THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 29
Record Number: 2018/340
High Court Record Number: 2015/5925P

Noonan J.
Collins J.
Binchy J.

BETWEEN/

TERENCE (OTHERWISE TERRY) MORGAN

PLAINTIFF/RESPONDENT

-AND-

ELECTRICITY SUPPLY BOARD

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 5th day of February, 2021

1. This claim arises out of a slip and fall accident that befell the respondent (the plaintiff) at the premises of the appellant (the defendant) at Dundalk, where the plaintiff was employed by the defendant, on the 30th April, 2013. By its judgment of the 10th May, 2018 and order of the 31st of May, 2018 respectively, the High Court (O'Hanlon J.) found in favour of the plaintiff and awarded him a sum of €110,000 in damages.

Facts

2. The plaintiff, who was born on the 17th November, 1957, was employed by the defendant as a network technician for over 30 years at the time of the accident. He was based at the ESB Regional Office at Avenue Road, Dundalk, which was a two storey premises containing three staircases. One of these was described as the western staircase, where the plaintiff fell. As well as attending to technical matters concerning electricity supply, the plaintiff's duties also included the collection and delivery of post. On the day of the accident, having attended to his outdoor duties in the morning, the plaintiff returned to the Avenue Road premises at around 1pm.

3. He went upstairs to collect outward post for franking and despatch from an office on the ground floor. He had both hands full with envelopes and a parcel as he proceeded down the western staircase which comprises two flights with a landing/return halfway down. He reached the landing and turned to descend the second flight and as he was stepping

onto the first step he slipped, lost his footing and fell forward most of the way down the stairs.

4. His evidence was that he was winded and dazed by the fall and when he regained his composure after a few moments, he went back up the stairs to the landing where he observed a pool of water. There was a skylight immediately above the landing and the plaintiff said that he noticed droplets of water coming from it. Having gathered up the post, he proceeded to the franking room on the ground floor. He went to an area under the stairs where cloths were kept and used these to dry up the wet area. He did not immediately report the accident because it was lunchtime and there was nobody around.

5. However, he later began to develop pain and went home early. His condition deteriorated overnight and he attended hospital early the following morning. At that stage he contacted a fellow employee, David Wallace, and reported the accident to him. The plaintiff's evidence was that he told Mr. Wallace that the stairs were wet and he had noticed there were droplets falling from the skylight. Mr. Wallace in evidence denied that the plaintiff mentioned anything about water on the stairs or a leak from the skylight when he reported the accident.

6. The plaintiff was off work for a period of around four months. His evidence was that five or six weeks after the accident, a form was posted to him by the defendant entitled "Notice of Accidental Injury" for him to complete. The form contained a box captioned "Accident cause and description" followed by the words "Give a precise description of the accident and how it was caused". In the box provided, the plaintiff wrote the following:

> "Slipped on wet steps of metal stairs – steps had covering of plastic tiles fell 7/8 steps to bottom of staircase. Water had been spilt on steps. Outstretched left arm to try to save myself."

7. A further box was provided on the form entitled "Site Conditions:" in which the plaintiff wrote "staircase steps wet".

8. Shortly after the plaintiff returned to work, a meeting was held with him on the 21st August, 2013 as part of the defendant's investigation into the accident. The meeting was attended by the plaintiff and three of the defendant's personnel, including David O'Neill, the area manager and most senior person at the Dundalk premises. Mr. O'Neill took notes during the meeting. Also in attendance was P.J. Rice, the defendant's safety officer responsible for accident investigation and Frank Coyne, who also took notes.

9. The evidence of Mr. O'Neill and Mr. Rice, which conformed to the terms of these contemporaneous notes, was that the plaintiff and the three other attendees at the meeting went to the locus of the accident. The plaintiff was asked to describe what had happened. The notes indicate that the plaintiff said there was rust coloured water on the step. He was asked did water come from the stain on the ceiling (beside the skylight) and his response was he was not sure. Mr. O'Neill put it to the plaintiff that there was no leak from the skylight since he, Mr. O'Neill, arrived in 1995. The plaintiff's response was

that it could have been coffee. He was then asked by Mr. O'Neill why did he not wipe it up and that he had left a hazard for someone else. The plaintiff did not reply. Mr. Coyne asked the plaintiff why did he not get towels from the men's toilet at the foot of the stairs and again the plaintiff did not respond.

