

THE HIGH COURT

[2011 No. 781 P.]

BETWEEN

TASHA FITZSIMONS

PLAINTIFF

AND

TEMPLEVILLE DEVELOPMENTS LIMITED trading as BARCODE

DEFENDANT

Judgment of Mr. Justice Michael White delivered on the 11th of December 2015.

1. The plaintiff alleges that on 22nd December, 2008, when a lawful visitor on the nightclub premises of the defendant at Barcode, Clontarf Road, Dublin 3, she was injured as a result of the defendant's negligence and breach of duty including statutory duty in failing to adequately supervise the nightclub, failing to have appropriate security staff available to supervise the locus of an incident and failing to ensure that other visitors to the nightclub were admitted without excess alcohol or given additional alcohol consumption on the premises when under the influence.

2. Evidence was completed on 23rd July, 2015. Written legal submissions were received by the court on 1st October, 2015 and judgment was reserved.

3. The plaintiff suffered a significant injury early on the morning of 22nd December, 2008, when she fell from the shoulders of another patron at the nightclub, Mr. Andrew Kellett. The plaintiff suffered a laceration to her forehead and an undisplaced fracture to the radial head of the left elbow.

4. There is a conflict of evidence as to how this incident occurred.

THE EVIDENCE OF THE PARTIES ON THE INCIDENT CAUSING THE INJURY.

5. The plaintiff in her evidence stated that when she arrived in the nightclub, she bought a drink at the bar and was standing close to it with her sister and a friend when Andrew Kellett approached her. She did not know him well but knew of him. She stated he was quite messy and drunk and wanted her attention and she did not feel comfortable. This attention lasted two to three minutes and involved him trying to put his arm around her and pulling her towards him. She stated that the bar area was crowded and it would be difficult for people to see but it was not normal behaviour. She did not see any security personnel there. She decided to move to the other side of the bar which was U-shaped.

6. She stated that a short time later, Mr. Kellet approached her again at the other side of the bar and again he was messy and drunk. She had a loose fitting top on and he was pulling at this to bring her towards him. This lasted for about two minutes. He then grabbed her by the thighs and threw her up into the air, scooping her up. She was trying to smack him to stop it. He slipped and fell down and she came over his shoulders and fell with force and lost consciousness. She considered his demeanour as drunk and messy. It was not the behaviour of someone who was not drunk as he did not know her well. She did not see any security personnel there.

7. Ciara Forbes gave evidence. She stated she did not know the parties to the proceedings. She had been to Barcode before. It was very crowded that night because it was the last going out night before Christmas. She stated that out of the corner of her eye she saw the plaintiff and another man who she still does not know. He grabbed her around the waist and his hands were going up a little higher. She saw the plaintiff slap his hand away, then she saw him holding the back of her thighs. She looked away and when she looked back again, the plaintiff had fallen over and there was blood everywhere. She stated he was hunched down and scooped her up. She did not see her jump on him. She said from what she saw the Plaintiff was not having fun and she did not see her joking with him. She described it as messy and not normal. His hands being higher up was a bit personal and you could tell that she did not want it. When the plaintiff was on the ground, she ran over to her straightaway and she was in total shock. There was blood pumping and she tried to calm her down and picked her up. She denied that it was the man from whose shoulders she fell who had picked her up. Ms. Forbes stated that she did not see security personnel in the vicinity.

8. Donna Fitzsimons, the plaintiff's sister, gave evidence that she was with the plaintiff on the night in question at the nightclub. When they were at the bar, Andrew Kellet approached them in a beeline for the plaintiff. He was very loud and would not go away and she told him to go away and at one stage stepped between him and the plaintiff. This went on for about three minutes. The plaintiff was rolling her eyes. He was very close to her and in her personal space and had held her arm and held her around the waist. He was extremely loud and would not go away and because of that, they left the area.

9. She stated that after approximately ten minutes, at most, around the other side of the bar, Mr. Kellet again made a beeline for the plaintiff. He was touching her around the waist and pulling at the top of her clothes, pulling her into him. This went on for about two to three minutes. She went to the bar and saw Andrew Kellet's friend, Patrick Treacy and asked him for his help to get Andrew Kellet away from her. Mr. Treacy replied that Andrew Kellet was locked and had been drinking since 3pm that day. She stated she then heard screaming and went over and the Plaintiff was lying in a pool of blood. She ran to a staircase to get a bouncer who she met half way up the staircase. He followed her, but the plaintiff had been taken outside.

10. She stated that the next day, at approximately 10am when she returned from the hospital that there was a message on her Bebo, social media site, from Andrew Kellet stating that he was sorry about last night. She sent a message asking him to ring her. He rang and stated he could not remember what happened the previous night that he was locked as he had been drinking all day.

