Neutral Citation Number: [2009] IEHC 554

THE HIGH COURT

2008 5734 P

BETWEEN/

MARY BEHAN

PLAINTIFF

AND

ALLIED IRISH BANKS PLC

DEFENDANT

JUDGMENT of Mr Justice Roderick Murphy delivered 18th day of December, 2009.

1. Pleadings

By personal injury summons dated 15th July, 2008 the plaintiff, a bank official working with the defendant bank claimed that on or about 12th June, 2008, she was "caused to suffer and sustain severe personal injury, loss and damage when she was caused or permitted to fall from a chair upon which she was seated owing to the congested and cluttered nature of the area where she was required to work".

In its defence dated 18th February, 2009 the defendant bank claimed that it was not liable for any injuries suffered by the plaintiff. The injuries did not arise from the negligence wrongdoing or breach of duty of the bank which had provided a safe place and system of work. The bank relied on statutory instrument no. 236 of 1989 and no. 44 of 1993 (in particular s. 14) in relation to safety, health and welfare at work. The bank also relied on s. 9 of the 1989 Act and s. 13 of the 2005, Safety Health and Welfare at Work Acts. The bank also gave notice that the plaintiff failed to mitigate her loss in accordance with the Civil Liability Act 1961.

The plaintiff had worked in the off-counter office of the bank. That office dealt with the checking of night safe bags or wallets and counting the contents thereof. The plaintiff was the senior official of that office. The money bags were placed in a basket on the floor between the plaintiff and two other bank employees. Access to the office for these bags or wallets was through a hatch. No one other than those employees and a porter had access to the off-counter area.

The personal injury summons particularised the act and the circumstances relating to the commission of the alleged negligence and breach of duty.

It was alleged that the off-counter area had been allowed to become and/or to remain congested, cluttered and in an unsafe and dangerous condition. The bank, it was claimed, failed to warn the plaintiff and others of the danger. In particular it was alleged that the bank caused, permitted or allowed the wheel of the plaintiff's chair to become caught in a money bag and to overbalance thereby causing the plaintiff to fall.

As a result of the incident the plaintiff claimed that she suffered personal injury, loss and damage and, in addition, she was extremely shocked and distressed. She struck her right knee whilst falling. She had already suffered from early onset arthritis in the knee. The impact caused severe symptoms in the knee. She was diagnosed as suffering from soft tissue injuries and having a torn meniscus. She was prescribed anti-inflammatories and painkillers. She was unable to work. She underwent an arthroscopy for the removal of a loose body in her right knee.

The summons described the continuation of suffering and pain and stiffness and the significant debilitating effects of the same. She had difficulty standing, climbing stairs, sitting and walking; the latter which caused pain. As a result of the pain in her right knee she developed a habit of favouring the left knee which caused an exacerbation in her left knee and referred pain into her back. In addition she was caused to sprain her left ankle while trying to protect the right knee. She had sprained her back by jerking backwards when she felt she was losing her balance. Her mobility was extremely limited as a result of a broken toe in her left foot which injury occurred on or about February 2007.

The plaintiff's affidavit of verification on 14th July, 2008 was in the standard form:

> "2. The assertions, allegations and information contained in the said personal injury summons, which are within my own knowledge, are true. I honestly believe that the assertions, allegations and information contained in the said personal injury summons, which are not within my own knowledge, are true."

The bank served a notice of particulars dated 29th August, 2008 asking *inter alia* as follows:

> "37. Has the plaintiff ever had any illness, sickness, disease, handicap, surgical operation or medical complaint, physical or otherwise, either prior to or subsequent to the alleged incident referred to? If so … (the plaintiff was asked to give details under seven different headings)."

By reply dated 8th September, 2008 the plaintiff's solicitor replied:

> "37. None relevant to these proceedings."

By defence dated 18th February, 2009, the defendant bank required proof of Mrs. Behan's alleged duties, details of how she was caused to suffer or sustain severe personal injuries, loss or damage as alleged on 12th June, 2006, how she was

caused or permitted to fall from the chair and how the area was congested or cluttered. The grounds upon which the bank says that they are not liable were that the plaintiff was provided with a safe place of work and a safe system of work and that if the plaintiff had personal injuries, the same did not arise from the alleged instances the subject matter of the proceedings. If she did so suffer this occurred as a consequence of her own negligence and breach of duty and that there was no wrongdoing, negligence, breach of duty or breach of statutory duty or breach of contract on the part of the bank.

The grounds upon which the bank claimed that the injuries were occasioned by the plaintiff's own acts included her failure to report any concerns regarding the area being in any way unsafe; causing of her chair to be overbalanced, her failure to sit on the chair properly and that if the area were cluttered such was caused or contributed to by the plaintiff herself who failed to have regard for her experience, failed to exercise care, failed to have the area tidied, failed to comply with the safety legislation, was the author of her own misfortune and failed to mitigate her loss.

2. Evidence of the plaintiff

The plaintiff, born on 27th August, 1958, had worked with the Bank of Ireland, from 1970 to 2001 when she became redundant. She worked in the defendant bank in Westport from 2004. Her duties with the bank were known as off-counter duties which involved collecting night safes and taking them into her office to be opened and counted.

She showed photographs taken by her a year after the accident and gave evidence that the office was the same as before other than the presence of a basket in the centre of the floor.

