UNAPPROVED
THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 125
Appeal Number: 2019/324

Donnelly J.
Faherty J.
Collins J.

BETWEEN/

ROSE DESMOND

PLAINTIFF/
RESPONDENT

- AND -

DUNNES STORES UNLIMITED COMPANY

DEFENDANT/
APPELLANT

JUDGMENT of Ms Justice Faherty dated the 6th day of May 2020

1. This is an appeal by the defendant/appellant (hereinafter "the defendant" for ease of reference) of the order and *ex tempore* judgment of the High Court (O'Regan J.) dated 1 July 2019 whereby the plaintiff was awarded the sum of €102,000 and costs in respect of injuries sustained in a fall on the defendant's premises.

2. By notice of appeal dated 8 July 2019, the defendant appeals the finding of liability, claiming the trial judge erred in law and in fact and/or on mixed questions of law and fact "in respect of the finding that the Defendant was negligent having regard to the evidence."

Quantum is not appealed. The defendant seeks an order vacating the order of the High Court and that this Court dismiss the plaintiff's claim with costs.

Background

3. On 21 August 2017, the plaintiff, then aged 83, was present on the defendant's retail premises at Bishops Court, Bishopstown Shopping Centre, Cork. She slipped and fell having stepped on a spillage on the floor of one of the aisles of the defendant's premises. The within proceedings were instituted on 13 February 2019 alleging, *inter alia*, negligence and breach of the Occupiers Liability Act 1995. The primary injury complained of was a fractured right hip which required a right bipolar hemiarthroplasty. A full defence was delivered.

The evidence given at trial

4. Evidence was given by the plaintiff on Day 2 of the trial. She testified that having been in the drapery section of the defendant's premises her intention was to proceed to the grocery section. She was carrying a shopping basket, a small paper bag and a handbag. She was wearing flat shoes. On route to the grocery section, she described walking on the left-hand side of the aisle which had goods such as baby food on its left side and razor blades on the right-hand side. The plaintiff testified that her intention in traversing the aisle was to turn left towards the grocery section. She stated that she suddenly slipped and fell forward heavily to the right and onto the floor. After falling, she was assisted by other persons present, one of whom removed her right shoe and wiped some substance from the heel. The plaintiff stated that a strip of clear liquid on the floor had been pointed out to her. She first thought it was water but later wondered if it was shampoo. She recounted how a member of staff produced a wheelchair and brought her to his car and drove her to the VHI clinic in Mahon, remaining with her until she was x-rayed.

5. In cross-examination, the plaintiff was unsure of the dimensions of the substance on the floor but stated that it was clear liquid and may have been a yard long and a foot to one and a half feet wide.

6. After the plaintiff's evidence, counsel for the defendant accepted that there was "something on the floor".

7. The trial judge had the benefit of CCTV footage of the period prior to the fall, the fall itself and its immediate aftermath. This one-hour footage consisted of a succession of stills captured at roughly one second intervals. The footage captured a member of the defendant's cleaning staff, Ms Marie Barrett, at or near the locus of the plaintiff's fall on five occasions in the hour leading up to the fall which occurred at 13:03:52. In the hour prior to the plaintiff's fall dozens of people passed through the aisle without incident.

8. Called by the plaintiff, Mr. Martin Foy, engineer, testified that his review of the CCTV footage showed that:

- There appeared to be stacking of shelves of baby food for almost twenty-five/ thirty minutes from approximately 12:03. He described staff walking with cardboard boxes along the aisle. Mr. Foy stated that this footage accorded with a statement made by Ms. Jacqueline Hayes, a staff member of the defendant, on 23 August 2017 where she described starting work at 12 noon on the day of the accident which involved delivering baby food to shelves, cleaning the shelves and the grey surround. She did not notice any spillage on the shop floor at the time. According to her statement, Ms. Hayes was the person who cleaned up the spillage. Her statement describes it as "a small thickish spillage …purple". Her later statement of 23 November 2017 described it as a "small purple jelly type liquid on [the] floor". Ms. Hayes was not called as a witness in the action.

- Another staff member, Ms. Marie Barrett, traversed the aisle five times, at 12:10, 12:14, 12:28, 12:40 and 12:58. She was pushing a sweeping brush. Of those traverses, Ms. Barrett "hit the spot" of the spillage with her brush at 12:10 and 12:28. At 12.40 the end of the brush was just to the right of the accident locus. At 12:58, Ms. Barrett was much more to the right of the aisle and distant from the spot at which the plaintiff fell.
- Ms. Barrett seemed to be simply pushing the brush in front of her and looking straight ahead. There was no indication of any active look out by her or of looking either side or looking down at that floor or doing a close inspection. It did not seem to Mr. Foy that there was any close inspection going on or any indication of such inspection in the area. Mr. Foy pointed out that for the system to be safe there had to be good inspection of each aisle where the cleaner passes through.
- On the one occasion Ms. Barrett was seen to look sideways, it proved to be her looking down a cross-aisle, which was not at the aisle where she was then engaged upon her duties.
- Between Ms. Barrett's last passage on the aisle (12:58) and the accident there is no evidence of a spillage occurring.

9. Mr. Foy testified that the floor in question, while typical of supermarket floors, was a type which, if there was some substance (be it moisture or jelly-like) on it, could become very slippery very easily. He stated that traversing the deleterious matter with a dry brush would spread the matter along the floor. While some of it might adhere to the brush some would be smeared along the floor, leaving it slippery and unsafe. He opined that brushing would not remove the danger.

