THE HIGH COURT

[RECORD NO: 2015/3422 P.]

BETWEEN

MICHAEL KELLY

PLAINTIFF

AND

TRANSDEV DUBLIN LIGHT RAIL LIMTED

AND

TRANSPORT INFRASTRUCTURE IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Hanna delivered on the 30th day of November, 2018.

1. The plaintiff was formerly a tool-maker and is currently a tattoo artist. He was born on 1st August, 1975 and is currently 43 years of age. He lives in Malahide, Co. Dublin. He is an impressive person; a confessed alcoholic who is now sober. He has faced challenges in his life, contributed to substantially by alcohol abuse. In his spare time he gives talks to schools, prisons and meetings of Alcoholics Anonymous to discourage young people from alcohol abuse and to encourage others suffering from the disease of alcoholism. He deserves commendation for this.

2. Around the time of this accident, the plaintiff had been homeless for some time and was living in a hostel, under the auspices of Sr. Consilio. This hostel was in Gardiner Street in Dublin and operated on the basis of a strict regime of times for meals, worship, bedtime and so forth. The establishment provided both shelter and aid to persons like the plaintiff meeting challenges such as he then did.

3. On the day of his accident, Saturday 20th October, 2012, the plaintiff was engaged to give a talk to fellow sufferers from alcoholism in Dundrum. To this end he took the Luas light rail network from central Dublin out to Dundrum using the Green Line. The accident, of which he complains occurred on the eastern platform of Dundrum Luas Station. The defendants are the occupiers and operators of this station and of the Luas system.

4. The plaintiff had never taken the Green Luas line before, although he had used the Red line on occasion. A distinguishing feature between the two which the plaintiff highlighted (he was not contradicted) was that the Red line stations and stops were at ground level and did not have "above road" platforms requiring stairs and/or elevators to gain access to same. Dundrum Station did and had access by means of stairways and an elevator. The plaintiff was new to this. He suffered his injury while attempting to access the eastern platform through an unauthorised route. While attempting to clamber over a locked gate his left (non-dominant) hand made contact with a rounded protrusion on top of a steel fence. He suffered an extremely nasty de-gloving injury to his left ring finger when he jumped down leading, ultimately, to the amputation of that finger and a disfiguring and debilitating permanent injury to his left hand. He seeks to establish liability on the part of the occupiers and operators of the station for this injury.

5. In evidence, the plaintiff described how the regime in Sr. Consilio's establishment in Gardiner Street was strict in that if you missed your dinner at 1 o'clock, that was that. You were not fed until the next meal time. This was on his mind at all material times, although he did say he was not in the act of rushing to catch a particular train when the accident occurred.

6. He described how he was going to address an Alcoholics Anonymous meeting on the morning of Saturday 20th October, 2012. Having arrived at the Luas station in Dundrum he was met by a representative of the organisation who took him to a motor car and drove him to address the meeting, a journey which took about five minutes.

7. Dundrum Luas station has two platforms facing east and west respectively. Travelling from town one would arrive on the east platform which is bound, although not in parallel, by Taney Road. The pedestrian access (and pick up point for the plaintiff) is on Taney Drive. The eastern platform is accessed by a laneway and stairway off Main Street in Dundrum. In addition, there is also a lift or elevator on Main Street. Dundrum Town Centre is located approximately 500 metres up Main Street, in a southerly direction. This is the starting point for Mr. Kelly's journey leading to the injury which he suffered.

