THE COURT OF APPEAL

Record No. 2016/50

Irvine J.
Whelan J.
Reynolds J.

BETWEEN

SAUNDRA O'FLYNN

PLAINTIFF/RESPONDENT

- AND –

CHERRY HILL INNS LIMITED TRADING AS THE OLIVER PLUNKETT BAR

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 21st day of July 2017

1. This is an appeal against the decision of the High Court of the 14th January, 2016, whereby the trial judge awarded the plaintiff/respondent, Ms. Saundra O'Flynn, ("Ms. O'Flynn) €75,000 by way of general damages in respect of injuries received by her on the premises of the defendant/appellant Cherryhill Inns Limited ("the Oliver Plunkett bar") on the 17th February. 2012. In so doing the High Court judge concluded that in setting the closing speed for an automatic door at other than the slowest possible speed the defendant had failed in its duty to protect customers such as Ms. O'Flynn from foreseeable injury, which in her case occurred when the ring finger of her left hand became trapped in the hinged recess of that door.

Summary of the liability evidence

2. On the evening of the 17th February, 2012, Ms. O'Flynn, who was then 64 years of age, and two of her friends, Ms. Eileen Cronin and Ms. Laura O'Mahony went to enjoy a few drinks in the Oliver Plunkett bar. After a while, and at a time when Ms. O'Flynn had consumed approximately three glasses of wine, Ms. Cronin and Ms. O'Mahony went to an outdoor smoking area. Ms. O'Flynn followed them a few minutes later. There was a door separating the bar from the smoking area and this had a hydraulically operated self-closing device. She told the Court that she pulled the door towards her to go through it and having done so put her left hand behind her in a type of impulse reaction to restrain the door she felt would be closing behind her. In doing so the tip of the ring finger of her left hand entered the rebate of the doorframe on the hinged side where it was crushed and then severed by the closing door. Ms. O'Flynn was unable to explain how her finger had become caught in the rebate. She nonetheless offered her opinion that because she had lost the top of her finger that the door must have swung quite hard.

3. Ms. Cronin was sitting just inside the automatic door in the smoking area. She told the Court that everything happened "really really quickly". The door hadn't, she said, closed like a normal door and it certainly had not closed like a "slower door". Ms. O'Mahony was also seated where she had a view of the door. She said the accident happened "in an instant" and that "[i]t was just so fast."

4. Mr. Philip O'Doherty, consulting engineer on behalf of Ms. O'Flynn, explained that the door was intended to close to 30 degrees with a fair degree of speed and thereafter very slowly. The mechanism was designed to give the person going through the door the chance to ensure that their fingers did not become caught as the door closed. Mr. O'Doherty explained that if the door was closing too quickly, a person might not get the chance to pull their fingers out. From the fact that Ms. O'Flynn had not managed to extract her fingers in time to avoid injury, he proposed that the probable cause of her injury was that the closing mechanism had malfunctioned. Mr. O'Doherty also stated, in what I can only describe as a burst of enthusiastic speculation unsupported by the evidence of any witness that "The reason her hand was behind her was to stop the door from slamming on her, on her legs or her feet. You know that's the reason you would do that." In turn the High Court judge suggested to Mr. O'Doherty that it was likely that Ms. O'Flynn had put her hand behind her because she was taken by surprise at the speed of the door's closure and that she had probably done so because there was something "odd" about the door.

5. In the course of a further exchange between the High Court judge and Mr. O'Doherty the witness confirmed that if the door had been working properly Ms. O'Flynn would likely have felt some pressure on her finger and would have had sufficient time to remove it before it got crushed. In response to questioning on the same issue by Ms Hyland S.C, for the defendants, Mr O'Doherty stated that it was to be inferred from the fact that she hadn't been able to retract her finger that the timing mechanism on the door must not have been working properly on the day in question.

6. Because of the findings ultimately made by the trial judge concerning liability and causation, it is also important to observe what evidence was not given by Mr. O'Doherty, he being Ms. O'Flynn's sole expert evidence. He did not assert that it was his professional opinion that it was unreasonable or unsafe for the occupier to have set the timing mechanism for the closure of this particular door at 5.5 seconds. Neither did he contend that because of the configuration of the premises that the defendant was under an obligation to set the timer on the door to the maximum closure time of 7 seconds. Indeed, it was his evidence that if set at 5.5 seconds a person who had their finger in the hinged recess of the door would get sufficient warning as the door was closing to allow them extract their finger so as to avoid injury. However, Mr. O'Doherty speculated that an occupier of a public house premises might be tempted to tension the door so that it would close more swiftly in order to avoid smoke travelling from the smoking area into the bar.