10. The plaintiff was cross-examined about the account of the accident he had given to the defendant's three witnesses. He was asked did he say that there was a brown liquid on the floor and his response to counsel was that he did not recall saying that. It was also put to him that Mr. O'Neill would say that he had said to the plaintiff that there was no leak from the skylight since at least 1995 and the plaintiff's response was that it might have been spilled coffee. The plaintiff said he did not recall saying that. He was pressed on the issue of why he did not inform those present at the meeting that he had cleaned up the liquid and he eventually accepted that the defendant's account was accurate and he could not explain why he had not told them that he cleaned it up.

11. Subsequently, the defendant prepared a report on the accident in draft format which was given to the plaintiff and he was asked for his comments on it. The plaintiff's evidence was that he took it home with him overnight and made some corrections before returning it. The report describes the plaintiff as having "slipped/lost his balance" but the plaintiff struck out the words "lost his balance" as he considered that this did not represent the mechanism of the accident. The report went on to state "he believes there may have been spillage on the step at the time." The plaintiff made no amendment to this statement. The next sentence in the report stated "when he fell, he was not aware of any injury at the time…" and the plaintiff struck out the words "he was not aware of any injury at the time" and substituted "no one to report it to".

12. The final paragraph of the report entitled "Key Findings and Causes of the Incident" stated: -

> "1) NTI [the Plaintiff] slipped/lost his balance when coming down the stairs when he had no hands available to hold on to the hand rail, there is clear signage in two places advising that the handrail should be held.
>
> 2) There is evidence of wear on the nosing on a number of steps, this should be inspected by a competent person to determined [sic] if it needs to be replaced.
>
> 3) The covering on the steps and half landing is a non-slip rubber type covering with raised nodules, this should be inspected by a competent person to determine if it needs to be replaced."

13. Below this, the plaintiff wrote the following in hand: -

> "Slipped on wet steps where I believe water had been spilt. I outstretched left hand to try and save myself. I fell 7/8 steps. I felt winded and rested – sore. I rested for a while. I franked post and posted same. There was nobody around to report accident to."

14. It is to be noted that this account by the plaintiff and the earlier "notice of accidental injury" contain no reference to either a leak from the skylight, or the plaintiff having cleaned up the wet area after his accident. The plaintiff was pressed in cross-examination as to why neither of these features were mentioned by him in his written account of the accident, itself a correction of the report prepared by the defendant. The following exchange occurred with counsel for the defendant on Day 1 of the Transcript at p. 69: -

> "299 Q. So what the people here want to find out is what happened?
>
> A. What I have said.
>
> 300 Q. You have said I believe there may have been a spillage on the step but what you are now telling us is that there is a leak in the roof?
>
> A. No. I can only say that there was water on the ground there was water on the steps. I saw some droplets falling from the roof.
>
> 301 Q. And that is the leak I am talking about. Why didn't you, when you go back to correct this report, when you actually take out the phrase 'lost his balance' and say that it is not accurate. When you actually take that phrase out and you take out 'believe he may have made contact with the wall when he lost his balance', when you took that out, you didn't say listen, gentlemen, when I say spillage I just want to be clear about this, there was water on the ground. And I want to be clear about this, there was water coming from the roof, there was a hole in the roof. It is the most obvious thing in the world, particularly with the ethos of the organisation for which you work?
>
> A. I can't say why.
>
> 302 Q. If you go to 'key findings' and the phrase is 'causes of the incident'. To actually highlight an issue, what is the cause of the incident? According to you, if I am correct about what you are saying and if the court is to believe you, the cause of this incident is that water is escaping onto the floor from a hole in the roof or the skylight, and yet you don't see fit six months afterwards in this report to put it in, and yet take time out to make very significant minor corrections if I can put it that way. Can you answer that?
>
> A. Sorry, I didn't realise you were asking me a question.
>
> 303 Q. I am asking you if what you are saying is now correct, the cause of this incident was water coming through the roof in the skylight. That is the cause of it. This report, this investigation is there to find out the cause of the incident. Why did you not tell them that because that seems to be the single cause of this incident if you are now to be believed. Why?
>
> A. I don't know why.

