Duty of care to employees working off site: where lies the blame?

Mary Purtill (Partner)

A recent case before the High Court (*Thomas McMahon v Irish Biscuits Ltd and Power Supermarkets T/A Quinnsworth, 28 January 2002*) has examined the complex issue of duties to employees of another company and the related issue of the duty of employers to inspect premises of third parties where their employees carry out work.

Facts

The plaintiff had suffered personal injuries, following a fall from shelving, in the course of his employment as a sales representative with Irish Biscuits, while stocktaking in the Quinnsworth premises in Cavan.

As part of his employment with Irish Biscuits, Mr. McMahon was required to check his employer's stock in the storeroom at the Quinnsworth supermarket every Monday morning and to place an order for the stock required for the next delivery before 10.30 am. Evidence was given that he was under a time constraint in relation to the placing of the order to ensure the delivery required by Quinnsworth. On the date of his accident the plaintiff did not arrive until approximately 9:45am. As a result he only had about 40 to 45 minutes to check the stock, agree the order with the Quinnsworth manager and place an order by telephone to his employer's.

The task of checking stock for the purpose of preparing an order involved the plaintiff gaining access to the top shelf of a rack of metal shelving, which measured 9'3" from the ground. Access to the top shelves could only be gained by means of a mobile platform that was in the storeroom and available to the plaintiff.

However, on the date of his accident, the plaintiff could not use the platform, as there were Quinnsworth pallets in the aisle, leaving no room to position the platform. The plaintiff felt that he had no option but to climb the shelving to gain access to his employer's stock. In his evidence he said that he had asked a young employee of Quinnsworth, who was driving a pallet truck, to move the pallets and who had said that he would come back to move them when he had finished what he was doing. As the employee did not return with the pallet truck and because of the time constraint on the plaintiff to place the order, he started to climb the shelving. When he had climbed as far as the third shelf he heard a voice, turned towards it and his hand slipped and he fell to the ground.

It was of note from the plaintiff's evidence that his area manager was aware of the fact that the plaintiff, on occasion, climbed the shelving.

The plaintiff suffered an injury to his back. He had a previous back injury and also suffered from long standing degenerative changes in his lumbar spine. In addition to contributory negligence the judgment also dealt with the discount for a vulnerable back and the fact that there could have been an intervening illness despite the occurrence of the accident. These issues are not dealt with in detail in this article.

In his evidence the plaintiff stated that he complained to members of the Quinnsworth staff, both managers and floor staff, about the clutter in the stock room, which prevented the use of the platform provided. However, the Quinnsworth Assistant Manager, at the date of the accident, gave evidence that he had no recollection of ever receiving any complaints from the plaintiff regarding his inability to access the stock. He further indicated that he had never seen the plaintiff climb the shelving. He conceded that he was busy on Monday mornings and gave further evidence that there were signs affixed to the shelves, containing warnings such as "Think Safety – Always Use a Ladder", "Climbing up on the Racking is Forbidden" and photographs were produced showing those signs. The plaintiff stated that he never saw those signs and O'Donovan J. accepted that the plaintiff was not aware of them, nor were they ever brought to his attention. The Area Sales Manager of Irish Biscuits gave evidence that he was aware that the plaintiff was engaging in the potentially dangerous practice of climbing racks and shelves to check stock in the Quinnsworth premises, yet his employers took no steps whatsoever to ensure that the practice was discontinued. However, the plaintiff made no complaint to anyone in Irish Biscuits other than his area manager, who did not follow up the complaint.

The National Sales Manager of Irish Biscuits gave evidence to the effect that, in the absence of complaints, the company had no obligation to carry out any checks on the working conditions of its sales staff. She never visited the Quinnsworth premises in Cavan, her excuse being that, as Irish Biscuits had over 1,000 outlets for the sales of its products, it was impractical to check them all.

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LITIGATION NEWS

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Late Payments Regulations
New Regulations extending the regime for combating late payments in the commercial sector were introduced at the beginning of August. The Regulations are designed to protect small companies that sometimes can be forced out of business due to late payments from their customers. The Regulations now apply to all commercial operations as well as State bodies and impose a 30-day payment period for invoices unless otherwise agreed. Interest penalty payments attach to overdue invoices and the Regulations also deal with unfair contractual clauses.

