



THE COURT OF APPEAL

UNAPPROVED

Record Number: 2023 107
High Court Record Number: 2018/627P
Neutral Citation Number [2023] IECA 268

Noonan J.

Binchy J.

Meenan J.

BETWEEN/

PATRICIA SWEENEY

PLAINTIFF/RESPONDENT

-AND-

ATLANTIC TROY LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 6th day of November, 2023

1. The respondent (the plaintiff) was attending a wedding reception at the appellant's (the defendant) hotel premises when she slipped and fell on the dancefloor suffering injury. The High Court found in her favour and awarded damages. The defendant appeals against the High Court judgment in its entirety so that both quantum and liability are in issue.

The Evidence on Liability

2. The plaintiff was born on the 23rd October, 1983 and is and was at the relevant time employed by Paddy Power as an administrator. The accident occurred on the 2nd May, 2015

at around 2am at the Charleville Park Hotel in Charleville, County Cork. The hotel is owned and operated by the defendant. The plaintiff attended the wedding reception with her partner Mark Howard. She is a friend of the bride, Tracey Daly. The plaintiff's evidence was that the wedding ceremony took place at around 2pm and she arrived at the hotel at 4 - 4.30pm. She said that the wedding guests sat down to a meal around 5 - 5.30pm and following the meal and speeches, they moved into a function room with a dancefloor at around 8pm. The plaintiff had been wearing high heeled shoes but changed into flip flops when the dancing commenced. A light meal comprising "*finger food*" was served around 10 to 11pm. The plaintiff was coming off the dancefloor after the last dance, which was approaching 2am, when, as she described it, "*my leg just went from under me on the floor.*"

3. She was asked how much she had to drink during the course of the evening, and her evidence was four or five bottles of beer. It was accepted at the appeal that a bottle of beer would in the normal way be about 33 centilitres or one third of a litre. It was suggested by counsel for the defendant that the evidence, when examined, showed that she could have consumed as much as six to seven bottles of beer. Thus, the evidence as a whole suggests that the plaintiff may have consumed either a little less or more than two litres of beer between her arrival at the hotel and the occurrence of the accident, a period of approximately nine hours during which she also consumed a substantial meal and later, a light meal.

4. The plaintiff described the floor as being "*like glass*" where she fell. She said "*It was wet, my dress was wet, my hand was wet*". Her evidence was that there was no supervision in the function room at any stage during the evening and in particular, there was no waiting staff on the floor so that it was necessary to queue up at the bar to obtain a drink. There was one barman serving and, according to the plaintiff, he was the only employee of the defendant present in the room throughout the evening.

5. The plaintiff's evidence was that her partner, Mr. Howard, and the bride, Ms. Daly, came to her aid and put her on a chair while elevating her leg, which was very swollen, on another chair. Ten minutes later, Mr. Jonathan Finn, an employee of the hotel, arrived. Mr. Finn was described as a night manager having a junior managerial role. The plaintiff's direct evidence was that she was not intoxicated at the time she fell. The plaintiff said that the tables were very close to the dancefloor and people getting drinks at the bar were crossing the dancefloor over and back.

6. Under cross-examination, the plaintiff was asked about the amount she had to drink and she again confirmed that she had one or two drinks with the meal and three or four drinks afterwards in the function room. She said she was working the next day and had to drive home to Fedamore in County Limerick the next morning. It was put to the plaintiff that Mr. Finn's evidence would be that when he arrived, she was not very coherent. She denied this. It was also put to her that Mr. Finn's evidence would be that the bride and groom told him when he arrived that the plaintiff had tripped over herself and she got up and walked over to the chair. She denied that she could walk as her foot was broken in the fall. It was also put to the plaintiff that Mr. Finn would say that he did not see any drink on the dancefloor. The plaintiff disputed this and said her dress and hand were wet.

7. In his evidence, Mr. Howard said that after the plaintiff had fallen, he noticed the floor was quite wet. He had knelt down to assist the plaintiff and said his knees were wet from kneeling as well as his hands. He was challenged on this in cross-examination:

"371 Q. I've suggested to you there'll be evidence that it wasn't wet, but you don't seem to agree with that.

A. That's a suggestion. I know exactly what it was and it was wet. When I kneeled down there, my knees were wet, my hands were wet from the floor. And I observed,

when Patricia was on the floor that yes, the floor, I could clearly see that there was wetness on the floor.”