She said that Mondays were always busy as was the Monday, 12th June, 2006 when the incident occurred. The content of the night safes, 80 to 100 bags, were distributed at 11.00 o'clock. She was working with another bank official and a student. There was no space on the desk so the bags were put on the floor. She said she was trained in that system but made some changes. The night safe wallets or bags were in a basket in the centre of the room.

She said that the photographs she had taken one year after the incident showed that all the clutter had gone.

On the day in question she was balancing one of the night safe contents. She said she was about to stand up to talk to the porter when one of the bags on the floor caught in the castor of her chair. As the chair propelled backwards she caught her right knee on the second drawer of the pedestal which was slightly open as the weight of its contents tended to pull the drawer out.

The right part of her knee hit the open drawer. There was no blood. She fell on her head, neck and shoulders and back.

She said that the off-counter workload fluctuated from time to time. There was low morale amongst staff. A third person was present in the off-counter office on Mondays and Fridays and on Wednesday afternoons.

She referred to a staff seminar in 2004 where she was one of a group to make a presentation. The staff levels were down. There was low morale. Staff were working in jobs they were not trained on. She said she was constantly giving out about staff.

There were night safe bags on the floor. She would then put them to the side and then on top of the second safe. The basket in the centre of the floor was equidistant from the desks. On occasions the basket overflowed with night safe bags. On two occasions bags were moved and the money sent back to the customer. The staff working there changed. She could not say who the staff were.

She described the injuries to her head and knee. She was brought upstairs to the tea room and given Panadol. She continued to work Monday 12th through Friday 16th June when she went on a holiday to West Cork and returned to work on 3rd July, 2006. The pain was so bad that her sight seeing was curtailed.

When she realised it was not getting any better she went to Dr. John Keane, her G.P., on 13th July, 2006 who gave her anti-inflammatory medication. An appointment was made with Mr. Ken Karr, Consultant Orthopaedic Surgeon on 26th September, 2006. The knee was extremely sore. Work was difficult. This was due to the bending and kneeling. She continued at work.

Mrs. Behan was asked if she had previous problems with her knee and she said that she had her left knee checked some years beforehand. She said her pre-existing arthritis had not caused the problem.

Then she described the treatment by Mr. Karr which involved X-rays and arthroscopy involving keyhole surgery. The surgery showed more than the X-ray. She needed a full knee replacement. She was two nights in hospital and then on crutches. She did not go back to work as, she said that the doctors had told her that she was not fit to go back. She said that Mr. Karr and Mr. Derek Bennett, Consultant Orthopaedic Surgeon of Castlebar whom she saw on 23rd July, 2008 advised her of a replacement of the right and later the left knee.

Her right knee was extremely painful. She was prescribed anti-inflammatory medication. Her walk was strained. Her left knee deteriorated as a result and her left ankle keeled over in January 2007 after the operation and developed a bruise.

She said that 30 years before she had been assaulted. There was a criminal case in 1990. Her nose was broken and fixed.

She had disc supplementation therapy with Dr. Gibbs who gave her injections of steroids. He was a rheumatologist.

She gave evidence of her earning capacity. She had full salary to 16th April 2007, then half salary and social welfare payments to October 2007.

The pension scheme had an income continuous plan.

She was paid two thirds of her salary up to October, being one third social welfare and one third income continuous. She has now only social welfare. The one third income continuous plan is being reviewed.

In cross-examination she was referred to her verifying affidavit and to her reply to in particular no. 37.

She said that she got over the assault in 1990 which had no effect on her working life. She was treated by Dr. Waldron and Dr. Siobhan Hoey for joint pain in her right elbow.

She denied that she had been dogged by bad health.

She said she had gone to see Dr. Marrinan, who was her husband's doctor, for asthma. She did not say when. He had referred to her left knee pain. She said that it had healed.

She agreed that she had seen Dr. Chris Pigeon in 2003 regarding a trapped nerve where she had jerked her neck while starting the lawnmower which made her fingers numb. He had referred to a disc hernia at C5/6.

She had started work with the bank in 2004. In June 2004 she was prescribed Cortisoid for her left knee as a result of banging it off the counter at the bank. It did not involve her right knee.

She said that the staff survey in which she prepared a presentation when she became permanent related to getting more staff. She could not recall the names of the group she represented. She agreed that there was no reference to the off-counter office in that presentation.

She agreed that she had met Dr. Gibbs who had diagnosed her with Fibromyalgia.

She agreed that from March 2004 to December 2004 when she joined A.I.B. that she had 24 days sick leave; 22 to 26 days sick leave in 2005 and was four months off work in 2006 with laryngitis which was caused by the air conditioning at work.

She said she had complained about the air conditioning to Mrs. Kathleen Keane of the Human Resources department of the bank. She had a good relationship with her. She said that others suffered from sinusitis but she could not remember their names.

She came back to work in mid-May 2006 and referred to the social welfare certificate of 29th May, 2006.

She said the incident on 12th June, 2006 did not involve her falling off the chair. It was the chair which fell with her. She agreed that she was in charge of the cabinet drawer and the chair, which were under her control. She was the most senior member of staff in the off-counter area.

Then she said she did not think of moving the basket. She did not see the wallet on the floor before the fall. She had no idea why the wallet caused the chair to topple.

As a result there was weakness in the left knee following the injury to the right knee. She said she never had a fall of any significance before. She agreed that she had fallen in James's Street in Westport in January 2007.

She was asked whether she had told Mrs. Kathleen Keane about falling off a bench in Clew Bay Hotel. She said she went to the ground on the grass. She fell on her back.