7. Having carefully considered the transcript of the evidence, it is fair to state that it was Mr. O'Doherty's expert opinion that it was highly probable that the automatic door had malfunctioned on the night of Ms. O'Flynn's injury such that it had closed behind her without restraint or alternatively that it had been set with a significantly faster closing speed than the 5.5 seconds recorded at the time of inspection to minimise smoke entering the non-smoking areas of the premises.

8. Mr. Pat O'Connell, consulting engineer on behalf of the defendant, gave evidence that the automatic door was one which complied with the prevailing British Standard. He explained that automatic doors of this nature were to be found in every type of public building and all operate on the same principle. A closing time of 3 to 7 seconds was within the acceptable range and this door when examined was set to close over a period of 5.5 seconds. Even though closure decelerates over the last part of the closing cycle it was his opinion that once the door started bearing in on a finger within the rebate of the doorframe on the hinged side, as opposed to a finger

resting on the leading-edge of the closing door, the individual concerned would have little chance of extracting their finger. In the former scenario the grip of the door would be instantaneous and then, of course, there was the issue of reaction time.

9. In the course of his evidence, Mr. O'Connell stated that while contributory negligence was a matter for the Court, it was his opinion that anybody using a door such as this, if they put their hand behind them in an effort to restrain the closing door, ought to have looked behind them to ensure that they were placing their hand against the door proper rather than into the rebate of the doorframe.

10. Mr. Creed S.C., on behalf of the plaintiff, put two propositions to Mr. O'Connell, neither of which had been advanced by his own engineer, as the basis upon which liability might be found against the occupier. The first of these was a query as to whether in setting the closing time for the door the occupier should have taken into account factors such as the location of the door. The second was that given that patrons in a public house would be consuming alcohol the closing mechanism should be set to the slowest closing time. Mr. O'Connell disagreed with both propositions stating that 5.5 seconds was "absolutely satisfactory" in this scenario.

11. In addition to the evidence of Mr. O'Connell, evidence was given by a Mr. Heffernan who was first to arrive on the scene after the accident, Mr. Weldon, the bar manager, and a Mr. Murray who had provided first aid, all of whom stated that they had noted nothing untoward about the door that night. Mr. Fergus Byrne, maintenance manager, also gave evidence that he inspected the door at nine the following morning and that it was operating normally. He gave evidence that he maintains approximately 40/50 of these doors for the defendant. There were 12 in the Oliver Plunkett bar and 24 across the road in another pub called Reardon's. His uncontested evidence was that the tensioning on these doors never slips and that the closure timing settings on the door concerned had not been altered since the accident. According to Mr. Byrne, the only thing that ever went wrong with an automatic door was that it might stay open as a result of a shortage of oil due to a leak. He also stated that in his opinion a hand would not become caught on the leading edge of an automatic door as it closed but that on the hinge side, it would be a "different story".

12. In the course of cross examination it was put to Mr. Byrne that in a pub situation that the timing of the closing device "should be at the further end" (presumably of the 3 to 7 second spectrum) to which he replied, "[i]t would be an idea to have it at the longer closing, yes".

Judgment of the trial Judge
13. At the commencement of his judgment the High Court judge records that no one had observed the exact moment when the accident happened. All the plaintiff had been able to say was that she travelled through the door. Her friends could do no more than say that she had put her hand up as she came through the door. It was for this reason that the High Court judge said it was difficult to determine how the accident had happened. He then concluded that she had instinctively put up her hand behind her as this was what people do when walking through a door and she could not be faulted for that instinctive act.

14. When it came to the facts upon which he decided the liability issue in the case the trial judge reached somewhat different conclusions. He expressed himself satisfied that when Ms. O'Flynn had arrived where she wanted to be, namely immediately beyond the automatic door in the smoking area, that the door was still coming towards her and that she needed to protect herself from it. This was why she had put out her hand. He then proceeded to find as a fact that the calibration on the door had been insufficient to protect her in circumstances where she was going to be stopping immediately beyond the door.

15. The basis upon which the trial judge found the defendant liable for Ms. O'Flynn's injuries was that he concluded that there had to be a difference in the calibration for spring-loaded doors, depending upon where a particular door was situated and what was immediately beyond it. Because the area immediately beyond the door in question was a place where people tended to gather and might stop rather than proceed onwards, he concluded that the door should have been calibrated to afford more time to the person passing through to get "free" of the door. Given that the calibration of the door had proved insufficient to protect Ms. O'Flynn, the trial judge found liability against the defendant and that Ms. O'Flynn had not been guilty of any contributory negligence.

