THE COURT OF APPEAL

UNAPPROVED
Record Number: 2022/260
High Court Record Number: 2019/5356P

Noonan J. **Neutral Citation Number [2023] IECA 91**

Faherty J.

Binchy J.

BETWEEN/

LIZA CARROLL

PLAINTIFF/RESPONDENT

-AND-

MICHAEL PHELAN, TADGH O'CONNOR AND BERNARD FITZPATRICK AND IONTAOBHAS CORPARAIDEACH CHUMANN LUTHCHLEAS GAEL CUIDEACHTA FAOI THEORAINN RATHAIOCHTA

DEFENDANTS/APPELLANTS

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 18th day of April, 2023

1. The appeal before the court today is from the judgment and order of the High Court (Phelan J.) sitting in Waterford on the 20th October, 2022. This is a slip and fall accident at premises owned and occupied by the defendants and in the appeal, liability only is in issue. There is no appeal against the quantum of general damages assessed by the High Court in the sum of €90,000 together with agreed special damages of €4,000. Liability was apportioned by the High Court on a 50/50 basis which resulted in a net decree in favour of

the plaintiff of €47,000 together with costs on the Circuit Court scale and a certificate for senior counsel.

2. The plaintiff was born on the 12th December, 1975 and is a long time camogie player. On the 4th December, 2017 at about 9am, the plaintiff attended at Roscrea GAA pitch to assist in the training of junior camogie players.

3. There is no real dispute about the facts. The plaintiff was on the pitch with the young players and another coach, Ms. Siobhán Ryan. The pitch is surrounded by a wall in which there is a pedestrian entrance. Behind the wall from the plaintiff's perspective is the car park. On the pitch side of the wall, there are five rows of fairly basic concrete seating. Each row comprises essentially a low cement wall without gaps staggered at different heights to facilitate spectator viewing of the pitch. The front row is about 10 inches high and 9 inches wide. The other rows are sequentially higher but the same width. On top of each row is placed what was described in evidence as a galvanised metal sheet covered in plastic wrapped over the top of each row and painted in the club's colours of red and white.

4. As the training was about to start, the plaintiff heard a car coming into the carpark and moved from the pitch towards the wall in order to see who was arriving, intending to get sufficiently close to the wall to see over it by stepping over several rows of seating. She accepted in evidence that she could alternatively have gone slightly further, only a matter of a few yards, past the rows of seating to the pedestrian access through the wall and looked out there.

5. The plaintiff was togged out for the training wearing studded hurling boots and as she approached the first row of seating, she went to step over it, leading with her left foot. As her foot went over the seating, it would appear that the rear lip or edge of her boot caught on the galvanised and slippery surface with the result that her left foot shot out and she was

pitched violently forward hitting the second row with her chest and the third with her face. As a result, she suffered serious facial injuries.

6. The case was heard with commendable efficiency by all concerned in about two hours. Evidence for the plaintiff was given by the plaintiff herself, Ms. Ryan and a consulting engineer, Mr. Peter Flynn, the medical reports having been agreed. For the defendant, evidence was given by Mr. Tom Hayes, consulting engineer and Mr. Tadgh O'Connor, a local GAA representative. The plaintiff's evidence, which was not contradicted, was that it was common for people to climb over the seats, to stand on them and walk on them. This happened frequently over a long number of years.

7. When the seating was installed originally, it comprised bare concrete and the metal/plastic cladding had been installed some ten to fifteen years before the plaintiff's accident. Mr. Flynn's evidence was that the metal surface of the seating was smooth with a plastic coating and had little or no resistance to slip, especially if wet or frosty. Mr. Flynn said that if the original concrete surface had been there without the cladding, it would have provided more slip resistance and in that event the plaintiff might have avoided the accident.

8. In his evidence on behalf of the defendant, Mr. Hayes said that he accepted that people like children could walk on the seats, this increases the risk of slip and generally he wouldn't be in favour of putting metal sheeting on the seating.

9. In cross-examination, Mr. Hayes agreed that no risk assessment was, as far as he was aware, carried out in relation to the seating. He agreed that the seating had been done in a rather amateurish fashion. He agreed that people were likely to step over the seats and for that reason he would not recommend the surface that had been placed on them. It made a slip more likely than had they been just concrete. They were not suitable for people to walk

on as configured. He very fairly and candidly agreed that he would not be satisfied with the slip resistance of the seating in the context of people stepping on them.