She said she started back after her holiday in West Cork on 3rd July, 2006. She agreed that on 13th July, 2006 she hit against the filing cabinet door outside the corridor of the off-counter office and gashed her left leg. The incident was reported and signed. She agreed that the incident of the 12th June was not signed by her. After the incident on 13th July, 2006 she went to see the doctor. She said she was not aware of arthritis.

She said she went back to work until October 2006.

She said that as a result of the incident on 12th June, 2006 her right knee was injured which caused her left knee and ankle to be affected. This resulted in a loss of income. The doctors had advised her that she could not work.

She said she made no application for any other job. She had not sought any work as she was unfit for work due to her knee.

In re-examination she was asked about her arthritis. She said that neither knee was symptomatic and that she was able to kneel. She was not on medication for asthma.

In relation to the incident on falling off a bench in Clew Bay Hotel she said that that occurred at 5pm on the Monday after she returned to work. She sat at the end of the bench.

3. The porter's evidence

Mr. Richard Gavin was the bank porter. On 12th June, 2006 he had collected the contents of the night safes which mainly contained paper money and sometimes coins though customers were not supposed to put in coinage. The bags went into the off-counter office on the floor or were kept in the safe.

He said he did not know where he put the bags on that date. He had no recollection of being outside the hatch when the accident occurred.

He described the plaintiff's desk as being six foot by three foot (less than 1000 x 5000mm) with loads of room as there was nothing on it except a totting machine.

On that Monday, 12th June, 2006 there were 40 to 50 of what he termed pouches and 20 to 30 plastic bags. He said there would not be pouches on the floor unless they were thrown on the floor. The plastic bags were in a bin bag.

In cross-examination he said he had no recollection of the incident. He said he would take the baskets out when asked.

Mrs. Behan could ask him to put the baskets out. He did not remember her asking him to put the baskets anywhere other than on the floor.

4. Engineering evidence
The third witness was Dr. Mark Jordan, consultant forensic engineer who made a technical investigation on 23rd January, 2009 when he visited the off-counter area.

He described the desk as being 1600mm by 800mm. His evidence was that there was no room on the desk and that the basket was on the floor. He said that putting anything on the floor was against the regulations as it created a hazard. He described how a castor could become snagged.

He believed that the basket should have been on the trolley which could have been moved around. Fifty wallets would weigh 15 kilos. They would be a strain if you were lifting all of them. It was feasible that the wallet or coin bag could snag a castor. It would put a break on the castor and act as a chock. The person in the chair could topple the chair as the centre of gravity was on the top.

He described the room as being too small for three people. The recommended space was 8 to 12 metres squared with a standard of 9.4 metres squared. The order regulations, revoked in 1995 was 4.5 m2 per person.

He calculated the floor area of the off-counter office as being 12 metres squared. He said the space was too cluttered and was unsafe where material was placed on the floor.

In cross-examination he said he had no criticism of the chair nor of the drawer being opened and agreed that Mrs. Behan had been in charge of the drawer.

He believed it to be plausible that something on the floor acted as a chock on the chair castor. It was less likely that she was pushing herself back and lost balance.

Mrs. Behan had said that the chair stopped. But he agreed that she did not say to him what stopped the castor. He agreed that the chair was stable. He would expect workers to keep their place of work tidy.

It was put to him that the evidence of Mr. Gavin, the main porter, was that Mrs. Behan had asked for the basket to be left on the floor. He said there appeared to be no room on her desk but that the basket should not have been left on the floor. He agreed that employees had a general duty as to their own care. It was safer to put it on the desk or on a trolley.

He agreed that the plaintiff was the senior employee and that there was no evidence of her complaining about the position of the basket. Her report was confined to manning.

He said that the 4.5 metres square per employee would exclude the area taken up by the safe and filing cabinet.

He said he had excluded the outside of the office where the bank's engineer, Mr. Mooney had included in his measurements, the office as 4.4 x 3.6m2.

Dr. Jordan believed that the plaintiff should have made a complaint. She was one of the people in charge of the wallets and had put the wallets into the basket. He agreed that he did not know that it was a wallet which stopped the chair.

In re-examination of Dr. Mark Jordan he disagreed that a trolley in the middle of the floor would constitute a hazard. He was concerned about trip hazards in circulation areas and not a trolley or desk.

5. Medical evidence
The fourth witness, Mr. Kenneth Karr, Consultant Surgeon, saw the plaintiff on 26th September, 2006 when she presented with a pain in her right knee. She also had some pain on the left but not as severe. The accident that she sustained was a fall from a sitting height of a chair at work in June. She told Mr. Karr that she had a very similar event in July of that year also.

She complained of knee pain on the right hand side and also on the left to a lesser degree. There was also some pain around the right hip at times and over the sacroiliac joint and the posterior aspect of her pelvis. There was some right wrist pain, chest wall pain and ankle pains also.

She did have some background pain in her knees of an aching nature but it was very much aggravated by the injuries at work, she said.

This report dated 24th April, 2008 referred to his clinical evaluation and radiographs which suggested a diagnosis of osteoarthritis developing particularly in the right knee. His working diagnosis was that she had perhaps developed a degenerative miniscule tear that would require surgical treatment. She underwent this surgery during 16th October, 2006. He performed a right knee arthroscopy and partial lateral meniscectomy and removal of a loose body. She recovered well. The effusion following her surgery had largely settled on the 28th November and her range of movements was quite good and full extension was possible. She was referred to physiotherapy. Her prognosis was good. There was in all likelihood going to be a progression of her arthritis in due course and consideration might well have to be given in latter years to total knee arthroplasty.

