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Judgment: approved by the Court for handing down | *Delivered:* **17/5/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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LYNSEY KELLY

-v-

C & F INNS T/A COPPERFIELDS

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MORGAN J

[1] The plaintiff claims damages for a nasty fracture of the left ankle sustained by her as a result of a fall in Copperfields Bar, Belfast in the early hours of 28 October 2001. She claims that her fall was caused by the defective state of a carpet at the top of steps leading on to a wooden floored area. The defendant denies that the carpet was defective. By agreement between the parties I heard the liability evidence and this is my determination on the liability issue

[2] The plaintiff said that on Saturday 27 October 2001 she was at home with her parents, her sister Jacqueline and her boyfriend Michael Blower until 11 p.m. A close friend's sister had arranged a 30th birthday party at Copperfields Bar but she was undecided as to whether she should go. She was persuaded by her sister and her boyfriend that she should attend and they got a taxi arriving at the bar about 11:15 p.m. She was familiar with the bar having been there for a meal before that. They went up to the first floor and the three of them formed a table with the plaintiff's girlfriend. Her boyfriend got her a glass of beer which was her first drink that night. The layout of the bar comprised a wooden floor area with a number of slightly raised areas within it. In particular there were three steps leading from the wooden floor area up to the carpeted bar area. After her first drink her boyfriend asked her to come with him to the bar. She used the steps leading up to the raised area on which the bar was positioned. She waited some five or six minutes. Her boyfriend bought a pint of beer for himself and a glass for her. She then walked in front of her boyfriend in order to make her way back to her table. As she reached the top of the steps her left heel caught and she lost her footing as a result of which he fell onto the steps so that her head was

towards the bottom of the bottom step. She had been wearing sandals with medium to low heels. She was unable to walk and her boyfriend carried her to where she had been sitting. Her ankle started to swell and was extremely painful. She said that she looked to see what had held her left heel back and saw a tear in the carpet around the middle of the top step. She said it was the size of a teacup. It was circular with the sides torn. She described the carpet as dark, very old with drink spilt on it and squashed in. She said that there were no nosings on the steps. She said that she remembered that there were other parts of the carpet which were frayed around the circle where she fell. She also said that the area of the steps was worn. She said that there were staff collecting glasses and two bouncers but that none of them came over to her. After 15 minutes her boyfriend came back to lift her down the stairs to await her ambulance. She had to wait outside on a stool which was provided for her.

[3] In cross-examination the plaintiff said that she developed a back problem within weeks of her accident. She said that it started in her left leg and travelled to the left side of her back. It was very sore. It had never gone away. She still suffered pain in her left ankle, left leg, neck and left arm as well as her back. All came on within a few weeks. She agreed that she had seen Mr Peyton, the surgeon, on 13 February 2002. She agreed that she had told him about the left ankle but had not mentioned the back, leg, neck or left arm. She said that she did not think it necessary to tell him about those other injuries. She could not explain why there had been no entry in relation to any of those injuries in her medical notes for about two years. She was referred to a medical report prepared by Dr Bell in August 2003 and agreed that she must have said at that time that her ankle was painful intermittently. Dr Bell reported that she was making excellent progress with only intermittent pain. Her evidence was that she had been in constant pain.

[4] Her admission record to the hospital referred to alcohol. She said that she had only consumed a glass of beer that night. She was shown photographs of the steps taken by an investigator on 21st March 2002. Those photographs showed nosings on each of the steps. She was sure that there were no nosings at the time of her fall. She was asked had she had seen any signs of wear and tear as she made her way to the bar. She said that she had seen some signs on the way up. She also said that there were frayed areas up at the bar. She said that there were ripped areas at different parts of the carpet and there were also areas that were old and frayed with drink spilt on them. She said that she had seen fraying or ripping on the second step but agreed that she had not mentioned this before. She said the whole of the carpet was old and frayed. She agreed that she had not described any fraying on the nose of any of the steps. She said that she saw the hole when she was in the process of falling. She said she twisted to the left as she fell. She had tried to protect her face with her hands. It was pointed out to her that in

opening the case her counsel said that it was only when she was prone that she saw that the carpet was frayed and defective.

[5] Michael Blower was the plaintiff's boyfriend. They had been going out for about one year at the time of the accident but their relationship ended 2 years after the accident. He remembered arriving at Copperfields Bar at around 11:15 p.m.. He got a round of drinks and remembered that he bought a pint of beer for himself. He and the plaintiff went to the bar to get another drink. It was fairly busy and he was at the bar five minutes before he got served. He intended to return to their seats. The plaintiff was ahead of him and he was 1 or 2 yards behind her. As the plaintiff approached the steps her left heel snagged on a piece of carpet causing her to fall. She fell forwards twisting to the left and ended up partly on the steps and partly on the floor below. He said that he put the drinks down to lift her up and noticed the carpet was worn and threadbare. He could not say exactly where this was as it was only a glance. He had no recollection of the nosings in the investigator's photographs and was almost 100% certain that there were no nosings. He approached 2 security men and one member of bar staff downstairs to ask for the manager but the staff said that no manager was on. He eventually carried the plaintiff downstairs and somewhat reluctantly bar staff provided her with a stool.

