Neutral Citation: [2015] IEHC 90

THE HIGH COURT

[2014 No. 1340 P.]

BETWEEN

GEORGE MCNAMARA

PLAINTIFF

AND

UNIVERSITY COLLEGE DUBLIN

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 4th day of February 2015

1. On 28th September, 2012, the plaintiff had an appointment with a member of the staff of University College Dublin. The meeting was to take place in the Nova building on the Belfield campus in Dublin. The plaintiff stated that shortly before 11am he entered the Belfield campus from the upper entrance on Foster's Avenue. The plaintiff parked his car in a car park which was adjacent to a pedestrian walkway. The car park and walkway is shown in photograph number two in Mr Tennyson's booklet of photographs.

2. The defendant's witness, Ms Sara Casey, stated in her evidence that the plaintiff had told her that he parked his car in a car park near the Sutherland School of Law, which was under construction at the time. She said the plaintiff recounted that he had walked down the side of the building site, with hoarding on his left; and that at the end of the hoarding, he turned to his right and walked along another path also with hoarding to his left. He said that he took a further right turn at the end of this hoarding, which would bring him to the car park and walkway, as shown in Mr Tennyson's photograph number two.

3. While there is some disagreement between the parties as to how the plaintiff made his way to the walkway shown in photograph number two, the parties seem to be agreed that the plaintiff came to be on this particular walkway, where he met with his accident. In the circumstances it is not necessary to resolve this dispute as to the route which the plaintiff took to get to the walkway in question.

4. The plaintiff stated that he entered the walkway through a gap in a small hedge between the car park and the walkway. The walkway is approximately 126m long and 3.5m wide. The plaintiff stated that on this particular day at approximately 11am, the walkway was crowded with students coming and going from their lectures. The plaintiff stated that most of the students were walking against him. As he came towards the end of the walkway, there were two groups of students coming against him. After that there was a line of five people also coming against him. The plaintiff was walking on the walkway slightly to the right, on the side which was bordered by a large hedge.

5. The plaintiff knew the general area where the Nova building was located. However, he stopped a man, who was in the line of five people coming against him. The plaintiff stated that the man was on his own; he just happened to be walking in a line with the other four people on the walkway. The plaintiff asked the man if he was going in the correct direction for the Nova building. The man replied "Yes" and indicated that the building was over to his left. With that the man continued on. The plaintiff said that he took one step forward when his knees hit a bollard in the shape of a cube, which had been placed with another similar bollard on the walkway. The plaintiff tripped and fell to the ground, suffering a fracture of the left radial head.

6. There were two cube shaped bollards placed across the walkway. They were situated 10m back from the pedestrian crossing on the road within the campus. They were approximately 115m from the Glenamena end of the walkway. The bollards were two granite cubes measuring 450 x 450 x 450mm (18 inches). There was a gap of 1.7m (5 feet 7 inches) between the bollards.

7. The plaintiff stated that he had not seen the bollards due to the large volume of people coming against him on the walkway. Ms Casey, the assistant safety officer, stated that the particular walkway is one of the main access routes for students leading from the student residences to the other buildings on the campus.

8. The plaintiff stated that the man he spoke to, was standing in front of the bollard, thereby blocking his view of it. When he had confirmed the location of the Nova building, he simply stepped forward and immediately came into contact with the bollard as a result of which he tripped and fell to the ground.

9. It was put to the plaintiff that the bollards were plainly visible, if he had been keeping a proper lookout of where he was going. The defendant's engineer, Dr. Woods, stated that the bollards were visible from a distance back of 97m. This measurement presupposes that the plaintiff had a clear line of sight of the walkway ahead of him, which was not obscured by the presence of other people on the walkway in front of him. The plaintiff was very clear in his evidence that, at the time of the accident, his line of sight of the bollards was obscured due to the large number of people coming against him on the walkway.

10. The plaintiff's engineer, Mr Tennyson, was of the opinion that the use of these cube shaped bollards was a crude way of preventing vehicles entering the walkway. He stated that the use of isolated bollards on the walkway represented a danger to the plaintiff, as he would not have been aware of their existence. He was of the view that the cube shaped bollards were unsuitable for a busy pedestrian zone. It was dangerous because they were low level and were difficult to see with pedestrian traffic on the walkway. In this regard, Mr Tennyson thought that the bollard, being grey in colour, did not stand out sufficiently from the surrounding tarmacadam surface of the walkway.

