[2019] IEHC 301

THE HIGH COURT

RECORD NO. 2014 891 P

BETWEEN:

SABRINA DOUGLAS

PLAINITFF

AND

MICHAEL GUINEY LIMITED

AND

ROGERIO JOAO

DEFENDANTS

JUDGMENT of Mr Justice Bernard J. Barton delivered the 8th day of April 2019

Introduction

1. The Plaintiff was born on the 27th July, 1980, and is a separated mother of two children aged eleven and nine. She resides at 20 Pike Avenue, Garryowen, County Limerick and lives in difficult social circumstances. At the material time giving rise to these proceedings the Plaintiff was employed by the 1st Defendant as a part time sales assistant. The incident in respect of which these proceedings are brought occurred in the course of the Plaintiff's employment on the 21st September, 2011, at the 1st Defendant's shop premises William Street, Limerick.

2. The Plaintiff alleges that she was first subjected to verbal abuse and was then assaulted by the 2nd Defendant with a bicycle locking chain; she was struck on the right hand and on the right-hand side of her head. The incident was captured by closed circuit television cameras (CCTV) located in the shop. The footage was retained and featured prominently in the course of the trial. The 2nd Defendant was arrested at the scene and was subsequently charged with assault contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997, (the 1997 Act). He was legally represented and having viewed the relevant portions of the CCTV footage pleaded guilty to the offence. The case against the 2nd Defendant in these proceedings was brought in trespass to the person, however, he did not appear and the Plaintiff did not proceed against him.

3. The case against the 1st Defendant is brought in negligence and for breach of statutory duty pursuant to the provisions of the Safety, Health and Welfare at Work Act 2005 (the 2005 Act) and the Safety Health and Welfare at Work Act Regulations 2007. (the 2007 Regulations). A defence confined to traversing the pleas and particulars of negligence and breach of statutory and pleading no vicarious liability for the 2nd Defendant's wrong was delivered on 17th December, 2015. This was followed much later by an amended Defence delivered the 15th February, 2019 which put the assault in issue and for the first time raised a plea that the Plaintiff was the author of her own misfortune and was guilty of contributory negligence.

4. The original defence had proceeded on the premise that the Plaintiff had been assaulted as she had alleged, consistent with the 2nd Defendant's guilty plea to the s.3 offence. The reason for what are significant differences between the two defences was advanced on affidavit by the first Defendant's solicitor, sworn the 2nd August 2018, to ground an application for liberty to deliver an amended defence. The essence of the explanation is

that when the CCTV footage was analysed by a security consultant retained by the 1st Defendant, it became evident that the defence first delivered did not reflect what had actually occurred; the recorded footage disclosed no evidence of an assault.

5. The first defence had advanced the case that the 1st Defendant was not vicariously responsible in law for the assault by the 2nd Defendant; he had concealed the chain on his person and had produced it without warning momentarily before striking the Plaintiff, circumstances over which the 1st Defendant had no control or notice. On the face of it a perfectly good defence, however, for the reasons which follow I am satisfied there is no factual basis on which it could be sustained.

6. Apart from being put on proof of the assault by the amended defence the case made to found the allegation that the Plaintiff was the author of her own misfortune and was guilty of contributory negligence is that she took possession of the chain before the incident had occurred, that she escalated the situation when the second Defendant subsequently took hold of it and that she had grabbed the chain and had tried to pull it from him on two occasions, causing herself to be struck in the process. Furthermore, the Plaintiff had failed to comply with the training and safety instructions which had been given to her and had failed to comply with and observe the provisions of the Employee Handbook concerning guidance on how to behave towards customers.

Conclusion on Training and Instructions; Aggressive Customers

7. I accept the Plaintiff's evidence that she had not been trained nor had she received instruction on how to deal with an aggressive customer and having read and considered the Employee Handbook proved in the course of the evidence I am also satisfied that this did not provide sufficient guidance or adequate information on how to behave towards a customer who became aggressive for whatever reason.

CCTV Footage

8. Given the issues raised by the amended defence it was hardly surprising that the relevant CCTV footage featured very prominently in the course of the trial; the content proved to be extremely controversial. It is common case that some of the images are difficult to decipher and are thus actually inconclusive. Moreover, the footage was recorded at three frames per second rather six to eight frames which would have been the minimum required to capture everything which had occurred in real time and in this regard, I accept the evidence of Mr. Sears that at least 50% or perhaps a little more of what occurred was not captured at all on the footage.

Conclusion;

9. I am satisfied and find that the recording frame rate provides the most likely explanation for the propositions canvassed and questions put on behalf of the 1st Defendant during cross examination by Mr. McCartan S.C. as to why the footage failed to disclose elements of the alleged assault about which the Plaintiff had given evidence, such as being struck on her right hand by the chain. It follows that in determining what had occurred leading up to, at and immediately after the incident the Court is largely dependent on oral evidence, on the recorded footage and the inferences which may properly be drawn from that.

Risk Assessment and Safety Statement

10. With regard to compliance with the statutory requirement to have undertaken a 'Risk Assessment' and to have prepared a 'Safety Statement' which took account of the assessment findings, it was quite correctly accepted by Mr. McCartan, as I think it had to be having regard to the evidence of the store manageress, Ms. Stubbins, that there was no safety statement or formal risk assessment within the meaning of those terms as set out in the 2005 Act.

11. However, it was submitted by Mr. McCartan that this deficiency was not causative of the incident and that whatever the outcome of the factual controversy the 1st Defendant was not vicariously liable in law for the acts or omissions of the 2nd Defendant. It was not accepted that the Plaintiff was assaulted but if the Court found that she was the only cause of action upon which any legal liability could attach to the 1st Defendant was in negligence and breach of statutory duty for its own acts or omissions rather than those of the 2nd Defendant; in fairness to the Plaintiff neither Mr Downing S.C. nor Mr Johnson S.C. suggested otherwise on her behalf.

