THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 287

Record Number: 2014/1139

[Article 64 transfer]

Peart J.
Hogan J.
Whelan J.

BETWEEN:

GERALDINE McCARTHY

PLAINTIFF/APPELLANT

- AND -

ISS IRELAND LIMITED (TRADING AS ISS FACILITY SERVICES)

- AND -

THE HEALTH SERVICE EXECUTIVE

DEFENDANTS/RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 13TH DAY OF AUGUST 2018

1. This is the plaintiff's appeal against the dismissal of her personal injuries claim by the High Court (Kearns P.) by order dated the 11th December 2013. It is important to point out that the dismissal of the action did not occur at the conclusion of the plaintiff's case on foot of any non-suit application made by the defendant. At the conclusion of the plaintiff's case, counsel for the defendant simply indicated to the Court that the defendant was not calling any evidence.

2. At the relevant time the plaintiff was employed by the first named defendant as a cleaning supervisor at the Mid-Western Regional Hospital at Dooradoyle, Limerick. She claims that between May 2009 and February 2011 there were five separate incidents in which other cleaning staff whom she supervised, acted in an aggressive, threatening and abusive manner towards her, mainly by shouting and by other aggressive behaviour during the course of their employment, and over time thereby caused her such severe stress and anxiety (including post traumatic stress disorder), humiliation, pain and suffering that she was compelled to leave her employment. She alleges that following the first such incident she reported same to her employer, but that no particular action was taken to prevent a recurrence. She contends that by not taking any sufficient action following her complaint, and her subsequent complaints, her employer allowed a situation to prevail in her work place whereby the cleaning staff whom she supervised felt able to behave in this abusive, threatening and aggressive manner towards the plaintiff with no fear that there would be consequences for them.

3. It is the failure of the first defendant to have acted appropriately to prevent a recurrence following the plaintiff's first complaint, and subsequent failures, that is alleged to constitute negligence on its part, whereby the plaintiff suffered personal injuries as a result of the particular incidents on a cumulative basis, and the atmosphere of intimidation that prevailed in her work against her, and which put her in fear.

4. The plaintiff accepts that each of the five particular incidents which she has recounted were perpetrated by different staff members, and that they were not acting in any coordinated way or in concert. She accepts also that a considerable time elapsed between each such particular incident. She accepts also that the first incident happened 'out of the blue' so to speak, and that her employer could not reasonably be expected to have anticipated or foreseen it. But, as I have said, the gravamen of her case against her employer is that having made a complaint to her employer in the aftermath of the first incident, combined with the failure to act even after subsequent complaints, no steps were taken to prevent a recurrence, and that this failure led to a culture in the workplace where aggressive, abusive and threatening behaviour towards the plaintiff, as their supervisor, was allowed to occur with impunity to the perpetrators, and that the incidents themselves and the atmosphere of fear and intimidation towards her led cumulatively to her suffering such fear, stress and anxiety that she was forced to leave her employment. That is the essence of her claim.

The five particular incidents:
5. The five particular incidents are listed below:-

> (a) The first incident happened on the 28th May 2009. On that date Ms. J who worked as a cleaner under the supervision of the plaintiff, approached the plaintiff and accused her of having made complaints about her in a work audit. Ms. J was accompanied at the time by her husband. They both acted in a very aggressive manner towards the plaintiff. The plaintiff contends that this behaviour amounted to an assault. In particular the evidence was that it was Ms. J's husband who, during the course of this encounter, pinned the plaintiff against a wall and threatened her. She was in fear that he would hit her. Ms. J's husband was not employed by the first defendant. But the plaintiff contends that since Ms. J who was an employee was acting in concert with her husband, the first defendant is vicariously liable for the actions of Ms. J on the occasion. She reported this incident to her employer. She was so distressed by what had happened that she went on sick leave. She attempted to return to work in September 2009 but being still nervous and stressed she resumed sick leave. She did not hear back from her employer as to any steps taken on foot of her reporting the incident.

(b) The second incident occurred some seven months later on the 5th January 2010 when a male employee working under the plaintiff's supervision shouted into her face, and behaved in an intimidating and threatening manner towards her. She was afraid that he was going to hit her. This is said to amount to an assault also. Again, she says that she reported the incident but heard nothing further about it.

(c) The third incident occurred five months later on the 30th June 2010 when another male employee shouted at her. This happened after the plaintiff as his supervisor had asked him not to enter the intensive care unit of the hospital because there was some infection there. He apparently responded to her request by shouting and roaring at her in public and behaved in a threatening and abusive manner. The plaintiff was very distressed about this incident also, and reported it. She says that she heard nothing further about it from her employer.

