THE COURT OF APPEAL
UNAPPROVED

Record Number: 2022/51
High Court Record Number: 2018/9370P

Whelan J. **Neutral Citation Number [2022] IECA 269**

Noonan J.

Allen J.

BETWEEN/

SHAKUR AHMED

PLAINTIFF/RESPONDENT

-AND-

CASTLEGRANGE MANAGEMENT COMPANY LIMITED BY GUARANTEE

- AND –

CASTLEGRANGE SQUARE MANAGEMENT COMPANY LIMITED BY GUARANTEE

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Noonan delivered on the 23rd day of November, 2022

Background

1. The appellants (the defendants) bring this appeal from the judgment of the High Court finding them liable for injuries suffered by the respondent (the plaintiff) when he slipped and fell on ice on the landing outside his apartment. The plaintiff owns and has lived at

Apartment 74, Castlegrange Square, Clondalkin since 2002. He was born on 19 September 1968 and is a bus driver by occupation. The Castlegrange apartment complex comprises some 78 apartments. The defendants are in substance the management company of the apartment complex and as such are the owners and occupiers of the common areas. All apartment owners, including the plaintiff, are members of the management company and the plaintiff was also at the material time a member of its residents' committee.

2. The plaintiff's apartment is a two storey or duplex apartment with a balcony upstairs which overhangs his front door. When the plaintiff comes out his front door, which is at first floor level, he emerges into the open air onto an external landing, in front of which is a set of steps leading to ground level.

3. On the morning of 21 November 2016, the plaintiff left his apartment at about 5.30 a.m. to go to work which started at 6.15 a.m. It was a very cold morning, as had been the previous morning. It was dark and the external light over the plaintiff's front door was not working because it had *"blown"* apparently as a result of water ingress. As the plaintiff came out the door and proceeded to take the small number of steps to cross the landing to the stairs, he slipped on what he claims was black ice on the tiled surface of the landing and fell down the first flight of stairs. In the course of his fall, he suffered an injury to his left elbow consisting of a displaced comminuted fracture of the left olecranon.

4. The plaintiff claims that he was caused to fall by reason of the negligence and breach of duty of the defendants. In particular, he alleges that they failed to comply with their obligations under ss.3 and 4 of the Occupiers Liability Act, 1995.

5. In his personal injuries summons dated 25 October 2018, the plaintiff pleads that he was caused and permitted to lose his footing by reason of the surface underfoot being *"wet, slippery and icy"*. The particulars of negligence are entirely generic and give little, if any,

assistance in identifying what precisely it is the defendants are said to have done or failed to do that caused the plaintiff's accident. The closest the summons comes to identifying any concrete particular of negligence is in suggesting that the defendants failed to provide matting or other material which would have reduced the risk of slipping. There is a complaint that the plaintiff ought to have been warned by signage that the floor was slippery.

6. The particulars of negligence were supplemented on 18 February 2020 by a notice alleging that the defendants had failed to provide and maintain an adequate system of cleaning. This notice appears to have been an attempt to retrospectively justify a request for voluntary discovery of the defendants' records of the cleaning system on the day of the plaintiff's accident, which had been refused on the basis that there was no complaint in the personal injuries summons in relation to the cleaning system.

7. It is notable that it was not until June 2020 that the plaintiff's solicitors obtained a report from a consulting engineer, Mr. David Browne. In his report, Mr. Browne makes a number of criticisms of the defendants. He suggested that had the landing been gritted the day before the accident, it would have prevented ice forming. He had no criticism of the tiles on the landing in themselves. He also suggested that no, or no adequate, nosing strips were present on the steps which might have arrested the plaintiff's skidding motions towards the stairs and *"may"* have allowed him to grab the handrail and prevent his fall.

8. The report also says that if the external light had been in operation, the plaintiff may have been alerted to the presence of ice. These three issues became the issues relied upon by the plaintiff when the case was opened before the High Court. Although this report was available to the plaintiff for over a year before the case came on for hearing, no additional particulars of negligence were at any stage delivered until the morning of the trial, when a

single additional particular of *"failing to provide appropriate lighting in the area"* was furnished.

