

THE HIGH COURT

[2010 No. 4533 P]

BETWEEN

ANITA CRAY

PLAINTIFF

AND

FINGAL COUNTY COUNCIL

DEFENDANTS

JUDGMENT of O'Neill J. delivered on the 29th day of January 2013

1. The plaintiff in this case sues the defendants for damages in respect of an injury she suffered to her left ankle on 22nd April 2009.
2. On the day in question, the plaintiff, with her two sisters, Ms. Donna Kelly and Ms. Deirdre Cray, went for a walk on the beach at Malahide, County Dublin. They arrived there at approximately 10.30am. They parked in the car park adjacent to the beach and proceeded to get down onto the beach *via* a concrete ramp which was built by the defendants in 2001. The weather on the day was good; it was a bright day with some cloud.
3. The ramp in question is shown in all its aspects on the many photographs that have been put in evidence and it leads from the car park area down to the beach. It is approximately 9m or 10m in length. It is obviously fairly steeply sloped and on the right-hand side, as one descends, a handrail is provided which terminates a few inches back from the edge of the ramp where it ends. The ramp is constructed of Newton 40 concrete which is apparently the strongest concrete available, so that it would resist erosion by sea, sand and wind. The ramp is constructed on top of two piles driven approximately 2m into the sand and the steel reinforcing in the ramp is connected to the piles.
4. As is apparent from all of the photographs and from the expert evidence given by the two engineers, Mr. Osborne for the plaintiff and Mr. Maguire for the defendants and also Mr. Sean Healy, an administrative officer in charge of the Claims Department of the defendants, because of the action of the tides and wind, the sand levels in and around this ramp are in a constant state of flux and adjacent to the ramp, the level of the sand rises and falls, dictated by these forces of nature. The variance in the levels of the sand at the ramp would seem to be extensive and perhaps up to a foot, and certainly at least six to eight inches. The evidence of Mr. Healy would suggest that at times it could be even greater. His evidence was that the ramp was designed to allow the tide go under the ramp; hence, the reason it was supported on two piles, and he said on the morning of the trial, the bottom of the ramp was visible where the tide had gone under it.
5. Some controversy in the evidence centred around a clump of grass visible on Mr. Osborne's photographs which were taken in April 2010. This clump of grass was located to the right-hand side of the ramp as one descends. This large clump of grass was missing in the photographs taken by Mr. Maguire on 6th July 2010. It was suggested on behalf of the plaintiff that works had been carried out in the area, causing the removal of the clump of grass. This, however, was vehemently denied by Mr. Healy who said no works had been carried out in the area and that the clump of grass had been removed simply by the action of the sea. I accept Mr. Healy's evidence in this regard and it illustrates the extraordinary power of the action of the sea, to continuously alter the landscape in this area of sand dunes.
6. On the day of the plaintiff's accident, the three sisters descended the ramp. Donna Kelly was in front and the plaintiff was behind, towards the left-hand side of the ramp. Her sister, Deirdre, was to her right and slightly behind her. When Donna Kelly got to the end of the ramp ahead of the others, she stepped off the ramp onto the sand, uneventfully. The plaintiff described reaching the end of the ramp with her right foot close to the edge, hesitating for a second because the step down was a big step and then stepping out in a normal way, but when her left foot reached the sand, she went over on her left ankle and fell down to the left side. She fractured her ankle in this fall and cried out in pain. She felt she had stood on something hard which caused her to fall. Neither she nor her sisters could understand, initially, why she could not get up or what caused her fall. When they realised she was unable to get up, her sisters assisted her up and put her sitting on the end of the ramp. At that stage, they examined the area and their evidence was that they found a ledge of concrete protruding outwards from the edge of the ramp on its left-hand side. This ledge came out a distance of approximately four to six inches from the edge of the step and all of them said that it was covered by about a half-inch to an inch of sand which was brushed away by one of them to reveal the surface of the piece of concrete which was described as having a jagged or uneven surface.
7. The plaintiff denied standing on something which moved underneath her foot, when it was suggested to her in cross-examination that she may have said something of that kind at a meeting on 9th November 2009 at the scene, attended by Mr. Healy, Mr. Osborne and the plaintiff. Because the tide was in on that occasion, a proper inspection could not be carried out that day.
8. The case made against the defendants in these proceedings is that they failed in their duty as occupiers of the location where the plaintiff's accident occurred in causing or permitting this piece or ledge of concrete to protrude from the end of the ramp which, in combination with the shallow covering of sand over it, created a trap for the plaintiff as she attempted to step off the ramp onto the beach. The evidence of the plaintiff's engineer, Mr. Osborne, may have added a slight variance to the plaintiff's case insofar as in his evidence he accepted that for the plaintiff to have tumbled or fallen on a piece of concrete, as she described, it would have had to have been loose or detached from the face of the step and he said that when he did his inspection in April 2010, he found about two to three inches from the face of the step a piece of concrete which he said, in his opinion, was the result of concrete protruding from under the shuttering and which had probably become detached from the ramp by the process of erosion. It was his opinion that the piece or ledge of concrete which the plaintiff said she stood on, although very close to the ramp, was probably detached from it.
9. The defendants' status as the occupier of this place was not in dispute, nor was there any controversy about the plaintiff's status as a "recreational user". Accordingly, the duty owed by the defendants to the plaintiff was that set out in s. 4 of the Occupiers'

