SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 55

PN1744/18

JUDGMENT OF SHERIFF R B WEIR QC

in the cause

PATRICIA GIBB

Pursuer

against

EDINBURGH WOOLLEN MILL LIMITED

Defenders

Pursuer: Cowie; Digby Brown LLP
Defenders: Quinn; DAC Beachcroft Scotland LLP

EDINBURGH, 24 June 2019

The Sheriff, having resumed consideration of the cause:

Finds in fact:

1. That the pursuer is 65 years old.

2. On 29 August 2017 she was working in the course of her employment with the defenders as a cook within the kitchen area of their premises at Belford Road, Fort William.

3. Her duties included conveying hot food from the kitchen to a hotplate serving the public café on the premises.

4. Shortly before 0900 hours one of the defenders' employees, Marion Welsh, had reason to fill a kettle, which she had brought from the staffroom for the purpose, with water

from one of the sinks near to the door between the kitchen and the room where the hotplate was located ("the hotplate room").

5. After filling it with water Ms Welsh replaced the lid on the kettle.

6. In the process of filling it Ms Welsh accidentally overfilled the kettle.

7. As Ms Welsh turned from the sink to make her way back to the staffroom, water spilled from the spout of the kettle and landed on the kitchen floor beside the sink.

8. Ms Welsh placed a "wet floor" sign in the immediate vicinity of the sink and shouted a warning to other members of staff in the kitchen that there was a spillage in the kitchen. She then mopped the floor with a dry floor mop.

9. Ms Welsh did not mop the floor area beyond the door between the kitchen and the hotplate room. At the time of the accident that door was wedged open.

10. After Ms Welsh had mopped the floor the pursuer uplifted a kitchen container of hot beans from the kitchen in order to convey it to the hotplate room.

11. At the time when she did so the pursuer was wearing a pair of plastic "crocs".

12. The pursuer had previously been warned by her manager that crocs were not appropriate footwear for use in the workplace.

13. At a point just beyond the door from the kitchen to the hotplate room an accident befell the pursuer. She lost her footing and fell to the floor, resulting in the widespread distribution of her container of beans to the immediately surrounding area.

14. In the aftermath of the accident no visible evidence of any water was observed by any witness in the immediate vicinity of the place where the pursuer lost her footing.

15. The defenders' then catering manager, Lorraine Mackinnon, was not on duty on the day of the pursuer's accident. She was advised that an incident had occurred and arrived at the defenders' premises about 30-40 minutes later.

16. After the accident the pursuer was seen by the assistant manager on duty on 29 August 2017, Margaret Weir, in the staff common room. In the hearing of both Margaret Weir and Moira Bryson, one of the defenders' catering assistants, the pursuer said to tell Marion Welsh that the accident had not been her fault.

17. The pursuer was driven by Margaret Weir to Belford Hospital. They were accompanied by Moira Bryson and arrived at the hospital at approximately 0930 hours.

18. On the way to Belford Hospital the pursuer repeatedly told both Margaret Weir and Moira Bryson to tell Marion Welsh that it was not her fault that she (the pursuer) had fallen.

19. Later on 29 August 2017, Lorraine Mackinnon, completed an accident report (no 5/5/72 of process). She did so after speaking to the pursuer about the circumstances of the accident. She recorded on the form *inter alia* "Slip on wet floor, signage was present…"

20. As a result of the accident the pursuer sustained a T2 wedge fracture of her thoracic spine.

Finds in fact and law

1. That the pursuer did not suffer loss, injury and damage as a result of any act or omission on the part of the defenders' employee, Marion Welsh.

THEREFORE:

(i) Assoilzies the defenders from the craves of the initial writ;

(ii) Finds the pursuer liable to the defenders in the expenses of the cause, save in so far as already dealt with; allows an account thereof to be given in, and remits same to the auditor of court to tax and to report.

Note:

[1] On 29 August 2017 the pursuer suffered a fall in the kitchen area of the Edinburgh Woollen Mill, Belford Road, Fort William, a retail outlet operated by the defenders. She suffered a painful T2 wedge fracture of her thoracic spine. The pursuer now seeks to recover damages from the defenders on the factual basis that what caused her to fall was a quantity of water, spilt by a fellow employee - Marion Welsh - from a kettle, in the passage from the kitchen to the hotplate room where food was served to the public. She maintains that the defenders are vicariously liable for the negligence of Marion Welsh who failed to take reasonable care (i) not to overfill the kettle, (ii) to mop up the water which she had thus spilt, and/or (iii) to mop up that water adequately, using a dry mop.