11. Andrew Kellet in his evidence stated that he had arrived at the nightclub at 11:15pm and went straight to the bowling area of the

bar and did not come into contact with the plaintiff on the other side of the bar. He stated he met Donna Fitzsimons, the plaintiff's sister and was talking to her and that he knew the plaintiff, to see, and they were talking, laughing and joking together. His friend, Pat Treacy, arrived and went up to get a drink at the bar. He had his back to the plaintiff and she climbed up on it. He stated he thought it was lads messing and bent back, he heard her screaming and pulling at his neck and he fell forward. He stated that he lost his balance and both fell over and that he immediately picked the plaintiff up from the floor and some girls came over and took her immediately outside through an exit door. He stated that the plaintiff was waving her hands around in the air and that she was having a great time laughing and joking. He denied scooping her up. He denied touching her in any inappropriate way.

12. Patrick Treacy gave evidence that he came to the nightclub at approximately 11:30pm on the evening of 21st December, 2008, and that he met his friend, Andrew Kellet, at the bowling area beside the bar. He stated that he met Donna Fitzsimons and her sister, the plaintiff. He stated that while queuing at the bar Donna Fitzsimons said to him "your friend and my sister are muching over there". He stated that Donna was in good spirits and that she did not mention anything about harassment by Andrew Kellett. He stated that the plaintiff was jumping up on Andrew Kellett and swinging her arms, her arm going around in a circle not trying to get down. He stated that he did not notice any interaction between Mr. Kellet and the plaintiff before he went to the bar. He then saw the two of them fall suddenly, forward and saw Andrew lifting her up and then saw two girls bring her out through an exit. Shortly afterwards, Veronica, one of the security staff came over and asked him what had happened and she then followed the plaintiff in the direction that she had left. He denied ever saying the words "don't mind him he has been drinking since 3pm in the afternoon". He stated that the nightclub was busy but not packed. He did not know how the plaintiff got up on his back.

13. Veronica Phelan, Security Supervisor, gave evidence that she received a call that an incident had occurred and went to the area and was told by Andrew Kellet that the plaintiff had been taken out an exit door. Ms. Phelan met the plaintiff on the stairs in a distressed condition and when asked what had happened, the plaintiff replied that "she had been messing with Andrew Kellet and had fallen". Ms. Phelan said to her it was a stupid thing to do and the plaintiff agreed and apologised. The plaintiff denies saying this.

14. Christopher O'Reilly, the General Manager, of the nightclub in his evidence stated that he met the plaintiff at the security hut when she was brought there and that he spoke to her and she told him, she was messing around in the bowling area and had got up on Andrew Kellet's back. The plaintiff denied saying this. He stated that the first time he heard there was an allegation that the plaintiff had been harassed in the nightclub by Andrew Kellett was when he heard the evidence of the plaintiff in court on 10th March. He stated that the plaintiff did not tell him about the first incident or that he had picked her up. He stated that if that had been the case he would have treated the matter as an assault and would have contacted An Garda Síochána. He stated that if Andrew Kellett was drunk, he would not have been admitted to the nightclub and that he was certainly not drunk when he was leaving the premises.

Evidence about the alleged deficiency in security.

15. Mr. Joseph Hogan, Consulting Engineer, gave evidence on behalf of the plaintiff and stated that from his examination of CCTV footage and the size of the venue, he formed an opinion there were 1,400 – 1,700 present at the nightclub on the evening of 21st December, 2008. In his opinion, the maximum capacity of the venue of 1,300 was exceeded on the evening.

16. In cross examination, he accepted he had carried out a multiplication exercise and there was a possibility there were less than 1,300 there.

17. Mr. Hogan also gave evidence about the lack of planning permission at the premises. That matter is irrelevant to the matter before the court.

18. Stephan Heffernan, a security consultant gave evidence and presented a report to the court on his assessment of security at the premises.

19. Mr. Heffernan gave evidence in accordance with his report of March 2015, and a short addendum. He concluded that the chances of the incident happening would have been dramatically reduced or avoided altogether if the following procedures had been followed.

- A proper hazard, identification and risk assessment for the activities carried out on the premises.
- A risk assessment from the security provider.
- Increased number of security staff. In my opinion, there should have been at least ten more staff employed.
- Ensuring the security provider provided a current license to operate as directed by the Private Security Act 2004.
- Ensuring the security provider employed fully licensed trained staff.
- Sufficient CCTV coverage of all areas of the premises.
- A CCTV operator who was in contact with the security personnel by radio in order to address issues and direct staff to the area.
- Timely intervention by management to address the behaviour of the male person involved in the incident.
- Removal of the alcohol dispensing machines to ensure control of the quantities and general availability of alcohol to patrons.
- An accident report form in order for management to review the incident and make future plans re incidents.

