

**THE HIGH COURT**

[2020] IEHC 600

[Record No. 2020/22 CA.]

**BETWEEN**

**PAMELA DUDGEON**

**PLAINTIFF**

**AND**

**SUPERMACS IRELAND LIMITED**

**DEFENDANT**

**JUDGMENT of Mr. Justice Barr delivered ex tempore on the 16th day of November, 2020**

1. This is an appeal brought by the plaintiff against the refusal by Groarke J. in the Circuit Court of her application for discovery of the CCTV recording taken at the defendants restaurant premises in Eyre Square, Galway on 6th January, 2017.
2. The background to the application can be briefly summarised in the following way: the plaintiff, who was born on 9th March, 1965, and at least one companion went into the defendants restaurant premises in Eyre Square, Galway on 6th January, 2017. It is pleaded on behalf of the plaintiff that having purchased some food and while awaiting receipt of same, "*the plaintiff sat on a chair which broke, resulting in her falling to the ground and as a consequence whereof she sustained personal injuries, loss, damage, inconvenience and expense, which are ongoing.*"
3. It is further pleaded in the Civil Bill that the plaintiff fell "*in a twisting type mechanism*" and was extremely embarrassed by the entire accident. It was pleaded that she had pain in the lower part of her back throughout the remainder of the day, particularly having returned home that evening by train. It appears that the plaintiff complained of soreness in her buttocks and in her abdominal muscles. Examination by her GP noted that she had tenderness over the large muscles related to her hip. She underwent an x-ray of her pelvis and lumbar spine, which were normal. The x-ray was carried out on 11th January, 2017.
4. The plaintiff consulted with her solicitor who issued a formal letter notifying the defendant of the claim on 12th January 2017. In that letter the defendant was informed that unless they admitted liability within a period of 10 days from the date of that letter, they were required to undertake in writing that they would preserve any real or movable property relevant to the accident in their possession, power or control pending an examination by the plaintiff's expert.
5. Proceedings were issued against the defendant in the Circuit Court on 18th December, 2017. In broad terms, it was pleaded on behalf of the plaintiff that in breach of duty, the defendant as owner and occupier of the restaurant premises, had caused or permitted her to sit on a chair that was defective and as a result thereof, the chair had broken and the plaintiff was caused to fall to the ground and suffer personal injury, loss and damage. In a defence filed on 7th December, 2018, the defendant stated that it did not require the plaintiff to prove that she had been present on the defendant's premises on the date of the accident, or that she had been seated on a chair that had broken as alleged at para. 4

of the Civil Bill. However, the defence stated "*it is not admitted that the plaintiff fell to the ground as a consequence of the aforesaid break, or that she suffered or sustained the alleged or any personal injury, loss, damage, inconvenience and/or expense and the particulars of same are denied as if set out hereunder and traversed seriatim.*" Other than that, the defence denied that the accident had happened in the manner alleged, and it went on to deny each of the particulars of negligence pleaded in the endorsement of claim.

