THE HIGH COURT

[2009 No. 4133 P.]

BETWEEN

JAMES WILLIAM O'SHAUGHNESSY

PLAINTIFF

AND

DUBLIN CITY COUNCIL, IRISH RAIL THE RAILWAY PROCUREMENT AGENCY AND VEOLIA TRANSPORT IRELAND LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 20th day of December, 2017

Introduction

1. This action arises out of an accident which occurred at approximately 01:00 hours on 4th November, 2007, at Cullenswood Road, Ranelagh, Dublin. The plaintiff had left his flat at No. 6A Oakley Road, Ranelagh, for the purpose of purchasing some cigarettes. Although it was late in the night, he thought that the Spar shop at the triangle in Ranelagh, might have been open. On the night in question, he had his neighbour's dog, which was a small terrier, on a lead walking in front of him.

2. The plaintiff came out of his flat and turned left onto Oakley Road. He proceeded to the end of the road and then turned right onto Cullenswood Road, where he walked along the right hand footpath going towards the triangle in Ranelagh village.

3. It is the plaintiff's case that while walking under the Luas bridge, he was caused to trip and fall to the ground, when his right foot came into contact with portion of a stone block, which was projecting from the right hand side of the Luas bridge at ground level. The offending piece of stone is shown in photographs Nos. 3, 4 and 5 which were taken by Mr. Alan Conlan, Engineer, on 5th December, 2007.

4. The defendants were jointly represented at the trial of the action. Each of the defendants denied liability for the accident and also put quantum in issue. The defence also contained a plea of contributory negligence to the effect that the plaintiff was the author of his own misfortune, he had failed to maintain any or any proper lookout, had failed to look at the footpath upon which he was walking, had failed to observe the presence of the stone on the footpath in front of him and had exposed himself to a risk of injury or damage of which he knew, or ought to have known. Thus, all matters were in issue between the parties.

Summary of the Evidence

5. The plaintiff is sixty-one years of age. He had spent most of his working life in Britain, working as a plumber. He returned to Ireland in or about 1994, when his mother became ill. He had worked for various construction firms on and off during the years that followed. He was ultimately made redundant by a company called Tenec in 2001. He had not worked in the interval between that time and the time of the accident.

6. The plaintiff stated that on the night in question, which was a Saturday night, going into the early hours of Sunday morning, he had spent the day in his flat watching television with his friend, Mr. Noel Nugent, who also resided there. The plaintiff stated that he had gone out during the day to purchase cigarettes and some cans of beer. He explained that on that particular evening, he and Mr. Nugent had a neighbour's dog staying with them, as the neighbour would often leave his dog with them, as he was elderly and did not like walking the dog at night.

7. At approximately 01:00 hours the plaintiff put the dog on a lead and proceeded out to go to the Spar shop in Ranelagh village to purchase some more cigarettes. He left his flat on Oakley Road and turned left and walked down the road to the junction with Cullenswood Road, where he turned right and proceeded towards the triangle in Ranelagh village. The plaintiff indicated that by reference to photograph No. 13, of the photographs taken by Mr. Conlan, he had come down Oakley Road which was to the left of the junction, where the blue house could be seen. He then turned right and started to walk towards the camera. He proceeded down the road and went under the Luas bridge, as shown in photograph No. 8. He stated that the dog was walking some 4/6ft in front of him, tight against the wall. He was following directly behind the dog and was also very close to the wall. As he was going under the Luas bridge going in the direction of the triangle, as shown in photograph No. 2, the wall itself jutted out at the far-end of the bridge. As he came to the very end of that section, his right foot caught on a piece of stone, which was protruding from the wall, causing him to trip and fall forwards onto the ground. He turned to his right as he was falling and landed on his right shoulder.

8. The plaintiff stated that he tripped on the piece of stone which was jutting out from the bottom section of the wall as shown in photograph No. 3, and in closer view in photographs 4 and 5.