A follow up report was made on 8th September, 2009 where Mr. Karr said that Mrs. Behan continued to have significant problems with the right knee. She had seen numerous doctors for evaluation as regards this problem including Dr. Adrian Gibbs, Consultant Rheumatologist. He understood she had obtained benefit from interarticular injections that Dr. Gibbs administered. She had also seen several orthopaedic surgeons including surgeons in Dublin.

The ongoing symptoms were those of pain aggravated by activity. She had a swelling in the posterior aspect of her knee in keeping with a Baker's cyst which was intermittently severe and painful. It interfered with her ability to flex her knee which was stiff with crepitus. She had developed some problems with recurrent pain and instability in her left ankle and was wearing a support. She needed to employ home help with regard to cleaning and her sleep was broken. She felt that her knee had deteriorated in the past year with increasing severity of symptoms. On examination Mr. Karr said there was no obvious effusion in either knee but that there was synovitis particularly in the right. There was a loss of full extension, particularly on the right by about three to four degrees and flexion was approximately 90 degrees. There was a slightly better range of motion on the left. There was no instability but he referred to the Baker's cyst. There was some tenderness on palpitating the joints, the joint line medially and laterally. Patello femoral compression was also painful. Radiographs showed the established degenerative changes in all three compartments suggesting some progression of the degenerative changes.

His impression was that Mrs. Behan had sustained a closed injury in her right knee which most likely aggravated the pre-existing osteoarthritic condition which resulted in the need for an interventional form of surgery. Her overall condition had slightly deteriorated.

The prognosis remained guarded. There was likelihood that Mrs. Behan would need to consider total knee arthroplasty in the future. She would have symptoms as pertained at present prior to any such surgery. If she had also had de-replacement surgery the quantum survivorship of that knee may mean that she may need to consider revision surgery in later years.

In evidence before the Court he said there was limited benefit from surgery. The symptoms had now become more chronic. There was a balance between pain and replacement. While it was difficult to say, he believed that the left knee could reasonably be affected by the right. She had difficulty with sitting at work and it was reasonable for her to feel she was unfit for work.

In cross-examination he said he had seen her some three months after the incident. She may have told him that she was out on sick leave because of laryngitis for four months before the accident.

He said that both knees would trouble her eventually. She had told him about two falls from a height but could not say if that contributed. She hit her left leg after her holiday.

He said that Dr. Gibbs had diagnosed fibromyalgia which was a catch-all syndrome with multiple joint aches and pains but with no specific pathology.

The osteoarthritis had nothing to do with the fall but could exacerbate any injuries. At this stage she had chronic arthritis.

He was asked whether she was able to work. Mr. Karr said the sole reason for her not going back to work related to her knee in the main. It related to symptoms especially chronic symptoms. He was not saying that she could never work unless the symptoms were related to work.

He explained that osteoarthritis develops very slowly. The right knee was more severe than the left. He had never treated her for anything else.

He said he relied on what patients tell him regarding symptoms. There were no letters from other consultants. He was aware of other complaints.

He said that if there was no replacement then there would be treatment for pain relief, anti-inflammatory exercise and physiotherapy.

6. Dr. Bennett's evidence

The fifth witness, Dr. Derek Bennett, submitted a report on 25th July, 2008, two days after examining Mrs. Behan. This was over two years after the incident.

He noted that she was currently not at work, was 5ft, 6 ins., weighed 18 stone and was right hand dominant.

He gave brief details of the accident as recounted by Mrs. Behan in relation to the injury to her right knee, and also pain in her neck, back and both shoulders. She was able to continue with her duties at work. He found soft tissue injuries to her cervical lumbar spine, both shoulders and in particular, an injury to her right knee.

He also noted that she had been absent from work from 16th October, 2006 to the present. He also noted the arthroscopy carried out by Mr. Ken Karr and her treatment and medication.

Her present complaints were severe pain in her right knee, medial aspect. The pain in her left knee was to a lesser extent. There had been substantial recovery of her neck, back and shoulders pain within a few months of the date of the accident.

He found severe swelling of the right knee, moderate to the left knee and range of motion as zero to 90 degrees right knee. There was palpable swelling on the posterior aspect of her right knee, joint line tenderness, particularly in the medial aspect of her right knee. All ligaments felt intact.

Her degree of disablement was severe in terms of lifting, carrying, bending, kneeling and squatting. It was normal for sitting and moderate for standing, climbing stairs and walking.

His anticipated treatment in the future was that Mrs. Behan would undoubtedly require a knee replacement in the not too distant future.

He believed the injuries were consistent with the accident and that no further investigations were required. A full

recovery was not expected. No late complications were expected and no further specialist reports were expected.

His general comments were that Mrs. Behan had an impact to her right knee which had undoubtedly unmasked symptoms of what were pre-existing asymptomatic mild arthritis. Since that injury, her pain and arthritis had progressed. She had almost complete loss of joint space in the medial aspect of her right knee.

By supplementary medical report on 11th February, 2009, Mr. Bennett said that the hip X-rays were normal but X-rays of her knees which were weight-bearing showed moderate loss of joint space in the medial compartments of both knees, particularly the right one. There was also spurring of her tibial spine on both sides, more pronounced on the right. These findings indicate that she was starting to develop arthritis within three months of the accident. It was most probable that the development of arthritis preceded her injury, although her symptoms had been unmasked by the injury.

