

THE HIGH COURT
CIRCUIT COURT APPEAL

[2016 No. 635]

BETWEEN**NOREEN MEEHAN****PLAINTIFF****AND****TIPPERARY COUNTY COUNCIL****DEFENDANT****JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 17th day of May, 2019**

1. This is an appeal of a decision of Judge Alice Doyle of the Circuit Court made on 15th May, 2018. These are personal injury proceedings in which the Circuit Court granted the plaintiff an award of €36,350 plus costs, having decided liability in favour of the plaintiff.

2. The events giving rise to these proceedings are purported to have occurred on 6th August, 2015. The plaintiff claims that she was caused to trip and fall while walking on a public footpath beside the Cahir Road, Clonmel, Co. Tipperary by virtue of a raised lip in the said footpath.

Procedural history

3. The defendant was granted liberty to adduce further evidence at the hearing of the appeal herein conditional upon their paying the costs of the Circuit Court proceedings.

4. The plaintiff, Ms. Noreen Meehan ('the plaintiff') is a retired nurse born on 14th May, 1948 residing in Clonmel, Co. Tipperary, and is right-handed. The defendant is Tipperary County Council ('the County Council') and it is pleaded that at all material times the County Council had a responsibility for *inter alia*, the repair and maintenance of roads and streets in County Tipperary, including Cahir Road, the *locus* of the accident.

5. The nature of this appeal centres on the issue of whether the aforementioned lip in the footpath was caused due to damage by tree root growth or whether it was the result of subsidence due to poor foundations. The plaintiff argues that the road was built using inadequate foundation which led to subsidence; whereas the County Council denies this allegation and submits that the raised lip is caused by a *novus actus interveniens*, an intervening act causing an alteration in the level of the footpath due to the growth of the maple tree roots beneath it.

The nature of the accident

6. The plaintiff's evidence was that on the 6th August, 2015 she was taking a walk on a loop from her home through some nearby housing estates on the footpath beside the Cahir Road. As the plaintiff was approximately twenty yards from the entrance to the Fan Aoibhinn Estate, heading south towards the centre of the town of Clonmel, she was caused to trip due to a lip in the footpath between two slabs of concrete in the said footpath. The plaintiff submits that as she tripped, she fell forwards and put her right arm out to break her fall, landing heavily on her right side sustaining an injury to her right humerus. The plaintiff submits that after she fell, a passerby assisted her back to her home and she then went to hospital.

Subsidence and tree root growth

7. An excavation of the *locus in quo* took place on 3rd September, 2018 with attendance by Mr. Ned Flahavin, consultant engineer for the plaintiff, and Mr. Brian Twomey, consultant engineer for the County Council.

8. The plaintiff gave evidence to the court that the raised lip on the footpath measured 15 mm and in his view this amounted to a tripping hazard. Referring to a series of photographs which were produced to the court, Mr. Flahavin observed that this specific lip had evidence of subsidence and in a particular photograph which was shown to the court, he observed settlement on the left side of the lip due to an inadequate foundation which led to the subsidence. Mr. Flahavin discussed the joint inspection in September 2018, and observed that the lip measured 15 mm at that point, the same as it had done three years previously.

9. Mr. Flahavin found that in his expert opinion, there were a number of compelling reasons for his belief that the lip in the footpath was due to subsidence and not tree root growth. Making specific reference to the British Standards of 1991, Mr. Flahavin gave evidence that as the measurements of the lip in the footpath had not altered in three years, this indicated that the lip was caused by subsidence. The stagnation in the lip is a significant result, and conveyed the fact that the slab of concrete had settled and found equilibrium, which is another sign of subsidence. Mr. Flahavin also observed that there was only one isolated instance of joint slippage, and that this observation pointed to the lip being caused by subsidence.

10. In his evidence to the Court, Mr. Flahavin made reference to the British Standard Institute's guidelines "*Guide for Trees in Relation to Construction*" (1991). Table 2 of these guidelines finds that it is best practice for the minimum distance between an in situ concrete path and the centre of the trunk of a young tree or new plant should be 1 metre, and this distance will provide for the avoidance of virtually all direct damage to a structure by the future growth of the base of the tree trunk and roots. The facts of the present case are such that the maple trees were planted approximately 2 metres from the footpath. The evidence presented by Mr. Flahavin to the court was that the growth of the tree roots was not the cause of the lip. Mr. Flahavin gave evidence that it appeared to him that the roots of the trees grew downwards.

