



**THE COURT OF APPEAL
CIVIL**

Neutral Citation Number: [2019] IECA 245

Record No. 2018/9

**Peart J.
McGovern J.
Baker J.**

BETWEEN

THOMAS KEEGAN

PLAINTIFF/RESPONDENT

- AND -

SLIGO COUNTY COUNCIL

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice McGovern delivered on the 10th day of October 2019

1. This is an appeal from a decision of Barr J. delivered on the 30th November, 2017 in a personal injury action where liability and quantum were both in issue.
2. The claim arose from a slip and fall accident that occurred on the 18th November, 2013 while the respondent was returning to his home at Cranmore, Sligo. He was a tenant of the house which was let by the appellant, the housing authority for the relevant area. The respondent had resided at the premises for approximately nine years prior to the accident.
3. The accident occurred at around 5 p.m. as the respondent was about to enter his hall door. He had been at a funeral during the afternoon and between 1 p.m. - 5 p.m. admits to having consumed approximately four or five pints of Guinness having visited three different pubs in that period. As he went to open the hall door, he claims that his left foot slipped on the tiles which were wet as a result of the weather conditions on that day. The porch faced in a south-westerly direction and was therefore open to the prevailing wind in the area. The respondent gave evidence that the tiled surface of the porch would frequently get wet.
4. In the High Court the trial judge heard evidence from consulting engineers that the tiles provided good slip resistance when dry but presented a moderate risk when wet. It appears from the evidence in the High Court that the tiles were of a standard type that was provided in such locations at the time when they were laid.
5. The plaintiff suffered a pilon fracture to his left ankle which required surgical fixation. He was unemployed at the time of the accident and the special damages were agreed in a sum of €650.
6. Having heard the evidence, the trial judge determined the liability issue in favour of the respondent and awarded general damages of €50,000 to date and €55,000 into the future and the agreed special damages making in all a total of €105,650. He declined to make any finding of contributory negligence.

7. Although the appeal in this case was in respect of liability and quantum, the issue of quantum was not pursued with any great vigour. The thrust of the oral submissions made at the hearing of the appeal by both parties concerned the issue of liability.

Liability and related issues

8. The appellant sets out its principal grounds of appeal in the following terms: -
- (i) Whether the respondent's house is unfit for human habitation so as to trigger liability under *Siney v. Dublin Corporation* [1980] I.R. 400 and *Burke v. Dublin Corporation* [1991] 1 I.R. 341?
 - (ii) Whether the trial judge took the correct approach in deciding to impose liability under the Occupiers Liability Act 1996?
 - (iii) Whether the trial judge erred in law in his approach to the evidence of the mechanism of the accident as described by the respondent and erred in fact in his finding as to that evidence?
 - (iv) Whether the trial judge erred in law in declining to make a finding as to prior complaints?
 - (v) Whether the trial judge erred in law in his treatment of the effect of alcohol on the ability of the respondent to take reasonable care for his own safety?
 - (vi) Whether the trial judge erred in law and in fact in not finding the respondent guilty of contributory negligence?

Unfit for human habitation

9. The trial judge held that the use of the particular ceramic tiles in the porch of the respondent's house rendered that house "unfit for human habitation". In respect of this finding the appellant has concerns on a number of grounds. In the first place, it claims that this point was not pleaded as part of the respondent's claim. Secondly, it says that such a finding has significant and serious implications for the appellant in a way which transcends this particular case. The respondent argues that when the case came on for hearing the point was raised in submissions and was not objected to by the appellant.
10. It seems to me that this is an issue which gives rise to a number of legal questions of some complexity, including the legal relationship between the respondent and appellant. For example, is the respondent to be considered a "visitor" in the usual sense or is this case one where there is more than one "occupier" of the premises as understood under the Occupiers Liability Act 1995 having regard to the fact that the respondent had resided in the house for approximately nine years prior to the accident? What is the meaning of "unfit for human habitation" within the meaning of the Housing Act 1966?
11. In my view, it is not at all satisfactory that a finding of the trial judge on an issue of such importance should be made where it has not been pleaded by the respondent and arose in circumstances which required the appellant to deal with it on an *ad hoc* basis in the course of the trial. I do not think it matters whether or not the appellant engaged with the