8. After the meeting he was dropped back to the Dundrum Centre where he had coffee with a person or persons involved in the meeting. He declined the offer of a trip to see a soccer match and was directed towards the Luas station. He was pointed down the road and he could observe the bridge in the distance as he proceeded along Main Street in Dundrum. As he neared the bridge, a laneway to his right provided access to the pedestrian stairway to the station. There were two signposts pointing to the Luas station, both intended for the benefit of pedestrians. The first of these was at the laneway opposite a corner shop and pointing at an oblique angle towards the steps at the end of a laneway. The other pedestrian sign was near the base of the steps. As the plaintiff approached the Main Street pedestrian sign, he claims his view of it was obscured by two posters apparently advocating support for a referendum which was taking place at the time. These were on a lamp standard positioned just over four metres or approximately fifteen feet in front of the pedestrian sign. The plaintiff took photographs of the *locus in quo* approximately one week later and assured us (he was not contradicted) that the posters were in exactly the same position as they were when he wandered towards and past them the previous week. Two of the photographs are taken from central positions on the footpath at diminishing distances approaching the posters. These, as presumably they are intended to do, demonstrate that the posters appeared to obscure the Main Street Luas sign as one directly approached the lamp standard. However, it would seem that the sign would have been visible as one passed the lamp standard. Indeed, as one would have been walking at some distance to the right of the lamppost to pass it (possibly even to the left) the Main Street pedestrian sign would have become apparent before one came immediately abreast of the lamppost. Therefore, assuming a normal walking pace, the plaintiff would have had not less than three seconds and, probably, a little more time in which to observe this first sign.

9. This sign directing pedestrians towards the Luas station was a standard directional pedestrian sign with a tapering, indicative end and was 20 cm in height and 70 cm in length. It was positioned on a pole at a height of approximately 2.5 metres from the ground. This directed pedestrians up the laneway towards the stairway where another, identical sign pointed them up the stairway towards the Luas station.

10. The plaintiff says that he missed both signs. He claims his view of the Main Street sign was obscured by the campaign posters (at a preliminary stage he threatened proceedings against the Fine Gael Party who were responsible for the posters on the lamppost). He could not dispute the fact that as he approached and had to go around the lamppost, the pedestrian sign was there for him to see. He says that he did look up to his right up the laneway. There were a number of vans there on that Saturday morning (this was around 12 o'clock) and several workmen. He says that these obscured his view of the other pedestrian sign. In addition, there was a tree in the vicinity of the sign which has since been felled either by storm or design and that this contributed to his inability to observe the second pedestrian sign. Again, his photographs taken approximately one week after the incident seek to demonstrate this. The material photograph is not of much help since it is taken in poor light and from a central position on the laneway. It does show a number of vans. Of itself, it is not reliable to support the proposition that the pedestrian sign was not visible to the intending passenger. However, part of the structure of the Luas station was visible to him.

11. He proceeded onwards to the lift which was in the vicinity of the railway bridge. He pressed the button but found that nothing was stirring after about 30 seconds and he assumed that it was out of order. This lift was located some 55 metres further along Main Street and around 20 metres from the junction of Main Street and Taney Road, in Dundrum. No issue arises from its state of functioning.

12. The plaintiff then walked under the railway bridge. This is a long span bridge over Taney crossroads. Underneath the bridge, there is a concrete abutment sloping upwards at an angle of approximately 45 degrees and bound on the Taney Road side by a grass embankment. At the top of the embankment there was a service area which was fenced and gated off. (I will return to this in a moment).

13. The proposed route for pedestrians was via Taney Road to a distance of approximately 120 metres from the junction of Main Street and Taney Road. There was a pedestrian signpost situated there and this provided direct access to the southbound platform on the east side of the station.

14. The total distance for pedestrians between the western and eastern entrances is in the order of 330 metres. Mr. Kelly proceeded to pass the bridge having noted what he described as a "goat path" leading from the road up towards some steps. He walked a bit up Taney Road but did not see the pedestrian sign pointing to the entrance that he was then approaching. It is probable that he would have observed it if he had walked a little further. He then decided to double back and try and access the platform on the eastern side of the bridge. As I have already noted, under the bridge there was a concrete abutment with a grassy embankment beside. These inclined upwards from the pavement at an angle of approximately 45 degrees. Although the plaintiff maintains that there was a pathway of sorts (the "goat path") apparent to him at the time, this is not readily visible in any of the photographs taken of the scene either one week later or some years afterwards in preparation for the hearing of this case. It would seem probable that even if there was some kind of track present at the time, it is clear that this was not of a nature, given all the circumstances, which presented to a pedestrian at the time as an approved entrance for members of the public to gain access to the Luas platform.

