THE SUPREME COURT

APPEAL NO. 77/2007

Fennelly J.
O'Donnell J.
McKechnie J.

BRENDAN O'NEILL

PLAINTIFF/RESPONDENT

AND

DUNNES STORES

APPELLANT/DEFENDANT

JUDGMENT of Mr. Justice Fennelly delivered the 16th day of November 2010.

1. I gratefully adopt the summary of the facts of this case set out in the judgment which is about to be delivered by O'Donnell J. In effect, the plaintiff came to the assistance of the security guard at Dunnes Stores, while the latter was seeking to overcome a suspected shoplifter who was in flight. The shoplifter's companion joined the fray and violently attacked the plaintiff, who had voluntarily come to the aid of the security guard, by swinging a bicycle chain across his face. The plaintiff suffered severe facial injuries.

2. The first and striking fact about the case is that it was decided that the defendant, Dunnes Stores, was negligent in the absence of any expert evidence that the standard of their security provisions departed from any objective or generally accepted norm. The second is that all the evidence upon which the learned trial judge (Kelly J) based his judgment was given on behalf of the defendant.

3. A first procedural point needs to be considered. In circumstances where the defendant applied unsuccessfully for a non-suit, but then went into evidence, can the defendant ask this Court, on appeal, to allow the appeal by ignoring the evidence called by the defendant? On this point, I am in full agreement with O'Donnell J. It is true that the non-suit application presents the defendant with somewhat of a dilemma. The procedure outlined in Hetherington v Ultra Tyre Service Ltd [1993] 2 I.R. 535 and O'Toole v Heavey [1993 2 I.R. 544 requires the defendant, when applying for a non-suit, to indicate whether or not he intends to call evidence. He is not; it appears, entitled to have a ruling on whether the plaintiff has established a prima facie case unless he informs the court that he intends to go into evidence. In that case, where he fails in his application, he will call evidence and the High Court decision will be based on the entire of the evidence. If the defendant informs the Court that he will not go into evidence, in the event that his non-suit application fails, the court makes no ruling on the existence of a prima facie case; it decides the entire case on its merits on the evidence called by the plaintiff. Thus,

the defendant cannot obtain a ruling on the existence of a prima facie case unless he is prepared to opt in advance to call his own evidence.

4. Nonetheless, in the situation presented by the present appeal, it seems clear that, as a matter of justice, the Court must look at the entirety of the evidence. The alternative could be that, because the trial judge should have granted a non-suit, this Court would have to close its eyes to actual evidence of negligence called on behalf of the defendant, which would be patently unjust. The final result is not unjust. If the defendant has been shown to have been negligent, it is no injustice that he should have to compensate the plaintiff, merely because he has suffered a procedural disadvantage.

5. Kelly J expressed his opinions on the question of liability, firstly, in the following terms:

> "The security arrangements which the defendant had in place on the evening in question were substandard. To ask one person to take responsibility for the security of the entire of the defendants shop consisting of drapery, grocery and off-licence was not reasonable.
>
> The absence of a two-way radio was a considerable impediment to Mr Byrne being able to carry out his duty and deprived him of the ability to call for backup from the defendant's personnel as a matter of urgency.
>
> Mr Byrne attempted to do his duty as best he saw it. Given that he was dealing with two intoxicated persons it would have been more prudent not to have attempted to detain Colville. He was alone and outnumbered. They were armed with bottles. It was very likely that the already violent Colville would be joined by McCormack when he was being arrested. Both were intoxicated.
>
> Under the terms of the protocol he ought to have sought help rather than attempt an arrest."

6. At a separate point in his judgment, the learned judge, following some legal citation, gave his reasons for his findings of negligence as follows:

> "First, the employment of a single security officer to cover the entire of the premises on an occasion of late night shopping was inadequate. There was no security back up for him. Secondly, the only method of communication that he had with other members of the defendant's staff was a mobile phone. That was much less efficient than the two-way radio which would have been in operation had other security personnel been on duty at the time. Thirdly, Mr. Byrne conscientiously attempted to do his duty in circumstances where it would have been more sensible to have adopted a different approach. When confronted with two drunken louts, both with bottles in their jacket pockets, it would have been safer to have contacted the police before endeavouring a citizen's arrest of Colville. The police station is next door to the shopping centre and closed circuit television was in operation in the defendant's store. The protocol which I was told about does not require a

security officer to attempt an arrest in circumstances where he is outnumbered. Mr Byrne negligently breached that protocol and the defendant is vicariously liable for that act. The situation requiring assistance of a rescuer was reasonably foreseeable and was brought about by a combination of Mr. Byrne's non-adherence to the protocol and the defendant's failure to provide appropriate backup for Mr. Byrne."

