

THE HIGH COURT

[2022] IEHC 89
[2021 No. 38 CA]

BETWEEN
MASON HEENEY (A MINOR) SUING BY HIS FATHER AND NEXT FRIEND KEVIN HEENEY
AND KEVIN HEENEY

PLAINTIFFS

AND
SUNWAY TRAVEL LIMITED T/A SUNWAY HOLIDAYS

DEFENDANT

Judgment of Mr. Justice Cian Ferriter delivered on the 17th day of February 2022

Introduction

1. This is an appeal from an order of the Circuit Court dismissing the plaintiffs' claims for damages for injuries sustained while on a package holiday in Tenerife, Spain and for the reimbursement of the costs of the holiday.

The Evidence

2. I heard evidence at the hearing from the first-named plaintiff (Mr. Heeneey) and from an expert engineer called upon the plaintiffs' behalf, Mr Conor Murphy (Mr. Murphy). The defendant did not call any evidence.
3. Mr Heeneey's evidence can be summarised as follows. In July 2015, Mr Heeneey booked a package holiday with the defendant for a two-week stay in an aparthotel in Tenerife in August, 2015 for himself, his wife and their two children, Evan, who was six at the time, and Mason (the first named plaintiff) who was just short of three years old at the time. Mr. Heeneey paid €3,596 to the defendant for the package holiday.
4. The family flew out to Tenerife on 8th August, 2015 to commence the holiday. Shortly after they arrived in their apartment, Mr. Heeneey (who, at six foot three inches, is tall) hit his fingers against an overhead ceiling fan in the apartment while changing into a t-shirt. As a result, Mr. Heeneey was concerned that the fan was unsafely low, particularly given his height. The following morning, 9th August, Mr Heeneey went down to the reception in the aparthotel to express his concern that the ceiling fan was too low and was "a bit dangerous" and to request that they be moved to an apartment that was air-conditioned but did not have a ceiling fan. He was told that there was not any other apartment available that day but to come back the following day. Mr. Heeneey gave evidence that he repeated this request on the following day, 10th August, but was again told there was no alternative accommodation.
5. On the morning of the next day, 11th August, Mason was on the end of a couch in one of the rooms in the apartment when he became agitated and started crying. Mr. Heeneey went to lift up Mason to comfort him. Mr. Heeneey didn't realise he was under the fan and in the lifting movement, lifted Mason up above his head and then heard a bang where one of the blades of the ceiling fan hit Mason on the back of the head. Mr. Heeneey said that there was "blood everywhere" and Mason was distressed. He and his wife immediately rushed down to reception with Mason. The aparthotel staff were, thereafter, helpful in arranging for a taxi to take the Heeneeys to the local GP who bandaged Mason's head and

arranged for an ambulance to take Mason to the local hospital where they spent a number of hours. The laceration to the area behind Mason's right ear (photographs of which were before the court) required three stitches. The blow from the blade also left a cut mark at the time on the side of Mason's face near his right ear. The family returned to the hospital a day or so before the end of the holiday to have the stiches removed.

