

THE HIGH COURT

[RECORD NO. 2015 5144 P]

BETWEEN

L.W. (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND, H.W.)

PLAINTIFF

AND

TIPPERARY COUNTY COUNCIL

DEFENDANT

Judgment of Ms. Justice Creedon delivered on the 26th day of October 2018;

1. The plaintiff was a minor suing through her mother and next friend in respect of an alleged accident which she said occurred on the 23rd June 2007. The pleadings were commenced by way of a Personal Injuries Summons alleging negligence and breach of duty, including breach of statutory duty.
2. The plaintiff said that she was present on a parameter wall situated on premises owned and occupied by the defendant when due to the condition of the wall, she was caused to fall suffering severe personal injury, loss, damage and distress. The plaintiff was five years of age at the time of the accident. She was immediately transported to Waterford Regional Hospital where she was diagnosed with a ruptured spleen. Liability is fully denied by the defendant.

Circumstances of the Accident

3. The plaintiff herself has very little memory of the accident. This was to be expected as she was five years of age at the time of the accident. Photographs of the location of the accident were produced in court. The location showed the boundary wall of the estate said to be seven feet high with pillars at intervals. At the location of the accident there was also an ESB pillar which could be more easily described as a metal box. The plaintiff identified the location from the photographs and gave evidence that she recalls stepping up on the ESB pillar and the next memory she had was of lying on the footpath and an ambulance being present. Engineering evidence given on behalf of the defendant suggested that the location of this may have altered slightly since the accident.
4. Her mother gave evidence of standing outside her residence in County Tipperary talking with friends; the location of this address was identified in photographs produced to the Court. It was in the evening sometime after 6pm, the mother gave evidence that the plaintiff had been in the square which was the area in front of the houses, when she ran out on the footpath. Her mother also gave evidence of seeing the plaintiff on the wall, she shouted at her to get off the wall and as she did so the plaintiff fell from the wall. Her mother's evidence was that she fell from the pillar. Her mother said that she heard the impact of her daughter hitting the pavement. She said that the plaintiff "belly flopped" onto the kerb resulting in her head and shoulders being out on the road with her feet on the footpath, this caused her spleen to rupture. She gave evidence that her daughter was unconscious for a time.
5. She further said that on admission to hospital, her daughter underwent surgical treatment, her spleen was saved, however she now has permanent substantial scarring

running down her abdomen. There was no other evidence from any witnesses to the accident.

Plaintiff's Evidence

6. The plaintiff resided with her family at another house in the same development in Co. Tipperary, which is a Local Authority housing estate. There were 31 houses in the estate, which was constructed in 1982. The plaintiff resided in a cluster of eight houses which form part of the estate.
7. The plaintiff's mother gave evidence that she had been residing in this housing estate herself since she was about two years of age. She said that she herself had climbed on this wall as a child and that children were climbing on it on a daily basis for as long as she can remember. When referred to the capping on the wall she confirmed in her evidence that she herself had climbed on both the capped and uncapped part of the wall.
8. She said that residents had made complaints about the wall, particularly in relation to the height of the wall. She said that she had made a verbal complaint about the height of the wall at the reception desk of Tipperary County Council roughly two years before the accident had occurred. After the accident in July 2007, a petition was signed by a large number of residents and sent to the Council. She said that she signed this petition herself.
9. Evidence was also given by a Mrs. M.O'D, who had been a resident of this particular estate for 35 years. She moved into the estate in 1983, she had four children and ten grandchildren. She gave evidence of children continuously climbing and playing on those walls during her residency in the estate. She also indicated that she was constantly telling her children to desist from climbing on the wall.
10. Mrs M.O'D said she herself never made a prior complaint about the wall, the only complaint she was aware of was the petition which was signed after the accident which was requesting the Council to reduce the height of the wall. She gave evidence that she remembers being told that the wall height would be reduced by the following September which would have been September, 2007. In cross-examination she confirmed that the real issue in respect of the wall was traffic and the visibility of children at the entrance.
11. Evidence was also given by Ms. K.A.W who is an aunt of the plaintiff and resides at another house in the estate. Her house is in fact inside the wall at the location of the accident. She gave evidence of children climbing and always playing on these walls. She confirmed that she had not made any complaints prior to the accident. She was involved in organising the petition after the plaintiff's accident for submission to the Council in respect of the wall.
12. Mr. Hayes, engineer, gave evidence on behalf of the plaintiff, his evidence touched on three main points:
 - (i) In respect of the height of the wall, he adduced evidence of An Foras Forbatha Guidelines and gave evidence in respect of site distances at the entrance. These

1974 guidelines had been updated in 1984 and again in 1998. He gave the view that if these guidelines had been followed, the height of the wall would have been reduced to one metre. This evidence was not in his original report.