Workplace stress
A pan-European campaign to tackle the problem of work-place stress was launched by the President of the European Parliament, Pat Cox, in July. Work-place stress is estimated to affect over 40 million employees throughout Europe with 50% to 60% of absenteeism related to stress-related symptoms. In recent years there has also been an increase in cases taken by employees against their employees for illnesses related to work-place stress. Information packs are available to all employers, regardless of size, and a number of events will be organised throughout Europe in October this year to coincide with the European Week for Safety and Health at Work.

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Please tear along perforated line & keep

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In the opinion of O'Donovan J. the plaintiff's practice of climbing the shelves was inherently dangerous, in fact, so much so that it might be suggested that the plaintiff was entirely the author of his own misfortune. He was satisfied, however, that on Monday mornings the plaintiff feared that there would be serious consequences for him if he failed to meet the deadline. He also felt that the plaintiff could not be faulted for not following up the complaint that he made to his area manager and, in particular for not putting more pressure on his employers to do something to ensure that he was not required to climb shelving for the purpose of checking stock in the Quinnsworth warehouse.

Liability

O'Donovan J. said that it was set in law that the plaintiff's employers owed him a duty of care. Reference was made to the dicta of the Supreme Court in the case of *Dalton v Frendo* (judgment of 15 December, 1997) "*to take reasonable care for the servants safety in all the circumstances in the case*". However, it was noted that this did not mean that Irish Biscuits was the insurer of the safety of Mr. McMahon in the course of his employment, but it did mean that the company was required to take all reasonable steps to ensure that he was not exposed to a risk of injury.

He noted that Irish Biscuits had a duty to acquaint itself with the facilities that were provided by its customers to enable its sales staff to carry out duties that were for their mutual benefit and to satisfy itself that those facilities and the system operated by the customers did not pose a threat to the well being of the staff. The Judge stated that Irish Biscuits "fell down badly" with regard to their duty. However difficult it might be to inspect all the outlets, he stated that the duty of care that Irish Biscuits owed to its employees obliged it to ensure that the facilities afforded to its employees by its customers enable its employees to carry out duties, for the mutual benefit of itself and its customers, and not threaten the safety of the employees.

The management of Irish Biscuits were aware of the risk to which the plaintiff was exposed while checking stock in the Quinnsworth warehouse and yet they did nothing about it. That failure amounted to negligence which significantly contributed to the plaintiff's fall and resultant injuries. The Judge rejected a submission by counsel for Irish Biscuits that, in the absence of any relevant complaint, it was unreasonable to expect an employer to inspect the premises of a third party in which members of the employer's staff were expected to carry out duties or make enquiries with regard to the system of work maintained for members of their staff in the premises of the third party for the purpose of satisfying themselves that their staff were not exposed to avoidable risks. O'Donovan J. felt that, if that were so, an employer would be entitled to abrogate the duty of care he owed to his employees in favour of a third party. Not only was Irish Biscuits negligent for its failure to act upon the complaint made by the plaintiff but also it was also negligent in failing to appraise itself of the system of work involving its employee that was tolerated in the Quinnsworth warehouse.

In relation to Quinnsworth, on whose premises the accident occurred, O'Donovan J. considered that he had no doubt that the supermarket was in a controlling position. It appeared that it did nothing to avoid the risk to the plaintiff, which he found was a negligent omission that contributed to the plaintiff's accident.

As to the issue of liability between Irish Biscuits and Quinnsworth, he felt that Quinnsworth were in control of the situation at the material time and had the best opportunity of doing something that might have avoided the accident. He felt that they were more to blame than the plaintiff's employers. The Judge was influenced by the fact that the plaintiff's visit to Quinnsworth was a scheduled one and that Quinnsworth should have ensured that the premises was in a state of preparedness for the plaintiff, which

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Post accident remedial measures do not imply pre-accident negligence

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In a recent Circuit Court case (*Imra Heaves v Westmeath County Council, 17 October 2001, Mullingar Circuit Court*) Judge McMahon concluded that, when considering the law on occupier's liability, measures taken by the occupier following an accident on his premises did not entitle the court to conclude that their initial omission inevitably constituted negligence at the time of injury.