6. Mr. Heeney gave evidence that he reported the incident to the manager of the aparthotel on return to the hotel and raised the fact that he had twice sought to be moved from the apartment because of his concerns as to the ceiling fan. The manager was very apologetic and told him that in fact they could have been moved because there was alternative accommodation free within the aparthotel. The manager then arranged for the Heeneys to move the following morning into an air-conditioned apartment which did not have ceiling fans.
7. Before moving apartment, Mr Heeney took photographs of the fan ceiling placement in the apartment and arranged for measurements of the height of the ceiling fan in the room to be taken. The defendant facilitated these measurements and it is agreed that the lowest point of the blades of the ceiling fan were 6 foot 9.5 inches above the floor.
8. When Mr. Heeney was cross-examined to the effect that the accident was entirely his fault, he maintained that he had identified the ceiling fan as a hazard from first arriving in the apartment, had twice raised that with the staff in the hotel and that the accident happened when he was engaging in the perfectly natural step of lifting up his two-year-old child to comfort him.
9. It was also put to Mr. Heeney in cross-examination that he would not be maintaining a claim if he had lifted his child up when going through a door opening (door openings being six foot, six inches in height) or if he had banged Mason's head into a curtain pole at that height. Mr. Heeney accepted that he would not have claimed in such circumstances but stated that a ceiling fan was something which he was not used to and represented a very different kind of hazard given that it was only six inches or so above his head and rotating at high speed. He accepted that he had switched the fan on but said that the fan needed to be on at all times given the heat in Tenerife in August.
10. Mr. Murphy, a highly experienced engineer and expert witness, then gave evidence on behalf of the plaintiffs.
11. Mr. Murphy gave evidence that he had been unable to identify any Spanish or Irish standards as regards a safe minimum height between floor and blade level for ceiling fans. Based on his research, Mr. Murphy was in a position to tell the court that an American ceiling fan standards document (which did not appear to be legislation-based) recommended that ceiling fans be fixed at ten feet from the floor but recognised that it would be permissible to hang ceiling fans at a minimum height of 2.1 metres or seven feet. Mr. Murphy said that a minimum of 2.1m/seven feet was also reflected in the manufacturers' recommendations in literature for various ceiling fans that he had researched. Mr. Murphy said that the safe height would depend on the utility and function

of the fan, making the point that, if the fan was in an industrial environment, it would require to be guarded.

12. Mr. Murphy expressed the view that the height of the ceiling fan in this case represented a clear hazard, particularly given the height of Mr. Heeney and particularly where that hazard had been identified by Mr. Heeney and brought to the attention of the aparthotel staff.
13. Under cross-examination, Mr. Heeney accepted that various head-height related provisions in Irish building regulations (such as the recommended minimum height for a door opening at six foot, six inches) were lower than the height of the ceiling fan here, but maintained that a ceiling fan was a very different type of hazard as the danger that was created by an unduly low-lying ceiling fan was that people ran the risk of coming into contact with the fan blades in "*absent moments*", such as stretching, taking off clothes or doing exercise.
14. It was also put to Mr. Murphy in cross-examination that Irish building regulations require a fire safety corridor to have a minimum headroom of two metres. He did not dispute that but maintained that this could not be correlated to the hazard presented by a high speed rotating metal object, which, in his view, needed to be at a higher level.
15. It was put to Mr Murphy that the photographs of the location of the injury to Mason's head (being behind the lower part of his right ear) demonstrated that Mason had been lifted a number of inches higher than the six foot, nine and a half inches of the lowest height of the fan blades and, in all likelihood, was lifted over seven feet. Mr. Murphy accepted that that was certainly a possibility.
16. He expressed the view, under cross-examination, that it was perfectly foreseeable that an accident of the type which occurred here could happen as a result of the hazardously low level of the fan and that it was a danger which should have been eliminated.
17. There was no factual or expert evidence led at the hearing on behalf of the defendant.

The Law

18. The EU introduced a regime of protection for those travelling within Europe on package holidays in Council Directive 90/311/EEC. The provisions of that Directive were implemented in Irish law in the Package Holidays Trade and Travel Act, 1995 ("the 1995 Act"). It is common case that the holiday purchased by Mr. Heeney was a "*package holiday*" within the meaning of s. 2 of the 1995 Act, and also that both plaintiffs were "*consumers*" within the meaning of s. 2 and that the defendant was an "*organiser*" within the meaning of the 1995 Act. The defendant accepted that, as a consequence of those matters, it was liable to the plaintiff for the "*proper performance*" of the obligations arising under the contract in accordance with s. 20(1) and (2) of the 1995 Act but maintained that there was no breach of that obligation on the facts. Section 20(1) and (2) mirror precisely Article 5(1) and (2) of Council Directive 90/314/EEC.
19. Section 20 provides as follows:

"20.—(1) The organiser shall be liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by the organiser, the retailer, or other suppliers of services but this shall not affect any remedy or right of action which the organiser may have against the retailer or those other suppliers of services..