10. Mr. Hayes accepted that he had stated in his report:

> *"In conclusion, in general terms, I am of the view that it was unadvisable to place the smooth metal cladding on the surface of the seats at the location of the accident. At the very least, there is a significant possibility that a young person could step up on the seats, and possibly slip and fall."*

11. Further, in his report, which was put in evidence before the High Court, Mr. Hayes fairly conceded that *"it is probably undeniable that her boot would be more likely to skid on the metal than on the bare concrete"* and *"accordingly, if one accepts the plaintiff's description of the accident, it seems reasonable to suggest that a court could determine that the presence of the smooth cladding did contribute to the incident."*

12. He also suggested that the plaintiff had herself contributed significantly to the accident. When asked in cross-examination whether the reason why the plaintiff's foot slid and shot out was the smooth plastic surface, he said he agreed absolutely.

13. At the conclusion of the evidence, neither side sought to make any submissions on the law and indeed, as far as I can ascertain, although much of the focus of the appeal is concerned with the provisions of the Occupiers Liability Act, 1995, the Act is not once mentioned throughout the case or indeed in the judgment.

14. On the morning following the trial, the judge delivered an *ex-tempore* judgment. She referred to the evidence in some detail, noting Mr. Flynn's evidence that the metal/plastic surface was extremely slippery, particularly when wet and that it was foreseeable that people would step over the benches as it was necessary to do so to access seating along the rows

and that it was his evidence that a more slip resistant surface should have been used. She noted that Mr. Hayes also accepted that the effect of the metal sheeting increased the risk of slip noting that people tend to walk on these types of seats. She noted his fair admission that the job on the steps themselves was amateurish and the surface covering would not be recommended because of the slip risk it created.

15. She made a number of findings of fact. The judge was satisfied that it was commonplace for people to step over the benches to access seating and also to stand and to walk on them. She found it was therefore foreseeable that feet would come into contact with the surface given the layout and structure of the benches. She said she was satisfied that it was foreseeable that people would step over and on the benches and that the defendants were negligent in installing a slippery surface in the form of galvanised plastic cladding described in evidence. Importantly, she found as a fact that it was unlikely that the plaintiff would have slipped and fallen in the manner described but for the presence of the slippery surface of the plastic galvanised cladding.

16. The judge therefore found the defendants to be liable in negligence but considered that the plaintiff was also guilty of contributory negligence, first in not availing of the pedestrian entrance to the carpark which was nearby and second, in failing to safely step over the 10 inch high bench which she ought to have been able to safely complete even in football boots had she been paying proper attention and exercising due care. On this basis she apportioned liability 50/50.

17. There is really only one issue arising in this appeal and that is whether the trial judge was entitled to find that the defendants were in breach of their obligations under s. 3 of the Occupiers Liability Act, 1995. Unusually in this case, virtually all the arguments advanced on appeal by the appellants were never made in the High Court. This would normally give

rise to an insurmountable obstacle for the appellants. However, this point has not been taken by the respondent and given the fact that there was no argument of any hue in the High Court, I propose to deal with it in the absence of objection.

18. Subsection (2) defines the *"common duty of care"* as meaning 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… to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon."*

19. The defendants placed particular reliance on the judgments of this court in *Byrne v Ardenheath* [2017] IECA 293 and *Lavin v Dublin Airport Authority* [2016] IECA 261. *Lavin* was more recently applied by this court in *White v Doherty & Anor*. [2019] IECA 295 where the court noted the observations made in *Lavin* regarding the scope of s. 3 of the 1995 Act:

> *"The section has not expanded the duty of care at common law previously imposed on 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.' "*

20. In analysing these decisions, it is important to have regard to the factual background against which these statements were made. In *Lavin*, the plaintiff fell down an escalator in Dublin Airport. There was no allegation that there was any defect in the escalator as agreed by the engineers on both sides. The sole and only basis upon which the High Court found in favour of the plaintiff is that the airport authority failed to bring to her attention by adequate signage within the terminal the fact that she could reach the departures area by means other than the escalator, namely by using one of the lifts provided or the stairs. Speaking for this court, Peart J. considered that this alleged failure by the defendant could not reasonably be regarded as a failure to take reasonable care for the safety of the plaintiff to avoid injury by reason of a danger on the premises.