11. The defendant's engineer gave evidence to the court on behalf of the County Council. In his report dated 6th September, 2018 and his oral evidence, Mr. Twomey explained that he had measured the footpath of the *locus in quo* to be 1.8 metres wide, and inside the footpath a landscaped area approximately 4 metres wide. In that landscaped area, there are maple trees and those trees are typically offset approximately 2 metres from the edge of the footpath. Mr. Twomey found that the footpath was jointed every 6 metres and that the footpath consisted of 100 mm thick concrete. In excavation works, the roots of the particular maple tree by the *locus* were exposed. Mr. Twomey measured these roots and found the first to be offset from the joint by approximately 850 mm and

was 75 mm in diameter, located 100 mm below the underside of the footpath. The second root was offset 1.4 metres from the joint, was 75 mm in diameter and located 150 mm below the underside of the footpath. Mr. Twomey was of the opinion that:

"It is clear that the footpath was properly supported and that there was no gap or void beneath the footpath in the area where the lip has occurred. From the excavation it is quite clear that the footpath has lifted due to the roots of the maple tree".

12. In his summary, Mr. Twomey found that excavation of the area demonstrated that the lip in the footpath was caused by root growth of maple trees which had developed in the 30 years subsequent to the installation of the footpath. He did not agree that the cause of the lip was subsidence. In his cross-examination, Mr. Twomey acknowledged the British Standard guidelines, but expressed his opinion that in the instant case the roots of the maple tree had grown with such strength as to affect the footpath of the *locus in quo* and cause the lip.

13. Mr. Jim Kinsella, a forestry consultant, was called as an expert witness by the plaintiff. The Court found his evidence to be particularly persuasive. Mr. Kinsella has over 50 years' experience in forestry, and was familiar with the specific tree in question, which he identified in court as a Norwegian Maple. In his evidence referring to photographs, Mr. Kinsella identified the loose soil at the *locus* and instances where the roots grew downwards, not laterally. In those circumstances Mr. Kinsella said he would expect the roots of the tree to grow into the space available and that he would not expect the growth of these tree roots to alter the level of the footpath.

In his conclusion, his opinion was that while these trees are a danger to the public and should be removed he could safely say that the roots have no effect whatsoever in causing this lip of 15 mm in height across the full width of the footpath. In conclusion, he agrees with Mr. Flahavan that the lip was caused by subsidence of the section at the time of construction due to poor foundation.

14. The County Council also called a forestry expert, a Mr. Patrick Ryan, who was firmly of the opinion that as the tree had grown throughout the previous 30 years, so too had the roots grown in proportion.

15. Mr. Ryan in his evidence outlined that the choice to plant maple trees was typical at the time of planting. There were no root barriers used or available at that time to contain or restrict roots and rootballed trees were not widely available or used in Ireland until the late 1980s.

Findings of fact

16. The central dispute in this case was as between the expert witnesses on each side as to whether the raised lip on the footpath in question was due to three root growth upwards or due to subsidence from poor construction of the footpath.

17. The court finds that there are a number of compelling reasons which lead to the conclusion that the lip in the footpath was due to subsidence and not to tree root.

18. Reference was made to the British standards of 1991 by Mr. Flahavin who indicated that these standards are used daily by engineers in terms of best practice because they are very comprehensive and detailed and he said that the measurements of the lip in the footpath had not altered in three years and in his opinion this meant that it was subsidence was causing the lip to be raised. The stagnation in the lip in his opinion is a significant result and conveyed the fact that the slab of concrete had settled and found equilibrium which is another sign of subsidence. He also observed that there was one isolated incidence of joint slippage and that this observation pointed to the lip again being caused by subsidence.

19. The court accepts the evidence of Mr. Flahavin in full and his reference to the British Standard Institute Guidelines "guide for trees in relation to construction" (1991) table 2 of these guidelines finds that it is best practice for the minimum distance between an in situ concrete path at the centre of the trunk of young tree or a young plant should be one metre. I find as a fact that he is correct in this and especially when he says that this distance will provide for the avoidance of virtually all direct damage to a structure by the future growth of the base of the tree trunk and roots.

20. I find as a fact and accept his evidence that the maple trees planted here were approximately two metres from this footpath. His evidence was that the roots of these trees grew downwards. This Court noted from the photographs shown, clear evidence of the downward growth of the roots and he agreed with Flahavin's evidence that the lip was caused by subsidence of the section at the time of construction due to poor foundation.

