THE COURT OF APPEAL

[2021] IECA 123

Record Number: 2018/470

High Court Record Number: 2013/5928P

Whelan J.
Noonan J.
Binchy J.

BETWEEN/

MICHELLE MCGEOGHAN

PLAINTIFF/RESPONDENT

-AND-

CHRISTOPHER KELLY, MARTIN MCBRIERTY AND PAURIC MCINERN

DEFENDANTS/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 21st day of April, 2021

1. The first appellant is the owner of a licenced premises known as McLaughlin's Bar, Dunkineely, County Donegal. The second and third appellants had, at the material time, taken a one year lease of the premises from the first appellant. I shall for convenience refer to the appellants as the defendants. This personal injuries action arises out of an unfortunate accident that befell the respondent (the plaintiff) on the 6th August, 2012 at about 2.30am on a Sunday night/Monday morning.

2. The plaintiff attended a bingo session locally earlier in the evening and arrived at the bar sometime after 11pm. The bar was very busy that evening. She had a few drinks in company with her husband who left ahead of her to get a taxi. As it was well after closing time, the entrance door into the bar was closed and the plaintiff had to leave by a separate door opening onto Main Street which also served as the hall door for the adjoining residence. The plaintiff was alone as she entered the corridor to the outside which she claimed was dark.

3. The door was secured by what was described as a Union snib lock of a typical kind. She opened the lock with her right hand and as the door opened slightly, she placed her left hand around the leading edge of the door intending to draw it towards her. Before she could do so however, the door suddenly slammed shut catching the little finger of her left

hand between the door and its jamb. As a result, she suffered a severe crushing injury to the finger which ultimately resulted in the amputation of the tip.

4. The High Court (Meenan J.) found in favour of the plaintiff. The negligence identified by the trial judge on the part of the defendants was a failure to ensure that a door closer that was fitted to the door was functioning correctly so as to prevent the door slamming. He awarded general damages in the sum of €75,000 but subject to a deduction of 25% for contributory negligence on the part of the plaintiff.

The Case Pleaded by the Plaintiff

5. A personal injuries summons was issued by the plaintiff on the 13th June, 2013, about ten months after the accident. It is of some significance to note that the summons was issued in advance of a joint engineering inspection taking place. The plaintiff's evidence at the trial was that there was, in fact, no door closer fitted to the door in question. That was reflected in the summons that pleaded that there were no measures to prevent violent and sudden slamming of the door.

6. In her particulars of negligence, the plaintiff pleaded at item (d) that there was a failure to ensure that there was an appropriate mechanism on the door to prevent sudden and violent slamming and (l), a failure to apply a device which would prevent the door from violently slamming. Paragraph (n) pleaded that there was a failure to warn the plaintiff that the door was prone to violent slamming but no evidence was led by either side at the trial which supported this latter allegation. Accordingly, the sole and only case pleaded by the plaintiff was in substance that there was no closer on the door.

7. A joint engineering inspection took place on the 18th September, 2013, three months after the summons containing the pleas I have identified was issued. The inspection was attended by the plaintiff with her consulting engineer, Ms. Anne Kelly, and by Mr. Tom O'Brien, the consulting engineer on behalf of the defendants. In his report following this inspection, Mr. O'Brien noted that the door was fixed with a closing/damping device of standard type with two adjustments that allowed for variation in the swing speed and the latch speed at its final stage of closure. Mr. O'Brien noted that the door was inclined to stick as it closed because the underside was catching against the top surface of the doorstep and once past this restriction, the door closed freely and quickly taking between .45 and .55 seconds for the final phase of closure. Accordingly, the damping effect was negligible at that time.

8. The case took a somewhat protracted course to come to trial but was eventually listed for hearing at the Sligo sessions of the High Court which commenced on Monday 29th October, 2018 for a period of two weeks.

9. Before the case came on for trial, the plaintiff's original engineer, Ms. Kelly, had retired and it would seem that very shortly prior to the Sligo sessions, a new engineer was instructed, Mr. Vincent McBride. A second joint engineering inspection took place on the 8th October, 2018 again attended by the plaintiff, this time with Mr. McBride and Mr. O'Brien. Both engineers again assessed the operation of the door closer, again noting

that there were two phases. The door opened to a maximum of 80 degrees and took about two seconds to close from 80 degrees to 20 degrees when the second damping phase slowed it further.

