THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2019] IECA 295

Record Number: 2014/1317

Baker J.
Costello J.
Donnelly J.

BETWEEN/

PHILOMENA WHITE

PLAINTIFF/APPELLANT

- AND –

WILLIAM DOHERTY AND S & K CAREY LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT of the Court delivered on the 27th day of November 2019, by Ms. Justice Donnelly

Introduction

1. The plaintiff/appellant, ("Mrs. White"), then aged 73 years, suffered a serious injury to her left arm when she tripped and fell on the 3rd May, 2010 at Woodstown Caravan Park ("the park"), County Waterford. Mrs. White and her husband had a mobile home in the said caravan park for approximately forty-six years. The trial judge accepted in full Mrs. White's evidence as to how her accident occurred. The trial judge rejected her claim for damages and held that there was no breach of the common duty of care owed by the respondents as occupiers of the park under s. 3 of the Occupiers Liability Act, 1995 ("the 1995 Act"). It is against that finding that Mrs. White appeals.

2. Mrs. White had walked from her mobile home to the toilet/shower block at about 6pm on the May Bank Holiday in 2010. Her own mobile home was five or six homes back on the left hand side of the park as one faced the toilet block. She walked up close to the mobile homes on the left side. At some point between the last two mobile homes her toe stuck in something, she lost her balance and as she described it, paddled through the air. As the ground was sloping away from her she could not stop herself falling. Mrs. White was not exactly sure where she hit the toilet block but thought it may have been in the centre of the wall and recalls sitting up with her back against the wall after she fell.

3. At the trial Mrs. White's claim in negligence revolved around the state of the ground in the vicinity of the toilet block. She claimed it was uneven with protruding stones. Of relevance was that in or about the winter of 2007/2008, the defendants/respondents (hereinafter "the respondents") purchased the park for a sum of €860,000. The respondents increased the licence fee to €2,500 from the year 2008 from an initial fee of €500. While there was an issue at the trial as to whether the increased fee was for the landscaping of the park or simply to pay for the purchase price, the claim in contract was not pursued at the trial. No documentary evidence as to the terms of the licence was given at trial.

4. At the hearing of the appeal, counsel on behalf of Mrs. White submitted that there were various concerns about the credibility of the respondents' case. For example, the main witness for the respondents, Mr. Carey, had given evidence about the reason for the increase in the fee, which reason was at odds with that put to Mrs. White in cross-examination by the respondents' counsel. It was submitted that these were issues of credibility that ought to have been taken into account in the consideration of the overall question of negligence.

5. In the winter of 2008/2009, the respondents had installed a sewerage system and running water to each of the mobile homes. The respondents initially gave incorrect instructions to their engineer that the water had been cut off to the toilet block at the time of the accident. It was, however, no longer in regular use for mobile home owners because they each had their own toilet provided. Mrs. White's evidence was that she had probably not used the toilet block since she had been provided with her own toilet in her caravan at least one year prior to the accident. She had a particular reason for using the toilet block rather than the toilet in her own mobile home on the day of the accident; a reason accepted by the trial judge.

The Trial Judge's Findings

6. The trial judge accepted that the sewerage and water pipes had been installed in approximately a three-foot trench which was then back-filled. After that top soil was spread in the park. This was not sieved top soil and there were stones in it, which the trial judge accepted was required for drainage. The trial judge held there was grass on the relevant areas. The evidence is that the respondents cut the grass and there does not appear to be a problem with stones protruding through the soil when cutting the grass.

7. In her judgment, the trial judge found that: -

> "*the relevant area to the plaintiff's fall was an uneven, grassy area with indentations of field like quality, not a smooth lawn, and a probability of some stones embedded in the grass and in some patches close to the toilet block where the grass was worn there may have been some small, loose stones.*"

8. The trial judge also accepted the evidence of Mr. Carey on behalf of the respondents, that during the year the grass becomes thinner and patchier. There had been evidence that children play soccer in front of the toilet block as they use the wall as a goal and that some of the loose, patchier areas in the photographs may result from that activity.

9. Ultimately, on the issue of whether there was a breach of the common duty of care set out in s.3 of the 1995 Act, the trial judge found as follows: -

> "*There is a dispute between the two consulting engineers as experts as to whether the stony and indented ground constituted what they termed a "hazard", and I cannot accept the evidence of Mr. Hart on behalf of the plaintiff that the nature of the ground in this caravan park can be considered to be a hazard within the normal meaning of that term. It is common case that the defendants cut the grass in the*

caravan park, and, as I have already indicated, that it was an indented field with some stones."

10. The trial judge went on to say that even if it could be considered to constitute a danger within the meaning of the 1995 Act, it did not appear to her that the defendants as occupiers could be considered to be in breach of the duty of care in maintaining such an indented ground having regard to the care which Mrs. White must be expected to take while walking on such indented ground. The trial judge therefore dismissed Mrs. White's claim.