9. The plaintiff stated that he was lying on the ground for a few moments. He was in shock and also in severe pain. However, after a few moments, he was able to get himself sitting up. He had managed to keep hold of the lead, so the dog had not escaped. While he was sitting on the ground, a female garda, who had been walking on the far side of the street, saw him and came across. She enquired if he was alright. He assured her that he was all right and told her that he would just rest there for a few moments before proceeding on. The female garda then proceeded on her way. The plaintiff stated that he was unable to get himself into a standing position, so he shuffled on his backside along the pavement to a doorway, or entrance, which was shown beneath the "For Sale" sign in photograph No. 8. He was hoping that by using the aid of the wall, he might be able to stand up. However, he was not able to do so.

10. After some time, the female garda returned. The plaintiff asked her to help him up and she did so. She then escorted him back to his flat on Oakley Road. She used his key to open the front door and left him sitting in the sitting room. The plaintiff was unable to sleep that night due to pain in his right shoulder. His arm became very swollen and sore. Later that day, he went to the Accident and Emergency Department of the Mater Hospital. That was on Sunday 4th November, 2007. They told him to return on the following day to the fracture clinic. When he returned on 5th November, 2007, his arm was placed in a collar and cuff. He was instructed to return a week later. When he did so, he was seen by a Dr. Sinnott, who referred him to the care of Mr. Darragh Hynes, Consultant Orthopaedic Surgeon.

11. X-rays revealed that the plaintiff had a comminuted fracture of the right shoulder. Having examined the plaintiff and reviewed the x-rays, Mr. Hynes admitted the plaintiff to hospital on 13th November, 2007. Two days later, the plaintiff was brought to theatre,

where open reduction and internal fixation was carried out to the shoulder. However, due to the grossly comminuted nature of the fracture, it was not possible to insert any screws into the shoulder itself. Post-operatively, the plaintiff's wound healed. The fracture went on to make a satisfactory, though incomplete, union.

12. The plaintiff had physiotherapy treatment, where he was shown movements of the shoulder joint and was given a home exercise program and was also told to squeeze a rubber ball, so as to increase strength in his arm and shoulder. He stated that he followed this program, until he realised that he was not getting any better, at which stage, he stopped doing the exercises. In terms of pain, he stated that while the pain had been severe during the initial stages, it had pretty much settled after 2008.

13. The plaintiff returned to the U.K. in February 2008. He currently lives there in sheltered accommodation, which has been provided to him by the local authority, on the basis that he has a permanent disability. Having assessed his needs, they installed a wet-room in the house. He is currently on Disability Allowance and Employment Support Allowance from the U.K. government.

14. The plaintiff stated that although he does not have much pain on an ongoing basis, he does require injections from his G.P. from time to time when his shoulder is stiff and sore. He remains quite disabled in the ordinary aspects of his life. He states that he is unable to use his right arm and hand. He had been right hand dominant. Now he is obliged to do everything using his left hand. He finds this difficult and is a lot slower doing ordinary tasks. It affects him when washing and toileting. The toilet seat has been raised and he has rails in the bathroom and shower. He is unable to tie his shoelaces and requires the assistance of a neighbour to do this for him. He has to shave with his left hand. When eating, he uses a fork in this left hand. He does not do much cooking, as he tends to put ready meals into the microwave. He is able to dress himself, but it takes longer than normal. Prior to the accident his hobbies had been snooker and table tennis. He is not able to do these things since the accident. The other aspect of his injury which causes him considerable embarrassment is the fact that as a result of the fracture and the operative treatment thereto, his right arm is 6cm shorter than his left arm. As he is not able to use the right arm, the muscles on the arm have become wasted away. Movement of the right shoulder is limited. He indicated that he was only able to raise his arm approximately at an angle of 45 degrees from the side of his body.

15. In cross-examination, the plaintiff was asked about a number of seizures that he had prior to the time of the accident. While he was unsure of dates, he thought that he may have had a seizure in 2004 or 2006. It was put to him that he had been admitted to the Mater Hospital in February 2007 after suffering a seizure, while in a public house. In the hospital admission records in relation to that event, it was recorded that he may have had a seizure some eight months previously, which would put it circa June 2006. The plaintiff accepted that as accurate. It was put to the plaintiff that in February 2007, he had in fact had two seizures while in the pub. He had had one earlier in the evening, but had recovered and remained on in the pub and then had had a second seizure, which required his removal by ambulance to the Mater Hospital. The plaintiff stated that that was correct. The plaintiff was asked as to the medical diagnosis for the seizures. He stated that the doctors had told him that it might have been epilepsy, which might have been alcohol related. He accepted that he had a brother who also had alcohol related epilepsy.