Background

The plaintiff, together with his children, was visiting the grounds of Belvedere House in County Westmeath. While descending a set of what were described as rustic steps, Mr. Heaves slipped on an uneven indentation on the steps, which were partly covered with lichen and moss. As Mr. Heaves transferred his weight from his left foot to his right foot, he slipped and slid down the steps hitting his right elbow off a row of rocks, which formed a barrier on the right side. Mr. Heaves sustained injuries and sued Westmeath County Council as occupiers of the premises.

The judgment

Judge Brian McMahon, considered the law on occupiers' liability as laid down in the Occupiers Liability Act, 1995 ("the Act"). The judge was of the opinion that Mr. Heaves was a visitor to the premises as defined in the Act.

The standard of duty owed to "visitors", to make sure that any visitors to the premises do not suffer injury or damage by reason of any danger existing on the premises, was examined by the court and it was held that the duty upon Westmeath County Council was to take reasonable care and no more.

The law, therefore, only requires that the occupier take reasonable measures. McMahon J. stated that, in considering and assessing the occupier's conduct, care should be taken not to condemn with the benefit of hindsight. The judge made this statement with reference to the evidence given in court that, since the accident, Westmeath County Council had put up a warning sign and cordoned off the access to the steps.

McMahon J. held that such post-accident precautions could, for example, be the result of the insurer insisting on better risk management. He stated that, "*because we are more prudent and more cautious today does not necessarily mean that we were negligent yesterday*". The post-accident precautions taken by the occupier did not mean their original omission was negligent.

Westmeath County Council was found to have taken all reasonable precautions in the circumstances. It was found that they had, for example, a satisfactory cleaning system in place. The head gardener personally supervised the grounds and kept them in order with the aid of two assistants and any advice given by outside experts was implemented. McMahon J. also referred to the fact that the plaintiff, before commencing his descent on the steps, had stated that he had approached them with his eyes open and was fully aware of the nature of the steps that confronted him. He concluded that Mr. Heaves was in full possession of all the requisite knowledge that a warning sign, had there been one, would have given him and, therefore, he could not conclude that the absence of such a notice contributed to Mr. Heaves injury.

McMahon J. held that the plaintiff was a "visitor" as defined in the Act, but that there was no failure on the part of Westmeath County Council to discharge its statutory duty to take reasonable care in respect of dangers existing on the premises. Accordingly, the plaintiff's action was dismissed.

In this case the court concluded that the occupier had only to take reasonable care. It demonstrates that the occupier is not an insurer and cannot guarantee that an accident will never occur to a visitor on the premises. If an accident does occur then the court, when assessing the conduct of the occupier, cannot condemn with the benefit of hindsight and if post accident measures are taken then their original omission does not automatically mean that the occupier was negligent.

Office news

Photographed left to right, Graham Duggan (Senior Associate, O'Rourke Reid); Gerard Canavan (Special Olympics Fundraising Committee); John Reid (Managing Partner, O'Rourke Reid); Vivienne Darbey (Practice Manager, O'Rourke Reid).

O'Rourke Reid Law Firm handed over a cheque to the Special Olympics Fundraising Committee after its participation in the 2002 RTE Road Race at Belfield. We also held a raffle and auction and, to date, the firm has raised just over €18,000 for the Special Olympics World Summer Games to be held in Dublin in June 2003. We would like to extend our thanks to all the sponsors and our very generous clients.

Equality and the Equal Status Act, 2000

Graham Duggan (Senior Associate)

The Office of the Director of Equality Investigations ("the ODEI") is the main forum for investigation into claims of inequality under both employment equality and equal status legislation. The Employment Equality Act, 1998 prohibits discrimination in relation to employment and the Equal Status Act 2000 prohibits discrimination in the provision of goods, services, disposal of property and access to education. The focus of this article is to comment on the operation of the Equal Status Act, 2000 ("the Act"), its impact and how best to avoid claims on foot of its provisions.

