THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 12
Record Number: 2019/541
High Court Record Number: 2016/2634P

Whelan J.
Noonan J.
Faherty J.

BETWEEN/

EVA CEKANOVA

PLAINTIFF/RESPONDENT

-AND-

DUNNES STORES

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 20th day of January, 2021

1. In December 2015 the respondent ("the plaintiff") purchased a glass jug in the appellant's ("Dunnes") store in Blanchardstown for €10. She brought it home and made tea in it, using very hot water. In consequence it shattered resulting in burns to the plaintiff's legs. She brings these proceedings claiming damages in negligence and breach of contract against Dunnes. She was successful in the High Court (Cross J.) who assessed her general damages at €75,000 and special damages of €844.96. The trial judge found the plaintiff to have been guilty of contributory negligence to the extent of 25% resulting in a net decree to the plaintiff of €56,833.72. Dunnes have appealed to this court on the issues of both liability and quantum. The plaintiff has cross-appealed against the finding of contributory negligence.

Background Facts

2. The plaintiff is a Slovakian national who was born on the 7th June, 1989. She came to live in Ireland in 2014. At the material time, she was employed as a warehouse operative by a logistics company called Wincanton which, coincidentally, is engaged by Dunnes for its logistics operations.

3. On the 5th December, 2015, the plaintiff and her partner went to Dunnes Stores at Blanchardstown with the intention of buying a glass jug in which to make tea. Her evidence was that prior to that time, she and her partner shared a flat with a couple from Czechoslovakia who made tea in a glass jug. She said that this is normal in Slovakia, but she was aware that the habit in Ireland is to make tea in a teapot. The plaintiff went to the glassware section of the shop where glass jugs were located along with drinking glasses, bottles and other items of typical glassware. Apart from price, there was no

particular labelling on the jug in question, which appears from the photographs to have been a fairly standard looking tall glass jug. Neither the plaintiff nor her partner made any enquiries from staff at the store as to the jug's suitability for making tea.

4. The plaintiff's evidence was that when she got home, she made a small amount of tea in the jug that evening without incident. On the next morning, the 6th December, 2015, the plaintiff was making breakfast and boiled a kettle to make tea. She put some teabags into the jug and let the kettle cool for a period of time. As appears from her engineer's report, she told him that she allowed it to cool for 5 – 10 minutes. Her partner's evidence was that she left it for maybe 10 minutes. She then poured the water, which was not boiling but very hot, estimated by the plaintiff at around 80 to 90 degrees centigrade, into the jug. The jug then shattered, spilling the very hot water onto the plaintiff's legs causing what the trial judge described as very nasty burns.

5. On the 8th December, 2015, the plaintiff attended with her solicitor and on the 10th December, 2015, she went back to the Blanchardstown Store to find that there were no jugs on display. She returned again on the 15th December, 2015 and this time, there were jugs on display but each with a sticker label on it in the English and French languages stating "hand made product, not for use with hot liquids, nes pas utiliser avec liquids chaude, hand wash recommended", with further translations in French of the other English words. The plaintiff again returned to the store on the 18th December, 2015 when she reported the accident to a Dunnes staff member, Kenneth Young. On that occasion, there were again jugs present with the warning label. Finally, some months later, on the 13th May, 2016, the plaintiff again attended at the store and noted that the same or similar jugs were again on display but this time, without labels.

6. The jug in question was manufactured by Libbey Inc. at a factory in Mexico. Libbey was originally joined by Dunnes as a third party to the proceedings, but the third party issue was resolved in advance of the plaintiff's claim proceeding.

The Case Pleaded

7. The plaintiff's claim is brought in negligence, breach of duty including statutory duty, and breach of contract. The particulars given under these headings in the personal injuries summons plead that Dunnes sold to the plaintiff a defective and dangerous homeware item which was of less than merchantable quality. It is alleged that Dunnes failed to provide any adequate warning as to the fragility of the jug and represented that it was suitable for holding liquids without conditions of use. Some further general particulars are pleaded including a breach of s. 14 of the Sale of Goods and Supply of Services Act, 1980 which I think is intended as a reference to s. 14 of the Sale of Goods Act, 1893 as amended by s. 10 of the 1980 Act and implies terms as to merchantable quality and fitness for purpose. There is no plea in the personal injuries summons or any subsequent particulars alleging that it was a custom in Slovakia or any other Eastern European country to make tea in glass jugs and that Dunnes knew or ought to have known that this was so.