Liability Act 1995 [the Act of 1995], and was as follows:

"4.—(1) In respect of a danger existing on premises, an occupier owes towards a recreational user of the premises or a trespasser thereon ('the person') a duty—

(a) not to injure the person or damage the property of the person intentionally, and

(b) not to act with reckless disregard for the person or the property of the person,

except in so far as the occupier extends the duty in accordance with section 5 .

(2) In determining whether or not an occupier has so acted with reckless disregard, regard shall be had to all the circumstances of the case, including—

(a) whether the occupier knew or had reasonable grounds for believing that a danger existed on the premises;

(b) whether the occupier knew or had reasonable grounds for believing that the person and, in the case of damage, property of the person, was or was likely to be on the premises;

(c) whether the occupier knew or had reasonable grounds for believing that the person or property of the person was in, or was likely to be in, the vicinity of the place where the danger existed;

(d) whether the danger was one against which, in all the circumstances, the occupier might reasonably be expected to provide protection for the person and property of the person;

(e) the burden on the occupier of eliminating the danger or of protecting the person and property of the person from the danger, taking into account the difficulty, expense or impracticability, having regard to the character of the premises and the degree of the danger, of so doing;

(f) the character of the premises including, in relation to premises of such a character as to be likely to be used for recreational activity, the desirability of maintaining the tradition of open access to premises of such a character for such an activity;

(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;

(h) the nature of any warning given by the occupier or another person of the danger; and

(i) whether or not the person was on the premises in the company of another person and, if so, the extent of the supervision and control the latter person might reasonably be expected to exercise over the other's activities

... "

10. Before embarking upon a consideration of whether or not the defendants failed in their duty as set out in s. 4 of the Act of 1995, it is necessary to consider precisely what caused the plaintiff to fall, as the defendants, through the evidence of their engineer, Mr. Maguire, disputed the mechanism of the plaintiff's fall as she described it in her evidence.

11. Photographs of the scene of this accident were taken on four different occasions, the first being 9th November 2009, when the original inspection was arranged but could not be completed because the tide was in. The second occasion was when Mr. Healy visited the scene alone on 16th December 2009. The next photographs were taken by Mr. Osborne, the plaintiff's engineer, on 7th April 2010. Finally, the scene was photographed by Mr. Maguire on 6th July 2010. As is apparent from all of these photographs, the level of sand around this ramp changes to a considerable degree as a result of the action of the tide. It is apparent that this force of nature has the capacity to shift large quantities of sand, to the extent of at times leaving the ramp where it meets the beach almost fully buried, to at other times leaving the ramp, or at least the smooth concrete part of same, almost standing proud of the beach.

12. The plaintiff and her two sisters selected Photograph 6 of Mr. Osborne's photographs as being a close representation of the state of the sand on the beach vis a vis the ramp when the plaintiff's accident occurred. Mr. Osborne measured the depth of the step to the beach in that photograph as being approximately eight and half inches.

13. The first issue to be determined is whether or not the concrete ledge as described by the plaintiff and her two sisters was there when she had her accident.