16. It was put to the plaintiff that during his admission to the Mater Hospital, he had been prescribed a large amount of medication. The plaintiff agreed. He was not able to recall what exact medication had been prescribed. He had also had a drip inserted into his arm on that occasion. It was put to him that from the notes, it would appear that he was prescribed a drug called Cabonax, which was for vitamin deficiencies caused by alcoholism. The plaintiff agreed that he had been given that drug. It was also put to him that he had been prescribed Librium for anxiety and acute alcohol withdrawal. It was put to him that the side effects of Librium, included dizziness and difficulty walking. The plaintiff stated that he was not made aware of any such side effects. He had only been given Librium while in hospital. It was put to him that he had also been prescribed Atoplan and Diazepam for the seizures. The plaintiff did not remember those medications, but accepted that he may have been given them. The doctor had told him that he could have alcohol related epilepsy, due to the fact that he was drinking too much. The plaintiff accepted that he had discharged himself from hospital against medical advice on that occasion in February 2007.

17. The plaintiff was asked as to whether he had been treated by his G.P. after his discharge from hospital in February 2007. The plaintiff stated that he had gone to his G.P., Dr. Joyce. He had seen him after the seizures and before the time of his fall. He had placed the plaintiff on medication to calm him down, which could have been Diazepam. The plaintiff did not think that he was on Librium at that time. He recalled that he may have been told of the side effects of Diazepam, being dizziness, blurred vision and possible ataxia. He was not told anything about possible vertigo. He thought that he took the medication which had been prescribed, possibly up to the time of the accident, but he was not sure.

18. The plaintiff was asked what he had done during the day prior to the fall. He stated that he had just been sitting around his house with his friend Noel Nugent. He may have gone out to the shops during the afternoon to get cigarettes and cans of beer. He could not actually recall going out. He was not sure at what time the dog was left in by his neighbour during that evening. They would have kept the dog overnight. In relation to going out to get the cigarettes, the plaintiff stated that he just decided to go out to get the cigarettes for himself and, his housemate, Noel. He thought that the Spar shop in Ranelagh village had late opening hours. However, he was not certain of that, because he did not get to the shop that night. His intention was to take the dog for a walk and to get cigarettes in the Spar shop, but he was not sure if the shop would actually be open.

19. The plaintiff described that the dog was on a leather lead, which was some 4/6ft long. The dog was walking close to the wall and was cocking his leg against it from time to time. The plaintiff stated that he was walking directly behind the dog and almost touching the wall. He was asked whether he would have taken such a path, given that that would have involved him walking through the urine that had been left by the dog. The plaintiff stated that he did walk along that route, as the dog was very small. He stated that he tended to walk close to the wall, as he did not like to walk near the edge of the footpath close to the road. He was asked why he had not seen the portion of stone sticking out onto the footpath. The plaintiff stated that it was very dark under the bridge and there was no lighting in the area. On this account, he had not seen the piece of stone sticking out from the wall.

20. The plaintiff was asked why in both the solicitor's initial letter, in his form submitted to the Injuries Board and in his engineer's report, following an inspection of the *locus* on 5th December, 2007, the incorrect date of the accident had been given as 9th November, 2007. The plaintiff accepted that that was the wrong date. He could not explain how that mistake had occurred. It was put to him that in his form submitted to the Injuries Board, he had merely stated that he had tripped and fallen at the Luas bridge near the triangle in Ranelagh. He accepted that that account did not mention anything about any stone sticking out from the wall. However, the form had not been filled in by him, although he accepted that it was his signature at the foot of the form. It was put to him that a similar mistake in relation to the date of the accident had been set out in a letter which had been sent to the first named defendant on 30th November, 2007. The plaintiff accepted that the date was mistakenly stated therein, but he could not explain how that had happened.

21. The plaintiff was asked about the female garda, who had come to his assistance. He stated that she had attended on him twice

that evening. On the second occasion, she had escorted him home. However, he had not asked her, her name.

