

**THE HIGH COURT****[2014 No. 3317 P.]****BETWEEN****JOSEPH RYAN****PLAINTIFF****AND****DUNNES STORES****DEFENDANT****JUDGMENT of Mr. Justice Barr delivered on the 7<sup>th</sup> day of June, 2016****Introduction**

1. The plaintiff is employed as a shelf packer with the defendant at its shop premises in the Parkway Shopping Centre, Limerick. He suffered injury on 15<sup>th</sup> July, 2013, when he fell on a flight of stairs leading from the staff locker room. It is alleged by the plaintiff that the stairs were in a defective and dangerous condition and that it was this which caused him to trip and fall. The plaintiff alleges that he has suffered soft tissue injury to his neck, right shoulder and lower back. Both liability and quantum are in issue in these proceedings.

**Liability**

2. When the plaintiff finished his shift, he went to the staff locker room to retrieve his personal belongings. He used the staff stairs. While descending the flight of stairs, which had sixteen steps on it, on the sixth step from the bottom, his heel caught in the nosing on the step, which had become loose and had risen above the level of the step. The plaintiff states that when his heel caught in the nosing, he lost balance and fell down the remaining six steps, landing on the half landing at the foot of the stairs.

3. A member of staff came on the scene of the accident and went to get the HR Manager, Ms. Elaine O'Hare. By the time she arrived at the locus, the plaintiff was standing and was anxious to go home. She asked him whether he had banged his head and whether he needed treatment. The plaintiff said he was fine and then left the premises. Ms. O'Hare did not look at the stairs on that occasion. She filled in an accident report form in relation to the accident.

4. On the following morning, the plaintiff phoned in sick and said that he had tripped when his heel caught on the nosing at the front of the step. He said that he had pulled muscles in his arm and in his back. Ms. O'Hare contacted the security manager, Mr. Mannix. She stated that she was aware that a repair was subsequently carried out to one of the steps on the flight of stairs.

5. In cross examination, she was asked how the plea came to be made in the defence, that the plaintiff had been reading text messages or composing text messages while descending the stairs. She said she did not know how this plea came to be made in the defence, as she had not seen the plaintiff fall on the stairs.

6. Evidence was given by Mr. John Mannix, the security manager at the shop. He was alerted to the accident on the following morning at approximately 11:30hrs. He went to the locus and found that on the sixth step, the nosing was raised some two inches above the surface of the step. He took the photograph which had been handed into court showing another male employee with his fingers under the raised portion of the nosing.

7. Mr. Mannix placed yellow safety tape on the edge of the nosing. He notified head office and he also notified the health and safety department of the defect. A repair of the nosing was subsequently carried out. An invoice from Floor Form Limited dated 2<sup>nd</sup> August, 2013, was handed into court. It was agreed that this referred to repairs which had been carried out to the flight of stairs.

8. Mr. Mannix stated that he had used the stairs a number of times that day, but did not notice any defect. In cross examination, he accepted that he was not inspecting the steps. He accepted that on the day after the accident there was a two inch gap between the nosing and the surface of the step and that this was a hazard. He accepted that the defendant did not have anyone in particular designated to inspect these steps. They did not check the steps individually.

9. Evidence was given by Mr. Paul Durbin, the grocery manager. He had descended the stairs where he saw the plaintiff, Ms. O'Hare and another employee standing on the half landing. Ms. O'Hare told him of the accident. He asked the plaintiff how he was. The plaintiff was anxious to go home. Mr. Durbin stated that the plaintiff worked in the grocery department and that he was a good employee. He only had a very brief conversation with the plaintiff, who said that he had tripped coming down the stairs. He did not mention the nosing on the stairs. He was anxious to go home. Mr. Durbin stated that he only learned about the defect in the nosing on the following day. He had not noticed any defect when he used the stairs.

10. Finally, evidence was given by Mr. Thomas Hayes, Consulting Engineer. He inspected the locus on 3<sup>rd</sup> September, 2014. He found that the sixth step had been screwed down with a brass screw. He thought that this was a replacement screw, as normally steel screws would be used with plastic caps on them. This suggested that the nosing had been repaired post-accident.