(d) The fourth incident happened on the 18th July 2010. On that date she had asked another male employee to clean a particular corridor and his reaction to that request was to roar and shout at her using abusive language, saying that it was not his job, and generally intimidated her. The plaintiff was caused great distress by this incident. She again reported the incident. Her evidence was also that on the day following this particular incident her superior asked her if she would take redundancy, and a few days later asked her if she was "one of the McCarthy Dundons" (a Limerick family notoriously associated with criminality in Limerick), and suggested that things were going to get very difficult for the plaintiff.

(e) the fifth and final incident occurred on the 15th February 2011 when the plaintiff was in the course of speaking to her manager about another employee whom she cold not find. It appears that while talking about this to her manager, that employee burst into the room and started roaring and shouting about the plaintiff. The manager told that employee that he was to do what the plaintiff said, but apparently he continued to roar and shout. The plaintiff again became very upset over this incident. She says that once again nothing was done about what had happened, and she heard no more about it from her employee.

6. It is the cumulative effect of these incidents upon the plaintiff's mental health that is relied upon, rather than any one incident, combined with the fact that despite being made aware of what was happening and its effect on the plaintiff the defendant employer took no proper or appropriate steps as employer to prevent any recurrence. The plaintiff contends that if proper steps had been taken after the first incident, and after any subsequent incident she would not have been exposed to the aggression and intimidation that persisted in her workplace and would not have suffered injury to her mental health, and would not have been forced to leave her employment. It is in these circumstances that it is contended that the first defendant was in breach of its duty of care to the plaintiff to provide a safe place of work, and that as a result of such breach she suffered personal injuries, loss and damage.

7. Having heard the evidence the trial judge delivered an ex tempore judgment and dismissed the plaintiff's claim on the basis that she had not made out her claim of negligence against the first defendant. Though not pleaded as a case of workplace bullying as such, the trial judge commenced his ex tempore judgment as follows:

> "This is effectively a bullying in the workplace case and so one looks at a case of this nature for characteristics which go with bullying and which mark bullying out as a particular form of experience that a person has to go through. Markers for bullying might include, for example, repetition, something happening on a daily basis or even less frequently than that, a weekly basis, that a person has to endure. The duration of the particular treatment to which the person is subjected. Thirdly, one looks for indications of escalation of the activity because certainly once more one thing in life teaches is that bullies don't stop, at the first sign of weakness, they on the contrary step up the pressure and increase it and usually look for a disparity in the relevant positions of power and strength of the two sides to the situation. So, for example, a teacher is in a stronger position to bully a pupil. An employer is in a stronger position to bully an employee. A senior employee is in a stronger position to bully a junior employee. As Mr Aylward quite properly pointed out that can flip over at time and we're equally aware of teachers being mercilessly bullied by young pupils and he's made the point, and I think a valid one, that a person in a supervisory capacity can in turn be bullied by those over whom they are supposed to exert control. That can often happen because in the view of those below that supervisor they may feel that they were the ones that should have been appointed to this particular job or for some other reason."

8. Having commenced his remarks in that way, the trial judge then outlined the five incidents referred to. He referred to the fact that each incident was perpetrated by a different employee and referred to the temporal gaps between each such incident. He referred to the first incident being 'out of the blue' and one that the employer could not have anticipated, and that it had been investigated and that Ms. J had never again approached the plaintiff.

9. The trial judge stated that he could not see how any careful employer could have predicted that an episode such as the February 2010 incident would happen. In fact it can be inferred from his remarks that he considered that none of the particular incidents cold reasonably have been anticipated by the employer given the spontaneous nature of what occurred on each occasion.

10. The trial judge went on to state:

> "So, there were these four/five episodes with significant intervals between them and they are brought together by the plaintiff in this set of legal proceedings to argue that here was a situation of, if you like, systemic bullying in the work place. But that case it seems to me is totally undermined by the plaintiff's own evidence. I must in a sense pay tribute to Ms. McCarthy because I felt that she was a very genuine person and she was doing the best she could and honestly she has misconstrued what happened in work totally. She very fairly admits in her opinion, and she was there and she knows the situation, that there was absolutely nothing her employers could have done about any of these incidents, all of which I am satisfied cannot be taken as having occurred in the course of the respective employee's employment. They were not part of their ordinary work or foreseeable that any employee would have behaved in this particular way.
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> Secondly, she accepts that there was no question of any of these people acting in concert or acting in common cause against her. There is no evidence of any feud going on in the work place. It is a very large work place with thousands of employees and so it would have been, I would have thought, fairly easy if there was some sort of conspiracy to carry out this sort of shameful activity that I would have heard about it.
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> But on the contrary, and that would have been indicative of a culture of bullying being tolerated at the work place and I discussed with Mr Aylward how history is full of examples of that sort of culture of bullying perhaps even being encouraged in certain organisations or certainly occurring and one can think of many instances some of which I discussed with Mr Aylward. Even with the thousands of employees working in this particular organisation, not one other single employee has come forward or has been identified as having been bullied or bring forward similar complaints or identifying