304 Q. It is a glaring omission, that is first of all. Would you agree with that? It is a glaring omission on your part?

A. Yes."

15. He was then asked why he did not say at the interview that there were droplets coming from the roof skylight, and his answer was that he didn't know why he did not say it at that stage. He was equally pressed on why he had not advised the investigators of his going back to dry the wet area and again his answer was that he did not know why he didn't tell them this. Further on in his cross-examination, the following exchange occurred (at Day 4, p. 71): -

"311 Q. Mr. Morgan, this is an investigation into your accident in which you know at this stage you sustained –

A. Of how it happened.

312 Q. It is an investigation into your accident where you now know at this stage you sustained very significant injuries?

A. Yes.

313 Q. Yet you don't tell them what the cause of it was and you don't tell them that you cleaned it up afterwards?

A. I omitted to tell them about cleaning it up. I don't know why. I didn't believe it to be relevant."

16. Mr. O'Neill gave evidence that he was absent from the office on the day after the accident, Wednesday 1st May, 2013, when it was reported by the plaintiff to Mr. Wallace. Mr. O'Neill became aware of it on his return on Thursday 2nd May, 2013. He made a note in his diary then of the occasions that he had used the western staircase on the Tuesday, the day of the plaintiff's accident. He noted in his diary that he had used the staircase at 8am, 10.30am, 12.30pm, 2pm and 3.15pm. The first three times preceded the plaintiff's accident.

17. Mr. O'Neill's evidence was that there was nothing on the stairs on any of those occasions. He said there was a stain on the ceiling beside the skylight above where the plaintiff's accident had occurred. This was caused by a leak that had been repaired prior to Mr. O'Neill's arrival in 1995 and there had been no leak since then or indeed subsequent to the plaintiff's accident. No work had been carried out on the skylight since then up to the present time. Similarly, no work had been carried out on the staircase since the plaintiff's accident. Evidence to like effect was given by three other witnesses for the defendant, David Wallace, Declan Black and P.J. Rice.

Pleadings

18. A personal injuries summons was issued on the 22nd July, 2015. Apart from the usual generic particulars, there is an allegation in particular (i) that the defendant failed to

maintain the skylight which, it is said, "was and is located over the said stairway" and at particular (j), the plaintiff pleaded: -

> "Failing to have any or any sufficient regard to the fact that the said skylight was leaking and a source of rainwater contamination of the said staircase which said fact the plaintiff will say speaks for itself and the plaintiff will rely upon the doctrine of *res ipsa loquitur* in support of his claim."

19. There is no complaint in the summons of a spillage of coffee or any other liquid having occurred on the staircase nor is there any specific complaint directed to any shortcoming in the training received by the plaintiff. On the 20th February, 2018, shortly before the trial was due to commence on the 23rd February, 2018, the plaintiff delivered a single additional particular of negligence as follows: -

> "(n) Failing to properly, or at all, maintain the said staircase thereby permitting the nosing on the steps of same to become worn and disintegrating so as to constitute a danger to persons using the said staircase, in particular the plaintiff."

20. It would appear that through an oversight, the page of the personal injuries summons referring to the leak from the skylight was not included in the version that was served upon the defendant. It was only when the parties exchanged their S.I. 391 disclosure shortly prior to the trial that the defendant became aware that this was the alleged cause of the plaintiff's accident because the plaintiff's disclosure included a report from a consulting engineer, Mr. Joseph Osborne, which expressly referred to this. Although Mr. Osborne's report was dated the 29th June, 2015, shortly prior to the issue of the summons, and referred to an issue about wear of the nosings on the stairs, this complaint was not reproduced in the summons. Mr. Osborne's report also made no reference to any issue concerning the plaintiff's training.

The Plaintiff's Engineering Evidence

21. In his report, Mr. Osborne comments that the stairs were wet from an overhead leaking skylight which he describes as a contributory factor in the accident. He further states that the step nosings were well worn and disintegrating and this also was a contributory factor. Mr. Osborne attached seven photographs to his original report. These included photographs of the steps and the skylight and with regard to the latter, he notes that there are clear signs of leakage on the periphery of the skylight, this being a reference to the staining commented upon by the factual witnesses.

22. Although Mr. Osborne's photographs do not show them, he refers to the fact that there are notices in the stairwell advising on the use of the handrails. He refers to the fact that two of his photographs, numbered 6 and 7, show worn and disintegrating nosings on the steps. It is unclear which steps are shown in photograph number 6 but they do not show the nosing on the landing where the plaintiff actually slipped. Of note is the fact that while Mr. Osborne's original report refers to a photograph no. 7, this photograph is not actually included in the report.