The Incident

12. There are conflicting recollections as to what happened on the day. Apart from the Plaintiff the only other witness who was present at the scene and who gave evidence was a fellow employee, Mr. Pinto. The only other real evidence of the incident is the CCTV footage. The store detective, Mr. Kelly saw a situation developing on the CCTV monitor to which, on his evidence, he reacted but the incident had already occurred moments before he arrived on the scene. It was suggested that he had arrived there shortly before hand but for reasons which follow later I am satisfied that was not so.

13. Mr. Pinto, who was called on behalf of the Plaintiff, gave evidence that he had used a tannoy system to call Mr. Kelly whose evidence in that regard was that he could not recall one way or the other, rather he had responded to a situation he had seen developing on the monitor. Either way it is clear he reacted by leaving his station and proceeding to the scene. CCTV footage captured by other cameras shows that he did so in a hurried fashion and without stopping. When the CCTV footage is considered together with his evidence, which I accept, it is apparent and the Court finds that he arrived momentarily after the incident had taken place. Other members of staff, including the Manageress Ms. Stubbins and her assistant, Ms. Stelmasczuk were not in the store; they had left at around 11 AM to go to a café nearby on a mid morning break

14. The Plaintiff's recollection was that shortly before the incident she had left the counter after speaking with the second Defendant who was looking for a refund of the purchase price of the bicycle locking chain he had bought the previous day from Mr Pinto. She went to speak to Ms. Stelmasczuk, referred to during the trial as Agnes, after the second Defendant refused to accept that he could not get a refund without a receipt. In this respect, I am satisfied she is mistaken in her recollection. Although she certainly left the counter as evidenced on the CCTV footage and may well have gone to look for Ms Stelmasczuk she could not have spoken to her because she had left the store with the Manageress to go on the mid-morning break. Ms Stubbins also gave evidence that she

would not have told the Plaintiff about the break and the Plaintiff would not have been aware they were not in the store at the time.

15. The first Defendant had a policy on refunds and exchanges. To obtain a refund it was necessary for the customer to produce a sales receipt; no receipt no refund. As the second Defendant had no receipt if any flexibility was to be afforded to him it would have required sanction by Ms Stelmasczuk or Ms Stubbins Although the Plaintiff's duties involved dealing with refunds, returns and exchanges she could not have given the second Defendant a refund without a receipt. Having failed to get authority the Plaintiff returned to the counter where, as is evident from the CCTV footage, she persisted in repeating the company policy which the second Defendant quite clearly refused to accept.

16. Detective Garda Nash gave evidence of having answered a call to attend at the first Defendant's premises to investigate a report of a serious assault. His evidence was that when he and Garda Lynch arrived it was necessary for them to assist the store detective Mr. Kelly and a number of other people who were trying to restrain the second Defendant. He described the second Defendant's demeanour as being extremely aggressive, an assertion about which there was no controversy. Mr. Kelly, who tackled the second Defendant momentarily after the incident, described him as a very strong man. Detective Garda Nash, also gave evidence that the second Defendant was inebriated and that when he was medically examined by a doctor at the police station where he had been taken after arrest he was certified unfit to be interviewed for at least four to five hours because of the level of intoxication.

17. The Plaintiff's evidence was that she noticed there was something untoward or not quite right about the second Defendant's demeanour but she did not realise this was due to intoxication. He would not accept that he could not get and that she could not give him a refund without a receipt; he became verbally abusive and he did so she told him not to speak to her in that manner; the situation immediately escalated. The second Defendant took the chain off the counter, where it had been put by the Plaintiff, and used it to strike her on the right hand. She tried to defend herself and pushed him away but he then struck out again with the chain which hit her on the right-hand side of her head and face causing a laceration to the scalp that started to bleed immediately. She said that she had also fallen back against a peg board and had hurt her back. This was one of the movements not recorded on the CCTV.

18. A quite different scenario was put to the Plaintiff by Mr. McCartan namely that she had not hit her back at all. If that had happened, as she had suggested, it would have been captured on the CCTV footage, moreover, the reason she had been hit by the bicycle locking chain was because she had grabbed it from the second Defendant striking herself in the process, a proposition with which the Plaintiff strenuously disagreed.

19. Mr. Pinto is a Portuguese national and fellow employee of the Plaintiff. He had worked for a number of years as a sales assistant in the first Defendants shop premises at Williams Street. He sold the bicycle locking chain and a foot pump to the second Defendant. His evidence was that the second Defendant approached the counter the next day and asked

him for a refund of the money he had paid for the chain. He was aware that the Plaintiff's duties included attending to customers seeking refunds or an exchange of goods; he asked her to look after the second Defendant. She complied with the request and he then went to the assistance of another customer. At all times, he remained in the vicinity of the counter and witnessed the incident. At trial the Plaintiff had no recollection it was he who had asked her to deal with the 2nd Defendant's request or that he was present when the incident took place. However, I am satisfied that this explanation best explains how the Plaintiff and not Mr. Pinto, who had made the sale the previous day, became involved in dealing with the second Defendant's request for a refund.

20. To summarise Mr. Pinto's evidence leading up to the alleged assault, he heard the 2nd Defendant demanding a refund from the Plaintiff, raising his voice and banging the counter with the chain. The Plaintiff had repeatedly told him that she could not refund the money without a receipt; the situation escalated rapidly. He saw the Plaintiff's right hand being struck with the chain. Almost immediately, he noticed blood on her face and reacted spontaneously by putting his hands up and out towards the 2nd Defendant. When questioned on why, if his account was correct, he had not intervened earlier his evidence was that it was not his job to do so. He had not been trained or instructed on how to deal with such a situation and as far as he was concerned any sort of aggressive behaviour was the responsibility of the security officer or the store detective.

