Neutral Citation [2013] IEHC 259

THE HIGH COURT

[2011 No. 1376 P.]

BETWEEN

LOUISE BARRY

PLAINTIFF

AND

DUNNES STORES CLONMEL (LIMITED)

DEFENDANT

JUDGMENT of Ms. Justice Irvine delivered on the 12th June, 2013

Background

1. The plaintiff in these proceedings was born on 12th November, 1971. She is a married lady with six children, two of whom were born prior to the events the subject matter of these proceedings.

2. This claim concerns an incident which took place on the defendant's premises at Clonmel, Co. Tipperary on 13th October, 2004. At that time the plaintiff was employed as a part time sales assistant and she was six weeks pregnant. Her job included putting out stock on the shop floor from trolleys which are loaded by members of staff in the stores area.

3. On the day in question when the plaintiff and her colleague, Michelle Collins, arrived into work they found a number of trolleys in the homeware department which were stacked with goods to be displayed on shelves in that department. It is accepted that the plaintiff and Ms. Collins were expected to unload any trolleys so positioned as part of their regular duties and to place the goods on display.

4. The plaintiff states that she went over to one of the trolleys which was stacked with boxes well above the height of her head. She reached up to one of these boxes not knowing what was inside it and pulled it forward to take it down. As the weight of the box came into her arms, which were stretched above her head, she realised it was too heavy for her to manage. She called out to Ms. Collins to help her. Unfortunately at that precise moment when the plaintiff could no longer hold the box nor push it back up onto the trolley, Ms. Collins was herself busy handling another box. As a result, the plaintiff had to take the weight of the box into her arms and put it down quickly on a table that was close by. This required her to perform a twisting or turning type of manoeuvre. A few minutes later she felt pain in her back which soon started to radiate into her left buttock and down her left leg.

The Liability Issues

5. The plaintiff maintains that she suffered a significant injury to her back due to negligence and breach of duty on the part of her employer. She maintains that her employer failed to provide her with a safe place of work, a safe system of work, safe equipment or any competent assistance. In particular, the plaintiff alleges that she was allowed and required to lift a cumbersome and heavy box from a stock trolley which was stacked excessively high, causing her to overreach. She maintains that the defendant is liable at common law due to its failure to take reasonable care for her safety claiming that as a result she sustained a foreseeable injury to her back. The plaintiff also relies upon the defendant's failure to comply with the provisions of the Safety in Industry Acts 1955 - 1980, the Safety Health and Welfare at Work Acts 1989-2005 (and the Regulations made thereunder) and also the Safety Welfare at Work (General Application) Regulations 1993.

The defendant denies all liability in respect of the plaintiff's claim. It contends that the plaintiff was not exposed to a trolley which was laden in the manner alleged. However, if a trolley was laden in such a manner, it contends that the plaintiff's injuries were caused entirely by her own negligence. It asserts that she was given extensive safety training which focused significantly on accident prevention and back safety. The defendant maintains that in the course of safety training the plaintiff was warned that she should never lift any load without first ascertaining its weight. It maintains that she was also trained never to carry out a lifting manoeuvre if it involved stretching and taking a load from an overhead position. Any loads which were positioned above an employee's waist or shoulder were only to be moved if a safe platform was available such as a stepladder. Further, if having ascertained its likely weight, the load appeared to be too heavy or cumbersome, staff members were trained to seek assistance from other staff members. All staff, according to the defendant, were warned and advised of the danger of moving a load which they knew or ought to have known could expose them to injury. Accordingly, there were no circumstances which could justify an employee taking a risk such as that which the plaintiff had taken on the day of her injury. In other words, the defendant maintains that the plaintiff was the author of her own misfortune.

Decision

6. I do not propose in the course of this judgment to set out all of the evidence advanced by the parties. I will do no more than set out my findings of fact and the evidence supporting these findings after which I will deal with the liability issue.

7. I found the plaintiff in these proceedings to be a careful and thoughtful witness. I have no doubt whatsoever that she injured herself precisely in the manner which she recounted in the course of evidence. Her account of the events and the manoeuvre which she was performing was entirely consistent with the pleadings, her written account of how she sustained her injuries dated 14th February, 2005 and the evidence of Ms. Michelle Collins. The fact that Dr. Foley, in her records, recorded the plaintiff as having sustained her injury in the course of a dragging manoeuvre, does not to my mind in any significant way undermine the plaintiff's evidence.

