THE HIGH COURT

[2014 No. 2111P]

BETWEEN

MICHAEL WARD (A MINOR)

PLAINTIFF

AND

THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND, THE OFFICE OF PUBLIC WORKS, THE DEPARTMENT OF SOCIAL PROTECTION & THE MINISTER FOR SOCIAL PROTECTION

DEFENDANTS

Ex tempore JUDGMENT of Mr. Justice Hanna delivered in Sligo on the 10th day of May, 2017.

1. The Plaintiff in this case, who was aged seven years at the time of the accident the subject matter of these proceedings, resided with his family at the time of the accident at 9 Ardnacassa Avenue, Ballinalee Road in Longford, in the County of Longford.

2. This dwelling house is beside what has been referred to as "government buildings". These are relatively modern buildings and contain a number of government services. The offices to be found there include the driving test centre, offices of the Department of Social Protection, and, I understand, some offices relevant to the Department of Agriculture. The premises were opened in or around the year 1993.

3. The premises generally have been described and photographed by Mr. O'Brien, a consulting engineer, and, as well as buildings, contain, inter alia, a large grassy area which adjoins a service road. The premises are bound in by a boundary wall which appears to be something in the region of three to four feet in height and this constitutes a clear, marked-off boundary. That is not to say that it could not be scaled or accessed by anyone, including children, wishing to enter the premises. But it is a clear boundary. Otherwise, the property is gated and those gates are locked outside office hours.

4. Security is provided during the course of the day, which will begin at around 8 o'clock, with the gates being opened at around ten minutes to eight, and throughout the day thereafter by an appropriate services officer, who then closes the premises at close of business at around 7 or 8 o'clock at night. The buildings are then secured and the gates are closed and padlocked and the premises are thus, and to that extent, rendered secure and closed to all members of the public each night. In addition to this, they are closed throughout the weekend from Friday evening until the following Monday morning, or, presumably, on bank holiday weekends until the Tuesday morning, and are then, again, rendered accessible to members of the public.

5. The Plaintiff and his parents allege that outside these hours, sometimes at weekends, maybe in the evening on sunny days, and during holidays these lands were accessed by children, who would use the grassy area as a play area including for football.

6. There was no evidence outside of the Plaintiff and his immediate family of this particular use and this, of course, was recounted to Mr. O'Brien who, understandably, reported and advised this Court based upon the instructions given to him. But beyond this, there was no evidence whatsoever of this alleged continuous use of the grassy area as some sort of occasional ad hoc sports and recreation ground for local children. Given the well-populated nature of the location, this was somewhat surprising.

7. The precise circumstances of the accident put forward by the Plaintiff are that he was playing a "kick around" game of football on this grassy area with his brother, a cousin or cousins, and maybe a couple of friends - about seven children in all. He ran after the ball and, as he described in Court, while running for the ball he slipped on stones or gravel which were on the grass, fell forward and his right knee met the edge of a kerbing stone which flanked the service road in the premises. As a consequence of this, there is no doubt that he suffered a very nasty injury, comprising a cut to his right knee which required stitching and had certain complications. The end result of this is that, whereas there are otherwise no long lasting effects of this injury, he is, however, left with a very noticeable and very unpleasant scar.

8. The green area to which I have referred adjoins the service road and is flanked by kerbing stones. These kerbing stones, according to Mr. O'Brien, come in lengths of about 1 metre and border the road surface at a height of approximately 99 millimetres. The outer top edge of their presenting face on the roadside is slightly curved and bevelled away from the tarmac surface. On the inner, grass side, it is not so curved and is more acute than the roadside.

9. The outer side is like kerbing such as we meet not only adjoining grassy areas, but every day on the public footpath and the public highway and stands some 90 millimetres proud of the road surface. The intent on the other side is that the surface which it adjoins - in this case grass but it could equally be a paving area - is infilled or built up to the top of the paving stone so, therefore, the top of the surface would be flush with the top of the kerb stone.

10. In this particular case it would seem, as described by Mr. Darcy the Higher Executive Officer in charge of the premises, that through the passage of time and general wear and tear, including the application of weed killer over the years, the inner side or the grass side beside the kerbing stone has become denuded and depressed, leaving a shortfall of between some 60 or so and 70 millimetres between the top of the paving stone and the ground surface. This has given rise to what is in effect a step-like arrangement from the lower level to the top sharper level of the paving. That proceeds for a certain distance alongside the service road and it was with that portion of the kerbing with which the Plaintiff alleged in Court that his knee came in contact.

11. The description of the accident as set out in the Personal Injuries Summons is that the Plaintiff ran along the green area close to and parallel to the service road in front of the building and, by reason of the dangerous and defective condition of the said property, was caused to trip and fall by reason whereof he sustained severe personal injuries, loss and damage, which bring us to where we are. The Plaintiff, now aged, I think, some 12 or 13 years, it must be said has stuck to his guns throughout the case, although pressed upon it, to the effect that he was chasing a ball and that he slipped on gravel and his knee hit the kerb.