In Store Security Arrangements; Whether Breach of Regulations

21. The security arrangements in the store varied depending on the day and on the circumstances. Generally, the CCTV monitoring station, located on the ground floor, was monitored by a security officer on Thursdays, Fridays and Saturdays. On those days the store detective, Mr. Kelly, would patrol the first floor. On the other weekdays, when a security officer was not on duty, he carried out the CCTV monitoring. The incident occurred on a Wednesday and so, in line with the usual security arrangements, the store detective, Mr. Kelly, was posted and present at the CCTV monitoring station.

22. There was a tannoy system in place over which staff could be called and as part of that system there was a microphone at the counter where the Plaintiff and Mr Pinto were stationed. The store detective was dressed in plain clothes. There was quite an issue about whether or not he should have been wearing a badge or should have been wearing some form of security identification and if so whether his failure to be so identified amounted to a breach of the security industry regulations.

Conclusion; Breach of Regulations

23. Given the function of the role I am quite satisfied and the Court finds that Mr Kelly was entitled to be dressed incognito; it would have been different had he been a security officer. Accordingly, the first Defendant was not in breach of any security regulation or for that matter any of the 2007 regulations arising from the non wearing of any form of identification by Mr. Kelly as a Store Detective. I find as a fact that Mr. Kelly's principle function and duty was to detect possible theft rather than to provide security duties in the store.

Decision; Incident; Whether an Assault and Battery

24. I had the opportunity of viewing the CCTV footage running through at three frames per second as well as frame by frame on a number of occasions during the trial. In addition to the evidence of the Plaintiff and Mr Pinto I also had the benefit of the opinions of the security consultants Mr. Gallagher on behalf of the Plaintiff and Mr. Sears on behalf of the 1st Defendant. As mentioned earlier because the CCTV recording was made at three frames per second 50% or perhaps slightly more than 50% of what occurred was not captured on the footage.

25. In civil proceedings such as these the law does not require the Court to be satisfied beyond any reasonable doubt about what occurred at the counter, rather the burden of proof which the Plaintiff carries is to establish the case she has brought on the balance of probabilities. Two scenarios for what occurred were offered to the Court, the first that the Plaintiff was verbally abused by an aggressive customer who then struck her with a bicycle lock chain and the second that the Plaintiff was the author of her own misfortune. It was contended by the 1st Defendant that it was she who had escalated the situation by speaking loudly to the customer and by wagging her finger at him and that this behaviour was contrary to the customer care policy. I took the submission made by Mr. McCartan to be that it was the Plaintiff's wholly inappropriate behaviour which resulted in the incident about which she now complains and that the 2nd Defendant did no more than respond in kind to the tone of speech and the demeanour adopted by the Plaintiff, indeed, frames from the footage show the 2nd Defendant putting out his hand and pointing his finger back at the Plaintiff immediately before the alleged assault.

26. He contended that the injury about which the Plaintiff complains was caused when she reached out and grabbed the chain from the second Defendant, pulling it towards her in the process. She had given evidence that the chain, which she had put back down on the counter, was the second Defendant's property which she then tried to take from him by grabbing it. It was the process of pulling the chain rather than any action of the second Defendant which had caused her to be struck on the right side of her head and face. It was not accepted she had been hit on the hand.

27. The Court is tasked with resolving the conflict between these two very different and contrasting scenarios. I had the opportunity of observing the demeanour of all of the witnesses as they gave evidence and was left with the impression by all that they did the best they could to give truthful evidence. I was also conscious of the period of time which has elapsed since the occurrence of the events giving rise to these proceedings in 2011 and that with particular regard to the Plaintiff that she was very shocked by what had happened and that she went on to develop serious psychological injuries. I am satisfied that a combination of these factors impacted on her negatively and explain in large measure the inaccuracies and inconsistencies in certain aspects or her evidence as well as her inability to recall certain, mainly peripheral, facts.

28. Mr. Pinto was closely cross examined and accepted he had not seen the Plaintiff being struck on the head with the chain though he did see that she was bleeding from there. However, he had seen the Plaintiff being struck with the chain on her right hand. His

impression was that the Plaintiff tried to grab the chain but failed in the attempt; the chain was banged on the counter and then hit her on the right hand. She reacted by reaching out as if to defend herself. Mr Pinto's impression that she had tried to grab the chain is consistent to that extent with the proposition advanced by the 1st Defendant, however, the Plaintiff did not accept she had tried to grab the chain at all quite the contrary. She had simply put out her arm and hand to try and defend herself by pushing the Defendant away. This action was captured on the CCTV footage and corroborated by the evidence of Mr Pinto that she had reached out in what he took to be a defensive action.

Conclusion

29. Having carefully considered all of the evidence on the issue I accept the evidence of the Plaintiff and Mr. Pinto and find that the Plaintiff was subjected to an assault and battery by the 2nd Defendant with a bicycle lock chain. The CCTV footage frame taken at 11:22:15.92 captures the 2nd Defendant's right arm reaching across the counter directly at the Plaintiff. The chain is also seen travelling in the same direction albeit the image is blurred. In this regard, I accept the evidence of Mr. Sears in response to a question of clarification raised by the Court concerning the image. He explained that the blurring was attributable to the speed at which the chain was moving. It had been suggested that the Plaintiff's left hand, over which the chain can be seen to pass, had had hold of the chain. The proposition advanced on behalf of the first Defendant was that although the frame did not show the Plaintiff's left hand closed around the chain the hand reaction seen was consistent with the chain being released. I do not accept that suggestion for the following reasons.