8. I accept the plaintiff's evidence that on the morning of her injury, several trolleys were stacked with goods to a height of approximately 6ft and were left on the shop floor to be unpacked by herself and Ms. Collins, both of whom are ladies of quite short stature. Ms. Collins confirmed that she is about 5ft tall and I think the plaintiff is probably no more than an inch or two taller than her. Although the court heard evidence from Mr. McNamara, who was the plaintiff's manager at the time, that staff were trained not to stack trolleys above eye level for safety reasons to which I will later refer, I am satisfied that on this occasion, the company's safety

practice was not followed. I believe my finding in this regard is well supported by the evidence of Mr. Fogarty, Consulting Engineer. Mr. Fogarty attended at the defendant's premises in July 2009 for the purposes of inspecting the locus in quo and one of the trolleys relevant to the plaintiff's injury. In the course of that inspection he was only permitted to photograph an empty trolley. However, as he carried out his inspection he noted the presence of three other trolleys on the premises. Two of these were on the shop floor. Mr. Fogarty estimated that the trolleys were stacked with goods to a height of 6.5, 7 and 8ft respectively. He asked for permission to photograph these trolleys but was refused. Regardless of the absence of photographs of these trolleys, I accept Mr Fogarty's evidence as to the presence of these trolleys laden in the manner described. His evidence on this issue was not challenged by the defendant even though its representatives were present throughout his inspection.

9. I also accept the plaintiff's evidence that the boxes on the uppermost level of the trolleys on the day of her accident contained ten or twelve bathmats and that each box weighed something between 9 and 10kg. In reaching this finding, I have taken into account the evidence of Mr. McNamara and that of Ms. Hawe, from the department of human resources, to the effect that staff are warned not to stock these trolleys above shoulder height and are trained to put heavier goods on the lower levels and lighter goods above. The plaintiff's account regarding the contents of the offending trolleys was fully supported by Ms. Collins.

10. Having regard to my findings of fact I am satisfied that I must find the defendant guilty of negligence. The defendant should not have left out a trolley such as the one in question to be unloaded by the plaintiff. That trolley was stacked too high and boxes of bath mats weighting 9-10 kilos should never have been stacked above shoulder height. No engineering evidence was called on behalf of the defendant to counter that of Mr. Fogarty to the effect that the task of unloading such a trolley was potentially dangerous and unsafe. Further, the fact that such a practice would be likely to cause injury is borne out by the safety guidelines which set out and advise upon weights which may be lifted from any level from the ground up to shoulder height with relative safety. For example, a woman is expected to be able to handle a load of 3 - 7 kg at shoulder height with safety. However, no guidance is given as to weights which can be lifted safely above shoulder height and I accept Mr Fogarty's evidence that this is because the handling goods of any weight manually above shoulder height is always potentially dangerous. Indeed, Ms. Hawe and Mr. McNamara both gave evidence to the effect that they knew it was unsafe to stack trolleys above eye level and that staff were trained not to do this and were always told that heaviest goods should be stacked below lighter goods and never above waist level. They both acknowledged that a trolley was stacked to above eye level is hazardous to manoeuvre safely around the store and that it also poses a risk of injury to the employee involved in the stacking and unstacking operation.

11. Clearly, it is not only the employer that has obligations in terms of health and safety. Every employee must take care for their own safety. Having considered all of the evidence, including the training videos shown in the course of the proceedings, I am satisfied that as of 2004, the plaintiff had received adequate safety training as to the manner in which she should approach any task involving the lifting of goods. Any employee who saw the defendant's instruction video in relation to back safety could not fail to appreciate that they would risk injuring their back if they decided to move a load from above their head with their back extended. I am also satisfied that the plaintiff was adequately trained to seek help from other personnel if faced with a task which she considered might expose her to a risk of injury and that she was trained always to assess a load before seeking to take its weight in her hands.

12. However, the fact that an employer may train its staff at the time of recruitment and intermittently thereafter regarding the risk of injury to their back is significantly negated if, in daily practice, the methods for moving goods safely as advised in the course of training are not deployed by employees and managers do not enforce compliance with training and safe practice. In this regard I am satisfied from the evidence of the plaintiff, Ms Collins and Mr. Fogarty that it was not uncommon for trolleys to be stacked in the manner in which they were stacked on the day of the plaintiff's injury. Further, while Mr. McNamara advised the court of the dangers associated with lifting boxes from a height he told the court that he felt the plaintiff should have called him to assist her if she had been unable to lift this box and that he would have taken it down for her, thereby putting himself at risk of injury and acting contrary to all safety training. This evidence suggests to me that the work practices adopted by staff and management at the time of the plaintiff's injury may well have been at odds with the training relied upon by the defendant in its defence to these proceedings.