His final report of 11th September, 2009, related that her knees were progressively getting more and more painful: worse in the right knee in the medial aspect but also quite severe in the left knee medial aspect. Both were progressively worsening. Walking range was approximately 200 metres, with pain. She had seen Dr. Adrian Gibbs, Rheumatologist and had bilateral steroid injections in both knees which had given some benefit. He described her medication for pain relief and anti-inflammatory treatment. Prolonged standing or sitting aggravated her low back pain which he rated at approximately six out of ten. There was bilateral knee swelling with a restricted range of motion in both knees: left knee flexes from 0 to 120 degrees, while right knee flexes from 5 to 110 degrees. There was palpable crepitus in both knees with a restricted range of motion in the lumbar spine with later flexion of only 15 degrees in both sides. Forward flexion brought her fingertips to her knees only. There was no neurological deficit in either lower limb. Her gait was normal.

He repeated his opinion and prognosis that she had sustained a soft tissue injury to her right knee superimposed on an earlier pre-existing degenerative change which had accelerated and made her now quite symptomatic with her knees. Viscosupplementation therapy had given her some temporary relief as had the steroid injections from her rheumatologist. She was advised to put off total knee replacement which she would need, for as long as possible. There was some discomfort in her back which was severe and constant and required painkillers.

In cross-examination he agreed that X-rays on 26th September, 2006 indicated pre-existing arthritis to both knees. He said he did not think there was a referral from the right to the left knee. In due course knee replacement would be necessary for both knees. She had not asked for knee replacement.

He said that medical insurance would cover knee replacement as she had pre-existing arthritis.

He said he had not told her not to go to work.

7. The defendant's evidence

The sixth witness, Mrs. Kathleen Keane, had worked with the bank in Westport since 1979 and was with the Human Resources department of the bank from November, 2004.

She referred to the plaintiff's contract which commenced on 15th March, 2004. Six months later in September she was made permanent. In that year she was 24 days on sick leave. Twenty three of those days were from September onwards.

On the following year she had 26 days sick leave up to the end of 2005. Her annual leave was 22 days.

She was absent for 90 days from 9th January, 2006 to 18th May, 2006. She worked from that date to 19th June, 2006 when she took holidays until 30th June, 2006.

She was sick on 25th August and on 19th and 20th of September. She was on holiday from 9th to 13th October and on sick leave from 16th October 2006 to date.

Mrs. Keane said that the plaintiff made no complaints other than a complaint regarding air conditioning. The bank had a specialist check the system when she made the complaint in addition to the routine annual check. Both showed that the system functioned correctly.

Mrs. Keane said that Mrs. Behan worked in an off-counter office dealing with large lodgements and with night safe lodgments. It was a secure room. Other staff could not walk in and out of it. Most of the time there was one person present and during the summer two persons. On a few occasions there were three people there.

Each one worked in an area organising their work. They had access to the manager or to herself. She referred to the 2004 Staff Survey Report which she had seen before. She did not give directions as to where the basket was put. She was not aware of the practice. Mrs. Behan was in charge and was responsible for the cabinet and the drawers.

She said she did remember the incident and filled in a safety and injury report on 12th June, 2006, the day of the incident. The cause of the incident was given as "fall". The outline explanation of the incident was as follows:

> "Turning around on chair to open safe, coin bag caught in castors, fell off chair just between the two safes. Hurt her knee and got a shock"

The nature of the injury/damage was indicated as shock and the affected part of the body was leg/knee.

The report form indicated that following the incident the injured person resumed work. The witnesses were indicated as Maria McMahon and Kathleen Flynn, both bank officials. Mrs. Keane indicated that she checked out the area, "a lot of stuff on floor, coin bags, etc. Looked at ways of clearing some of it. Mary is O.K. Knee a bit sore but luckily not bruised". Mrs. Keane signed a report and the managers also signed it and dated it 12th June, 2006.

Mrs. Keane said that the place was untidy. Her recollection was that Mrs. Behan had dealt with the coin bag.

She said she would have asked Mrs. Behan how she was before she went on holidays and remembered her telling her about the Clew Bay Hotel incident where she was having lunch in the garden and fell off a bench. She also remembered an incident on 13th July, 2006 at 12.30pm where Mrs. Behan got a big gash, maybe two inches, on her leg. She worked the following day. That incident was also recorded in a safety and health incident report form as occurring in the open plan office with the filing cabinet and drawer.

"Mary caught her leg above ankle causing long cut and bruising."

She said that Mrs. Behan left work on 16th October, 2006 and submitted sick certificates referring to her knee.

She gave an indication of the full income paid for six months and half pay and social welfare thereafter.

She said that if furniture needed to be moved one would ask the porter. If the basket would require to be moved then the porter would do so. There is a similar role today regarding the baskets.

Under cross-examination she said that there were 23 or 24 people working in the branch. There were three people who had been capable of working in the off-counter office. The system was already in operation and furniture and cabinets had been arranged by the bank.

She said that the tidiness of the office depended on who was in the office at the time. When the basket was used it was usually on the floor as it was still too empty.

She said that the loose coinage should be in the cabinet by the hatch. She had never seen the basket overflowing.

She said that after the incident nobody at the bank asked her to do anything. She said she did a tidy up. She picked up stuff which should not have been there. She was never told that the office was untidy. It was a closed room. Others were not allowed in. Mrs. Behan was responsible for keeping it tidy.