issue at the trial. While the particulars of negligence in the personal injuries summons included a plea of “failing to comply with the provisions of the Occupiers Liability Act 1995 and the Housing Acts 1966” the respondent did not furnish further particulars of same although asked to do so in a notice for particulars dated the 26th August, 2016. Both the *Siney* and *Burke* cases involve claims regarding the interior condition of dwellings. This appeal however concerns an external surface on the porch where one enters the dwelling. Under the Housing Act 1966 a housing authority has a duty to inspect houses in their functional area and ascertain the extent to which they are in any respect unfit or unsuitable for human habitation. The second schedule of the Act sets out matters to which a housing authority ought to have regard in considering whether a house is unfit for human habitation and the list of matters is stated to include “safety of stair cases and common passages including the state of paving in any yard or open space pertinent to the house”. That schedule has, below its heading, a reference to “Section 66”. That section deals with the power of a housing authority to serve a notice on the owner of the house or any other person having an interest in the house whether as mortgagee, tenant or otherwise a notice under the act requiring certain works to be done where the authorities is of the opinion that the house is unfit for human habitation. While it may well be that this also applies to the housing authority itself this is not something that was canvassed in either *Siney* or *Burke* or in this case when the matter was before the High Court. Though it is not for this court to express any view on these issues, I have concluded that it was unsatisfactory for the trial judge to make a finding that the house was unfit for human habitation having regard to the fact that the matter was not specifically pleaded and therefore had to be dealt with in an *ad hoc* way at the trial and in circumstances where the legal issue could be properly argued and considered.

The Occupiers Liability Act 1996

12. Section 3(2) of the Act of 1996 states: -

“In this section “the common duty of care” means a duty to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to extend 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.”

13. In *Allen v. Trabolgan Holiday Centre Limited* [2010] IEHC 129, Charleton J. stated: -

“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 danger; that the occupier did not take such care as is reasonable in the circumstances to avoid the occurrence.”

14. In this case, the trial judge held that the mosaic ceramic tiles in the porch of the premises held by the respondent as a local authority tenant were "inappropriate" and "unsuitable". The appellant argues that the test was whether or not they constitute a "danger".
15. I think it is fair to say that the judgment of the trial judge makes it clear that he regarded the tiles as being a danger on account of the fact that, when they were wet, they presented a moderate risk of slipping. It seems to me the question which has to be considered is whether or not on the facts of this case the respondent took reasonable care for his own safety. This may also include a consideration of the question as to whether he was a "visitor" or "occupier". The evidence established that the respondent was aware that in wet conditions the porch tiles could become somewhat slippy and to prevent that danger he placed a rubber backed mat on the tiles. He gave evidence that on the morning of the accident the mat was extremely wet so he lifted it out and hung it over his side gate before proceeding into town to attend a funeral. On his return, he said the mat was gone and on entering the porch he slipped and met with his accident. He described how he proceeded down the garden path and came to the tiled porch area in front of the hall door and that the tiles were wet as it had been raining all day. It is clear therefore that the respondent, in those circumstances, must have anticipated that the tiles would be somewhat slippy as (a) he could see they were wet, and (b) the mat which he normally used to prevent anyone slipping on the tiles was not available to put down on the tiles.
16. The trial judge does not appear to have considered that evidence and whether or not, in those circumstances, the respondent had exercised reasonable care for his own safety. Nor does he appear to have given any consideration as to whether he was a "visitor" in the normal sense or whether, having regard to his occupancy of the house for approximately nine years, he should in some way be considered differently, and indeed whether he could be considered an "occupier". Some of these matters are relevant to the issue of contributory negligence. It seems to me that the trial judge did not sufficiently engage with these issues before concluding that there was no contributory negligence.
17. Another issue which falls to be considered under the question of whether the respondent took reasonable care for his own safety concerns the amount of alcohol he consumed between approximately 1 p.m. and 5 p.m. on the day of the accident. This will be considered in more detail later.