[2] The defenders do not dispute that the pursuer fell on the occasion averred. They do, however, dispute liability for the pursuer's fall. They do so substantially on the basis that the pursuer has failed to prove on the evidence that there was any water in the area where she fell. Quantum of damages is agreed between the parties at £8,000 inclusive of interest.

[3] I heard evidence over 2 days. During the pursuer's proof I heard evidence from the pursuer herself and Lorraine Mackinnon, a former catering manager of the defenders. I also heard evidence, interposed within the pursuer's proof, from Sarah Hamilton. During the defenders' proof I heard evidence from Marion Welsh, Margaret Weir, Moira Bryson and Neilina Hatch.

The evidence

[4] I do not find it necessary to set out in detail the evidence of the witnesses in this case. So far as relevant to the issues I had to resolve the facts are set out in the findings set out above. The evidence of both the pursuer and Marion Welsh was to the effect that, shortly

before the pursuer suffered a fall, Ms Welsh was filling a kettle with water in the sink area of the kitchen. She intended then to take it through to the staff room. Having filled the kettle she replaced the lid. She turned to make her way back to the staff room. As she did so, Ms Welsh allowed a small quantity of water (what she described as a "drip" or "dribble") to spill from the spout of the kettle (the lid of the kettle being closed at the time). Ms Welsh shouted a warning to members of staff working in the kitchen area. She placed a "wet floor" sign on the floor just beyond the sinks in the passageway leading to the food preparation area (the photograph, no 6/1/5 of process, p 15, refers), and dealt with the spillage using a mop which was stored nearby. According to Ms Welsh the mop was brand new and had been left out specifically for use in the kitchen. I believed her evidence in that respect.

[5] The pursuer disputed this version of events. She said that Ms Welsh had placed a "wet floor" sign at a location in the kitchen towards the bottom right of the photograph, no 6/1/5 of process, p 14, which, if correct, would place the spillage a number of feet further away from where the pursuer fell. The pursuer maintained that Ms Welsh used a damp mop to deal with the spillage, and failed to leave the floor in a dry condition.

[6] Either way, a few minutes later, the pursuer was conveying a container of hot baked beans from the kitchen to the hotplate room. She was wearing a pair of crocs on her feet. She passed through the door (which was wedged open) leading from the food preparation area, which is shown in the photograph, no 6/1/5 of process, p 17, to the hotplate room. She lost her footing on the blue coloured floor area in the photograph just mentioned, spilling the hot beans, and sustaining the injury averred in statement 5.

[7] In cross-examination the pursuer was pressed to explain what had caused her to fall. I was left with the clear impression that the pursuer had not, in fact, seen any water in the area where she fell. In a revealing exchange, the pursuer was specifically asked about the

quantity of water on the floor where she fell. She initially replied that there had been "a fair amount". When pressed further the pursuer said that she was sure that there had been water in the area where she fell because, if there had been none, she would not have fallen.

[8] It is also a feature of the evidence that, the pursuer aside, none of the witnesses witnessed the pursuer's fall. Of the witnesses led during the pursuer's proof, Lorraine Mackinnon arrived on the premises (by her estimation) some 30-40 minutes after the accident. Sarah Hamilton was in the food preparation area at the time of the accident. She appeared to have seen Marion Welsh in the sink area when some water was spilled. She did not, however, see the pursuer fall. Nor did she actually see any water on the floor. (Ms Hamilton was, however, prepared to volunteer the opinion that not enough water would have escaped the kettle to have affected the area where the pursuer did fall - an opinion to which, in the circumstances, I was not prepared to attach any weight).

[9] Of the defenders' witnesses, Marion Welsh was not a member of the kitchen staff and had left the kitchen area by the time the pursuer fell. Margaret Weir was the assistant manager on duty within the shop area. She was informed by Moira Bryson that the pursuer had taken a fall. Moira Bryson had involved Margaret Weir after observing the pursuer (at, she thought, about 0950 hours) and thinking that she appeared unwell. Neilina Hatch appears to have commenced work (as a sales assistant in the shop) after the pursuer fell. She saw the pursuer, in a state of discomfort, in the staff room talking to Margaret Weir and Moira Bryson while Margaret Weir was removing the pursuer's crocs. It was apparent that anything Ms Hatch had to relate about the circumstances of the pursuer's accident was related to her second-hand. All that she could say was that she had been told by Margaret Weir that the pursuer had fallen at the hotplate.