(2) The organiser shall be liable to the consumer for any damage caused by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of the organiser or the retailer nor to that of another supplier of services, because—

(a) the failures which occur in the performance of the contract are attributable to the consumer,

(b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable, or

(c) such failures are due to—

(i) force majeure, that is to say, unusual and unforeseeable circumstances beyond the control of the organiser, the retailer or other supplier of services, the consequences of which could not have been avoided even if all due care had been exercised, or

(ii) an event which the organiser, the retailer or the supplier of services, even with all due care, could not foresee or forestall.

(6) Without prejudice to subsections (3), (4) and (5), liability under subsections (1) and (2) cannot be excluded by any contractual term.

(8) The provisions of this section are without prejudice to the provisions of the Hotel Proprietors Act, 1963."

20. The issues in the case centred on whether there had in fact been a breach of the defendant's obligations of proper performance under s.20 and if so whether the breach resulted unforeseeably, and entirely from Mr Heeney's actions, such that the defendant had no liability to the plaintiffs.
21. While s.20 imposes liability for the proper performance of the obligations arising under contract, it does not stipulate the scope of those obligations. The question of the scope of such obligations, including the question of whether s. 20 encompasses the protections afforded to a guest in Irish law under the Hotel Proprietors' Act, 1963 and the Occupiers' Liability Act, 1995, and the question of whether the performance of the obligations should be measured by reference to standards prevailing in the country of the accident or to Irish standards, has been addressed in a number of authorities, including the Supreme Court decision in *Scaife v. Falcon Travel* [2008] 2 IR 359 ("*Scaife*") and the recent Court

of Appeal case of *Kellett v. RCL Cruises Ltd & ors* [2020] IECA 138 (in which separate judgments were delivered by each of Noonan J., Collins J. and Haughton J.) ("*Kellett*").

22. Noonan J., in *Kellett*, sought to summarise the applicable legal principles as follows (at para. 39):-

"39. I think a consideration of these authorities suggests that the following principles may be distilled:

- (a) In claims pursuant to section 20 of the 1995 Act, the appropriate test is whether reasonable skill and care have been employed in the provision of the service complained of;*
- (b) the standard by which the test of reasonable skill and care is to be judged is the standard, as distinct from the law, applying in the place where the event complained of occurs. The issue of liability is to be determined by reference to Irish law;*
- (c) if there are internationally recognised norms applicable to the facts of the case, the court is entitled to have regard to these in its assessment of whether reasonable skill and care has been used;*
- (d) Per Scaife, there may be cases where the court can have regard to the standards prescribed in Irish legislation such as the Hotel Proprietors Act 1963 and the Occupiers Liability Act 1995 in determining whether there has been compliance with the Directive and the 1995 Act;*
- (e) it will not necessarily be a defence to a claim to show that local regulations were complied with, if such are recognised locally as inadequate, or are so patently deficient that any reasonable person would view them as obviously inadequate; conversely, there may be a requirement to comply with local standards that are higher than those obtaining in this jurisdiction;*
- (f) the tour operator is not to be regarded as an insurer;*
- (g) the onus of proving that the relevant service has been provided without reasonable skill and care rests upon the plaintiff and accordingly, it is for the plaintiff to establish that any relevant standard has not been complied with;*
- (h) it will normally be difficult for the court to make an assessment of whether reasonable skill and care has been used in the provision of the service, absent evidence of relevant local standards, as distinct from Irish standards, subject to (d) above,*
- (i) the court should not be overly prescriptive as to how compliance with local standards is to be proved. It is not necessarily the case that such proof can only be*

provided by a locally qualified expert, subject always to the rules of evidence and the relative weight to be attached to non-expert evidence.

(j) The parties may, of course, expressly contract for the provision of a service to a particular standard, as the trial judge pointed out."