Mechanism of the accident

18. The issue which attracted the greatest deal of attention during the appeal was the manner in which the judge addressed the way in which the accident occurred and in particular what the appellant described as conflicting and improbable accounts of what happened. The transcript shows that the respondent gave a number of accounts of his accident not all of which were consistent. At one point he stated that, as the door opened, he fell forward and inserted the key into the lock before he started to slip. At another point he stated that he was slipping before the key went into the lock. Then he said "As I approached, I stood in with my right foot, then my left foot, key in. As I got the key in I put the handle down at the same time, it happened together at the same time". On that version of events he had the key in the door and his hand on the handle yet he managed

to slip and fall forward into the hall. But then the following question and answer emerged from the transcript: -

“Q. And it is applying pressure to the handle to open the door. It is only then that you started to slip. Isn't that right?

A: No, I had already slipped.”

Then a few moments later he said that he slipped as he entered the porch and he put the key in and opened the door and that is when he went forward. He agreed that this meant that he managed to get the key into the lock while he was slipping. He agreed that this account sounded “a bit strange”. At an earlier point in his evidence he accepted that an account he had given did not make sense and at another point he admitted that he could not explain how he had fallen while getting the key into the keyhole and his hand on the handle.

19. In the course of his judgment the trial judge described the accident in the following terms; -

“When he arrived at his house, he noted that the mat had been removed from his side gate. He did not know who had removed it, or to where it had been taken. He proceeded down the garden path and came to the tiled porch area in front of his hall door. He stated that it had been raining that day and the tiles were wet. He placed the key into the lock of the front door with his left hand and depressed the handle with his right hand. While moving forward his left foot slipped on the tiles and he fell forward, through the partially opened hall door landing in his hall...”
(para. 10 judgment).

20. While the trial judge noted that the respondent was questioned at length in relation to the exact mechanisms of the slip and fall and that it would not have been possible for him to have been moving at the time when he inserted the key into the keyhole with the left hand while depressing the handle with his right hand, he remarked that the respondent said that it had happened in that way.
21. Later at para. 62, the trial judge referred to the submission of the appellant that the respondent's account as to how the accident occurred was totally implausible and that it was not possible to put the key into the lock, turn the key and depress the handle and slip and fall through the door.
22. When it came to the trial judge's conclusions on causation at para. 71 he stated: -

“...I do not think that it is possible to break down the mechanics of a slip and fall into neat sequences which lawyers, or others, may think convenient, at a considerable remove from the time of the accident. It would have been different if there had been medical evidence to the effect that such an injury could not have happened from the circumstances of the accident as described by the plaintiff. However, there was no such evidence.”

23. There was no serious attempt by the trial judge to analyse the various and somewhat conflicting accounts of the accident given by the respondent. Furthermore, it was not for the appellant to call medical evidence to show that such an injury could not have happened in the manner as described by the respondent. The burden of proof at all times remained on the respondent. In my view the trial judge was in error in failing to properly apply the burden of proof and in neglecting to analyse in any meaningful way the discrepancies in the evidence given by the respondent. This is especially in light of the fact that the respondent admitted in cross-examination that it was "extraordinary" and "strange" but "a fair summary" that he commenced slipping, managed to insert his key into the lock of the hall door, turn the key, open the door with his other hand, push the door open and then fall inside, see transcript, day 1, pp. 49-51.
24. Furthermore, the engineer called on behalf of the respondent gave evidence that the account of the accident given by the respondent to him was that he had slipped and fallen on his porch and outside his door and not that he had slipped, opened the door and fell inside.
25. Effectively, the outcome of the case turned on the account giving by the respondent as to how the accident occurred. If the account had been deemed implausible or unreliable by the trial judge than it is likely that the action would have been dismissed. In those circumstances the trial judge ought to have conducted an analysis of the evidence and stated why he accepted a particular version of the accident as given by the respondent and rejected the thesis postulated by the appellant that the account was entirely implausible.
26. To reach such a conclusion is not to call into question the law as well established in *Hay v O'Grady [1992] I.R. 210*. While an appellate court cannot substitute its view of the evidence for that of the trial judge this does not absolve the trial judge from carrying out a proper analysis of the evidence where there are issues in controversy so that it is possible to see why he preferred or accepted one account or one piece of evidence over the other.

