

FOLEY v Musgrave

Finlay C.J.
Griffin J.
McCarthy J.
(143/85)

THE SUPREME COURT

EILEEN FOLEY

v.

MUSGRAVE CASH AND CARRY LIMITED

JUDGMENT delivered on the 20th day of December 1985 by

McCARTHY J. *Finlay C v case.*

On the 13th of December 1976, the plaintiff, for the purpose of her business at Cappoquin, came to the defendants' wholesale supermarket at Kinsale Road, Cork. These premises, so far as is relevant, consist of a very large shop area with a series of aisles and criss-crossing bays, the aisles being significantly wider than the bays. Along the sides of both aisles and bays the various goods for sale are displayed appropriately for wholesale purposes and, at intervals, there are hung from the ceiling signs indicating the whereabouts of different commodities. The plaintiff's purpose was to buy two cases of sherry and she was, therefore, seeking the Wines and Spirits area. In such a self-service establishment trolleys are provided for customers at a trolley bay which is

(2)

replenished from time to time by trolleys collected by junior employees of the defendants from the car park area where the trolleys are unloaded. Each trolley is low slung at the front with two angled arms which are joined by a handle bar and has a wire basket hanging clear at the rear. The bearing surface of the trolley is about 5 feet long and 2½ feet wide, flat and wholly unencumbered. The trolley is of a fairly nondescript colour and is mounted on four wheels, the rear two being on flexible mountings. As the plaintiff was walking along an aisle fairly near to the cash desk and seeking the Wine and Spirits section she fell over the low front portion of an unladen and unattended trolley, the front portion of which extended some 2½ feet into her path.

At the trial, the learned trial Judge posed and the jury answered the following questions:

"1) Were the Defendants negligent in

(a) allowing a trolley to be in a position where it might reasonably have been regarded as a danger to persons using the Cash-and-Carry premises?

Answer: Yes

(b) failing to take reasonable steps to remove trolleys temporarily out of use from the part of the premises

(3)

resorted to by the customers?

Answer: Yes

2) (a) Had the Plaintiff used the trolley over which she fell?

Answer: No

(b) Was the Plaintiff negligent in failing to keep a proper look-out?

Answer: Yes

3) If the answer is "Yes" to either part of Question (1) and to Question No. (2) (b), then apportion the degrees of fault as between

(a) the Defendant

Answer: 65 per cent

(b) the Plaintiff

Answer: 35 per cent

4) Assess damages under the following heads:

(a) Special damages [agreed]	£261.00
(b) Pain and suffering to date:	£16,000.00
(c) Pain and suffering in the future:	<u>£12,000.00</u>
Total	£28,261.00

The defendants challenge to the verdict is twofold:

1. That the claim should have been withdrawn from the jury either at the close of the plaintiff's evidence or at the close of the defendants' evidence.

(4)

2. That failing in that contention the apportionment of fault is wholly unreasonable and the amount of the general damages wholly excessive.

1. The application for a direction.

Mr. Hickey S.C., acknowledging that the plaintiff was an invitee, in effect, contended that there was nothing unusual about the danger of which the plaintiff complains - of falling over a trolley such as would be encountered in a wholesale supermarket. He cited a number of authorities seeking to identify the scope of "unusual danger"¹.

In cases of alleged occupier liability I find little assistance in the examination of different and somewhat artificial legal relationships. In my view, cases of this kind are better approached on the simple principle of foreseeable risk, of the duty to take reasonable care to avoid unnecessary risk of injury to persons who may come upon the

¹O'Donoghue v. Greene (1967) I.R. 40.
Ward v. Tesco (1976) 1 A.E.R. 219
Murphy v. Roches Stores (1977 Supreme Court unreported).
Morely v. Eye, Ear and Throat Hospital Incorporated (1967) I.R. 143

(5)

premises. Here, the real contention is that the combination of the low slung neutrally coloured trolley projecting marginally into the particular aisle allied to the probability of a customer seeking to identify a particular sales location did create a danger of injury. On an objective view, this is clearly so. The key question was whether or not it was open to a jury to hold that the existence of such a danger constituted negligence as found.

Part of the defendants' contention was that this Court, in an appeal of this kind, should examine the case as it presented at the end of the plaintiff's evidence and determine the issue as it then was, without regard to such evidence as the defendants may afterwards have led, however damaging to the defendants' case such evidence may have been. I reject such a proposition. One possible consequence of such a principle would be that, despite being wholly satisfied of the propriety of a plaintiff's claim, having heard the defendants' evidence, this Court should consciously perpetrate an injustice by excluding from consideration the established truth.

Once it had been established that the danger I have sought to describe existed and caused injury, in my judgment the onus shifted to the defendants to demonstrate that they had taken all reasonable

(6)

precautions for the safety of their customers. An obvious precaution would be the maintenance of a system of inspection and removal so as to lessen this very risk. It may well be that such precautions would not have avoided this accident; obviously, if the trolley had been left unloaded and unattended for a very short time, it would be unreasonable to demand of the occupier a system to prevent the sort of accident that happened. In that respect, however, there was no evidence before the jury, the only significant feature being that one of the staff, Mrs. Cronin, stated that if she had seen an empty unattended trolley she would have moved it away. There being no evidence by the defendants to establish any such system, in my view, the learned trial Judge properly allowed the case to go to the jury in the manner already detailed.