Evidence in the High Court

9. The plaintiff said that the landing was icy but also wet as it had been raining earlier. He agreed that he was aware it was very cold overnight and it might be *"slippy"*. Under cross examination, the plaintiff agreed that if water got into the light over the hall door, it had come down from his own balcony. He agreed that the light was his responsibility. In answer to his own counsel on re-examination, the plaintiff said:

> *"Q. On that day when did you first see water?*
>
> *A. I opened the door and I saw it was wet and it was icy but when you see that it is watery, that doesn't mean that it was flowing with water. Just wet, that is all."*

10. In his oral evidence, Mr. Browne was asked about the issue of gritting the common areas and said that had this been done the day before, which was also extremely wintery, then the ice and frost would not have been present on the morning of the accident. He was then asked:

> *"Q. Now, it was said to the plaintiff that that is an unreasonable suggestion that the area should be gritted, notwithstanding that the weather was bad the day before. What is your view about that?*
>
> *A. As I say, Judge, it would appear that the management company are responsible for the safety of the area so any system whereby, any appropriate system, would include gritting of common areas that they are responsible for in such weather conditions."*

11. On the issue of the nosings, Mr. Browne agreed under cross-examination that the presence of the nosings would not have prevented the fall but might have slowed the plaintiff as he proceeded beyond the edge such that he may have had an opportunity to grab the handrail and thus *"may have mitigated his injuries."*

12. Evidence was given on behalf of the defendants by Mr. Bernard Walsh, who was described as the facilities and maintenance manager of Smith Property Management who, as the name implies, are a property management company engaged by the defendants in relation to the Castlegrange complex. Mr. Walsh confirmed that there are 78 apartments in the development and that Smith Property Management look after about 98 different developments in the greater Leinster region.

13. In relation to gritting, he was asked the following in direct examination:

> *"Q. And do you provide gritting services if requested to do so?*
>
> *A. Yes, if requested to do so we can, we can organise a contractor to do that.*
>
> *Q. Of the 98 or so that you manage, how many have gritting services?*
>
> *A. None have gritting services to footpaths or steps. Some, I would say maybe 10 or 11 may have gritting services just to the roads."*

Judgment of the High Court

14. The judge set out the background and the facts and summarised the evidence of each of the witnesses. At para. 17, she noted the plaintiff's evidence regarding what he saw when he opened the door:

"17. Under re-examination, this witness said that he saw the water when he opened the door, he saw it [sic] wet and icy outside his door, that it was not flowing water, it was just wet."

15. In the final segment of her judgment, under the heading *"Conclusions/Findings of Fact"*, the judge makes a number of findings including that the incident involved black ice as the plaintiff had contended. She found the evidence giving by the plaintiff to be *"very credible"* and she accepted it. At para. 43, she said as follows:

"43. However that the area was a public pathway that fell within the control of the defendants and the effect of gritting would have averted this accident. The court rejected that there would have been no beneficial effect to this surface. The presence of gritting would appear, on the balance of probabilities, to have averted the accident had it been carried out on the area of the accident. The defendants failed to grit the surface."

16. Although the judge did not say so in terms, it would appear from this passage that she held that the defendants had a duty to grit the landing where the plaintiff fell. The judge went on to find as follows:

"45. The issues concerning water dripping through the light fixture were a major contributor to the causing of ice to form on the surface as indicated, given prevailing weather conditions at the time. While the lack of nosings contributed to the accident as had they been in place and in proper condition, they would have assisted the plaintiff in breaking his fall. To some degree they are a contributory factor to the ice being allowed to form in the common area.

46. It was reasonably foreseeable that an accident such as that which occurred would so occur given the combination of causative factors as set out above, causing extensive pain and suffering to the plaintiff as described. The major factors included, failure to maintain in a safe manner the common areas well lit and free from excess water which formed the black ice in manner [sic] which would have ensured the plaintiff's safety."

17. A number of findings emerge from this passage which are somewhat perplexing. Insofar as the judge appears to have held that the water dripping through the light fixture had any relevance to the formation of the ice on which the plaintiff fell, that conclusion appears to be clearly erroneous. Neither party made that case nor was there any evidence to that effect. This much was conceded by the plaintiff at the hearing of this appeal.

18. The judge also identified two factors as being *"major"*, presumably in the context of contributing to the accident, as first, the failure to keep the common areas well lit. This again does not appear to be a sustainable finding in the light of the clear admission made by the plaintiff that the maintenance of the light in question over his door was his own responsibility. This too was fairly conceded by counsel for the plaintiff during the appeal.

19. The second *"major"* factor identified by the trial judge was a failure to keep the common area free from excess water. Here again, this never formed any part of the plaintiff's case nor did any witness suggest that there was excess water present on the landing on the day of the accident. Equally, therefore, this finding cannot stand either.

