Case No: CC/2008/APP/099

NEUTRAL CITATION NUMBER: [2008] EWHC 2343 (QB)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION (FAMILY)

Royal Courts of Justice

Strand, London, WC2A 2LL

12th June 2008

BEFORE:

THE HONOURABLE MR JUSTICE EADY

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BETWEEN:

ALDENHAM SCHOOL Ap

- and -

DEACON Resp

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Wordwave International, a Merrill Communications Company

PO Box 1336, Kingston –upon-Thames KT1 1QT

Tel No: 020 8974 7300 Fax No: 020 8974 7301

Email Address: tape@merrillcorp.com

(Official Shorthand Writers to the Court)

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Mr Mark Radburn (instructed by Everatt & Co) appeared on behalf of the Appellant.

Mr Daniel Bennett (instructed by Harris Fowler) appeared on behalf of the Respondent.

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Judgment

MR JUSTICE EADY:

1.

This is an appeal from a decision of Miss Fine, sitting as a Recorder at the Luton County Court on 12th December 2007, in respect of which Openshaw J granted permission. The nature of the claim emerges clearly from the particulars.

2.

The defendant, Aldenham School, owned and occupied and controlled the school of that name at Borehamwood in Hertfordshire and on 3rd February 2006 claimant was employed by the defendant as the school nurse and was at work. It is accepted that the Workplace Health Safety and Welfare Regulations 1992 applied.

3.

The usual school cleaner was called Anita and she had a regular practice of cleaning the linoleum floors in the school and of placing A frames at each end of the section she was working on, which consisted of wet mopping and then dry mopping the floor. But she was unfortunately off sick just before the material date, 3rd February 2006. In those circumstances the defendant had to hire a temporary cleaner and the one who was performing these services did not speak terribly good English, so it was alleged, although findings were made at the trial to the effect that her English was adequate.

4.
At all events on the day in question the claimant was walking around the medical building wearing rubber soled shoes with no heel. When she stepped into the corridor after returning from lunch she saw an A frame sign to indicate that the floor was wet, although the floor in the immediate vicinity of that was completely dry. She made her way along the corridor and found that the floor was also dry there. Towards the end of the corridor she walked into one of the bedrooms to check on a boy and then she made her way further along the corridor to the next room. Just as she approached that second bedroom, which was about 20 feet or so away from the A frame sign according to her case, the claimant slipped on the floor and fell heavily to the ground. She sustained injury. The floor where she fell was wet and that was evidenced to some extent by the fact that her clothes became wet when they were in contact. In the immediate vicinity of where she fell there were no A frame signs and the cleaner was around the corner at the time. There were no barriers or anything to prevent her walking on the area in question and no other signs to demarcate the dry from the wet areas. The lighting was by electricity.

5.
The basis of the liability pleaded was that in accordance primarily with Regulation 12.3:

"The defendant had failed to ensure that every floor in the workplace and the surface of every traffic route in the workplace was kept free from obstructions and from articles or substances which may cause a person to slip, trip or fall."

6.
The substance in question of course in this instance was water. There was another plea based on Regulation 12.1 to this effect, namely:

"To the extent only that the defendant argues that it was not practicable to keep the floor dry, the defendant failed to ensure that every floor in the workplace and the surface of every traffic route traffic route was constructed so as to be suitable for the purpose for which it was used contrary to the regulation."

There was also a criticism of lighting, but that is not material for present purposes.

7.
The complaint was amplified by reliance upon failure to dry mop the floor, failure to clean one half of the corridor at a time, demarcating wet and dry halves with signs or barriers. It was also said that to the extent only that the floor could not be dried or that a half of the corridor could not be left dry and safe, the defendant failed to place “wet floor” signs at the point at which the floor was wet.

8.
The injuries which the claimant suffered were in the region of her right hip and buttock.

9.

The outcome of the hearing in December was that the learned Recorder made an order that the defendant should pay the claimant £2,947.58 within 21 days. The claimant was also to receive her costs. Permission to appeal was refused. There was a finding of 50 per cent contributory negligence, which is not the subject of challenge.

