the floor several times a week before conducting her fitness classes and had never discovered any sticky residue on it. Second, there is the unchallenged evidence of several witnesses on behalf of the company that the temporary carpeting had not been installed at any time between December 2015 and 6 August 2016, when Ireland's Three Tenors performed a concert in the hall. From the relatively intact appearance of the segment of duct tape in Mr Larkin's photographs, that invites a countervailing inference or conjecture that Mr Larkin is mistaken in his assertion that he took the first photograph, described as Image B, prior to 6 August 2016. And if that duct tape was not present on the floor of the hall prior to 6 August 2016, it significantly undermines Mr Burke's inference or conjecture about the presence and nature of the sticky substance that Mr Larkin asserts was present on another part of the floor on 12 July 2016.

47. For that reason, it is particularly unfortunate that Mr Larkin made no formal report of his concerns to the management of the centre. It is understandable that he did not do so in the immediate aftermath of his accident, as he was undoubtedly in great pain and, in all probability, in shock. However, it is less understandable that he did not formally report those concerns at any time over the succeeding days, weeks or months, until he caused his solicitor to write a letter of claim to the company in February 2017. In evidence, Mr Larkin said that he spoke to Mr McKeivitt about his accident 'within weeks' of its occurrence when he ran into him locally. However, Mr McKeivitt was emphatic in his evidence that no such conversation occurred and that the first he heard of Mr Larkin's accident was when Mr McGuinness came to him with the letter of claim from Mr Larkin's solicitors many months later. While I do not doubt Mr Larkin's sincerity, I conclude that he must be in error on this point as I prefer the evidence of Mr McKeivitt. I do find it difficult to understand why Mr Larkin was taking photographs of the floor of the hall in July or (as I conclude, more probably) in August 2016 and in January 2017 without bringing the issue formally to the attention of the management committee, even if I were to assume that he had briefly spoken to Mr McKeivitt about it on encountering him in the locality during that period. The unfortunate consequence of the way in which Mr Larkin approached the matter was that any opportunity to conduct a prompt investigation of the cause of the accident was lost.

48. One other matter was the subject of some little controversy in the course of the trial, and that was the configuration of the temporary carpeting when installed. Mr Larkin was adamant that, when he had attended a school play with one of his children in the month of December prior to his accident, the temporary carpet had been laid from wall to wall. That was certainly the configuration evident from certain photographs on Facebook of an event held at the centre in 2014. However, the defendant's witnesses were broadly consistent in their evidence that, in more recent times, the temporary carpeting was configured to leave the sides of the hall and a central aisle uncovered, in order to permit easier access for prams and buggies. The peculiar thing about this dispute was that the defendant's evidence lends support to the plaintiff's case more obviously than his own evidence on the point does. In indicating during cross-examination where the accident occurred by reference to one of Mr Burke's photographs of the floor of the hall, Mr Larkin pointed to a spot approximately a metre away from the wall. It is not obvious to me how Mr Larkin's insistence that the temporary carpeting was installed from wall to wall supports the hypothesis that any sticky residue present on the floor approximately one metre from the wall should be considered, on the balance of probabilities, to be the remains of duct tape used to secure the carpet. In the heel of the hunt, I do not think that the resolution of that controversy is especially material to any of the issues I must decide.

Conclusion

49. As s. 3(2) of the Occupiers Liability Act 1995 makes clear, the common duty of care owed by an occupier of premises to a visitor means a duty to take such care as is reasonable in all of the circumstances "having regard to the care which a visitor may reasonably be expected to take for his or her own safety". There is no doubt that the common duty of care on the defendant company, under s. 3(1) of the Act of 1995, as the occupier of the centre would extend to taking reasonable steps to ensure that a sticky residue was neither caused nor permitted to be present on the floor of the sports hall while it was being used for activities like playing indoor football. There is also no doubt but that Mr Larkin, as a visitor, would also be expected to take reasonable care for his own safety

50. As with so many other aspects of the law of torts, the correct approach to the issue of proof of negligence is succinctly stated by the authors of McMahon and Binchy, *The Law of Torts*, 4th edn. (Dublin, 2013) (at para. 9.01) in the following way:

'As a general rule, a plaintiff in an action for negligence must plead and prove negligence on the part of the defendant in order to succeed. The plaintiff must convince the judge, on the balance of probabilities, that the defendant was negligent. Anything less will not be sufficient.'

51. As many eminent authorities, including the work just cited, also point out, the plaintiff's evidence must pass beyond the region of pure conjecture and into that of legal inference, although the dividing line between those two concepts is often a very difficult one to draw. In this case, Mr Larkin has failed to satisfy me on the balance of probabilities that there was a sticky residue present on the part of the floor where he fell on 12 July 2016 and, by a slightly wider margin, has failed to convince me on the balance of probabilities, that an inference should be drawn that any such substance that may have been present there was the remnants of adhesive duct tape previously used to secure temporary carpeting that the defendant company had caused to be there or had failed to properly remove from there, or both.

52. For those reasons, Mr Larkin's claim against the defendant company is dismissed.