23. It subsequently emerged that photograph no. 7 was in fact taken by the plaintiff himself on his camera phone sometime after his return to work following the accident. The provenance of photograph no. 7 became somewhat controversial during the course of the trial. Mr. Osborne was asked in direct examination about photograph no. 7 which, in contrast to those taken by Mr. Osborne which were in colour, was in black and white. He was asked by counsel on Day 4 at p. 32: -

> "123 Q. It was time to replace them and you used the term 'disintegrating'
>
> A. Yes.
>
> 124. Q. Can you elaborate on that?
>
> A. It is as shown in the black and white photograph.
>
> 125 Q. That is photograph no. 7?
>
> A. The nosing is coming off.
>
> 126. Q. Yes. Then you say that this was a contributory factor?
>
> A. It could have been."

24. Mr. Osborne went on to express the view that somebody walking down the stairs with the nosing as it appears in photograph no. 7 could trip and fall. Mr. Osborne was asked by the plaintiff's counsel whether the plaintiff should have been allowed to carry armfuls of post, which prevented him from being able to hold the handrail, and the witness expressed the view that this was unsafe. This view was expressed despite objection to this evidence by counsel for the defendant and also the fact that no criticism of the defendant was made in the pleadings, in Mr. Osborne's report or elsewhere of the fact that the plaintiff was carrying armfuls of post and therefore, could not hold the railing.

25. In cross-examination, Mr. Osborne was asked about his description of the nosings disintegrating and whether that meant they were falling apart. His answer (on Day 3, p. 49) was that the nosing shown in photograph no. 7 was falling apart. With regard to that photograph, Mr. Osborne was asked (Day 3, p. 50): -

> "249 Q. Did [the plaintiff] bring you over and say look at this, Mr. Osborne, this is what I am talking about?
>
> A. As far as I recall he did.
>
> 250. Q. And why didn't you take a photograph of it? Can I suggest to you that through no fault of yours, this photograph isn't terribly helpful because we can't contextualise, we don't even know and you can't know?
>
> A. I don't know who took it and where it was taken.

251. Q. Exactly. That could be step 1, it could be step 10, it could be around the corner. We don't know where this occurred, do we?

A. It is an example of the disintegration of the steps, of the nosings. That it all it is intended to be."

26. Later in his cross-examination, Mr. Osborne was asked about the evidence that would be given by a flooring expert on behalf of the defendant who had examined the steps and concluded that the nosings did not require replacement. Mr. Osborne was asked whether the basis for his disagreement with this evidence was photograph no. 7 (at Day 3, p. 52):-

"263 Q. And your disagreeing with him is predicated on this photograph, and we don't know the step that it shows, sure we don't?

A. No.

264 Q. And we don't know when it was taken?

A. It is based on that photograph. We don't know who took it or when it was taken.

265 Q. I have been interrupting you all morning, Mr. Osborne, and I am sorry if I have. I shouldn't be doing that. Could I ask you to say what you just said again?

A. I don't know who took that black and white photograph.

266 Q. Did I hear you say that this was what you based your opinion of the disintegration on?

A. Yes.

267 Q. This photograph here?

A. Yes.

268 Q. But we don't know where it was taken?

A. We don't know who took it or where it was taken.

269 Q. Or what it shows?

A. It shows the disintegrating nosing.

270 Q. But isn't the reality that we don't know if it was on this actual staircase, do we?

A. We don't, no."

27. Mr. Osborne was asked for his opinion as to whether the water or the worn nosings or both were responsible for the accident. His view was that the water was two thirds responsible and the nosing one third (Day 3, p. 55 qq. 286 – 288).

Evidence Concerning Training

28. As I have already noted, the question of any alleged shortcomings in the plaintiff's training was not one that was raised in the pleadings, in Mr. Osborne's report or indeed in the opening of the case itself. It seems instead to have entered the case by virtue of the plea in the defence of contributory negligence alleging that the plaintiff had failed to have regard to his training. Although it was accepted that the plaintiff had been fully trained in relation to his duties as a network technician, the suggestion that he had no training to act as a postman was one which seems to have, so to speak, crept into the case by the back door.