8. Subsequent particulars were delivered alleging a breach of Dunnes' obligations under the Liability for Defective Products Act 1991, although I think it is fair to say that this was not actively pursued either at the trial or on appeal. Dunnes' defence is a full traverse including a plea that the plaintiff had failed to have regard to the warning sticker on the jug, apparently based on an understanding that the bi-lingual warning sticker was attached. The defence further pleads that if there was negligence, it was that of Libbey and there was contributory negligence on the part of the plaintiff. It is common case that the first mention of the Slovakian custom of making tea in glass jugs is to be found in the report of the plaintiff's engineer, Mr. Alan Conlon which was exchanged pursuant to S.I. 391 of 1998.

Evidence in the High Court

9. Evidence was given by the plaintiff and her partner, now husband, as described above. As the medical reports were agreed, the only other witness to give evidence for the plaintiff was her engineer, Mr. Alan Conlon. On behalf of Dunnes, Mr. Kenneth Young gave evidence, who was a member of management at the Blanchardstown Store and to whom the plaintiff reported the incident. Evidence was also given by Ms. Caroline Scanlon, a buyer in Dunnes Stores head office who was involved in the ordering and purchasing of this line of glass jugs. The manufacturer, Libbey, was described as the world's largest manufacturer of glassware, distributing its products in 169 different countries. Ms. Scanlon described the purchasing process and identified the relevant purchase order documentation.

10. The relevant purchase order was a document used for both homeware and drapery, particularly ladies' wear. The document refers to "fabric details" and under the heading "labelling" the words "care label ref" appears after which is typed "required". Ms. Scanlon was asked was the label required on the glass jug and her answer (at Day 2, Q. 413) was: -

> "No, we never simply asked for a care, care label or a warning label to be put on these…"

11. After the same question, the trial judge had the following exchange with Ms. Scanlon: -

> "Mr. Justice Cross: That's okay. Just to assist me there, you said it says here 'care label required' on the document.
>
> A. Yes, that's correct.
>
> Mr. Justice Cross: But you said what?
>
> A. It's, this, it's required for ladies wear or drapery. It wouldn't be required for homewares, like, on hard goods.
>
> Mr. Justice Cross: But it's on, sorry, it's on this document which relates to these jugs so is it, is it wrong?

A. It is wrong, it shouldn't be, it shouldn't be on a hard, it shouldn't be on the purchase order for homewares.

Mr. Justice Cross: But it was.

A. But it was."

12. Ms. Scanlon went on to give evidence that between April 2015 and May/June of 2019, Dunnes Stores sold over 11,240 of these jugs and the only complaint received in relation to same was that of the plaintiff.

13. The issue of labelling was pursued further with Ms. Scanlon under cross-examination by counsel for the plaintiff who asked her (on Day 2 at Q. 437 et seq.): -

"437 Q. You are aware that this product was intended to be marked and warned 'not for use with hot liquids' by the manufacturer?

A. No I wasn't.

438 Q. You weren't aware of that?

A. No. We, I wasn't expecting to see, I wasn't expecting to see a label that says 'do not use with hot water'.

Mr. Justice Cross: But you wouldn't have looked at the jugs, would you, as they came in there?

A. Well we do, we get and we always get a production sample to check.

Mr. Justice Cross: You take a sample.

A. Yes. And it did have the label on it because when we got the call we went and checked and said 'oh, it does have a label'. But I wasn't actually expecting to see a label on it because it wasn't bought for that intent, to put hot water into it, it was, it was bought clearly to merchandise in stores with our glassware. It was bought under the glassware section."

14. Ms. Scanlon reiterated this position when pressed by counsel for the plaintiff as to why there was no system in the store for checking the labels on the jugs (at Day 2, Q. 468): -

"468 Q. Can I suggest to you that if there had been a system such as that in place this action could have been avoided?