11. Of some note was that Mrs. White's engineer, Mr. Hart, had visited the site in November 2010, which was approximately six months after the accident at the request of the plaintiff's family. This was not a formal inspection, but he had taken certain photographs, referred to as photographs number 10 and 11 in his book of photographs. By the time his formal inspection took place, the scene had changed and further works had been done to provide a somewhat different entrance towards the toilets. This Court was provided with the book of photographs. Unfortunately, photographs number 10 and 11 are close ups of ground that did not in themselves self-identify the location of the ground being depicted therein. The trial judge stated: -

"*Mr. Hart's recollection is that they are in the approximate area of where the accident occurred, but the area was identified for him by Mr. White not Mrs. White and the evidence is Mr. White was not present when Mrs. White fell.*"

12. The trial judge went on to say:

"[I]t seems to me that [the] evidence is too vague to be of any assistance to the court or to be accepted as demonstrating the type of ground where the accident occurred."

The Appeal

13. Although neither the grounds of appeal nor Mrs White's written submissions contained any specific reference to photographs 10 or 11, these became significant at the hearing of the appeal. It appears that at the trial, Mr. Hart, circled an area in photograph 8 which he said was the area photographs 10 and 11 depicted. That original exhibit was not available to this Court. Photograph 8 depicts an area in front of part of the toilet block, which based on the evidence Mrs. White gave at trial, appears to have been the general area where she tripped.

14. For the purposes of understanding this judgment, it is necessary to say that photograph 10 shows a close-up of an almost bare area of ground with sandy soil and containing several stones thereon with one reasonably large stone protruding from the ground. It is not clear how far the stone protrudes from the ground however and it appears that no evidence was given at the trial as to that. There are small tufts of grass apparent in photograph 10 and while it is clear that these tufts are not cut short, it is difficult to estimate their height. Photograph number 11 also shows a close-up area of a piece of ground in which there is some bare soil but also areas of growing grass. There are a

number of stones in the ground but again it depicts one reasonably large stone protruding. Again, it is unclear how far this stone protrudes from the ground. It is apparent that grass, although not cut short, extends above the height of the stone. These photographs were taken in November and the accident occurred in early May. It is thus likely that they do not reflect the condition of the grass at the date of the accident, though this is not a finding made by the trial judge.

15. Counsel for Mrs. White submitted at the hearing of the appeal that the weight of the evidence was such, that these stones were present in what was agreed as the general area of the accident. They were protrusions of stone in a caravan park. Counsel for Mrs. White submitted that protrusions of this sort should not have been on what was accepted as the appropriate path that Mrs. White took to the toilet block. It was submitted that by referring to a hazard rather than a danger, the trial judge had imposed too high a standard. It was also submitted that in respect of the common duty of care, the fact that this was a commercial caravan park was relevant as to whether the duty of care had been breached.

16. Counsel for the respondents submitted that there had been no error in law or in fact by the trial judge. As regards issue of the evidence, this Court had to take into account the decision of the Supreme Court in *Hay v. O'Grady* [1992] 1 I.R. 210.

The Role of the Appellate Court

17. In *Hay v. O'Grady*, McCarthy J. set out the role of an appellate court on the hearing of an appeal as follows: -

> *"1. An appellate Court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial Judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.*
>
> *2. If the findings of fact made by the trial Judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.*
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> *3. Inferences of fact are drawn in most trials; it is said that an appellate Court is in as good a position as the trial Judge to draw inferences of fact. (See the Judgment of Holmes L.J. in the SS. Gairloch (1899) 2 I.R. 1, 18, cited by O'Higgins C.J. in the People .v. Madden (1977 I.R.) 336 at 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate Court would not draw. In my judgment, an appellate Court should be slow to substitute its own inference of fact where such depends upon oral evidence of recollection of fact and a different inference has been drawn by the trial Judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial Judge.*

4. *A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper inference - in a case of this kind, was there negligence? I leave aside the question of any special circumstance applying as a test of negligence in the particular case. If, on the facts found and either on the inferences drawn by the trial Judge or on the inferences drawn by the appellate Court in accordance with the principles set out above, it is established to the satisfaction of the appellate Court that the conclusion of the trial Judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly.*

5. *These views emphasise the importance of a clear statement, as was made in this case, by the trial Judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows."*

The Finding of Fact

18. In my view, a number of issues arise on this appeal, the first of which is whether the findings of fact made by the trial judge were supported by credible evidence? If so, this Court is bound by those findings, however voluminous and apparently weighty the testimony against them. This Court may in limited circumstances be in as good a position as a trial judge to draw inferences of fact. It is important to note, however, that if it is established that the conclusion of law reached on the basis of the primary facts and proper inference drawn by the trial judge is erroneous in law then the appellate court must vary the order.

