Neutral Citation Number: [2012] IEHC 502

THE HIGH COURT

[2003 No. 3273 P]

BETWEEN

OLIVE LOUGHREY

PLAINTIFF

AND

DUN LAOGHAIRE COUNTY COUNCIL

DEFENDANTS

JUDGMENT of Mr. Justice Kevin Cross delivered on the 23rd day of November, 2012

1. The plaintiff is a 62 year old, single lady who resides with her mother, daughter and granddaughter in Shankill, County Dublin. She was, at all material times, working as a seamstress with dressmaking firm in Dun Laoghaire.

2. On the morning of 9th July, 2002, the plaintiff, as was her norm, exited from the DART at Dun Laoghaire Station and crossed the road with the intention of walking up the hill to spend a short time in the Church before commencing her work at approximately 9.30am.

3. On this occasion, the plaintiff crossed the road at a slightly different place from usual. When she left the road, entered the footpath and was walking along by the Town Hall near the comer of Marine Road and Crofton Road, she tripped at a point on the footpath just in from the pedestrian crossing from the DART station close to the wall of the Town Hall.

4. The plaintiff was helped to her feet, was embarrassed, looked back to where she had fallen and what has caused her to fall, but declined further assistance and made her way to the Church and then to work.

5. While at work, both of her wrists became significantly more painful over a number of hours and she was brought to St. Michael's Hospital where X-rays revealed a fracture to both wrists.

6. She went on to develop pain in her shoulder, especially in her left shoulder, with some back pain and headaches.

7. The plaintiff was unable to return to work since the accident in July 2005.

8. The defendants contested liability on the basis of what they contended was a matter of principle on the extent of their liability as highway authority to pedestrians.

The Nature of the Pavement

9. The plaintiffs consulting engineer who had surveyed the locus was Mr. Collier. He presented a series of photographs. I was also furnished with a series of photographs taken of the locus by the plaintiffs brother in the immediate aftermath of the fall and also a further set of photographs showing the present layout of the pavement which has been substantially altered.

10. Mr. Collier identified the point which the plaintiff identified to him. The plaintiff subsequently identified this point to the Court. Mr. Collier identified the difference in the levels of the slabs at the point where she tripped at being between 5mm and 6mm. Mr. Collier gave evidence that if slabs were properly laid, they ought not to sink at a differential level, and accordingly, he concluded that the slabs were improperly laid. He made reference to the fact that the slab in question was in the immediate vicinity of a slope towards the road crossing, and pointed out that the slabs generally in that area were badly laid with a number of differentials in height.

11. Evidence was also given on behalf of the plaintiff by Mr. Sample, consulting engineer, who also stated that the cause of the slab subsiding was defective workmanship and he and Mr. Collier both said that the lip, though small, was a tripping hazard and was dangerous.

12. The defendants' engineers, Mr. Maguire and Mr. Joseph O'Sullivan, contended that the "laying standard" for tiles allowed a differential of 3mm (to take into account "owing" of tiles), and by reference to a number of English standards, Mr. Maguire contended that a 6mm differential did not constitute a tripping hazard.

13. Mr. Maguire made reference to various British standards whereby local authorities were not expected to intervene and repair differentials of less than 13mm.

14. Similar evidence was given on behalf of the defendant by Mr. Joseph O'Sullivan who gave evidence from observing pavements in a number of foreign countries and indicated that he had never seen a standard whereby a lip could be no greater than 6 inches.

Liability

15. The local authority in this case is acting as the highway authority and the duties of the defendants as highway authority are similar in relation to pavements as on roadways.

16. The law in Ireland is that whereas a highway authority may be liable for misfeasance i.e. acts of a positively negligent character regarding the maintenance or repair of the highway, they will not be liable for nonfeasance, that is, the failure to maintain the highway, however negligent that failure may have been. In *Kelly v. Mayo County Council* [1964] I.R. 315, Lavery J. at p. 318 to 319, stated:

> "As such authority they are liable in damages for injuries suffered by a road user if they have been negligent in doing repairs or in interfering with the road. They are not liable for injuries suffered or caused by the want of repair of a road.

> This is the familiar distinction-they are liable for mis-feasance but not for non-feasance."