8. Ms. Daly then gave evidence and said that after the plaintiff had fallen, *“she was trying to get herself up but the floor was wet so she couldn’t get her feet under her.”* She went on to say that *“the floor was really slippery so we were finding it hard to, like, lift her up off the floor.”*

9. Ms. Daly was asked what it was that was causing the floor to be slippery and said *“there was a table and chairs lined up along there. That people were trying to get through, there was nothing in their way here. So they were crossing the - you could see people throughout the night crossing the dancefloor with drinks in their hands trying to make their way, like the smoking area you had to go out across the floor and out through double doors.”* She confirmed that when she put the plaintiff on the chair, she elevated her leg and her dress was wet and her leg was wet. She thought this came from spilled drink on the floor. She believed that the plaintiff was not intoxicated. In cross-examination, it was put to Ms. Daly that she did not see any wet on the floor and she said *“I felt wet, I was also wet. So, I was enjoying dancing when I went to pick my friend up off the floor I was also wet. So, therefore, I can assume that the floor was wet.”*

10. Consulting engineers gave evidence on behalf of both parties and having conducted slip resistance tests on the floor, both agreed that the floor would be highly slippery when wet.

11. The only witness as to fact called by the defence was Mr. Finn. Regarding the plaintiff’s sobriety he said:

“She didn’t seem, obviously with the pain she seemed to have taken some drink in my opinion.”

He said that he had been told that the plaintiff had tripped coming off the dancefloor and was wearing heels. He said that no one had said anything to him about the floor being wet and that he inspected it straight after attending to the plaintiff and couldn’t see any sign of it being wet.

12. Mr. Finn confirmed that there was CCTV footage but he described it as having been “grainy” and it showed nothing so was not retained. In cross-examination, Mr. Finn insisted that the plaintiff was intoxicated as well as in distress. He also disagreed with the suggestion that there was only one barman in the room and said another employee, Shane O’Callaghan, was clearing glasses. Shane O’Callaghan was a barman and he reported the accident to Mr. Finn. He was also behind the bar. Mr. Finn suggested that there were other waiting staff in the room with multiple barmen but no work roster was produced by the defendant to identify those individuals.

13. He was also asked why on discovery, the defendant produced no documents evidencing any system of inspection, detection or cleaning of spillages and Mr. Finn said there was no formalised sign-in and sign-out sheet which had only been introduced subsequently. He described himself as being a member of junior management. At the end of Mr. Finn’s evidence, he was asked some questions by the judge and in particular whether he accepted that when the floor was wet, it was dangerous. Mr. Finn agreed. When asked by the judge about checking the floor after the accident, Mr. Finn said that he checked and he was not looking for wetness but rather the carpet was old and quite frayed and when he heard the plaintiff tripped coming off the dancefloor, he thought maybe there was “something lifting” but while inspecting the carpet, did not see any wet patch on the floor.

Judgment of the High Court on liability

14. The judge delivered judgment on the 21st April, 2023. He noted that the plaintiff's cause of action was grounded upon the duty owed to her pursuant to the Occupiers Liability Act, 1995 and section 4 of the Hotel Proprietors Act, 1963 which provides:

“Where a person is received as a guest at a hotel, whether or not under special contract, the proprietor of the hotel is under a duty to take reasonable care of the person of the guest and to ensure that, for the purpose of personal use by the guest, the premises are as safe as reasonable care and skill can make them.”

15. The judge observed that Mr. Finn, the only defence witness as to fact, was unable to identify any system of checking, monitoring or cleaning spillages on the dancefloor. With regard to his evidence concerning the plaintiff's intoxication, the judge said:

“His assumption that the plaintiff was intoxicated based on his perception of attendees at other events was ill-founded.”

16. The judge said that in an accident report form completed by him, Mr. Finn had stated that the plaintiff was wearing heels and was of the “*opinion*” that the dancefloor was dry, and this was flatly contradicted by the plaintiff. The judge said:

“The court is well satisfied that those coming to and from the bar largely crossed the dancefloor. Inevitably, many carried drinks which were liable to spill. There was one person behind the bar, and I am not satisfied that there was another staff member at 2am in and around the dancefloor area of the hotel upon which the plaintiff fell.”

17. Referring to the evidence of the plaintiff's witnesses concerning the floor being wet, he said that Mr. Finn's opinion that the floor was not wet did not arise from any detailed inspection and the judge concluded:

“There is no doubt that there was liquid on the dancefloor at the time of the plaintiff's fall. The evidence of the engineers called do not dispute that the dancefloor, when wet, has a high slip potential ... The court finds that the defendant failed in its statutory duty owed to the plaintiff, who was a guest, for the wedding reception and also for the night in the hotel. No system of inspection, monitoring or cleaning was disclosed on behalf of the defendant.”