10. He accepted that if the aisle is "properly checked every fifteen minutes that is a reasonable system". He opined however that it was necessary to see a spillage before cleaning it - the aisle needed to be properly checked over its whole width - not just one brush width of it. For this purpose, the cleaner needed to be properly trained both as to checking and cleaning. Mr. Foy emphasised the necessity for a thorough check, with adequate time to do such a check when passing through the aisle. He testified that insofar as training documents had been discovered, no such document contained the substantive content of the training afforded cleaning staff. Albeit that there was instruction how to clean up a spillage there was no evidence of instruction as to actively checking the floor, no evidence that Ms. Barrett got any training in active lookout for spillages, in how an inspection should be conducted or how the fifteen-minute circuit should be conducted. He stated that "she didn't have any training as to what to do or what not to do." Mr Foy also opined that training should be refreshed at no more than three-year intervals. However, records indicated that five and a half years had elapsed from Ms. Barrett's last recorded training.

11. Mr. Foy testified that following Ms. Barrett's final passage through the aisle, the CCTV footage showed only three others in the area where the plaintiff fell. This trio consisted of two women (with a trolley) and a child. One of this group is seen traversing the spot where the plaintiff fell. The CCTV footage did not show these customers spilling anything. The only other person in the area post 12:58 captured by the CCTV was a man (a manager with the defendant) who is seen passing through the aisle to the right of where the plaintiff fell.

12. Ms. Barrett gave evidence on behalf of the defendant. She testified that on the day of the accident she had taken over a colleague's shift from 12:00 to 13:00 and was operating the cleaning system for one hour before the plaintiff's accident. She stated that when

operating the cleaning system, she was looking around to make sure there is nothing on the floor. The type of spillage she might encounter would be yoghurts, milk, oil, washing powder, shampoo and shower gel. When pushing the brush, she was not cleaning. The brush was only utilized if she detected a spillage that she could clean up herself with the brush or the kitchen-sized paper roll attached to the brush. She stated that she was keeping a proper look out with her eyes. If she had come across a spillage she would have cleaned it up herself or else contacted another member of staff for assistance depending on the nature of the spillage.

13. She testified that it was her responsibility to ensure that there was nothing on the floor so that no one would fall. Her task was to ensure every customer in the shop was safe.

14. In cross-examination, she accepted that, save if there was a spillage, one round of her route was just like every other, by and large the same route in the same supermarket store for the seven years she had been doing the task, from an hour a day to the whole day. She testified that the work was boring, and the system was designed to produce boredom. She accepted that that it was difficult to maintain concentration and that her mind would wander especially in a low-risk aisle such as that where the plaintiff's accident occurred, where a spillage was not expected.

15. Ms. Barrett did not recall the detail of the training she had received in 2012. She accepted that the training records for February 2012 recorded job-specific training only and that there was no evidence that the question of vigilance and look out was addressed, much less emphasised. She refuted any suggestion that the use of the words "inspection" and "inspecting" in the training documents meant that the training she received failed to emphasise the importance of keeping a look out.

16. A statement prepared by Ms. Barrett on the day of the plaintiff's accident records that she had been informed that there had been an accident "at the cosmetics aisle" and that

it happened at around 1:00 o'clock. The statement records Ms. Barrett having been there two minutes previously and that she "didn't see anything to cause [the] accident". Under cross-examination she acknowledged that she had not said anything in her statement about keeping a look out.

17. Ms. Barrett made a further statement on 23 November 2017 wherein she states as follows:

> "I remember passing there about 5 mins [prior] to the accident. While on my route at that time the floor was clean and dry and free from any [hazard] that could have caused a slip or trip or a fall accident".

18. In evidence, she acknowledged that her memory on the day of the accident was likely to be a more accurate account than the statement made some three months later on 23 November 2017.

19. Ms. Barrett acknowledged that on both the CCTV stills and footage she is seen on all but one occasion looking straight ahead. She agreed that there was nothing on the CCTV to suggest that she was actively looking around, positively searching or looking for debris on the floor.

20. The testimony of Mr. Pat O'Connell, engineer, called by the defendant, echoed Mr. Foy's evidence that the system of cleaning and inspection in place on the day was appropriate as far as the frequency of inspections was concerned. He also accepted that it was important for a cleaner to be actively looking and vigilant. He disagreed, however, with Mr. Foy's view that the implementation of the defendant's cleaning system was inadequate on the basis that Ms. Barrett appeared in the CCTV footage to be only looking straight ahead. He explained that an active look out can be maintained by an operative who looks straight ahead since an area of excess of nine feet wide, which was the width of the

relevant aisle, was capable of being scanned by an individual albeit that that person was looking straight ahead. He went on to state:

> "The key factor would appear to me is her presence in the aisle, Judge, the fact that she is in the aisle. Her function there is to inspect, to scan, to observe and whether she is to the right-hand side, the centre or to the left certainly she should be in a position to scan that type of dimension regardless of where she is positioned, centrally or to the left or right."

21. Mr. O'Connell did not place any significance on the fact that in her final passage (12:58), the CCTV footage showed Ms. Barrett on the side of the aisle opposite to where the plaintiff would ultimately fall. He accepted that there was "no doubt certainly that the brush doesn't pass through the relevant area at the time." He also observed that a manager passed by the locus thirteen minutes before the plaintiff's fall albeit that the manager was not inspecting the area at the time. Mr. O'Connell formed the view, based on the CCTV footage, that the defendant had "an appropriate system in operation". He stated that the central issue was that Ms. Barrett had been in the aisle and that she was in fact patrolling the aisle.