10. To cover the last 20 degrees required 5.3 seconds which was, give or take, approximately ten times longer than had been the case five years earlier when it was assessed in 2013. As at the previous inspection, Mr. O'Brien also noted that the door had a handle just below the snib lock. Of note at the second joint inspection, the plaintiff alleged that on the night of the accident, there was no handle fitted to the door nor was there a closer on the door. These allegations were not made by the plaintiff at the first engineering inspection. Another contentious issue was the lighting in the hallway/corridor leading to the door. There was a ceiling light present but the plaintiff alleged that this was not on at the time of her accident and thus the corridor was in near darkness.

11. Mr. McBride prepared his report which is dated the 11th October, 2018 shortly after the inspection. At the conclusion of his report, he expressed the view that patrons should be escorted off the premises particularly if the corridor were to be left unlit, as the plaintiff alleged. Mr. McBride's report appears to have led to further particulars of negligence being delivered by the plaintiff on the 31st October, 2018, two days before the trial commenced and these were, (r) failing to ensure that the plaintiff was escorted safely off the premises after hours, (s) causing, allowing and/or permitting the plaintiff off the premises without any adequate lighting or any adequate supervision after hours and (t), failing to light the exit area properly or at all.

Hearing before the High Court

12. The hearing commenced on the 2nd November, 2018 with counsel for the plaintiff opening the case to the trial judge. Counsel indicated that the plaintiff had to leave via a very dimly lit corridor totally unsupervised and there was no one to let her out. In the course of the opening, counsel said (at Transcript Day 1, page 6-7): -

> "Her evidence, Judge, will be that she opened the snib above the handle, which may or may not have been there on the day in question, and she put her left hand inside the door to open it when suddenly the door closed and caught her finger. It is a little bit unclear what caused the door to close. But the plaintiff's case, Judge, is that she should have been let out of the premises safely. There should have been somebody there to supervisor (*sic*) and let her out in circumstances where the defendants' bar was profiting from serving drink after hours. But the plaintiff had to make her own way out into the dark on to the street and the injury befell her."

13. Counsel went on to refer to the fact that the engineering photographs showed a closer on the door which the plaintiff didn't recall being present, a matter which the defendants would dispute. Counsel went on to say however that this was irrelevant.

14. During the course of the evidence, it was common case between both sides that an external force had to act on the door to cause it to slam on the plaintiff's finger. The source of that force was never identified nor was it at any stage suggested that the closer

had caused the door to slam. However, in the course of his evidence, Mr. McBride said that if the door closer was operating properly, the door would not slam shut.

15. He referred to the original timings for the door closing measured by the engineers in 2013 and said that these would indicate that the door closer was not in effect working because it had not been properly adjusted. Although the defendants each denied in evidence that they had in fact adjusted the door closer between the two inspections taking place, it was clear from the results of the inspections that somebody had in fact adjusted it. The first defendant indicated in evidence that he had installed the door closer for safety reasons and when asked what the safety reason was, he said it was to prevent the door from slamming. He denied however that the door had a tendency to slam. In fact, all the doors in the pub had closers.

16. Thus there were three issues of fact in dispute between the parties. The plaintiff both pleaded and claimed in evidence that there was no closer on the door on the night in question. She also said in evidence that there was no handle on the door and thirdly, she claimed that there was no light on in the corridor. In his *ex tempore* judgment delivered on the 6th November, 2018, the trial judge found against the plaintiff on each of these issues of fact. He found as a fact that there was both a handle and a closer on the door. He preferred the evidence of the barman on duty, who said that the light was switched on, otherwise he would not have seen the blood present on the door as a result of the accident, to that of the plaintiff.

17. He also referred to the differential in the door closing speeds on the first and second joint engineering inspections and said: -

> "The fact that there can be such a difference indicates to me that the closer is required to be maintained. The evidence from the second and third defendant is clear that there was no such maintenance carried out in the relevant period. In my view the probable cause of the accident was that the closer was not functioning correctly, and thus not doing what it was designed to do, i.e. ensure the door closed safely. Therefore, I find that there was negligence on the part of the defendants."

18. He went on to say that for completeness, he found that there was no duty on the defendants on the evening in question to escort the plaintiff off the premises.

Discussion

19. The primary ground of appeal advanced by the defendants is that there was no evidence as to what caused the door to slam and in the absence of such evidence, the trial judge was not entitled to find that the defendants had been negligent. The plaintiff cross-appeals against the finding of contributory negligence on the basis that the finding by the trial judge that there was no duty on the defendants to escort the plaintiff off the premises was erroneous. It is further pleaded that the judge was wrong to conclude that the light in the hall must have been on.