> a group of people who were carrying out bullying and I'm left then in a situation where there is a serious, I won't call it serious, but a succession of unrelated events to a greater or lesser degree were upsetting from the plaintiff's point of view.
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> Now, ordinary human life is full of upsets large and small … which don't necessarily give rise to legal liability or responsibility and again one has to ask the question: in respect of any one of these incidents what could her employers reasonably have done? Were they supposed to bring all three and a half employees in one by one into some sort of a room, close the door, sit the person down and lecture them about this particular employee had reacted in a particular way to an episode and put them on notice of a warning and possible dismissal if anything of the sort occurred again? I mean no work place could operate on that sort of basis.
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> I am satisfied really at the end of the day that this was an unfortunate episode. That the plaintiff herself does not associate it in any way the fact that her marriage broke up at around the time that these particular episodes. So I am sure she certainly doesn't believe there is any connection, but the particular incidents themselves do not strike me as incidents which would in the ordinary course cause a person to suffer as the plaintiff claims to have suffered in this case. She may have been particularly vulnerable but there was no evidence of that over the 25 years during which she was perfectly happy at her place of work. So while it has all been a very unfortunate experience for the plaintiff, I cannot see and I could not possibly impose some sort of legal liability to pay the huge sums of damages and compensation being claimed on behalf of the plaintiff in this case, and I must dismiss the claim."

11. The starting point of the appellant's submissions is that the trial judge erred in characterising her claim as one of work place bullying, and that he erred in dismissing her claim on the basis that the indicia of work place bullying had not been established by her.

12. The plaintiff submits that she never pleaded or presented her case as one of work place bullying, but rather one of negligence on two different bases.

13. Firstly, she alleged individual tortious acts by employees committed by them in the course of their employment, which individually and cumulatively caused her injury, and for which the employer is therefore vicariously liable.

14. Secondly, she alleged negligence by the employer by failing to provide a safe place of work. The case for a failure to provide a safe place of work relies on the fact that having been informed of the first incident, and each later incident, and the anxiety and distress which each caused the plaintiff, the employer took no reasonable and effective action to prevent a recurrence. It is submitted that by this failure the employer negligently permitted an atmosphere or culture to exist in her work place whereby cleaning staff over whom the plaintiff was the supervisor felt free to speak and act aggressively and abusively towards her without fear of sanction or other adverse consequences. In other words this tortious type of behaviour by other cleaning staff was tolerated in the work place by the employer, and therefore deemed by staff to be acceptable.

The individual acts and vicarious liability

15. The appellant submits that by concentrating in his analysis of the plaintiff's claim on the question of bullying, and finding that the indicia of bullying were not established by the evidence, the trial judge failed to carry out any proper analysis of the question of the employer's vicarious liability for the individual tortious acts of the employees. It is submitted that the evidence of each of the five acts supports a conclusion that each act constituted an assault committed in the work place and in the course of their employment. As to the conclusion that each individual act complained of by the plaintiff was 'out of the blue' and not foreseeable by the employer, the plaintiff submits that as a matter of law the question of foreseeability on the part of the employer does not arise, since vicarious liability is a form of strict liability – see *O'Keeffe v. Hickey* [2009] 2 I.R. 302, per Hardiman J. and Fennelly J.

16. I am not satisfied that as a matter of law the employer in this case can be held vicariously liable for the five individual acts which the plaintiff complained of. Each act does amount to a technical assault given the aggressive way in which she was shouted at and abused, but I would not hold that these acts are committed in the course of the perpetrator's employment in the sense in which that phrase should generally be understood. I say that despite the undoubted fact that the plaintiff was in a supervisory role over the employees in question when these events occurred. The acts complained of are to be contrasted with the more usual situation of vicarious liability where during the course of carrying out the work for which the employee was employed he/she performs that work in a negligent fashion and causes some third party to sustain an injury. In the context of the present case by way of example, clearly if one of the cleaning staff, having washed a floor in the hospital, left the surface wet and without any warning in that regard to the public or his fellow workers, and somebody then slipped and fell on the wet surface, there could be no question but that the employer would be liable for the negligent act of the employee. That is a classic case of vicarious liability in which the question of foreseeability on the part of the employer is irrelevant, and would not have to be established.