11. Mr Tennyson was of the view that such bollards could be used at other locations, such as if placed at the edge of a kerb to prevent vehicles mounting the curb. Or they could be used if there was a line of such bollards thereby making them more visible. In this regard, he noted that such bollards were used by Dun Laoghaire Rathdown County Council at the ferry port in Dun Laoghaire. However, they were in a line of bollards interspersed with planting boxes, placed at the edge of the footpath or promenade area, so as to prevent vehicles parking on the edge of the kerb or entering the promenade area. In such circumstances, the cubes would be

visible because they were being used in a wide open space and therefore their presence would not be obscured by other people using this area. Also, the fact that they were placed in a long line would have alerted pedestrians to their existence.

12. In Mr Tennyson's opinion, the defendants should have used posts at the locus to prevent vehicles entering onto the walkway. Such posts would be fixed into the ground and would be approximately waist height. Posts of this kind had been used by the defendant on a number of walkways throughout the campus.

13. The defendant's engineer, Dr Woods, thought that the height of the bollard at 18 inches was not particularly low lying or dangerous. He thought that there was quite good colour contrast between the granite cube and the surrounding tarmacadam surface. He was of the view that even when a large a number of people were on the walkway, the flow of pedestrians would have to come inwards to pass through the space between the cubes. At this point, the cubes would be visible to an oncoming pedestrian. The flow of pedestrians would then fan back out over the width of the walkway. He was of the opinion that the cubes would still be visible through the legs of the oncoming pedestrians. However, he accepted in cross-examination that if a person was standing directly in front of the cube, he would block the plaintiff's view of it; and that if there was a large number of people on the walkway, a persons view of the bollard would be obscured.

14. Dr. Woods accepted that if the defendants were doing a risk assessment of the locus, they should have taken into account the large number of people in the area. On the evidence, they did not appear to have carried out any such risk assessment. In this regard, evidence had been given by Mr Ciaran Bennett, the ground facilities manager with UCD Estate Services. He stated that there was a problem with vehicles entering the walkway, hence the need for the cube shaped bollards to prevent this from happening. He stated that the defendant did not carry out any risk assessment when deciding to place cubes at the locus. They just made sure that there was sufficient space between the cubes to allow for wheelchair access to the walkway.

15. Mr Bennett stated that there were a number of different types of bollards used throughout the campus. They used steel posts on a number of walkways. He stated that the drawback of using such posts was that they needed ground works to secure them into the ground. This could pose a difficulty if there were underground cables in the area. He accepted that steel posts could have been used at the locus.

16. In the course of his evidence, the plaintiff recounted the content of a telephone conversation which he had with Ms Casey. He said that the lady from UCD had phoned him and, in the course of the conversation, had said that the bollards had been put in place to stop bicycles going onto the walkway. He recounted that she said "*we must do something about them, maybe paint them. We need to make them more visible*". In her evidence, Ms Casey denied ever making such comments to the plaintiff in the course of their telephone conversations.

The Law

17. The legal duty owed by an occupier of premises to a visitor thereon, is governed by s. 3 of the Occupiers Liability Act, 1995. That section provides as follows:-

> *"3.—(1) An occupier of premises owes a duty of care ("the common duty of care") towards a visitor thereto except in so far as the occupier extends, restricts, modifies or excludes that duty in accordance with section 5 .*
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> *(2) In this section "the common duty of care" means a duty to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon."*

18. The term "visitor" is defined in s. 1 of the Occupiers Liability Act, 1995 as:-

> *(a) an entrant, other than a recreational user, who is present on premises at the invitation, or with the permission, of the occupier or any other entrant specified in paragraph (a), (b) or (c) of the definition of "recreational user",*
>
> *(b) an entrant, other than a recreational user, who is present on premises by virtue of an express or implied term in a contract, and*
>
> *(c) an entrant as of right,*
>
> *while he or she is so present, as the case may be, for the purpose for which he or she is invited or permitted to be there, for the purpose of the performance of the contract or for the purpose of the exercise of the right, and includes any such entrant whose presence on premises has become unlawful after entry thereon and who is taking reasonable steps to leave."*