30. Firstly, the frame is a two-dimensional photograph and thus it is not possible to gauge the depth of field. Secondly, the raised left hand is more consistent with an instant defensive reflex and thirdly, even if the Plaintiff had tried to grab the chain Mr. Pinto's evidence was that her attempt to do so was unsuccessful. Moreover, the Plaintiff's attempt to push the Defendant away is consistent with a defensive reaction in response to her right hand having been struck with the chain.

31. Finally, I am fortified in the conclusion which has been reached on this question firstly, by the content of an e mail sent on behalf of the first Defendant at 13:43 on the day of the incident which appears to be a collation of all available information ascertained from those directly or indirectly involved and secondly, by the guilty plea to the Section 3 assault charge, a plea entered by the 2nd Defendant following and with the benefit of legal advice.

Consequences

32. However, it does not follow from the conclusion reached that the 1st Defendant is liable for the injuries and loss suffered by the Plaintiff as a result of the assault. Although she has a perfectly good cause of action in trespass to the person against the 2nd Defendant, I accept Mr. McCartan's submission that it does not follow the 1st Defendant is vicariously liable for the 2nd Defendant's wrongdoing, rather the Plaintiff' must establish the case brought it in negligence and for breach of statutory duty if she is to succeed.

The Law

33. As was made crystal clear by the Court of Appeal in *Martin v. Dunnes Stores* [2016] IECA 85 Irvine J. reaffirmed what has long since been the settled law in a case such as this; the employer is not an insurer for the safety of the employee, rather the duty is to take reasonable care for his or her safety at work. The general duties of the employer under statute are comprised in s.8 (1) of the 2005 Act and require the employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees and extends in particular, without prejudice to the general duty, to the matters set out in sub. s (2)

34. For the purposes of the relevant statutory provisions the meaning of 'Reasonably practicable is set out in s.2 (6) of the 2005 Act which provides:

> *"…that an employer has exercised all due care by putting in place the necessary protective and preventive measures, having identified the hazards and assessed the risks to safety and health likely to result in accidents or injury to health at the place of work concerned and where the putting in place of any further measures is grossly disproportionate having regard to the unusual, unforeseeable and exceptional nature of any circumstance or occurrence that may result in an accident at work or injury to health at that place of work."*

35. Section 13 of the 2005 Act also imposes on employees duties of care for their own safety which, amongst other obligations set out in sub. s (1), require compliance by every employee with the relevant provisions of the Act to take reasonable care to protect his or her safety, health and welfare as well as the safety, health and welfare of any other person who may be affected by the employees' acts or omissions at work.

36. The statutory scheme for the safety of all those at a place of work established by the 2005 Act includes an obligation on the employer to carry out an identification of hazards in the work place and to be in possession of a written 'Risk Assessment' (s 19). In addition, the employer is required to arrange for the preparation and to be in possession of a 'Safety Statement' (s.20) based on the hazard identification and risk assessment carried out under s.19, which specifies the manner in which the safety, health and welfare at work of his or her employees is to be secured and managed. In evidence Mr. Sears expressed the view that it was not necessary to have a risk assessment in writing, a view which is clearly incorrect having regard to the provisions of s.19; the 'Risk Assessment' must be in writing as must the 'Safety Statement'.

37. Although Mr. Sears did his best to identify the provisions of the employee handbook regarding security and customer relations in what I took to be an attempt to establish compliance with statutory requirements, in so far as these provisions are relevant to the issues under consideration here it is clear that the 1st Defendant had not carried out a hazard identification nor had it prepared a consequential 'Risk Assessment' or 'Safety Statement' within the meaning of the 2005 Act; the relevant provisions of the employee hand book do not suffice for this purpose. Subsequent to the events giving rise to these

proceedings the relevant statutory requirements have been satisfied though the Court is not privy to the content of the resulting 'Risk Assessment' or 'Safety Statement'.

Submissions; First Defendant

38. As already mentioned at the outset Mr. McCartan urged the Court to conclude that the absence of a 'Safety Statement' and 'Risk Assessment' at the material time, constituting as it does a breach of the 2005 Act, was not in any way causative of the assault and battery on the Plaintiff. On his submissions, the breach of statutory duty in this respect was irrelevant to the issue of liability. The essence of the submissions made otherwise was that there was nothing more the 1st Defendant could reasonably have done in the circumstances to comply with its obligations for the Plaintiff's the safety, health and welfare at work.

39. The security system in place at the time was perfectly reasonable and adequate; it was standard in other businesses in the area. Mr. Kelly had kept his eye on the monitor as he was asked and responded appropriately in a timely and proper manner as soon as it became apparent something untoward and out of the ordinary was occurring. There was an intercom system in place to call Mr. Kelly about which the Plaintiff was aware but had failed to use. Furthermore, the Plaintiff's response to the 2nd Defendant's demands was contrary to the customer relations provisions of the employee handbook about which it was contended she was also aware. In this regard she, like Mr Pinto, had been taken through the handbook as part of her induction by the Manageress. Instead of behaving courteously and if necessary standing back and diffusing the situation or going to seek help and advice she had done the opposite; she had admonished and her demeanour had antagonised the customer.

Submissions; the Plaintiff

40. On behalf of the Plaintiff Mr. Downing drew the attention of the Court to the provisions of the 2005 Act referred to earlier as well as to the decision of the Court of Appeal in *Martin v. Dunnes Stores (Supra).* The precautions by way of training and instruction for the safety of the employees put in place by the defendant in that case were found by the court to have complied with the statutory requirements of the 2005 Act.

41. He submitted that unlike the situation in *Martin*, the training and instruction which should have been afforded to the Plaintiff was missing and that this was the nub of the case. The 1st Defendant could not rely on the Plaintiff's behaviour, about which complaint was made, to relieve itself of liability for the consequences of its failure to comply with the relevant statutory provisions by attributing the cause of the assault to the Plaintiff.