Evidence of prior complaints

27. There was conflicting evidence as to whether the respondent had made complaints about the tiles prior to the accident. It is important to note that this was not pleaded in the personal injuries summons. The respondent gave evidence that he had complained to the appellant's regeneration office on several occasions and asked that the tiles be taken up and the area replaced with concrete. He also stated that he regularly complained to staff on the street and he referred to a conversation with Mr. Noel Mehigan, the estate manager, about replacing the tiles and enclosing the porch when works were done on the house. A reading of the transcript shows that any such discussion of that nature with Mr. Mehigan involving an alteration to the porch was not a complaint, as such, about the condition of the tiles but rather a request for an enclosed porch. It was explained to the respondent that this could not be done because of the existence of a services meter outside the hall door which had to be available for inspection. The appellant had records of extensive complaints made by the respondent in respect of various matters but none in

respect of the porch tiles. The trial judge decided that it was not necessary to resolve this issue but referred to the evidence called by the appellant as “reasonably strong” and suggested that the appellant did not submit records in evidence to establish that there were no complaints.

28. At para. 70 of his judgment, the trial judge incorrectly characterised the evidence concerning the records as given by Ms. Marissa Moran. She was not challenged in her evidence as to what was in the records and what (if anything) was missing.
29. The appellant submits that the evidence which was described by the trial judge as “reasonably strong” raised credibility issues for the respondent and that the trial judge did not give any reason for declining to take that into account. It seems to me that the appellant is entitled to feel that a credibility issue which might have had an impact on the determination of liability was ignored by the trial judge in circumstances where he had accepted the evidence of the appellant on this issue was “reasonably strong”. In doing so he fell into error. While the issue of prior complaint had not been pleaded the trial judge allowed the issue to be canvassed in evidence and, having done so, ought to have explained why he decided to ignore evidence from the appellant which he described as “reasonably strong” when it could have had a bearing on the respondent’s credibility.

The issue of alcohol

30. The respondent admitted that he had attended a funeral on the afternoon of the accident and that between 1 p.m. and 5 p.m. he had consumed four or five pints of Guinness. The trial judge dismissed this as a factor to be considered either in terms of the issue of negligence or contributory negligence. On the first day of the trial, the judge remarked “[b]ut also five pints for a man who has done physical work all his life, unless you are going to allege that he in fact had considerably more, I wouldn’t take five pints as being a particularly large amount over a number of hours”. At para. 73 of his judgment he stated: -

“...Having regard to the fact that this is a man who has worked in manual labouring jobs all his life, I decline to make any adverse finding against him having regard to the level of alcohol consumed by him that day.”

31. It has to be said that there was no specific plea in the personal injury defence that the respondent’s actions on the day of the accident were impaired by alcohol. However, the issue was clearly canvassed in the exchange of particulars before trial and therefore the respondent was aware that it might become a feature in the case. It seems that an objection was taken to the matter being raised in cross-examination and the issue was not pursued. But the pleadings did encompass an allegation that the respondent failed to take reasonable care for his own safety. Since the matter had been canvassed in the exchange of particulars prior to trial and since the issue was raised before the judge in the course of the trial, it seems to me that it was a factor which he ought to have taken into consideration having regard to the duty of the respondent to take reasonable care for his own safety and given the conflicting accounts given as to how the accident that occurred. Furthermore, the judge’s remarks as to how alcohol would affect “a man who

has worked in manual labouring jobs all his life" was unsupported by any evidence given at the trial and was no more than the expression of his opinion. Such an opinion should not play a part in the trial judge's decision to rule out alcohol as relevant.

Contributory negligence

32. The issue of alcohol was a relevant matter for the judge to take into account in determining whether there was any contributory negligence on the part of the respondent. But he declined to make any adverse finding having regard to the level of alcohol consumed by him that day. There was no evidence as to what effect four or five pints of Guinness might have on the respondent in the period between 1 p.m. and 5 p.m. In *O'Flynn v. Cherry Hill Inns Limited* [2017] IECA 211 Irvine J. stated "adult members of society are obliged to take care for their own safety and cannot divest themselves of responsibilities for their actions". That was in the context of a claim made under the Occupiers Liability Act 1996. In *Lavin v. DAA* [2016] IECA 268 Peart J. referred to s. 3 of the 1996 Act and stated at 56:-

"...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."