17. The legislature, by virtue of s. 60 of the Civil Liability Act 1961, provided that a road authority will be liable for damages caused by reason of their failure to maintain adequately a public road in certain circumstances. It is trite law, however, that this section was specified as not to come into operation until a day fixed by order of the Government and no such order has yet been made. The Supreme Court in *The State (Sheehan) v. Government of Ireland* [1987] I.R. 550, held by a majority that s.60 was an enabling provision only, vesting a complete discretion in the Government.

18. Since the enactment of the Civil Liability Act, generations of skilful civil engineers have struggled manfully to give practical effect to the intentions of the legislature in relation to s. 60; however, the law still remains in its ancient purity in this jurisdiction.

19. The first question, therefore, to be addressed is whether or not the local authority was guilty of misfeasance.

20. Mr. Semple and Mr. Collier both said that the only explanation for the differential in this slab was defective workmanship. Mr. Maguire and Mr. O'Sullivan both stated, and the Court accepts, that differentials in levels can occur due to many different reasons. The Court accepts the eight possible causes of general deterioration in footpaths as stated by Mr. Maguire quoting from *'Footway Maintenance Management'*, a paper prepared for the Pavement Engineering Group of the Highways Agency by Bird, Scott, Zohrai and Cooper, and set out at Table 1 thereof.

21. These causes are identified by them as being: "(a) weathering/ageing; (b) utility openings; (c) abuse; (d) poor specification and design; (e) faulty construction; (f) damage by vegetation; (g) fair wear and tear, and (h) user perceived failure".

22. Mr. Maguire accepted that the issues of "damage by vegetation", "fair wear and tear" and "user perceived failure" do not arise. Similarly, he accepts that the deterioration was not caused by "utility openings" and that there is no evidence that abuse by vehicle overrun leading to foundations and structural failure is a causative factor here.

23. Though there is evidence in the plaintiff's brother's photographs of tyre marks on the portion of the pavement nearer to the kerb, the slab in question is close to the wall of the Town Hall and Mr. Maguire agreed that there is no evidence that any vehicle abuse was the cause of this slab's subsidence.

24. Accordingly, the Court is left with considering the cause of the deterioration as being either weathering/ageing or poor specification and design or faulty construction. On the face of it, any of those three possible causes are reasons for the subsidence which occurred. If, as a matter of probability, the Court finds that the cause of the deterioration in this slab was either poor specification and design or faulty construction, then the Court will be obliged to conclude that the differential was caused by the fault of the local authority and misfeasance rather than non-feasance.

25. It was conceded by both Mr. O'Sullivan and Mr. Maguire that there was no evidence of major weather damage, in the sense of a pothole, on this pavement. However, Mr. O'Sullivan argued forcibly that water can enter under a tile causing subsidence in any well constructed pavement.

26. Table 1 stated under the heading relating to weather damage: "Ageing Leads to Hardening and Embrittlement of Bitumen. Freeze/thaw cycles cause surface deterioration. Clay shrinkage or swelling causes ground movement. Water ingress through cracked surfaces leads to weakening of foundations".

27. The Court has to consider whether, as a matter of probability, the plaintiff has established that the differential in this case was caused by one or other of the remaining two possible headings i.e. poor specification design or faulty construction.

28. In this regard, the Court is helped by the location of the particular slab. The slab is beside a sloped area going towards the kerb opposite the crossing. From Mr. Collier's photographs (and Mr. Collier was the only engineer to see the locus in its pre-repaired state), it is clear that the pavement generally in the area up from the kerb is in bad repair. It was common case that a sloped area towards a kerb does present more serious engineering and building problems than a flat surface. It was common case that extra care must be taken in the construction of these areas. The court notes the poor quality of the workmanship, generally, as shown in Photograph 1, in the sloped area, in the foreground of that photograph, and notes that the slab in question is just adjacent to this area. Accordingly, the Court concludes that as a matter of probability, the differential in height between the two slabs was caused by reason of either faulty construction or poor specification and design or a combination of the two, and accordingly, represents an act of misfeasance on the part of the local authority.

Was the Differential Dangerous?

29. It is frequently said that a local authority is liable in cases of misfeasance. That is, of course, correct. It is the view of the court, however, that they are only liable for misfeasance if as a result of their negligent acts they created a danger to the plaintiff.