15. Having ascended the embankment, one was met by a barrier gate, which was locked, fencing and stairs and a further barrier gate at the top of those stairs. This was a service area intended to facilitate access by service personnel to doorways under the bridge, through which electrics and other matters pertinent to the running of the Luas could be reached for repair and maintenance. This was not an area intended for access by members of the public seeking to use the Luas or to gain entrance to the platform for the purpose of so doing. There was no sign on the initial barrier gate indicating that entry was not permitted. Nonetheless, it was at the top of the embankment with no designated or demarcated means of reaching it from the footpath on Taney Road other than ascending the grassy embankment or scaling the concrete abutment which the plaintiff admitted would expose him to a risk of slipping down.

16. Having made his way up the embankment, the plaintiff proceeded to clamber over the one metre plus high gate leading to the service area. He did this by rotating on his stomach and swivelling his body over the gate.

17. The plaintiff altered somewhat his description of his state of mind when he first sought to gain access in this fashion. Initially his evidence was to the effect that he knew he shouldn't have been entering at that particular gate. He later changed his evidence to say that he was not really sure about his status when first he got over the gate but that by the time he made his way up the stairs, he knew he was where he ought not to have been.

18. I am satisfied that he knew or, at very least, ought to have known that this was not an authorised means of access to the Luas platform and that he was aware of this fact or ought to have been so when he surveyed the gate and surrounds from the footpath below the railway bridge. Mr. Beatty, S.C., on behalf of the plaintiff attempted to highlight the fact that since these events, a much taller and imposing structure has been placed barring access to these steps. In the light of what transpired, that may well have been a prudent precaution on behalf of the defendants. However, this post facto state of affairs does not alter the plaintiff's status in any way whatsoever. When he attempted to gain access to this stairway he was a trespasser, and he remained a trespasser thereafter.

19. The plaintiff mounted the steps and, finding that the gate at the top of the steps was locked, determined to get over it. In giving evidence, he described how he weighed up the "pros and cons" of either retracing his steps and exiting onto the embankment or getting over the gate on the platform at the top of the steps. He says he was concerned that he might slip and fall if he tried to exit by scaling the lower gateway (a recognition perhaps of the inappropriateness of that gate as a means of access in the first place) and risked, *inter alia*, dirtying his clothes in the process, I suspect that this all was a bit of retrospective rationalisation on Mr. Kelly's part and I believe that he decided simply to proceed over the gate without giving very much thought to it in order to access the railway platform.

20. The barrier gate which the plaintiff now surveyed with a view to surmounting it was made from a tubular frame and incorporated two glass panels. It was locked and, of course, also was intended to provide access for employees of the defendant to the service areas under the bridge, to which I have already alluded. To the left of this gate, as the plaintiff observed it, was a permanent rigid open panelled fence commencing at a point (looking away from the plaintiff) just before the maintenance access gate and proceeding along the public area of the platform. At its far end, it was sealed off by "Harris fencing". The combined effect of all of this fencing was to seal off a construction site on the opposite side of the fence. The fence incorporated protrusions at its top which appear to have been anti-climb security measures. These protrusions measured 22 millimetres and the fence itself was 2.09 metres high. Mr. Colin Glynn, consulting engineer, on behalf of the plaintiff expressed the view that this was simply a barrier fence with no security function. Mr. Donal G. Terry, consulting engineer, on behalf of the defendants suggested that the fence had a dual function. It provided a barrier to prevent members of the public using the platform from falling down from a height into the construction site. In addition, it performed a security function to prevent people climbing over it. Mr. Glynn pointed out that a 'would be' intruder could manoeuvre himself or herself between the access gate and the fencing, where there was a small but appreciable gap.

21. The fence commenced 500 millimetres before the barrier gate and measured, as noted, 2.09 metres in height above platform level.

