THE COURT OF APPEAL
CIVIL

Neutral Citation Number: [2020] IECA 9

Record No. 2019/15

McGovern J.
Ní Raifeartaigh J.
Collins J.

BETWEEN/

GERALDINE MCHUGH

PLAINTIFF/
RESPONDENT

- AND -

THE OFFICE OF THE REVENUE COMMISSIONERS, THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/
PPELLANTS

JUDGMENT of Mr. Justice McGovern delivered on the 30th day of January 2020

1. This is an appeal against a judgment of O'Hanlon J. delivered on 10 December 2018, [2018] IEHC 754, and the order of 21 December 2018 which was perfected on 8 January 2019. The plaintiff/respondent's claim arises out of an accident on the 1 September 2014 when she tripped and fell while crossing a courtyard area adjacent to her place of work at Cranmore in Sligo. In the High Court a full defence was filed and there was a plea of contributory negligence.

2. The incident was captured on CCTV from which it was possible to pinpoint precisely where the respondent fell. The existence of the CCTV footage was an important feature in the case because it established that the place where the respondent claimed to have fallen was not the same as the actual location where she fell.

3. Having heard the evidence over three days, the High Court judge delivered a written judgment on 10 December 2018 in which she found in favour of the respondent awarding her a sum of €80,000 for general damages with a further sum of €78,864 for special damages making in all a total of €158,864. The respondent was also granted an order for costs. The High Court judge refused to grant a stay on the award but on an application to Irvine J. in this court on 22 February 2019, a stay was granted until the hearing of this appeal.

The High Court judgment

4. A critical finding of the High Court judge is to be found at para. 68 of her judgment when she states:-

> "...On the balance of probabilities, the [respondent's] toe snagged consistent with a raised lip of a concrete paver. This was reasonably foreseeable in all the circumstances."

5. From this finding the judge determined that the appellant was negligent in failing to ensure that the respondent had safe access to and egress from her place of work and the judge at para. 72 also criticised:-

> "... the failure to ensure the design, provision and maintenance of the particular paving concerning [sic] was in a condition which was safe and without risk to health."

6. At para. 73 she held that there was movement in the slab which caused the accident.

7. The appeal is against the High Court judge's findings on both liability and quantum. Insofar as quantum is concerned, the appellant complains that the general damages awarded were above the guidelines set out in the Book of Quantum and also on the basis that the judge awarded the respondent's full claim for loss of earnings in circumstances where she conceded that she took early retirement in 2016 because of a back complaint and not the injury to her thumb which was sustained in the accident. While it was conceded that she may have sustained some injury to her back in the fall, her own surgeon accepted that there were long term changes to her back which were unrelated to the accident.

8. It is fair to say that the main thrust of the appeal was against the High Court judge's finding on liability having regard to what was established from the CCTV footage which was available in evidence.

Discussion

9. The case was pleaded as a trip and fall by reason of the alleged dangerous and defective condition of the courtyard area where the accident occurred. The High Court judge and the members of this court had the benefit of seeing photos of the accident location taken from CCTV footage and/or photos taken some time later, as well as the CCTV footage itself and there was nothing remarkable in those photos or in the CCTV footage about the overall appearance of the surface of the courtyard. The particulars of negligence and breach of duty alleged include permitting the pavement to be laid in an irregular manner and causing, allowing or permitting slabs to be raised relative to adjacent slabs thereby creating a trip hazard. The particulars did not state, in terms, that there was movement in the paving stones. Counsel for the respondent opened the case on the basis that she tripped on a raised edge of a pavement slab illustrated by reference to a number of photographs taken by an engineer, Dr. Mark Jordan. These photographs were taken on the basis of an account of the accident given by the respondent to Dr. Jordan. However, in the course of the trial it was accepted – as a result of the CCTV evidence – that the respondent had given an incorrect account of where the accident occurred. This was accepted by both her and the engineer. Dr. Jordan also recorded that the respondent informed him that she was immediately assisted by a woman, whereas the CCTV footage

showed this was not the case. In the course of her evidence, she said that she did not mean by that statement that someone came to her assistance in the context of lifting her up off the ground. She also informed Dr. Jordan that at the time of her fall her mobile phone flew from her pocket, while the CCTV footage shows quite clearly that she was using her phone at the time of her fall. Indeed, the respondent admitted in evidence that she was doing so. The trial judge did not address these inconsistencies in her judgment.

