

THE HIGH COURT

[2016 No. 6471 P.]

BETWEEN

BREDA HAMPSON

PLAINTIFF

AND

TIPPERARY COUNTY COUNCIL

DEFENDANT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 25th day of July, 2018.

1. This case arises because of an accident which occurred on or about 17th December, 2014. The plaintiff alleged that when she reached a footpath, her foot became trapped in a large hole between two concrete kerbs, causing her to fall heavily onto the ground. The plaintiff is a homemaker and resided at the time of this accident at Clogheen in the County of Tipperary and now resides in Scotland with her family.

2. The defendant is sued in its capacity as a local and highway authority for the town of Cahir and has its offices at County Hall, Emmet Street, Clonmel in the County of Tipperary. The plaintiff claims she suffered significant loss, personal injury, and damage as a result of this accident.

3. Authorisation under s. 14 of the Personal Injuries Assessment Board Acts, 2002 and 2007, was issued by the Board on 16th June, 2016, under Claim No.: PL0120201604752. The defendant filed a full defence and pleads in particular nonfeasance as opposed to misfeasance and also pleads *novus actus interveniens* and/or the involvement of third parties, that is traffic striking into and mounting the footpath at the location, thereby causing the damage.

4. The important features to note with regard to the plaintiff's evidence was that while she confirmed that the accident occurred on 8th December, 2014, at 1:00pm while she was doing a message and had looked up and down the road and was crossing the road and that her right leg got stuck in the footpath opening and she went flat down on her hands and knees. She noted that there was a pipe coming out of the pavement which was broken. She had grazing of the hands and knees.

5. It is of significance that she first attended her General Practitioner about this accident as late as 29th January, 2015. She explained this by saying that she waited until the grazing on her hands had healed and started swelling before she attended Dr. Melanie O'Reilly, her G.P. at the time. Her reasoning for this was that Christmas and children and Santa intervened. She also added that cancer treatment was causing her memory loss. This witness freely admitted that she was crossing the road and she was not looking at the hole in the footpath and that she did take a chance crossing the road and she was alert and perhaps more concerned about crossing the road than falling down a hole. This court will deal with the plaintiff's evidence on the medical aspect of this case at a later point in this judgment.

The Issue of Liability

6. Mr. Michael Fogarty engineer described himself as a civil and construction forensic engineer being qualified with a degree in Mechanical Engineering in 1994 from the University of Limerick.

7. He described a PCV plastic pipe and he said the pipe could be 30 years old coming right out to the road edge of the kerb and the bottom of the pipe was still in position but that in his view vehicle wheels on the kerb had caused the kerb edges to be vulnerable and that this was the cause of the gap and that the outer edge had an inner crack over the pipe and that it was only an inch and should have a minimum covering of 4-inches.

8. This witness made the point that it was a satisfactory system because the pipe came across to the road under the kerb line and could not be seen from the road level. His opinion was that this was going to end up as something dangerous and he showed a Kilkenny eco drain showing concrete and holes (photographs 9 and 10).

9. Under cross-examination he was asked was it not a 6-inch kerb, a 4-inch pipe and a 2-inch concrete on top. He gave his opinion that there was 2-inches over the footpath but not over the kerb section and that originally concrete would have come over the pipe. It was very unusual to discharge between precast concrete kerbs with a gap of 4.5-inches and very unusual to have it discharging out at road level and that this caused the whole defect to be more obvious to someone looking downwards.

10. His opinion was that the disadvantages of this system far outweighed any other advantage. He agreed that the *locus* the area was not exclusively residential.

Evidence of Rory O'Callaghan, Area Engineer, Tipperary County Council

11. The essential point this witness made was that he had researched this topic and had found no other works were carried out to this piping and drainage over the last 30 years. He indicated also that trucks went up on the footpath at the *locus* and that the kerb was damaged by cars and trucks which could not take that sort of loading and he gave his opinion that the path was designed for pedestrians, not for heavy trucks and he agreed that if you apply more than pedestrian loading to the footpath there would be problems.

Evidence of Mr. Lorcán O'Flannery

12. This witness described himself as an employee of Mr. Rohan. He said that the kerb was 6-inches high in general in the area but that here it was pushed down and that there was a 4-inch pipe with 1-inch rather than 2-inches of covering above it and that as it crosses to the little gully it is more likely 2 inches.