22. The plaintiff was asked why his engineer had stated in his report that the plaintiff was "not a 100% sure of the exact accident location. However, he considers it highly probably that he tripped at the protruding stone (photograph 5)." The plaintiff stated that when he went to the *locus* with the engineer on 5th December, 2007, he told him that he had met with the accident "around about there", pointing to the accident *locus*. He stated that he did point out the exact *locus* to the engineer. He stated that the engineer was wrong to say that he was not sure of the *locus*. The plaintiff was asked to explain why the engineer had stated that the plaintiff considered it "highly probable" that he tripped on the stone. The plaintiff stated that he was sure of where he had fallen, and that it was most likely because of the stone sticking out from the wall.

23. The plaintiff was asked about his conduct on the evening after the operation had been carried out to his shoulder on 15th November, 2007, while he was still in the Mater Hospital. In particular, it was put to him that the hospital records showed that he was recorded as being missing at 22:00 hours on the evening of 15th November, 2007. The plaintiff initially stated that he had gone out to the gazebo to smoke a cigarette and had fallen asleep out there. When it was pointed out that the hospital records noted that he had returned at 1.15 hours on the 16th, with his girlfriend, Sharon, and had stated that he had been to O'Connell Street to get a lift for his girlfriend, but when she had missed the lift, they had gone to a pub instead; the plaintiff accepted that that had happened. He stated that he had gone out for a smoke and he and his girlfriend had ended up going for a pint.

24. It was put to the plaintiff that his account lacked credibility; that he would be walking so close to the wall to trip on the piece of stone, which was only jutting out 4.75 inches onto the footpath and if he had been that close to the wall and had tripped, he would have struck the wall, when in reality the accident had happened due to the consumption of alcohol. Counsel for the plaintiff objected at this point, pointing out that there was no allegation made in the pleadings, that the accident had occurred due to any consumption of alcohol, or due to taking prescription medication, or was due to alcohol related epilepsy.

25. In relation to his pre-accident work record, the plaintiff accepted that he had returned to Ireland in 1994, and worked for various employers subsequent to that time. Although he had been present in Ireland during the so-called Celtic Tiger years, he had not in fact been working since being made redundant in or about 2001. He confirmed that he had not worked since the accident. In relation to taking prescription medication, the plaintiff stated that while certain medication had been prescribed for him in the Mater Hospital at the time of the seizure in February 2007, he had discharged himself from the hospital and had not taken any prescription for medication with him. Accordingly, he had not taken any of the medication that had been prescribed for him in the hospital, after he had left the hospital on that occasion.

26. Evidence was given by the plaintiff's sister, Ms. Carmel O'Shaughnessy-Martin. She had been with the plaintiff when he had been brought from the pub to the hospital suffering from seizures in February 2007. This had occurred on the night that their brother, who had died just prior to that time, had been taken to the church in preparation for the funeral. She had kept the plaintiff in her house, so that he would not drink. He had not been drinking during the day and had only had two pints that evening. As far as she knew, the doctors put him on a detox program in the hospital. He subsequently signed himself out of the hospital. He had not had problems since that time. This witness was not cross-examined.

27. Evidence was given on behalf of the plaintiff by Mr. Alan Conlan, consulting engineer. He confirmed that he had taken photographs Nos. 1-7 at the time of his inspection of the *locus* on 5th December, 2007. The remaining photographs had been taken on 23rd November, 2017. He stated that prior to the opening of the green Luas line for operation on 20th June, 2004, a thorough survey and assessment would have been carried out of the tracks and bridges along the route. It was clear that fairly substantial works had been carried out to reinforce the bridge. These were particularly evident on the far side of the road as shown in photograph No. 14, where an entirely new wall and a concrete plinth had been put in situ to support the overhead bridge. On the side on which the accident had occurred, it appeared that the reinforced concrete plinth had been placed on top of the existing stone wall.

28. Mr. Conlan stated that any visual inspection of the structure of the bridge, would have revealed the protruding piece of stone as shown in photographs 2 – 5. He could think of no reason why the defendants had left the stone protruding out onto the footpath. It could easily have been removed. It served no function at all. In his opinion it ought to have been removed, as it constituted a danger on the public footpath.

29. The protruding stone was approximately 370mm long. Its front facing edge was 50mm high. At the back edge the stone was 100mm high. The stone extended out from the wall of the Luas bridge onto the footpath by 120mm (4.75in).