It was made up of rigid mesh fence with five millimetres diameter verticals and five millimetre double horizontals. The openings in the mesh measured 60 millimetres wide by 200 millimetres high. The vertical bars protruded by 22 millimetres at the top of the fence. The verticals were finished flush with the bottom of the fence – there were no protrusions at the bottom of the fence. Mr. Glynn cited both British Standard BS1722-14 in order to classify the fence as being a boundary or general type of fencing rather than a security fence. He sought to marry this standard to the general specifications provided by NK fencing, the manufacturers of the fence in question which stipulated, *inter alia*, that fence heights below two metres should be installed with a wire end down to ground level but that this was subject to a site specific risk assessment and that due regard should be given to nearby aids to scaling or natural overhangs. Another type of fencing provided by NK fencing referred to protruding wire ends from panel heights "greater than 1.8 metres" for security purposes.

22. The general specifications by NK fencing are no more than that and are expressed to be subject to the site requirements in the manner specified above. In any event, the fencing in this case slightly exceeds two metres. For what it is worth, Mr. Glynn attempted to argue that the panel heights should be measured without taking account of the protrusions but this argument would seem to fall foul of the pictorial examples in the relevant British Standard document which, at figure 2, measures panels to include protrusions.

23. I should add that these protrusions are rounded and not jagged. Neither are they manufactured or honed to a pointed tip like so many railings that can be observed in virtually every corner of this city, albeit often on more permanent and aesthetically oriented fencing rather than these more functional railings.

24. Further, as can be observed from the photograph of the plaintiff standing beside the fence with his arm extended upwards, these protrusions were at a considerable height and presented no obstacle, difficulty or danger to anyone going about their ordinary business in and about these premises.

25. How, therefore, did the plaintiff meet his injury? As he contemplated how to gain access to the platform, he observed a brick or block to the left. He decided to use this to enable him to scale the locked barrier gate, thereby abandoning the technique earlier employed of clambering over the gate by pivoting on his stomach. He placed one foot (his right) on the block and then his left foot on the hand rail. He reached for and grabbed the top of the fence and then relocated his right foot onto the top of the barrier gate. At this point, he would have been more than head height above the top of the fence and would have a clear view of where his hand was located. He then proceeded to jump onto the platform. It seems that the ring on his ring finger became snagged on the protrusion. As he fell downwards, as the plaintiff rather chillingly put it, he left "the meat" of his finger on the protrusion thereby suffering the terrible injury which has left him with a total amputation of his left ring finger and very significant loss of function of his hand (he already had a partially amputated finger before all of this). It was unquestionably an appalling experience for this man. A passer-by, when asked for help, walked away. Fortunately, an elderly couple who were waiting in the station came to the plaintiff's aid and summoned help.

26. Two points should be made here. Firstly, at no stage prior to reaching his decision to make his way up the embankment did the plaintiff enquire of anyone what was the way in to the station. The plaintiff says that, having crossed the laneway prior to proceeding to the lift and having observed workmen in the laneway, he came across no one else throughout his brief journey. It is difficult to accept this as being plausible given the time and location of these events. However, even if there was no one in the vicinity of the bridge when he doubled back, there was nothing to stop him going to where the workmen were to ask for directions. He could have inquired in the shop. It is difficult to imagine that, having done this, even without having asked directions, he would not have observed on this occasion the sign pointing him to the entrance to the station.

27. The plaintiff was of course anxious to be back in time for his dinner given the rigidity of the regime of the hostel in which he was staying. However, he said that that he was not rushing for a particular train. Nor did he suggest that a few minutes would have made any difference to his being home on time for his meal

28. I think it more likely that the plaintiff took a chance on what he thought might be a short cut and that he was, at all times, fully aware that he was not supposed to go that way. From the first moment he attempted to gain access to the barrier gate below the bridge he knew or ought to have known that he was a trespasser.