30. Counsel on behalf of the defendants, as a matter of principle, submitted and was supported by his engineers, that to hold that the differential lip in question was a hazard, would be to place an unfair burden upon the highway authority. English engineering and legal authorities were opened to me.

31. English engineering standards as to the level of differential between slabs which made it reasonable for a local authority to intervene are set given the abolition of the misfeasance/nonfeasance rule in that jurisdiction for the benefit of local authorities. It would clearly be unreasonable to expect an English local authority to examine every piece of pavement for relatively small differentials in height which could only be seen by close inspection. The issue in this jurisdiction is entirely different. It is whether given a finding of negligence, a particular height differential is as a matter of fact a danger to a pedestrian. I do not find the English engineering authorities of much assistance to me.

32. In addition to the English Engineering Standards referred to above which deals with when a local authority should intervene, it was submitted that the court should follow the English law as to what was or was not a danger on the highway or pavement. The Court was referred to a number of English and Northern Irish authorities. In *Mills v. Barnsley Metropolitan Borough Council* [1992] PIQR, p. 291, Dillon L.J. famously stated of highway authorities:-

> "The liability is not to ensure a bowling green which is entirely free from all irregularities or changes in level at all. The question is whether a reasonable person would regard it as presenting a real source of danger."

In *Meggs v. Liverpool Corporation* [1968] 1 WLR, Lord Denning M.R. stated:

> "That the plaintiff tripped because the flagstones were uneven. They had sunk in different places: so much so that one of them had sunk about three quarters of an inch. She tripped and fell and hurt herself.
>
> In the old days, there would have been a simple answer to this claim. A highway authority was not liable for the bad state of a highway if it was due to non-feasance, that is, not doing any repairs. A highway authority was only liable for misfeasance, that is, doing things badly. That distinction was criticised for years: and in 1961, it was abolished by section 1 of the Highways Act 1961.
>
> What is the effect of the abolition? It means that the highway authority are under a duty to maintain the highway and keep it in repair. If it is an dangerous condition so that it is not reasonably safe for people going along it, then prima facie there is a breach in the obligation to maintain and keep it in repair ... but the highway authority can escape liability if they prove that they took all reasonable care that it was safe, having regard to the various matters set out in the Statute ....at the outset, however, in order to make a prima facie case, the plaintiff must show that the highway is not reasonably safe, i.e. that it was dangerous to traffic."

33. Lord Denning then indicated that in the trial court, the judge found that the particular pavement was not a danger and indicated that the plaintiff asks the Court of Appeal to review that finding of fact and to say that this pavement was dangerous and not reasonably safe, but Lord Denning said, using the ordinary knowledge of pavements, "everyone must take into account the fact that there may be unevenness here and there. There may be a ridge of half an inch or three-quarters of an inch occasionally, but that is not the sort of thing which makes it dangerous or not reasonably safe".

34. Similarly, I was referred by counsel for the defendants to the case of *Littler v. Liverpool Corporation* [1968] 2 AER, p.343, and *James v. Presli Pembrokeshire District Cou*ncil (The Independent, 16th November, 1992), and *McArdle v. Department of Regional Development* (Northern Ireland) [2005] Q.B. 13.

35. It was submitted that in the instant case, far from half and inch or three quarters of an inch, if you accept allowable differential of 3mm, the difference in this case was an extra possibly one-tenth of an inch.

36. The Court has read the authorities submitted to it and, while finding them of assistance, does note that the authorities are, naturally, concerned with the wording of the 1961 Highways Act (later replaced by the 1980 Act).

37. The distinction between misfeasance and nonfeasance has been abolished. The English legislation provides that it s a defence for the highway authority to prove that it had taken reasonable care to ensure that the highway was not dangerous. In *Mills v. Barnsley*, Steyn L.J. stated that in order for a plaintiff to succeed in claim against the highway authority for failure to maintain or repair the highway, the plaintiff must prove:-

> "(a) the highway was in such a condition that it was dangerous to traffic or pedestrians in the sense that in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public;
>
> (b) the dangerous conditions created by the failure to maintain or repair the highway; and
>
> (c) the injury or damage resulting from such a failure."

It is stated that it is only if the plaintiff proves the above facts that it is necessary to turn to the highway authority's reliance on the special defences of reasonable care that the highway authorities have taken.