Submissions of appellant
16. Mr. John Lucey S.C., on behalf of the defendant, submits that the trial judge made no real finding of negligence against the defendant that would have entitled him to award compensation to the plaintiff. He submits that there was no evidential basis for the liability finding and that no consideration was given to the evidence of the defendant's witnesses. Counsel submits that in circumstances where Ms. O'Flynn had admitted putting her hand behind her to restrain a closing door that a finding of substantial contributory negligence was warranted.

17. Insofar as the award of damages made by the trial judge in the sum of €75,000 was concerned the award was simply not proportionate having regard to her injuries and was also not in keeping with the compensation advised in the Book of Quantum for partial amputations of a finger in the plaintiff's personal circumstances.

Submissions of respondent
18. Mr. Tom Creed S.C. submits that the fact that the door in question may have operated in accordance with the British Standard on the day of inspection was not dispositive of the liability issue. There was evidence to support the trial judge's finding of liability on the basis that the defendant, in setting the closing time for the door, had failed to consider the fact that patrons would not necessarily be proceeding straight through the door and might be compromised if intending to move left to join activities immediately beyond the door. He relied upon the evidence of Mr. O'Doherty to the effect that a person coming through the door moving immediately to their left would be compromised as they would be moving towards the hinged side of the door. He also relied upon evidence of the defendant's maintenance manager, Mr. Byrne, to support his submission that the trial judge was entitled to conclude that the door should have had a longer closing time having regard to the fact that it was in a public house.

19. Mr. Creed submits that the trial judge's finding was also supported by the evidence of Mr. O'Connell, the defendant's engineer, concerning the desirability of having a longer closing cycle in circumstances where a person travelling through the door might want to immediately stop thereafter because of the location and set up of tables inside the door.

20. Mr. Creed also submits that it was open to the trial judge on the evidence to make no finding of contributory negligence against the plaintiff. Finally, he submits that the award of damages was within the permissible range. The damages were not excessive to the extent required i.e. 25% or 30% as would warrant the Court treating the award as an error in principle.

Role of the appellate court
21. Where an appellate court does not enjoy the benefit of hearing and seeing witnesses the circumstances in which it may interfere with the findings of a High Court judge are indeed limited. Those circumstances are identified in the often cited decision of McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210 where he described the role of the appellate court in the following terms at page 217:-

> "1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
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> 2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.
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> 3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in *"Gairloch," The S.S., Aberdeen Glenline Steamship Co. v. Macken* [1899] 2 I.R. 1, cited by O'Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.
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> 4. A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper inference — in a case of this kind, was there negligence? I leave aside the question of any special circumstance applying as a test of negligence in the particular case. If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly.
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> 5. These views emphasise the importance of a clear statement, as was made in this case, by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows."

22. It is with the aforementioned restrictions in mind that I will briefly address the liability issue in this case. It goes without saying that the burden of proof in every personal injuries claim rests upon the plaintiff. They must prove their claim on the balance of probabilities and proof of that claim will depend upon the facts found by the trial judge and whether on those facts liability is established.

23. It is for the trial judge to adjudicate upon the claim pleaded and advanced at trial. Insofar as a claim is to be advanced based on expert evidence S.I. No. 391 of 1998 requires the plaintiff to deliver to the defendant in advance of trial, any report to be relied upon and that must contain the substance of the evidence to be adduced by that witness. This is so the defendant may properly understand the case to be made against them.

24. It does not perhaps need to be stated that it is not any function of the court to propose an alternative set of facts to those which the plaintiff has sought to establish in evidence or to canvass an alternative liability case to that which was advanced on their behalf in their pleadings, expert reports and evidence.

Nature of the claim

25. In the present claim it is important to record that the liability of the defendant to Ms. O'Flynn is claimed to arise in negligence and also pursuant to the Occupiers Liability Act 1995 ("the 1995 Act"). It is common case that the duty of care owed by the occupier under the 1995 Act to a visitor such as Ms. O'Flynn is akin to the standard of care in ordinary negligence. The statutory duty of the occupier is provided for in s. 3 of the 1995 Act which provides as follows:-

> "3(1) An occupier of premises owes a duty of care ("the common duty of care") towards a visitor thereto except in so far as the occupier extends, restricts, modifies or excludes that duty in accordance with section 5.
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> (2) In this section "the common duty of care" means a duty to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon."

26. While it may appear pedantic to so state, an occupier is not the insurer of the welfare of a visitor and their duty of care does not extend to taking all steps as might be necessary to *ensure* (my emphasis) that the visitor will not be injured whilst on their premises.

