THE COURT OF APPEAL

(CIVIL)

Neutral Citation Number: [2016] IECA 261

Appeal No. 2015 No. 261

Peart J.
Hogan J.
White J.
BETWEEN:

ELIZABETH LAVIN

PLAINTIFF/RESPONDENT

- AND -

DUBLIN AIRPORT AUTHORITY PLC.

DEFENDANT/APPELLANT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 11TH DAY OF OCTOBER 2016:

1. This is an appeal by the defendant authority against a finding of liability for negligence and an award of damages for personal injuries in the sum of €60,000 made in favour of the plaintiff by Mr. Justice Hanna on the 30th April 2015 following a two day hearing in the High Court. In addition, he made a finding of contributory negligence against the plaintiff to the extent of one third, resulting in an award of damages in her favour of €40,000. The core issue in this appeal is the scope of the duty of care under s. 3 of the Occupiers Liability Act, 1995 owed by the authority as occupier of the terminal to the plaintiff who was its "visitor" on the date of this accident, and whether in this case that duty was breached. The trial judge concluded that there was a breach of that duty to the plaintiff. I regret that I cannot agree for reasons which I hope to make clear.

2. Section 3 of the Act of 1995 provides:-

> *"3(1) An occupier of a 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.*
>
> *(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 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."* [emphasis added]

Factual Background

3. On the 2nd November 2011 the plaintiff, then aged 64, received a nasty injury to her head and other soft tissue injuries, when she lost her balance and fell while being transported upwards on a large escalator from the check-in area on the ground floor to the departures area on the first floor at Terminal 2 in Dublin Airport. She was intending to take a flight to the UK for a family funeral, and was accompanied by her sister in law, (aged 81 at the time), and her niece, who was much younger. The defendant is the "occupier" of Terminal 2 for the purpose of the section.

4. Terminal 2 is a new state of the art airport terminal which had been operational for about a year prior to the plaintiff's fall. She was unfamiliar with its geography and features, not having previously visited it. Neither had she ever used an escalator in all her 64 years. However, her niece had used that terminal previously.

5. The facts are not controversial, though it must be said that the plaintiff's account of how her fall occurred which she gave to her consulting engineer, Conor Murphy, when they visited the terminal together on the 12th May 2013 for the purposes of his preparing an expert report was clearly incorrect given what is to be seen on the very clear CCTV footage of the incident. His report records that she told him that she had entered upon the escalator, placed her carry-on suitcase in front of her and ascended with her left hand gripping the handrail on her left hand side. The CCTV footage however clearly shows her entering upon the escalator with her carry-on bag placed first of all on the step immediately behind her, and then immediately thereafter on the step on which she was standing and to the right of her own feet. But her left hand is not gripping the handrail. She is in fact holding in that hand what seems to be the print-out of her boarding card. In other words she is seen not to be holding onto the handrail at all.

6. Her account of the incident to Mr Murphy did not explain what caused her to lose her balance and fall down the escalator, whereas the CCTV footage makes clear that she turned around to adjust her carry-on bag in some way, and in doing so she fell over and down the escalator. Fortunately, a member of the public saw what happened and quickly pressed the emergency button which brought the escalator to an abrupt halt. In addition, airport staff was on hand within seconds and they were able to render immediate assistance to her.

7. In her personal injury summons which issued on the 8th October 2013, some four months after the CCTV footage was made available to the plaintiff's side, she makes no mention of her carry-on bag, or whether or not she was holding onto the handrail. She pleads simply that while present on the premises as a lawful invitee *"she was caused to fall straight down on her face as she was travelling up the said escalator which was moving and thereby sustained personal injuries* … etc." [emphasis added]

8. As for what is alleged to have caused her to fall one must look to the particulars of negligence as set out in the summons. These allegations are spread over some twenty five separate paragraphs (if one excludes the usual formulaic and, in most cases including

this one, meaningless final plea of *res ipsa loquitor*) with each paragraph specifying a separate basis on which she alleges that the defendant was negligent. I mention the quantity of these allegations of negligence because despite their prolixity none makes any explicit mention of the only allegation of negligence on which this case was actually opened in the High Court and on which it proceeded, and on which the judge ultimately found against the defendant, despite the fact that by the time this summons was issued the CCTV footage had been provided by the defendant, and the plaintiff's engineer had provided his first report following a joint inspection of the locus on the 12th May 2013.

9. That sole basis for the finding of negligence against the defendant authority is that it failed to bring to the plaintiff's attention by adequate signage within the terminal the fact that she could reach the departures area by means other than the escalator, namely by using one of the lifts provided or the stairs.

10. As it happens, there are three substantial lifts immediately adjacent to the escalator, which are clearly visible, as one would expect in a modern airport terminal. In fact not only are the lift doors large and clearly visible on the ground floor as one would expect, but as the lifts themselves ascend and descend they are visible since they are behind a feature blue transparent glass wall. However, the plaintiff said in her evidence that she did not know of their existence, and that had she known there was a lift she would have taken it, because she was apprehensive and nervous about using the escalator never having been on one before.

11. However, there is no evidence that she ever brought that nervousness and apprehension to the attention of her niece or her sister in law, both of whom are seen on the CCTV footage confidently making their way to the escalator with the plaintiff following close behind. There is no evidence that she gave any thought to asking the airport staff who were in the immediate vicinity of the escalator and clearly identifiable wearing a hi-viz pink garment, if there was a lift or where it was located. She simply followed her sister in law and niece to the escalator without any apparent unease or hesitation.