11. Mr. Hayes stated in relation to the photograph handed into court, which showed a man with his fingers under the nosing, that he should not be able to do that. The nosing should be securely affixed to the top of the step. Mr. Hayes stated that the nosing was a vital part of the step; if it becomes loose, this renders the step very unsafe, and a person could catch their foot in it. Thus, he was of opinion that the stairs were unsafe at the time of the accident.

12. He stated that management and cleaners should inspect the stairs regularly when cleaning them and if any nosing is found to have lifted, this would be in need of urgent repair. If the nosing was loose enough to catch a person's heel, that should be observable

by anyone inspecting the stairs.

13. Coincidentally, Mr. Hayes stated that on the day of his inspection, two steps further up from the sixth step, he found that the nosing had become loose and slightly raised. He had depicted this in his photographs No. 5 and No. 6.

14. In cross examination, Mr. Hayes accepted that there were approximately 140 employees in Parkway Shopping Centre. They would use the stairs to gain access to the staff locker room. The defect in the nosing would not be apparent to people ascending the stairs.

15. Mr. Hayes also accepted that his report was incorrect where it was stated that the plaintiff had caught his toe in the nosing, whereas it was actually his heel which had got caught. The plaintiff had just told him that he tripped on the step. Mr. Hayes stated that the plaintiff's evidence that he caught his heel on the nosing was the more likely mechanism of injury. When the whole foot is placed on the step, as it moves forward the heel could catch on the raised nosing.

16. Mr. Hayes stated that it was his understanding that the plaintiff was not holding the banister at the time of his fall, because he had said that he made a grab for it. Even if he was holding the banister, a person could still fall. It was put to the witness that the locus was examined approximately once per month and that this can generate a request for urgent repair. Mr. Hayes thought that this was inadequate and the defendant needed to have a better inspection system.

### **Conclusions on Liability**

17. I am satisfied that the plaintiff has given an honest account of what caused him to trip while descending the stairs on 15<sup>th</sup> July, 2013. The evidence of Mr. Mannix confirms that there was a two inch gap between the nosing and the step on the day after the accident. The repair invoice, while not evidence of negligence on the part of the defendant, is evidence that there was a defect in the nosing, which required repair.

18. In the circumstances, I am satisfied that there was a defect in the step, when the nosing had become loose and raised. This constituted a danger to persons using the staff stairs.

19. While there may have been monthly checks of the stairs, I accept the evidence of Mr. Hayes that this was inadequate having regard to the serious danger which exists once the nosing comes loose from the step. Furthermore, it would appear that whatever checking mechanism was in place at the store, it was inadequate having regard to the fact that at the time of the engineering inspection in September 2014, the nosing on the eighth step was loose and had become raised from the step.

20. I am satisfied that in these circumstances, the defendant failed in its duty to provide the plaintiff with a safe means of access to and egress from his place of work.

21. In the defence, it was pleaded that the plaintiff had been using his mobile phone at the time of the fall. No evidence was called from any witness who actually saw the plaintiff falling. The matter was canvassed with the plaintiff in a broad manner. He emphatically denied that he was using his mobile phone while descending the stairs. In these circumstances, the defendant has not established that the plaintiff was using the phone at the time of the accident.

22. The evidence is equivocal as to whether the plaintiff was holding the banister at the time of the accident. Even if he was not holding the banister, that does not constitute contributory negligence, as he was descending a short flight of stairs. Accordingly, the defendant is liable for the injury suffered by the plaintiff. I do not propose to find any finding of contributory negligence against him.

### **Quantum**

23. The plaintiff has stated that as a result of the accident, he suffers constant, and at times, severe pain in his neck, right shoulder and lower back. He was out of work for approximately four months after the accident. Thereafter, he returned to his job as a shelf packer on a minimum fifteen hour contract. He stated that, on average, he would work approximately twenty hours a week. Although, in recent times he has had to decrease his hours to approximately fifteen per week due to his injuries.

