THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 88

Record No. 2017 174

McGovern J.
Baker J.
Costello J.

BETWEEN/

KEVIN KEEGAN (AMENDED BY ORDER OF THE COURT TO KEVIN DUKE)

RESPONDENT

- AND–

DUNNES STORES

APPELLANT

JUDGMENT of Mr. Justice McGovern delivered on the 25th day of March 2019

1. This is an appeal from a decision of Barr J. made on the 3rd March, 2017 in which he held the appellant liable in negligence for an accident at work suffered by the respondent. The trial judge held the respondent to be guilty of contributory negligence to the extent of 20%. Having assessed damages at €45,000, the sum was reduced to €36,320 on account of contributory negligence and the respondent was granted costs on the Circuit Court scale to include reserved and discovery costs as well as a certificate for senior counsel. Although liability was in issue, the trial judge placed a stay on execution for a period of twenty-eight days on the undertaking of the appellant to pay to the plaintiff the sum of €15,000 in respect of damages and €5,000 in respect of costs.

2. While the appellant appealed the entire of the judgment, at the hearing of the appeal the trial judge's findings on quantum were not challenged and the appeal was confined to the liability issue.

Background
3. The respondent was at all material times an employee of the appellant at Dunnes Stores, The Mill Shopping Centre, 9th Lock Road, Clondalkin, Dublin 22. On the 20th October 2013, he went into the freezer room to collect some frozen pizzas to bring out onto the shop floor. In order to access the pizzas, he stood on a pallet and when he was stepping off the pallet his foot became entangled in some shrink wrapping which was on the pallet and on the floor immediately adjacent to it.

4. In the accident the plaintiff sustained a fracture of the cuboid bone in his right foot.

Evidence on issue of liability

5. In the course of his evidence the respondent said that he commenced working for the appellant in November 2011 and entered an induction programme which included training which stressed the importance of housekeeping and keeping floors and other work areas free of obstruction. He accepted that he and his fellow employees had been instructed to "clean as you go" and that this meant if there was a hazard present in the work place they would have to clean it up. The respondent also accepted that he attended a refresher course in August 2012.

6. Some important background information emerged from the evidence. The accident occurred between 4 p.m. and 5 p.m. on a Sunday afternoon which was a relatively quiet time for the store. The respondent accepted that he was not under pressure to perform the task in which he was engaged. The quality of the lighting in the cold store was good and the area was not cluttered. Within five or ten minutes of the accident Ms. Kamma Kryzak, the deli manager, arrived on the scene of the accident and took photographs. It was accepted by the respondent that the photograph produced in court represented the general condition of the freezer store room at the time of the accident. The respondent also accepted that the shrink wrap or cling film on the pallet and floor was obvious and that he should have seen it.

The law
7. Section 8(1) of the Safety, Health and Welfare At Work Act 2005 states:

> "Every employer shall ensure, *so far as is reasonably practicable*, the safety, health and welfare at work of his or her employees." [emphasis added]

8. Section 8(2) sets out in more particular terms that the employer's duty extends to a number of listed matters, most of which are predicated on taking steps to ensure "so far as is reasonably practicable" the safety, health and welfare at work of the employee.

9. Section 13 of the 2005 Act imposes a statutory duty on an employee to "comply with the relevant statutory provisions, as appropriate, and take reasonable care to protect his or her safety, health and welfare and the safety, health and welfare of any other person who may be affected by the employee's acts or omissions at work". There is also a duty to "attend such training and, as appropriate, undergo such assessment as may reasonably be requested by his or her employer or as may be prescribed relating to safety, health and welfare at work or relating to the work carried out by the employee". There are other duties also specified in s. 13 which are not relevant to this appeal.

10. It could be said that the provisions of s. 8 of the 2005 Act do no more than reiterate, in statutory form, what was stated by

Henchy J. in *Bradley v. CIE* [1976] I.R. 217 at 223:

> "The law does not require an employer to ensure in all circumstances the safety of his workmen. He will have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances."

11. In *Fanning v. Myerscough* [2012] IEHC 128, Ryan J. stated at para. 16:

> "The onus on an employer seeking to establish contributory negligence is higher when the employee has proven breach of statutory duty as compared with common law negligence. There is of course a duty on every employee to take care of his own safety."

12. In *Bowell v. Dunnes Stores* [2015] IEHC 613, Barton J. at para. 66 said:

> "The fact that the plaintiff owed both a common law and statutory duty of care to himself in particular to comply with training and instructions which he freely accepts that he received but failed to comply with, does not absolve the defendant from complying with the common law and statutory duty of care which was placed on it for the safety of its employees, including the plaintiff."

13. In *Martin v. Dunnes Stores* [2016] IECA 85, Irvine J. quoted from Henchy J. in Bradley v. CIE (above} and stated:

> "Time and time again the courts, in personal injuries litigation, have stressed that the duty of the employer to their employee is not an unlimited one. The employer is not to be taken as an insurer of the welfare of their employees."