19. The trial judge accepted that photographs 10 and 11 showed larger stones imbedded in the ground but stated that the evidence was too vague to be of any assistance to her or to be accepted as demonstrating the type of ground where the accident occurred. It is necessary to consider if that finding of fact is a finding correctly made on the evidence at the hearing and/or if it is open to review by this Court.

20. The trial judge referred to Mr. Hart's recollection that this was in the approximate area of where the accident occurred, but the area was identified for him by Mr. White not Mrs. White. It is correct to say that Mr. Hart's evidence was that Mr. White had indicated to him the general area where Mrs White fell. Mr. Hart gave evidence that "photograph No. 6 was indicated as the general area where Mrs. White lost her footing. There was no particular area referred to, just that general area." Mr. White had earlier given evidence that he did not see his wife fall and that she was brought into one of the other caravans afterwards. In her evidence Mrs. White was asked to indicate by reference to the photographs where she fell. She made reference to photograph number 5 and said by reference to the photograph that the middle of the wall of the toilet block was roughly where she fell.

21. Photograph number 5 shows almost the entirety of the toilet block, the front of which has a solid wall on the left hand side and then an inset area with pillars to the right. Photograph number 6 shows a close up area of the bare patch in front of the wall. It depicts only part of the solid wall and part of the open inset area on the right. It does not

depict the left hand side of the solid wall. That can be deduced from the dark patch on the wall in photograph number 5 and 6. It is therefore clear that photograph number 6 is focussed much more to the right hand side of the wall than the middle of the wall.

22. For those reasons, while the trial judge may not have set out completely accurately the chain of evidence that demonstrated the location of the ground depicted in photographs 10 and 11, there is certainly evidence to support her contention that the evidence of where Mrs. White fell was very vague. No one had given evidence that identified the ground in photographs 10 and 11 as being the location of the accident.

23. The trial judge also indicated that the evidence was too vague to be of assistance in demonstrating the type of ground where the accident occurred. In so holding, the trial judge was pointing out that all the photographs demonstrated was that in a certain area there were two particular stones of some reasonable size. In other words, she did not accept them as evidence that the entire area in front of the wall consisted of sandy soil with reasonably large stones embedded therein. This is consistent with her earlier finding that the toilet block area, being an uneven grassy area, has a probability of some stones embedded in it.

24. In the circumstances, the essential finding of fact made by the trial judge, namely that the evidence was too vague to be of assistance or to be accepted as demonstrating the type of ground where the accident occurred is supported by the evidence on the transcript. As there is support in the evidence for her conclusion on this finding of fact, I am of the view that this Court, as an appellate court, must accept the finding. It must also be noted that in the present case, there is no other evidence to show that the ground was embedded with protruding rocks/stones, indeed the evidence is to the contrary; this was an area where a push lawn mower was capable of cutting the grass.

25. In all of those circumstances, the finding of fact that the plaintiff fell in an uneven grassy area with indentations of field-like quality, not a smooth lawn, and a probability of some stones embedded in the grass where there may have also been some small loose stones, must stand. The stones to which she referred as embedded in the grass were not the larger stones depicted in photographs 10 and 11 but the stones in the unsieved topsoil which were required for drainage. It is on that basis that this Court must assess whether as a matter of law there was negligence on the part of the respondents leading to Mrs. White's injuries.

The Findings of Law

26. Section 3 of the 1995 Act provides as follows: -

> "(1) An occupier of premises owes a duty of care ("the common duty of care") towards a visitor thereto except in so far as the occupier extends, restricts, modifies or excludes that duty in accordance with section 5.
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> (2) In this section "the common duty of care" means a duty to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may

reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon."

27. Counsel for Mrs. White criticised the trial judge's assessment of the word "hazard" and suggested that the trial judge was applying an incorrect test. This submission can be rejected promptly. It was accepted that the common duty of care under the 1995 Act was the same as the ordinary duty of care at common law. At the hearing, both engineers used the word "hazard" in addressing the question of the presence of stones, whether large or small, in the caravan park. In submissions to the trial judge, counsel for Mrs. White referred to the stones as having created "a trip hazard" and that these were as a matter of probability the cause of the plaintiff's accident. In the manner in which the trial judge referred to "hazard", it is apparent that she was reflecting the language that had been used in evidence and in submissions in the case before her. Furthermore, having decided that the stones did not amount to a hazard, she then went on to say that even if there was a danger by virtue of the stones there was no breach of the duty of care. In those circumstances it is clear she too was using hazard interchangeably with danger. Finally, counsel has not demonstrated how or what would be the difference between a hazard and danger in a legal sense.