14. I am quite satisfied from the evidence, and in particular, the evidence of Mr. Osborne, that when this ramp was constructed, there was some leaking or oozing out of concrete underneath the shuttering at various parts of the ramp. Mr. Osborne, in his evidence, described this and in his Photographs 7 and 8, demonstrated two pieces of protruding concrete, one on either side of the ramp. The main criticism which Mr. Osborne made of the manner in which the ramp was constructed was that the shuttering was not continued down to a much greater depth into the sand. He said it should have gone down another two to two and half feet which, he said, would have meant that even if there was some leakage at that level it would be well below the sand level at all times and not cause a hazard to anybody.

15. When Mr. Healy visited the scene on 16th December 2009, he excavated along the front of the step to a depth of about six inches with a small trowel and then, with a screwdriver, penetrated the sand further down to an additional depth of two to three inches. His evidence was that he could find no protruding concrete. It is apparent from the photographs that he took on that day that the sand at the front of the step varied in height. On the left-hand side, as one faces the step, it was at depth of about eight inches, similar to that in Mr. Osborne's Photograph 6 and on the right-hand side it was a couple of inches higher.

16. When Mr. Maguire visited the scene on 6th July 2010, he excavated in front of the step down to a depth of 18 inches and exposed the entire façade of the step down to that depth. The photographs which he took of that excavation clearly demonstrated that there was smooth concrete down to about a depth of 12 inches, below which there appeared to have been further concrete but without a smooth edge. His evidence was that there was no protrusion of concrete as described by the plaintiff and her sisters. I accept the evidence of Mr. Healy and Mr. Maguire as to their findings on the occasions when they inspected the front of this ramp.

That does not, of course, mean that there was not the ledge or protrusion of concrete there on the date of this accident as seen by the plaintiff and her sisters. It may very well have been the case that this was there, but subsequently became detached by erosion, and washed away. I do not think that the piece of concrete that was found by Mr. Osborne on 7th April 2010, could have been the ledge the plaintiff and her sisters described for the simple reason that if it had become detached between 22nd April, 2009, and 16th December 2009, when Mr. Healy was there, it is unlikely to the point of impossibility that it would simply have been lying in the position where Mr. Osborne found it, because undoubtedly, the action of the sea and the movement of the sand would have carried it far away from that location by 7th April 2009, almost one year after the plaintiff's accident. It is, of course, the case that if this ledge was there, it would have had to have been at a depth of at least one foot from the top of the step because it was not in dispute that the smooth concrete went down to that depth around the ramp. This necessarily means that if, on the day of the plaintiff's accident, the sand was eight or eight and half inches below the top of the step, the concrete ledge would have had to have been four inches below the surface of the sand. If there was approximately four inches of sand on top of this ledge, it could hardly have interfered with any footfall over it. Thus, the only way in which a ledge at that level could have interfered with the plaintiff's footfall would be if the sand or beach level was lower than estimated by the plaintiff and her two sisters. They all said that there was about an inch or half-inch of sand on top of this ledge. That would necessarily have meant that the sand would have had to have been approximately eleven inches below the top of the step. It is quite clear from the evidence of Mr. Healy that variations in the level of the sand at the step commonly go down to that level or even below if it is the case that the tide can pass under the ramp.

17. I accept the evidence of the plaintiff and her two sisters that they did find a ledge of concrete protruding from the front of the ramp but down at a depth of approximately one foot below the top of the ramp, which means that, on that day, the level of the sand was lower than eight inches and probably around eleven inches below the top of the ramp. I am also satisfied from the evidence of Mr. Healy and Mr. Maguire that between the date of the plaintiff's accident and 16th December 2009, this ledge became detached and was washed away by the action of the sea. As said earlier, I do not think that the piece of concrete found by Mr. Osborne on 7th April 2010 could have been the same piece as detached from the face of the ramp because between April 2009 and April, 2010, it would almost certainly have been moved far away from the ramp. Thus, it follows that the piece of concrete found by Mr. Osborne in all probability came from somewhere else and it is not possible to explain where it came from or to establish any connection between it and the plaintiff's accident.