Mrs. Behan had complained of lack of staff but there was hardly ever three people in that office as there was on the busy Monday. There was an extra person there.

She said that it was reasonable to have a trolley.

She said that Mrs. Behan came back one year after the accident while she was on sick leave and brought a camera into the off-counter office which was in breach of security.

She agreed that different people worked in different ways. She would have asked the person in charge to tidy up.

8. Defendant's engineer

he seventh witness Mr. John Mooney, Engineer, undertook an inspection on 23rd January, 2009 with Dr. Jordan and Bridget Meehan, the deputy manager. They agreed that Mrs. Behan had given a good description of the office.

His measurements were 155 x 149 square metres giving just short of 15 square metres net. The regulations did not require any deduction for counter. The top of the safe was also usable.

The room was comfortably laid out for two people. There was reasonable space for three. The surface of Mrs. Behan's desk measured fourteen square feet.

There is an obligation on employees to take reasonable care for their own safety. He said that when he inspected the room the desk was cleared for security reasons.

The floor area around the desk was also the employees responsibility and the other areas the responsibility of the person in charge.

He had no problem with the chair.

He distinguished between the small coin plastic bag, the larger bags which were less likely to chock the chair and the basket which was not likely to cause any breaking effect.

He said he had not seen the drawer for coin bags.

He noted that Mrs. Behan had said she was unsure what caused the chair to overturn.

In cross-examination he said he was unaware of Kathleen Keane's evidence. He agreed with Mrs. Behan and Mrs. Keane's evidence of the canvas coin bags being caught in the castors.

The desk was full, it was a busy office. The basket did not cause the accident. He said there were three chairs in the room. He referred to the office regulations of 1958 and 1963 which indicated that the space allowed for every person was 50ft floor space. He had measured the usable floor space and found it reasonable. His evidence was that 3.7 metres squared was the minimum while 4.2 square metres was standard space per person.

He did not agree that the basket was a hazard. If the basket had overflowed the porter should have been asked to remove it.

9. Civil liability and Courts Act 2004

An application was made by the defendant to dismiss the plaintiffs claim pursuant to s. 26 of the Civil Liability and Courts Act 2004 which provides as follows:

> "(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that –
>
> (a) is false or misleading, in any material respect, and
>
> (b) he or she knows to be false or misleading,
>
> the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.
>
> (2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under s. 14 that -
>
> (a) is false or misleading in any material respect, and
>
> (b) that he or she knew to be false or misleading when swearing the affidavit,
>
> dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.
>
> (3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.
>
> (4) This section applies to personal injuries actions –
>
> (a) brought on or after the commencement of this section, and
>
> (b) pending on the date of such commencement."

10. Case law

In *Carmello v. Casey* [2008] I.R. 524 the plaintiff suffered personal injuries as a result of a road traffic accident in October, 2002 and issued proceedings against the defendants. Liability was conceded and the case proceeded as an assessment of damages only. At the hearing, the defendants contended that facial numbness, which the plaintiff alleged was attributable to the accident, was actually caused by a subsequent accident in May, 2003. The defendants' solicitors became aware of this incident as a result of other litigation involving the plaintiff in which they were also involved. The incident was not disclosed in the plaintiff's replies to particulars. Under cross-examination the plaintiff stated that he could not recall any such subsequent incident and maintained that his facial numbness was caused by the road traffic accident.

No complaint of facial numbness was made in the particulars of injuries in the statement of claim, nor in a report of the plaintiff's general practitioner nor in the notes of the treating doctor at the hospital which the plaintiff attended. The first complaint of facial numbness by the plaintiff was in a medical report prepared in September, 2003, after the subsequent accident. The particulars of injury further stated that the plaintiff suffered a broken nose, which was in contradiction to a medical report which was to hand prior to delivery of the statement of claim.

The plaintiff swore an affidavit of verification of the particulars in the statement of claim and in the replied to particulars. The defendants alleged that the plaintiff, in his evidence and in the manner in which he instructed his solicitors and by swearing an affidavit verifying the particulars of his injuries, had deliberately given false and misleading evidence to exaggerate his claim and asked the court to dismiss the plaintiff's claim under s. 26 of the Act of 2004.

It was held by the High Court (Peart J.), in dismissing the plaintiff's claim,

> "1. That the question for the court, under s. 26 of the Civil Liability and Courts Act 2004, was whether on the balance of probability the court could be satisfied that in relation to his evidence and/or his verifying affidavit, the plaintiff had knowingly given false and or misleading evidence in a material respect. The section was mandatory in its terms once the court was satisfied on the balance of probability, unless to dismiss the action would result in injustice. The court first had to look to the plaintiff's evidence and then at all the surrounding circumstances, including what was contained in the pleadings, the replies to particulars and the medical reports and arrive at a conclusion as to the truthfulness of the plaintiff on the balance of probability.
>
> 2. That, on the balance of probability, the plaintiff was deliberately untruthful in his pleadings, evidence and affidavit of verification in an effort to obtain an award of damages to which he was not entitled from the defendants. He knowingly gave false and misleading evidence contrary to s. 26(1) of the Act of 2004 in relation to questions about his injuries, which was a material respect within the meaning of s. 26 and also swore a verifying affidavit of the assertion of facts contained in the statement of claim and the replies to particulars, knowing that some of what was contained therein in relation to his injuries was false and misleading, contrary to s. 26 (2) of the Act of 2004.
>
> 3. That s. 26 of the Act of 2004 was introduced by the Oireachtas for the very clear purpose of avoiding injustice to, *inter alia*, defendants against whom false or exaggerated claims were mounted. Such actions were also an abuse of court and it had always been a very serious criminal offence to knowingly give false evidence under oath. Proof of such offence was beyond a reasonable doubt, but under s. 26 the court made its findings on the balance of probability.