12. Now there is no dispute in this case, as I have indicated, that the grassy area was the Defendant's property and the Plaintiff's justification, such as it might be, for being present was that he was playing there and that children habitually played there. No one ever told him to get off. It was suggested in cross-examination that the children might have been told to get away from the place on one occasion but that certainly wasn't pursued in evidence. The Plaintiff's case is: that he was somewhere where he was owed a

duty of care by the Defendant and that this kerb constituted a hazard which was in breach of the Defendant's duty of care to him; what occurred to the Plaintiff was reasonably foreseeable by the Defendant; and that the Defendant stands liable to compensate the Plaintiff for the injury which he has suffered.

13. The Defendant's defence is that the Plaintiff was a trespasser although, as has been pointed out by Mr. Smith S.C. in cross-examination, this was a plea that came rather late in the day. That may well be so. But it is a plea that was permitted by Order of the Court. I don't know if it was by consent or not. It is an important plea in law. The Defence also asserts that the kerbing, in any event, was not a hazard, that it materially would have made no difference even if the grass side of the kerbing had been infilled, and that the accident was not, in all the circumstances of the case, foreseeable.

14. Now with regard to what I might describe as the mechanics of the physical injury (as opposed to the mechanics of the accident) and as to what materiality the absence or presence of the infill and the presenting sharper edge of the kerbing would have had to the nature and degree of the injury, had the top of the grass service been flush with the kerbing, we have no medical evidence to advise us one way or the other. We do have Mr. O'Brien, who offered his own view that the outcome may have been that of a substantial bruise, rather than the cut that occurred. I think it is fair to point out that he conceded in cross-examination that the Plaintiff's fall and the impact and the force of that fall may, had the grass been flush with the top of the paving stone, have suppressed the grass surface to the extent that the sharp edge of the kerbing would have come in contact with the Plaintiff's knee anyway. In those circumstances, one could reasonably infer that this instant injury would have occurred anyway insofar as the so-called sharp edge had any part to play in the accident.

15. Since the passage of the Occupiers Liability Act of 1995 the law, which had been otherwise for a number of years as a consequence of the case of *McNamara v. ESB* [1975] IR 1, effectively reverted, as far as trespassers were concerned, to what it was before and the previous common law, with the various instances of judicial nurturing over the years, provides that the duty of an occupier in the circumstances is not intentionally to injure trespassers, or, not to act recklessly towards trespassers. An occupier can be liable for what would be negligent misfeasance carried out with the knowledge of the presence of trespassers. That duty is owed to the persons or a person whom they knew or ought to have known were going to be on the premises, albeit unlawfully.

16. Not surprisingly, much judicial attention has been paid over the years to the extent of the duty of care owed to child trespassers. This is what we are dealing with here and I should, in case I forget it later, point out that I have to take account of the fact that when this accident occurred, the Plaintiff was seven years of age and whereas there are certain differences in the narrative as to what may have occurred, one has to be careful not to be too strict as far as the Plaintiff personally is concerned, given the fact that he was but seven years of age and, obviously, had a very unpleasant and shocking experience. He might not be the most accurate narrator of what actually occurred.

17. In any event, one of the main stays of the case advanced by Mr. Smith is that this all constituted an allurement. An allurement is one of the features of this law concerning children which the courts have visited over the years and, indeed, some authority was opened to me on the topic.

18. Mr. O'Brien, in his evidence, said that in his view this grassy area constituted an allurement and, obviously, in this allurement was to be found a hazard, to wit the kerbing stone complained of. That's the essence of the Plaintiff's case.

19. Now Mr. Clarke, S.C., perhaps a little unkindly, badgered Mr. O'Brien in cross-examination about giving an opinion on law and I think he was probably justified to a certain extent. I'm sure Mr. O'Brien wouldn't try to do other than "stick to his last" in this or any other Court and I think he probably meant an allurement in the commonly understood sense; the way one might say that a potential romantic partner of either or any sex is alluring and when one says that one does not mean that such a person is fascinating and potentially fatal. But in law an allurement, we are told as of 1913 Kings Bench, is something that is both "fascinating and fatal" and that is the way that the law views an allurement.

20. As described by Kingsmill Moore J. in the Supreme Court, as noted in *McMahon & Binchy* at page 435, that's the 4th edition I think, quoted in *O'Leary v. John A. Wood Ltd.*, from 1964 Irish Reports 269 at page 277, he says:

> *"… an object should not be considered an allurement unless the temptation which it presents is such that no normal child could be expected to restrain himself from intermeddling, even if he knows that to intermeddle is wrong."*

21. Now that is what an allurement is. The fascinating piece of machinery that a child just can't resist putting his or her hand into is a good example of what is an allurement. And, indeed, some of the Irish authorities relate to moving vehicles and such things. But to say that what amounts to a lawn in front of a public building constitutes an allurement would seem to me to be a "bridge too far" in the circumstances of this case. This is an enclosed lawn that is clear as such to all and I think it simply does not come within the category of something that I could legitimately hold was, to use the old term, "fascinating and fatal". Nor, in any event, does it come within the scope of what is described so clearly by Kingsmill Moore J. speaking for the Supreme Court, as reported in 1964.