7. These findings fall into the following three parts:

   i) it was negligent, on the part of the defendant, to confide the security of premises consisting of drapery, grocery and off-licence to a single security guard;
   ii) it was negligent to equip that guard only with a mobile phone as distinct from two-way radio;
   iii) it was negligent, on the part of the security guard himself, to confront and seek to apprehend the suspected shoplifter, Colville, instead of summoning the gardaí.

8. The second and third headings were, in effect, closely related to and dependent on the first. Mr Byrne explained the absence of a two-way radio in evidence: there was no point in having one, when there was no other security man to communicate with. The finding of negligence in deciding to confront Colville flowed from a part of Mr Byrne's evidence to the effect that a Dunnes Stores protocol, not produced in evidence, stated that the security staff were not to confront shoplifters or others, if they were outnumbered, but were to call for help. The fundamental basis, therefore, of the judgment was that it was negligent, on the part of the defendant, to have only one security guard on duty on the occasion the plaintiff suffered his injury.

9. Neither side called any expert to give evidence. The evidence of Mr Byrne provided the only basis for the findings of negligence. Mr Byrne had served in the defence forces where he had received training in restraint and self-defence. He had served in security in Dunne Stores for about three years, originally in Clonmel and subsequently for a year and 1/2 to 2 years in Thurles. There he had received procedural training. There was no suggestion that he was inadequately trained for his assigned task. He was cross-examined about a security protocol about whose contents the evidence was, to say the least, fragmentary. Insofar as Mr Byrne had seen a copy, it was kept in Clonmel. As already stated, his instructions were that, if he felt he was outnumbered, he was to wait for help. Mr Byrne's own interpretation of this provision of the protocol—and he was the only witness to its contents—was that he did not breach its terms by running after Colville and seeking to apprehend him: he considered that he was confronting one person. According to the witness, the security complement at Dunnes Stores consisted of three security men: himself, a security manager and one part-time security guard. At times there would be two and at other times there would be one on duty. When there were two, they used two-way radio. He agreed that he had been unable effectively to communicate with anybody from Dunne stores over the approximately 20 minute period of the incident. He agreed that this was not ideal and that the two-way radio was a quicker method of communication than a mobile phone.

10. The question that has to be posed is: what was the basis in the evidence for concluding that it was negligent on the part of Dunne's Stores to have only one security man on duty?

11. The decision of this court in Bradley v Córas Iompair Eireann [1976] I.R. 217 suggests that, at least in cases of employers liability, negligence can be established in either of two ways: firstly, by establishing a departure from known and accepted standards in the particular trade or industry; secondly, by demonstrating a failing so obvious as to be unreasonable. Henchy J cited two principal authorities. In Morton v. William Dixon Ltd [1909] S.C. 807, Lord Dunedin pronounced what Henchy J considered to be "the most commonly cited statement of the necessary degree of proof" as follows:

> ". . . I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

12. That prescription was, as Henchy J put it, "glossed" by Lord Normand in Paris v Stepney Borough Council [1951] A.C. 367 at 382:

> "The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances. But it does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it."

13. The authority of Bradley v CIE was accepted by this Court in Kennedy v Hughes Dairy Ltd [1989] I.L.R.M., though McCarthy expressed doubt that Bradley "should be regarded as laying down for all time two unchanging compartments into one or both of which every plaintiff's claim must be brought if it is to succeed." In that case, a majority of this Court held that the High Court had been wrong to withdraw a case from a jury on the authority of Bradley. The plaintiff's claim that his employer had been negligent in failing to provide him with protective gloves or gauntlets to protect him against broken glass had, however, been supported by the expert evidence of an engineer.