27. Having considered the evidence adduced in the High Court and all that has been submitted to this Court on the appeal, I am satisfied that there was no evidential basis upon which the trial judge was entitled to make a finding of liability as against the defendant. I am also satisfied that, even on the facts found by the trial judge, the same would have warranted a very substantial finding of contributory negligence on the part of Ms. O'Flynn.

Findings of fact

28. The High Court judge found as a fact that Ms. O'Flynn, because she was meeting her friends immediately inside the automatic door, required greater time to get beyond the door than if she had been walking straight on. However, Ms. O'Flynn gave no evidence that she had any difficulty getting through the door or that she was held up in any respect in clearing the door. There was no evidence that she was obstructed by people standing or communing beyond the door in the smoking area such that she might have found it difficult to complete her passage through the doorway. Neither did she or any other witness suggest that she sustained her injury due to insufficient time afforded to her to get beyond the door. Even if there had been insufficient time, no expert evidence was called to establish that the defendant had failed in its obligation to Ms. O'Flynn by failing to provide her with more than 5.5 seconds to pass through the door and its hinge having regard to the circumstances which pertained.

29. It is to be inferred from the evidence of Ms. O'Flynn and that of her friends who were present on the night in question and from the expert evidence of Mr. O'Doherty, consulting engineer, as flagged in his expert report, that the claim she intended to pursue was to be based on the probability that the closing mechanism on the door was not working such that it "swung quite hard", "didn't close like a normal" door close and "didn't close like a slower door". Further, Mr. O'Doherty had given evidence to the effect that the fact that Ms. O'Flynn had not been able to withdraw her hand was proof that the door was not operating at the closing speed of 5.5 seconds as was contended for by the defendant but was either not working at all or had been tightened to an excessively fast closing time to keep smoke out of the common areas. That however was not the case that the High Court judge adjudicated upon. He found liability against the defendant for an act of negligence that was not pleaded, not referred to in the expert report of the

plaintiff's consulting engineer, was not referred to by him in his oral evidence and was unsupported by any other evidence in the course of the trial.

Discussion and decision re liability issue

30. It is clear from the judgment of the trial judge that he accepted as a matter of fact that the door in question was not malfunctioning on the night in question. It is implicit from his judgment, where he expressed himself satisfied that in calibrating the closing time for the door that "more than the medium" amount of time should be given to protect a person in Ms. O'Flynn's situation from the closing door, that he accepted the evidence of the defendant that the timing mechanism had been set to 5.5 seconds. Accordingly, it is clear that the trial judge rejected the claim, which Ms. O'Flynn had sought to advance through her witnesses, which was to the effect that the closing mechanism of the door was either not working or had been set to the lowest possible calibration such that the defendant should be found liable.

31. Core to the liability finding made by the trial judge was his conclusion that the defendant was in breach of its duty of care to Ms. O'Flynn in its failure to calibrate the closing mechanism on the door having regard to its location and the setup of the area immediately beyond it. However, the evidential basis for that finding is simply not present on any review of the evidence. Mr. O'Doherty, the plaintiff's engineer, did not make that case. His evidence in response to extensive questioning by the trial judge was that if the door was working property, as was contended for by the defendant at a closing setting of 5.5 seconds, Ms. O'Flynn would have felt some pressure on her fingers as the door started to close on them but would nonetheless have been able to extract them before they got crushed. Thus it was his opinion that her injury was caused as a result of the malfunctioning of the timing mechanism. The only other possibility, in his opinion, was that the defendant might have set the timer to a shorter timeframe so that the door would close more quickly to keep smoke out of the non-smoking area.

32. Not only was Mr. O'Doherty's evidence insufficient to support the liability finding made by the trial judge but the finding is unsupported by any other evidence. I reject Mr. Creed's submission that the finding can be supported either by the evidence of Mr. Byrne or that of Mr. O'Connell. Mr. Byrne did no more than make a modest concession that when fixing a timer for a door in a pub situation that it would be "an idea" to have it at the "longer closing". Mr. O'Connell went no further than to agree that it would "be more desirable" to give a long time rather than a short time if adjusting the closing mechanism of a door in circumstances where the occupier was aware that there would be tables inside that door. To support the finding made by the trial judge the plaintiff would have to have proved that it was common practice in a situation such as that which pertained in the defendant's premises that automatic doors would be set to a 7 second closing time and that it was recognised that to set such a door to any lesser closing speed would foreseeably cause injury to the customer. In this case the trial judge had no such evidence. To the contrary, he had positive evidence from Mr. O'Connell that 5.5 seconds was considered satisfactory for automatic doors in circumstances such as presented in this case and he also had evidence from Mr. Byrne that this was the standard setting for all automatic doors in the public house premises owned by the defendant.

