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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **14/06/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

KATHLEEN McALLISTER

Plaintiff

and

ODYSSEY TRUST LIMITED AND EVENTSEC

Defendants

HORNER J

Introduction

[1] The plaintiff is aged 73 years. On 26 March 2007 she was taken by her son, Paul McAllister, to a Lionel Ritchie concert at the Odyssey Arena ("the arena"). This is an arena that has been used as an entertainment and sporting arena since 2000. It is owned by the first defendant. The stewarding for events which are held at it is provided by the second defendant. As the Managing Director, Mr Murphy, of the second defendant said, the first defendant provides the arena including the lighting and seating suitable for the occasion and the second defendant then delivers the stewarding solution.

[2] At 8.15pm before the main event, but during the support act, the plaintiff and her son decided to take their seats. The plaintiff had an aisle seat and her son's seat was one further in. They accessed their seats through Gate 22. The steward, Ms Kernaghan who was employed by the second defendant, erroneously formed the view that the plaintiff was unsteady on her feet. She accompanied the plaintiff and her son from behind flashing her torch to direct them to where their seats were. This required the plaintiff and her son to descend a number of steps which they did, the plaintiff's hand being held all the time by her son.

[3] When the plaintiff and her son reached the level, G, where their seats were at, Ms Kernaghan flashed the torch to indicate those seats. The plaintiff's son let go of

the plaintiff's hand and turned to take his seat two in from the aisle. The plaintiff lost her balance and fell down some four or five steps. She suffered quite significant injuries and was obviously very shaken.

[4] She now brings a claim against both defendants. The claim has changed somewhat with the passage of time, but 6 years after the accident involves the following central allegations:

(i) The arena was dangerous; the steps were insufficiently illuminated and the luminescent strips on the nosing were inadequate.

(ii) Ms Kernaghan failed to remain and illuminate the edge of the step where the plaintiff was standing and as a result the plaintiff must have stepped over the edge and lost her balance.

(iii) Ms Kernaghan was not properly trained and the risk assessment carried out was inadequate.

[5] Both defendants deny that they were in breach of the common duty of care which they may have owed to the plaintiff. Furthermore the second defendant denies that Ms Kernaghan was negligent in performing her duties as a steward.

Legal discussion

[6] Section 2(1) of the Employers Liability Act 1957 ("the Act") provides at:

> "(1) An occupier owes the same duty, the common duty of care to all his visitors, except in so far as he is free and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is the duty to take such care as in all the circumstances of the case it is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there".

[7] There can be more than one occupier and I conclude that both the defendants had sufficient control to be considered as occupiers. In any event if the second defendant was not an occupier it knew that if it failed to exercise reasonable care in stewarding the event a spectator could suffer injuries. In those circumstances there was a duty owed to the visitors by any steward engaged by the second named

defendant. Of course, the second named defendant would be vicariously liable for any negligent act or omission on the part of Ms Kernaghan.

[8] Clark and Linsell on Torts 20th Edition at 12.32 states:

> "If a visitor is injured in the dark by a danger which would have been obvious enough in the light, his right to recover depends to a large extent on whether he was invited to use the premises in the dark or not. If he was, the occupier has a duty to protect him by lighting, guarding or otherwise. Even then, however, it may well amount to contributory negligence to walk about in the dark without a light."

However it is important to remember that this refers to the dark. It does not refer to a situation where there is subdued or reflected lighting which does not prevent the safe functional use of premises.

[9] In determining whether what was done or not done by the occupier was in fact reasonable, and whether in the particular circumstances of the case the visitor was reasonably safe, the court is free to consider all the circumstances, such as how obvious the danger is, warnings, lighting, fencing, the age of the visitor, the purpose of his visit, the conduct expected of him and the state of knowledge of the occupier: see 12-29 of Clark and Linsell. Furthermore if risk assessments had been carried out and an accident occurs despite them, then there is unlikely to be any liability.

[10] So the court is engaged in what is essentially a fact sensitive exercise in trying to determine whether the plaintiff satisfied the onus of proof placed upon her that the defendants failed to exercise such care as was reasonable in all the circumstances.

