Neutral Citation [2015] IEHC 343

THE HIGH COURT

[2013 No. 6094 P]

BETWEEN

THOMAS FITZGERALD

PLAINTIFF

AND

SOUTH DUBLIN COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 21st day of May 2015.

1. This is an action brought by the plaintiff against the defendant for damages for personal injuries and loss arising as result of an accident which occurred on the 11th June 2006 when the plaintiff was playing on a common area of a housing estate situated adjacent to 34 Cloonmore Crescent, Jobstown, Tallaght, Dublin 24; then the plaintiff's home.

2. The plaintiff's case is that whilst he was crossing the common area to retrieve a football, he slipped and fell to the ground. When he did so, his back struck part of a broken bottle which was lying in the grass and as a result of which he sustained a laceration injury to the right hand side of his upper back. He brings this case in negligence and for breach of statutory duty against the defendant as the owner and occupier of the common area in question.

3. A full defence was delivered on behalf of the defendant who pleaded, *inter alia*, that the plaintiff was a recreational user on the common area within the meaning of s.4 of the Occupiers' Liability Act 1995 (the Act). The defence also included a plea of negligence and/or contributory negligence on the part of the plaintiff; the essence of which is that the plaintiff was the author of his own misfortune in failing to keep a proper lookout, to exercise due care and attention and playing on the open space when he knew or ought to have known that broken glass was present.

4. The plaintiff was born on the 22nd November 1996 and was therefore only 9 years old when this accident occurred. He has since attained his majority and the court has made an order amending the title of the proceedings enabling him to proceed in his own name.

5. It was accepted by the defendant during the trial that in the particular circumstances of this case the plaintiff was too young to be held guilty of contributory negligence. Accordingly, if legal liability is found to rest with the defendant, the plaintiff is entitled to succeed 100% in respect of his claim.

6. The plaintiff is currently studying for his Leaving Certificate. He is hoping to qualify as a carer. He has already obtained experience as a carer in the context of undertaking voluntary work in Northampton for the Prince's Trust. After he finishes his exams, it is his intention to go back to Northampton where he has been offered an apprenticeship in becoming a carer.

7. At the time of the accident the plaintiff was very keen on soccer and was a follower of the Shamrock Rovers team, and for which it was his ambition to play when he was older.

8. The estate where the plaintiff lived at the time of this accident has a number of open green spaces. One of these was a triangular-shaped common area adjacent to his home where the plaintiff often kicked a ball about with his friends and where the accident occurred. In the housing estate there were also a number of regulation football pitches to which the plaintiff , depending on the time of year and weather permitting, would go to play organised games a couple of times a week .

9. On the evening of the 11th June 2006 the Plaintiff was involved in a football 'kick-about' with some friends. A couple of jumpers or jackets had been used to create a goal. In the course of play the ball was kicked across part of the open green space towards the entrance to the plaintiff's home. The accident occurred when he went to retrieve the ball.

10. The plaintiff's mother took photographs of the triangular open green space within 24 hours of the accident. These photographs were introduced into evidence. Those photographs show that at the time when they were taken the grass was cut short. These photographs also show a few bits and pieces of what might be described as rubbish scattered about on the open green space, as well as what appears to be a bicycle lying on the ground next to one of the boundary walls. In addition, the photographs show what appear to be a number of brown coloured shards of glass. One photograph, said to be taken at the accident locus, shows what appears to be blood on and in the vicinity of some broken glass.

11. The football pitches and all of the common areas of the Cloonmore estate, including the triangular area where the accident occurred, are the property and under the control of the defendant. It was accepted in the course of the trial that the defendant was responsible for the maintenance of these open areas, and which included grass cutting.

12. As a result of the accident the plaintiff sustained a significant laceration to the upper right hand side of his back, which created a ten centimetre flap and which included the subcutaneous fat but not the underlying muscle. The wound was inspected and cleaned at the Adelaide and Meath Hospital and on the next day it was closed with sutures.

13. Some two weeks after the accident it was noted on medical review that the edges of the laceration were mildly inflamed .The plaintiff was prescribed and kept on antibiotics in respect of a discharge from the wound. When he was reviewed subsequently, it was noted that the wound had completely dried up.

14. The plaintiff went on to make an uneventful recovery but has been left with a 10 cm scar which I have had the opportunity of viewing. There is no functional impairment of the right arm and the reports of Mr Awadalla, consultant paediatric surgeon, dated the 4th December 2006 and the 16th December 2014, were admitted into evidence.