17. But this is not such a case. In each of these incidents the employee in question simply spoke and behaved aggressively both verbally and to an extent physically but short of a physical assault as such, towards the plaintiff. Although the incidents happened while both were at work and in the work place, it was not behaviour committed in the course of employment. It is the sort of behaviour that would entitle the employer to invoke some form of disciplinary action, commencing perhaps with a warning, but it would in my view be stretching the concept of vicarious liability beyond its intended limit if an employer was to be found vicariously liable for every individual aggressive verbal outburst by one employee to another during the course of a day's work, even where that outburst has caused distress and anxiety to its victim.

18. In fact, in the present case, the plaintiff does not make her case on the basis that each individual act complained is one for which she seeks to be compensated by her employer. The Court would have to consider the matter very differently if, for example, the first incident was the only incident that occurred and the plaintiff sought damages from her employer for that particular incident. The same goes for each subsequent incident. But, as I have said, that it not the basis on which she brings her claim. It is on the basis of the cumulative effect of these five separate incidents on her mental health.

19. I would dismiss her appeal in so far as she relies upon vicarious liability for these incidents.

The failure to provide a safe place of work

20. All employers owe a duty of care to their employees while they are at work. This is a duty owed both under the common law, and as mandated by many regulations governing working conditions and safety in the work place in all its many and varied forms.

21. The duty of care under the common law includes the general obligation to provide a safe place of work. What comprises the concept of safety in any particular case will vary depending on the nature of the work and of the work place. Broadly speaking where it is reasonably foreseeable by the employer that when carrying out their lawful duties in the course of their employment there is a

foreseeable risk to which the employee will be exposed, the employer is under a duty to take all reasonable steps to protect the employee against it so that no injury is caused. All work places have risks that must be anticipated and protected against by the employer. Those risks will pose a danger to some employees in a particular work place and not to others. For example, on a building site the risks to which a construction worker is exposed while working at a height are very different to those to which a person whose work is confined to the office will be exposed. The employer must consider each and take reasonable steps to protect against the risks posed to each category of employee.

22. In this case the plaintiff was a supervisor. That role is a particular role in the work place which is different to the role of those over whom she supervises, even if some of her work involved actual cleaning. She is not the employer of those whom she supervises, yet she has authority over them. She can both direct the work they are to do, and check that it has been done correctly. It is the sort of role that can potentially bring her into conflict with those under her supervision. I would consider it reasonable that an employer of such a supervisor should have a particular duty of care towards a supervisor, and to anticipate that such conflict might occur, and to have procedures in place to minimise such conflict and to deal with it when it occurs so as to prevent as far as reasonably possible any recurrence.

23. The evidence of Mr Brian Aylward called by the plaintiff was important evidence in this context. He has over 30 years' experience in the industrial relations field, and he prepared a report in relation to the plaintiff's complaints. He was critical of the company's failure to act on foot of the complaint first made by the plaintiff in May 2009. His view was that this complaint should have alerted the employer, especially when soon afterwards the plaintiff had to go on sick leave for some weeks. He referred to the company's own manual in relation to how complaints should be addressed. In relation to the manual, it is worth quoting a lengthy passage from his direct evidence as it appears in the transcript (Day 2, p.61):

> "The company booklet is quite good. There is a paragraph there to which I direct your attention and I would argue that it wasn't fulfilled at all, but also normal good practice wasn't fulfilled. It says:
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> > 'The complainant should be subject to an initial examination by a member of management who can be considered impartial with a view to determining an appropriate course of action …'.
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> Now it seems to me that that probably did happen. Mr Sweeney in fact did that.
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> > '… An appropriate course of action at this stage, for example, could be exploring a mediated solution or a view that the issue can be resolved informally. Should either of these approaches be deemed inappropriate or inconclusive, a formal investigation of the complaint should take place with a view to determining the facts and the credibility or otherwise of the allegation'.
>
> Insofar as I am aware the company did absolutely nothing after Mr Sweeney presented them with the statements. They did not interview people and they did not do what would be the normal thing in a situation like that. They did not offer counselling after the incident. They did not call the staff together and point out to them the inappropriateness of their actions, of actions of this nature. They just did nothing. It died. They left it rest and this is why I asked, if I could go back, but what that does is inculcate a culture in the organisation where bad behaviour of some sort is allowable. So in other words you can argue, and it is for the Court obviously to decide, that this allowed the culture to develop where employees could abuse their supervisors. Now you've asked about repeat, and your good friend also asked about once off incidents, and they are clearly once off incidents, but bullying and harassment, and harassment is once-off incident, it needs only one incident of harassment to be deemed harassment but bullying is repeated. What the codes allow for is that they accept there can be group bullying and a number of people in this instance clearly bullied the plaintiff."