38. In England, if a local authority has not by their actions caused a problem on the pavement, then of course, one would not expect them to inspect every pavement under their jurisdiction and clearly the visual inspection would not be sufficient to uncover a relatively small difference.

39. That is not the case here. To succeed, a plaintiff must show misfeasance which is a far higher standard. In this case, I have held that the plaintiff has established as a matter of probability that the difference in height was caused by reason of the misfeasance or the active fault of the highway authority.

40. In *Mills* above, Steyn L.J. stated, "I do not consider that it would be right to say that a depression of less than one inch will never be dangerous but one above it will always be dangerous. Such mechanical jurisprudence is not to be encouraged. All that one can say is that the test of dangerousness is one of reasonable foresight of harm to users on the highway and that each case will turn on its own facts".

41. It was urged upon me by Mr. O'Sullivan, Engineer, that on every pavement in the land there are differentials of far more than the differential in this case caused by, for example, manholes, or in more recent times, of special pavements to alert the pedestrians who are visually challenged that they are approaching a junction.

42. I do not find that differentials in height caused by manholes or by the "bubbled" pavement which exists to warn those who are visually challenged, is of any relevance. The pedestrian will be able to subconsciously see manholes and take account of them. Similarly, the bubble pavements are of a different colour to the paving slabs around them and are clearly visible wherever they may be.

43. In England before there is negligence, the injured party must prove, *inter alia*, that the highway was in such a condition that it was dangerous to traffic etc. In this jurisdiction, to succeed, the plaintiff must first prove that there was misfeasance on the part of the local authority. This plaintiff has achieved that exacting standard and accordingly, the issue of whether or not the lip represented a tripping hazard is entirely different from the issue that the English Courts had to decide which was whether the differential was dangerous before negligence could be found against the highway authority.

44. The courts in England because of their abolition of the distinction between nonfeasance and misfeasance, adopted as a matter of public policy that before any differential not caused by action of the local authority, could be considered to be negligent, a relatively large differential between slabs must be found. Without deciding whether public policy ought to have any role to play in these matters, clearly the same considerations that apply in England do not apply in this jurisdiction.

45. Accordingly, I do not see the English and Northern Irish authorities cited to me as being of great assistance to me other than to remind the Court that one must be reasonable.

46. There is no suggestion in this case that the plaintiff was in any way to blame for her own fall. The plaintiff has, of course, a duty to keep a reasonable look out but all the evidence is that the differential between the slabs was small and I do not believe it would have been apparent to a pedestrian such as the plaintiff that there was any danger caused by the differential. Apparently, the accident was witnessed by some employees of the defendants and it was suggested to the plaintiff that the accident may have happened in a different manner than her evidence suggests. However, these local authority witnesses were not called and the Court accepts fully that the accident happened without any fault on the part of the plaintiff. The accident also happened on a pavement which had subsided to a degree by reason of the actions of the defendants.

47. The Court does not accept that the pavement would have been laid originally at a differential of 3mm. The slabs would have been laid straight and even and there is nothing to suggest that in any way they were curved or that there was an original3mm difference. The 3mm difference is what is allowed by the local authority. This differential is allowed to account for the fact that all slabs are not constructed straight and even. There is no evidence that these slabs were not straight and even. The differential has been caused by the subsidence of one slab, vis-a-vis, its neighbour. The issue the Court has to decide is whether the misfeasance of the local authority has resulted in a danger to the highway.

48. This issue is one of fact untainted by any considerations of public policy. The very fact that the plaintiff herself doing nothing wrong fell on this negligently constructed footpath is of itself suggested that it was dangerous. Also, in this regard, the court is greatly assisted by the contemporaneous photographs taken both by the plaintiffs brother and by Mr. Collier and notes the general condition of the pavement in the locality where the plaintiff had her fall, adjacent to the sloped area and concludes that in the circumstances, as evidenced by the accident itself there was a hazardous differential. The fact that the plaintiff was not adduced to any evidence of other persons falling therein is of no relevance.

49. In view of the Court, the plaintiff has established that the differential of between 5mm and 6mm was a tripping hazard to the plaintiff and is the sort of hidden danger or trap which, in the opinion of the Court, results in the plaintiff being entitled to succeed without any contributory negligence against the defendants.