22. Mr. O'Connell was questioned by the trial judge about the movements of Ms. Barrett's head while engaged in her duties on the day in question. He accepted that the reality was that there was only one occasion on the CCTV footage where any movement of Ms. Barrett's head was seen, which had no connection to her tasks in the aisle in question. Responding to the trial judge's query about his evidence that a person could scan for an hour without moving their head, Mr. O'Connell accepted that this would be difficult to maintain over an hour and that if Ms. Barrett was working on the right-hand side of the aisle it would be difficult for her to scan a range of eighteen feet which she would have to

do in order to inspect the left-hand side of the aisle. Even he would find it difficult to scan that width over the course of an hour.

23. Cross-examined by counsel for the plaintiff, Mr. O'Connell accepted that small spillages can be difficult to spot. He agreed that the important issue was vigilance. It was put to him that adopting a system which requires a person to look further ahead without moving one's head was not the most effective way of doing the job in hand. Mr. O'Connell responded that Ms. Barrett may have had her own system and that he did not know what her system was. He accepted that there was no record of Ms. Barrett having had any training emphasising the question of vigilance and look out.

The trial judge's decision

24. The trial judge commenced her judgment by stating that once it was established that there was some contaminant on the floor, the burden shifted to the defendant to establish that they had taken reasonable care in all the circumstances. She noted that the one-hour CCTV footage disclosed that Ms. Barrett had passed through the aisle on which the plaintiff had fallen on five occasions "which [was] somewhat more than the average of four different occasions in a given hour". She noted that "CCTV is not like a video" in that it does not show continuous motion and that the present case was one in respect of which the CCTV did not capture what occurred to cause contamination to be on the floor of the defendant's premises.

25. The trial judge was satisfied, however, that the plaintiff did fall on the contamination that was on the floor and, citing *Mullen v. Quinnsworth* [1990] 1 I.R. 59, was satisfied that the onus then shifted to the defendant "to establish that their system of care at the time was sufficient so that liability doesn't attach to them".

26. She went on to state:

> "Mr. Holland [counsel for the plaintiff] urged on me that it is clear that the, the contamination occurred because of Ms. Hayes working. I don't' know how the contamination occurred and I can't say that it is clear that it was Ms. Hayes' cleaning occasioned the contamination?"

27. The trial judge next noted Ms. Barrett's evidence that her job was a boring task and that her mind could wander over the course of an hour "even more if one was doing this job on a regular basis." She noted the agreed engineering evidence that a fifteen-minute cleaning circuit was enough to discharge the onus on the defendant but added that "a diligent look out for spillages was also necessary". The trial judge then went on to state:

> "There were a number, there was one trolley with two women and children and one gentleman that appeared to pass this aisle between the 12.58 spillage and the 13.03 accident. Having reconsidered the photographs, and in fact looking at the CCTV, I am not at all satisfied that it was the fact that these people passed caused the spillage. In other words, I am not satisfied that Dunnes has demonstrated that the spillage was not there during the course of the passage at 12.58. I confess, as is the case with all parties involved, it is not clear when the spillage occurred. I think it is on balance likely to have occurred during the period 12.40 to 12.58 because of the volume of customers which passed at that time, because Ms. Hayes was cleaning the shelf and but I am not satisfied that the contamination was not there during the passage at 12.58. I am not satisfied that Dunnes have established that their system is sufficiently robust enough to discharge the onus on them that they have a system that, although not required to insure, did protect customers by establishing that it was reasonably safe in the circumstances. Having looked at that CCTV footage it does seem to me that the width of the brush does identify particularly the area which the operative was looking at. There was a lot to do with the fact that Ms.

Barrett was not looking around her but Mr. O'Connell, on behalf of the Defendants, did indicate that he could do a sweep of nine feet, which is the width of the aisle, without moving his head, and I accept that, although on questioning him I asked could he do this continuously for a full hour period and he wasn't so sure about that, and nor am I? I am not convinced that it would be possible to sustain a sweep of the full nine feet continuously for an hour, furthermore when one considers that the sweeper passage occurred at different areas depending on the sweep, as it were. In other words the operative moved down towards the right-hand side, then the centre, then the left-hand side, so that would enlarge the area for which the vigilant enquiry as to whether or not there was any spillage requiring being taken care of had been thrown up? So numerically I do believe that the spillage occurred prior to 12.58 as opposed to thereafter and for, I am satisfied that Dunnes have not discharged that it occurred after 12.58. The significance of that, of course, is that Dunnes would then have established that they had taken reasonable care if the spillage had occurred after 12.58. If it occurred before that, the onus is not, in my view discharged by Dunnes.

Insofar as training is concerned, it is clear that the training that was given to Ms. Barrett was in relation to once a spillage was identified, the cordoning off of the area and the immediate clean up of the area. There doesn't seem to have been any concentration whatsoever on how vigilant the passage through the particular aisle should be and I think this is a lapse insofar as training is concerned.

Retraining; I'm not so sure a picture was made in that regard also on behalf of the Plaintiff that that should have been updated more regularly than between 2012 and 2017? Certainly it might have been helpful but I am not satisfied that there was the nature of the negligence that can be attached to Dunnes?