19. In *Louise Allen v. Trabolgan Holiday Centre Limited* [2010] IEHC 129, Charleton J. gave the following analysis of the common duty of care which is owed by an occupier to a visitor:-

> *"2. Under s. 3 of the Act the occupier owes a common duty of care towards a visitor. This duty is defined as an obligation to take such care as is reasonable in all the circumstances to ensure that a visitor does not suffer injury or damage by reason of any danger existing on the property. As to that duty, it is clear that merely establishing that an accident occurred on premises is not enough. The plaintiff must show that a danger existed by reason of the static condition of the premises; that in consequence of it he/she suffered injury or damage; and that the occupier did not take such care as was reasonable in the circumstances to avoid the occurrence. The duty of care so defined is at a markedly higher level than that which applies to recreational visitors, such as those exploring the countryside or historical sites, or to trespassers. A visitor is defined in s. 1(1) of the Act as a person who enters as of right, for instance a fire fighter; or someone paying to go to the theatre would be an example of that; who is in the premises on the invitation, or with the permission of, the occupier, this would extend to both the customer of a shop and a guest coming to a private house for a meal; and those who come to a place for a recreation without charge and who are a family member, or someone invited, or are there for social reasons."*

20. I will now proceed to apply these legal principles to the facts of this case.

Conclusions on Liability

21. The plaintiff was present on the UCD campus due to an arrangement that he had to meet with a member of staff in the Nova building. In these circumstances, the plaintiff was a "*visitor*" within the meaning of the Occupiers Liability Act, 1995. The defendant owed to him the common duty of care which amounts to a duty to take reasonable care to prevent the plaintiff suffering injury due to any danger on the premises.

22. I am satisfied that the plaintiff has given a truthful and accurate account as to how he came to have his accident. I accept that there was a large number of pedestrians on the walkway in front of the plaintiff at the time of the accident; and that his view of the bollards was obscured by the volume of pedestrians coming against him. Accordingly, the plaintiff was not guilty of contributory negligence in failing to see the bollards which had been placed across the walkway.

23. This raises the question as to whether the use of these bollards at the locus constituted a danger on the premises. I am satisfied that the bollards did constitute a danger to people using the walkway and to the plaintiff in particular. The bollards were isolated in the sense that they were not part of a line of bollards. They were a low lying obstacle, measuring only 18 inches high. When there was a large number of people on the walkway, their presence would have been obscured to pedestrians coming from the Glenamena end of the walkway. In the circumstances, to place a low lying obstacle on the walkway created a danger at the locus.

24. The defendant has made a case that such bollards were used elsewhere on the campus and are also in use at Dun Laoghaire ferry port and on Capel Street Bridge. I do not accept this as a fair comparison. The use of the cubes in Dun Laoghaire and on Capel Street Bridge was different to the use of the cubes in this instance. At the ferry port and at Capel Street Bridge, the cubes were used in a fairly wide expanse such that they would be visible to persons using these areas. Secondly, they were used as a part of line of such cubes, thereby making them more visible.

25. From the photographs taken by Mr Tennyson, it would appear that the cubes used elsewhere in the college, were either at the side to prevent vehicles mounting the kerb or entering across areas of vegetation, or were in wide expanses such that they would be plainly visible to persons using the area.

26. In the present case the cubes were placed across a walkway measuring 3.5m wide. When the walkway was busy with pedestrian traffic, their presence would be obscured from the line of sight of persons approaching from the Glenamena end. The presence of such low lying obstacles at the locus constituted a danger and a breach by the defendant of the common duty of care owed to the plaintiff. I am satisfied that if the defendant had given thought to the question, they would have seen that the use of such cubes at the locus constituted a danger to persons on the walkway. As Mr Tennyson said, this was a crude method of preventing vehicular access to the walkway. The same result could have been achieved by placing posts across the walkway. This would have prevented cars going down the walkway, but would not have constituted a trip hazard to pedestrians on the walkway. If there were any underground cables in the area, the posts could have been moved forward or backwards as required. In the circumstances, I am satisfied that the defendant is liable for the injuries suffered by the plaintiff. As already noted in this judgment, I do not consider that the plaintiff failed to take reasonable care for his own safety.