- (ii) He also dealt with the issue of capping, he indicated that the capping had a dual function: firstly, that it was a feature to prevent weather damage to the wall, and secondly that it made it more difficult to stand on the wall. He gave the view that if there had been full capping on the wall and on the pillar, it would in turn have made it more difficult to climb.
- (iii) He also dealt with the location of the ESB pillar and the effect that this had on the ability of the plaintiff to climb on the wall.

Defendants Evidence

13. Mr. Torpey, an engineering technician employed by the Council, gave evidence on behalf of the defendant. His primary evidence was with regard to an investigation he carried out as to what complaints, if any, had been made to the Council in respect of this wall. In his evidence he indicated that the search that he had made of the complaint records of the Council had been confined to the period from the 7th March 2006, to the 25th September 2007, being some fifteen months prior, and three months following the accident, a total eighteen-month period. In that period, he had not been able to locate any record of complaints being made to the Council in respect of this wall.
14. Mr. John O' Sullivan a chartered engineer, also gave evidence on behalf of the defendant. He gave evidence as follows: -
 - (i) With regard to the height of the wall, his evidence was that this height was perfectly standard,
 - (ii) With regard to capping, his evidence was that this was primarily as a weather shield and not to prevent people walking on the walls. He further indicated that most caps would not be for the purpose of preventing people walking on top of the walls.
 - (iii) With regard to the An Foras Forbartha Guidelines, he indicated that these concerned traffic and safety, that they were not a statutory document and were only for guidance. He said that these guidelines were in relation to site distances coming out onto larger roads. His evidence was that the speed limits mentioned in the guidelines would be greater than that in the housing estate. He also gave evidence that there would be relaxation permitted for local authorities and that while local authorities would strive to comply with them, they were not required to strictly adhere to them. He said that in any event, since the footpath was two metres wide this allowed cars to halt and gave a safe sight distance.
 - (iv) With regard to allurement he was of the view that a lower wall would be of a greater allurement and he did not have any particular criticism of the wall.

- (v) In cross-examination he dealt with the level differences of the ground, both inside and outside of the wall at the location of the accident and indicated there was a wheelchair ramp inside the wall which required the wall to be of a certain height. In relation to the ESB pillar he said that even with the ESB pillar it would be difficult for any child to get up on that wall.

Legal Arguments of the Plaintiff

15. The plaintiff first of all dealt with the issue of the wall, saying that it was not a rear wall but a boundary wall and accordingly it did not have to provide privacy but it did affect visibility. Counsel submitted that it created a site obstruction and was contraindicated. Counsel said the wall had a negative effect as it had no functional use. He said that the wall was too high and not suitable for a residential housing estate. He said that given the height and the history of complaints, it was entirely foreseeable that somebody would climb onto it and fall. Further he said that capping had been removed and not replaced rendering the top of the wall flat and so an allurements to children. While no negligence was being inputted in respect of the ESB pillar, he argued that its position did nonetheless provide a step up and made the accident more foreseeable.
16. With regard to the An Foras Forbartha Guidelines, counsel said that it had never been suggested by the plaintiff that they had the same legal standing as an Act or a statutory instrument. However, the plaintiff said it was absurd to suggest that a national body could ignore or not comply with them, or that there would be a more relaxed approach taken in respect of Local Authorities. The plaintiff contended that a statutory local authority cannot ignore the requirements of another statutory body.
17. With regard to the making of complaints the plaintiff said that the Council had confirmed in evidence that the only evidence it could give in respect of complaints was for the time period from March 2006 to September 2007. The plaintiff said that there was no evidence to rebut the evidence of Ms. O'D that from 1983 onwards complaints were made regarding the height of the walls and that this was a continuing and reoccurring feature.
18. The plaintiff then went on to address the legal principles. In particular counsel spoke about the purpose of the Occupiers Liability Act 1995 ("the Act") and the background of the Act and opened the Circuit Court case of *Heaves and Westmeath County Council 20 Ir L Times (ns) 236 (17th October 2001) CC (Mullingar)*. He referred to the concerns of the agricultural community which gave rise to the passing of this Act. He said that it was absurd to suggest that the plaintiff, when she got on the wall was a trespasser. He said further that while the ownership was with the Council it had been indicated that there is an obligation on the tenant to maintain the wall. The mother was legally obliged to look after maintenance of the wall and that it was absurd to suggest that the daughter becomes a trespasser when she goes up on the wall.
19. The Court was asked to consider whether a child of a tenant could be anything other than a visitor and that it would be inconceivable if she was anything other than a visitor. Counsel drew an analogy with an apartment complex and the common areas within an apartment complex. He said to fragment the wall from the rest of the property was an