[6] He agreed in cross-examination that he had noticed nothing untoward about the carpet on his previous visits to the bar that evening. He said that he had not seen the plaintiff twist her head round as she fell to look at her left heel. He said that he noticed that her left heel snagged on the carpet as she fell and he noticed that the carpet was in a deteriorating state as he picked her up. It looked like the left heel had caught but he could not say what had caused it to catch. He said that he only glanced at the carpet and saw a worn and threadbare patch at the top of the stairs. He did not see a tear. He did not see any other pieces of torn carpet. He believed that he would have remembered if there had been nosings on the carpet. He agreed that he had not mentioned the defective state of the carpet to anyone on the premises.

[7] The plaintiff's sister did not see the accident but says that after the plaintiff left for hospital she went to look at the area where she fell. She glanced over and noticed a worn patch at the top of the stairs. She says that she mentioned this to a member of staff. She says that there was a rip on the carpet close to the edge. In cross-examination she said that she had walked right over to the stairs and looked up. She said that she had seen a tear and then said that it was more like a worn bit of thread on the carpet. She said that she was extremely close to the worn and torn area and was looking down at it. She said that patch of worn and torn area was about 9 inches long. She said that she could not remember looking at the second step. She said that there were no nosings on the steps. She agreed that she had not felt it necessary to point out this tripping point to management on the premises.

[8] Mr Kealey, consultant surgeon, established that the injury was consistent with the account given by the plaintiff. He also agreed in cross-examination that it was consistent with a twisting of the ankle.

[9] Mrs Larmour is an experienced insurance loss adjuster. She was instructed to investigate the accident and visited the premises on 21 March 2002. She was familiar with the premises as they were close to her office and she had visited them on a number of occasions. She took the two photographs showing the steps with nosings during her investigation visit. At that visit she examined the nosings and formed the view that they were not new. The carpet itself was very satisfactory. There was slight deterioration in the main thoroughfare up the steps. There were no rips and no tears and no bare patches. There were no frayed edges or holes and no signs or repair. She had never noticed any defect in the carpet on her previous social visits to the premises.

[10] She agreed that the letter of claim dated 29 November 2001 was specific and referred to the plaintiff's heel being caught on frayed carpet. She said that she had asked the insured for witnesses and was told that the accident had not been reported at the time. She had no note of inspection of any accident book entry. The insured told her that the carpet had been laid about 12 months prior to her inspection. She had asked for documents in relation to that but they were not available at that stage. She said that she had checked the carpet at the accident locus by getting down on her knees and running her hand over it. She did not recollect seeing invoices from Antrim Contract Carpets Ltd at the time of her inspection. She agreed that it was unlikely that the carpet in the bar area was a single piece and she agreed that she had not located the joints in the carpet.

[11] The final witness was Mr McHugh who had been the owner of the premises at the relevant time. He said that he had taken over the lease of the premises at the start of 2000 and surrendered the lease in 2003. He was now a self-employed taxi driver. He had carried out a refurbishment of the premises in March 2000 and had replaced the carpet. He produced a faxed copy of a sales invoice from Antrim Contract Carpets Ltd for 30 and 31 March 2000. The invoice only referred to the carpet and did not refer to nosings, nor did it refer to fitting. Mr McHugh claimed that both were included in the price. He said that no further work was done to the carpet between March 2000 and the inspection in March 2002. He said that he had obtained these documents when his accountant had returned to him the financial records of the business which he kept in his garage. He had searched through the records for 2000 shortly before the case to obtain these copy invoices. He agreed that he was entirely reliant on his memory as to whether or not any repairs had been carried out to the carpet. He said that the nosings had been in place since the fitting of the carpet in March 2000.

[12] This case turns upon whether the plaintiff satisfies the court on the balance of probabilities that the carpet was defective at the time of her fall and that her fall was caused by the defective carpet. The plaintiff's evidence was unsatisfactory. Her description of the defects in the carpet on cross-examination was substantially beyond the criticisms that she had made in her direct evidence. Her description of the tear that caused her fall appears to be unsupported by any other witness. Her account as to when she first saw the tear contradicts the manner in which the case was opened by her counsel. I consider that the evidence of the plaintiff's sister was also unsatisfactory. She initially described a glance at the offending area. She then suggested that she had carried out an inspection by walking over to the area and looking down. The defect that she described was entirely different from that described by the plaintiff. The evidence of Mr Blower was careful and measured. He described a glance which caused him to think that a portion of the stair was worn and threadbare. He did not identify any defective portion of carpet which caught the plaintiff's shoe. Although he strongly believed that there were no nosings on the steps he allowed for the possibility that he was wrong on that.

[13] The evidence of Mrs Larmour was similarly careful and thorough. She supports the defendant's case that the carpet was not defective but evidently she is dependent on Mr McHugh for the fact that the nosings were in place at the time of the accident and that no repair work had been carried out to the carpet after the fall. Mr McHugh had been slow to produce records in relation to the carpet and had not checked his records for evidence relating to repairs to the carpet. His records did not expressly deal with the nosings.

[14] If the plaintiff is correct it appears that Mr McHugh must have arranged for the replacement of substantial quantities of the carpet in this area and the construction of nosings and has denied doing so with a view to defeating this claim. Having heard his evidence it seems to me unlikely that he would have considered it appropriate to embark on such an exercise and if he had I consider it likely that Mrs Larmour would have detected differences in the carpet at the time of her inspection in March 2002. On the balance of probabilities I consider, therefore, that the state of the carpet at the time of the accident was similar to that at the time of Mrs Larmour's inspection and I am further satisfied on the balance of probabilities that the carpet was not at either time defective. Accordingly I must dismiss the plaintiff's claim.