15. Although the plaintiff's scar is well healed, it is very obvious – even beyond conversation distance. There is some keloid tissue present and the scar is about half an inch in width. The plaintiff does not like the sight of the scar and generally keeps it covered. He sometimes experiences pain in the area of the scar and for which he takes pain killers intermittently depending on the level of symptomology.

16. In its defence the defendant pleaded, *inter alia*, that the plaintiff was guilty of inordinate and inexcusable delay in bringing the proceedings, thereby greatly prejudicing the defendant in its defence of the proceedings.

17. This defence was pursued at the trial of the action. Insofar as the plaintiff himself was concerned, he felt that it would be entirely unjust that he should be blamed for the delay which, admittedly, took place before he attained his majority. In relation to that the plaintiff's mother, who had been his next friend, gave an explanation for the delay which she admitted had taken place, and which she fully accepted ought not to have taken place. She sought to excuse the delay by virtue of circumstances in which she found herself, and which included a significant post natal depression. Having heard all of the evidence, I am satisfied that the defendant was not prejudiced by the delay in its defence of the proceedings and, in any event, the delay was in all of the circumstances excusable.

18. The evidence of the plaintiff's mother, Mrs Fitzgerald, was that for some considerable time prior to the date of the accident, she had regularly phoned the relevant department of the defendant Council to complain of problems in relation to the triangular-shaped open space. In essence her complaints related to anti-social behaviour which included, amongst other things, young people sitting up drinking on low walls which bounded the open green space. Mrs Fitzgerald gave evidence as to how her calls would be dealt with and that she would be put through to an individual in the appropriate department. Apart from making these calls she did not at any stage confirm their content either by email or by letter. She assumed her complaints would simply have been recorded and would be acted upon. On occasion she also went to the County Council offices to make similar complaints.

19. In evidence she said that her complaints also related to rubbish being left around and in the vicinity of the open space. She accepted that the defendant Council cut the grass but in relation to the presence of rubbish her view was that, more often than not, the rubbish encountered would just be pushed up against the side of the boundary wall rather than removed. She herself cleaned up rubbish from time to time, especially after the accident, and accepted that on a few occasions the defendant did come and collect the rubbish that she had picked up. She described the rubbish as consisting of all sorts of things including bits of bikes. She never saw any litter pickers in the vicinity of the green open space but she accepted that the height of the walls had been increased by the defendant; most likely in response to complaints about anti social behaviour.

20. Having notified the defendant of the accident, Mrs Fitzgerald gave evidence that some days later an official called to her house with cleaning-up equipment, which included big green bags. She did not recall seeing litter wardens either before or after the accident, nor litter pickers at any time, though she did recall some grass cutters whom she assumed were the defendant's employees. She accepted that the grass was cut often enough to keep it short but that rubbish scattered here and there was a continuing problem and that it was only through the efforts of herself and a neighbour that this problem was in some areas ameliorated. As far as she was concerned, however, the defendant did not follow up on the promises made to board up the area, or plant flower beds or otherwise deal with the rubbish problem.

21. Expert evidence on behalf of the plaintiff was given by Mr Donal McCarthy, chartered engineer. He accepted, however, that he had no expertise in the management of open green spaces. Nevertheless, as an engineer his view was that the rota system of men and machinery, which had been the subject matter of discovery and which was put to Mr McCarthy, was deficient and that there ought to have been rubbish bins located at different places around the estate. In addition it was his opinion that there ought to have been warning signs erected in the vicinity of the open space. It was also his opinion that there ought to have been independent inspections of the green open spaces later in the week since, on his analysis of the rotas prior to the accident, most all inspections and/or maintenance works took place in the early days of any given week. Mr McCarthy's opinion was that warning signs and the presence of rubbish bins would have assisted in ameliorating an obvious litter problem and which was apparent from the account given to him by Mrs Fitzgerald and also upon his own inspection of the area as shown in his own photographs.