Peart J. held at 538 that the contrary evidence between the pleadings and the medical reports in that case weighed

heavily against the plaintiff's overall credibility, quite apart from constituting another possible factor in the consideration of s. 26 of the Act of 2004. The plaintiff in that case had categorically stated that he was never at any time involved in any incident. He had set out to attribute a later injury to his face to the accident the subject of the proceedings (at 539).

11. Submissions of counsel
Counsel for the defendant referred in particular to the replies to particulars and, in particular to the reply to number 37 referred to above. He also referred to the claim for special damages on the basis of loss of earnings and to the plaintiff's affidavit of verification of the 14th July, 2008. Counsel submitted that the claim was misleading in that the plaintiff answered effectively that she had no illness, sickness, disease, handicap, surgical operation or medical complaint, physical or otherwise relevant to these proceedings, either prior to or subsequent to the alleged incident. It was submitted that the evidence showed that there had been relevant injuries and relevant treatment, some of which were dealt with by the plaintiff herself in examination in chief, and others in reply to questions put to her in cross-examination.

Moreover, counsel submitted that the evidence of Mrs. Kathleen Keane regarding the extent of sick leave taken by the plaintiff related, in part, to illnesses and to treatments which were relevant to the incident the subject of these proceedings.

Counsel for the plaintiff, in reply, submitted that the burden of proof was on the defendant to show "an intention to mislead". The plaintiff had referred in her evidence to pre-existing problems. She believed that her other knee had been affected. Mr. Karr supported her belief. She did not say that she could not work.

12. Decision of the Court
The plaintiff in the s. 3 personal injury pleaded that she was caused to suffer and sustain severe personal injury, loss and damage when she was caused or permitted to fall from a chair upon which she was seated owing to the congested and cluttered nature of the area where she was required to work.

In her evidence she said that the incident did not involve her falling off the chair. It was the chair which fell with her. The defendant in its defence alleged that she caused her chair to be overbalanced and failed to sit properly on the chair. They also plead that she allowed bags to be on the floor. When she took photographs of the off-counter office a year later she told the Court that the office was free from clutter.

She agreed that she was in charge of the office. This was the evidence of Mrs. Keane. Both engineers agreed that employees had a duty in this regard.

The plaintiff said that the pre-existing arthritis had not caused the problem. She said when cross-examined that she was not aware of earlier arthritis.

She explained in her direct evidence that she was "about to stand up to talk to the porter when one of the bags on the floor caught in the castor of the chair".

Dr. Jordan, the engineer called on her behalf, in cross-examination agreed that Mrs. Behan had not said to him what stopped the chair.

Mr. Mooney, the engineer called on behalf of the bank said that while Mrs. Behan was unsure what caused the chair to overturn he agreed with her and Mrs. Keane's evidence that it was a canvas coin bag.

It was clear to the Court that there were, indeed, a number of injuries and treatments which were relevant and which the plaintiff disclosed in examination and others under cross-examination but not in her reply to particulars.

The plaintiff did not disclose her pre-existing arthritis which she said she was unaware of but was noted by Mr. Karr. The Court finds that it was probable that she would have known of pre-existing arthritis.

She had not given evidence that she had supplementation therapy with a rheumatologist, Dr. Gibbs.

The reference by Dr. Marrinan to her left knee was explained by it having been healed. The reference in 2003 by Dr. Chris Pigeon to a trapped nerve in the neck may not have been relevant but Dr. Pigeon referred to a disc hernia a C5/6 at that time which came within particular number 37.

In June 2004, the plaintiff had been prescribed cortisoid for her left knee. She said it did not involve her right knee. Yet she claimed that her left knee was compromised after the injury to the right.

Subsequent to the incident she had fallen in the Clew Bay Hotel and, indeed, had told Mrs. Keane of that on the Monday after she returned to work from her holiday when she had fallen from a bench.

There was a reference later in 2007 to a fall in James's Street.

Significantly on 13th July, 2006 she agreed that she had hit against a filing cabinet outside the corridor of the off-counter office and gashed her leg. This was the subject of a report of that date made by Mrs. Keane.

It would appear that she first visited her G.P. in relation to the incident on that day which was a month after the incident complained about. No evidence was given or reference made to notes of this visit.

Mr. Karr said that he relied on what patients told him. He had referred to his notes which stated that the plaintiff had presented with pain in the right hand side knee and to a lesser degree on the left hand side knee resulting from a fall from a sitting height from a chair at work. She had, according to his notes, referred to a similar event in July. In cross-examination he said there were two falls but could not say if the second contributed to the first. Mr. Karr found, in his

report of 24th April, 2008, that the plaintiff had background pain in her knees which was much aggravated by the injury at work.

The similar event and the background pain were relevant and should have been referred to in her reply to particular 37.

The Court is also concerned regarding the direct evidence given by the plaintiff that the doctors had told her that she was not fit to go back to work. In cross-examination she said that the doctors had advised her that she could not work. She agreed she made no application for any other job as she was unfit to work because of her knee.