Decision;

42. Ms. Stubbins gave evidence that she had taken the Plaintiff through the employee handbook. The Plaintiff disputed this and gave evidence that she had never been instructed or trained on how to deal with an aggressive customer. She was supported in this assertion by Mr. Pinto, who also gave evidence that he had not received any instruction or training on how to deal with an aggressive customer. I accept the evidence of the Plaintiff and Mr. Pinto in this regard.

43. On my view of the evidence and the submissions it is unnecessary to determine whether or not the Plaintiff or Ms Stubbins is mistaken in this regard since even if this had been done the Court has found that the provisions of the handbook on which the 1st Defendant relied did not satisfy the statutory requirements with regard to training and information. Furthermore, in my judgment they would not have been sufficient to equip the Plaintiff to deal with the situation in which she found herself.

44. Although the evidence of Ms. Stubbins was that there had never been an incident like this before or since, the risk of injury arising from an aggressive customer, particularly one who is intoxicated or under the influence of drugs, is far from removed from fancy; sadly, such is all too real in the world of the early 21st century. Anti social and unlawful behaviour is precisely why shops and all types of premises to which the public have access are required to be staffed by security personnel and fitted a myriad of security devises such stock alarms and CCTV monitoring systems.

45. Moreover, specialisation has developed apace with store detectives and security officers receiving special training and instruction on how to deal with potentially troublesome situations, including those which might give rise to aggressive behaviour such as where, for example, a person is detected shop lifting and placed under restraint or where an unruly argument breaks out between customers or between a customer and a member of staff. The risk of such and the necessity to make provision to deal with it is reflected to a certain extent in the evidence of Mr. Pinto that it was not his job but that of the security officer or store detective to deal with the problem. In the context of the case against the 1st Defendant the essential point is that risk of such behaviour was reasonably foreseeable.

46. The Plaintiff had the responsibility of dealing with refunds and returns. On my view of the evidence it was reasonably foreseeable that a customer, particularly a customer who was under the influence of alcohol or drugs such as the 2nd Defendant, might well react aggressively and behave in a threatening and abusive manner if refused a refund as happened in the circumstances of this case. Although clearly not relevant here, given what occurred it would certainly come as a surprise to me if the subsequent risk assessment and safety statement did not identify the risk arising and make provision for training and information on how to deal with an aggressive or intoxicated customer.

47. We shall never know what a properly and professionally executed risk assessment would have identified in terms of hazards and if undertaken what safety measures would have been put in place prior to September 2011. In my judgment, the risk of injury arising as a result of having to deal with aggressive behaviour in a customer for whatever reason was reasonably foreseeable without ever having recourse to the provisions of the 2005 Act. Accordingly, quite apart from its statutory obligations, there was a common law duty of care and the 1st Defendant's staff, particularly those whose duties involved dealing with customers in circumstances with the potential to result in anti-social or aggressive behaviour, ought to have received training and instruction on how to deal with same. It

follows that the failure to provide such was a breach by the 1st Defendant not only of its statutory duty but also its common law duty of care to the Plaintiff.

48. For completeness, I should add that Mr. Kelly most probably answered a call for assistance made by Mr. Pinto over the tannoy system, a conclusion consistent with Mr Pinto's evidence that it was not his job but the job of the security officer or store detective to deal with an aggressive customer. To be fair to him Mr Kelly could not recall whether he had answered a call but accepted on occasion he had responded to such calls and that the tannoy was one ways he could have been called to assist.

49. Mr Pinto also gave evidence that Mr Kelly arrived and was present in the area before the assault took place. In this regard, I am satisfied he was mistaken and I accept the evidence of Mr. Sears this did not happen. CCTV footage recorded by another camera was commented upon by Mr Sears and was said to show that Mr Kelly hurried from the monitoring station without stopping until he arrived at the scene and that he arrived there momentarily after the assault had taken place.

50. The Plaintiff's evidence was that prior to the assault she had gone down to Mr. Kelly and alerted him about her concerns. Mr. Kelly's evidence was that she had just asked him to keep an eye on the 2nd Defendant and that he did so via the monitor, using the zoom facility on the security camera which was located high up on the wall in the vicinity of the shop counter. The CCTV footage recorded through that camera is corroborative of his account. However, what seems to me to be crucial in terms of causation is that neither the Plaintiff nor Mr Pinto had received any training or instruction on what to do if they found themselves in a verbally heated or other confrontational situation. It seems highly likely that had appropriate training, information and instruction been afforded to them the situation would not have escalated or would certainly not have escalated to the point where an assault took place.

Conclusion; Negligence and Breach of Statutory Duty.

51. For all these reasons, the Court finds that the Plaintiff has discharged the burden which the law places on her to establish, on the balance of probabilities, the case made against the 1st Defendant. It follows that the 1st Defendant is liable in negligence and for breach of statutory duty for what befell the Plaintiff and the consequences thereof.

Conclusion; Contributory Negligence

52. As far as the question of contributory negligence is concerned, the Court finds that it would be wrong in law to find the Plaintiff guilty of contributory negligence and breach of statutory duty in circumstances where she had received no training or instructions on how to deal with a confrontational situation such as that in which she found herself with the second Defendant.

Quantum

53. The Plaintiff's credibility was called into question as a result of certain inconsistencies in some of the answers to questions she gave in the course of her evidence. I had the opportunity, as I had with the other witness who gave evidence, to observe her demeanour and made some general comments in this regard earlier in the judgment. I

found her to be a credible witness and was satisfied that the nature of the injury she sustained explains in large measure her deficiencies in recollection which she very fairly accepted, on more than one occasion, when being cross examined. It would be remiss of me in this context if I failed to refer to the Plaintiff's minimisation of her physical injuries, which speaks to her good character. Although hidden within the hair line, she has a permanent scar at the site of the chain laceration to the right side of her scalp about which she could have complained but chose not to do so and I was impressed by that.