14. At para 24 she stated:

> "…In the context of this case it is reasonable to say that the obligation of the defendant was to identify potential hazards likely to affect the safety and health of the plaintiff and then, whether through training or the implementation of procedures and precautions which were practicable in all the circumstances, to guard against those risks: see *Quinn v. Bradbury* [2011] IEHC per Charlton J."

15. The above summary of the statutory provisions and extracts from case law encapsulate the duties and obligations of the parties to this appeal.

Discussion

16. In the course of his judgment, the trial judge made a number of findings of fact. He accepted that the photograph taken by Ms. Kryzak showed the locus as it was at the time of the accident and he found that the freezer was not in a chaotic condition on that occasion. He was satisfied on the balance of probability that the shrink wrap had been left on the pallet and floor of the freezer room by an employee of the appellant as it did not appear that any third parties had access to the freezer to retrieve items from pallets. Those findings were supported by the evidence. He also referred to evidence given by the plaintiff and a former employee, Mr. Kiernan, that the freezer room was sometimes in a chaotic state and products did not have a designated place within it. The condition of the freezer on other occasions was not relevant to the issue of liability. But the trial judge deemed this evidence to be relevant to the issue of contributory negligence on the basis that when the respondent entered the freezer he did not know where the pizzas were likely to be and in such circumstances his gaze would have been directed to the boxes on the various pallets rather than on the floor of the freezer. In circumstances where the respondent had admitted, on more than one occasion, that the shrink wrap was perfectly obvious (Day 2, pp. 30 and 35), and having regard to his duty to keep a proper look out and the fact that he had received training to clear anything that might constitute a hazard it is difficult to understand how the trial judge approached the issue of contributory negligence in that way.

17. The trial judge was entitled to infer from the evidence that the presence of the shrink wrap on the pallet and floor was caused by another employee failing to tidy up as he/she went along with his/her work. Indeed, there has been no challenge to this finding. Nor do the appellants take issue with the proposition that – as a starting point - they are vicariously liable for the negligence of that employee.

18. The trial judge appears to have stopped his enquiry into the proximate cause of the accident at that point and did not consider properly the effect of the statutory duty imposed on the appellant to ensure, "so far as is reasonably practicable" the safety, health and welfare of the respondent. In the context of this case this involved a consideration of the obvious nature of the hazard and the training which the respondent had received and the fact that he was not under pressure to complete the task on which he was engaged.

19. The trial judge accepted that it was part of the respondent's training that when he was sent to an area to work he should check the area carefully before commencing to work there and should remove any hazards in the area. But he went on to state at para 56 "it would be unreasonable to hold that this applies to all areas in the extended shop premises, to which he may be sent to retrieve items in the course of his working day". The evidence before the court was that that the freezer room was an area where the respondent regularly worked as he had accepted that his function was the replenishment of goods in freezers on the shop floor from the cold store. (See Day 2, Q. 127). Furthermore, the case was opened on the basis that at the time of the accident he was assigned to the frozen food department and his job was to keep the freezers on the shop floor stocked with frozen food items from the freezer room.

20. At para 57 of his judgment, the trial judge went on to state:-

> "It would be absurd to suggest that when an employee is sent to an area to fetch something needed on the shop floor, that he would be under a duty to assess and clean all the areas through which he would travel, including the area where the object was actually located. In other words, it would be unreasonable to argue that where an employee was sent to the stock room to retrieve an item, that he should clean the stockroom before getting the required item. This would also apply when an employee is sent to retrieve an item from the freezer. If he was expected to do such an exercise, there would be an enormous delay in bringing items back to where they were needed. It would be almost impossible to carry on operations in such circumstances. Accordingly, I decline to find that the plaintiff had to carry out any elaborate assessment of the freezer, prior to retrieving products from it."

21. This characterisation of the duty of employees in the shop is unsupported by evidence. The respondent and other employees received training to clean as they went along. This meant that if they saw something on the floor which presented a hazard they

were expected to lift it and dispose of it or put it away. It was never suggested in evidence that it was the role of employees to "assess and clean all the areas through which "[they]" would travel…" or that they "…should clean the stock room before getting the required items". The question of general cleaning duties was never an issue in the trial. What was an issue was an ad hoc system of cleaning or clearing up items which presented a hazard to customers or employees.

22. At para 50 of his judgment the trial judge said:

> "However, the fact that the plaintiff was not sent to work in the freezer as such, but was merely retrieving an item from that area, does not relieve him of the common law and statutory duty to take reasonable care for his own safety. The central question is, to what extent, if any, should he be held guilty of contributory negligence for failing to see the shrink wrapping as shown in the defendant's photograph."

23. While the trial judge recognises the respondent's duty to take reasonable care for his own safety, the statement that the respondent was not sent to work in the freezer is at variance with both the opening statement at the commencement of the case and the evidence of the respondent himself who had clearly stated that his function was to take goods out from the cold store or freezer and put them on shelves in the shop as they were required. In answer to his own counsel the respondent has stated that "I was on the shop floor and I was instructed by either Kama or Vida to get pizzas for one of the displays. So I went into the cold store to retrieve the pizzas…" (see Day 2, Q. 9).