22. Evidence was given on behalf of the defendant by Ms Paula O'Rourke, executive park superintendent, and by Mr Paul Allen who was responsible for the organising and management of the litter and grass cutting crews employed to maintain the open green spaces. These witnesses gave evidence in relation to the defendant's system of recording public complaints prior to and at the time of the accident, as well as to the defendant's system of maintenance of the open green spaces under its control and which extended in area to in excess of 4,000 acres. It became apparent from this evidence that, in addition to the dates of attendance for maintenance of the Cloonmoore area set out in a letter of 11th February 2013 which had been sent to the plaintiff's solicitors, there were attendances on other dates as well. In this regard there was evidence that the Kubota grass cutting machine, which was utilised for cutting certain types of open spaces and which would have included the triangular open space the subject matter of these proceedings, would have been particularly liable to sustain damage if it were driven over or onto debris such as stones, bits of bricks, pieces of metal or broken bottles. Accordingly, it was necessary for employees to proceed to inspect and pick up any such objects prior to grass cutting. This was always done in advance of the cutting itself. That could be done on the day of the actual cutting or on the day before. That litter was a problem in the housing estate as a whole was not really in dispute. Some areas were known black spots but the open space in question was not one of these. The defendant did what it could, given its resources and the extensive open parks and green spaces under its control. Rubbish was picked up prior to or during grass cutting operations but there was nothing the defendant could do to prevent rubbish being deposited or scattered on the open spaces thereafter. Mr Allen's evidence was that he would have been regularly out and about carrying out inspections to ensure that the system was being complied with, directing special attention to problems as and when they arose, and ensuring his teams carried out their tasks in accordance with instructions and to a required standard.

The law.

23. Section 1 (1) of the Occupiers Liability Act 1995 defines a *"recreational user"* as:-

> *"an entrant who, with or without the occupier's permission or at the occupier's implied invitation, is present on premises without a charge (other than a reasonable charge in respect of the cost of providing vehicle parking facilities) being imposed for the purpose of engaging in a recreational activity, including an entrant admitted without charge to a national monument pursuant to section 16 (1) of the National Monuments Act, 1930, but not including an entrant who is so present and is—*
>
> *(a) a member of the occupier's family who is ordinarily resident on the premises,*
>
> *(b) an entrant who is present at the express invitation of the occupier or such a member, or*
>
> *(c) an entrant who is present with the permission of the occupier or such a member for social reasons connected with the occupier or such a member."*

24. Section 1 (1) of the Act of 1995 also defines the meaning of "recreational activity" as *"… any recreational activity conducted, whether alone or with others, in the open air (including any sporting activity), scientific research and nature study so conducted,*

exploring caves and visiting sites and buildings of historical, architectural, traditional, artistic, archaeological or scientific importance."

25. The duty owed by an occupier to a recreational user or a trespasser is set out in s.4 (1) of the Act of 1995 as follows:-

> *"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."*

26. This section also sets out the factors to which, together with all of the circumstances of the case, the court must have regard in determining whether or not the occupier acted with reckless disregard towards a recreational user or trespasser and which are as follows:-

> *"(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 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."*

27. Absent any evidence of intention to injure, the test of recklessness on the part of the occupier is, in my view, an objective one and that this is so is apparent from the wording employed by the Oireachtas in s.4 (2) of the Act of 1995.

28. It is also my view quite clear from the wording in s.4 of the Act that the duty owed by an occupier to a trespasser or a recreational user is not only less onerous than the statutory duty of care owed by an occupier to a lawful visitor within the meaning of s.3 of the Act , but significantly so. The statutory duty of care under s.3 may be said to be co-terminous with the ordinary duty of care at common law as enunciated by Lord Atkin in *Donoghue v. Stephenson* [1932] AC 562 and as thereafter explained and applied in the many decisions of the courts in the United Kingdom and the courts in this jurisdiction. See *Vega v.Cullen* (unreported) HC PeartJ. delivered 9th November 2005.

29. By adopting the phraseology "reckless disregard" used in the old case law, the Oireachts rejected the recommendation contained in the final report of the Law Reform Commission in relation to occupiers' liability towards recreational users or trespassers that the liability should be in respect of "gross negligence". In choosing the terminology "reckless disregard", the Oireachtas determined that the point at which the occupier was to have a liability should be quantitatively greater than that which may be said to constitute "gross negligence". As to whether the liability in respect of *reckless disregard* is to be equated, albeit accessed objectively, to the liability arising from an *intention to injure* on the part of the occupier, it is my view that any other construction of the section would admit a lower threshold for the imposition of liability and which, giving the words their ordinary and natural meaning, was not the intention of the Oireachtas. Although *"reckless disregard"* is not defined by the Act, such terminology had long since been adopted in pre-existing case law and must be considered as being so understood by the Oireachtas in choosing that terminology when enacting s.4 of the Act .

30. It may, I think, be argued with some force that the effect of the provisions of s.4 of the Act – with regard to the liability of an occupier in respect of the static condition of the premises involving a danger existing at the time of an accident – has been to return broadly to the state of the law regarding such liability as enunciated in the authorities prior to the decisions of the Supreme Court in *Purtill v. Athlone UDC* [1968] I.R. 205 and *McNamara v. ESB* [1975] I.R. 1.