14. I agree with the view of McCarthy J that Bradley should not be treated as laying down a rigid formula. The test in all cases is as to whether the plaintiff has been able to show that the defendant has done something or, as failed to do something, which a reasonable man, exercising reasonable care, would have done or not done, as the case may be. Has the defendant been in breach of the duty of care he or she owes to the plaintiff? Nonetheless, it is necessary to look for some objective guidance as to what is or is not a safe system, whether of work or of anything else. That is why it is customary, even if not

absolutely necessary in principle, to seek to support a claim for damages for negligence by expert evidence. The plaintiff must show that the defendant has fallen short of the standard of care that the plaintiff is entitled to expect of him in all the circumstances of the relationship between them. The notion of standard connotes something objective and, if not measurable, at least capable of objective assessment. It is not, therefore, a mere matter of subjective judgment or impression. It must be consistent, not random. The following passage form Charlesworth and Percy on Negligence (Sweet & Maxwell, 8th ed. Par 6-06) explains that the problem is to relate the generality of the duty and standard of care in negligence to particular practical circumstances:

> "……to say that the standard of care is that of a reasonable man is to beg the question. A tribunal of fact can only be directed to apply the standard of care, if it is explained what amount of care the law regards as reasonable under the circumstances of the case being tried."

15. Applying these principles to the present case, I fail to see, in the evidence, any basis for concluding that negligence has been established against the defendant in failing to have more than one security guard on duty on the evening in question. O'Donnell J suggests that there was "a sparse evidential basis" to sustain the plaintiff's claim but I would go further. The learned trial judge appears to have attached importance to the fact that Mr Byrne was responsible for a drapery as well as a grocery and an off-licence, a fact which he established himself at the end of the evidence. Mr Byrne's physical area of responsibility had not featured in the evidence and it is not clear that it played any part in the events of the evening in question, where all relevant action took place in the off-licence or on escape from it. More fundamentally, I do not think he had any foundation in the evidence for concluding that more than one guard was necessary. No comparative standards were established. The only point of reference was the protocol which was not produced in court. The existence of the latter document emerged only in cross-examination. The plaintiff had not sought discovery of documents. Mr Byrne's interpretation was that he was not out-numbered. He considered that he was not in breach of the protocol and he was the only witness to have seen it. In effect, the plaintiff relied on cross-examination of Mr Byrne to establish the existence of the protocol and give a partial account of its undisclosed contents, but rejected his interpretation of it.

16. It follows from the foregoing that the absence of two-way radio was not in any way relevant. It could only be relevant if the absence of a second security guard amounted to negligence.

17. Finally, I do not agree with the conclusion of the learned trial judge that the defendant was negligent insofar as Mr Byrne chose to pursue Colville rather than merely watch him and call the gardaí. In an obvious sense, that would, of course, have been the safer course. However, it was not negligent of the defendant to try to pursue and catch an obvious shoplifter. No attempt was made to establish a departure from standards in this respect. It is true that Mr Byrne was vigorously cross-examined to the effect that he had disobeyed the protocol by pursuing in the way he did but he disagreed. I simply do not

see how Dunnes Stores were negligent in pursuing a shoplifter rather than adopting the alternative course of simply watching, noting the evidence and calling the gardaí.

18. In these circumstances, I do not believe that any finding of negligence was justified. Accordingly, any question of rescue simply does not arise. Liability in rescue cases is predicated on some act of want of care on the part of the defendant leading to the creation of the risk which prompted the voluntary act of rescue. Thus, the necessary precondition does not exist. I would add that I am not at all convinced that liability for the creation of a situation of danger could, on any view, be placed at the door of the defendant. In Philips v Durgan [1991] I.L.R.M., 321, Finlay C.J. expressed the view, at page 326, that the principle of rescue " truly consists only of a situation in which the court will rule on as a foreseeable consequence of the negligent commencement of a fire that persons seeking to put out that fire, either by reason of their duty as officers of a fire brigade or by reason of their desire to prevent damage, whether to persons or property may be hindered by the existence of the fire." It appears to me at least possible that the true analogy with the present case would be the behaviour of the suspected shoplifters, including the criminal behaviour of McCormack, rather than Dunne Stores' security arrangements. The former was a danger which was not created by Dunnes Stores. However, I would prefer to leave the issue of liability to rescuers to be decided by a larger formation of this Court in a case where it more directly arises.

19. I would allow the appeal and dismiss the plaintiff's claim.