29. Secondly, from the time he commenced his climb up the embankment up to and including his jump from the top of the barrier gate to the platform the plaintiff carried out a sequence of reckless acts, all of which he admits to, culminating in the injury which he suffered. There is no dispute between Mr. Glynn and Terry, the Consultant Engineers, that there was anything inherently dangerous or wrong about these protrusions on which the plaintiff's finger became caught. Their argument, fundamentally, was about context. Mr. Glynn argued that the defendants ought to have taken account of persons, even as trespassers, attempting to gain entry to the platform by the route and in the manner adopted by the plaintiff and the spikes constituted a danger in such circumstances.

30. As a means of dissuading intending intruders these spikes or protrusions are relatively benign when compared to pointed spikes, barbed wire, or other even more severe means of repelling intruders. They are constructed of rounded steel placed well above head height for all commuters. Even if an adult exercising reasonable care were to reach up a hand to the protrusion there is no inherent reason that a finger or fingers should be caught on the tip. In this case, the plaintiff was more than head height above where his hand was positioned and cold see clearly, or ought to have seen, where his hand was positioned.

31. I am satisfied that this fence was both a boundary/barrier fence and also served a security purpose in that the protrusion would have dissuaded persons attempting to scale same and would have impeded persons trying to manoeuvre their bodies over the top of the fence. The fact that the protrusions were pointing upwards does not seem to offend against the British Standard as evidenced by the examples shown in figure 2 of BS1722-14: 2006 which was identified the benchmark applicable in this country by both engineers. This is not of binding statutory force in this jurisdiction but British Standards are regularly used in evidence and accepted by the courts as identifying appropriate standards in this and many other areas where quality assessment and evaluation is a material consideration. However, the general specifications of NK Fencing, the manufacturers and (one cannot be sure) the presumed installers on site of this fencing, would not have such force and are what they say they are, namely guidelines.

32. Bearing these limitations in mind and the fact that they are subject to site-specific variabilities, the recommendations are that the protrusions are intended to point upwards at heights commencing variously at 1.8 metres and 2 metres. Thus, it is apparent that the panels installed here are either slightly above the stated minimum height specification or, at the very least on the margins thereof.

33. Overall, I prefer Mr. Terry's evidence to that of Mr. Glynn. In my view, the former addressed the British Standard and the manufacturer's specifications (to whatever extent they assisted) and their application to the *locus in quo* and the unfortunate circumstances of this accident in a manner which was more comprehensive and realistic. This fence was hybrid in its purpose, partly security and partly boundary, for the safety of passengers on the platform. In security terms, it is true to say that it did not entirely

enclose the platform and that an intending intruder could perhaps squeeze in between the fence and the pillar of the service access gate on the platform. Further, at the far end of the fence, it was bounded by Harris Fencing giving the impression (at least at the time the photographs were taken) of being something of a "work in progress". Nonetheless, I am satisfied that this was standard fencing, protrusions included, appropriate to the task and location in which it was employed. I am not persuaded that it was reasonably foreseeable that an intending passenger might have sought to gain access to the platform in the manner in which the plaintiff did or that, in the course of so doing, that his finger might become snagged in the manner which occurred.

34. For the plaintiff, Mr. Beatty, S.C. seemed at one point to argue that the plaintiff, having attained the status of trespasser as envisaged by the Occupiers Liability Act, 1995 ("the 1995 Act"), this state somehow altered (to what, it was not quite clear) when he sought to access the platform while mounting the gate. On more secure grounds, he argued that, as a trespasser, the defendant was obliged pursuant to s. 4 not to injure the plaintiff or to act with reckless disregard to his person. It was reasonably foreseeable on the evidence that a person seeking to surmount the gate to access the platform, thereby converting himself from a trespasser into a visitor for the purpose of the act, might place his or her hand on the top of the fence as an aid to carry out the manoeuvre.

35. No evidence was adduced to suggest that the signage pointing to the station was of itself defective or insufficient and that anything other than pure happenstance prevented the plaintiff from identifying the access points to the platform. Furthermore, assuming that the lift was not functioning, no evidence was adduced such as might indicate that this state of affairs gave rise to any liability on the part of the defendant.