20. I am satisfied that there was more than ample credible evidence to entitle the trial judge to find the facts that he did. As *Hay v O'Grady* [1992] 1 I.R. 210 makes clear, this court cannot interfere with such findings of fact once such credible evidence exists. It is also true to say that if the door closer had been working properly on the night in question, the accident may not have happened. The trial judge extrapolated from that that the probable cause of the accident was the failure of the door closer to function properly. On one level that is so. However, it does not necessarily follow that because the taking of a particular step might have avoided an accident, the failure to take that step must be viewed as negligent.

21. It is important to note that the case the defendants came to court to meet was the case defined in the pleadings and the S.I. 391 of 1998 disclosure. The purpose of pleadings is of course to define the issues between the parties at trial. The introduction of S.I. 391 of 1998 was intended to consign to history the notion of trial by ambush. This is particularly important in the context of experts, the substance of whose evidence must be notified to the other side in advance.

22. The case pleaded by the plaintiff here was that there was no closer on the door and there should have been. That pleaded case never changed despite the fact that two days before the trial, further particulars were introduced to suggest that there was a second aspect to the defendants' negligence, namely a failure to escort the plaintiff off the premises. However, at the trial, no evidence of any kind, expert or otherwise, was led to suggest that the defendants had a duty, be it under the Occupier's Liability Act, 1995, at common law, or otherwise, to equip the door in question with a closing device.

23. The fact that the actual closer in this case was or was not working cannot be in any sense material unless there was a duty to have it there in the first place. The plaintiff's expert did not purport to suggest that there was any such duty. On the contrary, it was made clear by counsel for the plaintiff in opening the case, quite properly, that the presence or absence of the door closer was irrelevant because the plaintiff's case, and her only case, was that she should have been escorted off the premises.

24. It is perfectly understandable that counsel should have approached the case in this way because the case that was originally pleaded, before expert evidence was available, to the effect that there ought to have been a closer on the door, could not be stood up. Equally, there was nothing in the plaintiff's expert report disclosed to the defendants to suggest, first, that there was a failure to maintain the door closer and second, that such failure was causative of the accident.

25. It seems to me therefore inescapable that the trial judge found the defendants liable on a case never actually either pleaded or made by the plaintiff. It was instead something that, almost incidentally, arose from the evidence. It is of course trite to say that the pleadings define the issues between the parties but in a case such as the present, it is important that sight not be lost of that fundamental tenet of our law. Although this remains true for all classes of litigation, it is particularly important in the context of

personal injuries litigation since the passing of the Civil Liability and Courts Act, 2004 and in particular sections 10-13 of that Act.

26. The importance of this legislation in the context of pleading in personal injuries actions was considered by this court in *Morgan v ESB* [2021] IECA 29 where Collins J. observed:-

> "6. …I considered the effect of those sections [10–13] in *Crean v Harty* [2020] IECA 364 and in the course of my judgment noted that "*the provisions of sections 10–13 of the Act are clearly intended to ensure that parties (including defendants) plead with greater precision and particularity so that, in advance of trial, the actual issues between the parties will be clearly identified*." (at para 23).
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> 7. A "*very significant innovation*" in Part 2 (so I characterised it in *Crean v Harty*) is the requirement in section 14 that pleadings be verified on affidavit. A plaintiff is required to verify "*any pleading containing assertions or allegations*" or any "*further information*" provided to the defendant: section 14(1). A corresponding obligation is imposed on defendants by section 14(2). The importance of the requirement for verification was highlighted by Noonan J in his recent judgment *in Naghten (A minor) v Cool Running Events Ltd* [2021] IECA 17, with which I agreed. As Noonan J states at para 52 of that judgment, " *.. the days of making allegations in pleadings without a factual or evidential basis, if they ever existed, have long since passed*." That certainly *ought* to be the case having regard to the requirements of section 14.
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> 8. The intended effect of section 14 would be greatly undermined if parties were permitted to continue to plead claims in wholly generic terms. Thus – unsurprisingly – the provisions of Part 2 relating to pleadings, and the requirement for verification introduced by section 14, operate coherently. Plaintiffs (and defendants) are required to state clearly and specifically what their claim (or defence) is and identify the basis for it in their pleadings and must then verify *that* claim (or *that* defence) on affidavit. Where further particulars are furnished, such must also be verified on affidavit. Unless pleadings are clear and meaningful, the value of section 14 verifying affidavits will be significantly diluted."