[10] Turning to the matter of footwear it was not disputed on the evidence that, at the time of the accident, the pursuer was wearing a pair of crocs on her feet. She wore them because they were comfortable and because the pursuer spent much of her eight hour shifts on her feet. According to her, no one had ever told the pursuer that the wearing of crocs in the kitchen was inappropriate. She had been wearing them without criticism for all the years she had worked in the kitchen.

[11] The issue of her footwear was another feature of the pursuer's evidence which was contentious. Lorraine Mackinnon denied that she had warned the pursuer about wearing crocs in the kitchen. Her evidence was at odds with that of Margaret Weir who told the court that, on the day following the accident, Mrs Mackinnon had stated in the staff room that she had told the pursuer before not to wear crocs in the kitchen area. Moira Bryson too said that the pursuer had been told by both Mrs Mackinnon and the unit manager, Ewan Gunn, that she should not be wearing crocs. Ms Bryson saw the pursuer's crocs in the immediate aftermath of the accident and was able to describe them as old and faded, with the soles being well worn. Neilina Hatch said that the pursuer knew that she should not have been wearing crocs on the day of the accident, and had told her that Lorraine Mackinnon had said they were not safe in the kitchen.

[12] Finally, it is necessary to relate that, according to the evidence of each of Margaret Weir, Moira Bryson and Neilina Hatch, the pursuer wished it to be made known to Marion Welsh that the accident had not been her fault. According to those witnesses the pursuer had stated as much, both in the staff room before she was taken to hospital and during the journey there in Margaret Weir's car.

Submissions

[13] Mr Cowie submitted that the evidence of the pursuer was both credible and reliable and consistent with Lorraine Mackinnon's broadly contemporaneous record of the accident (no 5/5/72 of process) which gave, as its cause, a slip on wet floor. There was no dispute that Ms Welsh had been responsible for spilling water on the kitchen floor. I was invited to conclude, substantially on the evidence of the pursuer herself, that that spillage extended to the area where the pursuer fell. Mr Cowie further submitted Ms Welsh's actions (i) in spilling water from the kettle and (ii) using a damp mop to clear the spillage amounted to common law negligence for which the defenders ought to be held vicariously liable.

[14] As for contributory negligence, Mr Cowie submitted that any reduction should be modest and reflect the following features of the evidence, namely (i) that the pursuer was obliged to carry a large tray of baked beans in front of her as she progressed; (ii) that she was entitled to conclude, from Ms Welsh's mopping of the spillage, that the passage where she fell would be free of hazards, and (iii) that the defenders were aware of her choice of footwear and had done nothing to prevent her from wearing crocs at work (cf *Palfrey* v *Morrisons* [2012] EWCA Civ 1917; *Salmond* v *Redpath Dorman Long (North Sea) Ltd* 1980 SLT (Notes) 39).

[15] Although Mr Cowie furnished me with an extensive list of authorities in support of his basic proposition that the defenders would be vicariously liable for any acts or omissions of Ms Welsh which caused or materially contributed to the pursuer's fall, Mr Quinn, for the defenders, did not dispute that vicarious liability would, on that hypothesis, be engaged. He did, however, emphasise that the duty owed by the defenders to the pursuer was one of reasonable care. There was no absolute duty on the defenders to *ensure* that the floor was at all times free of spillages.

[16] Mr Quinn submitted that I should have reservations about the credibility and reliability of the pursuer, on whose evidence the case was dependent. He compared her account of the accident to that given in *Baxter* v *Freshbake Frozen Foods Ltd,* Unreported, CSOH, 15 November 2000, a case in which the pursuer sought damages for a fall at her workplace but was unable to establish in evidence that the floor upon which she claimed to slip was wet. He submitted that the quality of the evidence was not such as to allow me to make a finding that the accident occurred in the manner averred by the pursuer. If he was wrong about that, Mr Quinn submitted that there should be a substantial finding of contributory negligence. That submission was predicated on (i) the pursuer's awareness of the spillage of a quantity of water shortly before her fall; (ii) the presence of the "wet floor" sign in close proximity, and (iii) the pursuer's inappropriate footwear (cf *Stalker* v *Greater Glasgow Health Board* [2013] CSOH 194).

