

THE HIGH COURT
PERSONAL INJURY SUMMONS

2007 3311 P

BETWEEN

MICHELLE WALSH

PLAINTIFF

AND

SOUTH DUBLIN COUNTY COUNCIL

DEFENDANTS

JUDGMENT of Mr. Justice Lavan delivered on the 28th day of November, 2009.

This plaintiff has suffered a serious injury to her ankle.

The plaintiff claims that in or about 21st November, 2004, just after midnight, the plaintiff was walking along the public footpath on Woodford Villas in Clondalkin, Dublin 22 with her brother and sister.

As the plaintiff was walking across the mouth of Woodford Villas, she alleges that she was caused to trip over a damaged sluice valve marker post. The marker posts are concrete slabs each bearing steel plate with the letters S.V. As a result of tripping over the marker post she was caused to fracture her ankle.

On 12th day of July, 2007 the plaintiff swore an affidavit of verification in which she claims that:

"The assertions, allegations and information contained in the personal injury summons which are within my own knowledge, are true. I honestly believe that the assertions, allegations and information contained in the personal injury summons which are not within my own knowledge, are true.

I am aware that it is an offence to make a statement in this affidavit that is false or misleading in any material respect and that I know to be false or misleading."

The defence delivered 19th June, 2007 is a complete traverse of the plaintiff's claim with 8 particulars of contributory negligence.

The evidence

The plaintiff gave evidence in terms of the endorsement of claim. Arising out of that evidence her case was that she left Bloomers public house shortly after midnight and that her injury was sustained between 12:30am and 12:45am.

Under cross-examination a number of issues arose.

- Firstly, that the ambulance call-out records show that the call-out was made at 1:57am and not as alleged by the plaintiff.
- Secondly, that the ambulance arrived at the locus at Bloomers public house aforesaid at 2:19am.

In my view, the plaintiff's answers did not adequately deny these points other than to say and I quote:

"Well, they had me in the ambulance for about 20 minutes trying to get the boot off and all."

It was then put to the plaintiff that the ambulance was at the scene for no more than two minutes.

At that stage in the cross-examination it was obvious that the plaintiff had no answer to the time discrepancy and further was unable to comment on the time she arrived at the hospital.

The plaintiff's evidence of being attended on at the hospital was most unsatisfactory. The issue arising here is that the plaintiff gave an account of her accident to nurse Bury. This the plaintiff adamantly denied. It was put to the plaintiff that she suffered a blunt injury and the note take by nurse Bury states as follows and I quote:

"Our patient, she was pushed this am, sustained injury, right ankle swelling, lateral malleolus, e.m.s.t. intact."

It was then put to the plaintiff that at 5:30am, at 5:45am and at 6.00am she failed to answer when she was called for attention by the accident and emergency staff. This she agreed to.

It was then put to the plaintiff that she returned to the hospital at 10:17am on that Sunday morning. She was again triaged by a male nurse, Mr. Joaquin. The plaintiff was asked did she tell the nurse what had happened to her to which she replied "I just told him that I fell over cement and that I didn't know what the name of it was". It was then put to the plaintiff that the history she did, in fact, give was:

"stepped into a pothole last night".

This the plaintiff denied.

Later on in her evidence the plaintiff under cross-examination being asked how the accident occurred replied and I quote:

"She said her brother and sister were each of me. The two of them were walking beside me on either side of me and when I fell I know I kind of fell out but I fell out into the middle of the road and Jon started laughing and he was saying 'you eejit get up, you spa, how did you do that, kind of thing?'"

At this stage in the evidence it quickly became apparent that the plaintiff could not clearly identify where she fell.

As I have said at the outset I am satisfied that the plaintiff suffered a serious injury.

The second witness called for the plaintiff was her brother Jonathan Walsh. In relation to his evidence I find it wholly unreliable. He was in Bloomers public house from 4:30 pm until he departed with the plaintiff and his other sister Joanne at a time which is in dispute.

In my view, on his own admission, he was seriously intoxicated. He had been drinking for between seven and a half and eight and half hours. He is a young man.

I am satisfied on the balance of probabilities that he could have no clear recollection of the events leading to the accident.

Mr. Sean Walsh, engineer, gave evidence on behalf of the plaintiff. My view of Mr. Walsh's evidence is that it amounted to a counsel of perfection. The estate in question has been constructed in the 1980s and no other accident has ever been reported in respect of the S.V. signs. Nor do I accept that these two signs were a trap or hazard given the clear street lighting shining down.

In relation to the defendant's case I accept as fact the evidence of nurse Joaquin, Mr. Maguire (engineer), Mr. Cawley and Mr. Brian Heapes (ambulance personnel on the night) and Ms. Emily Bury and Mr. Frank McManus.

It is clear from the foregoing and from the transcript that this has been an unhappy case. How the plaintiff's lawyers permitted her into the witness box to give the evidence that she gave when they were in possession of the hospital records detailing the time she arrived at the hospital. And I note that the plaintiff's solicitors furnished those records to the defendants' solicitors on request.

On any perusal of those records it must have been evident that there was a serious discrepancy between the plaintiff's times and that of the hospital times as contained in their records.

I have a similar criticism in relation to the ambulance records. Likewise from these it was clear that there was a serious discrepancy in relation to times.

I ask myself did the plaintiff's lawyers take a tactical view and say that if they accepted the records of both the ambulance service and the hospital does it affect the credibility of the plaintiff as a witness given the she has sworn an affidavit of verification in contravention of those probably incontrovertible facts. Before proceeding to judgment there is one further matter of which I want to seek clarification and that was what was the date of the plaintiff's solicitors originating letter?

I note from the defendant's notice for particulars dated 17th May, 2002, that at No. 2 they ask:

"Please confirm the date upon which the plaintiff notified the defendant of the alleged accident. Please forward any documentation in relation thereto."

The plaintiff's replies dated 17th August, 2007 were as follows:

(2). "The plaintiff did not formally notify the defendant of the occurrence of the accident other than by way of the initial letter furnished to the defendants by this firm.

It is clear to me that the plaintiff's lawyers took the view that they would accept her word. They clearly ignored the facts surrounding the swearing of the affidavit of verification.

The Oireachtas being concerned with bogus claims has move to ensure that claims are verified. Where an affidavit of verification is sworn and subsequently proven to be wrong then the offending party must pay the price for this.

In this instant case the plaintiff was in difficulties from the beginning of her cross-examination. She could not validate her affidavit of verification. And I have to reject her evidence and that of her witnesses. I do so noting that this was a special evening whereby the family were saying goodbye to the plaintiff's sister Joanne who was leaving for New Zealand.

I therefore find as fact that the plaintiff has failed, on the balance of probability, to establish a case in negligence against the defendant. I therefore must dismiss the plaintiff's case.