30. In cross-examination, Mr. Conlan accepted that a person would have to be up against the wall in order to trip on the piece of stone. They would have to be walking along the line of the wall itself and would have to have been almost touching the wall in order to make contact with the stone. He accepted that it was not the usual way in which pedestrians would walk along the footpath. However, in this case the plaintiff stated that he had been following the dog, which had been walking tight to the wall.

31. Mr. Conlan outlined how he had attended at the *locus* on 5th December, 2007 with the plaintiff and his solicitor. The plaintiff had described the accident as set out in his report. The plaintiff stated that he could not be 100% sure, but as a matter of "high probability" he thought that he had tripped on the piece of stone. Mr. Conlan thought that in phrasing it that way, he was just being honest. He identified the stone as being highly probable as the cause of his fall. Mr. Conlan confirmed that the plaintiff has given him the date of the accident as being 9th November, 2007. He accepted that the plaintiff was wrong in that regard.

32. Mr. Conlan stated that he did not consider the lighting of the *locus*, as that had not come up at the inspection. That was why it was not mentioned in his report. He accepted that given the particular location, it would be highly unlikely that the plaintiff would not have been able to see his dog at the end of the lead. It was put to the witness that if the plaintiff had told the court that it was so dark, that he could not see the dog at the end of the lead, this implied that he was totally confused. Mr. Conlan accepted that the plaintiff should have been able to see the dog at the end of the lead.

33. No evidence was called on behalf of the defendants.

Submissions of Counsel

34. At the conclusion of the case, counsel for the plaintiff, Ms. Patricia Dillon, S.C., submitted that having regard to the provisions of the Transport (Railway Infrastructure) Act 2001, the third and/or fourth named defendants were the owners and occupiers of the bridge in question and as such, were liable for the nuisance created on the public highway, which caused the injuries sustained by the plaintiff. She submitted that the entire of the railway line known as the Harcourt Street Line had originally been owned by CIE. By virtue of s. 33 of the Transport (Railway Infrastructure) Act 2001, all of the property which had been owned by CIE, was transferred on the establishment day to the third named defendant. The third named defendant had subsequently entered into a contract, which

provided that the operation and maintenance of the Luas line, including the Green Line running to Ranelagh, was to be operated and maintained by the fourth named defendant. It was the third named defendant, or the fourth named defendant, which was responsible for surveying the Harcourt Street line to ensure that it was capable of carrying the Luas and it was they who had carried out the works to the bridge in question, as set out by Mr. Conlan in his report and in his evidence.

35. Counsel submitted that in the circumstances, the third and/or fourth named defendant had created or maintained a nuisance on the public highway in letting the piece of stone, as shown in photographs 3 – 5, extend out from the foot of the wall by some 120mm (4.75 inches). The portion of stone that jutted out onto the pavement, served no functional purpose at all. It could easily have been cut away. Based on the evidence of Mr. Conlan, that is what the defendants should have done, in order to render the *locus* safe.

36. Counsel further submitted that the defendants, and each or either of them, were the owners and occupiers of the bridge and the footpath and as such they owed the common duty of care as defined in the Occupier's Liability Act 1995 to the plaintiff, who was a visitor on their premises. It was submitted that in permitting the *locus* to be in a dangerous condition, with the piece of stone jutting out from the wall onto the footpath in the manner that it did, constituted a breach of the common duty of care owed to the plaintiff. In these circumstances, it was submitted that the defendants were liable for the injuries sustained by the plaintiff.

Conclusions
37. There are three issues on liability in this case, as follows: (a) did the defendants, or any of them, create or maintain a nuisance on the public highway; (b) did the plaintiff fall to the ground on the night in question, as a result of tripping against this piece of stone; and (c) if the answers to the two previous questions are yes, was the plaintiff guilty of contributory negligence in failing to see the stone?