A. I personally don't think so because you didn't expect to see that label there. We didn't ask for the label to be put on there so we would have never asked the stores to check for a label. The, the jug was never bought for that reason. The jug was bought for having on the table making cordial, say, like orange juice, lime, you

know, water and lime. It was never bought with the intention of putting hot water into it.

469 Q. Well you never bought it for that intent?

A. No.

470 Q. I understand?

A. So we never asked for a care label to be put on it with that. We never asked the supplier to do that."

15. Ms. Scanlon went on to explain that when Dunnes request a care label to be placed on a product, the label has to be submitted to Dunnes for approval before the order proceeds. In the case of the glass jugs in question, no such approval was sought or given.

16. The final witness called for Dunnes was its engineer, Mr. Donal Terry.

Judgment of the High Court

17. Following the conclusion of the evidence, the trial judge delivered an *ex tempore* judgment which appears in Day 3 of the transcript. He described the circumstances noting (at p. 1): -

> "I accept that in, in Slovakia and other parts of Eastern Europe it is the custom to make tea in a glass, in glass jugs."

18. The judge went on to note (at p. 2): -

> "The defendant has brought a claim against the third party but has settled it and I accept that the jugs were distributed from the third party and were meant at the time to have a label on them in English and French warning that the jugs were not to be used with hot water. The plaintiff and her partner state that the jug that she purchased did not have such a warning on it and she would not have purchased the jug if it had the warning on it, as the purpose for which the jug was required was to make tea."

19. In commenting on the plaintiff's evidence, the judge said the following (at p. 4): -

> "I accept the evidence of the plaintiff. She is an honest witness who did not pretend that she saw any of the jugs without warning labels after the purchase until May of 2016. I accept that she would not have purchased the jug if it had contained the warning label. It is clear that either due to the actions of the defendant or the manufacturers some batches did not appear on the shelves of Dunnes Stores with the warning label which the manufacturers supposed to be there. And I think the key to the mystery of some jugs having labels and some jugs not having them is probably found by the fact that on the 10th December no jugs were on display. It is entirely possible and, I think, probable that jugs from a different batch were then put on display with the labels warning that were seen on

the 15th and the 18th December. But I find it a fact that the jug on display on the 5th December, and specifically the jug sold that the plaintiff purchased, did not have any warning on the label as the manufacturers had intended."

20. The judge then went on to consider the question as to whether Dunnes was negligent or in breach of duty in selling the jug without a label. He noted that Dunnes claimed it was not reasonably foreseeable that a customer would purchase a jug to put hot water into it and a schoolchild knows not to put very hot water into an ordinary glass without at least putting a spoon to deflect the heat. In commenting on the evidence of Ms. Scanlon, the trial judge said (at p. 5): -

> "Ms. Scanlon says that this requirement for a care label as shown in, on their order is, in fact, a mistake and that they didn't really require this on jugs and they note that the third party never sent them any care label for their approval. Be that as it may, the manufacturers sold the jug with care labelling on it. And that is certainly their practice and the contractual document that they had has an apparent obligation for them to do so."

21. The judge then went on to make certain findings of fact (at p. 6): -

> "What is clear is that the manufacturer realised that it was appropriate or possibly contractually obligated to affix a warning to the jug. The defendant's contract required a care label and this jug sold without the warning or care label that the manufacturer thought reasonable and that the defendants specified."

22. The trial judge's central finding on the liability issue appears at p. 7: -

> "And I find that to sell the jug, which in 2015 they ought to have known people in Ireland possibly from foreign countries might well use to pour water, hot water into rather than merely cool liquids, without the label which they had specified and without any system of checking the label that the, that the label was present, was negligent and that the plaintiff is entitled to succeed."

23. The judge went on to deal with the issue of contributory negligence and held that the plaintiff was in Ireland for a number of years and ought to have known that tea was not usually made here in glass jugs and therefore, she had an obligation to check to see if the jug was suitable before filling it with hot water. On this issue, he made the following observation (at p. 8): -

> "The modern supermarket does not offer the customer the same opportunity offered, posited by the Sale of Goods Act in the nineteenth century to expressly or by implication make known to the shopkeeper the particular purpose for which the good was required."

24. He found the plaintiff guilty of contributory negligence to the extent of 25% and proceeded to assess damages on that basis.