artificial fragmentation, that the wall is part of the property. He submitted that the plaintiff remains as a visitor on the entire property and asks the court not to engage in the fragmentation of the property. He submitted that she is a visitor with the reasonable duty of care that accompanies that status.

20. He submitted that the local authority is the occupier and as such is exercising control over the wall. He said that there is no dispute that the local authority is the occupier.
21. He said that a trespasser is somebody other than a visitor or a recreational user and that what the Court has to consider is whether the plaintiff is a visitor or a recreational user. The plaintiff's counsel said that the plaintiff is clearly not a recreational user, clearly not on the premises for the purposes of engaging in recreational activity, she is there as the daughter of the tenant.
22. As to the question of why the plaintiff is on the property, counsel for the plaintiff contended that she was there because she is the daughter of the tenant, that her mother entered into a contract of tenancy, and by virtue of this contract she was there by permission of the local authority. He says the tenancy contract brought her within subsections (a), (b), and (c) of the definition of "visitor" in section 1 of the Act and he opened again the case of *Heaves* at the bottom of p. 2 of that copy judgment and quoted from the judgment of Judge Bryan McMahon which says; *"From a careful reading of these definitions it is clear that by entering under a contract, the plaintiff is squarely in the category of "visitor" and by paying a charge he is outside the category of "recreational user"* He said that because of the tenancy under which her mother paid rent, the Council could engage in an act of separating out of the wall, as it was an integral element of the property. He says that the duty of care is then governed by section 3 of the Act.
23. With regard to the rules set down and section 2 of the Act he said that he agreed with the defence that section 2 of the Act now means that the common law is now transcended by the 1995 Act and that the law in relation to occupiers is now governed by the Act.
24. He made reference to p. 186 of *McMahon* and *Binchy* and said that the test for common law negligence still applies parallel to the Act. He said that the test is as elucidated in *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84 being reasonable foreseeability, proximity of relationship, countervailing public policy considerations and whether it is just and reasonable to impose a duty of care.
25. With regard to foreseeability, he said that there is incontrovertible evidence that before March 2006, that children were climbing on the wall and that it was a seven-foot-high wall.
26. With regard to proximity he said, there is proximity, as the plaintiff is a resident of the premises, her mother has executed a contract of tenancy, and she is entitled to be on the premises.

27. With regard to the test of just and reasonable, he highlighted to the Court the quotation from Keane C.J in *Glencar Explorations P.L.C v. The County Council of Mayo, (No.2)* [2001] 1 IR 84 at p.139; *"It seems to me that no injustice will be done and they are required to take the further step of considering whether in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff."*
28. He said that it was the plaintiff's case that when the estate was constructed in 1982 it was not in compliance with An Foras Forbartha Guidelines in respect to the entrance and no regard was given to the guidelines. He said that what the Court was being asked to do is impose a duty of care to protect children, who were exposed to the wall that would not have been dangerous had it been properly constructed.
29. He said that the plaintiff is a visitor under the Act with the attendant duty of care, he said further independently of that, the *Glencar* test is also satisfied and he argued that therefore whichever route the Court takes there is a duty of care in existence. Counsel contended that the wall was too high and capping was allowed not to be on the wall. He said further that capping would have made it harder to get up on the wall when it came to the positioning of the ESB pillar.