13. From a liability prospective, it is also no answer to the negligence claimed for the defendant to state that there were step ladders in the store which could have been used by the plaintiff for the task in question. Firstly the plaintiff should never have required a step ladder to unload any trolley of goods. Secondly, I got the impression from the evidence that step ladders were not in abundant supply and that any worker requiring one would have to go around the shop floor or into the stores area to find one. There was no designated area where these were kept. Thirdly, I am satisfied that the load concerned could not have been moved safely by the plaintiff standing on a step ladder, had she decided to try to find one. She would have needed to have two hands on the box to lift it and I don't believe she could safely have transferred it to another colleague without the risk of becoming unstable on the ladder. I think the best the plaintiff could have done in the circumstances was to use the ladder to gauge the weight of the box and then refuse to move it. The question then is how that box could then be taken down safely. Perhaps this could have been done by two tall men of equal height as was demonstrated in relation to the movement of one high load shown in the training video but clearly such a manoeuvre would never have arisen had the trolley not been loaded in an unsafe manner in the first place. However, regardless of these facts the Plaintiff should have known not to try to lift down the box which caused her injury. She did this without ascertaining its weight. Had the plaintiff ascertained its weight by getting a step ladder, albeit it that this may have taken some minutes, I think this injury would not have happened. Alternatively she should have recognized the risk of taking any load from over head height and she should have refused to do so. In either set of circumstances the plaintiff would not have been injured. Accordingly I have decided that she must bear 30% of the liability for her Injuries.

General Damages

14. As a result of her injuries, the plaintiff attended her general practitioner the following day. Her regular general practitioner, Dr. Cheasty was not in the surgery and consequently she was seen by her colleague Dr. Fogarty. Dr. Fogarty diagnosed what is commonly referred to as a slipped disc. An MRI scan subsequently carried out demonstrated the presence of a mild disc protrusion at the L4/5 level but neither Mr. O'Roirdan, Consultant Orthopaedic Surgeon retained on behalf of the defendant nor Mr. Kaar, Consultant Neurologist, retained on the plaintiff's behalf maintain that this disc protrusion was caused by the event under scrutiny. Because the plaintiff was six weeks pregnant, medication was not prescribed. She was advised to rest and to stay out of work. In January 2005, the plaintiff was advised to undertake some physiotherapy because of ongoing symptomology and she had five sessions which provided her with some relief. However, the plaintiff remained symptomatic with ongoing back and leg pain and this interfered with her day to day activities and made it particularly difficult to manage her family. She was reluctant to take even over the counter medication which might have eased her symptoms. I accept that she experienced ongoing back and leg pain over all of 2005 and into 2006. I further accept that there were many domestic tasks that the plaintiff was simply unable to perform because of her back pain.

15. In early 2006, the plaintiff had five further sessions of physiotherapy but achieved little by way of long term benefit from this intervention. In June 2007, when the Department of Social Welfare deemed her fit to reengage with the workforce, she discussed her position with Dr. Cheasty. She felt that having regard to the plaintiff's ongoing symptoms that she required specialist review. Consequently, Dr. Cheasty referred her to Mr. Kaar, Consultant Neurosurgeon who directed that an MRI scan be carried out. This

showed a mild broad based disc protrusion at the level of L4/5 but with no nerve root impingement. He was of the view that the plaintiff had mechanical back pain with referred leg pain as a result of the injuries sustained on 13th October, 2004. Mr. Kaar was of the opinion that prior to 2004, the plaintiff had some degree of underlying degenerative changes in her back. However, she was asymptomatic prior to her accident in October 2004 and he formed the view that but for the incident the subject matter of these proceedings she would probably not have experienced back or leg symptoms for many years to come. As far as he was concerned he considered the plaintiff capable of carrying out some light work as early as April 2007. Nonetheless, the plaintiff clearly continued to be quite symptomatic in so far as in September 2007 he considered that her symptoms warranted some degree of pain management.