29. The plaintiff himself however appeared to have no concern in relation to this issue. He was asked about it in cross-examination on Day 1 at pp. 54 – 55: -

> "206 Q. I take it you are making no complaint about your job in dealing with the post?
>
> A. At the moment?
>
> 207 Q. No at the time?
>
> A. At the time, yes. No, no.
>
> 208 Q. And you could decide whether to take a lot of post, a little post. You weren't under any pressure; is that correct?
>
> A. That's correct, yes.
>
> 209 Q. So it is up to you to decide. You are an experienced employee.
>
> A. Yes.
>
> 210 Q. So in other words, in this case when you decided to take enough post for two hands, you had no hands to hold the railing; isn't that correct? That was your decision?
>
> A. Yes, it was my decision alright. I wasn't provided with any mail bag or anything for carrying the post in.
>
> 211 Q. Are you criticising your employer for not - -
>
> A. No, no, no.
>
> 212 Q. Can we just take that out of the case. There is no criticism in respect of how you were to deal with the post; is that correct?

A. That's correct."

30. The plaintiff shortly thereafter confirmed again that he had no criticism in that regard of the defendant. Because the issue of training had come into the case obliquely, the plaintiff was not asked about it in direct examination and the trial judge gave liberty for him to be recalled to deal solely with this issue at the end of the case. He was again cross-examined and the above passages from the transcript were put to him and he confirmed they were correct.

Judgment of the High Court

31. The trial judge summarised the evidence of each of the witnesses in turn in some detail. She also summarised the medical evidence which had been submitted to the court by way of agreed reports. She also summarised the submissions of each of the parties. In the concluding section of her judgment the trial judge under the heading "Finding of fact" said that she found the plaintiff to be a very credible witness who did not overstate his complaints or exaggerate his injuries. The court's primary findings appear in the concluding paragraphs of the judgment at pp. 35 – 36: -

"85 The Court finds as a fact that the plaintiff was not trained in terms of part of the role which he had been carrying out for a long number of years i.e. the collection of post. It is accepted by both sides that the ESB is fastidious in terms of its emphasis on safety, protocol and investigation. It is not disputed that the plaintiff has been employed by the ESB for many years while this Court is not able to resolve the conflicts on the evidence as to exactly how wetness came to be on the surface of the area where the plaintiff slipped and fell, nonetheless the court views the plaintiff in the overall scheme of things to have been both consistent and credible. On the balance of probabilities, wetness caused the plaintiff to slip and fall. It is not possible for the Court to resolve the conflict as to whether it was wetness which came from a skylight or whether it was someone who had spilled something or caused the wetness at the locus of the accident. It is accepted by this Court as a matter of fact that photograph No. 7, the evidence of Mr. Osborne, and the evidence of the ESB preliminary report under the heading 'key findings and causes of the accident' show 'there is evidence of wear on the nosing on a number of steps. This should be inspected by a competent person to be determined if it needs to be replaced'. Photograph No. 6 is also relevant but photograph No. 7 is particularly relevant in this regard. It is the view of this Court that there was a problem with the nosing combined with the wetness which caused the plaintiff to slip and fall very heavily indeed down a number of steps causing him a severe and continuous injury to his left shoulder.

86. This Court also finds as a fact that the plaintiff did not get specific training in relation to the task he performed over a number of years concerning the collection of the post. The court accepts the submission of Mr. Mohan S.C. that the court is not entitled to take into account a change in system and the court accepts fully that such a change in itself cannot be used against the defendant.

87. The Court finds that there has been a breach of statutory duty [pursuant] to s. 8.2 of the Safety, Health and Welfare at Work Act, 2005 and that the plaintiff, while inadvertently carrying parcels in both hands, still did not amount to contributory negligence in the view of the absence of specific training and of the obligation of an employee to carry out a regular task (which went unchecked), and therefore a finding of contributory negligence cannot be made against the plaintiff. This accident was reasonably foreseeable and the defendants had given no specific training on collection and delivery of post. The witnesses who investigated the accident failed to properly record the plaintiff's version of events on the loss of balance point.

88. The Court prefers the evidence of the plaintiff, and of his engineer Mr. Osborne, to the evidence adduced by the defendant. He was a very credible witness.

89. As a result of the difficulties the plaintiff has suffered it appears to this Court he continues to receive treatment in respect of this injury and has ongoing pain. He came across as completely reasonable and I prefer his evidence to that adduced by, or on behalf of the defendant."