6. By letter dated 5th April, 2019, the plaintiff's solicitors sought voluntary discovery from the defendant of four categories of documents. The County Registrar directed that each of the four categories should be provided to the plaintiff. The defendant appealed that ruling to the learned Circuit Court judge. At the hearing of the appeal, the defendant consented to making discovery of the documents set out at categories two, three and four in the letter seeking voluntary discovery. However, the defendant maintained its objection to making discovery of category one, which was of the CCTV footage of the locus of the accident on the day of the accident.
7. Having heard argument on behalf of the parties, the learned Circuit Court judge (Groarke J.) refused to direct the defendant to make discovery of the relevant CCTV footage. It is against that order that the present appeal has been brought.
8. Mr. Hogan BL on behalf of the plaintiff, submitted that it has long been established that CCTV footage represents the best evidence that can be obtained in relation to the happening of an event, because it records in real time what took place at the relevant time. It is not dependent on the recollection of the parties, or the recollection of witnesses to the event, which evidence, may often be tainted by intentional or unintentional bias, or by frailty of memory: see *Braddish v. DPP* [2001] 3 I.R. 127, where Hardiman J. stated that "[i]t would be difficult to think of evidence more directly relevant than a purported video tape showing the commission of the crime." See also the decision of the same judge in *Dunne v. DPP* [2002] 2 I.R. 305, where he stated that "[v]ideo evidence [...] can have very dramatic effect in appropriate cases. If the film is clear, it approximates to having a good eyewitness." Counsel also referred to the decision in *McNamara v. Dunne Stores (Parkway) Ltd* [2017] IEHC 172 where Murphy J. concluded that CCTV footage depicting an incident that took place in a supermarket was "crucial" in determining whether the incident amounted to defamation.
9. Counsel also referred to the decision in *Colston v. Dunne Stores* [2019] IECA 59 where the defendant had been directed to make discovery of a number of categories of documents, one of which was the relevant CCTV footage of the shop at the relevant time.
10. It was submitted that in the circumstances of this case, which centred on the nature of the accident that had befallen the plaintiff on 6th January, 2017, the CCTV footage showing the accident actually occurring, was certainly relevant and necessary to the issues that arose on the pleadings and would be determined at the trial of the action. It was submitted that the CCTV footage would represent probably the best evidence as to what actually occurred in the restaurant that day.

11. Counsel further submitted that the Court was entitled to have regard to the fact that, notwithstanding the request to preserve material evidence in the solicitors letter sent six days after the accident, the defendant had failed to preserve the chair which had broken and from which the plaintiff fell. Furthermore, the defendant had never given any explanation as to why it had failed to retain the chair in question. It was stated that in these circumstances, the plaintiff's engineer had sworn an affidavit in which he had stated that he was severely prejudiced in giving any opinion in the matter due to the fact that he was not able to examine the offending chair. It was submitted that the Court was entitled to take into account the fact that due to the unexplained action on the part of the defendant, in failing to preserve the broken chair, the plaintiff had been severely prejudiced in the presentation of her case at the trial of the action and it was against that backdrop that the Court was entitled to view the request for discovery of the CCTV footage, which counsel stated was now absolutely essential to enable the plaintiff to have a fair opportunity to present her case at the trial of the action.
12. In response, Mr O'Donnell BL on behalf of the defendant, submitted, firstly, that the failure to preserve the chair was irrelevant. He submitted that it was a "*red herring*" being used by the plaintiff to justify an otherwise unmeritorious application for production of the CCTV footage to her. He submitted that in light of the fact that the defendant accepted that the plaintiff had been on the restaurant premises on the day in question; accepted that she had sat on a chair that had broken and also accepted that the chair was defective, that the failure to preserve the chair was irrelevant to any issue that might arise at the trial of the action.
13. It was submitted that in this case one of the central issues that would fall for determination at the trial of the action, was the issue as to whether the plaintiff had in fact fallen onto the ground, as she had pleaded in the indorsement of claim. The defendant strongly disputed that assertion of fact. It was submitted that the plaintiff was only seeking discovery of the CCTV records so as to be in a position to "*mend her hand*" in advance of giving evidence at the trial, if the CCTV footage should show that she had not in fact fallen onto the ground as she had pleaded.
14. Counsel submitted that this was abundantly clear from para. 13 of the affidavit sworn by the plaintiff's engineer, wherein he had stated:

*"I say, in that regard, if it is ultimately transpires that the CCTV footage discloses that the plaintiff did not actually strike the ground, then an issue further arises as to whether the nature in which the chair broke and the subsequent displacement of the Plaintiff from same, could have led to the injuries in whole or in part sustained by her and it would be your Deponent's strong preference that I have an opportunity to consider this issue, which can only be facilitated by viewing the CCTV footage, of which has been refused by the Defendants to date, notwithstanding their failure to retain the most important piece of evidence"*
15. Counsel referred to the decision of the Supreme Court in *Keating v. RTE* [2013] IESC 22, where McKechnie J. stated as follows at para. 60 of the judgment:

*"Discovery has been described as 'an instrument to advance the cause of justice' (O'Flaherty J. in Allied Irish Banks plc at p. 396). Its purpose is to aid a party in the progress of litigation: it is not designed to identify grounds capable of establishing a cause of action, i.e. it cannot be used to enable a person to plead the cause of action or a defence which he is not otherwise in a position to plead [...]"*

16. Counsel also referred to the decision of the Supreme Court in *Stafford v. Revenue Commissioners* (Unreported, Supreme Court, 27th March 1996) where the court referred to a passage that had been opened by counsel in the course of argument from *Matthews and Malek on Discovery* which stated as follows at p. 100:

*"Discovery will not be ordered of material which would be used solely for cross examination of a witness as to credit, since it would be oppressive if the party was obliged to disclose any document which might provide material for cross examination as to his credibility as a witness. Interrogatories will be refused on the same ground."*

17. The court noted that counsel had also referred to the decision in *Kennedy v. Dodson* (1895) 1 CH 334. The court stated that it was prepared to adopt these authorities as representing the current position in Irish law.
18. In summary, counsel submitted that the plaintiff was only seeking discovery of the CCTV footage to see if it would contradict her account of the accident as set out in her indorsement of claim. That was not a proper purpose for which discovery ought to be ordered against the defendant.
19. The Court has carefully considered the pleadings and affidavits in this matter, together with the very able written and oral submissions of counsel and the authorities referred to therein. While it has not been explicitly pleaded as yet on behalf of the defendant that the chair which broke was defective, counsel in the course of argument stated that that issue was accepted by the defendant and that an open letter would be furnished by the defendant's solicitor formally accepting that the chair which had broken had been in a defective condition. Thus, it seems to me that the issue of liability, as opposed to the issue of causation and the issue of quantum, is no longer live in these proceedings. It is against that background that I must consider the present application for discovery of the CCTV footage.
20. The Court is of the view that the arguments put forward by Mr O'Donnell BL on behalf of the defendant are correct. The fact that the broken chair is no longer available for production to the plaintiff's engineer, or available as an exhibit at the trial of the action, is not relevant, due to the fact that liability no longer remains in issue between the parties.
21. Thus, one must ask what is the true purpose of the plaintiff seeking discovery of the CCTV footage? It seems to me that its only purpose at this stage is to enable the plaintiff to see in advance of giving her evidence in chief and in advance of undergoing cross examination, whether her assertion as set out in the indorsement of claim that she fell to

the ground is correct. As such, the discovery material goes exclusively to the issue of the plaintiff's credit. Based on the *Stafford* decision and the authorities referred to therein, I am satisfied that it is not appropriate to order discovery of documents and other material which solely go to the credit of a party, or a witness.

22. The plaintiff will be able to give her own evidence as to what happened at the time of the accident. She will also be able to call the companion that was with her at the time and indeed, counsel for the plaintiff could not rule out that there may have been others in her party at the time of the accident. In addition, it may be possible for her to locate some independent witnesses to the accident, who may already be known to the plaintiff or her solicitor through their investigations, or may become identified to them when they see the accident report form which the defendant has agreed to discover in these proceedings. Accordingly, this is not a case in which the plaintiff cannot establish liability without access to the CCTV footage, as may be the situation where the plaintiff suffers an injury which renders them unconscious, or otherwise prevents their being in a position to give a full account of the accident; in which circumstances discovery of CCTV footage may be vital, particularly where liability remains in issue between the parties. Liability is essentially no longer in issue in these proceedings.
23. However, in this case I am satisfied that the discovery sought only goes to the issue of credit in relation to the plaintiff's account of the accident as set out in the pleadings to date. On the basis of the authorities that have been opened to me I am satisfied that it is inappropriate for a party to obtain discovery of documents or other material on such a basis. Accordingly, I refuse the plaintiff's application that the defendant make discovery of the relevant CCTV footage; I therefore affirm the order of the Circuit Court in relation to this category of documents.