Appeal on liability

18. It must be said that the defendant's complaint about the judge's finding of negligence against it is somewhat difficult to understand. Initially, the only matter raised in the notice of appeal on the primary finding of negligence was that the judge erred in law and fact in finding the defendant negligent, obviously a wholly uninformative ground of appeal. This was subsequently amended by the addition of particulars to the effect that the defendant's evidence was that the floor was not wet and the plaintiff was unable to identify specifically that the floor was wet but rather that her clothes were wet.

19. I find these pleas difficult to fathom in the light of the extremely clear evidence given by the plaintiff and her witnesses to which I have referred above. Each in turn said the floor was wet. The defendant has advanced absolutely no reason why the judge was not entitled to accept the evidence of the plaintiff's witnesses and reject that of Mr. Finn. In contrast to the very clear evidence given by the plaintiff's witnesses, Mr. Finn said he looked around the floor and did not see any wetness, but it is clear from his own evidence that if he had not been told that the floor was wet as he said, he had no reason to look for wetness and

instead, his inspection seemed to be focused on trying to find a trip hazard caused by the frayed carpet at the edge of the dancefloor.

20. Accordingly, the judge found as a fact that the floor was wet and the only candidate for the cause of this wetness was identified as drink spilled by people constantly going backwards and forwards to the bar over this area of the dancefloor during the course of the evening. Faced with the evidence of the defendant, or more accurately the lack of it, concerning any system of inspection, monitoring or cleaning of spillages on a dancefloor that the defendant knew or ought to have known was highly dangerous when wet throughout the course of the entire evening, it seems to me that the judge could have come to no other conclusion but that there was the clearest negligence and breach of statutory duty on the part of the defendant. It would indeed have been surprising if the judge had come to any other conclusion on the evidence.

21. This finding by the judge is, to say the very least, one that was clearly open on evidence which was patently credible and accordingly on well-settled *Hay v O'Grady* [1992] 1 IR 210 principles cannot be interfered with by this Court.

22. The second complaint raised about the judge's liability finding was that he failed to consider the issue of contributory negligence and conclude that there was clear evidence of such negligence on the part of the plaintiff. This was, in counsel's submission, primarily focused on the evidence concerning the plaintiff's alleged intoxication. This in turn was based on the evidence of Mr. Finn but as against that, the plaintiff herself and her two witnesses gave very clear evidence that she was not intoxicated, and certainly not intoxicated to the extent of being unable to exercise reasonable care for her own safety.

23. There was absolutely no evidence of the latter and counsel seemed to consider that the fact that the plaintiff admitted drinking a number of bottles of beer was in itself evidence

of negligence. That submission appears to me to be quite misconceived. The mere fact of having a few drinks is not evidence of negligence. As I have already noted, the plaintiff appears to have consumed in or around two litres of beer over the course of a nine hour period during which she had one substantial meal and a subsequent lighter meal. That, without more, could not conceivably amount to evidence of intoxication to such a degree as to be incapable of taking care for her own safety. Yet that appears to be the height of the defendant's case in this regard.

24. Mr. Finn spoke to the plaintiff after the accident when she was in severe pain from a very significant injury, which is described below, and his impression of the plaintiff being intoxicated was one that the trial judge was perfectly entitled to reject in favour of the evidence tendered for the plaintiff. There is no basis for any suggestion that the latter was other than credible evidence and thus no basis for interfering with the judge's finding.

25. It was also suggested that the plaintiff's footwear was a factor and one of the engineers said that there was a danger with flip flops of stepping out of them and presumably losing one's footing in consequence. Here again however, there was absolutely no evidence that anything of the kind occurred in relation to the plaintiff and there was certainly no evidence that the mere wearing of flip flops, as distinct from high heels, could be considered in and of itself to be negligent.

26. The fact that the trial judge did not expressly refer to the issue of contributory negligence does not mean that he did not consider it. His findings were clearly consistent only with there being no contributory negligence on the part of the plaintiff and it was in my view unnecessary for him to explicitly state that he was in fact finding that there was no contributory negligence. This would, in the circumstances, be no more than a statement of the obvious.

27. I am accordingly satisfied that the defendant has fallen far short of demonstrating any error on the part of the trial judge in his conclusions on liability.