12. As I have said, this particular allegation of negligence concerning the lack of adequate signage concerning the availability of a lift to the departures area was not pleaded in any direct way in the personal injury summons. The allegations of negligence are all in one way or another directed to the design, operation and maintenance of the escalator itself. While her counsel in his opening of the case stated that the plaintiff felt that the escalator was very steep and moving too fast, this complaint had no prospect of success given that the plaintiff's own engineer's report was satisfied that the escalator conformed to the appropriate British Standard and was operated appropriately. He could found no fault in this regard, and so the focus of the plaintiff's case shifted to the lack of adequate signage indicating an alternative means of ascent to the departures area.

13. In answer to a suggestion from counsel for the defendant during the hearing that the plaintiff's case had changed from that which was pleaded, counsel for the plaintiff said that he relied upon paragraphs (o) and (v) of the particulars of negligence which state as follows:-

> *"(o) Failed to provide any alternative means of access to upper/lower floors for persons, in particular the plaintiff, with baggage.*
>
> *(v) So designing and/or laying out, and/or operating the said premises so that [to] persons carrying baggage, in particular the plaintiff, said escalator presented itself as the only real practical access to the next floor."*

14. Given that there are lifts provided as a means of access to the upper levels, para. (o) could avail the plaintiff. So para. (v) must be the potential source of rescue for the plaintiff on the pleadings.

15. The trial judge stated in his ex tempore judgment that these paragraphs were broad enough to capture the head of negligence being relied upon, and contained sufficient particularity to accommodate the plaintiff's complaints relating to signage. He acknowledged in any event that the defence had not made a big issue of it and had taken it in their stride. Be that as it may, I would just say that the view taken by the trial judge as to the sufficiency of these paragraphs to encompass the issue as to signage was an indulgent one. The purpose of pleadings remains the same, despite the inclination nowadays to describe a point being made on the pleadings as being "a mere pleading point" as if to denigrate it to the level of unworthy pedantry on the part of the complainant. Their purpose remains to ensure that the other party knows precisely what case it has to meet, and on which it might, if it wishes, seek further particulars, and also to ensure that the issues are clearly described and therefore circumscribed so that neither the other party nor indeed the court are ambushed by a case being sprung like a rabbit out of a hat, and justified on the basis of some broad catch-all type of plea. I do not agree that the new ground of negligence relating to the inadequacy of the signage in relation to the existence and location of the lifts is properly pleaded in the personal injury summons in this case, if lack of adequate signage was truly in the plaintiff's mind as a cause of her injuries. In fact it is clear that when the summons was drafted and issued no allegation was being made in that regard. Her entire focus was on the escalator itself and the manner of its operation. If the pleading point had been pressed more strongly by the defendant, it would be hard not to agree that it was taken by surprise, and that an adjournment should be granted so that the defendant's engineer could have an opportunity of preparing a report to deal with the issue specifically.

16. Indeed, in this regard the defendant's engineer stated in his direct evidence that the question of signage was new to him. e said:-

> " *I have to confess that the issue of signage is a relatively new consideration for me in relation to the mechanism of this accident. We were initially instructed to conduct an audit on the escalator in circumstances where an allegation was made that the escalator was defective and it had either been too fast, too steep or through a sudden movement this very very ugly accident and that was the focus of our investigation and we did conduct a joint inspection. To be fair to the plaintiff she attended at that and gave a clear account, I have no doubt, [of] her best recollection of the circumstances. She did not indicate that she had a morbid fear of these mechanisms nor did she say it was her first time on such a mechanism. She just said it was too steep and too fast. The airport has in fact three distinct methods of vertical transit in this zone, the hierarchy of which would be the vast majority of people using the escalators. You can imagine it is the mass transit."* (T.1, p. 106)

17. It is clear from the report of each engineer following the joint inspection carried out on the 12th May 2013 in the presence of the plaintiff that signage in relation to the existence of alternative access to the departure area did not feature in their discussions. The plaintiff's focus on signage seems to emanate at quite a late stage from a comment contained in the second report prepared by Mr Murphy on the 26th February 2015 (just two months before the hearing in the High Court) whose purpose was to report on the CCTV footage viewed and on some changes in signage at the escalator which had subsequently been put in place by the defendant. There are two paragraphs contained at the end of this report under the heading "Comment" which in another context could be said to be 'obiter', but nonetheless they are in the report and have been latched onto by the plaintiff as a 'deus ex machina' by which to elude the inevitable consequence of the agreed opinion of the engineers that there is nothing defective in the design, operation and

maintenance of the escalator itself. The two paragraphs state the following:

> *"Escalators are a most efficient method of moving large number[s] of people between different levels in an airport as they have a larger passenger capacity than lifts.*
>
> *When providing an escalator in an airport an elevator option should be in close proximity. In this case the elevator is in close proximity yet the signage is poor. The signage at the locus directs passengers to the escalators, see photograph 1."* [emphasis added]

18. Thereafter the 'Comment' section reverts to the question of alterations made to the signage at the entrance point to the escalator itself after the date of this accident.