13. This witness did not think that it was unusual and unsatisfactory and he said whether dish or cast in a dish or cast in a pipe, it was entirely adequate for pedestrians. He described the particular pipe as having a design life of 40 years and that you would expect damage over 30 years. While the Kilkenny option of eco drainage was a better option, it just was not available 30 years ago.

14. This witness described the pipe as conspicuous especially where one steps over onto the path. This witness was shown

photographic evidence and agreed that there were cars on both sides of the street and a fairly large pub with no yard at the back to pull into and while he agreed one would expect a lorry to park as close as they can further up the street, he said it would be bad driving for a truck to go as close as possible to the pub with one wheel up and one wheel down in tight parking conditions.

15. This witness took the view that footpaths are not strengthened to take vehicles parking and that a vehicle can mount any footpath and that is more likely to be in front of a pub rather than down a road.

16. This witness said that where a pipe issues out into the footpath it cannot be as strong as if there was no pipe.

Medical Evidence on Behalf of the Plaintiff

17. Joseph G. O'Beirne, Consultant Orthopaedic surgeon by report dated 1st November, 2015, confirmed the plaintiff attended the Emergency Department of South Tipperary General Hospital Clonmel on 29th January, 2015, in relation to this incident. She was found to be tender over the lateral side of the wrist and the wrist had a decreased range of motion, x-rays were taken which showed no fracture. The status of the trapezium was in doubt and the plaintiff was given a back slab and referred to the fracture clinic.

18. The plaintiff was seen first in the fracture clinic on 4th February, 2015, and although the x-rays showed no fracture, she was tender over the radial side of the wrist and the base of the thumb and she was given a below elbow cast for four weeks. On 25th March, 2015, the plaintiff was found to have tenderness specifically over the first dorsal compartment with a positive Finkelstein's test and was given a thumb Spica splint and referred to the occupational hand therapy service at University College Waterford for a splinting regime for de Quervain's syndrome and in the interim she was advised to use anti-inflammatory medication as well as the thumb Spica splint. Hand therapy was advised on 15th April, 2015, and she continued with the splint and medication.

19. The plaintiff was complaining on 13th May, 2015, of pain over the base of the thumb with tenderness over the Carpometacarpal joint (CMC joint). Some osteoarthritis of the CMC joint was seen on the x-ray and she was advised that she had two issues: one being de Quervain's syndrome, but also CMC joint arthritis at the base of the thumb and she was advised that the splinting regime could help to address both issues and she was put down for review six weeks later. This treatment was continued at review on 24th June, 2015, and on 5th August, 2015 she had ongoing pain over the base of the thumb despite a hand therapy course. She continued to have distal tenderness and physiotherapy was advised and an MRI scan ordered. It is described that if the first dorsal compartment is too tight for the two tendons to go through, the patient experiences pain at the level of the compartment during wrist movement and particularly during thumb movement, this is the essence of de Quervain's syndrome. This can occur spontaneously, during an inflammatory disease or often as a result of over usage or unaccustomed use and it can be seen occasionally following a single injury as happened in this case. The majority of patients with this condition heal spontaneously, but a minority persist. Osteoarthritis of the first carpometacarpal joint has been identified. The plaintiff has suffered pain and tenderness at that area. It is conceivable that a fall could precipitate symptoms in the CMC joint with pre-existing osteoarthritis. While the de Quervain's syndrome may settle one could not be so hopeful about the osteoarthritis symptoms at the base of the thumb in the view of this medical professional.

20. Dr. Wee Lam, Consultant Hand and Plastic Surgeon, in his report of 6th January, 2017, reviewed her ultrasound scan suggesting synovitis of the right index Metacarpophalangeal joint (MCP joint) and also the CMC joint. He felt he was not entirely sure why she has ongoing synovitis and she told him that her symptoms are intermittent and effect only one hand and he referred her to a rheumatologist. He also referred her for a cervical spine x-ray in relation to ongoing pain in the neck. The plaintiff was seen by Mr. Steven Boyle, a rheumatologist, and his report is dated 23rd of February, 2017. Nerve conduction studies were carried out and were negative and there was no history of psoriasis, inflammatory bowel disease or any connective tissues associations, but there is a family history of arthritis. She was found to have degenerative disease at the thumb and MCP joint and mild synovitis at the CMC joint and the under aspect of the lunate index MCP joint.