Pre-Accident Medical History

54. The Plaintiff was involved in a previous accident on 15th May, 2010. She was knocked to the ground by a drunken patron while attending the Angel Lane Night Club at Robert's Street, Limerick. As a result of that accident she suffered a head injury in the fall as a result of which she sustained a wound which bled at the time. She also suffered soft tissue injury to her neck and her back. She was shocked after the accident, a sequela that featured in cross examination, particularly of Dr. Corby, the Plaintiff's GP. The head wound was attended to at the scene by a medic and she was subsequently taken to the Accident and Emergency Department of the Mid West Regional Hospital where she was prescribed pain killing medication.

55. I pause to note here, because it was an issue in the case that the Plaintiff subsequently discontinued the medication which had been prescribed for her physical injuries. As a result of the accident she developed headaches in addition to neck and back pain. She had soft tissue bruising at the base of her spine. The head wound left no scar. The headaches cleared up after a month and the neck pain cleared up after a week, however, she continued to experience some intermittent back pain, particularly when carrying out house work chores and lifting her children; sometimes the pain woke her night. Vocationally the Plaintiff was minimally affected by her injuries; in this regard, I note that she returned to work within two days. As it happens her employer at the time was the 1st Defendant.

Court Proceedings

56. The Plaintiff brought circuit court proceedings for loss and damage a result of the fall. Medical reports dated 14th February, 2012, and 14th October, 2013, were prepared for those proceedings by a GP, Dr. Mary Ryan and have been read by the Court; they featured during cross examination. The solicitors with carriage of the circuit court proceedings are also the solicitors for the Plaintiff in this case. The replies to particulars in those proceedings expressly refer to the assault and to the injuries the subject matter of these proceedings. Finally, a copy of the pleadings and the medical reports of Dr. Mary Ryan were furnished to the 1st Defendant in as long ago as August, 2015. The circuit court proceedings were compromised for a very modest sum.

The Assault Injuries

57. Medical reports for these proceedings were prepared on behalf of the Plaintiff by her GP, Dr. Kelly, and by a psychiatrist, Dr. Corby; both physicians gave evidence. Their reports were received by the Court as an aide-memoire. No medical evidence was led on behalf of the 1st Defendant. I pause to observe here that Dr. Kelly was aware of the 2010 accident

and the resulting sequelae but did not report or give evidence in the circuit court proceedings. He was questioned about this when he gave evidence and was also asked why he had not mentioned that accident and the injuries arising in the medical reports prepared for these proceedings. His reply was that although he knew about the injuries he didn't mention them because he considered they were entirely different and therefore not relevant to the injuries in these proceedings.

58. The Plaintiff suffered a laceration to her right fingers. In this regard, the report refers to bruising seen on both hands but the Plaintiff made no reference to her left hand in evidence. In fact, she only mentioned her right index finger notwithstanding that Dr. Kelly's report is very clear that all of the fingers on her right and left hands were bruised. However, in so far as there was bruising to her fingers I am satisfied the principle injury in this area was to the right index finger.

59. The Plaintiff was also struck by the chain to her head and face. Her left cheek and scalp was lacerated. The cheek laceration left a red mark which gradually resolved completely, leaving no blemish. The scalp laceration also healed but left a permanent scar within the hairline located above and in line slightly to the right of the lateral end of the right eye brow. It starts inside the hair line and is completely covered by hair. At the time of the assault the laceration inside the hair line bled. The Plaintiff made no functional complaint about the scar, such as when brushing her hair.

60. She also gave evidence of having hurt her back as a result of the assault. She had recoiled backwards and had hit her back against a peg board in the process. She was closely cross-examined about this by Mr. McCartan; nothing such was captured on the CCTV footage. However, as already indicated the footage only captured about 50% of what actually happened. In any event the Plaintiff made little or nothing of this injury. Whatever injury was caused it was very minor, described by the Plaintiff as momentary hurt rather than an injury as such and the Court so finds.

61. The Plaintiff was taken to St. John's hospital by ambulance. She did not remember how she got to hospital, but I am satisfied that she was taken there by ambulance and was attended to. She had received first aid in the shop canteen where staff members witnessed bleeding from her scalp. Although the scalp laceration left a permanent scar it did not require suturing. The principle injury sustained as a result of the assault was psychological rather than physical; the sequelae of which continue to this day.

Psychological Injury

62. The Plaintiff was very shocked by the assault and when she attended Dr. Kelly shortly afterwards he noted that her pulse was racing, that she was very tearful, stressed, anxious, complaining of fatigue and unable to sleep properly. I am satisfied the Plaintiff attended Dr. Kelly frequently over the next couple of months, that her symptoms continued and that Dr. Kelly was concerned they would deteriorate. He was concerned that the Plaintiff would develop depression, as indeed she did. In addition to the foregoing the Plaintiff also started to experience panic attacks. She developed a phobia about going to town or putting herself into any situation which involved mingling with crowds or

socialising with strangers; she became socially withdrawn. She also experienced feelings of guilt about what seemed to her to be a diminution in her ability to look after her children and an inability to face a return to work.

63. Dr. Kelly diagnosed a post-traumatic stress disorder and a depressive disorder for which he prescribed anti depressant medication and referred the Plaintiff to St. Anne's Day Psychiatric Hospital for assessment. Following assessment, she was referred to and attended counselling therapy under Mr. Michael Jennings. The Plaintiff's GP prescribed Zeroxat and subsequently Lexipro; medications designed to help treat psychological symptoms.