> I am not satisfied that the, given that we do not know the length of the store for which this operative was obliged to vigilantly supervise, as it were, for the floor or not an insurance basis but on a reasonable basis, as we do not know that amount, that length nor can we see that the area which was covered by her; namely to the right, the centre and to the left, would facilitate a sweep every turn that she passed down the aisle, I am satisfied that the Defendants have not discharged the onus on them and therefore I am satisfied that liability for this unfortunate incident rested with the Defendant.

28. As regards the size of the spillage, the trial judge had this to say:

> "…I would say insofar as the extent of the area that was covered I do not accept the Plaintiff's evidence in relation to that it was a yard long and a few feet wide, and I would stress in that regard that the Plaintiff did indicate that she was in shock, and I have absolutely no doubt but at the time following the fall the most significant detail from the Plaintiff's point of view was not the measurement of the area in which she fell, and I think it is likely understandable that she would not know that fact."

Analysis and Discussion

29. The starting point for this Court's consideration of the appeal is that there are several matters not in dispute in this case. Firstly, it is accepted by the defendant that the plaintiff fell in its supermarket premises and that the cause of her fall was a spillage present on the floor of the aisle where she fell. It is not in dispute that whenever it occurred, the spillage must have come from a container on the defendant's shelves or from a container being carried by an employee or a customer in the store. It is accepted that the plaintiff was not the cause of the spillage. It is also accepted that the spillage must have occurred in a split second not captured by the CCTV footage.

30. As made clear at the outset of his oral submissions, counsel for the defendant accepts that once it was established on balance of probability that a spillage was present on the defendant's premises and that the plaintiff fell on the spillage then the onus shifted to the defendant to prove on balance of probability that the system of cleaning in operation on the day was reasonable in all the circumstances. This acknowledgment reflects the principle set out in *Mullen v. Quinnsworth Ltd.*, encapsulated in the following quote from the judgment of Griffin J.:

> *"A customer in a supermarket cannot reasonably be expected to look down at his or her feet while walking along an aisle in a supermarket-the customer cannot be expected to look down at his or her feet while walking along an aisle in a supermarket-the customer cannot be selecting goods from the shelves as he or she walks along, and watch the floor at the same time…*
>
> *In my opinion if there is such a slippery substance on the floor, as in the present case, and a customer steps on it and falls, the maxim* res ipsa loquitur *applies-the circumstances of the accident raise a sufficient presumption of negligence on the part of the occupier of the premises.*
>
> *…*
>
> *In the instant case, the floor was under the management of the defendant, or its servants, and the accident was such as, in the ordinary course of things, would not happen if the floors were kept free from spillages of this nature. The onus is therefore on the defendant to show that the accident was not due to any want of care on its part.*
>
> *…*

> *The onus is therefore on the defendant of establishing that, in all the circumstances, it took reasonable car to see that the premises were reasonably safe for the plaintiff."* (at pp. 62-63)

31. While acknowledging that the onus was on it to establish that it had an adequate system in place and that the system operated adequately on the day of the plaintiff's accident, the defendant argues that there are several unsatisfactory factors in the trial judge's judgment such that this Court should conclude that had the evidence in the case been properly considered or analysed by the trial judge it should have led her to the conclusion that the onus on the defendant had been discharged. It is submitted that the trial judge erred in law or in fact or on a mixed question of law and fact in finding that the system of cleaning operated by the defendant was not reasonable in all of the circumstances. The nub of the appeal is that the trial judge held against the defendant on a basis that was far from clear and which was not grounded on the evidence.

32. Counsel for the defendant fairly concedes that to succeed in the appeal he must establish that the spillage occurred after 12:58. He further agrees that if he fails to demonstrate a basis for interfering with the trial judge's findings the appeal cannot succeed.

33. Before turning to the substance of the defendant's arguments and the plaintiff's responses thereto, it is apposite at this juncture to give mention to the role of an appellate court in reviewing findings of fact and the inferences drawn by the trial judge from such findings. The law in this regard is well established in *Hay v. O'Grady* [1992] 1 I.R. 210. The principles identified by the *Hay v. O'Grady* can be summarised as follows:

- An appellate court does not proceed by way of a full rehearing of a case.

- Unlike the trial judge, an appellate court does not enjoy the opportunity of seeing and hearing witnesses or of observing the manner in which evidence is given and the demeanour of those giving it.
- In general, an appellate court is bound by and proceeds on the findings of fact of a trial judge which are supported by credible evidence, however voluminous and, apparently, weighty the testimony against them. Accordingly, the fact that there is contrary evidence does not alter the position.
- An appellate court should be slow to substitute its own inferences of fact where such depends upon oral evidence, and a different inference has been drawn by the trial judge.
- The fact that there is some evidence before a trial judge which may lead to a different conclusion does not alter the fundamental principle.
- In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.
- A finding of the credibility, or not, of a witness is a primary finding of fact.

34. In *Doyle v. Banville* [2012] 1 I.R. 505, the Supreme Court, applying *Hay v. O'Grady*, reiterated that issues of fact and the inferences to be drawn from the facts as found should not be disturbed by an appellate court if there was evidence to support such findings. At para. 14 of the judgment, Clarke J. (as he then was) stated that *"part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts". Doyle v. Banville* is also authority for the proposition that an appellate court can review an inference of fact drawn by a trial judge where such inference did not depend on oral evidence or the

assessment of witnesses. For the purposes of this appeal, the defendant invites this Court to draw inferences based on the CCTV footage shown to the Court. I will return to this submission in due course.

