Finlay C.J.
Walsh J.
McCarthy J.

THE SUPREME COURT

267 & 346/87

THERESA O'BYRNE SUING BY HER MOTHER AND NEXT FRIEND SHEILA O'BYRNE

Plaintiff/
Respondent

and

BRENDAN GLOUCESTER AND BIBLA LIMITED TRADING AS DORINDA

Defendants/
Appellants

JUDGMENT delivered on the 3rd day of November 1988 by FINLAY C.J.

This is an appeal brought by the Defendants against the Order of the High Court.

The Plaintiff instituted proceedings in the High Court claiming damages for breach of a warranty implied by virtue of the provisions of the Sale of Goods Act 1893 and in the alternative for negligence against the Defendants arising out of personal injuries, damage and loss alleged to be resulting from an accident in which a skirt which she had purchased from the Defendants went on fire and caused her extensive burning.

The action was tried in the High Court by Johnson J. sitting without a jury, and on the 16th July 1987 he made an Order

(1) Finding the Defendants guilty of negligence,

(2) Finding the Plaintiff guilty of contributory negligence,

(3) Apportioning fault 80 per cent against the Defendants and 20 per cent against the Plaintiff, and assessing gross damages at £54,737.

He dismissed the Plaintiff's claim for damages for breach of warranty.

The Defendants appealed against so much of that Order as found them guilty of negligence and in the alternative against the apportionment of 80 per cent fault against them.

The Plaintiff entered a cross-appeal against the dismiss of her claim for damages for breach of the implied warranty and against the assessment of damages. She also appealed against the finding of contributory negligence. At the commencement of this appeal Counsel on behalf of

the Plaintiff abandoned the appeal against damages.

The facts

In December 1984 the Plaintiff, who was then approximately 15½ years of age purchased from the Defendants' shop in Waterford a brushed cotton skirt which she described as having a fairly tight waistband, buttoned with four buttons down the front, and from there gathered and standing out. On Christmas Day, 1984, she was standing in close proximity to a Super Ser butane gas heater in the livingroom of her home, helping a child to put up a model railway, when the hem of the skirt caught fire. The skirt burnt very rapidly and notwithstanding immediate help from her parents it took some time both to extinguish it and to get it off her, and she suffered very extensive burning indeed along her righthand side in particular, across the buttocks and down the thigh.

The learned trial Judge having heard all the evidence, including evidence of expert witnesses called with regard to tests carried out on remnants of the skirt involved

and on identical material with regard to its flammability adopted a course which is of considerable assistance in considering the decision reached by him, and much to be recommended, namely, setting out in brief form the primary facts which he found to have been established on the evidence. Having done so, it would appear (though the transcript does not reveal the fact) that he invited and received submissions from Counsel on both sides and then gave a short judgment reaching his conclusions. It obviously would be desirable in any case tried by a Judge in the High Court in which judgment is not reserved that submissions made at the conclusion of the evidence or as apparently occurred in this case, after the finding by him of primary facts with regard to the legal consequences of those findings should be noted and be available in this Court in the event of an appeal.

Briefly summarised, the primary facts found by the learned trial Judge were as follows.

1. That the skirt was purchased in a transaction which fell within the provisions of Section 10 of the Sale of

Goods Act 1893.

2. That the skirt must have touched the live flame from the gas heater for a very brief instant.

3. That the skirt burned in the manner as described by the Plaintiff, that is to say, very swiftly, and was made of a fast-burning material.

4. That the material was not treated so as to render it less rapidly burning.

5. That the Defendant knew the material was not treated against fast burning.

6. That the Defendants were aware of the making and contents of a declaration of specification numbered I.S. 128 of 1964 made by the Institute for Industrial Research and Standards, pursuant to the powers conferred on them by the Industrial Research and Standards Act 1961 which declared that any fabric purporting to be of low flammability within the terms of that specification should have a flame-resistance rating of 150 or more when tested by the method described in the declaration and specification.

7. That the Defendants were aware of a statutory prohibition against the utilisation of this type of fabric, namely, brushed cotton of the type involved in this case as material for children's nightdresses. This would appear to be a reference to the provisions of Statutory Instument No. 215 of 1979 which replaced Statutory Instrument No. 4 of 1967 and which is a prohibition on the manufacture, assembling or selling of children's nightdresses unless they complied with I.S. 148 of 1966 and in effect were of low flammability as there defined.

Though it is not specifically recited in the findings of the learned trial Judge, the agreed evidence was that the flammability of the material involved as tested pursuant to I.S. 148 of 1966 was 92, whereas the minimum which would make it a permissible material for the manufacture of children's nightdresses would have been 150.

8. He accepted that one or two seconds from the application of fire to the material would be enough to set it on fire and found that it could also have been set on fire from a spark from a fire.