21. In that case, it was on the facts quite clear that there was in fact no danger on the premises. Peart J. analysed in some detail the pre-existing law concerning occupiers' liability in the context of unusual dangers as opposed to ordinary dangers. He instanced the example that a stairs *simpliciter* may give rise to a danger of falling if the person using the stairs does not exercise some degree of care for their safety by, for example, failing to hold the handrail or carrying an inappropriate load. If there is no defect in the stairs, then it cannot be regarded as a *"danger"* within the meaning of s. 3.

22. Similarly in *White*, the danger was claimed to be the presence of an allegedly protruding stone in an uneven grassy area, somewhat like a field, with a sloping surface. The court concluded in this respect in a judgment delivered by Donnelly J. that *"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."*

23. In *Byrne*, the plaintiff slipped down a grassy slope adjoining a supermarket carpark when there was an alternative means of egress open to her in circumstances where the wet

grassy slope presented an obvious danger to the plaintiff. As I noted in *O'Connor v Wexford County Council* [2021] IECA 239, the defendant has absolutely no reason to anticipate that patrons within the carpark would use the grassy slope as a means of egress.

24. The facts of these cases are very remote from the circumstances of the present appeal. Here, there was no dispute but that the surface of the benches was used by many people for a long period of time for standing on, walking along and stepping over. That was uncontroversial as was the fact that the cladding was entirely unsuitable for these activities, a fact readily and fairly conceded by the defendants' expert. I therefore cannot see on what basis it could be said that the judge was not entitled to conclude that this slippery, and clearly dangerous underfoot, surface amounted to an unusual danger, albeit that she did not use that precise language. She simply held that its presence in the circumstances represented clear negligence on the part of the defendant, which in reality amounts to the same thing.

25. The defendants also place reliance on the fact that the precise mechanism of the accident was something that the defendants could not have foreseen and they could not therefore be liable. However, the law in relation to reasonable foreseeability does not require that the precise circumstances and mechanism of every accident must be actually anticipated by a defendant. What is required is that the defendant should be able to foresee the type or class of damage that may ensue as a result of the defendant's negligence. In the present case, it cannot in my view be gainsaid that the risk of somebody falling as a result of their foot or feet slipping on the surface of these benches was plainly foreseeable.

26. The defendants knew that visitors at the pitch used these benches for all sorts of purposes which exposed them to a risk of injury including standing on them, climbing over them, and walking along them. It was therefore perfectly foreseeable that a person might suffer an injury as a result of their foot slipping on the surface, which is precisely what

happened to the plaintiff. Counsel for the defendant emphasised that the necessary enquiry here had to commence with the fact that the rear lip of the plaintiff's boot caught on the edge of the seat as she attempted to traverse the benches. While that indeed is a factor to be taken account of, it does not gainsay the fact that at the end of the day it was the slippery nature of the cladding that caused her to slip at speed to the left with the result that she lost balance and pitched forward. The fact that the plaintiff could have avoided the accident by doing something different or taking a different route does not exculpate the defendants from the consequences of their own negligence.

27. As I think is clear from the authorities, the failure of a visitor to take care for their own safety is not to be seen as an absolute bar to succeeding in a claim against the occupier. Conversely, a failure on the part of the occupier to take reasonable care is not to be viewed in a vacuum divorced from the negligence of the visitor, which is not always purely a matter of contributory negligence. The corresponding obligations of occupier and visitor must be viewed as a whole.

28. The failure on the part of the plaintiff to watch her footing as she stepped over the first bench or alternatively to take the alternative route through the pedestrian entrance were properly regarded by the trial judge as matters going to her contributory negligence, but not to the extent of absolving the defendants entirely from the consequences of their negligence. It seems to me that the judge was perfectly entitled to apportion liability on the basis that she did, and I am satisfied that she got the balance right in doing so. In that respect, I note that there is no cross-appeal by the plaintiff.

29. Indeed, it appears to me that the observations by Mr. Hayes in his original report were quite prescient. His view as to the likely outcome of the case, as expressed in the conclusion

to his report, proved to be uncannily accurate and it has to be said, renders somewhat surprising the appeal being pursued by the defendants herein.

30. For these reasons, I would dismiss this appeal.