19. The plaintiff did not pay any attention to signage at all when proceeding to the departures area, be it in relation to the availability of lifts or otherwise. She did not discuss the possibility of using a lift, or make any inquiries in relation to that possibility. She simply followed her sister in law and niece who proceeded in a perfectly normal fashion to the escalator in order to gain the departures area. A point made by the defendant on this appeal is that even if the signage was inadequate (which it denies of course) there is no evidence that had any additional or better signage been in place it would have made any difference to the plaintiff since she did not consider taking a lift and made no effort to ascertain the possibility of using a lift, and therefore would in any event have proceeded after her companions in the direction of the escalator. It is submitted therefore that there is no causal link between the signage or the lack of it and the occurrence of this unfortunate accident which, it says, was caused simply by the plaintiff becoming unbalanced on the escalator because she was not holding the handrail provided as she ascended. I shall return to the question of causation in due course.

The engineers' evidence

20. I have referred to the comment on signage made by Mr. Murphy in his second report. When giving his evidence he was asked about signage in relation to alternative access to the departures area. .He could only refer to what can be seen on the CCTV footage and the still shots of that footage, because there have been changes made to some of the signage between the date of the accident and the date of the joint inspection. As far as he could see there may have been something at the entrance barrier to the escalator to indicate the existence of a lift, but he considered this would be meaningless given its location at the mouth of the escalator, since one would be virtually on the escalator before one could see it. He could not say what signage was or was not present on the date of the accident. I cannot help commenting that this is because the issue was not properly pleaded, and therefore was not investigated as part of the engineers' brief. It would not have been difficult to ascertain by discovery or evidence from relevant personnel what signage was actually in place on the date of the accident in relation to the existence of lift, where that was not clear from the CCTV footage.

21. Generally speaking Mr. Murphy's view was that such signage that appeared to exist on the date of this accident directed intending passengers towards the escalator in order to gain the departures area, and did not appear to make clear the existence of the lifts close by as an alternative. Under cross-examination Mr. Murphy accepted that the lifts were close by and *that "they are there to be seen".* He accepted also that as the plaintiff moved from the check-in area she passed the lifts which would have been over her right shoulder. He accepted that on the date of the joint inspection the plaintiff made no complaints about the absence of signage. He accepted also that had the plaintiff held the handrail and had not adjusted her carry-on bag, in all likelihood this accident would not have happened. He accepted also that the CCTV pictures indicated that the plaintiff seemed to exhibit no difficulty approaching the escalator and mounting the first few steps. In so far as the carrying of baggage onto the escalator presents an additional hazard, he accepted, when it was put to him, that there was a duty on the plaintiff herself to take care. Ultimately, Mr. Murphy's criticisms are that on the date of this accident the signage could have been better in relation to the existence of the lifts, and that such signage as there was directed passengers principally in the direction of the escalator. But, as I have said, he accepted that the lifts were *"there to be seen".*

22. The defendant's engineer, Mr. Terry, also gave evidence. He stated that as the plaintiff and her companions left the check-in area they would have faced the transparent lift shafts to their right before heading to the escalator. He went on to describe what can be seen in the CCTV footage when the plaintiff met with her accident. He was then asked about the signage, and it was at this point in his evidence that he made the comment that I have set out in para. 16 above. He went on to describe the process of mass transit through a modern airport, and the methods of getting people from one floor to another . He described the three methods, namely the escalator, the lifts and the stairs, with emphasis upon the escalator as the preferred means given its capacity to move greater volumes, with the lift being the next choice in the hierarchy, followed by the stairs. He described the escalator and lifts being beside one another.

23. On the day of the joint inspection he had paid no attention to the question of signage. But he went on to say:-

> *Notwithstanding signage … the elevator is there, so in terms of way finding as it is called, what trumps any sign is your arrival at the device. For example, at the bottom of that escalator it does not say 'escalator'. The elevator is immediately to the right of that. It is from that direction that the plaintiff and her leading party arrive into shot and it is a very, very visible part of the infrastructure being a feature within the airport. As I say, it not only has three sets of doors which are elevator doors, but the mechanism is on display as a feature there and the movement of the lift is clearly [visible]… . "* (T.2, p. 108)

24. The trial judge raised the question of interpretation of the signage which is the form of pictures or 'decals' as they are referred to. He drew attention to the fact that an overhead sign to the right of the escalator contained the words "Departure Gates" and had an arrow pointing to the left in the direction of the escalator. However, Mr. Terry pointed out that in the same overhead sign, but on the extreme right thereof there was an image or decal for the lift which was in the form of a box with a person inside it. He interpreted that decal as indicating the presence of the lifts. The judge commented that it was just his interpretation of the decal, and asked Mr. Terry if he thought that it was appropriate to leave it as a matter of interpretation of the sign when dealing with mass transport. To this Mr. Terry responded:

> *"No, judge. I don't think it is appropriate to leave it to random selection, if you like, interpretation.. Absolutely, we all have to interpret and way find our way through particularly airports where you, by definition, are expected to be unfamiliar with it. To be fair to the defendant in this instance, this is a new airport. In addition to the signage, subject to interpretation as you say, if you look at the screen now, judge, this is precisely what passengers are faced with, a very large presence of assistance, manned signs or human signs, way givers in terms of giving directions and you see them doing that as we watch the screen there. They are giving directions to people. They are a high visibility information system provided through a workforce. I think that is a useful supplement to fixed signage, be it decals. Judge, signage is*

notoriously un-followed, if that is correct. We have situations in fore safety where despite the best of signs, 'nearest fore exit', the vast majority of people statistically try and go back the way they come in and sometimes with tragic consequences. People are poor at following signs. To be fair to the plaintiff in this instance and it is very much borne out in my analysis of the CCTV, she neither seeks nor looks for signs, to be fair to her, she follows the leader, and of course this is a problem.