33. The respondent met with his accident after consuming four or five pints of Guinness that afternoon in circumstances where he knew the tiles were wet and that a mat which he had used to prevent slipping had been removed by him earlier in the day. He had hung that mat over a gate and it had been removed by some person unknown. In my view the trial judge did not give proper consideration to the issue of contributory negligence. He discounted alcohol as a factor purely on the basis of his own opinion and not on the basis of evidence and did not consider the question of the respondent's own knowledge of the tiles on his porch in premises where he had lived for nine years and which he knew could be slippery when wet.

34. Furthermore, the trial judge did not properly apply the provisions of s.3 of the Occupiers Liability Act 1996 by considering whether he had taken reasonable steps for his own safety.

Quantum

35. The trial judge pointed out that the appellant did not call any medical evidence although it had retained the services of Mr. Brendan Healy, orthopaedic surgeon, who had examined the respondent. The judge accepted the evidence of Mr. William Gaine, the orthopaedic surgeon called on behalf of the respondent, that he has developed mild to moderate osteoarthritis in the ankle joint with evidence of osteopenia (a weakening of the bones). The medical evidence was to the effect that the respondent would only be capable of light work. He was forty-nine years of age when the judgment was delivered and the trial judge held that should be taken into account. He had also been unemployed for some time prior to the accident and the trial judge had regard to that fact. The trial judge also

took into account the fact that he had a limited capacity for work in the future and took the view that this could be taken into account in the assessment of general damages. In a brief submission on quantum counsel for the appellant pointed out that the Book of Quantum provides a range of damages of €79,900 to €89,300 in respect of a moderately severe ankle injury being one which involves ongoing pain and stiffness which impacts on movement of the ankle. Although the trial judge was obliged to have regard to the Book of Quantum he did not make any reference to it in his judgment. In neglecting to do so he was in error. While he was entitled to take into account the factors that are referred to in his judgment, it is not clear to me how he related the figure of €105,000 for general damages to the ranges provided for in the Book of Quantum.

36. The Book of Quantum puts an upper limit of €89,300 for a moderately severe ankle injury. The judge built into his award for general damages the respondent's limited capacity for work in the future. In all the circumstances it seems to me that the difference between the higher figure provided in the Book of Quantum and the damages determined by the trial judge (being just over €15,000) is not so significant as to warrant this Court interfering with it.

Conclusions

37. This court is not entitled to substitute its view on the facts for that of the trial judge and *Hay v. O'Grady* still remains the law. But in my view there are a number of matters which have been referred to in this judgment which make the trial unsatisfactory and which can only be put right by a re-trial on the liability issue. In particular, the failure of the trial judge to engage in a meaningful way with the conflicting accounts of the accident given by the respondent before reaching his conclusions on liability fell short of what was required. There was no proper analysis of the conflicting evidence which would point to the reason why he was satisfied, on the balance of probability, that the incident happened in the manner as described in para. 10 of the judgment.
38. The trial judge was also in error in failing to properly examine and analyse the evidence before ruling out contributory negligence by failing to address the question as to whether the respondent had taken reasonable care for his own safety as required under the Occupiers Liability Act 1996. He also erred in law in holding, at para. 71 of his judgment, that the onus was on the appellant to call medical evidence to show that the accident could not have occurred in the manner claimed by the respondent.
39. The trial judge's finding that the respondent's house was not reasonably fit for habitation is one which could have far reaching consequences for the appellant. The trial judge erred in making such a finding in circumstances where it had not been pleaded thereby giving rise to a situation where the appellant had to deal with the matter on an ad hoc basis during the course of the trial. This gave rise to an entirely unsatisfactory situation. It is not for this court to express its view on the issue in circumstances where it should not have been dealt with by the trial judge.
40. The trial of the liability issue was unsatisfactory and I would allow the appeal. I would direct that the issue of liability be remitted back to the High Court for a re-hearing.