35. The defendant also requests that this Court assess the argument that the trial judge failed to conduct the required analysis of the evidence, or state why she preferred a particular version of events, and rejected the version proffered by the defendant, by reference to *Keegan v. Sligo County Council* [2019] IECA 245, where McGovern J. opined:

> *"25. Effectively, the outcome of the case turned on the account [given] by the respondent as to how the accident occurred. If the account had been deemed implausible or unreliable by the trial judge [then] it is likely that the action would have been dismissed. In those circumstances the trial judge ought to have conducted an analysis of the evidence and stated why he accepted a particular version of the accident as given by the respondent and rejected the thesis postulated by the appellant that the account was entirely implausible.*
>
> *26. To reach such a conclusion is not to call into question the law as well established in Hay v O'Grady [1992]1 I.R. 210. While an appellate court cannot substitute its view of the evidence for that of the trial judge this does not absolve the trial judge from carrying out a proper analysis of the evidence where there are issues in controversy so that it is possible to see why he preferred or accepted one account or one piece of evidence over the other.*
>
> *…*
>
> *37. This court is not entitled to substitute its view on the facts for that of the trial judge and Hay v. O'Grady still remains the law. But in my view there are a number of matters which have been referred to in this judgment which make the trial*

unsatisfactory and which can only be put right by a re-trial on the liability issue. In particular, the failure of the trial judge to engage in a meaningful way with the conflicting accounts of the accident given by the respondent before reaching his conclusions on liability fell short of what was required. There was no proper analysis of the conflicting evidence which would point to the reason why he was satisfied, on the balance of probability, that the incident happened in the manner as described in para. 10 of the judgment."

36. This appeal will be considered against the backdrop of the case law cited above.

37. In the defendant's submission, the outcome of the within appeal turns on the question of what the evidence shows as to when the spillage occurred.

38. It is urged on the Court that the trial judge erred in finding that the defendant had not discharged the onus on it to establish that the spillage occurred after 12:58 and erred in finding that the spillage was likely to have occurred during the period 12:40 to 12:58. Although not specifically spelled out by the trial judge, the implication of the latter finding is that the spillage was on the floor by the time of Ms Barrett's final passage along the aisle at 12.58 and that she failed to observe the spillage.

39. A review of the CCTV footage by this Court of the period 12:40 to 12:58 showed Ms. Hayes (at 12:40) undertaking a stock take and cleaning of the shelves on the aisle on which the plaintiff fell. The footage shows her coming and going in this regard pushing a trolley of stock. This footage also shows Ms. Barrett passing at 12.40 on what was her penultimate circuit on the day in question. Moreover, customers were passing through the aisle, some with trolleys. The footage shows Ms. Barrett coming through the aisle again at 12:58 (her final circuit) on the side of the aisle opposite to where the plaintiff ultimately fell. This footage, and more, was available to the trial judge.

40. The defendant complains that it was never specifically put to Ms. Barrett in cross-examination, or by the trial judge, that she had failed to observe the spillage. It is accepted, however, that Ms. Barrett was cross-examined as to where she was at relevant times proximate to where the plaintiff fell. Counsel submits that one would have expected that either counsel for the plaintiff or the trial judge, on the basis of fair procedures if nothing else, would have put it to Ms. Barret that the contaminant was on the floor in the period 12.40 to 12.58 and that she missed it. The plaintiff submits that there is no merit in the argument that it had not been put to Ms. Barrett that she had missed the spillage. I agree. Counsel does not have to ask a question in cross-examination merely to confirm what is already clear from a witness's evidence. Implicit in Ms. Barrett's direct examination is that she never saw a spillage. During cross-examination the possibility of Ms. Barrett failing to have noticed a spillage was raised, due to her concessions that her mind could wander, outlined at para. 14 of this judgment. Thus, even if counsel for the plaintiff did not explicitly put it to Ms. Barrett that she failed to observe a spillage, her evidence of having kept a lookout with her eyes and that if she had come across a spillage she would have done something about it was, to borrow from McKechnie J. in *McDonagh v. Sunday Newspapers Ltd.* [2017] IESC 46, [2018 2 I.R. 1, *"put in issue in a manner or way, whatever that might be, which conveys to all parties and the relevant witnesses that such evidence is being challenged"*.

41. It is the defendant's contention that there was no basis for the trial judge to hold that the volume of customers in the period 12:40 to 12:58 caused the spillage. The trial judge's reliance on the volume of customers that passed through the aisle between 12:40 and 12:58 in finding the defendant had not discharged the onus on it was discounted by counsel on the basis that volume was "a relative concept". The defendant also contends that there was no basis for attributing the spillage to Ms. Hayes in circumstances where earlier in her

judgment the trial judge had discounted Ms. Hayes as the cause of the spillage. Notwithstanding the defendant's argument, I am not persuaded that the trial judge's earlier reference, to wit, "I can't say that it is clear that it was Ms. Hayes' cleaning occasioned the contamination?" precluded her later finding that "on balance" the spillage was likely to have occurred between 12:40 and 12:58 because of the volume of customers passing through at that time together with the fact that Ms. Hayes was engaged in cleaning duties in the same timeframe.