10. In the course of his cross-examination on the second day of the trial, it was put to Dr. Jordan that what was pointed out to him and what he inspected was not in fact what caused the respondent to trip. He agreed with this “absolutely”. A short time later he was asked whether there was a tripping hazard where the respondent actually fell. He replied that on the day of the inspection, some 10 months after the incident, there was no tripping hazard at the location where the respondent fell (as shown on the CCTV footage). At an earlier point in his evidence he offered to the court his view that a lip in excess of 2mm between adjacent slabs would constitute a tripping hazard. When asked what the lip was where the respondent fell, he replied that he could not say what it was but that, because it was sufficient to cause her to trip, it was probably greater than 2mm. Not only was that response speculation on his part but it was contrary to the evidence which he accepted later, namely, that there was no tripping hazard at the point where she was seen to fall on the CCTV footage. His thesis appears to be based on the fact that the respondent fell and therefore there must have been a lip whereas the evidence showed- and he accepted- that there was, in fact, no lip.

11. It may be noted, bearing in mind the ultimate conclusion of the trial judge, that Dr. Jordan never gave evidence that the respondent was caused to fall as a result of a moving slab. He suggested that slabs become uneven because of a certain fluidity of the subbase and that may cause one slab to be raised in relation to an adjoining one. There was no evidential basis for his thesis that the respondent was caused to fall as a result of movement in a slab. It was not based on any measurement or observation on his part. It was put to him in cross-examination that he was assuming there was a tripping hazard because the respondent had fallen and he accepted that.

12. The Court has some concerns about the evidence of the engineer for the respondent, a point which will be returned to below.

13. On the third day of the trial, Mr. Tom O’Brien, an engineer, gave evidence on behalf of the appellant. Under cross-examination he was asked what caused the respondent to trip and it was suggested that the respondent’s foot caught on something causing her to pitch forward. The witness was careful in his reply. He accepted that her foot stopped and she tumbled forward but he did not concede that because she fell forward there was a lip or some irregularity in the slabs that caused her to fall. He told counsel for the respondent that he had looked at the scene, checked for lips and had not found any. He offered a number of possibilities as to how the accident could have occurred, such as the respondent being inadvertent due to the fact that she was using her mobile phone or that there may have been some problem with her footwear, but he did accept that in the

normal course of events a person walking along a place, such as the courtyard in question, should not be caused to trip and pitch forward. When asked what the likelihood was of the paving changing and/or a previously existing lip disappearing in the ten months or so between the respondent's fall and the inspection carried out by him, he regarded it as "extremely improbable" and gave a number of reasons why. The fact that there was moss or grass between the two slabs where the respondent fell was, in his view, an indication that there had not been a recent repair. The moss or grass noted by Mr. O'Brien also suggested that there had not been recent movement of the slabs.

14. The Court is somewhat concerned that Dr. Jordan crossed the line from giving independent evidence to advocating a particular position in favour of the respondent. At one point he suggested that if he had time to enhance the CCTV footage, he could certainly take steps to clarify what it was that caused the respondent to trip. Having been given an opportunity overnight to review again the CCTV footage and enhance it as best he could, he still conceded that he could not find any defect in the joint between the slabs where the respondent fell. Yet again and again he offered his view to the court that because the respondent fell, there must have been a tripping hazard.

15. It is perhaps worth re-stating what the role and duty of an expert witness involves. The overriding duty of the expert is to the court, rather than to take a partisan position on behalf of their instructing client. Such an expert should be independent and is to be distinguished from a witness as to fact. In England and Wales, the Court of Appeal stated in *EXP v. Barker* [2017] EWCA Civ 63 at para. 51 that the:-

> "…adversarial system depends heavily on the independence of expert witnesses, on the primacy of their duty to the Court over any other loyalty or obligation, and on the rigour with which experts make known any associations or loyalties which might give rise to a conflict".

These principles are reflected in the express and imperative terms of O.39, r.57(1) of the Rules of the Superior Courts, as inserted by the Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. No. 254 of 2016), and have also been the subject of recommendations by the Law Reform Commission in *its Report on the Consolidation and Reform of Aspects of the Law of Evidence*, LRC117-2016 (Dublin, 2016), where the Commission emphasises the importance of the independence and impartiality of expert witnesses. It is of the highest importance that expert witnesses remember and respect their obligations as such and, in particular, their overriding duty to assist the court. Apart from any other consequences, breach of that duty may have significant implications in costs.

The Law

16. In proceedings of this nature the starting point is that the burden of proof rests on the respondent to establish that there was a tripping hazard which caused her to fall and that the hazard was due to the negligence or breach of duty of the appellants.