24. He works in the grocery department, where he has responsibility for stacking bottles of minerals onto shelves. This is reasonably heavy work. In a case, there would be eight 1.5 litre bottles or six 3 litre bottles. There would be approximately eleven/twelve cases on a trolley. The cases would have to be loaded onto the trolley and then the individual bottles unloaded from the trolley onto the shelves.

25. The plaintiff states that he is required to take painkillers to enable him to complete his day's work. Prior to the accident, the plaintiff used to walk to work, whereas now he is obliged to take a lift from his wife. He had also been very interested in local history and used to enjoy walking around Limerick looking at various sites of historical interest. He is not able to manage that level of walking at present. He also experiences pain at night and sometimes has to get up after approximately two hours.

26. The plaintiff has been referred to Prof. Harmon, the pain specialist for treatment. He has administered painkilling injections, the first of which was in February 2016, and a further injection was given last week, being the end of May 2016. The plaintiff found that he only obtained temporary relief from the injections, which would last three/six weeks.

27. The plaintiff came under the care of Dr. Dominic Cooke, who first saw him on 13<sup>th</sup> August, 2013, approximately one month post-accident. On examination, he found that there was painful restriction of right and left lateral rotation of the neck. Abduction of the right shoulder was painful, being suggestive of impingement tendonitis of the right shoulder. The plaintiff had pain and tenderness over the lumbar interspinous ligaments. Movement of the hips was restricted and painful.

28. Dr. Cooke was of the opinion that the plaintiff had suffered a musculoligamentous sprain of the neck and that it would be necessary to carry out an MRI scan to confirm this. He was also of opinion that the plaintiff had suffered a musculoligamentous sprain of the lumbar spine. Again, an MRI scan was required. He was further of opinion that the plaintiff had suffered an impact injury to the right shoulder with symptoms of rotator cuff tendonitis.

29. An MRI scan of the plaintiff's neck revealed degenerative changes in the neck and a disc protrusion at C5/6 and a central disc bulge at C6/7. He was of opinion that the plaintiff had pre-existing degenerative changes in his spine, which had been asymptomatic prior to the time of the accident. He suspected that the accident caused the disc protrusion at C5/6.

30. The plaintiff was reviewed by Dr. Cooke on 19<sup>th</sup> August, 2014, approximately one year post accident. He still had pain and stiffness in his neck. His main problem was ongoing severe low back pain, which was causing him difficulty at work and required him to

take painkillers on a daily basis and to miss days from work occasionally. On examination, the plaintiff had limitation of movement of the neck and lower back. He had full movement of his shoulder. The shoulder injury had improved a good deal. An MRI scan of the lumbar spine revealed degenerative disc disease in the discs and facet joints. Dr. Cooke was of opinion that the degenerative changes in the back had been aggravated by the accident. He was of opinion that the soft tissue injuries were causing the ongoing pain. He recommended physiotherapy treatment and the plaintiff has had twenty sessions of physiotherapy to date.

31. On Dr. Cooke's retirement, the plaintiff came under the care of Dr. Aileen Henry, Consultant Physician in Orthopaedic and Sports Medicine. When seen in October 2015, the plaintiff had the following complaints. He complained of neck pain, which was sore on five out of every seven days. The pain was constant. It was aggravated by work. He still got pins and needles in his right hand and his head felt heavy on his neck. He complained of right shoulder pain, which was sore two or three times a week, particularly if he did any reaching and, when he went swimming, his right shoulder was extremely sore. He also complained of low back pain, which was particularly sore at night. It was sore six days a week. It improved when the plaintiff was off work and he felt a numbness in the back of his left knee.

32. Examination of the plaintiff's neck revealed a full range of motion. He felt a tightness at the limit of movement. There was a pain at the limit of left rotation and both lateral flexions. On palpation he was tender from C5 – C7 spinous processes. Upper limb neurology was normal. Examination of the right shoulder showed a full range of motion. There was pain at the limit of medial rotation and positive impingement tests. Examination of the lumbar spine also showed a full range of motion. There was pain at all extremes of movement. There was a negative slump test. There was reduced straight leg raising on the left by twenty degrees, with left leg pain and tenderness at L5 – S1 and to the left of this level. Neurology was normal.