28. The question of whether these stones amounted to a hazard or a danger is a matter of law to which this Court is entitled to reach a conclusion based on the finding of fact. The question of what amounts to a tripping hazard or a danger must depend on the particular circumstances. At the trial, no evidence was given as to how far a loose stone might protrude from the ground before it could be called a tripping hazard. There was contradictory evidence from the engineers as to whether loose stones or protruding stones in this instance would amount to a tripping hazard, particularly in the context of this being a caravan park. It does not appear to have been the plaintiff's case at trial or indeed on appeal, that the same smooth core surface should be available all over the caravan park and therefore no protrusions of any kind could be allowed. Indeed, given the manner in which the caravans are spread throughout the caravan park, if a smooth core surface was required each caravan would have to have a dedicated path to a toilet block or indeed to any entry or exit from the park.

29. The decision in *Lavin v. Dublin Airport Authority plc* [2016] IECA 268 is instructive as to what constitutes a danger. The Court of Appeal found that not every risk which exists on a premises will constitute a danger for the purposes of the 1995 Act. The Court of Appeal held that the common law distinction between an unusual danger and a usual danger was important even in the context of s. 3 of the 1995 Act. In the case of a usual danger, examples of which were a fixed staircase and an escalator, absent some unusual defect or danger being present and in respect of which the visitor ought to be warned and protected, the occupier will not be liable if the visitor loses her step and falls. As Peart J.

stated: *"[i]n other words provided that reasonable care has been taken by the occupier no liability will exist.*"

30. Counsel for Mrs. White submitted that in considering this as a "field" the trial judge had erred as a matter of law. It was a caravan park operated for commercial value by the respondents. It therefore required different consideration. Different consideration as to what amounts to a danger or hazard in a commercial caravan park when compared with a wild meadow or tilled field may well be appropriate. On the other hand, as a matter of common sense, a caravan park exists in an area of natural beauty or wilderness and different consideration may apply when compared with a pathway to a toilet in an urban or suburban setting. The question of what constitutes a hazard or danger in the particular circumstances must take those factors into account.

31. The Court of Appeal in *Lavin v. Dublin Airport Authority plc* held as followed with respect to s. 3 of the 1995 Act:

> *"The section has not expanded the duty of care at common law previously imposed upon an occupier of a premises in favour of an invitee (now a visitor). Rather, it reflects the common law principles, and has put [it] on a statutory footing. In the words of Charleton J. in Allen v. Trabolgan Holiday Centre Limited [2010] IEHC 129 'The Occupiers' Liability Act 1995 codifies responsibility in tort by the occupiers of premises towards entrants'. He went on to state in relation to the common duty of care owed:*
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> > 'As to that duty it is clear that merely establishing that an accident occurred on premises is not enough. The plaintiff must show that a danger existed by reason of the static condition of the premises; that in consequence of it he/she suffered injury or damage; that the occupier did not take such care as is reasonable in the circumstances to avoid the occurrence.'"

32. Initially, counsel for Mrs. White sought to argue that the trial judge was not entitled to take into account for the purposes of s.3 and assessing the common duty of care "the care which the visitor may reasonably be expected to take for his own safety". Counsel for Mrs. White argued that that was only relevant to the issue of contributory negligence. In the course of the hearing, this was conceded not to be correct in law. In assessing whether there has been a failure on the part of the occupier to take reasonable care, a court must have regard to the care which the visitor may reasonably be expected to take for his or her own safety. A statement of the law to this effect is to be found at para. 60 of the *Lavin v. Dublin Airport Authority plc* decision.

33. On the facts of the present case as found by the trial judge, there is no basis for considering that the evidence demonstrates that the ground consisted of an unusual danger over and above the type of uneven surface one might expect in a caravan park. Although this was a commercial caravan park where there had been works carried out prior to the accident, the surface which remained was more in keeping with the naturalistic settings which one expects to find at a caravan park. They are usually found

in areas of natural beauty and, while not areas of wilderness, no visitor would expect pristine surfaces. A certain unevenness of the surface is to be expected.

34. It is also a factor that every individual using the caravan park would be expected to take care as regard any tripping hazard that might exist by virtue of loose or embedded stones. The findings of the trial judge were that these stones were part of the topsoil and they did not prevent the cutting of the grass. In the absence of a finding by the trial judge that these loose or embedded stones had constituted an unusual danger by virtue of their size or the fact that they had recently been imported into the area it cannot be said as a matter of law that there has been breach of the common duty of care. On the contrary, the trial judge had found that the stones had not presented any problem with the cutting of the grass in the area. Having regard to the evidence as to the nature and condition of the area in which the respondent fell as found by the trial judge, it cannot be said that, as a matter of law, the trial judge erred in her conclusion that the respondents had not breached the common duty of care.

35. For the above reasons, I dismiss the appeal.