27. As already noted herein, there was a stark conflict of evidence between the plaintiff and Ms Casey as to the content of their telephone conversation. I do not find it necessary to resolve this conflict. However, I do not make any finding that there was any such admission of liability express or implied on behalf of the defendant in the course of this telephone conversation.

Quantum

28. The plaintiff is 65 years of age. He is right hand dominant. He suffered a fracture of the left radial head. He was taken to St Vincent's University Hospital on the day of the accident where he came under the care of Mr Sean Dudeney. He suffered significant pain and limitation of movement of the elbow joint in the immediate aftermath of the accident. He managed to continue with his work as a business consultant, due to the fact that his wife drove him to business meetings. He had four sessions of physiotherapy treatment between 13th October, 2012, and 9th February, 2013.

29. He was reviewed by Mr Dudeney on a date that is unclear. However it would appear to have been in 2014, because there is reference in the report to x-rays having been taken at two years post-accident. At the time of this examination, the plaintiff complained of intermittent left elbow pain. He was aware of this pain while swimming the backstroke. He avoided lifting on the left side and had difficulty driving. Overall, he rated his elbow at 85% of normal and felt that this was similar to the examination approximately one year previously. He continued to do his elbow exercises. He had no pain at night time and no mechanical locking. He was on no medication for the pain.

30. Examination revealed a loss of five degree of full flexion and full extension. He had full supination and pronation and there was no neurovascular deficit. He had some diffuse tenderness over the lateral aspect of the elbow in the region of the radial head.

31. Initial x-rays had showed a very minimally displaced fracture of the radial head, with evidence of haemarthrosis. An x-ray taken at the time of that examination showed a satisfactory appearance of the elbow joint and specifically of the radial head. There was no evidence of post traumatic degenerative change.

32. Mr Dudeney was of opinion that the plaintiff's symptoms had largely plateaued. He had some very minimal loss of range of movement which was not functionally significant and current x-rays at two years post injury showed no evidence of post traumatic degenerative change and, overall, a satisfactory appearance of the elbow.

33. Mr Dudeney stated that he would expect the plaintiff to continue to have some minimal symptoms into the future. There was no evidence of gross post traumatic degenerative change and he thought that the development of this was highly unlikely. The main difficulty for the plaintiff appeared to be when driving. Mr Dudeney was of the opinion that this may continue to bother him when driving. He would expect the plaintiff to go on to have minimal long term functional sequalae and not to develop post traumatic degenerative change

34. The plaintiff was seen by Mr James Colville FRCSI on behalf of the defendant on 4th June, 2014. At the time of that examination the plaintiff complained that he still had a problem with his elbow when driving. He had noticed that he had lost some movement in his elbow. He did not think that there had been any change in the recent past and he has learned to live with his symptoms. Examination of the left elbow comparing it to the right revealed a loss of extension of ten degrees. There was also a loss of supination of ten degrees. There were no clinical signs of arthritis.

35. Mr Colville noted that the plaintiff had sustained a painful injury requiring a short period of treatment, from which had made a good recovery. However, he had not made a full recovery. He had lost about ten degrees of full straightening of the elbow joint. This was unlikely to change with time, but it would not get any worse. He also had a slight loss of turning of the forearm which, in Mr Colville's

opinion, was a permanent reminder of his injury. Neither of these restrictions represented a significant functional deficit. The fracture involved the joint surface but was minimally displaced and the likelihood of the plaintiff developing arthritis in the long term was remote. The symptoms of which the plaintiff complained were reasonable and to be expected.

36. The special damages in this case amount to €765.00.

37. I am satisfied that the plaintiff has given a truthful account of his injury and recovery to date. He continues to have symptoms especially when driving, swimming and gardening. He has limitation of movement of the elbow joint, which will be permanent. In these circumstances, I award the plaintiff the following damages:

General damages to date €45,000.00

General damages for future pain and suffering €20,000.00

Special damages € 765.00

€65,765.00