20. In the course of his evidence, he stated that there should have been a proper monitoring system at the front gate and any person who was inebriated should not have gained admission. It should be taken into consideration that a patron could purchase more alcohol in the premises. He stated based on the account given to him about Andrew Kellet's behaviour, that he should have been prevented from entering the nightclub.

21. He was of the opinion that it was appropriate to have a proper ratio of security personnel to the number of patrons in a licensed nightclub. He considered 1 – 75 acceptable; 1 – 50, Rolls Royce treatment; 1 – 100 not acceptable. There should have been 24 personnel on duty and that 12 – 13 was not adequate. He stated there was no legislative maximum.

22. He was critical of the fact that nobody saw or did anything prior to the incident and there was no reaction to the incident. He also criticised the incident report.

23. In cross examination, he accepted that numbers of security personnel varied based on the numbers attending. He accepted there could have been less than 1,300 at the venue on the night in question. He accepted that he did not view the premises.

24. Veronica Phelan also gave evidence on the security aspect of her duties. She stated she was employed as a security supervisor directly by the defendant and was a licensed operator and had completed a certificate course. She stated that the procedure which was generally followed, and which was followed on the night in question was a meeting at 8pm when the security staff were briefed and provided with radios and earpieces. She stated there was constant CCTV monitoring of the premises and that security staff were assigned to different positions with position changing every two hours or so. Ms. Phelan could not see how the plaintiff, her sister and Ms. Forbes had not noted any security on the premises. She stated that the premises was a very well run establishment and that they had a lot of returning patrons. Drunk people were not allowed entry and there was an assessment if drunkenness developed on the premises. A patron would be asked to leave and there was a strict policy that the bar staff would not serve them. She stated she would not stand for any harassment of females on the premises. She knew Andrew Kellet, and did not have a concern about his condition on the night. There were ten security personnel on duty apart from herself and the numbers provided were not black and white but depended on how busy the night was. She stated that once the patrons were admitted staff moved from the cloakroom area to other positions. She allocated the positions. In addition, to the ten staff, Eric Boles, Head of Security, visited the premises and Fintan Lawlor was monitoring the CCTV. The security was provided by Eric Boles Security Firm apart from herself and Nick Nolan who were employed by the defendant. She stated she was floating at the club that night and did not see anything untoward.

25. Eric Boles, the Managing Director of the security company Renaissance who supplied security to the defendant gave evidence. He stated that they supplied security on an ongoing basis to the defendant's premises. A risk assessment had been carried out and that all his employees had PSA licenses or a s. 52 letter to indicate that a license was being processed and that they were suitable persons to be employed as security personnel. He stated that the company carried out in-house training. He disagreed with the evidence of Mr. Heffernan. He said that 1 – 100 was the rule of thumb for security in a nightclub with standing patrons and that it was 1 – 250 in a seated concert. The number of staff was dependent on how busy the club was. His company employed a total of 120 staff and the staff would be shifted to the premises if it was required. He insisted in cross examination that all his employees were properly vetted and licensed. He stated that the nightclub was busy on the night in question but there was not 1,300 people there. He accepted that the risk assessment document was a template document but maintained that it had been discussed and put in place for the defendant's premises. He accepted that nobody saw the incident on the night in question, other than Mr Lawlor monitoring the CCTV. The security staff wear badges with a high visibility jacket and tie.

26. The person monitoring the CCTV Fintan Lawlor stated that there were 20 cameras on the premises, 16 static cameras and 4 that could pan and rotate. The CCTV footage of the incident was taken from camera 37 which is a panning and rotating camera. It works automatically but that he could take control of it and zoom in. He noticed the incident and reported it to the security staff. He stated that the CCTV is constantly monitored by him and he was in radio contact with security staff.

27. Christopher O'Reilly, the club manager gave evidence. He stated that he operated a clicker system to record attendances. He had two clickers. The venue was open during the day for meals and leisure and he would use one clicker to establish the number of patrons already in the premises and the second clicker to record those attending the nightclub. He said that due to the numbers attending the premises was regularly monitored by a fire officer who would carry out a visual inspection. He stated that this incident took place on a Sunday night when an older crowd attended, it was a 70s disco night and he estimated that about 80% were regulars on that night. He stated on a good Sunday night approximately 1,000 people would attend and on a bad night, 600, and that he would always plan for the bigger number. He stated that the premises was not packed.

The Law

28. The defendant did have a duty of care to the plaintiff to take reasonable steps to ensure her safety while on the premises, what was reasonable depends on the facts of the particular case.

