

**BETWEEN****VINCENT O'MAHONEY****PLAINTIFF****AND****NICOLA MCCARTHY HANLON****AND****WATERFORD AND WEXFORD EDUCATION AND TRAINING BOARD****DEFENDANTS****JUDGMENT of Mr Justice David Keane delivered on the 23rd November 2018****Introduction**

1. At just after 2 p.m. on 23 April 2012, an accident occurred on the grounds of the Dungarvan Adult Education Centre at Wolfe Tone Street in Dungarvan. That premises is owned or controlled by the second defendant Waterford and Wexford Education and Training Board ('the board'), formerly Waterford County Vocational Education Committee. The plaintiff Vincent O'Mahoney, who was employed by the board as a caretaker, was riding a bicycle that collided with a car that was being driven by the first defendant Nicola McCarthy Hanlon, a literacy coordinator at the Centre. Mr O'Mahoney seeks damages from either or both of the defendants for the personal injuries that he suffered as a result of that collision.

2. In the personal injuries summons that issued on behalf of Mr O'Mahoney on 7 April 2014, he alleges, in essence, that the accident was caused by the negligence of Ms McCarthy in the care, control or driving of her vehicle, or by the board's negligence, breach of statutory duty, or breach of his employment contract with it, in failing to ensure his safety while on its premises.

3. As a result of the collision between his bicycle and Ms McCarthy's car, Mr O'Mahoney lost his balance and fell to the ground, landing heavily on his left shoulder. The injury was painful and he was later diagnosed with a tendon rotator cuff tear. He received prescription painkillers and, later, two injections of a corticosteroid and local anaesthetic. A little over two months after the accident, Mr O'Mahoney had surgery on his shoulder, after which he was required to keep his left arm in a sling for six weeks. Fortunately, he is right hand dominant. Later, he received physiotherapy and did exercises at home as directed. He returned to work approximately six months after his surgery (or eight months after the accident), from which work he has since retired. Happily, his operation was a success. He is mostly pain-free, although he suffers inflammation of his shoulder from time to time, for which he takes prescribed anti-inflammatory medication. He is physically in a position to do most things that he could before the accident, though doing heavy work above shoulder height can still cause problems with inflammation.

**The locus in quo**

4. The board maintains a small campus of buildings in Dungarvan, to the south of O'Connell Street and the west of Wolfe Tone Street, adjacent to the junction between those two roads. The Adult Education Centre is at the north end of that campus and the Adult Learning Centre is at the south end. In between are a number of smaller buildings used for various purposes including a Men's Shed and an after-school club.

5. The main entrance to the campus is at the north end of Wolfe Tone Street, a short distance back from the T-junction at which Wolfe Tone Street meets O'Connell Street. That entrance is designed to facilitate vehicular and pedestrian entry and exit. On driving through it, a private access road with a bitumen surface lies straight ahead to the east, running parallel with O'Connell Street just to its north. That private access road has the Adult Education Centre to its right and a row of car-parking spaces, running along the northern boundary of the campus, to its left. Another branch of that private access road lies to the south, from a point just inside the main entrance to the campus, running broadly parallel with Wolfe Tone Street just to its west. That private access road has the Adult Education Centre to its left and a row of car-parking spaces, running along the western boundary of the campus, to its right.

6. There is a second entrance to the campus, further south on Wolfe Tone Street. It is accessed through a wrought-iron gate, set in a pedestrian gateway, adjacent to the public footpath there. There is no dropped kerb between the road and the pavement anywhere in the vicinity of that gateway and nothing to suggest that it was designed, or intended, for anything other than pedestrian access.

7. A bitumen-surfaced pedestrian pathway, approximately 1.37m wide, runs east from the pedestrian gateway a distance of approximately 9.7m, before ending at a T-junction with the branch of the private access road that runs south from the main entrance. The pathway is edged with concrete kerbs and flanked on the right (to the south) by a grass lawn and on the left (to the north) by a tall hedgerow. To the north of the hedgerow is the bottom of the row of car parking spaces that runs along the western boundary of the campus. At the T-junction where the pathway meets the private access road, that road has veered a little to the southeast, with the result that the T-junction is not strictly perpendicular and the kerb to the right (or south) of the pathway extends further to the east than the kerb to the left (or north) of the pathway, before turning in each direction to follow the contour of the private access road (northwest to the north and southeast to the south).