38. It is settled law that even a small impediment on the public highway can constitute an actionable nuisance. In *Hassett v. O'Loughlin* [1943] 78 ILTR 47, O Briain J. stated:-

> *"A nuisance is not confined to an obstruction on the highway; it may consist of anything which makes the use of the highway unsafe or dangerous to the public."*

39. In the *Hassett* case, liability was imposed on the defendant for placing a tiny heap of stones on the highway. In *Stewart v. Governors of St. Patrick's Hospital* 73 I.L.T.R. 115, it was held that the occupier, of unfenced vacant land adjoining a highway, was liable in nuisance to a person lawfully using the highway, for injuries caused to that person by a pipe projecting from the land in close proximity to the highway.

40. I am satisfied from the evidence given by Mr. Conlan, that the piece of stone, which jutted out from the foot of the wall, as shown in photographs Nos. 3 – 5, constituted a nuisance on the public highway. It may well be that as the stone only jutted out some 120mm onto the highway and as people do not normally walk tight against a wall, for this reason accidents may not have occurred in the past. Just because the vast majority of people will walk some distance from a wall, when walking along the footpath, this does not mean that some people will not walk tight against the wall for whatever reason. I accept Mr. Conlan's evidence that when this bridge was being assessed in preparation for the commencement of the Luas operation, those carrying out the assessment should have seen that the stone projected out onto the footpath and that the projecting portion served no function whatsoever. I accept Mr. Conlan's evidence that even on a casual visual inspection, the danger should have been noted and the offending piece of stone should have been cut away. Accordingly, I am satisfied that the third and fourth named defendants created or maintained a nuisance on the public highway, by allowing this piece of stone to jut out onto the footpath.

41. I am also satisfied having regard to the provisions of the Transport (Railway Infrastructure) Act 2001, that the third and/or fourth named defendants were the owners and occupiers of the lands consisting of the Luas line and in particular of this bridge. As such, they were the owners of the highway out to the midpoint in the road. I am further satisfied that in allowing the stone to project out onto the footpath in the manner that it does, they have failed to extend the common duty of care as defined in the Occupier's Liability Act 1995, to persons using the footpath, who are visitors on their property.

42. The central issue in this case is whether the plaintiff has established that he met with his accident as a result of tripping against the piece of stone in the manner described by him. Having observed the plaintiff carefully giving his evidence and in particular when giving his evidence on cross examination, a number of things are clear to the court. Firstly, he has difficulty with dates. He was unsure in relation to the dates on which he returned to Ireland and was somewhat unclear in relation to the specific dates on which he had actually worked while in Ireland. It would also appear that he had been, at least unsure, in relation to the date of the accident, as it appears that the incorrect date was set out in the initial warning letters from his solicitor and in his form submitted to the Injuries Board. It would also appear that the incorrect date was given to his engineer at the time of the inspection on 5th December, 2007.

43. Secondly, it would appear that the plaintiff has had problems with alcohol in the past. From the records which were referred to in cross examination, it would appear that the seizures suffered by the plaintiff in 2006 and in February 2007, may well have been alcohol induced epileptic attacks. The plaintiff accepted that his brother had also been diagnosed with a similar problem. The plaintiff's sister gave unchallenged evidence to the effect that she had to take him into her house, so as to ensure that he did not drink to excess at the time of his brother's funeral. Thirdly, it appears that on the day on which the plaintiff had undergone fairly substantial operative treatment to his right shoulder, he actually left the hospital grounds and spent a number of hours drinking in a pub with his girlfriend. All of this is indicative of the plaintiff having a problem with alcohol. Although not asked specifically how much alcohol he had had to drink on the day and night in question, the plaintiff had candidly stated that during the day he may have gone to the shop to buy some cans of beer for himself and his flatmate.

44. There was also a suggestion in cross examination, that the plaintiff may have been taking certain medication at the time of the fall, the side effects of which may have caused him to suffer from dizziness, loss of balance and/or ataxia. However, two things need to be noted about these assertions; firstly, no medical evidence was called by the defendant to establish what are, in fact, the side effects of the medications that were mentioned in the medical records, nor as to what dosage of medication would normally be required in order to produce these side effects. Nor was it established that the plaintiff had been furnished with a sufficient quantity of medication to induce these side effects. Secondly, it would appear that while certain medication is mentioned in the hospital records from the time he was admitted with the seizure in February 2007, it appears that the plaintiff discharged himself from the hospital against medical advice and as such, he left without any prescription for medication. Thus, the only medication that he may have been on at the time of the accident, and this was not proven, was whatever medication may have been prescribed by his G.P. at that time.