Signage apart, the elevator itself, again, this is a bit like a sat-nav, judge. When you get there you are there. I do not believe it is required when you physically have a glass lift with three elevators elevating in front of you, to say 'this is the lift' …… " (T.2, p. 110-111).

25. Mr. Terry faced some cross-examination based on the premise that use of the escalator was the preferred option as far as the airport operator is concerned because of the volumes of people which it can get from point A to point B. It was suggested to him that the signage is designed and intended to encourage the public in the direction of the escalator rather than the lifts or the stairs for this reason, because if everybody was to use the lifts the whole system would break down. Mr. Terry replied:

"I don't want to argue about the interpretation of the signage but my interpretation again is as follows. You want to go to the departure, there is a sign. If you want to get there by taking an escalator you turn left. If you want to get there by taking the lift, you are at it. Now, the question of preferring, and it is particularly so in this case, if you have no experience in using escalators and you have a deep-seated desire to use the lift, that is what it is there for, and it is there, and to be fair everybody accepts that it is there and it is there to be seen. Regardless of signage it is there." (T.2, p. 120)

26. It was put to Mr. Terry that by virtue of the nature of the signage in place, the plaintiff was in effect "seduced" into taking the escalator, and followed the crowd. However, Mr. Terry disagreed, saying:-

"Judge, I am loath to disagree with counsel, but there is no question, if you watch the CCTV, of any seduction being involved here whatsoever. Neither the plaintiff, the lead, nor the immediate lady are seen in any way on that footage to pause, look around, seek assistance or look at the passive signage, if you like. I have spoken already about the active signage, the pink coats. All that occurred here, and it is not a matter of seduction, is a party of three led off with some gap between them, but all following like ducklings …… ." (T.2, p. 123-124)

27. Finally, counsel for the plaintiff referred to the fact that she was aged 64 years, was using the terminal for the first time, was on her way to a family funeral, pulling a carry-on bag and holding her boarding card in one hand. It was suggested that she was a person in need of particular care on the part of the defendant. I take that to suggest that because of these special features the defendant had a duty to this plaintiff over and above that which might be reasonably owed to a younger, more experienced traveller through the terminal. Mr. Terry agreed that the plaintiff was a person who needed "to be cared for", but went on to refer to the CCTV footage which he felt showed the three ladies acting independently of each other, with the youngest leading the way past the lifts and to the escalator, followed by the other two ladies. He went on to refer to the existence of the airport staff in their pink jackets, and in response to a question from the trial judge as to whether these staff would "supervise in the sense of saying to people "would you prefer to go on an elevator?", Mr. Terry felt that this particular party of three did not attract that sort of attention as far as he could see from the CCTV footage. I take that to mean that there was nothing obvious to indicate any particular frailty on the part of the plaintiff despite her 64 years, or any difficulty she might face in using the escalator. Indeed having viewed the CCTV footage the plaintiff seems admirably agile and confident as she purposefully strides to the escalator without any apparent hesitation or nervousness she may have been feeling. Mr. Terry stated finally in answer to the judge's question:

"I would not ask the airport to impose that duty on those employees to screen each person at the bottom and say 'are you happy enough with these?' … this is mass transit …". (T.2, pp. 128-129)

28. Mr. Terry was satisfied that the existence and location of the lifts were sufficiently clear from the signage in place, but went on to say, in answer to another question from the trial judge that even if a person such as the plaintiff was aware of the existence of lifts but was unaware that they would bring her to the departures area, that she would be able to ask one of the staff members in the pink jackets how she could get to the departures area other than on the escalator. His view was that what he referred to as "human signage" was superior to either worded or diagrammatic signage. (T.2, pp. 136-137)

The High Court judgment

29. In his *ex tempore* judgment delivered on the day following the conclusion of the evidence, the trial judge first of all outlined the general facts and circumstances of the accident. He noted in particular that there was no issue in the case around the construction, design or maintenance of the escalator. He then referred to the issue of the directional control of passengers and signage, and to the fact that this issue represented a shift of emphasis in the case, and that even though the defendant had drawn attention to this change in the nature of the negligence allegations, he was satisfied that there was sufficient particularity in the pleadings to accommodate the allegations now relied upon by the plaintiff. I have already made some comments in relation to this, which it is unnecessary to repeat.

30. The trial noted that this was the plaintiff's first experience of using an escalator, and that while the defendant was to not know that, it must nevertheless take account of such neophytes but also the steepness of the escalator in question. He then described the mechanism of the plaintiff's fall, finding as a fact that she was not holding the rail with her left hand but probably just leaning with her elbow on the handrail. He stated that he did not fault her in that regard.