36. At all times Mr. Beatty accepted that the threshold of reckless disregard was a high one (see *Fitzgerald v. South Dublin County Council* [2015] 1 I.R. 150 *per* Barton J.).

37. For the defence, Mr. David Nolan, S.C. and Mr. Simon Kearns, B.L. submitted that the plaintiff was manifestly a trespasser within the meaning of 1995 Act. Inviting me to take account of various matters specified in s. 4(2) of the 1995 Act in considering whether or not the defendant had acted with reckless disregard, he alluded to subs. 2(a), (b), (c), (d) and (f). In addition, he stressed the succession of acts of admitted recklessness by the plaintiff which brought him to the stage where he straddled the top of the gate and jumped. He asked the court to bear in mind (g) which refers to:-

> "(g) the conduct of the person, and the care which he or she may reasonably be expected to take for his or her own safety, while on the premises, having regard to the extent of his or her knowledge thereof".

38. Even if I was persuaded that the plaintiff was not a trespasser but met the definition of a visitor and thus the object of an enhanced duty of care under the 1995 Act, counsel cited paras. 44 and 45 of the decision of the Court of Appeal in *Louise Byrne v. Ardenheath Company Limited & Ano*. [2017] IECA 293 as demonstrating that the occupier would be entitled to expect people in the plaintiff's position to act with common sense and due regard for their own safety and not rather than embark on the journey up the grassy slope and beyond.

39. In this case, I am satisfied that the plaintiff was, at all material times, a trespasser within the meaning of the 1995 Act. He ought to have identified the appropriate access point or points to the station had he been keeping a proper look out when he crossed the laneway, had he walked a little further up the road to the access point to the other platform or had he asked someone including, if necessary, the workmen in the laneway of Dundrum Main Street. Equally, he could have enquired in the shop. It is most unlikely that there was nobody around generally from whom he could have made inquiry.

40. I am satisfied that it was reasonably clear to the plaintiff that the route he chose to gain access to the station was not the correct access point and could have been left in no doubt about that when he was met with the locked gate at the bottom of the service stairway which he then had to clamber over.

41. The plaintiff, thus being a trespasser, still has the protection afforded him in terms of a duty owed by the defendants pursuant to s. 4 (1) of the 1995 Act. I am satisfied that the defendant did not act in breach of the duty of care as described in that section. The defendants did not intentionally injure the plaintiff. There was no reckless disregard for the plaintiff established on the evidence. I take account of all of the circumstances of the case in coming to this view.

42. S.4 (2) of the 1995 Act sets out a number of matters to which I am enjoined to have regard in determining whether or not an occupier has acted with reckless disregard. Allowing for the legitimate assumption that adults are expected to act with due regard for their own safety (see the judgment of Irvine J. at paras. 44 and 45 of *Byrne v. Ardenheath* (see above)) I am not persuaded that the defendants knew or could have reasonable grounds for believing any of the matters specified in the various subsections. I am not persuaded that the protrusions amounted to a danger as envisaged by s.4 of the Act. I also bear in mind that when the plaintiff placed his hand on the top of the fence his head was positioned well above the protrusions and he would have had a clear view of where he was placing his hand.

43. I also take account of the fact that the plaintiff's conduct in committing a sequence of acts of admitted recklessness was to such a degree of egregiousness that even if the top of the fence had constituted a danger in some form (which it did not), the level of folly attained by the plaintiff was to such a degree as virtually to extinguish any potential fault in the part of the defendants.

44. The plaintiff is a man who is greatly to be admired for his personal fortitude in conquering alcohol abuse. He must be commended for his work in helping others so afflicted and in warning young people of the dangers alcohol abuse can pose. He has suffered a frightful injury and is entitled to considerable sympathy for what he has suffered. Alas, this sympathy cannot give rise to a finding of liability in tort where none such exists.

45. The plaintiff's claim must be dismissed.