33. Dr. Henry was of the opinion that the plaintiff suffered from the following injuries: persistent chronic neck pain with right arms pins and needles secondary to the fall in July 2013. In relation to a prognosis, she stated as the MRI had confirmed pre-existing degenerative change and as the plaintiff had an intervertebral disc protrusion at C5/6, which may well be irritating the nerve roots to the right arm, she felt that the prognosis was guarded. It remained to be seen how he would respond to the interventional treatment with Prof. Harmon. She recommended a review once the plaintiff was finished with Prof. Harmon.

34. The plaintiff also had persistent right shoulder pain secondary to the fall. In terms of a prognosis, Dr. Henry was of the opinion that on clinical examination, he had signs of impingement. She recommended an MRI of the right shoulder to assess if there had been a structural injury caused by the accident. The prognosis would depend on the diagnosis.

35. Dr. Henry was of opinion that the plaintiff suffered from chronic low back pain secondary to the fall in a man with pre-existing asymptomatic degenerative change. In terms of a prognosis, he was likely to have some interventional treatment with Prof. Harmon for his low back also, so she recommended a review after that treatment. As his symptoms were significant and ongoing, she felt the prognosis was guarded.

36. An MRI scan of the right shoulder on 11<sup>th</sup> November, 2015, showed the existence of supraspinatus tendinosis, subdeltoid bursitis and severe degenerative change in the acromioclavicular joint.

37. In a letter dated 12<sup>th</sup> November, 2015, Dr. Henry noted that the plaintiff was to see Prof. Harmon in the coming months for injection of his right shoulder. She noted that an MRI scan confirmed that there was no structural injury to the shoulder in the accident and that he had pre-existing degenerative change in his AC joint. When Dr. Cooke saw him in August 2013, he had clinical signs of shoulder tendonitis and similarly when she saw him, she felt that he had signs of shoulder impingement. The likely source of this pain was his supraspinatus tendon and irritation within the subacromial space. She stated that hopefully this would respond well to injection treatment under the care of Prof. Harmon. She recommended a review once that treatment had finished.

38. In a further letter dated 18<sup>th</sup> December, 2015, Dr. Henry stated that she felt that it was likely that the accident in July 2013, caused an impact injury to his right shoulder causing his previously pain free shoulder to become symptomatic. Without any results of investigations pre-accident, it was not possible to say what effect it had on his pre-existing degenerative change.

39. In her evidence, Dr. Henry stated that she felt that the plaintiff's complaints were genuine. He had significant ongoing pain, for which he had been referred to Prof. Harmon for injection treatment. From the GP's notes, which had been discovered in the case, there was reference to previous pain in the cervical spine, but this was not of a persistent nature and he did not need injection treatment for these complaints. While he did have pre-existing degenerative changes in his spine, and had some pain prior to the accident, it was not at the level that it was at post-accident.

40. In cross examination, Dr. Henry stated that she asked the plaintiff did he have pain in his neck, shoulder or lower back in the year immediately prior to the accident and he said that he did not. She noted that in the GP notes there was reference to paraesthesia and dorsal pain, but the plaintiff had not complained to her of dorsal pain; he had complained of neck and lower back pain. She stated that the existence of paraesthesia in the medical records did not affect her diagnosis. The plaintiff had degenerative changes in his neck and had had an incident of pain in 2010, but that seemed to have settled. She accepted that complaints of paraesthesia in the right hand were probably referable to something happening at the C5/6 level. She stated that people could have degenerative changes in their spine but could be asymptomatic. If he had not had the accident, the neck pain may have remained episodic.

41. It was put to the witness that when the plaintiff was examined by Dr. Spillane on behalf of the defendant in June 2014, examination revealed that the plaintiff had a pain free range of movement of the neck, shoulder and lower back. Dr. Henry stated that she had found full movement in these areas, but there was pain at the limits of movement. In re-examination, she stated that a person can have pre-existing degenerative changes and an accident can render these changes symptomatic. She was unable to give a prognosis in the case, as this would depend on the success or otherwise of the treatment being given to the plaintiff by Prof. Harmon.