20. Finally, at para. 48 of her judgment, the judge held as follows:

"48. In reference to the indorsement of claim the particular actions which the court finds the defendant to have been responsible for (a),(c),(d),(e) and (j) (namely failing to take any reasonable steps or precautions for the safety of the plaintiff, failing to

provide a safe premises and in particular the common areas thereof within its remit, creating, maintaining and adopting a nuisance and a hazard and a trap for the plaintiff in that the tiles surface was exposed to the elements and became wet and slippery as a result and failing to warn the Plaintiff that the tiled floor surface was dangerous and unsafe whether by way of signs, guard or otherwise).''

21. General damages were assessed by the judge in the sum of €56,500 together with agreed special damages of €3,701.27 making for a total decree of €60,201.27.

Discussion

22. In the High Court, the case for the plaintiff as it was opened relied on three propositions related to respectively; lighting, gritting and nosing on the steps. None of these matters were pleaded with the sole exception of lighting, and then only on the morning of the trial. This court has in recent times been at some pains to point out that it is simply not open to parties, and in particular plaintiffs, in personal injuries actions to plead their case one way, and run it in another. Section 13 of the Civil Liability and Courts Act, 2004 obliges the plaintiff to plead full and detailed particulars of each allegation, assertion or plea comprising the claim. Section 14 requires such pleading to be verified on affidavit.

23. As Collins J. observed in *Morgan v ESB* [2021] IECA 29 at para. 8:

''The intended effect of s. 14 would be greatly undermined if parties were permitted to continue to plead claims in wholly generic terms. Thus – unsurprisingly – the provisions of Part Two relating to pleadings, and the requirement for verification introduced by s. 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 s. 14 verifying affidavits will be significantly diluted."

24. I referred to the observations of Collins J. subsequently in the judgment of this court in *McGeoghan v Kelly & Ors* [2021] IECA 123 where I noted at para. 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."

25. Similar views were subsequently expressed in *Nemeth v Topaz Energy Group Limited* [2021] IECA 252, where a case was run on a basis that was never pleaded, nor the subject of any consideration in the plaintiff's expert reports.

26. The present case unfortunately constitutes more of the same. It would be entirely impossible for the defendants to fathom with any sufficient degree of particularity, on the basis of the case pleaded here, what claim they were expected to meet in court and particularly, the claim that actually emerged. The central feature of the case in the High Court, and again in this Court on appeal, was the question of gritting and that is not to be found mentioned anywhere in any of the plaintiff's pleadings or particulars. While this was something that counsel for the defendants referred to in the High Court as relevant to the issue of the plaintiff's credibility, the defendants did not seek to object further or have the

case adjourned and in fairness to the plaintiff, it must be said that these issues were at least flagged in the plaintiff's engineering report, if not in the pleadings, and the defendants were therefore not strictly in a position to suggest that they were taken by surprise.

27. However, expert reports are not pleadings, nor are they a substitute for pleadings, and the fact that some particular case is made in the report of an expert does not in any sense relieve a party from the obligation to plead that case clearly and specifically, if for no reason other than affidavits of verification in the normal way cover pleadings and particulars, but not expert reports. Here again, the provisions of the 2004 Act would be significantly undermined were cases to be run on the basis of information contained in expert reports rather than pleadings.

28. As I have said, the relevance of the lighting issue disappeared from the case with the plaintiff's admission that he was responsible for the lighting and in any event, when he opened the door he saw it was wet and icy despite the absence of the light.

29. Similarly in relation to the nosings on the steps, Mr. Browne very reasonably accepted in cross-examination that the presence of the nosings would not have prevented the plaintiff's fall but *"might"* have slowed him enough to enable him to grab the handrail and possibly mitigate his injuries. There are self-evidently many hypotheticals in that statement and certainly none that could ever have amounted to more than a possibility rather than a probability. As such, Mr. Browne's evidence could not have provided a basis for a finding by the judge that as a matter of probability, the nosings had contributed in any way to the plaintiff's accident. Again, and very fairly, counsel for the plaintiff broadly accepted that proposition at the hearing of the appeal.

30. What remained therefore was the issue of gritting and it is certainly true to say that there was evidence, in particular from Mr. Browne, that had the defendants gritted the

landing on the previous evening prior to the plaintiff's accident, the ice would not have been present and thus the plaintiff's accident averted. It seems to me that the judge was entitled to accept that evidence; from which the defendant's expert, Dr. O'Flannery, did not significantly demur.

31. Of course, the fact that gritting might have avoided the accident does not mean that the defendants become liable because they did not grit. It is not in dispute that the defendants are the occupiers of the common areas including the landing on which the plaintiff fell and as such, they owed him the common duty of care under the Occupiers Liability Act, 1995 to take such care as is reasonable in all the circumstances to ensure that the plaintiff did not suffer injury by reason of any danger on the premises.

