THE HIGH COURT

PERSONAL INJURIES

[2015 No. 8107P]

BETWEEN:

MIRIAM CRONIN

PLAINTIFF

-AND-

ARDKEEN SALES LIMITED TRADING AS LONDIS

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 22nd day of June, 2017.

1. This case involved a plaintiff who fell in the defendant's car park after she had left a neighbouring pub on the 21st June, 2014, at about 6 p.m. The defendant is the occupier of a Londis shop and the adjoining car park. The car park is used by customers of the shop, as well as being used by cars and pedestrians who frequent other nearby shops and premises. It was suggested on behalf of the plaintiff that the car park was also used by articulated trucks delivering goods to the Londis shop.

Factual background

2. On the day in question, the plaintiff had spent just over an hour at the pub and had consumed in that period three drinks; albeit three glasses of shandy. It is relevant to note that in her evidence to this Court, she stated that she was not a drinker and so was not used to drinking.

3. The plaintiff was wearing wedge heeled shoes which she described in her evidence as having a heel of about an inch. It is however relevant to note that when the shoes were produced in Court, it transpired that they had a five inch heel. In addition the front part of the shoe was also raised to almost an inch.

4. The plaintiff alleges that she caught her footwear in the uneven and cracked tarmacadam in the car park, that she fell forward and her left leg went from under her and backwards and that she suffered a fracture to her ankle. This resulted in extreme pain, which she described as worse than childbirth. Two plates were inserted in her ankle and she spent twelve days in hospital. It was necessary for her to use a Zimmer frame for several months after the accident.

5. Her solicitor's letter which was issued on the 2nd July, 2014, which seems to be either the day, or very close to the day, that she was released from hospital alleges that she "slipped" in the car park. Similarly, the note which was taken by the Hospital staff on her admission on the day of the accident states that "she slipped". Despite these two relatively contemporaneous accounts of the accident, it is relevant to note that Mrs. Cronin in her evidence to this Court, some three years after the accident, denies that she slipped on the tarmac. Rather she claims that her heel caught in the uneven tarmac in a depression in the tarmac which she has identified as the locus of the accident. She alleges that the uneven tarmac is the responsibility of the defendant and she alleges that the car park was unsafe because of its uneven surface where she fell.

6. The spot where she alleges the accident occurred is a slight circular depression of about a 1 metre in diameter in the tarmacadam, and the tarmacadam has a web-like or crazed pattern which the engineering evidence suggested occurs in tarmacadam after several years. Of more significance, from the plaintiff's perspective, is that this part of the tarmac had three small indentations of at least 10 millimetres in depth.

7. The plaintiff's husband was walking ahead of her at the time of her fall and when he heard her scream, he rushed back to help her. It is relevant that he could not confirm his wife's evidence that it was at the alleged depression in the tarmac that the accident occurred. While the plaintiff's son was alongside her when the accident occurred, he was not called to give evidence to confirm the locus of the accident. It follows that the only evidence that this Court has of the locus of the accident is the plaintiff's evidence. It appears that the plaintiff first confirmed the locus of the accident on the day that she was released from hospital. On that day, she drove with her husband to the car park where she identified to him the locus of the accident from the car in which she was driven from the hospital. She remained in the car, as she was at this stage using crutches. She explained to the Court that the reason that she identified the locus of the accident on the day she was being released from hospital was because she was due to meet her solicitor that day in her home.

8. It is also relevant to note that in her evidence to the Court the plaintiff indicated that at the time of the accident, the plaintiff was not paying any particular attention to where she was going, as this was the route she always takes.

9. The plaintiff also indicated that since her accident she has seen what she termed "thousands" of depressions like the one that caused her accident, but she acknowledged that she had not fallen into any of them.

10. The defendant's engineer examined the alleged locus of the accident some six months after the accident. Applying a spirit level across this depression he indicated that there was a drop of some 15 millimetre from its highest point to its lowest. His evidence was that there were three indentations in the centre of the depression, some 25 millimetres in diameter with a depth of 10 millimetres.