8. A rectangular box of cross-hatched yellow lines, measuring 3.4m by 3m, had been painted onto the southward branch of the private access road, just before the point where it is met by the pedestrian pathway. The purpose of that yellow box is to warn motor vehicle drivers not to obstruct access to the Adult Learning Centre beyond it to the southeast. At the southern end of the yellow box, which is roughly level with the line of the hedgerow behind which lies the pedestrian pathway, the access road narrows to a diameter of 3.15m at the end of the car parking area adjacent to the Adult Education Centre. The road then continues for a short distance south-eastward to provide access to the Adult Learning Centre at the southern end of the campus and to three additional car parking spaces that are located adjacent to it. At the material time, one of those spaces was allocated to Ms McCarthy.

9. There was a closed-circuit television camera on the external wall of the Adult Learning Centre that included the locus of the accident within its field of view. Unfortunately, because of the motion-activated nature of its operation, it commenced recording just after the collision had occurred. Nonetheless, the images it captured provide some useful information. For example, it is clear from those pictures that the hedgerow was more closely trimmed in April than in September (after a summer of growth) so that it did not

then extend quite so high and, more particularly, quite so far toward the junction between the pedestrian pathway and the access road.

### **The accident**

10. Mr O'Mahoney is now 68 years of age. At the time of the accident in 2012, he was almost 62. Having previously spent many years working for Waterford Crystal and a short period with Bausch and Lomb, he had commenced working as a caretaker for the board (then the VEC) in 2007. His home was about five minutes away from the Dungarvan campus. Mr O'Mahoney has been cycling, on and off, all his life. While working as a caretaker for the board, he cycled to work three or four times a week. He worked each day from 8 a.m. to 10.30 a.m. and, again, from 2 p.m. until 5 p.m. When he cycled to work, that usually involved four bike trips each day, as he would return home between the morning and evening portions of his shift.

11. Mr O'Mahoney's route from his home to the board's campus meant that he approached it by travelling up Wolfe Tone Street from the south. It was his habit to enter the campus through the pedestrian gateway, although it was perfectly possible to continue cycling up Wolfe Tone Street along the public roadway for a further 50 metres or so and then, by turning right, to enter the campus through the main entrance, which is designed to accommodate vehicular traffic, including bicycles.

12. Mr O'Mahoney gave evidence that, on the day in question, he entered the campus by cycling along - or across - the public footpath on Wolfe Tone Street and then - slowly, because it is a narrow entrance - through the the pedestrian gate. In his experience, 'plenty of people' cycled along the pedestrian pathway. The weather that day was good. Mr O'Mahoney testified that he peddled 'nice and steady' along the pedestrian pathway and, without stopping, began to emerge out onto the private access road. It was his intention to turn to the left on the access road in order to park his bicycle just behind the Adult Education Centre.

13. According to Mr O'Mahoney, the front wheel of his bicycle was just beyond the end of pedestrian pathway when he saw Ms McCarthy's car coming towards him from his left-hand side. Mr O'Mahoney thought that Ms McCarthy's car was going too fast. He turned right onto the access road, hoping that her car would avoid him by passing parallel to him on his left. He felt that that manoeuvre was safer than simply stopping because the front wheel of his bicycle was already on the access road when he saw Ms McCarthy's car. Mr O'Mahoney stated that, as he attempted that manoeuvre, the front offside wheel arch of Ms McCarthy's car glanced against his left thigh, causing him to lose his balance and fall against the wing of the car. That, in turn, meant that the offside wing mirror of the car caught him on his side, spinning him around to the right and toppling him off his bicycle and onto the ground, where he struck his left shoulder against the concrete curb at the right hand side of the road.

14. Mr O'Mahoney testified that, immediately after the collision, Ms McCarthy said to him: 'I didn't see you, Vincent. Please don't claim off the VEC's insurance; claim off my insurance', to which he responded that he would not be making any claim. He stated that he made that reply because he did not then believe that he had been injured.

15. Mr O'Mahoney acknowledged that Ms McCarthy expressed immediate concern for his welfare and drove him to a local doctor's surgery shortly after the accident.