31. The trial judge went on to note the plaintiff's evidence that she was unaware of the existence of the lifts, but stated also that there were lifts available and that they were visible. He was satisfied that the plaintiff just followed her niece and sister in law onto the escalator. He then stated:-

"She gave evidence, and she was not challenged on this, that if she was aware that a lift was available and that the lift would have taken her to the departure area she would have taken it. I am equally satisfied that had she taken the lift no accident would have happened in this case to this unfortunate neophyte in the ways of escalators." (T.3, p. 8)

32. The trial judge referred to the evidence of the two engineers, Mr. Murphy and Mr. Terry. He noted that some of the signage had changed since the date of the accident. He noted that the signage indicating 'Departures' had an arrow pointing in the direction of the escalators. He went on to state:-

"There was no sign or there is no evidence of any sign available to me to indicate that the departures, via the lift, were

shown. Therefore, I am persuaded that, at the time of the accident, there was no arrow indication or otherwise that the lifts would have taken the plaintiff to the departure area. Even if she had observed the lifts and even if there had been a sign indicating that the lifts were there, and I am not satisfied that there was such a sign there, certainly, was no sign which indicated that that would have afforded her access to the departure area.

The importance of signs was highlighted by Mr Murphy in his [evidence] because this is a modern airport terminal and like many public transport areas there are hazards there. These hazards can be avoided and the best any occupier can do is to accommodate these, eliminate and control them as best one can. Signage and available advice is the best option in accommodating mass transit.

33. The trial judge then recalled Mr Terry's evidence *that "signs are notoriously un-followed"*, and he stated that *this "emphasises the need for emphatic and clear signage as well as advice, which was clearly there at the time"*. He acknowledged that there was clearly visible staff assistance available who could give advice if it was sought. But he went on to say that the occupier of a premises must take account of the fact that people ignore signs and tend to *"follow their leader and people follow the herd"*, and that this had to be accommodated where services are being provided at a profit.

34. With reference to the so-called 'decals' where the meaning to be given to the sign is left to the individual's interpretation, the judge stated:-

"… but somebody who is going through an airport, who can be halts, who can be lame, who can be an experienced seasoned traveller, who can be a nervous traveller, who might be rushing to get to the departure, who might be proceeding gently and languidly along the way having arrived at the airport in plenty of time, this whole mix of people, by and large, do not have the luxury of time to sit, debate and ponder what particular signs mean or, indeed, what interesting comical interpretations one might put on some of them. That is not the function of signage when you are dealing with mass transit of people in terminals that have a throughput of millions of people every year…."

35. The trial judge went on to state that the defendant was under a duty to take reasonable care of passengers, and had to accommodate all the different types of passenger that he had referred to, and that the signage had to be viewed in that context, but also in the context that there was other advice available *i.e.* from airport staff. But he concluded:-

"I am satisfied that at the time there was not adequate indication of an alternative means of reaching the departure area, that there was not sufficient signage and that the attention of the plaintiff was not adequately drawn to the availability of an alternative means to get to the departure area. There is no indication that she was under any rush or stress in terms of trying to meet a deadline. I am satisfied that had sufficient signage been available to her, adequate signage at the time, that she probably would have availed of the lift and this accident would have been avoided. I am satisfied that this accident was [caused] by the fact that this woman simply did not know how to accommodate what happened when she was on an escalator."

36. As far as contributory negligence is concerned, the trial judge found no fault in the fact that the plaintiff did not hold the handrail provided, nor in the fact that she placed her bag behind her. He faulted her, however, because she failed to ask the airport staff who were available to her whether there was a lift that she could use, and he reduced the award of damages by one third to reflect this contributory negligence on the part of the plaintiff. In reaching these conclusions the trial judge stated:-

"She didn't ask an assistant and it is quite clear that there were assistants available. Had she asked an assistant: 'Could I use the lift?' she would have been very quickly, I have no doubt, pointed in the direction of the lift. I think that her own obligations to look after her own safety have to be viewed objectively and, in these circumstances, I think, in fairness to the defendant, it must be said that she ought to have asked somebody where the lift was if she was concerned and if she had she would have been pointed to the lift. That, I think, is to be viewed as a matter of contributory negligence rather than exculpatory of the defendant as a whole. I think, on the whole, the fault in this case, if such there be, is to be found, on the balance of probabilities, in the inadequate nature of the signage and in the apparent mandated direction of the plaintiff towards the escalator and up to the departure area, which in all the circumstances did not make available to her adequate knowledge that there was an alternative means of getting there by way of the lift."

Appellant's submissions

37. The defendant/appellant submits that the trial judge erred by first of all concluding that the signage which was in place adjacent to the escalator failed to adequately inform the plaintiff that access to the departures area could be gained other than by use of the escalator, and secondly that in any event, even if that signage was inadequate to so inform the plaintiff (which it denies), the trial judge erred in his conclusion that if it had been adequate to so inform the plaintiff she would as a matter of probability have availed of the lift and thereby have avoided having the accident that befell her on the escalator.

38. In support of those general submissions, the defendant refers to the wording of s. 3 of the Act of 1995 and to the statutory obligation which it imposes upon an occupier of a premises to take such care as is reasonable in all the circumstances to ensure that a visitor does not suffer injury by reason of any danger existing thereon, taking account of the care which the visitor may reasonably be expected to take for his or her own safety. In that regard the defendant refers to the fact that on the date of the accident there was signage in place adjacent to both the lifts and the escalator indicating the existence of lifts and a stairs, albeit that the plaintiff did not see it. It submits that it complied with its statutory obligation to the plaintiff, particularly in circumstances where there is no evidence that the escalator was a danger to the plaintiff as is clear from the evidence of both engineers.