42. At 13:01 two customers, one of whom appears to be a lady in high heels, enter the aisle. They are pushing a trolley in which a child sits. Counsel for the defendant submits that this footage has particular importance for the purposes of the within appeal as it shows the lady going in and out of the area at which the plaintiff was to fall at 13:03. The CCTV footage at 13:03 shows the plaintiff right foot making contact with, and the plaintiff clearly falling, on the floor tile which the lady with the high heels had traversed some two minutes previously. It is contended that the footage showing the lady with high heels directly traversing, without incident, the exact tile where the plaintiff fell is particularly significant. It is alleged that this is so in the context of the evidence given by the plaintiff that the spillage was a yard long and approximately one to one and a half feet wide. Counsel contends that the inference which should have been drawn by the trial judge from the combination of the footage of the lady with high heels thrice traversing the area the plaintiff fell and the plaintiff's evidence of the extent of the spillage was that had the spillage been on the floor at 13:01, the lady with the high heels would have encountered it and fallen. Accordingly, it is posited that in circumstances where this customer did not fall, the trial judge should have drawn the robust inference that the spillage was not on the floor at 13.01 and that it occurred between 13:01 and 13:03.

43. It is submitted that the most definitive evidence (as was before the trial judge) that the spillage was not on the floor at 12:58 are the movements of the customers at 13:01 who walk in and out of the accident locus area without incident. It is contended that this evidence was not engaged with by the trial judge, in breach of the principles set out in *Doyle v. Banville* and *Keegan v. Sligo County Council.* The defendant asserts that in such circumstance, there is a sufficient basis for this Court to interfere with the trial judge's findings, within the parameters set out in *Hay v O'Grady*, and to find that the present case is one that does not demonstrate the defendant's failure to discharge the requisite onus.

44. The defendant complains that the trial judge appeared to immediately discount the evidence of what was occurring on the aisle at 13:01 in circumstances where this footage should have led to the inference that the spillage could not have been there at 13:01. Insofar as the trial judge drew inferences regarding the period 12:40 and 12:58, it is the defendant's contention that she did so without any evidential basis for such inference.

45. It is alleged that a further unsatisfactory factor of the judgment was the trial judge's assessment of the size of the spillage. The defendant contends that the only evidence led in this regard (the plaintiff's) was discounted by the trial judge without adequate explanation as to why it was being discounted and in circumstances where she gave no indication in her judgment as to what size the spillage must have been. Counsel submits that the plaintiff's evidence, when considered in the context of the CCTV footage of the lady in high heels traversing the accident locus without incident, should properly have led the trial judge to infer that the spillage was not on the floor at 13:01.

46. Counsel stresses that it was not the defendant's case in the court below (or on appeal) that the lady with the high heels, or the group she was with, caused the spillage. While acknowledging that that argument might be inferred from the defendant's written

appeal submissions to this Court, that was not the case made by the defendant in the court below, nor the case now being made.

47. It is also the defendant's contention that this Court is in as good a position as the trial judge to draw whatever inferences it sees from the CCTV footage. It is in this regard that counsel urges on the Court that the trial judge drew inferences from the CCTV footage between 12:40 and 12:58 for which there was no factual basis and where there was in fact CCTV evidence in support of the defendant's contention that the spillage must have occurred in the period after 13:01.

48. The plaintiff contends (as she did in the High Court) that the defendant did not discharge that onus on it to establish that the substance on which the plaintiff fell came onto the floor after Ms. Barret's last passage through the aisle at 12:58. The defendant does not make the case in this Court that the customers in the proximity of the accident locus at 13:01 caused the spillage, rather, it is contended that the spillage must have occurred after that time. Counsel for the plaintiff, however, submits that what can be taken from the CCTV footage is that in the period between the customer at 13:01 traversing and re-traversing the area where the plaintiff fell and the plaintiff falling at 13:03 no other person entered the area. Yet the spillage was there when the plaintiff fell. Counsel argues that the mere fact a customer had minutes earlier walked over the spot where the plaintiff fell without incident is not proof that the spillage was not on the floor. This is in circumstances where a trap or hazard can exist without necessarily every person who encounters the hazard being caused to slip and fall. It is submitted that the fact that the lady at 13:01 did not fall could be attributed to a number of factors such as her speed, her weight or height, her balance and indeed the shoes she was wearing. Counsel points out that the only people who pass over the accident locus from 13:01 onwards are the lady with the high heel at 13:01 and the plaintiff at 13:03. No one has suggested that the plaintiff was the cause of the

spillage and the defendant does not attribute the spillage to the customers (including the lady in high heels) visible at the accident locus at 13:01.

49. As conceded by the defendant in the court below, it is not for the plaintiff to prove when the substance came onto the floor: once the substance is present it is for the defendant to prove the duration of its presence. At the end of the day, this appeal turns on whether the trial judge's finding that the defendant had not discharged the onus on it that the spillage occurred after 12:58 should be set aside by this Court.

50. Before considering whether there is any basis to interfere with the trial judge's conclusions it is necessary first to consider the defence submission that the trial judge failed to engage with the premise put forward by the defence that the proper inference to be drawn from the CCTV footage of the customer at 13:01 crossing and re-crossing without incident the spot where the plaintiff fell was that the spillage could only have occurred after this time.

51. The submission made to the trial judge by counsel for the defendant, in relevant part, was in the following terms:

> "Now, nobody can point to when this particular spillage occurred. I accept it is not Mr. Holland's [the plaintiff's counsel] obligation to say when it occurred but…and [Mr. Foy] accepted dozens of people passed this aisle, Judge, in the time the CCTV, the CCTV footage ran for an hour. Nobody else fell, Judge. There are a number of people who passed at or close to this spot within what I say is reasonable even if it is only at 12:40 rather than 12:58. But at 12:50 clearly a person walks right close to it. At 13:01 this lady goes in to the right-hand side to pick the blue container off the aisle, whatever that might be, and walks at or on this spot, Judge, and nobody else falls or has any difficulty and the accident happened at 13:03. And what I say, Judge, is it is a matter for the Court but here is a situation where the

aisle is fall-free for an hour. It is inspected five times during that hour. Dozens of people passing through it, people passing directly on these stills on this or at, or within a tile of this spillage, Judge, and nobody sees anything. At 13:01 there is movement and a particular reason, I am not suggesting anything happened, but there is activity in this area and right close to this area, Judge, and at 13:03 the fall occurs. No system in the world could pick up any incident of this nature if it occurs at 13:01.