Legal Arguments raised by the Defence

30. The defendant indicated that the plaintiff cannot be a visitor as contended for by her. The defendant says the plaintiff was a tenant in a housing estate, that she lived there, that she therefore occupied the house and could roam within the confines of the public housing area. The defendant said that her status changed when she climbed on to the wall, that she had no permission from any individual, including her mother and that resultantly, she was a trespasser on the wall.
31. The defendant said that without the consent or implied permission of the Council she cannot be a visitor or a recreational user and accordingly she was a trespasser with the attendant duty of care under section 4 of the Occupier's Liability Act, 1995.
32. The defendant argued that the Council done nothing wrong, he said that the wall was not of itself a danger and referred the court to the case of *Eoin Ryan v. Office of Public Works* [2015] IEHC 486, a judgment of Murphy J. The defendants said that the wall was not an attraction to children and that for the plaintiff to succeed that she had to overcome the issue canvassed in the Ryan case, namely that there is a danger existing on the premises. In that particular case, the plaintiff was held to be a recreational user, the swing was held not to be of itself a danger and the case was rejected entirely.
33. The defendant said that matters would be different if perchance the wall had fallen, then it would have been constructed in a dangerous manner, and there would be a case to answer in respect of defect, but in this case there was no defect and it was not inherently dangerous.

34. The defendant asserted that with regard to the recommendations of an Foras Forbartha, that compliance did not apply and that they did not have the force of law. The defendant stated that developers strive to accord with them but that does not give rise to liability.
35. The defendant argued that there has been no breach of any building regulations and no basis on which to properly find liability.
36. The defendant said that if the Court was against him on all of the above he would also highlight the common law position. Counsel for the defendant went on to contend that the Occupier's Liability Act 1995 has overtaken the common law and replaced it. Liability is confined to the plaintiff's status on the premises. He therefore argued that in order to succeed, the plaintiff would have to establish that the Council had acted in reckless disregard of the plaintiff.
37. The defence said that while a lot of emphasis had been placed on the disquiet in the locality, there had been no recent complaint. He said that there had been a complaint after the accident in respect of height and visibility and that the residents wanted the wall removed. The defendant said that in the absence of complaints there was reasonable foreseeability that the Council should have anticipated.
38. The defence asserted that the *Glencar* principles are applicable but the case would still have to meet the test of just and reasonable and in the absence of specific complaints, it would not be just and reasonable to impose liability on the defendant.
39. With regard to allurement and *McNamara v. Electricity Supply Board* [1975] 1 IR 1 (SC), the defendant states that Occupiers Liability Act has weakened that case. The defence said that *McNamara v. ESB* has no application since the Act came into effect which limits duties on occupiers. Counsel for the defence said that this claim comes within the framework of the 1995 Act or not at all.
40. With regard to the issue of capping, the defence argued that the plaintiff's mother and plaintiff had gone up and down the wall in both directions irrespective of whether there was capping on it or not.
41. The defence said the plaintiff was not entitled to be on the wall. They argued that here is no question that she had the implied permission of the mother as she did not want her daughter to be there. They say that the sight line only affects the entrance way, and that even if it had been lower, it would have made no difference to the location of the accident. They say that if the Council has breached the An Foras Forbartha Guidelines it is not relevant to the accident. In considering the *Glencar* principles, then the defence says that the court has to consider whether there is a wrong before dealing with the issues of proximity and foreseeability.
42. The defence invited the Court to identify what breach of any duty the plaintiff was able to establish. They argued that by virtue of section 2 of the Act, a raft of common law duties are all obliterated.

43. They pointed the Court to the duty of care that is owed to children by a school. They argued that children can also be classified as visitors while they are in school. However if they happened to be on school grounds outside of school hours, they could then be classified as trespassers and the duty of care that is owed to them would alter. The child's classification would reduce from being a visitor to a trespasser. Defence counsel then further mentioned *Heaves v Westmeath County Council* 20 Ir L Times (ns) 236 (17th October 2001) CC (Mullingar) at p 2.

