

**THE HIGH COURT****[Record No. 2004/14907P]****BETWEEN****MARY CUDDY****PLAINTIFF****AND****LAOIS COUNTY COUNCIL, THE ELECTRICITY SUPPLY BOARD AND CORRIGEEN CONSTRUCTION LIMITED****DEFENDANTS****Judgment of Mr. Justice Herbert delivered the 28th day of July, 2005**

1. I find on the evidence of Mr. Tom Carroll, an Executive Engineer with Laois County Council, that on 16th May, 2004, public works for the improvement of the environment were being carried out in Clonaslee, Co. Laois. I find, also by reference to the evidence of this witness, that as a result of these works the public footpath, in the charge of Laois County Council, on one side of Main St., Clonaslee, was in an uneven and un-surfaced state, while the footpath on the opposite side of Main St., - the side on which the plaintiff resides with her son Seamus and his wife, - was left generally untouched. I find on the evidence of Mr. Tom Carroll and Mr. Declan McCann that the public footpath just outside and parallel to "Blooms" Restaurant had, because of these public works come to consist of broken paving slabs succeeded by loose stones and gravel in the area next to the window of this restaurant nearest the local Roman Catholic Church.

2. Four photographs were introduced into evidence which were stated by Mr. Tom O'Carroll to have been received by the Roads Department of Laois County Council under cover of a letter from Bolger White Egan and Flanagan, Solicitors, Portlaoise dated 25th May, 2004, which letter was produced by him in evidence. The plaintiff Mrs. Mary Cuddy was cross-examined by Counsel for the County Council to the effect that these photographs were taken by her son Seamus on 16th May, 2004, and she accepted this. Between May and early July, 2004, the plaintiff changed her solicitors to Tormeys Solicitors, Athlone. Mr. Seamus Cuddy did not give evidence at the hearing of this case. I find on the evidence of the plaintiff and Mr. Tom Carroll that the 3rd in sequence of these photographs shows the condition of the public footpath on this side of Main St., Clonaslee on 16th May, 2004, from a point just beyond the edge of the last window of, "Blooms" Restaurant, on the Roman Catholic Church side, to the entrance of the adjoining lane way. This area is seen, (but in its then fully reinstated condition), in photograph 2 of the book of photographs taken on 21st March, 2005, by Mr. T. O'Brien, Consulting Engineer, called in evidence on behalf of the plaintiff and duly proved by him. Mr. O'Brien told the Court that he understood that the other four photographs had been taken by Mr. Seamus Cuddy on a prior occasion and that Mr. Cuddy had showed him the scene on 21st March, 2005.

3. Mr. Declan McCann is a self employed plumbing contractor who resides a few miles outside of Clonaslee on the Tullamore side. He told the court that on the morning of Sunday, 16th May, 2004, he had driven into Clonaslee to purchase the Sunday Newspapers. He said that he was not fully sure of the exact time he arrived in Clonaslee but that it would have been about 10am or a little earlier. Mrs. Mary Cuddy said that she was on her way to 12 o'clock mass when she tripped and fell. In cross-examination by Counsel for the County Council it was put to her that she had in fact fallen at 9.30am. She denied this and very indignantly said that she would not be out of bed at 9.30am. She then recalled that there was another mass at 11 o'clock and stated that maybe it was on her way to that mass she had tripped and fallen.

4. In Replies to Particulars dated 10th February, 2005, the solicitors for the plaintiff replied to the solicitors for the Electricity Supply Board that, "the accident occurred at 9.30 approximately, the plaintiff was on her way to mass when the accident occurred, and, the plaintiff was alone at the time of the accident." In their letter of 17th May, 2004, the day after the plaintiff's fall, Bolger White Egan and Flanagan, then Solicitors for the plaintiff, wrote to the Director of Services, - Roads Laois County Council, alleging that the plaintiff, "fell on the footpath at Main St., Clonaslee at approximately 9.50am on Sunday 16th May last." I find on the balance of probabilities that the plaintiff fell, - and the fact that she fell was not challenged by any of the three defendants in this case, - between 9.30am and 10am on that Sunday morning and, that the plaintiff's recollection in this regard is defective.