32. The judge went on to assess the plaintiff's general damages in the sum of €88,000 together with agreed special damages of €22,000 making a total award of €110,000.

The Leaking Skylight

33. The primary, and perhaps in reality only, issue in this case was whether the plaintiff established that the skylight was leaking. The only evidence in that regard was of the plaintiff himself. He said that when he went back to investigate the cause of his fall, he saw droplets coming from the skylight. Mr. Osborne was not in a position to offer any evidence on this point. He suggested that the staining on the ceiling beside the skylight was indicative of a leak. In that he was correct.

34. There had been a leak, but it had occurred the best part of two decades before the plaintiff's accident and had not recurred since at least 1995 according to the evidence of the defence witnesses. The best Mr. Osborne could do was to extrapolate that because the floor was wet, it must have come from a leak in the skylight. As against that, the evidence of three witnesses called by the defence was unequivocal. David O'Neill had commenced work at the building in 1995. He was aware that there had been a leak from the skylight prior to that time.

35. However, in the 18 years up to the plaintiff's accident, he had never seen a leak or water on the stairs. Nor had he seen same in the five years between the plaintiff's accident and the date of trial. He also gave evidence that he had been up and down the stairs on five occasions on the day of the accident and there was nothing to be seen. He was not challenged on any of this evidence. P.J. Rice, the defendant's safety officer, had been working in the building since it opened in or about 1991. He also gave evidence that he had never seen a leak from the skylight or water on the floor. He used the stairs about five times a week. Similarly, Declan Black said he used the staircase on probably every

day of the week and had never seen water on it. None of this evidence was challenged nor was it expressly rejected by the trial judge.

36. As against that, the plaintiff's evidence concerning the leaking skylight was undermined significantly by a number of factors. The plaintiff was a very experienced employee who readily accepted that the defendant had a strong safety ethos which was fastidiously maintained. He clearly was aware of the importance and significance of the document entitled "Notice of Accidental Injury" he completed about 5 or 6 weeks after the accident. He understood fully the purpose of the meeting to investigate the accident that took place on the 21st August, 2013, some four months later.

37. He was equally cognisant of the significance of the investigation report that he brought home for the purpose of amending and commenting upon as appropriate. In neither of these two documents nor at the investigation meeting did the plaintiff ever suggest that there was a leak from the skylight that had caused his accident. That was, by any standards, an extraordinary omission and one that the plaintiff was entirely unable to explain.

38. None of this arose in the heat of the moment or in the immediate aftermath of the accident when the plaintiff might have been suffering from shock. On the contrary, the plaintiff had weeks and months to reflect on the circumstances of the accident and yet despite all that had gone before, the first mention of a leaking skylight occurs in the personal injuries summons. Similarly, the plaintiff's failure to refer to the fact that he had mopped up the wetness after the accident is almost equally extraordinary.

39. When pressed on this point by both Mr. O'Neill and Mr. Coyne at the investigation meeting, the plaintiff did not demur in any way from the criticism that he had left the hazard for somebody else, which would be quite inexplicable in circumstances where, as he later claimed, he did in fact dry it and remove the hazard. Moreover, on each of these three critically important occasions, the plaintiff referred to there having been a spillage on the stairs, which is quite inconsistent with his subsequent claim that the wetness on the stairs came from droplets falling from the leaking skylight.

40. Having regard to the foregoing, it is therefore entirely unsurprising that the trial judge felt unable to conclude that the plaintiff had established that the wetness on the floor, which she accepted to be present, had come from a leaking skylight. Consistent with that finding, the trial judge made no express finding of negligence against the defendant. Although it is correct to say that the judge indicated her preference for the evidence of the plaintiff and Mr. Osborne over that of the defendant, she clearly cannot have accepted the evidence of either of those witnesses concerning an alleged leak from the skylight.

41. Although the trial judge did refer to being unable to resolve the conflict between a leaking skylight on the one hand, and a possible spillage on the other, in truth the issue of a spillage was never in the case at any stage. It was never seriously suggested in the High Court that this was a case where the doctrine of *res ipsa loquitur* had any application, so for instance, no complaint of any kind about the defendant's cleaning regime was agitated

or formed any part of the claim. There was no credible evidence on which the court could safely have concluded that there had been a leak from the skylight which caused the accident and the trial judge was therefore correct to decline to reach such a conclusion and I agree with that aspect of her judgment.