17. An appellate court cannot substitute its view of the evidence for that of the trial judge if there was credible evidence to support the judge's finding of fact; see *Hay v. O'Grady*

[1992] 1 I.R. 210. In this appeal the appellants argue that there was no credible evidence to support the trial judge's conclusion that on the balance of probability the respondent's toe snagged on a raised lip of concrete paving. The respondent's claim included a plea that the appellants were in breach of s.3 of the Occupiers Liability Act 1995. In *Lavin v. Dublin Airport Authority plc* [2016] IECA 268 Peart J. at para. 48, while commenting on s.3, said:-

> "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 (sic) 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:
>
> > '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; and that the occupier did not take such care as was reasonable in the circumstances to avoid the occurrence.'"

18. In *Rothwell v. Motor Insurers Bureau of Ireland* [2003] 1 I.R. 268 Hardiman J. said at p. 274:

> "The trial judge has held that the causation of the accident is one which may have arisen with, or without, negligence. Neither party can go any further than that. The onus of proof in general is upon the plaintiff, and negligence is amongst the things he must prove. Accordingly, it follows that, based on the trial judge's findings of fact, the plaintiff must lose the case unless his deficiency in direct evidence is compensated by some presumption or rule of law that might operate in his favour."

19. In this appeal it has not been argued that such a presumption or rule of law exists in favour of the respondent.

20. The respondent relies on a recent decision of this court in *Kilgannon v. Sligo County Council & Ors.* [2019] IECA 333. The case concerned a trip and fall outside a national school at Dromore in Sligo. There was a dispute as to where the plaintiff fell. She claimed to have fallen at a point where there was a missing kerb stone which was some thirty feet or so from the gate into the school. The defendants contended that she fell beside the gate. Before the trial the parties agreed that if the plaintiff was found to have fallen at the missing kerb stone, the school (which was in effect the only defendant) would be liable but if she was found to have fallen immediately beside the gate, the school would not. The trial judge found that the plaintiff had fallen at the place where there was a missing kerb stone and at the appeal the plaintiff/respondent relied on *Hay v. O'Grady*. Having analysed the High Court judgment and the evidence in that case this court concluded that

there was credible evidence to support the trial judge's finding. At para. 39 of the court's judgment, Noonan J. said:-

> "As Clarke J. observed in *Doyle v. Banville*, there may be cases where there is a simple conflict of evidence, the resolution of which requires little more from the trial court than finding one side more credible than the other. **This is such a case**. The judge was entitled to take the view in assessing where the probabilities lay that the version of events given by the plaintiff provided a readily understandable explanation for why the accident happened, whereas on the defendants' evidence, it remained an unexplained mystery despite all three defence witnesses having had a clear opportunity to inspect the locus." [emphasis added]

21. There is a crucial difference between that case and the appeal before this court. In that case there was a factual dispute which had to be resolved by the trial judge. In the case before this court on appeal there is no dispute as to where the accident occurred in view of the CCTV footage. The evidence clearly established that, at the point where the respondent actually fell, there was neither a lip nor tripping hazard. Further, there was no evidence of movement in the concrete slab. At its height, the evidence of the respondent was that of the engineer, Dr. Jordan, who appeared to make an assumption that there must have been a tripping hazard simply because the respondent fell; but this, in our view, is speculative and fell far short of meeting the burden of proof upon the respondent to prove that there was a hazard and that the appellant was negligent. In those circumstances, it was not open to the trial judge to conclude that the respondent fell as a result of a tripping hazard or movement of the slab.

Conclusion

22. The CCTV footage established that the respondent had incorrectly identified to her engineer the point at which she fell. Having seen the CCTV footage, the respondent accepted that she had identified the wrong area and her engineer accepted that his report prepared for the court was on the basis of an examination of an area where she did not trip and fall, although close to it. The respondent's engineer accepted under cross-examination that there was no tripping hazard at the place where she actually fell and this evidence was corroborated by the engineer called on behalf of the appellant. The trial judge's conclusions on liability were based on comments by the respondent's engineer that the snagging of the respondent's toe was consistent with a raised lip of a concrete paver. This conclusion was against the weight of the evidence. The trial judge adopted the fallacious thesis of the engineer called on behalf of the respondent that (i) the respondent fell over; (ii) she must have tripped; (iii) if she tripped, there must have been a trip hazard (even though none could be identified on inspection) and (iv) if there was a trip hazard, there must have been negligence.

23. Because the respondent fell in the manner in which she did, it does not necessarily follow that there was a trip hazard. Everyone's experience of life is that people can fall in the absence of any specific hazard. The High Court judge was invited to fill in the evidential gaps in the respondent's case and she fell into error in doing so.

24. The trial judge erroneously considered that the evidence satisfied the burden of proof on the respondent in circumstances where the evidence fell far short of doing so, to the extent that it could be said that there was no credible evidence to support the liability finding of the trial judge.

25. In those circumstances it is unnecessary to deal with the appeal on quantum.

26. I would allow the appeal.