Facts

[11] I have had an opportunity of seeing and hearing all the witnesses. I was most impressed with the plaintiff. She was straightforward and frank. I considered both her son, who I concluded feels some responsibility for what befell his mum, and Ms Kernaghan, the steward employed by the second defendant, who I considered felt she was personally on trial, did their best to give truthful evidence despite all the time that has passed. However both had a subconscious interest in giving evidence to suit their version of events. Consequently I concluded the records made at the time are a more reliable source of what happened than their present recollections which may have been affected by the passage of time and the interest which both had in the outcome of proceedings. The other witnesses seemed straightforward. I was impressed by Mr Murphy's achievements, qualifications and experience. Mr

Scott purported to give expert evidence on health and safety but he had ties with the second named defendant. He did not prepare a report or sign any declaration as to the expert's duty to the court. I therefore give very limited weight to his evidence. Mr Cosgrove and Mr McLaughlin, two Consulting Engineers who regularly give evidence in these courts, were both hampered by the fact that they had not inspected the area where the accident happened before changes had been made to the luminous strips. These changes which had been made years after the accident had nothing to do, I was informed, with the quality of the luminous strips previously in situ. Also the nature of the plaintiff's case changed and meant that their focus at the time they prepared the reports was somewhat different to the sharpened focus which is placed in certain areas during the court hearing.

[12] My findings are as follows:

(i) The plaintiff was on her first visit to the Odyssey. Her son had been there many times before. Both had been to concerts at other destinations such as the Waterfront.

(ii) The plaintiff, while a visitor at the Odyssey, descended some 20 steps successfully while holding her son's hands, not 5-6 as she remembers.

(iii) The plaintiff fell almost immediately after she let go of her son's hand. She was on the second level of row G almost immediately adjacent to her aisle seat.

(iv) The fall occurred immediately after Ms Kernaghan had indicated to the plaintiff and her son where their seats were. Ms Kernaghan was in the process of turning round but did see the fall. At the time her torch was not shining in the direction of the plaintiff or where she was standing.

(v) The plaintiff has no idea why she fell. All she knows is that she lost her balance, she could have tripped, slipped or placed her foot over the edge of the step. On her own evidence she was not looking where she was placing her feet. The most likely cause is that she mistakenly placed her foot onto the edge or over the edge and lost her balance.

(vi) It is clear that there is a risk in descending any stairs or arterial gangway. That risk was highlighted in the second defendant's risk assessment.

(vii) However, I do not accept that the arena was so dark as to make movement within it unsafe when the concert or support act was on stage. Of course, a torch was needed to enable a ticket to be read or the numbers of the seats in

the rows. That is not disputed. However the undisputed facts established before me are that:

(a) Hundreds of thousands of spectators have used the steps in similar circumstances as the plaintiff without accident.

(b) No complaints had been made of lack of any lighting by any spectators at this or any other concert or event.

(c) There is no evidence of any complaints about any problems with the luminescent strips at this concert.

(d) During the course of this concert, like all the others before it, spectators made their way up and down the arterial gangways without difficulty when the concert was ongoing in order to access the toilets or the bar.

(e) None of the contemporaneous documents relating to the accident into how it happened whether made by or on behalf of the plaintiff, the first defendant or the second defendant record any difficulty whatsoever with the lighting including the statement made by the plaintiff's son.

(f) There was building control approval for the construction of the Odyssey and no evidence to suggest that the lighting did not meet any British standard or other relevant standards for the construction of such arenas.

(viii) The background and ambient lighting available was functionally adequate for patrons to access the arterial gangways not only on this night but on other previous occasions.

(ix) I concluded that if the plaintiff had looked where she was placing her foot, she would have been able to see the edge of the step and the accident would not have occurred.

(x) I do not accept the plaintiff was disabled or unsteady on her feet. Ms Kernaghan may have obtained this impression because of the plaintiff's age and the fact that her son was holding her hand. If so, her conclusion was not warranted. I accept the plaintiff's evidence on this issue.

(xi) I also accept that Ms Kernaghan was adequately trained to carry out her job as steward. I accept that it was not her responsibility to illuminate the edges of the steps, which I have concluded were adequately highlighted but to read the tickets and, where necessary, the seat and row numbers.

[13] In those circumstances I conclude that:

(a) There was no breach by the first named defendant of its common duty of care.

(b) There was no breach by the second named defendant of its common duty of care.

(c) Ms Kernaghan, a servant or agent of the second named defendant exercised reasonable care in her role as a steward.

Conclusion

[14] In the circumstances I am constrained to dismiss the plaintiff's claim against the defendants. No one could fail to have the utmost sympathy for the plaintiff. Unfortunately as a plaintiff, she has to prove her case on the balance of probabilities. Unfortunately the evidence, especially the contemporary evidence and the records of the use of the arena by hundreds of thousands of others does not permit me to make a finding in her favour. On a personal note I hope she does make a full recovery and note that her candid testimony was refreshing. I wish to thank all counsel for their helpful contributions.