10.
I turn to the material part of the learned Recorder's judgment which really begins at paragraph 23. Before I do so, I remind myself that under the modern appeal regime my task is to approach the matter by way of review rather than re-hearing. I am concerned, therefore, with the situation which confronted the Recorder. There is at this level obviously a disadvantage in the sense that although I have a transcript of the judgment itself, there is no transcript or agreed note of the evidence that was given and counsel have to some extent been placed in difficulties in making their submissions in the light of their own recollections. That is an inherent difficulty in this type of appeal. But at paragraph 23 of the judgment the learned Recorder made the following observations:

"The question is whether the defendant can show that the risk is insignificant compared to the sacrifice involved in not cleaning the floor at this time. The defendant has to clean the floor and despite claimant's counsel's submissions to the contrary, I find that wet mopping is appropriate for a medical centre. The defendant's evidence was that a warning sign was put up and the cleaning was carried out at a quiet time (lunchtime). The issue that I have to decide is whether as submitted on the claimant's behalf it would have been reasonably practicable for the floor to have been cleaned after 6.00 pm when Ms McGinty(?) said the corridor closed. Although the claimant has not pleaded a failure to mop the floor at an appropriate time in the Particulars of Claim, the claimant has pleaded a breach of the regulations and it is for the defendant to prove that they took all reasonably practicable steps to keep the floor free from water.

"The defendant engaged a cleaner who was instructed by Mrs Deacon, the claimant. The cleaner put up a sign and mopped appropriately. The defendant has not established, however, that it was not reasonably practicable to arrange the cleaning to be performed outside school hours. Although the school is a boarding school, Ms McGinty confirmed that the corridor is normally closed after 6.00 pm.

"The burden of proof falls on the defendant to show that it was not reasonably practicable to keep the floor free of a substance at that time. I find that the defendant has not discharged the burden of proof and has not shown that it was not reasonably practicable for the defendant to clean the floor at a time when it would not be in use during the school day. Therefore, I find for the claimant and I also find that the claimant contributed to her misfortune."

11.
It will be observed that twice in that passage of the judgment the learned Recorder made reference to the evidence of Ms McGinty, the headteacher, to the effect that the corridor was normally closed after 6.00 pm.

12.
There is a further reference in the judgment (at paragraph 13) to the same point. I am told that it was in the course of cross-examination that this evidence emerged. It is not, I think, disputed that Ms McGinty did actually say that the corridor was closed.

13.
In the course of his submissions to me Mr Radburn for the appellant has suggested that this cannot be taken at face value and suggested at one point that the effect of what the witness had said was that

the office closed at 6 o'clock. He sought to rely upon the proposition that the effect of the evidence taken as a whole was that the corridor had to remain open at all times because it was a sick bay, sick wing, and that there would be access throughout that period.

14.
That submission is dealt with in two ways by Mr Bennett on behalf of the defendant. First of all, he says that there is no way round the evidence and the learned Recorder was entitled to make a finding in respect of the evidence before her from Ms McGinty, namely to the effect that the corridor was closed. It does, I have to confess, seem a little odd when it is taken literally because if there were sick children along the corridor it is unlikely that it would have been locked up and inaccessible to anyone, but nevertheless the Recorder had to deal with the evidence confronting her. It was always open for it to be developed or refined or explored in the course of examination and cross-examination or re-examination.

15.
The second way in which it is dealt with I shall come to shortly because it is addressed in a submission to the effect that at least the evidence supports the proposition that the corridor would have been less busy and that it would accordingly have reduced the overall risk to persons using the premises if the cleaning had been carried out after school hours and in particular after 6 o'clock.

16.
I turn to the relatively narrow grounds of appeal, which are to this effect: (a) the learned Recorder was wrong in fact, insofar as she concluded that by failing to cause the medical centre floor to be cleaned after 6.00 pm, when the medical centre was "closed", the defendant failed to ensure that no-one, and in particular the claimant, would have had to use the floor whilst it was in the process of being cleaned, since all the bedrooms in the medical centre were full, the claimant was on call and access was required to the corridor at all times; (b) the Recorder was wrong in fact and in law, insofar as she concluded the defendants had not done all that was reasonably practicable to keep the floor free from substances likely to cause persons to slip for the purposes of Regulation 12.3 of the 1992 Regulations by failing to ensure that the floor was cleaned after 6.00 pm. In addition to the matters stated above, the floor was cleaned on the claimant's instructions during her lunch hour. The claimant returned to use the corridor in the middle of the lunch hour at a time when she knew it was being cleaned.