There is no activity in this hour that Mr. Holland can point to that suggests any other basis for anybody picking anything off the aisle close by which may or may not have occurred leading to a spillage prior to somebody walking over that area, Judge. In other words there is activity walking on this aisle at the spot or very close to it on enumerable occasions during this hour and nobody else has any difficulty. Either this spillage is so minute, Judge, or it wasn't there and it is a matter for the Court to determine when it may or may not have happened. And the significance of this issue at 13:01 is this, Judge, if this is when the spillage occurs, no system in the world could have picked it up. I say this was a reasonable system in place and the effect of it was reasonable."

52. It will be recalled that the trial judge (having reconsidered the stills photographs and the CCTV footage) was not satisfied that the two customers with children (including the lady in high heels) and the man who passed through the isle between 12:58 and 13:03 caused the spillage. Counsel for the defendant argues before this Court that it was never the defendant's case in the court below that these individuals caused the spillage. I do not accept that that case was not made to the trial judge. The defendant's submissions to the court below clearly invite the trial judge to have regard to "movement" and "activity" in the accident locus at 13:01 and to find that if the spillage occurred at 13:01 then the

defendant's system could not be faulted. While I accept that the trial judge erred in not engaging specifically with the defendant's other invitation, namely, to draw the inference that the CCTV footage of the lady at 13:01 passing and re-passing (without incident) the same spot where the plaintiff fell showed that there was nothing on the ground by 13:01, for the reasons set out below, I do not believe that this frailty is a sufficient basis for this Court to interfere with the trial judge's findings.

53. The defendant bore the burden of establishing that the spillage was not there prior to 12:58. To aid her conclusions on this issue the trial judge had, in the first instance, the benefit of the CCTV footage which preceded the plaintiff's fall at 13:03 and which showed dozens of people (as acknowledged by the defendant) passing to and from the aisle over the course of an hour. Moreover, there was no specific CCTV footage from which the trial judge could infer that the spillage occurred either prior to 12:58 or thereafter.

54. The onus was on the defendant to satisfy the trial judge that the appropriate inference to be drawn was that the spillage occurred after 12:58. If the plaintiff did not cause the spillage and where there is no evidence that the lady or other customers at 13:01 did so, then, to my mind, the trial judge's finding that the defendant failed to establish that the spillage was not on the floor of the aisle at the time of Ms. Barrett's final passage through the aisle at 12:58 cannot be disturbed once there was a credible evidential basis for this finding. The essential question is whether there was a credible evidential basis for the inferences drawn by the trial judge.

55. The trial judge found on balance that the spillage was likely to have occurred between 12:40 and 12:58 by the combination of the volume of customers passing through the aisle between 12:40 and 12:58 and the fact of Ms. Hayes' cleaning of a shelf. I have already addressed the issue raised by the defendant with regard to Ms. Hayes. That a volume of customers passed through the aisle, including between 12:40 and 12:58, is not in

dispute. Counsel for the defendant suggests that the trial judge's reference to the volume of customers was unclear in the sense that one could not be sure whether she was saying there were many or few customers passing through the aisle between 12:40 and 12:58. To my mind, the import of the trial judge's finding is that there were people on the aisle in sufficient numbers to raise the inference that the spillage occurred in this timeframe.

56. The trial judge also had the CCTV evidence of Ms. Barrett looking straight ahead for almost the entirety of her hour shift and Ms. Barrett's concession that her mind could wander doing the job she did. While the trial judge accepted Mr. O'Connell's evidence that Ms. Barrett while looking straight ahead would still be capable of doing a sweep of nine feet (the width of the supermarket aisle in question) without moving her head she also had Mr. O'Connell's concession that it would be difficult to sustain such a sweep for an hour, all the more so, as stated by the trial judge, " when one considers that the sweeper passage occurred at different areas depending on the sweep as it were. In other words the operative moved down towards the right-hand side, then the centre, then the left-hand side, so that would enlarge the area for which the vigilant enquiry as to whether or not was any spillage requiring being taken care of had been thrown up…" Furthermore, the trial judge had before her the CCTV footage which showed that at 12:58, Ms. Barrett's passage through the aisle was on the side distant from the accident locus.

57. The trial judge also emphasised the absence in the training afforded to Ms. Barrett of "any concentration whatsoever on how vigilant the passage through the aisle should be". It was not suggested to this Court that the trial judge misread the documentary evidence in this regard. Furthermore, she had the evidence of Mr Foy and Mr. O'Connell of the importance of vigilance.

58. Unlike this Court, the trial judge also had the benefit of seeing and hearing Ms. Barrett. Thus, the trial judge's view was not just formed by the CCTV evidence but by the

evidence of Ms. Barrett and the impression left by her evidence, together with the engineering evidence and the concessions made by Mr. O'Connell. It is clear from the judgment that the trial judge took account of Ms. Barrett's admissions that the job was boring, that her attention tended to wander, that it was difficult to keep up concentration and that it was a job that was done hundreds perhaps thousands of times over seven years. Implicit in the judgment is the trial judge's lack of confidence in Ms. Barrett's testimony that she was in fact keeping a look out. To my mind, all of the foregoing factors constitute a credible basis upon which the trial judge could draw the inferences she did and to find that she was not satisfied that the contamination was not on the floor between 12:40 and 12:58 - a conclusion reflective of where the onus of proof lay.