9. That no notice was given to the purchaser that it was, as he found it to be, certainly hazardous if it went on fire and that it had that characteristic in common with a great number of other materials.

10. That it was not uncommon nowadays in respect of a large number of products, both domestic and otherwise, that the manufacturers put notices on them indicating that there are certain places that they might be dangerous.

Having made these primary findings of fact, the learned trial Judge after the submissions came to the following conclusions.

(a) That the skirt as sold was reasonably suitable for the purpose for which it was intended.

(b) That the Defendants were negligent in manufacturing this skirt and selling it without having attached to it some warning regarding the fact that it was made of a fast-burning fabric which had not been treated.

(c) That the Plaintiff was guilty of contributory negligence in allowing the skirt to come in contact with

a live flame.

(d) That the proportions of fault were 80 per cent upon the Defendants and 20 per cent on the Plaintiff.

Grounds of appeal

The major grounds of appeal submitted on behalf of the Defendants against the findings of liability as distinct from the proportions of fault were, firstly, that it was not reasonable, having regard to evidence establishing the common use over a long period of this material of brushed cotton for skirts and other clothing to expect a manufacturer or vendor of it to place upon it a warning. Secondly, it was asserted that even if a warning had been placed it was improbable that the Plaintiff would either have adverted to it, or if she had, would have acted differently from the way in which she did, causing the accident.

There was direct evidence by the admission of witnesses called on behalf of the Defendants, apart from the evidence adduced on behalf of the Plaintiff, that this was a dangerous substance, the main danger being

the rapidity with which fire, once it had been commenced by the application of a naked flame, spread in the material. This danger was well known to the trade for many years. It is clear on the evidence accepted by the learned trial Judge, the danger was especially likely to cause serious personal injury where the material was used for some garment such as a skirt which might come in contact with a naked flame from an open fire or from a gas fire. It was also established that the Defendants through their servants or agents were actually aware of this danger and actually contemplated, prior to the transaction concerned, the placing of a warning upon the garment but decided not to do it.

Having regard to the nature of the risk involved in this particular dangerous aspect of this material, namely, major physical injury to its wearer, which was a danger foreseeable by the Defendants, and having regard to the simplicity of the precaution which it is alleged the Defendants should have taken, namely, the attaching to the garment of a simple warning that it

was dangerous if exposed to a naked flame and would burn rapidly, the learned trial Judge was correct in concluding that this was a precaution which a reasonably careful manufacturer and vendor of this type of clothing should have taken.

With regard to the second contention made on behalf of the Defendant, whilst no questions were directed to the Plaintiff or her mother by her own Counsel or on behalf of the Defendants concerning what they might have done had a warning been given, I am satisfied that there was sufficient evidence before the learned trial Judge to raise the inference that either the Plaintiff herself or her parents whose gift this was to her would probably have taken or urged the taking of precautions in the use and wearing of the skirt, or possibly have chosen instead a less dangerous material had the warning been placed in a proper way upon it. Having regard to these considerations I am satisfied that the Defendants' appeal against the finding of liability in negligence against them must fail.

Contributory negligence

On the findings of fact as to how the accident happened, which were accepted by the learned trial Judge, I am satisfied that it is unreasonable to hold that the Plaintiff failed to take ordinary care for her own safety in respect of a danger of which she had no knowledge and which was peculiarly within the knowledge of the Defendants. The inadvertent touching of this gas heater by some portion of the flared or flaring skirt when she had no knowledge of the particular danger, could not be an act of contributory negligence on her part in the circumstances of this case. I would therefore allow the Plaintiff's appeal against the finding of contributory negligence and would vary the Order of the learned High Court Judge to that extent, but otherwise would confirm the said Order and the assessment of damages made.

approved
J. A. Finlay
4. March 1988

THE SUPREME COURT

Chief Justice
Walsh J.
McCarthy J.
(267/346-87)

THERESA O'BYRNE

- V -

BRENDAN GLOUCESTER AND BIBLA LTD
TRADING AS DORINDA

Judgment of McCarthy J., delivered the 3rd day of November 1988.

I have read the judgment delivered by the Chief Justice and I agree with it.

The only matter to which I wish to refer is the contention made on behalf of the Defendants' to the effect that a warning would have made no difference. No questions to this effect were directed either to the Plaintiff or to her mother who was the actual purchaser of the garment. In my view, the burden of proof in this regard lay upon the Defendants. Once the learned trial judge concluded, as this Court concludes, that the absence of an appropriate warning constituted negligence on the part of the Defendants, it was for the Defendants to establish, by cross-examination or otherwise, that the warning would not have affected the purchase or the conduct of the wearer of the garment.

I would dismiss the Defendants' appeal and allow that of the Plaintiff.

4.11.'88.