The Quantum Evidence

28. The plaintiff suffered a significant injury to her left foot comprising a fracture of the calcaneus, or heel bone, and the latter malleolus of the ankle. Two medical reports were agreed and put in evidence on behalf of the plaintiff, one from Professor Michael Stephens, Consultant Orthopaedic Surgeon and one from the plaintiff's general practitioner, Dr. Edmund O'Callaghan. The defendant proffered no medical evidence.

29. Dealing first with the plaintiff's own evidence, she was brought to the A&E Department of Limerick Regional Hospital after the accident where she was treated for a fractured ankle with a back slab plaster and crutches. She was discharged the next day but she had severe swelling with blisters around the fractured heel area. She had to remain in the back slab for the swelling to reduce. Thereafter the plaintiff was admitted to hospital on the 21st May, 2015 for surgery on her foot which comprised an open reduction and internal fixation of the calcaneus. She was discharged on crutches after about 10 days and had to continue non-weight bearing for 12 weeks when she was given a boot and commenced physiotherapy. Throughout this period, she suffered what she described as intense and unbearable pain. She was very concerned about developing an infection in her wound. She remained off work for some 14 weeks returning in September 2015. Intensive physiotherapy continued for about 14 weeks and intermittently thereafter.

30. The plaintiff had many visits to her GP particularly with complaints of constant swelling of her leg and foot for which he prescribed anti-inflammatories which she still takes when required. The plaintiff said that her heel and ankle continues to be painful on a daily basis. She has very limited movement and her foot turns out in consequence of which she

said she walks with a limp. Her foot is constantly swollen and she has difficulty walking. She said she is unable to walk in her bare feet and has problems with footwear. She can only wear runners or completely flat shoes which must have laces. She is unable to wear slippers. She is unable to run or walk on uneven ground and has problems with her balance standing up.

31. The plaintiff had a baby girl in 2018 who was a toddler at the time of the hearing in the High Court and the plaintiff says she has difficulty looking after her daughter because she cannot run after her. She describes the accident as a life changing one. She is unable to walk long distances and has to avoid situations which cause her foot pain to flare up. She says that from the time she rises in the morning, her foot starts to swell up and compress inside her shoe. During the course of the plaintiff's evidence, the judge had the opportunity to view the swelling and scarring on her foot. In cross-examination, she disagreed that her pain was occasional. She said she has constant pain and swelling but it becomes more severe when she overdoes it.

32. In his report, Professor Stephens describes the plaintiff's heel fracture as a displaced intra-articular fracture of the calcaneus. This was fixed with a plate and screws. Professor Stephens, who examined the plaintiff on the 28th June, 2022, seven years post-accident, said that she complained of trouble in her hind foot if she is walking long distances. She cannot wear high heels and finds it hard to walk on her left foot barefoot. He described her pain as occasional and particularly noticeable if she overdoes it.

33. When Professor Stephens examined the plaintiff, he found she had a normal gait, although as appears from the plaintiff's own evidence she appears to take a different view. She only has a "*jog of movement*" in her left subtalar joint. She has a lateral scar on the outer aspect of the foot. Her mid-foot is stiffer by about 50% compared to the right side.

34. Professor Stephens described the plaintiff's residual symptoms as being permanent. He did note however that they are not bad enough for her to take analgesic medication although again, the plaintiff appeared to suggest otherwise in her evidence. Professor Stephens said that the injury meant that the foot has lost two of its functions, that is in relation to walking on uneven ground or across an incline. Her foot stiffness means it is not a good shock absorber and requires specific footwear for walking. Professor Stephens says that there is a risk of post-traumatic osteoarthritis of the subtalar joint in the long term and if painful enough to justify the risks, can be treated by an arthrodesis or a fusion. He believed that as the plaintiff was now seven years post-injury, this situation would be very much in the long term. He said that there is evidence in the literature that when these fractures are fixed internally successfully as here, the risk of arthrodesis is less than if it was treated non-operatively after the index procedure. However, he does not identify the extent of the risk.

35. Dr. O'Callaghan's report is dated the 12th April, 2023, following examination on the 30th March, 2023. Dr. O'Callaghan says that the plaintiff still suffers pain in her ankle, has limited movement in the left ankle and a poor sense of balance on the left leg. She is unable to walk on rough ground and suffers pain even walking on level ground. She finds climbing steps very challenging and cannot run which poses difficulty when walking with her toddler. Her ankle remains swollen and this gets worse during the day. She has corns on the lateral three toes of the left foot due to post-injury deformity despite using practical footwear. Dr. O'Callaghan notes that the plaintiff suffers from psychological stress from the experience and the lack of progress physically. He notes that she uses Solpadine and Nurofen for pain as required. He does not expect much further improvement in her ankle at this stage.