Quantum
50. The plaintiffs case is that she fell on her outstretched hands that she was shocked, she worked for a time but her pain became severe and she attended the Accident and Emergency Department of St. Michael's Hospital where she was x rayed which showed an un-displaced radial styloid fracture and a chip fracture on the right wrist. Her left forearm was placed in a cast and her right wrist treated with a Futro Brace. The court has had sight of a photograph showing the plaintiff in this condition.

51. The right brace was removed and mobilisation commenced in the usual way. The left cast was removed some weeks later and she continued to suffer from ongoing pain and went on a course of physiotherapy. After the physiotherapy she attended her GP with stiffness in her wrist.

52. Mr. Séan Dudeney is of opinion that the plaintiff sustained what was considered a comparatively minor boney injury but unfortunately went on to develop significant symptoms of reflex sympathetic dystrophy resulting in stiffness of her hand and wrist and significant symptoms in her left shoulder. She also had some symptoms in her right shoulder but generally speaking her right side is not the source of complaint.

53. The plaintiff, however, remains considerably disabled due to poor hand function and also to some extent by shoulder limitation.

54. Mr. Dudeney is of the opinion that her clinical picture is consistent with effective "plateau" in symptoms which represents "the long term results following in the injury". The most significant functional loss she has related to her poor hand function which remains a problem for her.

55. The court was furnished with a number of reports from Mr. Dudeney and also from the plaintiffs GP, Dr. Marguerite Doyle.

56. The court also had the benefit of reports from the defendant's surgeon Mr. Darragh E. Hynes and also the radiological report from Dr. Samuel Hamilton. While the defendant's experts raise some questions as to the extent of her symptoms, the court accepts the picture as given by both the plaintiff and her doctors and notes that Mr. Hynes does thinks, as a matter of probability, the plaintiff has ongoing symptoms attributable to the injury. I accept that the plaintiff in no way exaggerated her symptoms.

57. Dr. Hamilton has raised questions as to whether the plaintiff suffered any fractures, however, I believe that the plaintiff had a fracture in her left wrist. The fracture in her right wrist was minor but whether the plaintiff had a fracture in the right wrist or merely soft tissue is a matter of little significance. I believe that the plaintiff is substantially debilitated as a result of this accident.

58. In relation to general damages, noting various figures for wrist and shoulder injuries in the Personal Injuries Assessment Board's Book of Quantum and, on this occasion finding it of some help, and using these as a guide, I will assess general damages to date in the sum of €75,000 and general damages for pain suffering into the future in the sum of €50,000.

Loss of Earnings
59. The plaintiff impressed the court as a honest, decent lady who at the time of the accident had returned to work under a get back to work scheme and was working part-time. The scheme was to run its course at the end of 2002 and the court accepts the evidence from the plaintiff and indeed from her then employer, Ms. DePoare that she would have been taken on full-time earning at the time, €19,000 per annum. The actuary's report seems to make it clear that this a gross sum. The equivalent of that sum on a net basis is €320 per week. It was estimated by the actuary that that sum would have arisen to €26,000 per annum gross (*i.e.* €420 per week net) by this date. The plaintiff is in a difficulty however in that her employer said that when the plaintiff was unable to get back to work, her services had to be replaced by another person and the plaintiff was let go. However, after the downturn in approximately 2008/2009, the new employee was also let go and Ms. DePaore is now working on her own.

60. The court accepts accordingly that the plaintiff would have taken up full-time work earning €19,000 per annum gross on a rising scale for a five year period.

61. €19,000 gross works out that €320 net per week with (€16,640 for the first year at €19,000 rising to an un-stated figure) and doing the best I can, I will affix the loss of earnings for a five year period at €85,000.

62. It is contended that on behalf of the defendant that the most the court should award would be the most for a five year period.

63. I do not accept that contention as I believe that the plaintiff would have attempted to work and would probably have found some

work even in a private capacity up to retirement at 66.

64. Taking into account the difficulties of the economy and periods the plaintiff would have spent without employment and the actuary's figures as a loose guide and will assess future loss of earnings from that five year period in the sum of €50,000.

65. There are no other special damages established.

Conclusion
66. I will add the sum of €85,000 and €50,000 in respect of past and future losses of earnings totalling a sum of €135,000 to the sum of €125,000, I have previously indicated for general damages total together with the sum of €260,000. It is a sum I consider fair and reasonable and will award the plaintiff.