Mr. Karr did not say that she could never work. In his first report of 24th April, 2008 her progress was good. In the second, of 8th September, 2009 his prognosis was guarded. The sole reason for not going back to work related to the chronic symptoms to her knee in the main.

Mr. Bennett said that he had not told her not to go to work.

The Court is not satisfied with the evidence of the plaintiff that the doctors had advised her that she could not work.

The concern of the Court with regard to the failure to answer particular number 37 and the discrepancy in her evidence in relation to previous medical history leads the Court to examine the merits of the application made by counsel on behalf of the defendant.

The preliminary issue is whether s. 26 of the Civil Liability and Courts Act 2004 applies.

The Court is satisfied that Mrs. Behan did not give evidence that she knew to be false or misleading pursuant to subsection 1 of that section. In this regard it is clear that the reasoning in *Carmello v. Casey* [2008] I.R. 524 was determined on facts entirely different to the facts in this case.

There were no grounds for determining that she dishonestly caused to be given or adduced false or misleading evidence.

Subsection 2 of that section refers to false or misleading affidavits. While the Court does find the reply to a particular number 37 to be incomplete and, to that extent, to be misleading, the Court is not satisfied that Mrs. Behan knew that her reply was false or misleading when swearing the affidavit. The subsection does not provide that she ought to have known. As with all affidavits, an affidavit of verification under s. 14 must be full and frank. It is significant that, as stated by Peart J. in *Carmello*, that s. 26 requires proof on the balance of probability rather than of being beyond a reasonable doubt.

The Court may, however, have regard to the non-disclosure of relevant illnesses and treatments as affecting the plaintiff's credibility.

Chapter 18 of McMahon and Binchy, *Irish Law of Torts*, 3rd Ed., outlines the duty of care of employers towards their employees. The employer is liable to provide competent staff, safe equipment and a safe place and system of work.

Where there is an injury at work the plaintiff must prove that such injuries were caused by the employer's negligence. The negligence pleaded in the present case would appear to relate to place and system of work. It is common case that the chair from which Mrs. Behan fell was not in issue in the proceedings.

Mrs. Behan claimed, *inter alia*, that there was failure to comply with the provisions of the Occupiers' Liability Act 1995 and that the premises were dangerous and that the bank did not warn her of such danger.

While there was some disagreement with regard to the requirements of space for three employees, the evidence was that only exceptionally were three employees present and, in any event, that the size of the premises, the off-counter secure room, was adequate. Even if there were differences it would not appear to this Court that the evidence sustained that the size of the room contributed to the incident.

The statement of claim referred to the area being free from obstructions and from danger.

It is common case that Mrs. Behan was the senior bank official in that room. She said that the system of placing bags in a basket in the centre of the floor pre-dated her being in that room. She had never complained of bags being on the floor notwithstanding her comprehensive memorandum of the system of work requiring more qualified persons to work in the area.

She had available to her the porter, Mr. Gavin, who gave evidence of his willingness to remove the baskets when full if required to do so.

I am satisfied from the evidence of Mrs. Kathleen Keane from the Human Resources department of the bank that everyone working in an area were required to organise their area. Mrs. Keane referred to the 2004 staff survey report and the contribution thereto by Mrs. Behan.

She said she did not give directions as to where the basket was to be put, nor was aware of the practice.

The Court is satisfied that it was the responsibility of Mrs. Behan to keep the area free from obstructions.

In *Ahern v. Sharlocks (Cork) Ltd*. reported in DPIJ: Hilary Easter Term [1992] at p. 73, the plaintiff fell over a palette that had been prematurely placed by a colleague in an area where he was working, in breach of the Employer's Safety Regulations. Murphy J. reduced the plaintiff's damage by 50% on account of his contributory negligence. It was the responsibility of the plaintiff and his colleagues to see that the area was properly maintained and every worker was "bound to have some regard for his own safety".

In the present case, however, it was, on the balance of probabilities, the plaintiff's canvas money bag which she was dealing with was on the floor. She was in charge of her own area of work where her chair was positioned.

The best evidence would appear to be that of the accident report filled in by Mrs. Kathleen Keane who had spoken to the plaintiff after the incident occurred. That report contained an outline explanation of the incident as follows:

> "Turning around on chair to open safe, coin bag caught in castors, fell off chair just between the two safes. Hurt her knee and got a shock."

Mrs. Keane indicated that she checked out the area and saw "a lot of stuff on the floor, coin bags, etc".

The plaintiff was in charge. There was no evidence that that basket was full or overflowing or that it contributed in any way to bags being on the floor. Significantly the plaintiffs own evidence when she took the photographs a year later was that the floor was clear. Mrs. Keane said that the same system of work had continued.

In the circumstance the plaintiff must bear responsibility for the incident. The Court finds no evidence of negligence, breach of duty or breach of statutory duty on the part of the defendant.

It is significant that Mrs. Behan did not seek medical assistance until the 13th July, 2006 when she hit her left leg on an open filing cabinet door. According to the medical report of Mr. Derek Bennett of 25th July, 2008 she had seen a Dr. John Keane, G.P.. Dr. Keane did not give evidence.

The evidence shows that there had been other incidents where injury was caused which were not disclosed to Mr. Bennett or to Mr. Karr (other than the similar incident a month later).

This made it difficult for the medical specialist to isolate the injury caused by the fall on 12th June, 2006 to be isolated from the other incidents which were not disclosed in the pleadings.

For this reason I would dismiss the plaintiff's claim.