16. Under cross-examination, Mr O'Mahoney agreed that the entrance and pathway concerned are for pedestrians. Shown photographs taken in September 2012 by the expert engineer instructed on his behalf, Mr O'Mahoney testified that the hedgerow as depicted in them was approximately the same height as it was at the time of the accident in April. Mr O'Mahoney did not accept that there were any gaps or bare patches in the hedgerow that would permit a person on one side of it to see the approach of a person or vehicle on the other. Mr O'Mahoney stated that, as he cycled up the pedestrian pathway, he had been listening for the sound of a motor vehicle on the private access road but had not heard Ms McCarthy's car approaching. He agreed that there was nothing wrong with his hearing.

17. Mr O'Mahoney denied that he had apologised to Ms McCarthy after the collision or that he had told her that he had been in a rush. Mr O'Mahoney acknowledged that his bicycle had not sustained any damage in the collision. Mr O'Mahoney did not accept that Ms McCarthy's vehicle proceeding directly along the private access road had right of way over his bicycle as it emerged onto that road from the pedestrian pathway. Mr O'Mahoney stated that when he first saw Ms McCarthy's vehicle, it had not yet reached the yellow box.

18. Mr O'Mahoney testified that he had cycled up the pedestrian pathway 'nice and slow' and that, because it was subject to a slight upward incline in the direction in which he was travelling, he had slowed almost to a halt by the time he reached the access road. Nonetheless, he conceded that he did emerge onto the access road without halting.

19. Mr O'Mahoney accepted that Ms McCarthy's car stopped at, or very nearly at, the point where the collision occurred.

20. A member of the Men's Shed group named Joseph O'Reilly was called as a witness on behalf of Mr O'Mahoney. He gave evidence that, in the course of the four years he attended the Men's Shed at the board's campus, he saw several persons cycling on the pedestrian pathway. In Mr O'Reilly's estimation, of the six to twelve persons a day who accessed the Men's Shed, a couple would use bicycles. Mr O'Reilly had cycled on the pedestrian pathway himself, although he always stopped before emerging onto the access road. This was something that he was able to do without dismounting because he was a very experienced cyclist and could keep his balance for a period while stationary.

21. Mr O'Mahoney called John Curtis as a witness. Mr Curtis worked as a carpenter at the Dungarvan campus of what was then the VEC from 2006 onwards. He had seen pedestrians (including pedestrians with buggies) and cyclists using the pedestrian pathway regularly.

22. Bernard Hart gave evidence as an expert engineer on behalf of Mr O'Mahoney. Mr Hart expressed the view that the hedgerow parallel to the pedestrian pathway creates a blind spot for both pedestrians using that pathway and motorists using the private access road. Mr Hart noted that there was no designated pedestrian pathway beyond the point where the pedestrian pathway at issue intersects with the access road. He also referred to the absence of speed ramps at any material point along the private access road. Mr Hart expressed the view that, in all of those circumstances, the board had failed to ensure that the Dungarvan campus, as Mr O'Mahoney's place of work, was organised in such a way that pedestrians and vehicles could circulate in a safe manner; or that the traffic routes there were designed, located and dimensioned to ensure easy, safe and appropriate access for pedestrians and vehicles in such a way as to not endanger employees employed in the vicinity of such routes; or that appropriate measures had not been taken to protect employees such as Mr O'Mahoney authorised to traverse the particular junction between the pedestrian pathway and the access road, as a 'danger area' within that place of work. Mr Hart further stated that it would be unusual for a motorist to travel at a speed of 5 kilometres per hour or less since that is no more than ordinary walking pace.

23. Under cross-examination, Mr Hart acknowledged that the point where Ms McCarthy's vehicle stopped, as acknowledged by Mr O'Mahoney and depicted in the CCTV footage, was consistent with a slow speed of no more than '10, 15 or 20 km/h'. Mr Hart accepted that, in view of the condition of the hedgerow as depicted in the CCTV footage, Mr O'Mahoney would have had a wider view of the access road to the left of the pedestrian pathway in April than was evident in the photographs taken in September. Mr Hart conceded that, if Mr O'Mahoney had stopped at the end of the pedestrian pathway before cycling out onto the access road, there would not have been an accident.