24. Having declined to find that the respondent was obliged to carry out any elaborate assessment of the freezer prior to retrieving products from it (para 57), the trial judge went on to state at para 58:

> "The position would be different, where an employee is sent to a particular area to carry out some work, which would last for an appreciable length of time. In these circumstances, that area would become his work station. It would be reasonable to expect that the employee would assess his work station before commencing work in that area. *He would be under a duty to tidy the area or to make it safe before continuing his work*…" [emphasis added]

25. This was precisely the evidence of the respondent who said that he was sent to the freezer room to get stock and bring it out to the shop floor and that he did this regularly. In those circumstances, the trial judge fell into error in concluding that the respondent did not have a duty to properly assess the freezer room prior to retrieving product from it.

26. By interpreting the evidence as he did the trial judge concluded that the respondent was only guilty of contributory negligence to the extent of 20% notwithstanding the fact that the hazard was obvious, the room was properly lit and was not cluttered and he had received training to look out for potential hazards and clean them up as he went along. In so doing the trial judge's conclusions were unsupported by the evidence.

27. While this court is not entitled to substitute its view of the evidence for that of the trial judge it has a role in conducting an analysis of the decision in the light of the evidence and the applicable legal principles.

28. In looking at the duty of the appellant to the respondent the court must look at the meaning of s. 8 of the 2005 Act. The inclusion of the words "so far as is reasonably practicable" in that section is important. Take out those words and you are left with strict liability on the part of the employer. It follows, in my view, that where a defendant/employer raises a defence of, for example, a proper training programme and a proper cleaning and maintenance regime, the court has a duty to analyse such evidence in the context of what is reasonably practicable. It seems to me that in this case the trial judge did not properly analyse the evidence so as to determine whether or not the appellant had established a defence based on those criteria. Neither did the trial judge adequately engage with the issue of the respondent's common law and statute duty to take reasonable care for his own safety and follow the instructions he had been given in training.

29. It was reasonable, on the evidence, for the trial judge to conclude that the hazard was caused by another employee. *Prima facie* that would give rise to vicarious liability. But when one looks at paras 53 and 54 of the judgment the judge appears to move from a position where there was vicarious liability to a position of strict liability. In my view, this is an insufficient and incorrect analysis of the situation as it failed to have proper regard to the issue of causation and whether or not the appellant had taken such steps as were reasonably practicable to ensure the safety of the respondent.

30. If one accepts that the hazard was created by another employee of the appellant for which the appellant is vicariously liable one must then ask the question whether it has been established that, nevertheless, the appellant has taken such steps are as reasonably practicable for the safety of the respondent? In the light of the evidence in this case I think the answer to that question must be "yes". The evidence was that the respondent underwent a rigorous training regime which, in part, was based on an assumption that from time to time he was likely to come across something which presented a hazard either on the shop floor or in the freezer room or some other area where he was required to work. It was to prevent such hazards occurring that employees were trained to clean as they went along. This would include cleaning litter or spillages on the shop floor which may have been caused by a customer or an employee, or cleaning up or removing a hazard in a restricted area caused by another employee whether inadvertently or through negligence.

31. In this case the hazard was clear and obvious and the accident occurred in an area which was not cluttered and was properly lit. While it is true to say that the accident would not have occurred but for the negligence of another employee in leaving the shrink wrap on the pallet and floor, the proximate cause of the accident was the failure of the respondent to keep a proper look out and adhere to the instructions he had received in training. Since the hazard was obvious it follows that if he had kept a proper lookout he would have avoided the accident. He accepted as much in his evidence. The trial judge made no finding that there were other reasonably practical steps which could have been taken by the appellant to ensure the safety, health and welfare at work of the respondent. That is the extent of their statutory duty and their common law duty does not go further than that.

Conclusions

32. In my view the trial judge did not carry out a proper analysis of the evidence in the light of the appellant's statutory obligations and he reached conclusions which were not supported by the evidence. While the appellant was vicariously liable for the negligence of the employee who left the shrink wrap on the pallet and floor, the trial judge did not carry out a proper analysis of the proximate cause of the accident having regard to the entirety of the evidence. Had he done so the proper finding would have been to dismiss the claim. Therefore, I would allow the appeal.

33. There are two further matters on which I wish to comment. While the issue of contributory negligence no longer arises, the finding against the respondent of contributory negligence by the trial judge to the extent of only 20% was, in my view, entirely against the

weight of the evidence. The trial judge directed the payment of €15,000 by way of damages and €5,000 in respect of costs as a condition of granting a stay for the purpose of this appeal. In my view, where liability is in issue, the judge at the end of a trial should not make an order for payment out except in special circumstances. Having had an opportunity of reading the transcript I find no special circumstances identified by the trial judge which would justify such an order. The court will hear counsel on the question as to whether it has power to direct repayment of those sums to the appellant or whether the matter should be sent back to the trial judge to deal with that matter.