22. As to the exposed kerb, this was kerbing at the side of a roadway, it wasn't kerbing that was presenting to people ordinarily walking up and down or driving up or down, which is the purpose of the roadway, and the purpose of the grass as far as the Defendants were concerned, as evidenced by Mr. Darcy, was largely aesthetic.

23. I have no doubt that an exposed paving stone in other circumstances would offer an open goal to a Plaintiff, who might, for example, lawfully have to pass and repass across it. But in the given circumstances, it was not, in my view, reasonably in the contemplation of the Defendants that people - if this was what happened - were pursuing footballs on the grass and I don't think, in the circumstances of this case, that it amounted to a hazard.

24. But even if it did, what are the Defendants to do? These are offices that are bounded by a wall. Of course somebody who so wishes could get over this wall. Children can get over walls. Children can climb trees. But we have to live in the real world. The wall is there to keep people out. The gates are locked. Notices, for what they are worth to children in any event, are there. You are not supposed to go in. The same way as you are not supposed to go into somebody's garden. But in this case, it is a garden or a lawn which is sealed, which is locked off. To hold that the Defendant would be under any greater duty, for example to build a much higher wall, or should have barbed wire on it or have full-time security in circumstances such as these, it seems to me would be to put a preposterous level of obligation on a public authority.

25. I found the evidence of Mr. Darcy to be credible and persuasive. He says that he was not aware that children played as alleged on the grassy area. This alleged activity did not occur as far as he was concerned. Occasions could arise where children might be disruptive or difficult during office hours or were not under the care of parents and would have been asked to leave. I am satisfied to

accept his evidence that, by and large, as far as the occupiers were concerned, trespassing children were not an issue. It may well have been the case that from time to time children did go in there and play. I am not persuaded that this was approaching the extent alluded to by the Plaintiff and his parents. I don't think, in all the circumstances of this case, that any more could have been expected of the Defendants as far as the securing of the premises goes.

26. Turning to the mechanics of the accident, as opposed to the mechanics of the injury, there have been a number of versions of the accident. These are set out variously in the solicitors initiating letter, the application to PIAB, the Personal Injuries Summons, which I have already described, the accident as reported to Mr. O'Brien, the engineer, and the accident as reported to Mr. McMurray, the surgeon, all of whom referred to versions of the accident different to those as described by the Plaintiff when giving evidence.

27. Now, again, I stress my concern that I do not want to overly fault the Plaintiff's recollection of what happened when he was seven years of age. However, if the same history and clarity had been relayed to his parents and lawyers following the accident and subsequently, although it is consistent with the injury, it is most improbable that such a narrative would have yielded the inconsistency that followed thereafter between the solicitors, Mr. O'Brien and Mr. McMurray. I think it is probably the case that matters have been reorganised in his head without, I stress, the Plaintiff trying to do anything other than to tell the truth as best he can.

28. The accident as described, certainly to Mr. O'Brien - he described the Plaintiff as running parallel to the kerb - is not consistent with an injury to the Plaintiff's right leg. If anything, the Plaintiff's left leg would have been injured and it would have been, perhaps, a different kind of injury to that described.

29. One of the doctors, that is Dr. Breslin, in the agreed reports does, from a report dated in 2013, give an account which is similar to what the Plaintiff has described here in Court. But it appears that other versions of events have abounded. All of this, sadly, causes me to be less than sure on the balance of probabilities as to what precisely happened or whether the accident happened as described by the Plaintiff in this Court.

30. The other difficulty I have is the nature of the injury he suffered to his right knee and specifically, whether the absence of infill made any real difference. I have, alas, not been persuaded that the absence of infill would have made any difference to this particular injury. That's assuming it happened as the Plaintiff described it.

31. Unfortunately, we don't have *viva voce* evidence from doctors, and this would be within their area of expertise, to tell us what the mechanics of the physical injury would be. But it is worthy of note that neither Mr. McMurray, who describes the Plaintiff falling over a kerb, nor Dr. Breslin, who describes the accident pretty well as the Plaintiff described it here, express any surprise that the injury was caused by a kerb. Now nothing much turns on it, but it is of significance that there was no mention to them, as far as we know, and it is certainly not recorded, of a sharp, inner edge of a kerb causing the injury. So when they were told that it was a kerb, one might infer that they thought of a kerb as we would all understand it; and that is the outer edge of a kerb. And there is no expression of surprise by Mr. Breslin that a kerb could have caused this injury or suggest that she would have expected a blunt trauma injury rather than the one that was actually caused. But that's of no moment. I merely mention that to show that in reality the medical evidence, had it been given viva voce in accordance with the medical report, may not have advanced the Plaintiff's case.

32. I have to be persuaded on the balance of probabilities on all of the matters with which I have dealt during the course of my judgment that what the Plaintiff has put to me constituted, firstly, the existence of a duty, the breach of that duty, and resultant injury for which he's entitled to be compensated, and I'm afraid that on all of the tests, I have to say that the Plaintiff has failed to satisfy me on the balance of probabilities and I regretfully must dismiss the action.