24. Ms McCarthy gave evidence in her own defence. She has been employed as a literacy coordinator with the board, formerly the VEC, since 2002. On the day in question, she drove through the main entrance of the Dungarvan campus shortly after two p.m. and proceeded southwards along the private access road towards her allocated parking space adjacent to the Adult Learning Centre. Ms McCarthy testified that, as she proceeded slowly along that road, all of a sudden there was a wallop on the driver's door. She discovered immediately afterwards that the impact between Mr O'Mahoney's bicycle and her car had left a small indentation on the driver's door panel of her car just below the window and two small scrapes on its wing mirror on that side. Ms McCarthy stopped the car immediately after the collision and asked Mr O'Mahoney if he was alright. Mr O'Mahoney replied that she should continue on and park her car. According to Ms McCarthy, he then said: 'I'm sorry. I wasn't looking when I came out.' Ms McCarthy wanted to call the guards but Mr O'Mahoney said no. Mr O'Mahoney came into the Adult Learning Centre where Ms McCarthy arranged a cup of tea for him and called the local doctor. Ms McCarthy gave Mr O'Mahoney her phone to call his wife and later drove him to the doctor's surgery.

25. Under cross-examination, Ms McCarthy admitted that she was not certain that, as she had first suggested, it was the front wheel of Mr O'Mahoney's bicycle that had struck her car, rather than, say, its handlebars. Ms McCarthy accepted that, in the CCTV footage of her vehicle immediately after the collision, it is shown to be much closer to the kerb on the right-hand side of the access road than it is to that on the left but insisted that that was because she had pulled in to the right to speak to Mr O'Mahoney. Ms McCarthy testified that she had been driving slowly, at approximately 5 km/h, when the collision occurred and this was evidenced by the fact that there was a distance of maybe a foot between the point where the collision occurred and that at which her car stopped. Ms McCarthy stated that the collision gave her the fright of her life and that it left her physically shaking. Ms McCarthy denied that she had made any of the comments attributed to her by Mr O'Mahoney.

26. Dr Lorcán O'Flannery gave evidence as an expert engineer on behalf of the board. Dr O'Flannery confirmed that the pedestrian pathway meets the access road 'slightly askew' so that the kerb on its southern edge extends beyond that on its northern edge. At the time of Dr O'Flannery's inspection of the locus in September 2012, the hedgerow ended some 600mm - or approximately two feet - from the edge of the kerb at the access road and would have ended another 300mm - or one foot - further back from the kerb when more tightly clipped the previous April (as depicted in the relevant CCTV footage).

27. According to Dr O'Flannery, the distance from the northern edge of the yellow box to the edge of the path closest to the accident locus is approximately 6 metres. In the absence of skid marks or any other record of the position of Ms McCarthy's vehicle during the braking manoeuvre prior to the collision, it is not possible to provide an estimate of its speed. Applying published data on emergency braking distances relative to speed, Dr O'Flannery testified that, in dry conditions, a vehicle travelling at 10 km/h should be able to make an emergency stop in 2.4 m and a vehicle travelling at 20 km/h should be able to do so in 6m. The location of the accident locus just 2.5m beyond the centre of the intersection between the pedestrian pathway and the access road renders it likely, in Dr O'Flannery's view, that the speed of Ms McCarthy's vehicle was relatively low.

28. In summary, Dr O'Flannery's professional opinion was as follows:

(i) For obvious reasons of safety and visibility, mounted cyclists should use the main entrance to the campus.

(ii) The pedestrian entrance and pedestrian pathway are for pedestrians, not cyclists.

(iii) While it is the responsibility of motorists to drive with appropriate caution and to reduce the speed of their vehicles in accordance with the requirements of their surroundings, the location of the collision in this case suggests that Ms McCarthy 'probably drove at a relatively low speed.'

(iv) Whilst pedestrians have a restricted view of vehicles approaching from the left at the intersection between the pedestrian pathway and the access road because of the presence of the hedgerow, there is ample time for a walking pedestrian (or dismounted cyclist) to stop in time for traffic.

(v) Mr O'Mahoney should have slowed down and, if necessary, stopped at the end of the pedestrian pathway to make sure that the way was clear before proceeding out onto the private access road.

## Analysis

29. On behalf of Mr O'Mahoney, it was submitted that he was entitled to use the pedestrian pathway as a cycleway, in circumstances where he frequently used it in that way; where others did so as well; and where there were no signs or markings in the immediate vicinity expressly prohibiting such use. I cannot accept that submission. The pedestrian entrance was directly accessible only from the public footpath upon which cycling is expressly prohibited by law. Beyond that, the narrowness of the pedestrian entrance and the very nature of the pedestrian pathway and its alignment with the access road confirm the lack of care and attention, if not outright dangerousness, implicit in treating it as a designated cycleway. Foolhardy behaviour does not become reasonable behaviour merely because a number of people have engaged in it in the past.