21. The x-ray of the cervical spine showed minor cervical spondylosis with normal alignment and no cervical rip. She had been treated and diagnosed with psoriatic arthritis by Dr. Boyle in January, 2017, and treated with an intramuscular injection of Depo-Medrone and the plan was to start on a disease modifying medication called Sulfasalazine in order to control symptoms. Dr. Walsh, a General Practitioner, in his report from the Barclay Medical Practice of 8th June, 2018, noted that she had a flare up of arthritic symptoms mainly in the knees and right hip and could not tolerate the drug which she had been treated with and so was not taking the medicine. The on-call rheumatology team suggested a further Depo-Medrone injection which she was given on 3rd April, 2018, and Cox-2 inhibitors were given, by way of analgesia due to a previous allergy to ibuprofen and she said that she would only take it depending on pain levels. Dr. Chhabra's report confirms the date of examination of the patient as 25th February, 2016. Dr. Chhabra found the patient to have a good range of movements of the right wrist with no local tenderness over her scaphoid. She was found to have tenderness generally over the volar aspect of her radial styloid on the right side and was tender over the MCP joint of the right thumb. This doctor found that her pain was now more at the outer aspect of her right distal radius and at the MCP joint of her thumb rather than in the de Quervain area. He notes that she had pre-existing osteoarthritic changes.

22. A second date for examination of 11th April, 2018 was given by Dr. Chhabra. The plaintiff described herself as on treatment for psoriatic arthritis.

23. The second report of this doctor was 11th April, 2018, and he noted that the plaintiff had an injection to the right thumb CMC joint under Mr. O'Byrne on 29th September, 2015, and that she attended him on 2nd September, 2015, complaining of pain in the right shoulder and underwent six weeks of physiotherapy which improved her condition. She was seen by a hand surgeon in Scotland and was found to have synovitis in the right index MPC joint and also the CMC joint on ultrasound and was referred to a rheumatologist and was reviewed on 23rd February, 2017, by Dr. Stephen Boyle in the UK. She complained of half an hour early morning stiffness in the right hand with tingling affecting all the fingertips of her right hand. Her nerve conduction studies were negative and she was found to have a small patch of psoriasis and a few nail beds and she was diagnosed with psoriatic arthritis and prescribed appropriate treatment and she was advised to take sulfasalazine and a steroid injection.

24. Her right shoulder forward flexion was to a hundred degrees, but with pain all through the range and her right hand had satisfactory grip with tenderness over her second MPC joint and her CMC joint. He confirmed degenerative changes in the thumb MPC joint and mild synovitis at the CMC joint and ulnar aspect of the lunate index MPC joint were found on the MRI done in England.

25. This doctor comments that in his opinion this lady had a pre-existing osteoarthritic changes in the CMC joint of her right thumb. These were aggravated at the time of her fall and she was found to have symptoms of de Quervain's syndrome. She was arthritic prior to this injury but remains symptomatic. The accident would only be expected to precipitate symptoms in the CMC joint. She is undergoing treatment for psoriatic arthritis. She is likely to have difficulties with the hand with some activities as mentioned. The osteoarthritic and psoriatic arthritis would not be related to her fall.

Legal Submissions on behalf of the Defendants

26. The defendants rely on nonfeasance and on the uncontested evidence that the footpath is at least 30 years old, and perhaps 40 years old. It is common case that a 4-inch Wavin pipe was inserted, the kerbs were placed either side of the emerging pipe and concrete was poured over the pipe. It is common case that the kerb is 6-inches high, the pipe is 4-inches in diameter and the inevitability is that there was 2-inches of concrete over the pipe, although this is to some extent disputed, and the defendant asserts that this equates with the depth of concrete in a standard concrete slab. The defendant's engineer acknowledges that with regard to any of the alternative methods of dealing with this item, other alternatives could have been used but there are advantages and disadvantages to each method, but he held firm to the view that there was nothing wrong with the option chosen by the Council. He stressed the fact that the offending area is a footpath not a road, but is constructed for pedestrians.

27. It is common case that damage appears to have come about by vehicles striking the footpath at this location and that for the plaintiff to succeed she has to convince the court that the defect came about not by wear and tear, but because of some improper construction ab initio which has led to the kerb's early disintegration. The defendant makes a strong point to the effect that there is no evidence to suggest that the kerb or pipe did not achieve the type of lifespan which it would have expected to have achieved and that the method of construction was appropriate at the time when the works were done. It is common case that no repairs were carried out to this portion of the footpath.