5. Mr. Declan McCann told the court that when he entered Sweeney's (now Brasils), shop Mrs. Mary Cuddy was at the counter. He said she was a nice woman, a local woman and he had often spoken to her. Mrs. Cuddy on the other hand was very emphatic in her evidence that she had not been in Sweeney's shop that Sunday morning. She said that she did not know Mr. McCann and had not seen him before she fell and he must, "have been seeing things" if he thought she was in Sweeney's shop. Mr. McCann recalled that Mrs. Cuddy was carrying a small white bag in her hand when she left Sweeney's shop. Mrs. Cuddy fell just one house, - O'Donovan's, it was named by Mr. McCann, - beyond Sweeney's shop in the direction of the Roman Catholic Church to which she was going. Mrs. Cuddy resides on the opposite side of Main St. and somewhat further along the street from Sweeney's shop. As I have already indicated, on the evidence, the footpath on that side of Main St. had not been interfered with. Undoubtedly, at some point Mrs. Cuddy would have had to cross Main St. to get to the Church. However, one has to ask why she chose to cross from a level and intact surface to a broken and disrupted surface beyond Sweeney's shop on her way to the Church unless she also had some business in the shop. While there is always the possibility of habit being involved, on the balance of probabilities it seems more likely to me that she had crossed Main St. at this point for the purpose of doing business in Sweeney's shop. On the balance of probabilities I find that Mrs. Cuddy was in Sweeney's shop on the morning of Sunday 16th May, 2004, when Mr. McCann entered the shop and, that he did see her there as he stated in his evidence.

6. Mr. Declan McCann told the Court, that while Mrs. Cuddy was at the counter in Sweeney's shop he noticed that something was wrong and that she seemed to be weak on her feet and very unsteady. In her evidence Mrs. Cuddy repeatedly stated that what mattered was the truth and not lies and how could, "that man" know that she was, "bet on her feet". She said that her medical history would show that there was nothing wrong with her feet and that she was not feeling queasy that day. She said that she had been up and down Main St. for thirty years without falling and that she had fallen that day only because she had tripped over the manhole cover. This manhole cover is shown on photograph No. 3 of the photographs taken by her son Mr. Seamus Cuddy and in several of the photographs taken by Mr. O'Brien. It is at the end of the Blooms restaurant building nearest to the Roman Catholic Church and furthest from Sweeney's shop.

7. Mr. McCann told the Court that he knew nothing about Mrs. Cuddy's health but on that morning had said to himself that she was going to fall. Normally, he said, he would have picked up his papers and left the shop but because he was concerned he decided to keep a watch on Mrs. Cuddy. He said he watched her walking towards mass and he thought it was an absolute miracle that she had got the number of steps she did. He said that he was ready to run and catch her. He said that she did not trip but fell over forwards and had not got near the manhole cover and junction box when she fell. He told the court that she had fallen in an area a yard or so on one side or the other of a rainwater down pipe, (to be seen on photograph No. 1 of Mr. O'Brien's book of photographs), between

O'Donovan's house and Blooms Restaurant: almost the full width of the restaurant building away from the manhole cover.

8. Mr. McCann told the court that Mrs. Cuddy was unable to get up and that he ran down from the door of Sweeney's shop and picked her up. He said that he had no doubt that she had not fallen on, "builder's ground", and was not at, "that", pointing to the manhole cover in the photographs. He said that he would have noticed if he had picked her up from stones but that the ground was clear where she fell. He denied that he had said to her that she was lucky not to have struck her head on the junction box. He said that he was watching out for her because he thought she was going to fall and he was right. After he had picked her up he shouted to a Mr. Sean Flynn who was on the opposite side of Main St. to come and stay with Mrs. Cuddy while he ran back along the street to her house. He said that he knocked several times on the house but got no response. Mr. McCann said that he then ran back and he and Mr. Flynn lifted Mrs. Cuddy into his car. He then drove to the Roman Catholic Church, went in and asked his mother to leave mass and to come out to the car. His mother came out and spoke to Mrs. Cuddy who kept asking for her neighbour Mrs. Kathleen Dunne. Mr. McCann said that he eventually succeeded in making contact with Mrs. Dunne who spoke to Mrs. Cuddy. He then drove Mrs. Cuddy to Portlaoise Hospital a considerable journey and remained there with her until Mrs. Dunne telephoned and said that he could go home.