30. Even if that were not so, the proximate cause of the accident would remain Mr O'Mahoney's failure to stop or dismount from his bicycle at the T-junction between the pedestrian pathway and the access road. As Mr Hart expressly acknowledged, if Mr O'Mahoney had stopped at that junction, the accident would not have happened. I accept Dr O'Flannery's uncontroverted evidence that there is ample time for for a walking pedestrian (or dismounted cyclist) on the pedestrian pathway to stop in time for any traffic on the access road. Thus, I do not accept that the presence of the hedgerow created a blind spot that would have rendered the intersection between that pathway and the access road a danger area for any person using reasonable care when traversing it.

31. This, in turn, means that I cannot accept Mr Hart's view that the board had failed to ensure: (i) that pedestrians and vehicles could circulate on the Dungarvan campus in a safe manner; (ii) that traffic routes on that campus were designed, located or dimensioned to ensure safe, easy and appropriate access for pedestrians and vehicles in such a way as to not endanger employees employed in the vicinity of such routes; or (iii) that appropriate measures were taken to protect employees authorised to traverse the

particular junction between the pedestrian pathway and the access road, as a 'danger area' within that place of work. It follows that I can find no breach of Regulation 14 of the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I. 299 of 2007) either on the basis suggested by Mr Hart or on any other basis.

32. Further, there are several reasons why I do not accept that Ms McCarthy's vehicle was travelling too fast immediately prior to the accident as Mr O'Mahoney asserts. The first reason is that I accept the logic behind Dr O'Flannery's expert opinion that the speed of Ms McCarthy's vehicle is likely to have been relatively low. The second reason is that Ms McCarthy's vehicle was hardly damaged in the collision. The third is that Mr O'Mahoney's bicycle was not damaged in the collision at all. And the fourth is that Mr O'Mahoney was barely injured by the collision, sustaining only a bruise to his thigh; his shoulder injury was sustained when, having lost his balance, he toppled over onto the ground, striking his left shoulder on the concrete kerb between the access road and the lawn beside it.

33. In all of the circumstances I have just described, I conclude that Mr O'Mahoney has failed to make out a case in negligence against either Ms McCarthy or the board.

34. Equally and for the same reasons, I can find no breach of s. 3 of the Occupiers Liability Act 1995, even assuming that Mr O'Mahoney has a right to claim against the board as a visitor to its premises, separate and distinct from his right to claim against it as its employee. In that regard, I am conscious that, in *Byrne v Ardenheath Company Ltd* [2017] IECA 217 (Unreported, Court of Appeal (Irvine J; Ryan P and Whelan J concurring), 9th November, 2017), the Court of Appeal has emphasised the need, particularly in cases where the court is not dealing with a complex specialist field of activity, for a trial judge, not only to consider the expert evidence tendered by the parties but to bring ordinary common sense to bear on his or her assessment of what should amount to reasonable care.

35. As s. 3(3) of the Act of 1995 makes clear, the common duty of care owed by an occupier of premises to a visitor means a duty to take such care as is reasonable in all of the circumstances 'having regard to the care which a visitor may reasonably be expected to take for his or her own safety'. It follows that I am not persuaded that reducing the height of the hedgerow or removing it altogether was something that the board was required to do as occupier before it could be said to have taken reasonable care for the safety of Mr O'Mahoney, bearing in mind the care it was reasonable to expect him to take for his own safety. As Peart J pointed out when giving judgment for the Court of Appeal in *Lavin v Dublin Airport Authority plc* [2016] IECA 268 (Unreported, Court of Appeal (Peart J; Hogan and White JJ concurring), 11th October, 2016) (at para. 54), one can always say that but for some particular thing an accident would not have happened but the thing in question must be the real or proximate cause of the accident. In this case, the real and proximate cause of the accident was Mr O'Mahoney's use of the pedestrian pathway as a cycleway and his failure to stop just prior to the intersection between that pathway and the private access road.

## **Conclusion**

35. Mr O'Mahoney's claim against Ms McCarthy and the board is dismissed.