28. The court is reminded of the line of authority from *Russell v. Men of Devon* (1788) 2 Term Rep. 667 and the distinction between misfeasance and nonfeasance which has survived in law, with reference to subsequent cases, *Gallagher v. Leitrim County Council* [1955] 89 ILTR at 151 describing the principle as an archaic principle of law and on appeal in that case the defence of nonfeasance was upheld. The plaintiff's claim failed because of nonfeasance in the case of *Gaye v. Dublin County Council*, High Court (unreported judgment of the 30th July, 1993) *per* Morris J. In the present case there is no evidence regarding the antiquity of the defect.

29. *Loughrey v. Dun Laoghaire County Council* [2012] IEHC 502 involved a trip on a footpath in Dun Laoghaire. Cross J. made a finding on the basis of misfeasance and that the hazard was dangerous on the basis of the engineering evidence which he heard with regard to modern construction but still reiterated that *"the law still remains in its ancient purity in this jurisdiction"*.

30. In *McCabe v. South Dublin County Council* [2014] IEHC 529, Hogan J. sets out:-

"This in itself is not sufficient to take the case outside of the nonfeasance rule, since the authorities are at one that there must be actual negligence in the actual repair of the highway before the case comes outside the scope of the nonfeasance immunity. This very point was made by Kingsmill Moore J. in Kelly v. Mayo County Council [1964] I.R. 31 (S.C.) where the council could only have been liable if there had been evidence that it had repaired the opening and had done so in a negligent fashion."

The defence in the present case relies on the assertion that there is no evidence of how long the defect had been there, no evidence that any repairs had been carried out and that is not even suggested on the evidence, and on the current state of the law the plaintiff cannot succeed therefore.

31. In the event of the court finding against the defendant, it is submitted that contributory negligence arises at the upper end because the entire carriageway was crossed and the admission of the plaintiff to avoid the approach of a vehicle travelling on the road and the obvious irregularity in the kerb had to be seen by her other than in her anxiety to avoid the approach of this vehicle and there is no excuse on her part for missing that irregularity. Although the defendant is described as the Local and Highway Authority of the Town of Cahir, it is not a case where the local authority interfered with the footpath or drain. Rather it is a question of a drain beneath the footpath and the question is whether they were negligent in the construction of the footpath. The defendant argues that there is no evidence that it was designed in a defective manner and stresses the issue of contributory negligence.

Legal Submissions on Behalf of the Plaintiff

32. The plaintiff argues that in the 1970s there could have been vehicular traffic and the plaintiff says there was no kerb where the pipe is at the gap at 4.5-inches and that there is shallow overlay of concrete, that intrinsically the defendant's design of the insulation is faulty or negligent. On the pleading point concerning the description of the defendant as a local and highway authority, the plaintiff argues that this is sufficient to encompass other statutory functions.

33. The plaintiff stresses that the local authority laid a 4.5-inch PVC drainage pipe close to the surface of the footpath in order to carry away surface water run-off from a down pipe serving two terraced houses on Church Street. A 4.5-inch gap was left between the kerbs at the outer edge of the pavement to allow the pipe to discharge onto the road itself and into a nearby gully. The plaintiff stresses the opinion of the engineer that the fault lay in laying the pipe too close to the surface of the footpath and that over time the concrete at the kerb edge had broken away and the plastic pipe had fractured at its outer end and this left a hole at the edge of the footpath. This left a significant hazard for pedestrians at that particular point. The plaintiff says, however, that the defendant laid this pipe in its capacity as a road authority and therefore the nonfeasance rule has no application and the defendant is liable for the failure to repair the pipe and the overlying footpath.

34. *Blackmore v. the Vestry of Mile End Old Tower* (9 Q. B. D. 45 (1882)) was affirmed by the Court of Appeal which held that as the meter had been installed by the defendant not in its capacity as "surveyor of the highways", but in that other capacity which give them power by statute to water the streets, and was liable.

35. In *Johnson v. Dublin Corporation* [1961] I.R. 24, a case where the waste water inspectors had a principal duty to sound leaks and the defendant was found negligent but it was not suggested that the nonfeasance rule applied, the reason being that the particular valve in question had not been installed by the defendant in its capacity as highway authority. Even if the court adopted the nonfeasance rule the court is urged on behalf of the plaintiff to find the defendant negligent regarding the original design of the drainage arrangement in the footpath and that there was therefore misfeasance.