32. There was some debate in the defendants' written submissions about the nature of the danger and whether it ought to be regarded as an unusual danger, being the common law reference point that preceded the 1995 Act. Before getting to that point however, the onus is on the plaintiff to establish that the failure to grit the landing was, in the circumstances of this case, a breach of the defendants' duty to take such care as was reasonable. What is, or is not, reasonable in the circumstances of the case is ultimately a matter for the court, but, in a case such as the present, will normally be informed to a significant degree by expert evidence.

33. The only evidence, expert or otherwise, in the present case as to the requirement on the part of the occupier to grit the landing was that of Mr. Browne, cited above, which was to the effect that an *"appropriate system"* would include gritting of the common areas, for which the defendants are responsible. Beyond a bald statement to that effect, Mr. Browne did not offer any supportive analysis for such a conclusion.

34. The fact that a particular precaution might have prevented an injury provides no basis for finding that it ought to have been taken. The view of an expert that something should, or should not, have been done is not, without more, of much assistance to the court. If that view is supported by evidence that the precaution is required by law, is the subject of some relevant standard, is widely regarded as best practice by reputable scientific or industrial bodies, or is something that is commonly done because it is seen as necessary or desirable on the part of employers, occupiers or whatever class the particular defendant belongs to, then that may provide a sound evidential basis for the opinion expressed, upon which the court may rely. However mere assertions of opinion by experts unsupported by such evidence really do not advance matters.

35. If, for example, Mr. Browne had been in a position to say that the management companies of a substantial or significant number of apartment complexes routinely carry out gritting of pedestrian areas within the complex if bad weather is anticipated, then perhaps that might have supported his opinion. Alternatively, if there were some code of practice or relevant standard published by an industrial standards body, or perhaps a representative body of managers of multi-unit developments, or the like, which advocated for gritting in circumstances such as in the present case, that might also have provided support for his opinion. In the event however, the only evidence on this point came from Mr. Walsh to the effect that of the 98 developments managed by the company employing him, none provided such a gritting service.

36. Faced with that evidence, it seems to me impossible for the judge to have legitimately concluded that compliance with their duty to take reasonable care required the defendants to constantly monitor weather conditions and, if ice was anticipated, provide gritting to the common areas. It is perhaps worth observing that if the provision of such gritting was such

an obvious measure that ought to have been employed by any reasonable management company, it is surprising to say the least that it never occurred to the plaintiff's legal team to plead it. In fact, what was pleaded without the benefit of an engineer's report was that there should have been matting on the landing.

37. It seems to me that the alleged obligation to grit pedestrian common areas in anticipation of adverse weather is to place an unreasonably burdensome duty on occupiers. I do not think that it is entirely without significance that although the management company is a separate legal entity from the individual owners, including the plaintiff, who are members of it, had the plaintiff and the other owners of apartments in the complex thought it necessary or appropriate to seek and pay for gritting services of the kind advocated for, Mr. Walsh's company would have been perfectly happy to provide them. The management company must be assumed to comprise a membership of reasonable people.

38. Even if it could be said that there was a basis for imposing such a duty on the defendants, there was equally a duty on the plaintiff to take care for his own safety; as the 1995 Act recognises in referring to care which a visitor may reasonably be expected to take for his or her own safety.

39. The plaintiff had resided in this apartment since 2002 and was intimately familiar with the locus of the accident. He knew that the weather had been extremely cold on the previous day and was able to see as he emerged from his apartment that the ground was wet. While he may not have been able to observe the black ice which he says was present, on account of its translucent quality, nonetheless he ought surely to have reasonably anticipated the potential or likely presence of ice on the landing. I cannot see in such circumstances how he could be regarded as other than guilty of a very high degree of contributory negligence, quite possibly to the extent of 100% as submitted by the defendants.

40. However, in the event that does not arise because I am satisfied that the trial judge's conclusion that the defendants had a duty to grit the landing cannot be permitted to stand.

41. In those circumstances I would allow the appeal and substitute for the order of the High Court an order dismissing the plaintiff's claim.

42. With regard to costs, as the defendants have been entirely successful, it would seem to follow that they should be entitled to their costs in this court and in the High Court. If the plaintiff wishes to contend for an alternative form of order, he will have 14 days from the date of this judgment to make a written submission not exceeding 1,000 words and the defendants will have the same period to respond likewise. In default of the receipt of such submission, an order in the terms proposed will be made.

43. As this judgment is delivered electronically, Whelan and Allen JJ. have authorised me to record their agreement with it.