31. However, for the sake of completeness and clarity it would seem appropriate to observe that these statutory provisions do not affect the duty of care under common law negligence principles in respect of the occupier's acts or omissions (sometimes referred to as "activities") in or upon the premises. That this is so is evident from the provisions of s.2 (1) which stipulates that the duties, liabilities and rights provided for by the Act in substitution for those applying to occupiers at common law, are confined to dangers existing on the premises. In short, the effect of s.2 (1) is to preserve the common law relating to the acts or omissions of an occupier otherwise than in relation to the static condition of the premises.

32. Finally, in the same way that an omission as well as a positive act can constitute negligence, there would seem to be no good reason in law why the use of the word "act" in the wording of s.4 (1) (b) should be interpreted otherwise than as connoting acts of omission as well as commission on the part of the occupier in relation to the danger.

33. That the effect of s.4 (1) (b) is to significantly restrict the liability of the occupier towards trespassers and recreational users has

in fact long since been recognised by our courts. In *Thomas v. Leitrim County Council* [2001] 3 JIC 0701, where the Supreme Court held that the plaintiff was a licensee, when visiting Glencar waterfall, County Leitrim, in a suit which arose from an accident which occurred prior to the coming into force of the Act , Hardiman J., delivering the unanimous judgment of the court, observed in relation to the Act that:-

> *"…had this law been in force at the time of the plaintiff's accident her position would have been a less favourable one than under the old law, which applies to this case".*

As to the effect of s.4 generally, see the judgment of Geoghegan J. in *Weir Rodgers v. S.F. Trust Limited* [2005] 1 ILRM 471.

Submissions and Decision

34. It was submitted on behalf of the plaintiff that in order for recreational use to arise, it was necessary that there be some form of organisational activity in which the plaintiff was involved. It was submitted that merely kicking a ball about on the open space did not satisfy such a requirement and that, in essence, the plaintiff was a lawful visitor to whom the defendant owed a statutory duty of care prescribed by s.3 of the Act.

35. The defendant submitted that no such issue had been raised by way of special reply to the defence. However, even if the court considered the delivery of a special reply unnecessary by virtue of the provisions of Order 23 of the Rules, the case had proceeded on the premise that the plaintiff's presence on the common open space was one of recreational use rather than as a visitor within the meaning of s.3 of the Act.

36. Whilst I accept the submission of the defendant on this aspect of matters, it is also clear that the plaintiff pleaded and sought to make a case at the trial against the defendant for ordinary common law negligence.

37. It was submitted on behalf of the plaintiff that given certain inconsistencies between the documented rotas in respect of different open green spaces (including the area the subject matter of these proceedings) and the diary entries made by Mr Allen in relation to additional work carried out by his team, and further, having regard to the inadequacies of the defendant's system relating to the recording of complaints and action taken in response to complaints made prior to the date of the accident and which failed to disclose any complaints having been made by Mrs Fitzgerald, that the court should reject such evidence as being unreliable with regard to those matters.

38. I have had the opportunity to observe the demeanour of both Ms. O'Rourke and Mr. Allen during the course of their giving evidence. I found both witnesses to be most credible and I accept their evidence as being reliable in relation to the system for recording and responding to complaints, as well as in relation to the defendant's system for the inspection and maintenance of the open green spaces under its control.

39. It was not suggested to Mrs. Fitzgerald that she had not made complaints or that there hadn't been any complaints generally about anti-social behaviour or litter problems. The court accepts that, although for reasons explained by Ms. O'Rourke that not every complaint at the time would have been recorded in a permanent form, the plaintiff did make complaints which included complaints in relation to litter. However, the court is also satisfied that there was a reasonable system in place for dealing with such complaints.

40. The defendant employed litter wardens, litter pickers and grass cutters as part of its management of something over 4000 acres of open spaces under its control. Its parks department is, not surprisingly, organised around the seasons and so grass cutting is rarely an issue during the winter but is a priority during the growing season. Not surprisingly, therefore, personnel are deployed during the year to meet the demands of the seasons as well as those arising by reason of human activity.

41. That litter on the open green space was a problem and that there were well known black spots in areas under the control of the defendant was, on the evidence, beyond question.