24. Having regard to the fact that there was no evidence of any connection between the five separate incidents, Mr Aylward went on to state;

> "I would accept there is no connection, but I would just say if there is a connection there is connection of the culture. I do not think Mr so-and-so conspired with Mr so-and-so to do it, they just knew that they could get away with it. If the company, as I would see it and some of the good companies have it in their procedures, if after … the first incident … a warning sign comes in, they know the person is going to be more vulnerable, so they have got to be more careful about how she is treated and whatever. The company in this instance, as far as I can see, in fact stripped her of a number of her entitlements when she came back to work. So in other words, instead of providing support which you would expect, they actually moved to almost discipline her. They removed her phone and I think she has described what they did to her and they allowed nothing to happen. If the company had offered counselling or if they had spoken to the staff, which they should have done, and they should have also spoken to the staff on the second occasion. I would think that would have stopped the incidents. There seems to have been no effort put into educating the staff as to the type of behaviour required from them."

25. At that point, Mr Aylward was cross examined in relation to his reference to there being "a culture" within the company of the staff knowing that they could get away with the sort of behaviour complained of. He had to accept that he had not carried out any particular investigation as to whether there was a culture of bullying as such at the hospital. He had not tried to find out how many people had been bullied, how many claims might have been made, or how many people had complained about a culture of bullying. The trial judge intervened also to the same effect.

26. In my view the trial judge was correct to reject the evidence offered as to a culture of bullying in the work place. There was insufficient evidence to establish such a culture. In any event, the plaintiff did not plead her case as one of bullying as such, and neither did counsel open the case as being one of bullying in the work place.

27. Neither in my view did the question of vicarious liability arise in relation to each individual act of aggression towards her that the plaintiff complained of. The first incident was 'out of the blue'. There is no reason why the employer should be held to be vicariously liable for what occurred either at the hands of AJ herself, or more seriously at the hands of her husband/partner who was not himself an employee. The other four incidents were quite minor outbursts, which perhaps, while not to be condoned, can inevitably be expected to happen from time to time in any work place. They do not necessarily give rise to a claim against the employer, even though they should if reported give rise to some sort of investigation and appropriate action by the employer to try and prevent a recurrence.

28. In his opening of the case, counsel referred to each separate incident and the fact that each had been reported, and that the

employer had taken no action. In his opening of the case counsel stated that the employer was "liable [for their neglect in] not providing and maintaining a safe place of work and for not doing anything to ease the situation or to calm the plaintiff's fears in any way".

29. The report prepared by Mr Aylward addressed the case not only in terms of harassment and bullying, but also as to the employer's duty of care to provide a safe system and place of work, and to prevent injury to its employees, including to the mental state of employees which can be adversely affected by stress. He was critical of the company's failure to investigate the plaintiff's complaints. He considered that to constitute a breach of its obligations under health and safety legislation. He also referred to case law regarding the scope of the employer's duty of care to provide a safe system of work, and to the potential liability that employers have in relation to work related stress, and that this duty extends also to the mental health of the employee. He referred to cases which have held that where an employee shows signs of stress in the course employment, the employer may be found negligent in failing to take appropriate steps to eliminate the cause of the stress

30. In his report Mr Aylward listed twelve failures on the part of the employer. Some related to bullying. But the following are relevant to the breach of the duty of care by the employer, which is the basis on which the case was pleaded and run by the plaintiff:

> • The company did not seem to have a policy for dealing with allegations of assault.
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> • The company did not investigate the alleged serious assault by the staff member nor did it invoke its disciplinary procedures.
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> • The company did not investigate the alleged serious assault by a member of the public who was a spouse of the above staff member.
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> • The company did not investigate a further threatened assault by a male employee.
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> • The company did not issue any guidelines to staff after this incident warning them of the seriousness of issues of this nature and the consequences.
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> • The company did not put in place a protocol for dealing with assault and threatened assault.
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> • The company did not monitor the situation post this incident and did not provide assistance to the plaintiff on her return to work. At this stage the company should have seriously considered giving the plaintiff a personal alarm.
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> • The company does not seem to have an Employee Assistance Programme (EAP) in place for dealing with work related stress. The company, by changing the plaintiff's terms and conditions of employment when she returned to work after the alleged assault almost seemed to be taking disciplinary action against the plaintiff rather than investigating her complaint and supporting her in a difficult situation.