42. Evidence was given on behalf of the defendant by Dr. Brian Spillane, Sports and Orthopaedic Physician. He first examined the plaintiff on 16<sup>th</sup> June, 2014, approximately eleven months post-accident, at which time the plaintiff's complaints were that his neck felt heavy at times and he complained of numbness and paraesthesia in the right hand. According to Dr. Spillane, the plaintiff had no actual pain in the neck. He complained of discomfort in both shoulders when working overhead, packing high level shelves. He also complained of a nagging discomfort in the lower back which was present constantly. His pain could be aggravated by walking, bending or lifting and prolonged sitting and standing.

43. On examination of the plaintiff's cervical spine, Dr. Spillane found that the plaintiff had a full range of pain free movement. Palpation revealed no localised tenderness. There was no neurological deficit present in either upper limb. Examination of the right

shoulder showed that the plaintiff had a full range of pain free movement, resisted movements were strong and pain free. Examination of the lumbar spine showed that flexion was to his mid-shin and extension was full. These were uncomfortable at the extremes of motion. Palpation revealed subjective tenderness over his lower lumbar segments. Straight leg raising was to eighty degrees on both sides and there was no neurological deficit present in either lower limb.

44. Dr. Spillane was of opinion that the plaintiff had suffered a soft tissue injury to his neck, lower back and right shoulder. He had been out of work for a number of months, which the doctor put at two months, but had since returned to work without interruption. The plaintiff's complaints were not very severe and he only required occasional painkilling medication. Dr. Spillane was of the view that the plaintiff had probably aggravated degenerative changes in his neck and lower back. He expected a full recovery within the next three – six months. He was of the view that any long-term problems which the plaintiff may have would be caused by the degenerative changes and the ongoing aging process.

45. The plaintiff was subsequently seen by Dr. Spillane on 22<sup>nd</sup> October, 2015, some two years and three months post-accident. At that examination, the plaintiff stated that he had not improved over the past sixteen months. He said that his discomfort was mainly at work. He did not need painkilling medications on his day off. He told Dr. Spillane that his head "*feels heavy*" at times. He gets pain at the back of his neck radiating to both shoulders. This "*comes and goes*". It tended to be precipitated by a heavy day at work. The pain could wake him at night.

46. The plaintiff also complained of central and left sided lower back pain as well as upper back discomfort. This was aggravated by sitting for too long or walking some distance. Any physical work would aggravate his complaints. He was unable to take his dog for a walk now. He stated that he occasionally got pain down the back of both legs.

47. Clinical examination of the cervical spine revealed that all movements were limited by the last ten degrees to twenty degrees, but were pain free. Palpation revealed subjective tenderness bilaterally over his mid-trapezius musculature. There was no neurological deficit present in either upper limb. Examination of the thoracic spine revealed that rotation to either side was restricted and painful. Palpation revealed subjective tenderness over the spinous process of T4 to T8 and bilaterally over the paravertebral musculature at these levels. Examination of the lumbar spine revealed that flexion was to his mid-shin and extension was limited. These were uncomfortable at the extremes of motion. Palpation revealed subjective tenderness over his lower lumbar segments and bilaterally over his paralumbar musculature. Straight leg raising was to seventy degrees on both sides and there was no neurological deficit present in either lower limb.

48. Dr. Spillane was of opinion that the plaintiff had genuine complaints related to his neck, upper back and lower back regions. However, not all these problems were caused by the fall. It was likely that the plaintiff had pre-existing degenerative changes which were aggravated by the accident. It was noted that the plaintiff was receiving further treatment from Prof. Harmon.

49. Dr. Spillane expected good improvement and a good recovery from any accident related complaints within the following six to twelve months. He was of opinion that any long term problems would be due to the natural progression of his degenerative disc disease and the normal aging process.

50. In cross examination, the witness accepted that the fall constituted a significant insult to someone who had pre-existing degenerative changes in their spine. Dr. Spillane noted that the plaintiff had had some visits to his GP in 2009, 2010, 2011 and he may have had pain for some time before he went to see his doctor. In particular, in May 2010, it was noted that the plaintiff had complained of neck pain for the previous six months. He accepted that the plaintiff had not been referred for specialist opinion on these occasions. The plaintiff had been treated appropriately with physiotherapy and medication.