2 (a) Apportionment of fault.

Where this Court is satisfied that the apportionment is such that no reasonable jury, properly directed, could have come to such conclusion, the Court should interfere. Such is not the case here.

I do not say that I would not have taken a different view from that of the jury. My doubts, however, are not such as to warrant

(7)


interference.

(b) Damages.

This accident took place on the 13th December 1976 and was an unconscionable time coming to hearing; indeed the proceedings did not commence until the 1st June 1979. It did mean that the jury had to consider a period of some seven years from the date of the accident to the date of trial, during which the plaintiff had to bear the results of a Colles fracture of the left wrist for which her arm was in plaster of Paris for five weeks and which achieved a fairly permanent stage within six to seven weeks. It is an unpleasant injury; the plaintiff appears to have suffered continuous pain up to the time of trial and it has incapacitated her to some relatively minor degree. It will continue at this level.

In my view, neither of the separate amounts assessed by the jury under the heading of general damages bear any reasonable proportion to the degree of injuries sustained. I would substitute the figures of £7,000 and £5,000 in lieu thereof.

The order of the High Court should be varied accordingly.

Approved as amended.

 8.1.86

FOLEY v. MUSGRAVE

Finlay C.J.
Griffin J.
McCarthy J.

THE SUPREME COURT

143/84

ELLEN FOLEY

v.

MUSGRAVE CASH AND CARRY LIMITED

JUDGMENT delivered the 20th day of December 1985 by

GRIFFIN J. *Finlay CJ concurring*

In 1976 the plaintiff and her husband carried on the business of a grocery and public house at Cappoquin in the County Waterford. The defendants were the owners and occupiers of a wholesale warehouse or supermarket at Kinsale Road, Cork. Access to the defendants' premises is confined to such retailers and other customers as are in possession of a customer's card issued by the defendants. The plaintiff was the holder of such a card, and on the 13th of December 1976 she went to the defendants' premises for the purpose of the purchase of two cases of sherry. The premises are very large, and the goods displayed there are stacked on shelves throughout the building. There are main aisles, approximately 12' wide, between each two rows of shelves, and side bays approximately 8' wide - the lay-

(2)

out is similar to that in common use in retail supermarkets but on a much larger scale. The different departments are indicated by signs which vary in height from 9' to 15' above floor level.

As the nature of the business involves purchases in large quantities, trolleys are provided by the defendants for the use of customers. In 1976 there were between 200 and 250 such trolleys in use on the premises. The trolleys have four small wheels, approximately 4" to 5" in diameter, and consist of a platform made of timber planks approximately 5' to 6' long and 2'6" wide, 8" high at the front and 10" to 11" high at the rear. This platform is open on the front and on both sides. At the rear there is a handle approximately 4' high, and from a cross bar on the handle a wire basket is hung, presumably for use with smaller or lighter goods.

The trolleys are kept in what is called the trolley bay, which is reached after the customer passes through the reception area having shown the customer's card at the reception desk. When a customer has collected the goods he wished to purchase and puts them on a trolley, he goes to the cash desk, pays for them and takes them on the trolley to the car park for loading onto a car or van as the case may be. Trolley boys are employed by the defendants for

the purpose of collecting the trolleys in the car park and bringing them back to the trolley bay for further use of customers. Trolley boys are not employed inside the supermarket for the purpose of collecting trolleys which are from time to time left by customers in the main aisles or the side bays.

The plaintiff was looking for the sign for the Wine and Spirit department, and while she was walking along one of the main aisles close to the junction of that aisle with one of the side bays, she fell over the front portion of a trolley which was stationary and unattended in the side bay, with approximately 2' to 2½' of the front portion projecting into the aisle on which she was walking, and she suffered injuries. In evidence she said that the premises were fairly crowded at the time and that she was carrying her handbag in one hand and a box of biscuits in the other and that she had not yet taken a trolley for her use. The goods on the nearby shelves were stacked up to a height which made it difficult to see into the side bay.

At the trial a very substantial portion of the evidence was directed by Counsel for the defendants towards endeavouring to establish that the plaintiff had in fact taken a trolley and had a

(4)

box of biscuits on it, and that she fell over her own trolley. This was based on statements she was alleged to have made after the accident to employees of the defendants, and on the evidence of an eye witness from Lismore, to whom the plaintiff was known. The latter said that as she came towards him in the supermarket she appeared to him to be looking downwards at a list or note which she had in her hand, that he saw the trolley over which she fell sticking out from the side bay with a box of biscuits on the front of it and that after he passed her he heard her fall over the trolley. That issue was not pursued at the hearing of the appeal - a question had been left to the jury on that issue and the jury found that she had not used the trolley over which she had fallen.