39. The defendant refers to the evidence that in addition to the signage, there was in any event human assistance available in the form of airport staff who were clearly identifiable in pink jackets, and who were there to provide any assistance or information that the plaintiff might require.

40. In addition, the appellant refers to the clear evidence given by the plaintiff that she never indicated to either of her companions that she did not wish to use the escalator, or raise the question as to whether or not there was a lift she could use to get to the departures area. This evidence was confirmed by her sister in law, Mrs. Gallagher. The defendant submits that what happened was that the plaintiff simply followed her two companions when they led off towards the escalator as the means of getting to the departures area, and paid no heed to the signage in relation to a lift or the lack of signage in that regard. It refers to the plaintiff's own admissions under cross-examination that she could have asked for directions, but did not do so since she thought the escalator was the only means of getting up to the departures area. It submits also that given the manner in which the case made against the defendant changed from that which was pleaded, it is clear that the plaintiff herself never made any complaint in relation to the lack

of adequate signage, either to her solicitor or to Mr. Terry during the joint inspection of the locus, and that the reality is that it simply did not occur to her at the time that she might take a lift instead of the escalator, and that this complaint about the inadequacy of the signage is something being brought *up ex post facto* in order to try and fix liability upon the defendant. It is submitted that the signage in question is in fact an irrelevance in the case given the fact that the plaintiff never looked at or for signage, or attempted to get information about other means of gaining the departures area, and simply followed her companions.

41. It is in the face of such evidence that the defendant submits that there was no proper basis for the trial judge's finding that if there had been adequate signage the plaintiff would as a probability have taken a lift instead of the escalator. It is submitted that the essential element of causation is lacking in the plaintiff's case, since it is clear that the cause of the plaintiff's injuries is the fact that she failed to hold the handrail when she turned to adjust her carry-on bag while travelling on the escalator.

42. The defendant submits that in circumstances where the engineers have agreed, and the trial judge accepted, that there was no fault to be found in the escalator itself or how it was operated, it cannot be considered to constitute a hazard or "danger" as referred to in s. 3 of the Act of 1995. It is submitted that for the plaintiff to succeed in establishing a breach of the duty under s. 3 of the Act of 1995 she must establish that

> (a) the escalator was a hazard or danger to the plaintiff, and
>
> (b) that the defendant failed to take reasonable care to ensure that she did not suffer an injury by reason of it being such a hazard. It is submitted that she has failed to do this, and that the trial judge erred in his conclusions in this regard.

Respondent's submissions

43. The plaintiff submits that when the Court is considering whether or not the premises or some aspect of the premises constitutes a danger from which the plaintiff is entitled to be reasonably protected by the occupier, the occupier must take account of the different kinds of persons who will visit the premises, and their potential individual characteristics, or as it was put by Kingsmill Moore J. in *Long v. Saorstat Eireann* [1959] 93 I.L.T.R 137, *"the different class and nature of the invitees"*. In other words it was incumbent upon the defendant to anticipate that a person such as the plaintiff would wish to access the departures area – *i.e.* a lady of 65 years of age who had never been in the premises previously and who had never before used an escalator, and being anxious about doing so would prefer to use a lift.

44. The plaintiff submits that the trial judge was entitled on the evidence which he heard to conclude that the plaintiff so described above was someone for whom it needed to take particular care, and for whom the signage in place on the day for the purpose of informing her of the existence of an alternative method of getting to the departures area by means of a lift was inadequate for that purpose, and therefore that the common duty of care under the section was breached, leading to her injury when she fell.

Conclusions

45. Prior to the 1995 Act it was never the case that an occupier of premises was liable for whatever injury was sustained by an invitee to his premises. In other words the occupier was not the insurer of the invitee in respect of any harm that might befall him or her while on the premises. A degree of negligence or want of reasonable care for the invitee was required before liability could be visited upon him. The duty of care owed was a restricted duty of care – one which obliged the occupier to take all reasonable steps to avoid injury to an invitee from any danger which was known to exist or which the occupier ought to have known existed on the premises. In his judgment in *Long v. Saorstat Eireann* [supra] Murnaghan J. described the task of the injured party in such a case as follows:-

> *"The plaintiff had to establish that the defendants had failed to take reasonable care to prevent damage from <u>unusual danger</u> which they knew or ought to have known."* [emphasis added]

46. The distinction between an unusual danger and a usual danger is important even in the context of s. 3 of the 1995 Act. A fixed staircase can be the cause of injury to a person descending same, since it is not difficult to lose one's step for any number of reasons, and fall. Such a danger is however a usual danger that any adult would anticipate and take care to avoid by, perhaps, holding the handrail provided, or ensuring that he/she is not carrying anything likely to cause loss of balance. It is the sort of danger that exists by reason of the nature of the staircase itself without any defect existing. On the other hand, the fixed staircase might have a defect that the invitee/visitor could not anticipate or be aware of. For example, the handrail might not be securely fastened to the wall, and may give way when used for balance, causing the person to fall. That would be an unusual danger, and therefore one in respect of which the occupier has a duty to guard or warn against, failing which he will be liable for any injury that ensues.