64. Her evidence was that she did not like taking medication and disliked the feelings that she experienced as a result; she discontinued the medication prescribed by her GP; as she had following the accident in 2010. The Plaintiff also gave evidence that she became very emotional and described how she felt just not being herself in contrast to her pre-morbid personality; prior to the assault she described herself as a very outgoing, friendly kind of person who enjoyed social interaction but all this all changed. She became socially withdrawn and unable to face going out. She remained emotionally unstable and upset and reached a point where she hated herself. In this regard, I noted a reference in the medical report of Dr. Corby that at a relatively early stage following the assault she had contemplated suicide, not a term used by Plaintiff, though this coincided with the period where she described hating herself.

65. She benefited from the counselling sessions with Mr. Jennings and about eight months after the assault she attempted to go back to work with the 1st Defendant; this turned out to be a disaster. She could not cope at all and within one day she knew she had to give up. She could not cope with customers or with people asking her about herself. She never attempted to return to work with the 1st Defendant and ultimately resigned her employment in 2012. The Plaintiff previous relationship with the father of her children had ended and he had returned to central Europe prior to the assault. Whatever the terms of the couple's separation, to which the Court is not privy, the situation in terms of the Plaintiff's ability to cope were so bad that he was persuaded to come back to Ireland to help look after the children; He remained here for approximately eighteen months.

66. Apart altogether from the anxiety, distress, fatigue, emotional upset and depression, the Plaintiff also suffered from nightmares and day time flashbacks of the incident. These sequelae turned out to be a significant in the context of the Plaintiff's previous medical history. Dr. Corby explained that from the clinician's point of view the content of these flashbacks and nightmares are particularly important because they are indicative of cause. This evidence arose from questions put to Dr. Corby that the Plaintiff had previously included a psychological injury, one of shock, in her claim arising from the 2010 accident. Dr. Corby said that although she was unaware of that claim she explained to the Court that this had no bearing whatsoever on her opinion or her view of the Plaintiff. In carrying out her assessment she had placed particular reliance on the content of the nightmares and the flashbacks since the descriptions of those were indicative of

cause and in her case, it was significant that they related in every instance to the assault. I accept Dr Corby's evidence and find that the psychological sequelae suffered by the Plaintiff are attributable in their entirety to the assault.

67. I am fortified in reaching this conclusion by the medical evidence in the circuit court proceedings where it appears that apart from the mention some shock in the pleadings it essentially does not feature in Dr. Ryan's reports as a sequela and when Dr. Corby was shown Dr. Ryan's reports she said, *"as far as I can see this is really more physical injuries."* And so it appears.

68. Returning to the consequences of the assault, the Plaintiff developed what Dr Corby described as de personalisation and de realisation behaviours evidenced by social withdrawal and avoidance. When assessed by Dr. Corby in March, 2019 she noted that the Plaintiff was still exhibiting depressed mood and was tearful during interview. I pause here because I noticed over the course of her evidence that the Plaintiff became emotional at times, she did not cry but one could hear it in her voice, the quivering. Otherwise she understated the significant and negative impact which this assault has had and was clearly continuing to have on her.

69. I found the evidence and the responses of Dr. Corby, particularly under cross examination, most instructive especially with regard to the present and prognosis. In her opinion, the Plaintiff continues to meet the requirements of the DSM 5 criteria for the diagnoses of post-traumatic stress disorder. It seems to me that that is particularly significant given the period of time which has elapsed since the assault.

70. The Plaintiff developed a depressive disorder which Dr Corby categorised as one of moderate severity. In order to get her illness into proportion, the Plaintiff's psychiatric illness was not something that required her to be hospitalised. It has certainly been prolonged but is not is approaching anything like the worst type of post-traumatic stress disorder resulting in periods of hospitalisation, some of which can be prolonged. This case does not fall into that category.

Vocational Implications

71. The symptoms of the post traumatic and depressive disorders from which she suffered impacted negatively on the Plaintiff's ability to return to the workforce. To her credit I am satisfied that she genuinely wanted to return to gainful employment, at least at some level, and that she had good reasons to do so, not the least of which was to provide for herself and her young family. Apart from the failed attempt to return to work for the first Defendant she subsequently started to do some baby sitting and child minding until 2017 when she managed to secure a part time position in a delicatessen where she continues to be employed.

72. Dr. Corby was cross-examined at some length about the Plaintiff's failure to comply with medical treatment and in particular her failure to remain on medication. Indeed, it was submitted by Mr. Collins S.C on behalf of the 1st Defendant that the claim for loss of earnings should be limited to date on which she ceased taking the medication. It was

accepted by Dr. Corby that the Plaintiff's failure or her inability to tolerate medication, as she preferred to describe it, had had a negative impact on recovery. However, she explained the severe limitations experienced by the Plaintiff and anyone seeking treatment in the public health system, operating as it was under immense strain and with limited resources. One of the many unfortunate consequences of this state of affairs is that patients aren't followed up and provided with support services, information, encouragement and the necessity to adhere to any treatment regime.

73. Dr. Corby considered the Plaintiff's social circumstances and educational background would also have militated against optimising her recovery and that when all these factors are taken into account it was is understandable why the Plaintiff would not have continued on medication, this apart altogether from any dislike she had for pill taking. She would not have had a full or proper understanding of the importance of continuing to take the medication which had been prescribed for her in order to assist and enhance her recovery.

74. Fortunately, she has now had the benefit of the necessary support and advice from Dr. Corby and has started taking Venlafaxine, a new generation drug which it is expected will prove particularly beneficial to her recovery. It is planned to increase the dose commensurate with tolerance levels in due course. The Plaintiff's nightmares and flashbacks had already diminished over time consistent with gradual recovery to the point that she was able to function at a level sufficient to enable a return to the work force and hold down a job. Although she has experienced a diminution in her psychological symptoms, some of which have almost disappeared completely, the social conditions in which the Plaintiff is living are difficult.