29. In the judgment of *Reynolds v. Woodman Inns Limited t/a Ruby's Nightclub and John O'Regan*, a judgement of Peart J. of 18th November, 2009, he stated at p. 10:-

"While it is a function of the security staff to intervene appropriately when it appears to them that some person or persons are likely to cause trouble with other patrons, whether as a result of intoxication or otherwise, and while it is of course a duty upon the first named defendant to ensure as far as possible that patrons behave appropriately while on its premises, and to take appropriate measures to eject those who are not, it is not in my view reasonable to impose a burden upon the first named defendant to in every instance observe the actions of each patron on an ongoing basis. That is an impossibly high burden. The law expects that reasonable efforts will be made by a person or legal entity to ensure the safety of its patrons. This premises was adequately staffed for that purpose."

30. This Court accepts that there is a duty on the court to examine the effectiveness of the security system in place on the evening of 21st and morning of 22nd December, 2008, in the nightclub premises, examined in the context of the decided facts.

Findings by the court on the conflict of evidence.

31. In respect of the first incident when the plaintiff alleges she was at the bar area on the other side from the bowling area, the court notes there was no complaint at the time by the plaintiff to security staff on the premises nor was any complaint made subsequent to the plaintiff's injury to either Veronica Phelan or Christopher O'Reilly. It was not referred to in the preliminary letter of claim of 9th January, 2009, when the incident was described as a prank when Andrew Kellet picked up the plaintiff and fell on top of her and alleging that Mr. Kellet was drunk. There was no reference in the personal injury summons to this incident. The particulars in the summons stated that the plaintiff was picked up by an individual without her consent who caused her to be dropped onto the floor on her head as a result of which she suffered injuries. Particular 6 of the notice for particulars of 7th May, 2013, asked "whether the plaintiff had danced with Andrew Kellet before the alleged accident. Particular 7 asked for details of what exactly the plaintiff was doing immediately before the accident. The replies which were delivered on 24th May, 2013, were 6. "no" and 7 "the plaintiff was in the middle of the floor immediately before the accident waiting for her drink." The first notice was the plaintiff's and Donna Fitzsimons evidence on 10th March, 2015. Mr. Andrew Kellet in his evidence stated that he was not in this part of the bar area.

32. It would have been very difficult for security staff to know that there was an incident going on. If the incident had been serious, I would have expected the plaintiff or Donna Fitzsimons to have brought it to the attention of the security staff, or to the attention of Ms Phelan or Mr O'Reilly when she spoke to them.

33. In respect of the second incident, Ciara Forbes was the only independent person who witnessed the incident and she contradicts the account of Andrew Kellet and Pat Treacy. The court has been confronted with the unusual situation in that two members of the management team of the defendants, Veronica Phelan and Christopher O'Reilly stated that the plaintiff had acknowledged she had been messing. The court considers Ciara Forbes, Veronica Phelan and Christopher O'Reilly reliable witnesses. Ms. Forbes stated she saw Andrew Kellet touching the plaintiff and scooping her up onto his shoulders and when she looked again the plaintiff had fallen. She is an independent witness, who was in close proximity to the incident and is the best evidence. The CCTV footage is not definitive.

34. I am satisfied that the overall security system in the nightclub was good. The defendants had two security personnel directly employed and had contracted out security to a reliable company with expertise. This company Renaissance were properly licensed as were all the staff provided on the night. Mr. Fintan Lawlor was constantly monitoring the CCTV, which was a sophisticated system with 16 fixed cameras and 4 panning cameras with 20 television monitors in the security area. There was a risk assessment prepared and a system in place to prevent overcrowding. I am satisfied there was no overcrowding on the night. This was a well run establishment.

35. The court has to determine if the security worked on the night in question and if the incident could have been prevented. When the plaintiff was injured, no member of the security staff witnessed it or was present in the immediate locus of the incident. Mr. Lawlor who was monitoring the CCTV alerted security. Is that enough to render the defendant negligent for the reckless acts of a third party.?

36. It would be difficult for the security staff in a busy nightclub to discern if a patron is receiving unwanted attention from another patron of the type described by the plaintiff. Mr. Kellet's action in placing her on his shoulders was of very short duration as evidenced by the CCTV and the evidence of Ms. Forbes. It would have been difficult to anticipate that and the subsequent loss of balance and heavy fall of the plaintiff to the floor. Even if a security officer was present in close proximity to the incident, he or she may not have been able to intervene in time.

37. Both Veronica Phelan and Christopher O'Reilly interviewed Andrew Kellet after the incident and stated in evidence he was not drunk. The defendants had security staff monitoring the front gate and the entrance to the nightclub.

38. The finding of negligence against the defendant in the circumstances of this case would be too high a standard of care to impose on the defendant.

39. The plaintiff suffered a significant injury on a social night out which was very unfortunate. Mr. Kellet was responsible for that injury. The nightclub was adequately supervised. The court does not have sufficient evidence to establish that Andrew Kellet should have been refused admission. There was sufficient security employed on the night.

40. I dismiss the plaintiff's claim.