23. In their separate judgments, Collins J and Haughton J. each queried whether Noonan J. was correct to hold that the standard by which the test of reasonable skill and care is to be judged is the standard applying in the place where the event complained of occurred (as suggested by Noonan J. at paragraph 39(b) of his judgment, above). Collins J. noted, and Haughton J agreed, that, in an appropriate case, there may need to be a reference to the CJEU under Article 267 on the question of the test by which the standard of reasonable, skill and care is to be judged (i.e. whether Irish or local).
24. Collins J. in his judgment also appeared to leave open the extent to which, as had been stated *obiter* by Macken J. in *Scaife*, there may be cases where the court can have regard to the standards prescribed in Irish legislation such as the Hotel Proprietors' Act, 1963 and the Occupiers' Liability Act, 1995 in determining whether there had been compliance with the Directive and the 1995 Act.
25. The defendant in its written submissions stated that, while it did not accept the plaintiff's contention that the effect of the Supreme Court decision in *Scaife* is to render foreign hotels in which accommodation is offered as part of a package holiday a premises for the purposes of the Hotel Proprietors Act 1963 or Occupiers Liability Act 1995, it was accepting that the test was that of "reasonable skill and care" (given that that was the test accepted by the Supreme Court in *Scaife* "at the end of the day").
26. Accordingly, I am not called upon to resolve the issues of law identified in *Kellett* in relation to the standards by which the applicable standard of care should be assessed. I will therefore approach the issues in this case applying the standard of reasonable skill and care in a common-sense fashion in light of the evidence I have heard, on the basis that the burden of proof rests on the plaintiffs in the first instance to demonstrate that such standard has been breached on the facts.

The parties' positions

27. The plaintiffs submitted that the expert evidence demonstrated that the reasonable skill and care obligation on the defendant was breached as the fan was at an unacceptably low level and therefore a hazard, particularly in circumstances where Mr Heaney as a tall man had specifically put the defendant on notice of the fact that he regarded the fan as a hazard to him. They submitted that the accident was caused by the very thing complained of (the unsafely low fan), as a result of a perfectly foreseeable act on the part of a parent in relation to a child i.e. lifting a child up to comfort him. The plaintiff also submitted that the terms of s.20 (2) (b) were such that the defendant was forced in effect to argue that Mr Heaney's actions were a form of *novus actus interveniens* when there was no tenable basis for that legal doctrine to apply.

28. The defendant's essential defence was twofold: firstly, that there had been no improper performance of their obligations within s.20 as the plaintiffs had not discharged the burden on them of demonstrating that there had been a lack of reasonable skill and care in relation to the height of the ceiling fan i.e. that the ceiling fan's height did not represent a true hazard at all; and, secondly, that if it was wrong in that regard, it submitted that the plaintiffs could not establish causation on the basis that either the act of Mr. Heeney lifting up Mason to the height of the level of the ceiling fan blades was not foreseeable or that the height to which Mason had been lifted by Mr. Heeney (which, on the balance of probabilities, was at least seven feet) meant that the height of the fan at below seven feet was not causative of the accident and the injuries sustained i.e. that the accident was entirely Mr. Heeney's fault.
29. The defendant had also pleaded in its defence reliance on s. 20(2)(b) but did not pursue that line of defence at the hearing.

Discussion

30. In my view, on the very particular facts of this case, there was a breach of the duty of reasonable skill and care by the defendant, and therefore improper performance by the defendant of its obligations to the plaintiffs in breach of s.20, in circumstances where Mr. Heeney had specifically complained about the dangerously low level of the ceiling fan and twice requested alternative accommodation without such a hazard and where the defendant did not take steps to address that hazard by moving Mr. Heeney and his family into separate accommodation notwithstanding that there was, in fact, separate accommodation with air conditioning without a ceiling fan in the complex at the time of his complaints. The defendant was on specific notice from Mr. Heeney that there was a specific hazard in his room presented to him as a result of his height but did not act to address it when it could, and should, have done so.
31. In the circumstances, there was a breach by the defendant of its duty to act with reasonable skill and care in the provision of the service covered by the contract with Mr Heeney.
32. The question that next arises is whether that breach of duty was causative of the injuries the subject of the claims in these proceedings, which requires addressing the questions of foreseeability and of whether Mr Heeney's actions were the sole cause of Mason's injuries.
33. In my view, the accident was foreseeable as a matter of law as the very thing which had been communicated by Mr Heeney to the defendant as being a hazard (the low level of the fan) proved to be a hazard and proved to be so in respect of the perfectly normal act of a father instinctively lifting a child up, including, as often happens when lifting a child, lifting the child somewhat above his head. Clearly, Mr Heeney did not go looking to cause the accident to Mason. In so far as it was contended by the defendant that the ceiling fan could not represent a foreseeable hazard to a small child, given the height of the small child relative to the height of the fan, that to my mind ignores the reality of life which is that many parents will instinctively lift their two or three year old children up to the head height of the parent and often beyond in order to soothe them.