42. Having had an opportunity to peruse the defendant's records in relation to its grass cutting and maintenance system for the area in question, which includes quotas for both men and machines and, further, having regard to the days on which the Cloonmore open spaces were maintained as set out in the defendant's letter of the 11th February 2013, the entries made in his diary by Mr. Allen and accepting his evidence, as I do, that he designated and supervised his maintenance and grass cutting crews , I am satisfied that the records in relation to the rotas, the nature of the work involved, and the dates on which it occurred, are reliable.

43. It is also clear on the evidence, and the court finds, that the plaintiff did slip and fall whilst in the process of retrieving a football and that as a result of doing so he fell backwards onto the ground striking a piece of broken glass – most likely from a broken beer bottle – and that as a result he sustained a laceration which has left a permanent scar described earlier in this judgment. The question, of course, is whether the defendant has a liability in law for that accident and its consequences.

44. Mr. Allen explained that the grass of the open space where the accident occurred was regularly cut in the summer with a Kobota grass cutting machine. He referred to photographs taken by the plaintiff's engineer, Mr. McCarthy, which show a considerable amount of litter close to one of the boundary walls of the open green space. These photographs also show that the grass of the open green space had been cut no more than two or three days previously.

45. Most of the litter, on my viewing of the photographs, is seen to be lying not only on top of the grass but also on top of the grass cuttings which have started to turn brown in colour. I am satisfied, on the evidence of Mr. Allen in relation to the operation of the Kobota grass cutter, that it would either have been damaged or, alternatively, would have shredded the litter seen in these photographs had litter or rubbish such as that seen in Mr. McCarthy's photographs been present on the day when the grass was cut. It is also evident from these photographs that the litter in question had not been subjected to shredding of the type that would have occurred if it had been caught up in the blades of the Kobata. On the balance of probabilities, I am satisfied that the litter shown in these photographs came to rest where it is seen in them; most likely as a result of being blown there by wind after grass cutting had taken place.

46. The fact that the litter seen in the photographs is intact also happens to be consistent with the evidence given on behalf of the defendant that litter was picked up a day before or the day of the grass cutting. Moreover, the photographs taken by Mrs. Fitzgerald within 24 hours of the occurrence of this accident, while showing bits of litter here and there on the open green space as well as bits of glass – including the piece of glass on which it is most likely the plaintiff fell – also show that the grass was short. It follows therefore that the grass had to have been cut within a few days at most before the accident.

47. These photographs are also corroborative of Mr. Allen's evidence as to the regularity of grass cutting during the spring and

summer of the year in which this accident occurred, which fortifies me in my conclusion that the evidence of the defendant in connection with its system for the supervision and maintenance of this open green space is reliable.

48. Whilst it was submitted on behalf of the plaintiff that the presence of the glass on the ground in the grass (which would have been visible to the plaintiff or anyone else walking on the common area as it was the next day when photographed by Mrs Fitzgerald) was a danger of which the defendant was aware on the day of the accident by virtue of the plea in that regard contained in its defence, it is quite clear from any reading of the defence in this case that the plaintiff was being put on proof of his claim. The plea of negligence and/or contributory negligence alleged in the defence was made without prejudice to the demurrers in the proceeding paragraphs and was, in any event, withdrawn at the trial.

49. Mr. Allen gave evidence at the trial in relation to the functions of litter pickers and grass cutters. Quite apart altogether from any safety considerations, it is abundantly clear from that evidence that the removal of bits of debris and litter – including bottles or broken glass – was essential if the grass cutting machinery was not to be damaged. That machinery is in daily use during the summer. If it were rendered inoperable or less effective by coming in contact with debris of one sort or another capable of damaging the machine, the parks department would be left without that machine pending repair, something it could ill afford in the summer months and given the vast area of open green space to be maintained.

50. It also means, of course, that the defendant was aware that such problems existed and so was required to devise a system to deal with them. I am satisfied that the defendant's management and grass cutting system had the dual purpose of protecting men and machinery as well removing litter and debris from the green open spaces.

51. In the course of the trial one of the suggestions made by the plaintiff for dealing with the problem of broken glass was that signs should have been erected and/or bins supplied or a hoarding could have been erected. The latter of these , it seems to me, would be completely counter-productive and contrary to the policy of providing open green space for the general enjoyment of the public at large.

52. Finally, given the necessity of having to remove objects which might likely cause damage to the Kobota grass cutting machine and, given the shortness of the grass evident from the photographs taken by Mrs. Fitzgerald, I think it highly likely that the bits of broken glass and the bits of litter shown in those photographs were deposited on the green open space at some time within the day or two following the last grass cutting.