Judgment of the High Court on Quantum

36. The judge described the plaintiff's injuries as per the medical reports and considered that the plaintiff did not exaggerate. The judge said he could understand the plaintiff's description of the accident as a life changing event. The judge noted that he had viewed the plaintiff's feet which had been medically photographed but the judge said that the photograph of the foot "*does not give the whole view*". He said that compared to the right foot, the existing continuing swelling and scarring are very noticeable on the plaintiff's left foot.

37. The judge referred to the fact that both parties had made submissions on the Book of Quantum and were in agreement that the plaintiff's injury falls within Category 5 on page 66 dealing with lower limb injuries and in particular fractures of the foot. "*Severe and permanent conditions*" are described in this section in the following terms:

"These injuries will include several bones in the foot or the heel bone of the ankle structure which required extensive surgery and extended healing but may result in an incomplete union. The possibility of having or has achieved arthritic change and degeneration of the foot joint and may affect the ability to walk unaided, and are so severe that an amputation may be considered - €65,2000 to €92,900."

While there was agreement that the injury was correctly categorised as falling into the severe and permanent conditions classification, counsel for the plaintiff contended that it was at the higher end whereas counsel for the defendant suggested the lower end. The judge assessed the plaintiff's general damages to date in the sum of €48,500 and into the future at €42,500, a total of €91,000.

The Appeal on Quantum

38. The defendant's essential submission in this regard is that the award was disproportionate and excessive on the basis that the judge assessed it at the top end of the severe category when clearly, there are potentially more severe injuries which might properly attract damages at that level. In oral submissions, counsel for the defendant suggested that the correct level was somewhere in the mid-range of the severe and permanent category at of the order of €70,000 to €80,000. While the defendant's submission in that regard appears to me to be not unreasonable, that is not the test that this Court has to apply.

39. Before an appellate court can interfere with a trial judge's award of damages, it must be satisfied that the award is so disproportionate to what the appellate court might be inclined to give as to amount to an error of law - *per* Fennelly J. in *Rossiter v Dun Laoghaire County Council* [2001] 3 IR 578. In the same case, McCarthy J. suggested that in order to warrant interference, disparity between the award and what the appellate court might be inclined to give should not be less than 25%. Speaking for this Court in *Meehan v Shawcove Limited* [2022] IECA 208, I observed that this is not a rule of law or even a rule of thumb to be invariably applied and is simply intended as a rough guide and probably best suited to lower value cases.

40. Whilst therefore it is true to say that the judge's award here was possibly at the higher end and somewhat above what this Court might be inclined to give, the defendant has not to my mind established that the disparity is such as to amount to an error of law and in those circumstances, I would decline to interfere. It follows that I would dismiss this appeal in its entirety.

The Cross-Appeal

41. The plaintiff's cross-appeal is essentially predicated on the submission that there should have been an uplift beyond the severe and permanent category of foot injury to take account of the severity of the scarring and swelling and psychological stress suffered by the plaintiff, particularly regarding her future prospects for further surgery and resultant increased limitation of movement. However, it seems to me that these are matters which must be encompassed within the severe and permanent category in the Book of Quantum, which speaks of injuries resulting in possible amputation which would of course carry with it significant cosmetic disfigurement and inevitable psychological trauma. I cannot accept therefore that these factors alone could be regarded as sufficient to take the injury beyond what is, as I have already indicated, a fairly generous award.

42. I would accordingly dismiss the cross-appeal.

Costs

43. As the plaintiff has been entirely successful in relation to the appeal, it would seem to follow that she should be entitled to her costs. With regard to the cross-appeal, it seems to me that in reality, this added nothing to the duration or complexity of this appeal given in particular that it was not felt necessary by the defendant to respond to it by way of submission, either written or oral. In those circumstances, I think justice is best served by making no order as to costs of the cross-appeal.

44. If either party wish to contend for an alternative form of order, they will have 14 days from the date of this judgment to make written submissions not exceeding 1,000 words and the opposing party will have 14 days to respond likewise. In default of receiving such submissions, an order in the terms proposed will be made.

45. As this judgment is delivered electronically, Binchy and Meenan JJ. have authorised me to record their agreement with it.