47. In the present case there was no unusual danger in the escalator. It was a properly designed and properly functioning escalator which conformed to the required British Standard. Both engineers were agreed upon that. No fault was found to exist in it. In that sense it is no different to the fixed stairs referred to above. It cannot be said in the light of that evidence that the escalator presented an unusual danger, such that the common duty of care under the section obliged the defendant to warn the plaintiff not to use it or to warn her of any particular danger in using it, beyond the normal sort of signage advice, for example to use the handrail provided. Indeed, it is only commonsense that on a moving object such as an escalator the person would use the handrail in order to take reasonable care for her own safety. Having provided the handrail, indeed supplemented by a sign or decal indicating that it should be used, one might reasonably ask what more can reasonably be expected of the defendant. As explained by Mr. Terry *"there is always a better mousetrap"*! By that he clearly meant that in every situation with the benefit of some hindsight one can think of something more that could be done that would have prevented the plaintiff from being injured on this escalator, the most obvious being that the defendant could have posted one or two personnel at the foot of the escalator in order to ask each of the hundreds of passengers each hour as they are about to enter the escalator if they had ever been one such a machine before, and if they were sure how to use it safely and perhaps fully instruct them. The question is whether that is something required of the occupant before it can be said to have, in the words of s. 3, *"take[n] 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)…"*.

48. The section has not expanded the duty of care at common law previously imposed upon an occupier of a premises in favour of an invitee (now a visitor). Rather, it reflects the common law principles, and has put on a statutory footing. In the words of Charleton J. in *Allen v. Trabolgan Holiday Centre Limited* [2010] IEHC 129 *"The Occupiers' Liability Act 1995 codifies responsibility in tort by the occupiers of premises towards entrants"*. He went on to state in relation to the common duty of care owed:

> *"As to that duty it is clear that merely establishing that an accident occurred on premises is not enough. The plaintiff*

must show that a danger existed by reason of the static condition of the premises; that in consequence of it he/she suffered injury or damage; that the occupier did not take such care as is reasonable in the circumstances to avoid the occurrence."

49. In considering what amounts to reasonable care in all the circumstances, one must of course have regard to the class and nature of persons who are likely to use the premises, as well as the nature of the premises themselves. In the case of a busy airport terminal it is reasonable to assume that every age and kind of person will use it, the young and the old, the feeble and the able-bodied, the fearless and the anxious, those in a hurry and those with time on their hands. Clearly if a particular feature of the premises presented an unusual hazard to an elderly or feeble person, but did not do so to a younger more able-bodied person, then the occupier would owe a greater duty of care to the former than to the latter to warn and/or protect against potential injury.

50. Equally, as far as the occupier is concerned, it must have certainty as to what steps are required to be taken by it in order to meet its obligations under the section. This suggests that whether or not something about the premises constitutes a danger to a visitor must be considered objectively, and not, in the words of Kingsmill Moore J. in *Long*, *"from the point of view of the particular invitee so as to equate "unusual" with "unexpected by the invitee"*.

51. Viewed objectively the escalator in the present case is not an unusual danger in the sense discussed. Yes, it is a danger in the ordinary sense that if the user herself does not take some reasonable care about its use she may fall and sustain an injury. But, as I have already stated, one could say the same about a fixed staircase. Absent some unusual defect or danger being present in respect of the staircase and in respect of which the visitor ought to be warned and protected, the occupier will not be liable if the visitor loses her step and falls. In other words provided that reasonable care has been taken by the occupier no liability will exist. The user, whether young or old, is expected to take reasonable care for his/her own safety too. This is provided for in s. 3 of the 1995 Act. Even an older person using the staircase must take such reasonable care, and there is no particular obligation imposed on the occupier to take greater precautions in respect of an older person than a younger person, absent some unusual danger, or some visitor's disability or other difficulty having been brought to its attention in advance.

52. There is nothing inherently or unusually dangerous about a moving escalator, even if a person has not used one previously. Such a neophyte is not to be treated as disabled either intellectually or physically. She is of herself expected to take reasonable care for her own safety in such circumstances, and the duty of care owed by the occupier is to be considered having regard to that. The most basic way that the visitor will have regard for her own safety while on the escalator is to hold the handrail provided. The speed at which the escalator may lawfully move upwards is controlled and regulated, and the engineers in the present case have stated that this one moved within the speed allowed under the relevant standard. Neither was the pitch of the escalator outside that which is permitted, though I accept that to the plaintiff it seemed steep.

53. There is no doubt that the use of the escalator is the preferred method of ascension to the departures floor as far as the defendant is concerned. It has the capacity to move far greater numbers of passengers than the lifts . However, the complaint by the plaintiff that the absence of adequate signage as to the presence of the lifts had the effect of corralling the plaintiff onto to the escalator with no time or opportunity to explore the possibility of using a lift is not borne out by the evidence. Both the evidence and the CCTV footage confirm that the plaintiff was in no particular hurry. Neither was she feeble or frail, or otherwise obviously in need of assistance. She was aged 64 years, but it is not to be assumed that such an age alone implies feebleness or frailty. She was in the company of her sister in law and niece. She never expressed any hesitation or concern about using the escalator to which they were leading her. The CCTV footage shows no hesitation on her part when approaching the escalator.