The jury found that the defendants were negligent in allowing a trolley to be in a position where it might reasonably have been regarded as a danger to persons using the premises and in failing to take reasonable steps to remove trolleys temporarily out of use from the part of the premises resorted to by the customers. The defendants had sought to have the case withdrawn from the jury at the conclusion of the plaintiff's case and again at the end of the defendants' case.

They submitted on the appeal that the learned trial judge was wrong in refusing both applications. Their submission essentially was that trolleys of the kind used by the defendants are a necessary part of any wholesale supermarket, and that in a crowded supermarket they are hazards which customers must expect to encounter and for which they must be on the lookout, and that it would be an unreal standard of care to expect that the proprietors of a wholesale supermarket should be required to police and supervise every trolley being used by a customer.

The plaintiff was on the premises as an invitee of the defendant. In modern times it appears to me that the duty owed by the occupier to an invitee could best be said to be to take reasonable care in all the circumstances to see that the premises are reasonably safe for the invitee. Nowadays in a case of this kind it seems to matter little whether this test is used, or whether the test of foresight and proximity enunciated by Mr. Justice Walsh in Purtill v. Athlone U.D.C. 1968 I.R. 205 or that of the neighbour principle stated by Lord Atkin in Donoghue v. Stevenson 1932 A.C. 862 is applied. I would accept that in this case it would be a wholly artificial standard of care to expect or require that customers using trolleys should be policed

(6)

by employees of the occupiers. No customer could reasonably expect that standard. However, in my view there are factors to which the defendants as occupiers are required to give consideration in ascertaining whether there are any steps they should take to see if the premises could be made reasonably safe for their customers. These would include: the fact that a large number of customers is frequently to be expected on the premises; that customers frequently leave trolleys in the aisles or bays; that while a loaded trolley, or even an empty trolley the entire of which is in view, can fairly readily be seen, the front portion which is just above ankle level is difficult to see and can constitute a real danger if it is projecting into an aisle or bay or if the rear portion which is some 4' in height is concealed in some way. A customer in a supermarket could not reasonably be expected to look down at his or her feet while walking along an aisle or a bay. Indeed the display of goods in such establishments is so designed and arranged that the customer will be encouraged and expected to look at shelves at or about eye level and the signs indicating the different departments are all well above eye level.

There was no evidence that the defendants gave any thought to taking any steps or devising a system to ensure that trolleys left

lying about in the supermarket proper would be periodically removed and taken to the trolley bay. Whilst the defendants employed a large number of trolley boys these were exclusively used between the car park and the trolley bay. If for example some of these boys were engaged in the supermarket to walk around the aisles and to take any unattended trolleys to the trolley bay, this would be an indication that they had considered the danger and taken steps to minimise it. They are not insurers. Their duty is to take reasonable steps to make the premises reasonably safe for the customer. If in such circumstances a customer fell over a trolley casually left by another customer they could show that they had taken reasonable steps and they would not be liable to the customer unless there was evidence that the particular trolley had been left in a dangerous position for an inordinate length of time.

In the absence of some such system, there was in my view evidence to go to the jury that the defendants were in breach of the duty they owed to the plaintiff, and the trial judge was correct in refusing to withdraw the case from the jury at the conclusion of the plaintiff's case and again at the conclusion of the defendants' case. The finding of negligence against the defendants cannot therefore

in my opinion be disturbed.

The jury also found that there was contributory negligence on the part of the plaintiff, and apportioned the liability as to 65 per cent on the defendants and 35 per cent on the plaintiff. Counsel for the plaintiff accepts that the jury were entitled to find that there was contributory negligence on the part of the plaintiff. The defendants contend that the apportionment of 65 per cent on them was too high and that the plaintiff should be found at least equally to blame. I cannot agree. The apportionment by the jury was within the range that might be expected from a reasonable jury properly directed. In addition, as the danger was one which the defendants, as occupiers of the premises, should have foreseen and taken steps to make the premises reasonably safe for their customers, the jury were in my view justified in imposing a higher percentage on the defendants than on the plaintiff.

The defendants have also appealed against the amounts of £16,000 awarded to the plaintiff for pain and suffering to the date of the trial and £12,000 for pain and suffering in the future. In my opinion, each of these figures was excessive. The plaintiff suffered a Colles fracture of the left wrist, and was removed to hospital in Cork

(9)

on the same day. The fracture was reduced under anaesthetic and a plaster applied. She was detained in hospital over night, and subsequently attended as an out-patient. The plaster was removed after 5 weeks and she was finally discharged from further treatment on the 18th February 1977 - 9 weeks after the accident. The particular fracture is a troublesome one and the plaintiff found difficulty for a very long time in doing some of her household tasks. She continued to have some weakness and discomfort in her left wrist up to the time of the trial, at which time she was 58 years of age. She is likely to continue in the future to have some discomfort. She has slight deformity of the wrist as a result of the fracture and her surgeon expects that she will have difficulty in such things as wringing out clothes.

In common with the views of my colleagues, I would reduce the damages to the date of the trial to £7,000 and those in respect of the future to £5,000. I would accordingly allow this appeal on the issue of damages only.

78

20. 12. 1985.