The Nosing on the Steps

42. It seems to me that the trial judge's determination that the plaintiff had not established that the skylight was leaking, in substance, effectively disposed of the case. Although there was very belated criticism of the nosing on the steps, there was no finding that the nosing in itself could have been responsible for the plaintiff's fall in the absence of it being combined with wetness as the trial judge found.

43. Even apart from that consideration however, I am satisfied that there was no credible evidence before the High Court to justify a finding that the nosing on the steps was in any way responsible for the plaintiff's accident. Quite apart from the fact that the plaintiff himself never complained about this at any stage, Mr. Osborne's entire thesis around the "disintegrating" nosing was constructed around the mysterious black and white photograph no. 7. Mr. Osborne candidly conceded that he did not know who took the photograph, when it was taken or even whether it was of the stairs in question at all.

44. That of course is entirely consistent with the fact that Mr. Osborne, who attended at the locus with the plaintiff, took extensive photographs himself of the stairs and yet did not photograph this allegedly "disintegrating" nosing, which is quite inexplicable if it was in fact there to be seen. In any event, the only nosing that could have been relevant to the plaintiff's accident was the nosing on the step of the landing or possibly one below it but it is clear that photograph no. 7 was not of either of these. Mr. Osborne ultimately conceded that it was simply there as an example of wear.

45. Both Mr. Wafer, the defendant's flooring expert, and Mr. Duggan, their consulting engineer, examined the steps carefully and both confirmed that no step was to be seen in the condition depicted in photograph 7. They were not challenged on this evidence. Also, there was no serious challenge to the defendant's uncontested evidence that no works of repair had been done on the stairs at any time subsequent to the plaintiff's accident. While the trial judge noted at para. 83 of her judgment that the engineers disagreed as to whether the defect in the nosing might have been stuck together to remove it, it was conceded by counsel for the plaintiff at the hearing of the appeal that the disagreement was whether it needed to be replaced, not whether it was repaired. I am therefore driven to the conclusion that the trial judge was in error in finding that the plaintiff's fall was caused or contributed to by any culpable defect in the nosing.

The Issue of Training

46. In my view, training was never an issue in this case. It is not mentioned other than in the most general terms in the particulars of negligence, breach of duty and breach of statutory duty in the summons, and certainly not in a way that would alert the defendant to any complaint concerning the plaintiff's training as a postman. Nor is it mentioned in any shape or form in Mr. Osborne's report so that when the trial commenced, the

defendant was not on notice of any issue surrounding training. That position was reinforced by the fact that in opening the case, counsel for the plaintiff did not refer to any complaint about training.

47. Quite apart from any pleading issue, if a criticism of the training was to be advanced by Mr. Osborne, as transpired, the defendant was entitled to know the substance of that evidence in advance of the trial on foot of the plaintiff's pre-trial disclosure obligation pursuant to S.I. 391. The defendant was entitled to know what precisely it was that was said to constitute a shortcoming in that training so as to be able to rebut it with their own evidence as a matter of basic fairness. Most importantly however, the plaintiff himself conceded that there was no issue as far as he was concerned about his training, as is evident from the relevant transcript passages to which I have referred.

48. Here again therefore, I am satisfied that there was no evidence before the High Court which would have entitled the trial judge to conclude that there had been a breach of the provisions of s. 8 of the Safety Health and Welfare at Work Act, 2005. Insofar, therefore, as the trial judge held that there was a shortcoming in the plaintiff's training which contributed to his accident and out-ruled contributory negligence, I am satisfied that such finding cannot be upheld by this court.

Conclusion

49. I am therefore of the view that this appeal should be allowed, the order of the High Court set aside and the plaintiff's claim dismissed. As the defendant has been entirely successful in this appeal, my provisional view is that it is entitled to its costs both in this court and the High Court. If the plaintiff wishes to contend for an alternative form of order, he will have liberty to apply within 14 days to the Court of Appeal Office for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the plaintiff may be liable for the additional costs of such hearing. In default of such application, an order in the terms I have proposed will be made.

50. As this judgment is being delivered electronically, Binchy J. has indicated his agreement with it. I have had the opportunity of reading in draft the judgment to be delivered by Collins J. and I agree with it.