31. I have referred to the fact that at the conclusion of the plaintiff' case the defendants called no evidence. In fact it is clear that there was never an intention to do so. At the conclusion of the opening of the plaintiff's case the trial judge in fact inquired of counsel if the defendants were going to call evidence, and was informed that they did not intend to. There was therefore no evidence to contradict the evidence of the plaintiff and witnesses called by her. In particular there was no evidence to contradict the evidence of Mr Aylward and what he said both in his evidence and in his report to which he spoke, and was cross-examined. He did not speak only in relation to bullying and harassment, but he also addressed the issue of a breach of the employer's duty of care to the plaintiff by failing to take any proper steps to investigate and address the incidents about which she complained and which clearly caused her fear, stress and anxiety. Nothing was done to protect the plaintiff who was in a supervisory role, which role, by its very nature, may lead to confrontation with those who are being supervised.

32. As the learned authors McMahon & Binchy point out in *Law of Torts* (4th edition) at p.700 the duty of care owed by an employer to an employee varies according to the employee's particular circumstances, and that there is no single duty of care laid down by the courts. The extent and nature of the duty of care will vary depending on the nature of the employee's employment. The authors reference the judgment of Griffin J. in *Dalton v. Frendo*, 15th December 1977, Supreme Court where at p. 5 thereof he stated:

> "Actions of negligence are concerned with the duty of care a between a particular employer and a particular workman … that duty may vary with the workman's age, knowledge and experience".

33. The duty of care will in my view also comfortably take account also of the nature of the employee's job and the relationship thereby existing between her and other employees. In other words, in the present case, one cannot overlook the fact that the plaintiff's job was as supervisor of cleaning staff in a busy hospital. It was her job to make sure that those under her supervision did the work for which they were employed and did it to the required standard. In a hospital environment, I need no expert evidence to be satisfied that in that environment a very high standard of cleanliness must exist at all times. In my view in such circumstances, and where the plaintiff made complaints to her employer about incidents of hostility, aggression, and abuse by those whom she was supervising, the employer owed a duty of care to her to take some reasonable steps to address what occurred with a view to minimising the chances of recurrence. The duty of care does not extend to ensuring that no recurrence ever takes place. That would be too high a standard to be expected. But they were obliged to take *reasonable* steps to protect her from a recurrence where it was evident to them that these were a cause of significant stress, anxiety and fear to the plaintiff. In my view the evidence establishes that they failed to do so. While AJ was spoken to, no other step was taken, and certainly the plaintiff was not informed of any steps taken, and was therefore permitted to remain in a state of anxiety over a considerable period of time, and despite making a further four complaints. Mr Aylward's uncontroverted evidence is that there were no policies and procedures in place to deal with issues of this nature. By these failures, the employer breached its duty of care to the plaintiff by failing to provide the plaintiff supervisor with a safe place of work, taking account of her particular role as a supervisor, and it is liable in negligence for the injuries, loss and damage that are attributable to that negligence.

34. The employer has adduced no evidence to the contrary. In my view the trial judge erred by considering only the question of bullying in the workplace. While he was, in my view, correct to reject the claim based on that ground, and in relation to vicarious liability in respect of each individual act complained of, he erred by failing to deal with the claim on the basis of a failure by the employer to provide a safe place of work for the reasons stated.

35. It is important to emphasise that this is not a case where the defendants made an application for non-suit at the conclusion of the plaintiff's case. It chose at the outset not to call evidence. At the conclusion of the plaintiff's case it simply indicated that it

would not go into evidence. In such circumstances it is unnecessary to return the case to the High Court on the question of negligence and this Court may legitimately find that the trial judge fell into error in the manner indicated and conclude that the employer was negligent.

36. I should add perhaps that counsel for the plaintiff accepted that the plaintiff's case was in reality only against the first named defendant and not against the HSE which owns the hospital. There were no costs implications by so accepting since both defendants were represented by the same legal team.

Conclusions
37. I would therefore allow the appeal, and would remit the case against the first named defendant, the employer, to the High Court for a determination of the issues of causation and damages.