21. This accident was reasonably foreseeable. On the balance of probabilities and applying common sense to the matters at issue in the case, this Court finds that the evidence of the plaintiff is both credible and cogent. This Court was particularly impressed with the evidence of Mr. Kinsella, the forestry consultant for the plaintiff, and his evidence is accepted in full. This technical evidence was particularly compelling as the witness demonstrated to the Court, through the use of photographs, that it could clearly be shown that the tree roots were growing downwards and not pressing on the actual footpath, and that therefore as a matter of probability, the lip in the footpath could not have been caused by the growth of the maple tree roots.

22. The Court accepts therefore that on the balance of probabilities, that the raised lip in the footpath was caused by one slab of concrete in the footpath dropping down due to subsidence, so that the two slabs of concrete in the footpath were at slightly different levels.

23. The Court therefore finds as a matter of probability that the plaintiff has proven her case, that the plaintiff was caused to trip on the lip on the footpath as a result of the negligence, breach of duty (including statutory duty) and nuisance of the Country Council, its servants and agents; and has reached that threshold for proving her case and that the risk was a reasonably foreseeable one.

24. The plaintiff claims that the County Council caused the existence of a trap in the footpath at the *locus in quo* as they caused or permitted a lip to develop between two slabs of concrete and exposed the plaintiff to serious risk of injury. This lip was caused by a failure on the part of the County Council to properly construct a proper foundation below the footpath which caused subsidence to occur which led to the development of a significant lip (15 mm) between the slabs of concrete. The County Council failed to carry out adequate inspection, warn the plaintiff of the risk, or cordon off the area at risk. The County Council were therefore in breach of s. 13 of the Roads Act 1995.

25. But for the County Council's failure to properly construct the foundation of the footpath, the plaintiff would not have tripped on the lip on the footpath which, on the balance of probabilities, was caused by subsidence. The County Council failed to prove on the

balance of probabilities that the cause of the lip on the footpath resulted from a novus actus interveniens, i.e. from upward growth of the tree roots. Therefore, both factual and legal causation are satisfied.

The Law

26. Geoghegan J. explored the issue of imposing liability on public authorities for poorly constructed footpaths in *Kennevan v Limerick Corporation* (Unreported, High Court, 1993), wherein a pedestrian tripped on a very large indentation in the footpath close to a lamppost. Geoghegan J. imposed liability on the corporation for the manner in which the tarmacadam had been laid.

Medical complaints of the plaintiff

27. The plaintiff attended South Tipperary General Hospital where she was diagnosed with a fracture to her right shoulder, given a shoulder brace and was referred to the care of Mr. O'Beirne, Orthopaedic Surgeon in Waterford Regional Hospital. Mr. O'Beirne in his medical report dated 16th December, 2016 found that the plaintiff suffered a three-part fracture of the proximal humerus with minimal displacement. In his review of the plaintiff, Mr. O'Beirne found her fracture alignment to be satisfactory and continued with non-operative treatment. The plaintiff also suffered bruising to her right forearm and soft tissue injuries to the right forearm and right hip region, which she later described as a "burning pain". The fracture to the plaintiff's arm required immobilisation of seven weeks, during which time the plaintiff resided with her daughter who cared for her. Subsequent to the removal of the right shoulder support, the plaintiff underwent physiotherapy and began pendular exercises. On his examination on the plaintiff on the 14th October 2015, Mr. O'Beirne confirmed the fracture's healing was advanced and the plaintiff was making reasonable progress. The main issue, according to Mr. O'Beirne, was that of shoulder function, and the possibility of a limitation in the range of motion.

28. The medical report dated 18th January, 2016 adduced by the plaintiff's G.P., Dr Colman Walsh, revealed that the plaintiff was prescribed painkillers for the duration of her injury and that the graze on her right forearm required dressings to be changed over a period of approximately three weeks. On examination in January 2016, Dr Walsh found that the plaintiff had a normal range of shoulder elevation, and a reduced range of right shoulder internal rotation. The bruising on the plaintiff's arm had resolved without scarring, but there was some localised tenderness over the right trochanteric region. Dr Walsh was of the opinion that the plaintiff might have some ongoing discomfort with her right shoulder, but that soft tissue injuries to her right forearm and right hip region should resolve without further sequelae.

29. The County Council produced a medical report dated 25th April, 2017 by Dr Gerry O'Sullivan who noted that the plaintiff stated that she was unable to lie on her right shoulder at night and that she gets aches in her right hip when walking. The plaintiff has occasional difficulty with some housework, such as lifting coal and gardening. In his physical examination of the plaintiff, Dr O'Sullivan was of the opinion that:

"There was full range of movement of [the plaintiff's] right shoulder. There was full range of movement of [the plaintiff's] right hip. No pain was elicited on movement of [the plaintiff's] shoulder or right hip".