51. It was put to the witness that the plaintiff had had a significant number of visits to the physiotherapist and required painkilling medication on a daily basis. Dr. Spillane stated that the plaintiff seemed to have deteriorated since he first saw him. However, he felt that the effects of the accident had diminished and that the plaintiff just got worse because he was getting older. He was of the view that the plaintiff's current problems were due to age related changes getting worse over time.

### **Conclusions on Quantum**

52. The plaintiff is 57 years of age. It is clear from the medical records and the MRI scans, that the plaintiff had pre-existing degenerative disc disease in his spine prior to the accident. While the plaintiff's neck had been symptomatic prior to the fall, it does not seem that it was particularly troublesome. The plaintiff had not been referred for specialist opinion for any such complaints prior to the accident.

53. There is a difference of opinion between Dr. Henry and Dr. Spillane as to the likely duration of the aggravation to the spine condition caused by the accident. Dr. Spillane is of the opinion that any such aggravation only lasted for a short period of a number of months such that the plaintiff's present condition is due to the presence of degenerative disc disease in his spine and the normal aging process. However, this view seems to be at odds with the content of his second medical report dated 22<sup>nd</sup> October, 2015, where he stated:-

*"I would expect gradual improvement with a full recovery from any remaining accident related complaints over the next six – twelve months."*

54. On the other hand, Dr. Henry is of the view that the accident did aggravate pre-existing degenerative changes in the plaintiff's spine, which, with the exception of the cervical spine, had been asymptomatic prior to the fall. She was of opinion that the effects of the accident continued to contribute to the plaintiff's current symptoms. She was of opinion that the accident caused an injury to the plaintiff's right shoulder, causing his previously pain free shoulder to become symptomatic.

55. I prefer the evidence of Dr. Henry. I am satisfied that the injuries sustained to the plaintiff's spine have caused an aggravation of pre-existing degenerative changes in his spine. The plaintiff's neck condition was made considerably worse and the right shoulder and lower back, which had been asymptomatic, have been rendered symptomatic as a result of the injuries suffered in the accident.

56. I accept the evidence of the plaintiff that he has considerable difficulty in carrying out the demands of his work. He also experiences pain at the end of the working day and at night. I accept that he is restricted in the pursuit of his hobbies of local history tours and walking his dog, as he is unable to walk long distances. He is not able to walk to work as he had done prior to the accident. It was put to the plaintiff that he had been less than forthcoming in his pleadings and in his statements to the defendant's doctor, as regards his previous neck complaints. I do not accept that the plaintiff deliberately held back any information concerning his pre-accident medical history. Given the nature of his complaints at that time, these were not of such a level that the plaintiff would have thought them relevant when giving an account of his post-accident symptoms. I have reviewed the plaintiff's GP medical records.

While they refer to some pre-accident complaints, mainly in his neck, they do not disclose serious or prolonged symptoms.

57. In assessing general damages in this case, I have had regard to the guidelines set down by the Court of Appeal in *Payne v. Nugent* [2015] IECA 265, *Nolan v. Wierski* [2016] IECA 56, and *Shannon v. O'Sullivan* [2016] IECA 93.

58. I award the plaintiff €50,000 for pain and suffering to date. In relation to the future, Dr. Henry was not able to give a prognosis until the injection treatment being carried out by Prof. Harmon was completed. It is not known what exact treatment is being given in this regard, nor for how long the treatment will last. In the absence of any information in respect of future treatment, the court cannot speculate as to the duration, or likely success, of such treatment. All I can do is have regard to the plaintiff's evidence that he has had two injections to date, but that they only gave him temporary relief from his symptoms. Whether this will remain the case, is not known. In the circumstances, I propose to allow a very modest sum for future pain and suffering. I award €10,000 for future pain and suffering.

59. To these figures must be added the agreed sum for special damages of €4,020.63, giving an overall award of €64,020.63.