Discussion

[17] In statement 6 of the record the pursuer avers that her claim is based on the defenders' *employee's* (my emphasis) breach of her common law duty to take reasonable care for the pursuer. Accordingly, the pursuer seeks to recover damages on the basis of the defenders' vicarious liability for the acts or omissions of Marion Welsh. I make that observation because, at times in the course of the proof, Mr Cowie appeared to float criticisms of the defenders in relation to the suitability of the pursuer's footwear, or supervision of her use of a particular type of footwear, namely crocs. Even if there was a basis on record for such a case (and I do not consider, on any sensible reading of statement 4 of the record, that there was) I would not have felt able to give effect to it. The evidence about the condition and suitability of the pursuer's footwear was little more than anecdotal.

I heard no evidence about the construction of crocs, their properties, and their particular shortcomings in a kitchen environment. Ultimately, I was prepared to accept that the pursuer had been told, prior to the accident, that she should not wear crocs while on duty. I believed the defenders' witnesses in that respect, and found unconvincing Mrs Mackinnon's denial that she had had to speak to the pursuer about her footwear. Even allowing for that evidence, however, I was left quite unable to form any view as to the suitability of crocs as footwear in a working kitchen environment or, more importantly, how they may have contributed to the pursuer's accident.

[18] Turning to the actual case of vicarious liability against the defenders, the pursuer's position in evidence was that Marion Welsh was at fault for over-filling, then spilling water from, the kettle she was carrying. She was also critical of Ms Welsh for then failing to clear the spillage with a dry mop. The trouble with either formulation of the position is that, for her to succeed in this action, the pursuer would require to establish that the floor in the area where she fell, that is to say the blue floored area in the photograph, no 6/1/5 of process, p 17, was in fact wet. That is what the pursuer offered to prove on record. But no witness spoke to seeing water in that location, either at the time of the initial spill or subsequently.

[19] In any event, on this and other points, I did not find the pursuer to be a reliable historian. When pressed on the matter, the pursuer herself seemed unable to say that she had seen water through the doorway to the hotplate room. At one point in her cross-examination she was reduced to saying that, because she had fallen, there must have been water present. That seemed to me to be a highly dubious assumption to make, especially given that (accepting the evidence of Ms Welsh on this point) it is unlikely that much water can have been involved in the initial spillage.

[20] Moreover, I thought the pursuer was mistaken in her evidence about where Ms Welsh had placed the "wet floor" sign. I did not accept that those witnesses who claim to have heard the pursuer say, in its immediate aftermath, that the accident was not Ms Welsh's fault, were mistaken. The pursuer's position was that the witnesses were wrong on that matter. However, I believed the evidence of each of Margaret Weir, Moira Bryson and Neilina Hatch, to the effect that at various points after the accident, and on her way to hospital, the pursuer had discounted Ms Welsh as being at fault. In submissions, Mr Cowie invited me to recognise that, if that was what she had said, the pursuer would have been shocked, distressed, and in pain at the time. That might in certain circumstances afford an explanation for what I believe was said by the pursuer. It was, however, never put to the pursuer and was, in any event, inconsistent with her position in evidence that the witnesses were simply wrong.

[21] There appeared to me to be a tension, derived from the terms of statement 4 of the record, between, on the one hand, the pursuer's averments concerning the purported failure of Ms Welsh "to adequately mop up the flooring" and, on the other hand, her averments to the effect that the floor where she slipped was wet *and had not been mopped at all* (my emphasis). The former position invited little more than speculation as to whether the condition of the floor which had been mopped may have contributed to conditions which made a fall more likely. On that point, I heard no evidence from any witness. But, in the final analysis, I was unable on the evidence to make any findings supportive of the essential factual premise upon which the case for the pursuer depended, that being that, at the point where the pursuer fell, the floor was wet. I have already indicated that I was unable to draw any conclusion from the evidence as to the involvement (if any) of the pursuer's footwear in what befell her. The point is that the pursuer set out to prove that she slipped on a wet floor

but did not, in my opinion, establish on a balance of probabilities that the floor where she fell was wet.

Quantum of damages

[22] I record that parties agreed damages in the sum of £8,000, inclusive of interest to the date of decree, with interest at the judicial rate thereafter. Since I was unable to reach any firm conclusion as to the significance of the issue of the pursuer's footwear to the circumstances of the accident I would not have been disposed to make any deduction for contributory negligence greater than the 10% suggested by Mr Cowie in his submissions.

Decision

[23] In the result, however, I have granted decree of absolvitor in favour of the defenders. Parties were content that expenses should follow success. I have accordingly found the pursuer liable to the defenders in the expenses of the cause, save in so far as not already dealt with.