18. The next question which must be considered is whether or not this ledge was the cause of the plaintiff's fall.

19. In her evidence, the plaintiff described walking down to the end of the ramp, hesitating at the edge of the step and then stepping off with her left foot. While she hesitated because of the height of the step, her evidence was that she took a normal step. There is nothing surprising in this. Her sister, Donna, had gone ahead of her and walked off the step uneventfully from the ramp onto the beach. The plaintiff was, and indeed is, a young, apparently healthy person, and it would have been surprising if there was anything more than a second's hesitation before stepping normally from the ramp onto the beach. It was quite clear from her evidence that she did not use the handrail nor did she turn sideways so as to carefully lower herself from the ramp to the beach. In taking a normal step, in my view, it is highly probable that her foot came to land on the sand well in excess of six inches from the front of the ramp. Mr. Osborne's evidence was that a normal stride is about a yard, and if allowance is made for the plaintiff being of short stature, it is very hard to see how the plaintiff's foot could have landed on the sand any closer than a foot and half from the ramp, and in reality it probably came to ground about two feet from the ramp. This would, of course, have taken her footfall well beyond the concrete ledge found by the plaintiff and her two sisters after her fall. Thus, I have come to the conclusion that it is very unlikely that this concrete ledge was the cause of the plaintiff's fall and very unfortunate injury.

20. I think it likely that what happened here was that the plaintiff, in her own mind, perhaps because she was distracted at the time, may have underestimated the depth of the step, and as a consequence stumbled when her foot finally landed on the sand. It is the case that a beach is not like a paved surface. It is uneven and of varying consistency, all of which, in combination with perhaps a misjudgement of the height of the step, could very easily cause a fall such as occurred to the plaintiff. Needless to say, no fault could attach to the defendants because of the natural uneven and inconsistent nature of the surface of the beach.

21. The foregoing conclusion leads inexorably to a finding that there was no fault on the part of the defendants which led to the plaintiff's accident. This conclusion is sufficient to dispose of the issues raised in this action. However, for the sake of completeness, I should add that even if the protruding ledge of concrete did cause the plaintiff's fall, I would be of opinion that that would not amount to a breach of the duty imposed upon the defendants under s. 4 of the Occupiers' Liability Act 1995.

22. The "*danger*" here that had to be guarded against was the existence of this concrete ledge at a depth of one foot below the front edge of the ramp. This "*danger*" would only exist in certain circumstances, namely, when the sand level was at or about the level of the protrusion so that it was thinly coated by the sand so as to be invisible but at the same time close enough to the surface of the sand to interfere with a footfall that came in contact with it. If the sand was at a higher level, for example, six or eight inches below the level of the step, then, manifestly, this protrusion would have been sufficiently buried by the sand so as not to interfere with any footfall there, and if the level of the sand was washed away to a much lower level so that the ledge was visible, then, manifestly, it would have been much less of a danger or no danger at all, firstly, because it was visible, and secondly, because the height of the ramp above the sand level would be such that it would not be possible to descend off the ramp taking a normal step. It would require either a jump for those athletic enough to do that, or alternatively, a careful sideways descent, probably using the handrail as a support.

23. Insofar as it was a "*danger*" as described, this came about at the time of the construction of the ramp and resulted from the extrusion of a small amount of concrete underneath the shuttering. Whilst Mr. Osborne criticised the way in which the ramp was constructed on the basis that the shuttering should have been extended much further downwards, namely, a further two to two and a half feet, his opinion in this regard was countered by the view expressed by Mr. Maguire and Mr. Healy which was to the effect that the ramp was designed and built on stiles specifically to allow the sea get under it, thereby reducing its exposure to the forces exerted by the sea. Thus, the design and construction of the ramp in that way would appear to have out ruled the depth of shuttering recommended by Mr. Osborne.

24. Having regard to the reasonable objectives sought to be attained by the design and construction of the ramp that was adopted by the defendants, the failure to do that which Mr. Osborne said they should have done, particularly bearing in mind the very limited nature of the potential "*danger*" created as discussed above, in my view, could not be said to be a breach of any duty of care, as occupier, known to the law. Far less can it be said that there was a "*reckless disregard*" for the person of the plaintiff, as contemplated in s. 4 of the Act of 1995.

25. As it is necessary for the plaintiff to establish "*reckless disregard*" and as I am quite satisfied that the evidence in this case goes nowhere near reaching that threshold for this reason and those already stated above, it necessarily follows that the plaintiff cannot succeed in this action and therefore it must be dismissed.