75. She has a very cramped apartment in which to live with two small children and is on the housing list. She is desperate to improve her housing circumstances. Her mother is a deaf mute who was deserted by her father. The Plaintiff has always been close to her mother who is reaching retirement and will need more care as she ages. A larger apartment or small house would enable her mother to come and live with the family. This evidence is relevant to Dr. Corby's opinion on prognosis. In her view, an improvement in the Plaintiff's circumstances would be significant in the context of recovery and would have beneficial impact, as would the end of the litigation. This would have been a negative stressor which, once removed, would also contribute significantly towards enabling the Plaintiff to make a full recovery, an opinion also shared by Dr. Kelly.

Conclusion;

76. I accept the evidence of Dr. Corby and Dr. Kelly; Accordingly, I cannot accept the submission of Mr Collins that Plaintiff failed to mitigate her loss by discontinuing the medication and that her claim for loss of earnings should be terminated at that point in time. The Courts finds that the Plaintiff suffered relatively minor physical injuries as described earlier in this judgment and that these healed relatively quickly with only one ongoing sequela, a small scar inside the hairline about which the Plaintiff makes no complaint, functional or cosmetic.

77. As the Court has a statutory obligation to refer to the Book of Quantum, for the reasons set out in *Bennett v. Cullen* [2014] IEHC 574 counsel were invited to make submissions in relation to the level of quantum appropriate to the physical injuries but chose not to do so as the categorisation of these is not in question. With regard to the quantification of the psychiatric injuries I accept the submission that the book is of no assistance. While the physical injuries may properly be categorised as relatively minor, the psychiatric injuries are a horse of an altogether different colour. She suffered a post-traumatic stress and depressive disorders. Having regard to the findings made and the conclusions reached it seems to me that if there were a range for the psychological injuries in the Book of Quantum they would have to be categorised as moderately severe. Although the ongoing sequelae are at relatively low level compared to the first two to three years following the assault, when the Plaintiff was assessed as recently as March this year the symptoms were considered sufficient to satisfy the DSM V criteria for the diagnosis of a post-traumatic stress disorder. However, in my judgment, the new medical treatment regime, the Plaintiff's attitude and the impact which the conclusion of the litigation is likely to have on her, it is probable she will progress steadily towards and will make a full recovery in due course.

Quantum; the Law

78. How is the Plaintiff to be compensated for her injuries? The law is well settled; she is entitled to compensatory damages the purpose and object of which is to restore the Plaintiff, so far as may be achieved by an award of money, to the position she was in at the time when the wrong was committed. The underlying principle behind every such award is encapsulated in the Latin restitutio in integrum. Of course, money is an inadequate vehicle for the achievement of the objective in respect of non-pecuniary loss, such as for physical or mental injury. No amount of money is going to put somebody back into the position they were in at the time when the wrong was committed. However, that is the remedy and the only remedy prescribed by the law in a case such as this; where liability has been established or conceded by a defendant the assessment of damages for pecuniary and non-pecuniary loss is an exercise which the Court is required to undertake.

79. In this regard, any award of compensation must be just and to be just must be fair to the Plaintiff and to the Defendant. Not only must it be fair to the Plaintiff and the Defendant it must also be commensurate with and proportionate to the injury and loss suffered; damages must be reasonable. The principles to be applied to the assessment of damages have been set out by Supreme Court and the Court of Appeal in a number of decisions which were recently reviewed by this Court in *BD v. The Minister for Health* [2019] IEHC 173.

Conclusion; Quantum

General Damages

80. Applying the principles to the facts found and conclusions reached the Court considers in the circumstances of the case that a fair and reasonable sum to compensate the Plaintiff for pain and suffering to date commensurate with and proportionate to her physical and psychological injuries is €40,000 and for pain and suffering into the future €10,000.

81. I pause to mention that it seems to me the use of the term 'pain and suffering' in this context is not always fully understood. It extends to cover much more than just the experience of neurological pain from a physical injury or the psychological consequences of that or psychiatric injuries. Those of us who appeared in these kinds of cases when decided by juries will remember that the explanation given to the jury for the meaning in law of 'pain and suffering' extended beyond these consequences to cover other sequelae caused by the wrongdoing such as inconvenience and the interference with the enjoyment of the amenities of life.

Pecuniary Loss

82. With regard to the claim for loss of earnings, it was accepted that at the time of the assault the Plaintiff was in receipt of €435.14, net income per week of which €207 was a social welfare single parent payment and that the Plaintiff received social welfare benefit until March, 2014 firstly, injury benefit and subsequently illness benefit. The Plaintiff's claim for loss of earnings is limited to a total of two years and 20 weeks from the time of the accident. She has not been in receipt of social welfare benefits since that time.

83. It appears that once in receipt of these social welfare benefits one is not entitled to receive other social welfare benefits. I have considered the submissions which have been made on behalf of the parties. In essence, the Court is invited by the first Defendant to disregard the single parent payment in which event, having regard to the amount of social welfare paid, there would be no loss. I accept that all social welfare benefits paid in this instance must be taken into account. As to that an RBA certificate for €35,821.22 has been issued, However, I don't accept that the single parent payment is to be disregarded.

84. The total value of the loss of earnings claimed which €53,957.38, leaving a net difference of €18,136.14 after taking the social welfare payments into account. Applying the principles of law to the assessment of damages for pecuniary loss, if the Plaintiff is to be restored to the position she was in when the wrong was committed her net weekly income at the time must be taken into account. The Court has no discretion in this regard, she has to have the pecuniary loss suffered restored to her and in my view, having taken account of the amount of the RBA certificate, her net loss of earning claim is €18,136.14 to which must be added a small sum in relation to travel, medical and miscellaneous expenses which has been agreed in the amount of €500 making in total €18,636.14.

Ruling

85. Adding the sum of €50,000 in respect of general damages together with the sum of €18,636.14 in respect of special damages; the total amount to be awarded by the Court is €68,636.14. And the Court will do Order.