34. Just as it is perfectly natural to stretch up hands when removing a t-shirt (the action which had caused Mr. Heeney's fingers to come into contact with the fan on the first evening he arrived in the aparthotel), it was perfectly natural for a father to lift a distressed child in a movement that would take the child above his head height.
35. In relation to the defendant's contention that there was a lack of causation between the alleged hazard and the injuries to Mason as a result of Mr. Heeney lifting Mason to a height in excess of six foot, nine and a half inches, I accept on the balance of probabilities, given the location where the blade hit Mason's head, that Mr. Heeney in fact lifted him to a level of seven feet and, perhaps, marginally beyond.
36. However, in my view, that does not answer the plaintiffs' case, given that an important part of the plaintiffs' case is that if he had been accommodated with alternative accommodation without a ceiling fan at the time of his complaint and request for alternative accommodation without a fan, or the follow up to that complaint, the accident would not have happened at all. It seems to me that this is a full answer to the defendant's causation argument given that I have found that the want of reasonable care and skill lay in failing to provide Mr Heeney with alternative accommodation after he had specifically brought the hazardous nature of the fan from his perspective to the attention of the defendant's agents (i.e. the aparthotel staff).
37. Accordingly, in my view, the defendant is liable for the improper performance of the contract, by reason of its failure to exercise reasonable skill and care once it was on notice of the specific concerns of Mr. Heeney in relation to the hazard presented by the low ceiling fan given his height.
38. s.20(2) on the face of it imposes a full liability on the organiser for any damage caused by the improper performance of the contract unless it can demonstrate that the improper performance of the contract "*is due neither to any fault of the organiser or the retailer nor to that of another supplier of services*" because of one of the scenarios specified in s.20(2)(a), (b) or (c), each of which in essence addresses scenarios where the fault is entirely that of someone other than the organiser and/or where the consequences are unforeseeable and unavoidable. None of these provisions was sought to be relied upon by the defendant as against Mr Heeney. As noted earlier, while the defendant had pleaded s.20(2)(b) in its defence as against Mason's claim, it did not pursue that defence at the hearing. In light of the provisions of s.20(2), in my view the defendant is liable in full to both defendants for the damage resulting from its improper performance of its obligations. I will turn, therefore, to the question of damages.

Damages

39. It is common case that Mason's injuries thankfully resolved in a relatively short time after the incident, save for the presence of a small scar behind his right ear which he will have permanently. I accept that Mr. Heeney's (and his family's) enjoyment of their holiday was substantially eroded by the accident, given the distress caused by the incident and given Mr Heeney's evidence that they were considerably curtailed in the activities which they could do as a family in light of the injuries sustained by Mason, and in particular the need

to keep him out of the sun and the pool to avoid his injury getting infected and the need for one parent to be with each of the boys at all times during the day as a result.

40. In my view, an appropriate level of general damages to fairly and reasonably compensate Mason for the injury of a small lifelong scar behind his right ear is €8,500. It is also appropriate to order compensation to Mr Heeney for the return of the entirety of the sum of €3,596 paid by Mr. Heeney for the package holiday. The total damages to the two plaintiffs is accordingly €12,096.