45. Counsel for the defendants, also laid great stress on the fact that in the plaintiff's engineer's report, it was stated that he was

not a hundred percent sure of the exact accident location. However, the plaintiff was adamant that he fell at that location and considered it highly probable that he tripped on the protruding stone as shown in the photographs. When questioned on this apparent lack of clarity, Mr. Conlan was of the view that the plaintiff was probably just being honest. Having watched the plaintiff give his evidence and in particular in the manner in which he answered questions put to him by counsel on behalf of the defendants, some of which would have been somewhat uncomfortable for him to answer, he was not generally evasive, or lacking in candour.

46. While the court cannot ignore the fact that the plaintiff gave the wrong date for the accident in his initial instructions to his solicitor and to his engineer, thereby causing the incorrect date to be stated in the initial warning letters from his solicitor and in his Injuries Board form, this does not necessarily mean that he is lying about his account of the incident. Not all plaintiffs will present with a well-rehearsed and neatly packaged story. The court must take account of human frailties, whether caused by age, poor memory, or the effects of excessive alcohol consumption over a number of years.

47. It is greatly to the credit of Ms. Gallagher, the plaintiff's solicitor, and Mr. Conlan, the plaintiffs' engineer, that they did not try to "nudge" the plaintiff to give a more definite account of his accident, when he attended the *locus* with them in December, 2007. I am satisfied that Mr. Conlan had faithfully reported what was said to him by the plaintiff on that occasion.

48. Save with the exception of his initial answer in relation to his conduct on the night of his operation, I am satisfied that the plaintiff has done his best to tell the truth in relation to the circumstances of the accident. I think that Mr. Conlan was correct, when he said that the plaintiff was probably just being honest, when he gave his description of the accident to the engineer at the inspection in December 2007. It seems to me that if the plaintiff was going to do a "*ready up*" in relation to the cause of his fall, the very least he would have done was, that he would have been emphatic as to what he had tripped over and how he had tripped, when giving instructions to his solicitor and engineer. If it was a "*ready up*" or fraudulent claim, he would also probably have acquired the assistance of a "witness", who would corroborate his version of events. The plaintiff did neither of these things.

49. A further matter pointing to the truthfulness of the plaintiff, is the fact that he did not try to exaggerate, or embellish his account of his injuries or disability to date. In fact, he very candidly stated that he had not had much pain after 2008. His account that he was not able to use his right arm and on that account has had to learn to use his left hand, is supported by the fact that on a visual examination, the muscles on his right arm are almost totally wasted. This suggests that he is telling the truth, when he states that he does not use the arm at all.

50. Taking all of these matters into consideration, I am satisfied that the plaintiff has told the truth in relation to how he met with his accident. While it is certainly unusual, I accept his account that on the night in question he was walking very close to the wall, directly behind the dog. In these circumstances it is entirely reasonable that his right foot would have come into contact with the protruding piece of stone. While it may be unusual for a pedestrian to walk so close to the wall, it is not indicative of contributory negligence for them to do so. A pedestrian may use the full width of a footpath to walk on. Accordingly, I find that the accident occurred in the manner alleged by the plaintiff. That being the case, having regard to the findings already made in relation to the creation of the nuisance on the footpath and the breach of the common duty of care owed by the defendants as owners and occupiers of the *locus*, I find that the third and fourth named defendants are liable to the plaintiff for the injuries sustained.

51. The final issue on liability, is whether the plaintiff was guilty of contributory negligence. It has been pleaded that the plaintiff failed to take reasonable care for his own safety; in particular, that he failed to watch where he was going and ought to have seen the portion of the stone which was projecting out onto the footpath. Pedestrians, when walking along the footpath, must take reasonable care. They must keep a proper lookout of the path in front of them and take care to avoid obstacles, or dangers which are readily apparent on the footpath. However, given that the average person is approximately 5ft 8 inches tall, their eyes are at some distance above ground level. Pedestrians are not expected to walk along looking down at their feet, in case there might be obstacles or other dangers on the surface of the footpath.