9. When Mrs. Cuddy was asked how her son Seamus had known where to take the photographs, she first said that she had told him where she fell and, then added, "sure he knew the place, it was only a few minutes from where we live". She then said that she went down with him to where the photographs were taken. When pressed further on this she said that he well knew the place, as it was only down the street a bit and she did not need to be with him. She said that she was quite sure that her son had photographed the correct place. She admitted that she had never spoken to Mr. Charles Flanagan Solicitor of Bolger White Egan and Flanagan Solicitors. She said that she knew nothing about solicitors but her son knew about them. She said that she, "never went out with anyone taking photographs". When cross-examined by Counsel for the Electricity Supply Board as to the location of her fall, Mrs. Cuddy appeared to become so completely confused that Counsel was obliged to discontinue his cross-examination which had been extremely sensitive and entirely non-threatening or confrontational. Mrs. Cuddy is eighty four years of age having been born on 5th October, 1920.

10. Mr. David Cogley, Consultant Orthopaedic Surgeon at Tullamore Hospital in his report dated 17th August, 2004, records that Mrs. Cuddy told him that, "she tripped over a manhole cover when going to mass and fell forwards onto her right hand and knees and face." Dr. Mary A. Sheehan, General Medical Practitioner at Clonaslee, who saw Mrs. Cuddy on 8th June, 2004, and on a number of occasions thereafter and on 5th July, 2005, merely records in her reports that, "she fell on the street on 16th May, 2004". Mr. F.M. Thompson, Consultant Orthopaedic Surgeon at Tullamore Hospital who reviewed Mrs. Cuddy on behalf of Laois County Council on 1st February, 2005, in his report of that date records that the plaintiff, "informed me that she was walking to mass on the public road when she fell and sustained injuries". In his report he states that he had not seen a report from Mr. Cogley.

11. Mr. Seamus Cuddy, as I have already remarked, did not give evidence and Mr. Sean Flynn was not called in evidence by any party to this action. In her direct evidence Mrs. Mary Cuddy told the Court that she had fallen sideways. This was put to Mr. McCann in cross-examination by her Counsel but he was certain, he said, that she had fallen forwards. He said that he felt, "she was doing well to have walked at all" after she left Sweeney's shop. In her direct evidence Mrs. Cuddy told the Court that the right side of her face was hurt and her glasses and dentures were broken up. Mr. McCann on the other hand in cross-examination stated that he did not see any broken glasses. In her report of 7th July, 2004, Dr. Mary A. Sheehan records that Mrs. Cuddy broke her false teeth and scratched her glasses. Mrs. Cuddy told Mr. Cogley and Mr. Thompson that she had broken her dentures and her glasses. In her medical report of 11th July, 2005, Dr. Mary A. Sheehan again repeats that Mrs. Cuddy had broken her false teeth and scratched her glasses. Dr. Sheehan went on to record that the plaintiff had not replaced either her teeth or her glasses, though this could be done on her medical card and, was using an older pair of glasses and older dentures.

12. Mr. Declan McCann impressed me in evidence as an accurate, careful and truthful witness who gave his evidence cheerfully and without any hesitation. He is a middle aged businessman who spoke kindly of Mrs. Cuddy and had every reason to recall the events of Sunday morning 16th May, 2004, when he was truly the Good Samaritan to Mrs. Cuddy. His evidence was not in anyway discredited nor was it demonstrated that he was in anyway under an obligation to any of the defendants in this case. Mrs. Mary Cuddy, while acknowledging that Mr. McCann lifted her up and took her to hospital on that morning, was very disparaging in her remarks about, "that man" and his saying that she was "shaky on her feet", and accused him indirectly but definitely of not telling the truth about how she had tripped over the manhole cover and then fallen. Though very assertive and even querulous in her direct evidence, in cross-examination by Counsel for Laois County Council Mrs. Cuddy showed a considerable lack of accuracy in her recollection of events, for example, as to the time of the fall and how her son Seamus had come to photograph the particular manhole and, when cross-examined by Counsel for the Electricity Supply Board she exhibited an apparent total confusion and demanded to leave the witness box saying that she was very sick and tired.

13. The onus of proof in this case is on the plaintiff to demonstrate, on the balance of probabilities, that she fell and suffered injury because she had tripped over a manhole cover rim which had been left elevated above the surrounding unmade surface of the public footpath. In my judgment she has not discharged this onus. I find on the balance of probabilities that she fell on the footpath at a point considerably removed from this manhole cover and for reasons totally un-associated with any misfeasance or negligence on the part of the defendants or any of them. The court will therefore dismiss this claim against all three defendants.