Conclusion.
53. In my view there is no credible evidence upon which the court could come to a conclusion that the defendant was guilty of common law negligence. Similarly, I am satisfied that s.3 of the Act has no application to the facts of this case.

54. The plaintiff was involved in a 'kick-about' with some of friends. They had erected a temporary goal by using some clothes. What else was this if it wasn't a recreational activity within the meaning of the Act? The plaintiff was a recreational user of the open green space and as such the defendant's duty towards him was that as set out in s.4 of the Act.

55. There can be no doubt but that the piece of broken glass lying on the grass of the open space constituted a danger which was present at the time when this accident occurred. I am satisfied on the evidence that the defendant was aware that pieces of broken glass or objects which could cause damage to the machines, as well as causing injury to members of the public using the open green spaces, was a recurrent problem and that this was most likely generated by anti-social or other miscreant behaviour.

56. There was no suggestion in this case that the defendant intended to injure the plaintiff. Accordingly, there being no liability at common law or under s. 3 of the Act, any liability on the part of the defendant for the danger which existed on the premises can arise only if, in relation to that danger, the defendant acted with *reckless disregard* towards the plaintiff. As to that, the court is bound to have regard to all of the circumstances of the case including the matters set out in S. 4 (2) of the Act. As to that the defendant relied on the decision of this court in *Kirwan v Dublin City Council* (Unreported, High Court, Feeney J., 9th March, 2011) delivered by Feeney J. on the 9th March 2011.

57. That was a case which arose as a result of an accident when the infant plaintiff, together with a number of friends who were playing on a green open space, caught her foot in a hole. The facts of that case differ in a number of respects and in particular with regard to the making of complaints. The court was satisfied on the evidence that the defendant had procedures in place which ensured, insofar as was reasonable, that the area was kept in a reasonably proper and fit condition. In this regard Feeney J. observed:-

> *"It (the defendant) couldn't operate a system which avoided all holes or depressions being present, because it was a general recreational area where all sorts of uses could take place, where children used it, where holes could be dug, where animals could scrape and excavate and where depressions could be caused as a result of subsidence. To place an onus on the Defendant to avoid the presence of depressions or small holes in those circumstances, would, in fact, require constant observation and inspection of the very highest degree and one which could not be suggested as being necessary or required."*

58. With an appropriate modification by reference to broken glass or other bits of debris being discarded, I adopt this statement of the learned trial judge.

The court found that whilst the defendant clearly owed a duty to the plaintiff as a recreational user, it was satisfied that the defendant was not in breach of the provisions of the Act and had not acted towards the plaintiff with reckless disregard.

59. As in that case, the court is satisfied that the system of management and maintenance of the open green spaces devised and employed by the defendant prior to and at the time of the accident was reasonable and entirely appropriate for what was a general recreational area.

60. Whilst on the evidence the factors set out in s.4 (2) (a), (b), (c) and (h) are satisfied, the court is also bound to have regard to the other factors, including:

(d) whether the danger was one against which the defendant might reasonably be expected to provide protection; (e) the burden on the defendant of eliminating the danger or of protecting the person from the danger , taking into account the difficulty, expense or impracticality, having regard to the character of the premises and the degree of the danger, of so doing; and, (f) the character of the premises, including, as in this case, premises used for recreational activity and the desirability of maintaining the tradition of open

access to such premises for such activity.

61. The expense and burden which would be placed on a local authority, such as the defendant, in protecting members of the public – including children – from dangers on open green spaces created by anti-social or miscreant behaviour through discarding broken bottles or the like or otherwise, would be nothing short of immense not to mention impracticable and, in my view, intolerable. Anti-social behaviour by its very nature is unlikely to be affected by the erection of notices or the placement of refuse bins. That the defendant could be required to inspect what in this case would be over 4,000 acres of open green space more than once or at best twice in a week – never mind maintaining and cleaning such an area at any shorter interval – would neither be realistic nor reasonable. A balance has to be struck between what is reasonable and practicable in terms of maintenance and safety of open green spaces and the desirability of making such spaces available for the enjoyment of the public.

62. This was an unfortunate accident which has left the plaintiff with a permanent scar. Whilst it represents a permanent cosmetic deficit the scar has not resulted in any functional disability, nor will it affect his chosen career as a carer – a choice for which he is to be commended. Regrettably, whilst I accept his evidence as being entirely truthful, on the findings made by the court the accident is not attributable to negligence and even less so to reckless disregard on the part of the defendant. Accordingly, the claim will be dismissed and the court will so order.