52. In this case, where the danger existed at ground level and where it would appear that the *locus* was somewhat badly lit and having regard to the fact that the projecting stone was of the same colour and material as the walls above it and surrounding it, I do not think there was any negligence on the part of the plaintiff in failing to see this particular obstacle on the footpath. Given that the wall and the projecting stone were both grey in colour and the surface of the footpath was of a similar colour, I do not think that it can fairly be said that the plaintiff failed to take reasonable care for his own safety, when he failed to see the stone jutting out onto the surface of the footpath. In these circumstances, I decline to make any finding of contributory negligence against the plaintiff.

53. Turning to the injuries, it is not necessary to repeat the account of the injuries and the account of the disability flowing therefrom as given by the plaintiff in his evidence. The only medical evidence in the case were the two reports and the letter furnished by Mr. Darragh Hynes, Consultant Orthopaedic Surgeon. It is not necessary to set out the content of those reports in detail.

54. In summary, the plaintiff has suffered a grossly comminuted fracture to the right shoulder. This required operative treatment. However, due to the extent of the comminution of the fracture, it was not possible to internally fixate the fracture itself. The fracture has gone on to make a satisfactory, although incomplete union. The plaintiff suffered pain in the shoulder at the time of the injury and for approximately one year thereafter. Since then, any pain or stiffness that the plaintiff has had, has been satisfactory treated by the administration of injections to his shoulder by his G.P. in the U.K. When seen on 18th August, 2015, Mr. Hynes noted that the plaintiff had had an injection approximately three years prior to that i.e. in 2012 and had had a further injection *circa* September 2014. The plaintiff in evidence, stated that he had had further injections at the rate of approximately two per year.

55. Mr. Hynes is of opinion that the plaintiff's current position, as set out in his report dated 26th August, 2015, is permanent. The plaintiff will continue to have a significant functional deficit as a result of decreased use of the right arm. He will continue to have difficulties with elevated use of his right hand. Mr. Hynes is of the view that there is unlikely to be any improvement in the future. The good news from the plaintiff's point of view is that he is of the view that, having regard to the progress made by the plaintiff up to that time, it is probable that the plaintiff will not develop a progressively more painful condition in the shoulder. However, he may require injection treatment from time to time from his G.P. Mr. Hynes enters the caveat that it is possible that the plaintiff may develop sufficient pain, such that surgical intervention would have to be undertaken. This would involve a shoulder replacement procedure. However, he did not feel that the plaintiff's condition in 2015 was bad enough to warrant that course of action.

56. Thus, the plaintiff has suffered a comminuted fracture to the right shoulder which required operative treatment. While pain in the shoulder had largely subsided with the administration of intermittent injection treatment by his G.P., the plaintiff has been left with a significantly disabled right arm. I accept his evidence that he does not use the right arm and hand. This has required him to use his left hand and as a result, he is considerably slower in doing normal activities of daily living.

57. However, the court must also have regard to two things. Firstly, while Mr. Hynes has stated in his report from August 2015, that

the plaintiff "will continue to have a significant functional deficit," he does not say that as a result of the fracture to the shoulder, the arm is incapable of any use. I accept that as a result of his injury, the plaintiff is functionally limited in his right arm, but I do not accept that the arm is incapable of any use at all. The medical evidence does not go that far.

58. The second point is that the plaintiff was shown a set of exercises by his physiotherapist to strengthen the muscles in his shoulder and arm. On his own evidence, he discontinued doing these exercises, when he came to the conclusion that they were not doing him any good. In these circumstances, the court has to come to the conclusion that on the balance of probabilities, a significant degree of his continuing disability and muscle wasting, has arisen as a result of his failure to follow the rehabilitation programme advised by his physiotherapist, rather than being due to any wrongdoing on the part of the defendant.

59. I accept that he is unable for his pre-accident hobbies of snooker and table tennis. I also accept the plaintiff's evidence that he is very embarrassed by the fact that his right arm is significantly shorter than his left arm. Some loss of function in the right arm and its being shorter in length, will be permanent. In these circumstances, I award the plaintiff €40,000 for pain and suffering and disability to date, together with €27,500 for disability and loss of function into the future. There are no items of special damage. In view of the fact that the defendants did not separately contest liability, but have reached some arrangement whereby they were jointly represented, the plaintiff is entitled to a joint and several judgment against all of the defendants in the sum of €67,500.