Labelling on the Jug

25. The trial judge made some important findings concerning the labelling, or more accurately lack of it, on the jug in question. As is evident from the passages in the judgment to which I have referred, the trial judge variously held that the jugs were "meant" to have a label on them and Libbey had an apparent obligation to attach such a label. Libbey realised that the label was appropriate and they were contractually obliged to attach it to each jug. Insofar as these findings were based on direct evidence, as opposed to inferences drawn by the trial judge, they appear to me to be unsupported and indeed contradicted by the evidence.

26. The only witness who was in a position to give evidence concerning the contractual arrangements between Dunnes and Libbey was Ms. Scanlon. Her evidence was that there was no requirement in the contract between Dunnes and Libbey for there to be a label on the jug of the kind that did in fact appear on occasion. Ms. Scanlon's evidence was clear on this point. She said that Dunnes never asked for a care label or a warning label to be put on the jugs. Had they required one, Libbey would have had to submit a proof for approval. That never happened.

27. The fact that the word "required" appeared after the words "care label ref" was an error. She explained that the same order form was used for glassware and other "hard goods" as was used for ladies' clothing. She was not asked to explain what was meant by a "care label" and whether it was to be regarded as equivalent to a warning label. She said she never expected to see a warning label and Dunnes had not asked for one. Her evidence in this regard was not contradicted. It was also consistent with the fact that there was no requirement for Dunnes staff to check the labelling on the jugs before putting them on display and also the fact that on some occasions, the jugs had labels and on others, there were none.

28. Nor do I think that the trial judge was entitled to infer from the presence of the label on jugs from time to time that this meant there was an obligation on Libbey to attach such a label by virtue of its contract with Dunnes. As previously noted, the label was printed in the English and French languages. Clearly therefore, it was not attached to the jugs for the Irish market alone, if at all. The most that could be inferred is that it was attached to products sold in countries having English or French as their primary language. The reason for attachment could include a contractual requirement with the importer in those countries or alternatively a legislative requirement in those jurisdictions.

29. Similar jugs may well have been sold by Libbey in countries like Croatia where, the trial judge held, it is the custom to make tea in glass jugs. It is clearly not the custom to do so in Ireland and significantly, the plaintiff knew that. I am therefore satisfied that the trial judge's conclusion concerning the requirement to affix a label to the jug was unsupported by the evidence and indeed, contrary to it. It must follow that Dunnes cannot have had an obligation to inspect the jugs for the presence of labelling or to have had some system in place to facilitate that.

30. That of course does not dispose of the matter because irrespective of any contractual arrangements between Dunnes and Libbey, the plaintiff's contention is that Dunnes was negligent in selling this jug without a warning label. The trial judge held that the plaintiff would not have purchased the jug if it had a label attached. That of course may well be so, but it does not logically follow that because the plaintiff might thus have avoided the accident, Dunnes is therefore liable for the absence of a label. If the label did no more than state what most reasonable people would know in any event, its presence or absence cannot be viewed as a causative factor in the plaintiff's accident.

31. It is universally known by reasonable adults of normal intelligence that boiling or very hot water has the potential to shatter an ordinary glass vessel. That is not a proposition that requires proof and the court is entitled and indeed required to use its own common sense in such matters. The plaintiff was asked in some detail about whether she was familiar with this phenomenon, which the engineers described as thermal shock. She said that, despite the fact that she studied science in school, she had never heard of this or of the notion that it is necessary to put a spoon or a piece of metal into a glass vessel to absorb the shock before filling it with hot water. This was news to the plaintiff.

32. Her evidence was that the first time she ever heard of such a suggestion was in her solicitor's office. That is, to say the least, a somewhat surprising proposition. Further, the plaintiff never explained in her evidence why, having boiled the kettle, she allowed it to cool for up to ten minutes before pouring it into the glass jug. She was quite insistent that the water was not boiling but rather at 80 to 90 degrees centigrade. As counsel for Dunnes urged on this court during the hearing of the appeal, the plaintiff's evidence in that regard is very difficult to account for in the absence of some understanding of the effects of boiling or very hot water on ordinary glass.

The Custom of Making Tea in Glass Jugs

33. The only evidence before the High Court concerning this aspect of the case was given by the plaintiff, in one sentence on Day 2 at p. 17 where she said: -

> "And in Slovakia we normally use a big glass jug for making tea."