36. Mr. Fogarty, an engineer, gave evidence that the likely cause of the failure at the kerb edge was vehicles mounting the footpath and that this ought to have been foreseen by the local authority when laying the pipe. His opinion is that the design was defective, the pipe was too close to the surface of the footpath, and it should have been laid underneath the surface of the footpath and the road in order to connect directly into the roadside storm drain. He stressed that as an unusual situation which he had not seen previously and showed photographs of a solid grid arrangement over the pipe in the footpath in Kilkenny city demonstrated by photographs.

37. The plaintiff argues that Mr. Lorcán O'Flannery implied in his evidence explicitly acknowledged that the footpath was not designed to take vehicles mounting the footpath when he stressed that the design of the footpath was adequate for pedestrian traffic. He said it was poor driving to park on the footpath. The plaintiff argues that the proximate cause of the footpath failing was the fact that the

pipe was laid so close to the surface and this is not work which the defendant carried out as a road authority and it is therefore liable for its failure to repair the hole and that even if nonfeasance applies, the original design of the drainage, with the foreseeability of vehicles mounting the footpath at the particular location, and with its various business premises nearby that it is reasonably foreseeable that vehicles would mount the pavement at this location and the design of the footpath should have taken that into account.

38. The court is asked to find that the likely effects of additional loading as a result of vehicles mounting the pavement ought to have been taken into account in the design of the drainage arrangement and to do so amounted to negligence on the part of the defendant.

39. The case of *Florrie Johnson v. the Right Honourable Lord Mayor, Alderman and Burgesses of Dublin* [1961] I.R. was a case where it was held that the mere operation of lids by waste water inspectors at night for the purpose of detecting water leakages was not a reasonably sufficient inspection to satisfy the obligation of the defendants as a highway authority to ensure that the lids were reasonably safe for persons normally using the footpath, and the plaintiff had accordingly shown such negligence on the part of the defendants as to entitle her to succeed in her action.

40. The court notes that reference was made for example where a meter box for watering the road or a manhole or other drain pipe or barrel or fountain placed by the local authority on the road becomes and remains defective, resulting in injury that they will be liable for. The plaintiff submits that the situation is analogous to the within situation, and that the drainage does not fall within the defendant's capacity as road authority and that the defect concerns defective installation of a pipe and it falls within the common law duty and it is accepted that if the court takes a narrow view of the defendant in the context of road authority that the plaintiff is caught by this and her claim will fail.

41. The issue then of reasonable foreseeability arises and it is argued by the plaintiff is one of common sense rather than expert evidence and that on the facts in this case it makes sense to distinguish this case from that of Hogan J. in *McCabe v. South Dublin County Council* [2014] IEHC 529.

Findings of Fact and Conclusion

42. The court is somewhat sceptical of the plaintiff's evidence in that she waited such a long time until the end of January to see her General Practitioner in relation to this particular accident. The court finds that while that is not something which is always fatal in a case such as this, it is hard to credit nonetheless.

43. It is the view of this court that it was not reasonably foreseeable to suggest that vehicles would mount the footpath at the *locus* of this accident at all. Nor is it possible to infer that the initial design was faulty as alleged. The court takes the view that this is truly a nonfeasance case in terms of the capacity of the road authority. The court notes the evidence of Mr. O'Flannery who said that the footpath was adequate for pedestrian traffic and notes the engineer, Mr. O'Callaghan, had researched this issue and had found no repairs to this *locus* in 30 years.

44. The court takes a very narrow view and the plaintiff is caught by this. While the court is very respectful of the very detailed submissions afforded to the court, it takes the view that there was not sufficient factual evidence in order to find for the plaintiff in terms of the various aspects of their legal submissions although they have raised issues which might well be argued in a future case, the facts simply were not there in this case. Essentially, this court took the view that on the flow of the evidence, the defendants were sued as a local and highway authority. The doctrine of nonfeasance does apply to this case and even if the plaintiff had reached the bar on the liability issue it is the view of this court that the plaintiff herself would face a considerable percentage of contributory negligence because she had crossed the road with oncoming traffic and freely admitted that, and was not therefore watching where she was going.

45. This court felt that there was insufficient evidence to suggest that there was construction of this footpath at the *locus* in the manner which was negligent and there certainly did not appear to have been any interference with the footpath. The court has to view this *locus* in the standards of the time and while it may have been somewhat unusual in terms of its construction, that by the standards of the time it was adequate for its purpose i.e. pedestrian traffic on the footpath. This court therefore dismisses the plaintiff's claim.