54. One can always say that but for some particular thing an accident would not have happened. But the thing in question must be the proximate or real cause of the accident. In this case the real and proximate cause of the plaintiff's fall was:-

(a) that she attempted to adjust her carry-on bag while on the moving escalator, and

(b) did so while not holding the handrail provided.

The trial judge has stated that but for the absence of adequate signage this would not have happened, because as a matter of probability she would have used the lift. In my view this is incorrect as a matter of law. There is a disconnect in my view between the inadequacy of signage (even if it is accepted that the signage was inadequate) and the proximate reason for the plaintiff's fall on the escalator. There is no evidence sufficient to establish causation.

55. But, in any event it is not incorrect to consider the issue of signage through the prism of causation as one might do if this was a claim in negligence in the strict sense. The issue is rather whether there is any evidence sufficient to establish for the purposes of s. 3 of the Act of 1995 that the defendant failed to take reasonable care for the safety of the plaintiff in all the circumstances, having regard also to the duty upon the plaintiff herself to take reasonable care for her own safety.

56. In my view the trial judge erred in considering the lack of care which the plaintiff took for her own safety (by failing to seek advice from available staff) in terms only of contributory negligence. Under s. 3 that question is part and parcel of the consideration of whether the occupier complied with its statutory duty or common duty of care imposed upon it by s. 3. The occupier must take such care as is reasonable in all the circumstances to protect the visitor, but having regard also to the duty of care upon the visitor herself.

57. In my view the trial judge was wrong to consider that the defendant had failed in its common duty of care to the plaintiff by having only such signage as it had in place on the date of this accident. The escalator was a safe escalator. It had no inherent or hidden or unusual danger against which the occupier needed to protect the visitor, who is expected to take reasonable care also for herself. The defendant also had alternative means of accessing the departures area in place, namely clearly visible lifts, and a stairs. These were there to be used by any person who did not wish to use the escalator for any reason. Quite apart from such signage as did exist, the lifts were there, and prominently so for any one to see who was genuinely interested in using them. It is in my view imposing a greater duty upon the defendant than that intended by the words of s. 3 for the defendant to 'spoon-feed' the plaintiff or otherwise treat her as being other than the adult, competent and able-bodied person that she was, and who was well able to seek out a lift had she had truly wanted to at the time, or to bring her concerns to the attention of her companions, or indeed as the trial judge found, to ask any one of the clearly identifiable staff who were on hand to provide just the sort of advice and guidance that the plaintiff now says that she required.

58. In fact there was signage indicating the presence of a lift. But, viewing the matter objectively, any normal adult of full capacity, as I take the plaintiff to be, must be taken to know that in a busy and modern airport terminal a lift or lifts will exist for the assistance of passengers. Viewed objectively, it would come as a complete surprise to most if such a lift was not included as part of the

terminal's design. I think that the occupier of the terminal is entitled to assume that visitors will know that there will be a lift which can be taken if required. The occupier has provided not one lift but three. Not only are the lifts present but they are presented prominently for anybody who cares to look. Not only that, but there is a sign in the form of a decal which indicates their presence, albeit that this plaintiff is critical now of its lack of clarity or prominence.

59. The fact that beside the decal for the escalator there is an arrow pointing in the direction of the escalator, and there is none pointing to the lifts is not a want of reasonable care in my view. If the plaintiff wanted to take a lift she was right beside them. The reality is that she gave it no thought at the time, and simply followed her companions onto the escalator. She did not, in my view, get coralled in that direction because of any want of care for her safety on the part of the defendant. I do not believe that the evidence supports a want of reasonable care by the defendant for the plaintiff or indeed the public generally. The defendant was entitled in accordance with the provisions of s. 3 of the Act of 1995, when considering what reasonable steps it should take to protect those likely to use the terminal, to have regard to the fact that a visitor herself must take reasonable care for her own safety. That person will be aware of her own frailties and anxieties in a way that an occupier cannot possibly anticipate. The section therefore permits the occupier to have regard to the fact that the visitor will look after herself and having regard to her own individual needs and predispositions. That of course would not absolve the occupier from warning and protecting all-comers from any unusual or hidden danger. The common duty of care as defined ensures that the occupier has that obligation.

60. I consider that the trial judge erred in concluding that the plaintiff was a person to whom this escalator was a danger (given that no fault was found with it by the engineers) and that inadequate signage breached the defendant's duty to take reasonable care to ensure that she did not suffer injury. As I have said already, it was an error also in my view to consider the failure on the part of the plaintiff to seek advice only in the context of contributory negligence rather as part of the consideration of whether or not the defendant occupier had taken reasonable steps in all the circumstances to protect the plaintiff in discharge of the common duty of care under s. 3 of the Act of 1995. The occupier was entitled to expect that if she did not wish to use the escalator she would ask one of the clearly visible airport staff who were in position for the very purpose of giving advice and directions if sought. In my view the defendant complied with its common duty if care under the section.

61. It follows from these conclusions that this appeal must be allowed, and that the order made in the High Court be vacated and the claim dismissed. However, I must add that I acknowledge that the plaintiff suffered a very nasty and unpleasant injury when she lost her balance on this escalator. Indeed, even without any injury occurring at all, such a fall would have been traumatic and frightening for the plaintiff. Speaking no doubt for all members of the Court I extend my sympathy and understanding to her in that respect. However, the law must be applied to these events, and in my view the application of the law, as explained above, must result in the appeal being allowed and the proceedings being dismissed.