33. In the aforementioned circumstances there was no evidence entitling the High Court judge to find that the defendant had failed to use reasonable care when it set the timing mechanism on the door in question at 5.5 seconds.

34. Apart from what I have already stated, the judgment of the High Court judge does not make clear how he resolved the issue of causation. It follows from what he stated in relation to liability that he was clearly satisfied that had the mechanism been set to close over a period of 7 seconds that Ms. O'Flynn would have had sufficient time to extract her fingers without injury. It follows that given that he accepted that the mechanism was working on the night in question and was operating on a 5.5 second closing time that he must have concluded that so operated the door was unsafe and did not provide sufficient time for a customer to extract their fingers once aware the door was closing. However, the High Court judge did not state how it was that he reached that conclusion. After all, it was Ms. O'Flynn's own engineer, Mr. O'Doherty, who stated that if the door was set to 5.5 seconds closing time that, in his view, she would have been able to extract her fingers safely. It follows that the only basis upon which the High Court judge could have awarded damages to the plaintiff is if he had accepted the defendant's evidence, i.e. that of Mr. O'Connell, that at 5.5 seconds the door at that point in time when it would be felt by the customer would instantaneously grip the finger such that it could not be withdrawn. However, if that was the basis upon which the High Court judge proceeded there was simply no evidence to suggest that at 7 seconds the plaintiff would have avoided injury and would have been in a position to extract her fingers.

35. For all of the aforementioned reasons the finding of liability must be set aside.

Contributory negligence

36. In light of the conclusions which I have just expressed, it is perhaps superfluous to engage with the trial judge's finding that on the facts as found by him there could be no finding of contributory negligence. Nonetheless I consider it important, in the context of cases of this nature, to state that I could not disagree more with his conclusion that a patron such as Ms. O'Flynn was not to be faulted in any respect for an injury which he concluded she sustained when the tip of her finger was amputated due to the fact that she had blindly put her hand behind her into the hinged recess of an automatic door with a 5.5 second closure speed.

37. Adult members of society are obliged to take care for the own safety and cannot divest themselves of responsibility for their actions. The duty of care of the publican is to take reasonable care for the safety of those who come to socialise on their premises. Their statutory obligations are those provided for in the Occupiers Liability Act 1995 which imposes upon the occupier equivalent duties to those required at common law. They must take reasonable care to protect the visitor from dangers on their premises.

38. From infancy we are warned of the risk of injury from closing doors. The education of toddlers concerning this particular type of danger probably starts when they first encounter the safety latch on the kitchen press. The concerned parent attaches such a device not only to keep children away from dangerous substances that may be in those presses but because they well understand the risk to little fingers that may be inserted unwittingly between the leading edge of the door and its frame or into the recess on the hinge side of the door. It is not long before that risk is absorbed by even relatively young children such that they can be left to move around their own homes where similar risks present with the opening and closing of larger and heavier doors.

39. Beyond the home, doors are part of every day life and automatic doors are no exception. They are commonplace in buildings of every nature. Automatic doors are encountered in every type of public building including hospitals, schools, courts and offices. As adults we know we must avoid leaving our fingers between the leading edge of the door and the door frame as it closes. Likewise, we are only too aware of the consequences of placing our fingers near or within the recess of the hinged side of a door. To propose that an adult should be considered blameless, and I use the word blameless in the legal sense in which that word is understood, for an injury sustained when, having proceeded through an automatic door, they blindly placed their hand behind them in a manner such that their fingers were placed in the hinged recess of the door is in my view untenable.

40. We are all guilty from time to time of doing things without paying sufficient attention to the consequences of those actions in

terms of potential risk. When we do so and sustain injury as a result we are to blame and we must absorb the consequences of our conduct unless we can demonstrate that some other party was in some respect culpable. On the facts of this case, as already explained, there was no basis for any finding of negligence or breach of duty on the part of the Oliver Plunkett bar. That being so, Ms. O'Flynn must be considered to be the author of her own misfortune.

41. It is indeed regrettable that Ms. O'Flynn sustained what was undoubtedly a significant and disfiguring injury to her left hand. However, judges must be careful not to allow the significance of an injury influence their judgment when it comes to deciding as a matter of law who is to be considered responsible for that injury. On the evidence before him there was no basis upon which the High Court judge was lawfully entitled to conclude that the defendant had any responsibility for this plaintiff's unfortunate injury.

42. For all of the reasons set out earlier in this judgment, I would allow the appeal.