16. The plaintiff was accordingly referred by Mr Karr to Dr. Damien Murphy, Consultant Anaesthetist. However, she was 22 weeks pregnant when she saw him in early 2010. He decided to postpone treatment until after the birth of her twins and later on 19th December, 2010, performed a diagnostic facet joint blockade. This gave the plaintiff very significant relief which she reported to him when she next saw him in February 2011. At present the plaintiff is not entirely symptom free and Dr. Murphy has advised that she may in the future need additional facet joint injections or radio frequency ablation. Further she is likely to require over the counter medication because of the vulnerability of her back.

17. Mr. O'Riordan, Consultant Orthopaedic Surgeon on behalf of the defendant examined the plaintiff on three occasions. He is satisfied that the plaintiff did not sustain a disc prolapse in October 2004 and that at that time she had asymptomatic underlying degenerative disc disease which became symptomatic as a result. He is satisfied that the plaintiff does not have any nerve root compression and that what she now has is degenerative disc disease associated with mechanical pain.

18. It is not disputed that the plaintiff still continues to have pain and discomfort in her back and also has restriction in the straight leg raising of her left leg. The plaintiff has, I believe, sought to mitigate her losses in terms of her compliance with all treatment and exercise programmes recommended by her doctors. The plaintiff has bought a treadmill and uses it to keep herself well exercised and she also engaged in pilates and swimming to keep her spine mobile. Having considered all of the evidence particularly that regarding the pre-existing degenerative change in the plaintiffs spine, I am satisfied that her symptoms at this stage can no longer be ascribed to taking down a heavy box from a height on the defendant's premises on 13th October, 2004. Having regard to her age and the previously underlying degenerative changes in her back I am satisfied, on the balance of probabilities, that she would in any event have run into some difficulties and be symptomatic in respect of her back at this stage.. Accordingly, I will only award a sum for pain and suffering to date and in this regard, I will award a sum of €45,000.

Loss of Earnings

19. In relation to the loss of earnings claim, I am satisfied that the plaintiff was out of work solely as a result of her injuries up to 5th June, 2007, at which stage she was awarded job seekers allowance. The parties have agreed that the maximum sum to which the plaintiff might be entitled in respect of this period is a sum of €33,000 taking into account the plaintiff's maternity leave. I see no reason why I should make any deduction from this sum.

20. I am invited by the plaintiff to conclude that she also sustained loss of earnings after 51 June, 2007, regardless of the fact that she was deemed fit to work, by the department of social welfare on 5th June, 2007 this being the basis upon which a job seekers allowance is paid. However, this determination by the Department does not mean that the plaintiff was symptom free and able for all types of work. Indeed I was advised by Dr. Cheasty that she considered the plaintiff unfit for her work in Dunnes Stores at this time because it involved a significant amount of manual handling and I accept Dr. Cheasty's evidence on this issue.

21. Notwithstanding the foregoing, I am not satisfied that the plaintiff has made out a sufficient case to justify me augmenting her general damages to reflect some potential loss of earnings to cover the period spanning 5th June, 2007 until June 2011 when she returned to work with a different employer earning an equivalent income to that which she had formally enjoyed when working with the defendant. While the plaintiff may not have been fit to return to her work with the defendant in June 2007, I am satisfied from the fact that she was granted social welfare payments and from Mr. Kaar's report that she was capable of doing light work as of April2007. There is an onus on every plaintiff to seek to mitigate their loss and in this regard, I think the onus was on the plaintiff to seek out alternative light work and had she done so she might have been entitled to claim a differential figure for loss of earnings over this period.

22. In deciding not to augment the plaintiffs general damages to reflect any further loss of earnings post 5th June, 2007, I have taken into account a number of complicating factors and these are firstly the fact that her daughter Ciara was born in May 2007. Regrettably the plaintiff's mother, who looked after her children without financial recompense, died in February 2007 and had the plaintiff then gone back to work she would have had childcare costs which would have significantly impacted on her net earnings. Furthermore, the plaintiff's twins were born in June 2009 and I think her pregnancy and the delivery of these twins might also have impacted upon her ability to work over this period of time. Consequently, I will not award any additional sum in respect of this period.

Conclusion

23. In all of the aforementioned circumstances, I will award the plaintiff a sum of €45,000 in respect of pain and suffering. I will further award a sum of €33,000 in respect of loss of earnings to which I will add any agreed special damages. I will not allow the cost of the treadmill as an item of special damage. A deduction of 30% must then be made in respect of the plaintiff's contributory negligence.