59. In other words, it was not shown by the defendant to the satisfaction of the trial judge that the more probable scenario was that the substance came onto the floor of the aisle post 12:58. On this basis, therefore, the trial judge was correct to find that the plaintiff must succeed in her action. The fact that there was some evidence before the trial judge from which it might have been inferred that had the spillage been there at 13:01 the lady in high heels would have slipped on it or at least noticed it does not alter the position. The decision of the trial judge was one open to her on the evidence. I accept the plaintiff's submission that on *Hay v. O'Grady* principles, the inferences drawn by the trial judge should not be set aside by this Court.

60. Much was made by counsel for the defendant of the fact that beyond discounting the plaintiff's evidence as to the size of the spillage the trial judge did not go on to make any finding as to the size of the spillage. It is also argued that the trial judge wrongly rejected the plaintiff's evidence in circumstances where when challenged on her testimony that the spillage was a yard long and a foot to one and a half feet wide she did not resile from that testimony.

61. On Day 2 of the trial, the following exchange took place between the plaintiff and counsel for the defendant:

> "Q. Do you think, Mrs. Desmond, you had had a terrible fall. Do you think that you could have been confused in relation to the size of it or the colour of it?
>
> A. Well, I do know I was very shocked. I was very shocked. But it looked, it looked clear. I think it was possibly a clear liquid."

62. While the plaintiff does not there respond to the defence suggestion that she was mistaken about the size of the spillage I do not believe that that failure impeded the trial judge in finding that the plaintiff may have been mistaken about its dimensions. This is in circumstances where the trial judge was aware that the defendant itself queried the plaintiff's evidence, both in its cross-examination of the plaintiff and of Mr. Foy. It was suggested to Mr. Foy that the spillage could "hardly" have been a yard long and a foot wide. Moreover, the trial judge clearly had regard to the plaintiff's state of shock in the immediate aftermath of the accident as a basis for discounting her evidence as to the size of the spillage, a not unreasonable surmise by the trial judge in my view.

63. Counsel for the plaintiff, in his submissions to this Court, drew attention to a photograph of the locus taken in the aftermath of the plaintiff's fall which he said did not suggest widely spread deleterious matter on the floor prior to the plaintiff's fall. The description afforded to the spillage is that of a "dry scuff mark found in accident location". I offer no view on the photographic evidence in circumstances where the trial judge did not allude to the discovery in the case. It is also submitted that the plaintiff was looking at the spillage in the aftermath of the accident in circumstances where, presumably, the act of falling and slipping would have caused the contaminant to spread out. I find this a not unreasonable observation.

64. Contrary to the defendant's submission, I do not find the present case to be one where the trial judge fell into error in the sense contemplated by McGovern J. in *Keegan v. Sligo County Council.* The case is not one where the trial judge failed to engage in a meaningful way with *"the conflicting accounts of the accident given by the [plaintiff/respondent]"* as was found to be the case in *Keegan.* In the instant case, there were no conflicting accounts of the accident, either from the plaintiff or as between the plaintiff and the defendant. The circumstances of the accident were not in issue. Nor indeed that it fell to the defendant to establish that it had a reasonable cleaning system in place on the day in question once it was accepted (as it was) that the defendant bore that onus. That was not established to the satisfaction of the trial judge. In my view, on the evidence before her, this was a conclusion open to the trial judge, as was her finding that the defendant had not established that the spillage was not on the floor at 12:58.

65. While the defendant invited this Court (in reliance on *Doyle v. Banville*) to draw the inference (from the CCTV footage) that the spillage came onto the aisle floor of its premises post Ms. Barrett's final circuit (in circumstances where it was not in dispute that if the spillage occurred after 12:58 the defendant would be found to have discharged the onus on it that it had a reasonable system in operation on the day of the accident), such an exercise does not arise in this case given my finding that the inferences drawn by the trial judge cannot be disturbed having regard to the principles set out in *Hay v. O'Grady* and in circumstances where it has not been established that the trial judge committed a material error or significant error in reaching her conclusions on the facts.

66. As stated by Clarke J. in *Doyle v. Banville:*

> *"…the obligation of the trial judge is to analyse the broad case made on both sides. To borrow a phrase from a different area of jurisprudence, it is no function of this court (nor is it appropriate for parties appealing to the court) to engage in a*

> *rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling. The obligation of the court is simply to address, in whatever terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides."* (at para. 11)

67. While the trial judge's analysis may not have been as detailed or forensically comprehensive as one would have liked, in my view she did not offend the principle that the broad case on both sides had to be analysed. I am satisfied that the judgment contains a sufficient analysis of the evidence before the trial judge which led her to conclude as she did.

68. In all the circumstances, I would dismiss the appeal.

69. As this judgment is to be delivered electronically, it is necessary to add that Donnelly J. and Collins J. agree with the judgment.

Donnelly J.

I have had the opportunity to read the judgment delivered by Faherty J. and I agree with the conclusions reached therein.

Collins J.

I have had the opportunity to read the judgment delivered by Faherty J. and I agree with the conclusions reached therein.