11. Some six months later the locus was examined by the engineer on behalf of the plaintiff who was of the view that the indentations were 15 to 20 millimetres deep. The defendant's engineer suggested that the difference in the readings could be due to the passage of time and further wear and tear of the area in the six months between the date of the inspections and there was some evidence from the photographs that the area had degraded somewhat, *albeit* that it was hard to discern as the photographs were taken of the locus in wet conditions on the first occasion and in dry conditions on the second occasion. In any case, as was evident from the photographs show to the Court, one is dealing with a crack or indentation in the tarmac of the order of 15 millimetres in depth.

Legal liability for the accident?

12. Against this background, the legal issue for this Court is whether, on the balance of probabilities, the plaintiff fell as she indicated

by catching her heel in the indentations in the car park which were identified by her. In light of the evidence to which reference has been made before the Court and the inconsistencies in the plaintiff's own recollection of even the size of the heel she was wearing on the day in question, this Court concludes that the plaintiff has failed to discharge the onus on her to prove on the balance of probabilities that the accident occurred at the locus she has indentified in the manner she has claimed.

13. This is not to suggest that the plaintiff is deliberately misleading the Court, but simply that before a Court can affix a third party, in this case the owner of the Londis shop, with the considerable damages which are being sought by the plaintiff, it is not sufficient for the Court to conclude that that the accident could or might have occurred as claimed, but rather the Court must be able to conclude that on the balance of probabilities her injury was caused by her heel catching at the exact spot indentified by her in the car park. Based on its consideration of the strength of the evidence, this Court concludes that the plaintiff has failed to convince this Court that, on the balance of probabilities, the accident occurred in the manner claimed by the plaintiff.

Legal obligation upon property owners to maintain premises in near perfection?
14. Although not determinative of this issue, it remains to be observed that even if this Court had concluded that on the balance of probabilities that the defendant had fallen in the way she described at the locus she indentified, there would remain the issue of whether the occupier of a car park is legally liable for the fact that his car park is not perfectly flat but rather that the tarmac contains unevenness and cracks or indentations of 15 millimetres or more in depth. What we are talking about here, as is evident from the photographs produced in evidence, are minor hollows with a diameter of about a 1 cent coin and of a depth of about the same size, which the plaintiff accepted she has come across regularly, *albeit* that she had not fallen on other tarmac surfaces.

15. If this Court were to find that the defendant was liable for the damages in this case, it would lead, in this Court's view, to the almost intolerable position that owners of car parks were required to ensure that the tarmac in all of their car parks was perfectly level or within millimetres of being perfectly level with a consequent increase in claims and possibly an increase in insurance costs as a result

16. This Court does not believe that when people walk around this country they can expect surfaces upon which they walk to be perfectly flat, or to put it another way that there is a duty of care on the owners of such surfaces to maintain the surfaces without minor indentations or cracks. Rather it is this Court's view that pedestrians cannot assume that tarmacadam in car parks or roads or other surfaces, particularly where they are exposed to the elements and heavy duty usage, will be perfectly flat.

17. While much of the jurisprudence in personal injury cases is taken up with the rights of victims of accidents as it should be, this Court is also acutely conscious that it has a duty to ensure that owners of property are not subjected unnecessarily to the very considerable cost of having to defend High Court actions which are based on claims that they are obliged to maintain their premises in a state of near perfection, particularly when there will be instances where unsuccessful plaintiffs will not have the resources to pay the considerable costs of the defendant having to defend such High Court actions.

18. When unfortunate accidents occur it is not always somebody else's fault and it is this Court's view that this was such a case. One can have sympathy with the plaintiff for the very severe pain and discomfort she has had to endure as a result of a fall. However, the role of this Court is not to award damages on the basis of sympathy. Rather it is this Court's role to determine whether a third party should be affixed with the considerable damages (and in this context one is dealing with a claim for a minimum of High Court damages of €60,000, in the context of an average industrial wage of circa. €37,000). It is this Court's view that such damages should not be visited upon the defendant in this instance.