Discriminatory grounds

The Act prohibits discrimination on nine distinct grounds:

1. Gender
2. Marital status
3. Family status
4. Sexual orientation
5. Religious belief
6. Age
7. Disability
8. Race
9. Membership of the Traveller community

Scope and procedure

The Act (which came into force on 25 October, 2000) prohibits discrimination in all services that are generally available to the public, whether provided by the State or the private sector. These include facilities for refreshment, entertainment, banking, insurance, grants, credit facilities, transport and travel services. In order to make a finding that discrimination has, in fact, occurred, the ODEI uses a comparative test. In practice this means that the ODEI must determine whether the complainant falls within one of the nine grounds; they then must make an evaluation as to whether or not that person was denied a service or treated less favourably than a person who is not a member of the complainant's social grouping.

In order for a complaint to be valid, the complainant must notify the respondent (the discriminating party) within two months of the alleged act of discrimination and inform them that they intend to refer the complaint to the Director of Equality Investigations. This notification need not be in a standard format but the ODEI strongly recommends complainants to use form ODEI 5. The complainant must then ensure that they lodge their complaint with the ODEI within six months of the occurrence of the act of discrimination. In exceptional cases the ODEI may grant an extension to this time frame.

Case law

The vast bulk of case law, to date, deals with complaints from members of the Traveller community relating to refusal of service in public houses, hotels, nightclubs and supermarkets. Traveller resource centres nationwide are playing a strong role in increasing awareness among members of their community as to their rights under the legislation. In recent times there has been a number of organised protests on the issue of service as well as demonstrations on the recently introduced provisions in the Housing (Miscellaneous Provisions) Act, 2002, which make the tort of trespass a criminal one.

In recent weeks the ODEI decided one of few cases of discrimination under the age ground. In this case, a 73 year-old man was refused permission to a Dublin pub. The pub management claimed that the man, and the group of people with him, was refused admission because of the pub's dress-code. The Equality Officer found that the complainant had produced prima facie evidence that he had been discriminated against because of his age and he was awarded €1000 compensation for embarrassment and stress suffered.

Redress

Where an Equality Officer upholds a complaint of discrimination, he/she may award compensation of up to €6,348.69 (£5,000) and/or require that a particular course of action be taken, such as allowing the complainant free accommodation and meals for a week-end in the hotel where the act of discrimination occurred.

Decisions may be appealed to the Circuit Court within 42 days from the date of the decision. If a decision or mediated agreement is not complied with, it may be enforced through the Circuit Court.

The inclusion of the mediation procedure displays awareness that alternative forms of dispute resolution can bring about a determination of the issue without the animosity and bad feelings associated with the adversarial system. One of the main advantages of mediated settlements, in relation to the defence of such actions, is that they are unreported and confidential and, as such, no bad publicity should attach to the alleged discriminating party.

Action

The Act is not yet two years old but a large number of complaints have been lodged and a high percentage of cases have gone on for hearing. By their nature, such claims attract publicity and have the potential to become defamation claims by way of a civil action in either the Circuit Court or the High Court.

Clearly, it is best to take a pro-active approach to avoid claims under the Act. Such steps could include the incorporation of equal status and treatment issues as sections in employee manuals, training your employees on the provisions of the legislation, or the addition of signs on the shop floor or behind the bar stating that all patrons will be treated equally and with dignity.

The aim of equal status legislation is to ensure that all members of society have equal access to services regardless of their race, gender or disability. If you are in the business of providing such services it is your responsibility to train your staff on the provisions of the legislation and to ensure that you have the proper procedures in place so that you will not find yourself the subject of investigation for discriminatory acts by the ODEI.

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they obviously were not. In that context the Judge apportioned blame for the plaintiff's accident 60% against Quinnsworth, 30% against Irish Biscuits and 10% contributory negligence on the part of Mr. McMahon.

This decision emphasises the onus on owners/occupiers at common law, and under the Occupiers Liability Act, to be aware of dangers on their premises, and indirectly highlights the fact that extensive risk assessments should be carried out. The duties of an employer cannot be abrogated and they have a strict duty to carry out inspections and risk assessments of premises, over which they may have no control, where their employees are obliged to work.