30. Dr O'Sullivan was optimistic for the plaintiff's prognosis, finding that:

"the fracture is well healed and currently [the plaintiff] has an excellent range of movement with no pain on movement. I feel [the plaintiff] has made an excellent recovery and [the plaintiff] is well-motivated and does regular exercises and yoga, it took approximately one year for this fracture to heal. [The plaintiff] still has an ache sometimes at night and apart from that [the plaintiff] had made a full recovery".

Amount of Award to be Granted

31. The parties presented submissions in relation to the amount of the award that ought to be granted by this Court to the plaintiff, and whether the award granted by the Circuit Court ought to be altered. The judgment of Irvine J., in *Shannon v O'Sullivan* [2016] IECA 93, at para. 43 is particularly instructive when considering quantum and the amount of an award to grant to a plaintiff. Irvine J. held that:

"43. Most judges, when it comes to assessing the severity of any given injury and the appropriate sum to be awarded in respect of pain and suffering to date, will be guided by the answers to questions such as the following:-

- (i) Was the incident which caused the injury traumatic, and if so, how much distress did it cause?
- (ii) Did the plaintiff require hospitalisation, and if so, for how long?
- (iii) What did the plaintiff suffer in terms of pain and discomfort or lack of dignity during that period?
- (iv) What type and number of surgical interventions or other treatments did they require during the period of hospitalisation?
- (v) Did the plaintiff need to attend a rehabilitation facility at any stage, and if so, for how long?
- (vi) While recovering in their home, was the plaintiff capable of independent living? Were they, for example, able to dress, toilet themselves and otherwise cater to all of their personal needs or were they dependent in all or some respects, and if so, for how long?
- (vii) If the plaintiff was dependent, why was this so? Were they, for example, wheelchair-bound, on crutches or did they have their arm in a sling? In respect of what activities were they so dependent?
- (viii) What limitations had been imposed on their activities such as leisure or sporting pursuits?
- (ix) For how long was the plaintiff out of work?
- (x) To what extent was their relationship with their family interfered with?
- (xi) Finally, what was the nature and extent of any treatment, therapy or medication required?"

32. In the instant case, the plaintiff suffered relatively serious injuries although it ought to be noted that she is recovering well. The

plaintiff was diagnosed with an undisplaced fracture of her right humerus, a "burning pain" in her right hip, and soft tissue damage to her right hand side. The plaintiff also spent a period of time in a shoulder brace, required a prescription of analgesics for pain relief, and spent a period of seven weeks convalescing in her daughter's home for which she paid her daughter €1050.

33. The plaintiff was required to attend hospital for treatment for her initial injury, and on six occasions thereafter. The plaintiff was incapable of independent living, and has found it difficult to maintain leisure activities, and was in severe pain for a prolonged period of time.

34. While the worst of the injury has largely resolved, the plaintiff continues to have residual discomfort affecting the amenities in her life, such as gardening and lying on her right hand side.

35. This Court has considered the level of award made in the Circuit Court in the light of prevailing rates for the injuries concerned, proportionate to the general scale of injuries, taking into account the medical evidence and all the evidence heard, especially the plaintiff's own evidence.

Conclusion

36. The Court is satisfied that on the balance of probabilities the tripping hazard was reasonably foreseeable, and was caused by subsidence due to a failure on the part on the County Council to properly construct that portion of the footpath at the *locus*. Accordingly, the Court upholds the decision of Judge Alice Doyle of the Circuit Court made on 15th May, 2018 and therefore affirms the Circuit Court Order of Doyle J. on the liability issue.

37. Not only did this plaintiff suffer a traumatic injury to her humerus as described, but she also suffered pain in her right hip and soft tissue damage to the right hand. More particularly, she suffered a loss of dignity during a seven-week period during which her daily life had to be put on hold, she had to live with her daughter to have full care. This distressed her greatly and she was not able to dress or toilet herself during that time. She was not capable of independent living for that period.

38. The plaintiff was unable to drive her car or lift and hold her infant granddaughter. The plaintiff was treated for this three-part fracture to the humerus in two hospitals as an out-patient. She was treated non-operatively with a brace and physiotherapy and medication. The plaintiff, although largely recovered, still has difficulty lying on her right side in bed.

39. The plaintiff suffered a considerable loss of the amenities of life for a sufficiently significant period of time. The appropriate award for pain and suffering to date, having regard to the totality of the case and the Book of Quantum is €55,000 in general damages as well as special damages in the sum of €1,350, encompassing €1,050 for care and €300 for trips to the fracture clinic.