34. She also said that she had used a similar jug previously for making tea when she shared a flat with another couple from the Czech Republic although that jug was not produced in evidence nor was the couple from Czechoslovakia called. While this evidence might be regarded as just about sufficient to enable the trial judge to conclude that it was a custom in Slovakia to make tea in glass jugs, it is difficult to see how one could extrapolate that this was a widespread practice in Eastern Europe and in other parts of the European Union as the trial judge concluded.

35. Even if the trial judge was entitled to accept that evidence as sufficient to establish a custom in Slovakia, the onus still lay on the plaintiff at all material times to establish that Dunnes knew, or ought to have known, of this fact and that Slovakian nationals might purchase glass jugs for that purpose. There was absolutely no evidence to support such a conclusion but on the contrary, the plaintiff's own evidence was that she was well aware

that people in this jurisdiction use teapots to make tea and that was her experience having lived here for at least a year at the material time.

36. If this was a well-known custom about which Dunnes should have known, it is also surprising that, having sold more than 11,000 of these jugs, some at least of which had no labels, no other complaints of a similar nature were received. Further, as Dunnes' engineer Mr. Terry pointed out, if the giving of a warning to users of the jug was "mission critical", as he described it, this would be inconsistent with the fact that the label would be washed off before or after the first use of the jug and would no longer be present for the benefit of subsequent users other than the purchaser. If such a safety warning were required or necessary, it would need to be in permanent form such as by engraving on the glass. Although the trial judge held that Dunnes ought to have known that people like the plaintiff would use the jug in this way, there was in my view no evidence of any colour to support such a conclusion and if anything, the evidence was to the opposite effect.

37. It is difficult logically to see how Dunnes could have a duty to put a warning label on a glass jug but not on other items of glassware. There was much discussion during the trial about the making of various beverages such as Irish coffee, hot whiskey and gluhwein in ordinary glasses. If such ordinary glasses do not require warning labels, then it seems difficult to argue that glass jugs should, exceptionally, carry such labelling. The fact that an item is used for a purpose other than that for which it is reasonably intended cannot translate into a duty to warn against such unintended use.

38. There are an infinite number of things which one might purchase that could cause harm if not used for the intended purpose. The careless use of a sharp knife may result in injury, but it cannot seriously be suggested that the manufacturer or vendor of such items is under a duty to warn of the consequences of misuse. Indeed, the plaintiff's own engineer in cross-examination conceded that the accident was caused by misuse of the jug in question by the plaintiff.

39. The plaintiff was, as I have said, aware that tea is normally made in Ireland in teapots and if it was her intention to instead use an ordinary glass jug for that purpose, the onus lay on her to make the appropriate enquiry from staff in the store as to whether it was suitable. There was no impediment to her doing so and certainly no evidence was led to suggest that there were no staff members available at the material time whom she could have asked. Although the trial judge observed that the modern supermarket does not offer the customer the opportunity to make known the purpose to which a particular item is required, no evidence was led to support such a conclusion.

Conclusion

40. I am therefore satisfied that the trial judge was in error in concluding that the plaintiff had established negligence in this case. The same considerations apply with equal force to the plaintiff's claim in contract or indeed breach of statutory duty. Whilst reference was made, somewhat peripherally, to the Liability for Defective Products Act, 1991, s. 5 of that Act expressly refers to the use to which it could reasonably be expected that the

product would be put and for the reasons I have outlined, the use in the present case was not such a use.

41. Accordingly, I would allow this appeal, and dismiss the plaintiff's cross appeal and her claim.

42. As this judgment is delivered electronically, Whelan and Faherty JJ. have indicated their agreement with it.

43. With regard to the issue of costs, as Dunnes has been entirely successful in this appeal, in my provisional view, it should be entitled to its costs both in this court and the High Court. If the plaintiff wishes to contend for an alternative order, she will have liberty to apply within 14 days to the Court of Appeal Office for a brief supplemental hearing on the costs issue. If such hearing is requested and results in the order already proposed by the court, the plaintiff may be liable for the costs of such additional hearing. In default of an application for such hearing being made, the order proposed will be made.