17.
There is, in fact, a respondent's notice also, which relied upon two arguments which had been addressed to the Recorder but which she had not herself dealt with in the light of her finding on the claimant's primary point which was in her favour. Those matters have been addressed in submissions to me today by Mr Bennett and they can be summarised under the headings: Why was it not reasonably practicable for the floor to be dried by 12.30? If the floor could not be dry by 12.30 why was the wet section opened to pedestrians? Those are two matters addressed in the respondent's notice, but primarily of course the respondent seeks to uphold the findings of the learned Recorder, particularly in the part of the judgment from which I have quoted.

18.
The submissions in respect of this were as follows. The respondent (that is to say the claimant) worked from 8.00 am in the morning until 6.00 in the evening on Tuesdays until Saturdays. The witnesses who were called worked similar hours. The Recorder addressed the issue of cleaning after 6.00 pm, although she had not contemplated the possibility of cleaning before 8.00 am, which would

have been subject to similar arguments no doubt. The evidence called on behalf of the defendant/ appellant was that all the staff finished by 6.00 pm and the corridor in the medical centre was closed by 6.00 pm. That, of course, refers back to the evidence of Ms McGinty. None of the appellant's witnesses apparently used the corridor after 6.00 pm.

19.
The evidence of the respondent/claimant was that while she remains on call 24 hours as the nurse, she was primarily in the medical centre from 8.00 am to 6.00 pm and it would only be if she were specifically called out that she would be required to attend and use the corridor outside those hours. That evidence as such was not challenged.

20.
I was reminded both in Mr Bennett's skeleton argument and in the submissions today of the decision of the Court of Appeal in Merseyside Fire & Civil Defence Authority v Bassey(?) [2005] EWCA Civ 1474 of which I have been helpfully supplied with a copy. The learned Recorder had that authority drawn to her attention also. The particular principle for which reference was made to it is to be found in paragraph 12 of the judgment of Tuckey LJ where he said:

"This is not a question of how this accident could have been avoided, rather it is a question of balancing the known risk against the effort and expense of eliminating it or reducing it."

21.
Mr Bennett submits that the simple fact that the corridor was quieter after 6.00 pm is enough to establish liability, even if the new facts referred to in the permission decision (to which I have not made reference and do not need to) are added to the evidence.

22.
Health and safety guidance included the recommendation to:

"... clean during quiet hours when pedestrians are not around. Whilst a wet floor may cause a person to slip, trip or fall at any time, it is self-evident that the fewer people around, the less busy the corridor, the less likely it is that someone will slip."

23.
It is this approach to reduction to risk which was also adopted, submits Mr Bennett, in the case of Anderson v Newham College of Further Education [2002] EWCA Civ 505.

24.
Mr Radburn for the appellant has submitted that the evidence does not really support the proposition that the corridor would necessarily be any less busy from 6.00 pm onwards as compared to lunchtime and has also submitted that the statistical chances of a person having an accident would be exactly the same. I am not persuaded by either of those arguments. First of all, the Recorder was entitled to conclude as a matter of ordinary inference that the fact that staff went off duty before 6.00 pm would make it likely that there would be less people using the corridor, and what is more that the claimant herself would be less likely to use the corridor when she was only on call and not making her regular daytime routine use of the corridor. Furthermore, it may be true that one person would be subject statistically to the same risk of injury on a visit, but the point of the submission based on Tuckey LJ's judgment is that the overall risk of an accident occurring to a person would be reduced inevitably if there were less people using the corridor.

25.

It seems to me in all these circumstances that the Recorder, dealing with the evidence that was before her, was entitled to come to the conclusions she reached in paragraphs 23 to 26 which I read out earlier. It may seem odd (and I have already indicated I agree that it is a little odd) to have the notion of a corridor being closed. It is less odd, however, if one treats this evidence, as one is entitled to, as showing that the corridor was less busily used during the later period which the Recorder had in mind, namely after 6.00 pm.

26.
I have briefly highlighted the alternative arguments raised in the respondent's notice. The Recorder did not deal with them and I think it would be otiose for me to deal with them in the light of my overall conclusion that the Recorder was entitled to reach the conclusion she did. Accordingly, I would therefore dismiss the appeal.