27. The pleading of formulaic and generic particulars of negligence in personal injuries litigation, while familiar to all practitioners in that area, is undoubtedly significantly impacted by the operation of the 2004 Act, as Collins J. explained in the same judgment:-

> "11. … From a practical point of view, one can readily understand why a pleader might wish to avoid committing themselves unduly to any particular theory of liability and instead seek to plead in a manner that covers all the bases lest something further should emerge at trial. Indeed, that was conventionally seen as part of the art of pleading. However, that mode of pleading is not, in my view, permissible since the enactment of the 2004 Act. A plaintiff is required to plead specifically and cannot properly rely on the pleading equivalent of the Trojan Horse,

which can as needed spring open at trial and disgorge a host of new and/or reformulated claims.

12. It is difficult to avoid the impression that, despite the fact that Part 2 of the 2004 Act has been in force for more than 15 years, the extent of the changes that it makes in the area of personal injuries pleading may not always be fully recognised or reflected in practice. Personal injuries claims are required to be pleaded in a manner which states clearly and precisely what act or omission of the defendant is alleged to have caused the injuries at issue and why it is said that such act or omission was wrongful. The reflexive instinct of practitioners to plead broadly and generally has to be curbed."

28. Whilst it was perhaps understandable that the trial judge concluded that the probable cause of the accident was the door closer not functioning correctly, in legal terms it was not the proximate cause or indeed a cause at all. The cause was never established. There was absolutely no evidence before the High Court of any requirement or obligation on the defendants to have a door closer on this or any other door in their premises. That being so, the fact that there was actually such a door closer, albeit one that was not working properly, was entirely immaterial to the defendants' liability or, as counsel for the plaintiff conceded in opening, was "irrelevant".

29. The essential basis upon which the trial judge held the defendants to be negligent was not one that was ever pleaded or made by the plaintiff, but simply one that fortuitously emerged in the course of the evidence. The provisions of the 2004 Act to which I have referred, and more generally the requirement for pleadings to define issues, would be robbed of any meaningful effect if courts were at large to determine the outcome of litigation on such a basis. Far from the parties being confined to the issues defined by the pleadings, claims would fall to be decided on an inquisitorial rather than adversarial basis.

30. As for the contention that the defendants had an obligation to escort the plaintiff off the premises, that seems to emerge from a suggestion by Mr. McBride in his report to that effect, clearly predicated on the plaintiff's instructions to him that there was no light on in the corridor. The trial judge having found as a fact that there was a light on, it seems to me that the suggestion of any alleged need for supervision fell away, as the judge rightly held. Indeed, Mr. McBride properly resiled from this suggestion in his evidence. At Transcript Day 1, p. 51, the following exchange occurred during his direct evidence: -

"Q. Mr. McBride, in relation to supervision, have you any observations in relation to the desirability or otherwise of supervision for somebody leaving a premises along this corridor at this time of night?

A. Well I think with respect, primarily I think the question of supervision is possibly one for the Court to adjudicate on. I'm not an expert in supervision. All I would say, Judge, is that one would expect, if one has to go out into a hallway to exit which is removed from the bar, that there would be some, it would be reasonably lit and that people could see what they're doing and so forth. I don't want to venture

into the realm of whether one should be escorted from pubs or not because it's not my sphere of expertise."

31. Confronted with that evidence, it is easy to understand how the trial judge felt constrained to find that there was no duty on the defendants to escort the plaintiff off the premises, particularly as he had already found that the light was on. It seems to me therefore, that there is no basis for the plaintiff's contention as a ground of cross-appeal that there was such a duty.

32. I am therefore satisfied that the plaintiff failed to establish that there was any negligence on the part of the defendants and her claim ought to have been dismissed. Accordingly, I would allow the appeal, dismiss the cross-appeal and set aside the order of the High Court.

33. As the defendants have been entirely successful, my provisional view is that they are entitled to the costs of the appeal and the proceedings in the High Court. If the plaintiff wishes to contend for an alternative form of costs order, she will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on costs, and in default of such application, an order in the proposed terms will be made.

34. As this judgment is delivered electronically, Whelan and Binchy JJ. have indicated their agreement with it.