Decision

44. This case was grounded on a personal injuries summons alleging negligence and breach of duty including statutory duty. The particulars of negligence on the part of the defendant are set out in paragraph 8 of the summons which set out seven particulars of negligence, breach of duty and breach of statutory duty in respect of the wall. The Plaintiff in the summons contended that the defendant was the occupier within the meaning of S1(1) of the Occupiers Liability Act 1995 but did not claim any particular status for the plaintiff under the Act. In its defense the defendant specifically pleaded that the plaintiff was a trespasser or in the alternative a recreational user within the meaning of the Act.
45. The plaintiff in this case managed to get up on the parameter wall of this housing estate and fall from it which caused the injuries that she sustained. The plaintiff's engineering evidence placed emphasis on the height of the wall, sight lines available from the entrance, capping on the wall and the An Foras Forbartha guidelines which were all opened to this Court. In addition, evidence was given in respect of complaints made to the Council in respect of the wall.
46. The Court is satisfied that the concerns of the residents prior to the accident concerned traffic and the visibility of children at the entrance, and this was supported by the evidence of Mrs. O'D. The plaintiff's mother said that she made one oral complaint to the Council prior to the accident. While the Court has no reason to doubt this testimony, the Council had no record of this complaint. The Council confirmed finding no record of any complaint for the period searched. The residents petition came after the accident. No evidence of any other accidents involving the wall were put before this Court.
47. While the plaintiff alleged that the wall was too high no evidence was put forward as to what might be an acceptable height, or a height that would limit the possibility or foreseeability of an accident. Indeed, the defendant's engineer indicated that the wall was of standard height and that a lower wall might be more accessible. Further no evidence of any inherent defects was put before the Court.
48. It was put forward by the plaintiff that the absence of capping on the wall made it easier to walk or run on the wall and created an additional allurements to children. The Court accepts the evidence of the defendant's engineer in this regard and that the function of the cappings on the wall are as an essential weathering feature and not to prevent climbing on the wall. In addition, the evidence before the Court was that children were

running up and down the top of the wall irrespective of the existence of capping or otherwise.

49. The Court is satisfied as follows; This accident was caused by the plaintiff climbing on the wall and falling. That sight lines at the entrance to the estate have no bearing on the accident. That the height of the wall is standard in housing estates of this nature and there were no inherent defects in it. The fact of capping being present or not has no relevance as to whether children will run or walk along the walls. The capping is primarily a weathering feature. Furthermore, neither the ESB pillar or its positioning are the responsibility of the defendant. There was no history of complaints shown to have happened since 1983.
50. The *Glencar* principles were opened to the Court. In considering these principles, the Court must firstly consider whether the accident was reasonably foreseeable before dealing with proximity and ultimately considering whether or not it would be appropriate to impose liability.
51. The test set out in *Glencar* is as follows: -
 - (i) There must be foreseeability of damage.
 - (ii) There must be proximity between the parties
 - (iii) There must be an absence of countervailing public policy considerations
 - (iv) The situation should be one in which the Court considers it fair, just and reasonable, to impose a duty.
52. In dealing with the first limb of the *Glencar* principles, the evidence in this case is that the wall was of standard construction and height in estates such as this and that there was no inherent defect in the wall. Further the evidence was that the fact of capping being present or not has no relevance as to whether children will run or walk along the walls. There was no history of complaints shown to have happened since 1983. In those circumstances the Court does not consider that the defendant could have reasonably foreseen this accident such as to meet the first limb of the *Glencar* principles.
53. Further on the facts of this case the Court finds that the serious injury sustained by the plaintiff was not caused by any negligence, breach of duty or breach of statutory duty on part of the defendant. This was a most unfortunate accident for which the plaintiff is responsible. The Court has considerable sympathy for the plaintiff but this cannot be transposed into liability on the part of the defendant.
54. In those circumstances the Court does not find it necessary to determine the plaintiff's status under the act. But even if the Court were to have taken the plaintiff's status and the defendant's obligations at their highest point under the Act as those under section 3 the Court finds that there has been no breach of the duty of care as defined in section 3(2) of the Act. As a matter of law the Court must dismiss the plaintiff's claim.