Neutral Citation Number: [2007 IEHC 159]

THE HIGH COURT

Record Number; 2003 No. 13762P

BETWEEN

MICHAEL RYAN [MINOR] SUING BY HIS MOTHER AND NEXT FRIEND, BRIDGET RYAN

PLAINTIFF

AND

GOLDEN VALE CO-OPERATIVE MART LIMITED

DEFENDANT

Judgment of Mr Justice Michael Peart delivered on the 4th day of May 2007

1. On the evening of 30th December 2001, when this young plaintiff was ten years old, he was in the company of three of his friends of similar age. His evidence is that on this date at around dusk, which I take to mean in the late afternoon, as the four boys were making their way, by way of a short-cut, through the premises of the defendants in Rathkeale, Co. Limerick intending to get to the library which is located on the opposite side of the street to the defendant's premises, their intention was to exit onto that street by means of a large metal gate onto the road.

2. This gate is a metal farm-type gate made of tubular steel and consists of two halves which join at the centre. At the centre point there is a hasp and slide bolt mechanism, which the defendants say was always, and on this occasion was, secured by a padlock or a chain and padlock. When not locked together they can be opened both inwards and outwards.

3. The top of the gate in question is about 42" above ground level, and the combined width of both halves of the gate spans about 24 feet. Each leaf of the gate would be very heavy.

4. The plaintiff says that on this occasion the gate was unlocked. The defendants deny that this was the case. Nevertheless that is what the plaintiff says the situation was, and he recalls that as they approached this gate with the intention of exiting through it, the other three boys were walking ahead of him. He described how one of these boys swung the gate inwards in his direction in such a way that it struck him heavily on the front of his body, causing him to fall to the ground and sustain the injuries for which he seeks to be compensated.

5. The basis of the allegation of negligence made against the defendant is that the defendants ought to have known that this gate was an allurement for boys such as these and should have ensured that the gate was locked so that this type of incident could not happen.

6. By way of summary of the injury, it appears that in the aftermath of the injury the other boys or at least one of them helped the plaintiff walk back to his house which was not too far away. The evidence has been that when he arrived at the house he told his mother what had happened, and that he vomited and was seen to be weak and unwell. His mother who gave evidence stated that she and another woman who was in the house at the time decided that he should be brought to the Limerick Regional Hospital and a friend of the family who was present brought him by car where he was admitted to the Accident and Emergency Department at 6.15pm. He was admitted later and underwent an operation for the removal of his spleen which had been severely damaged. This removal has left the plaintiff vulnerable to infection in the future and to address this he is obliged to take antibiotics for the remainder of his life. Apart from the loss of his spleen, and his predisposition to infection and the scar which he is left with on his abdomen, there are no other sequelae reported.

7. As I have stated the defendants have given evidence through the yard manager, Mr Kett that he at all times had responsibility for ensuring that all the numerous gates into the defendants were at all times closed and locked, and he states that at the date of this accident the premises was closed up for the Christmas period and he is certain that on this occasion the gate in question was locked. There is a clear conflict of evidence in this regard, and the defendants plead that injury, however it was sustained by the plaintiff on this date, was not caused in the manner alleged.

8. At the outset of the case, Michael McMahon SC requested an adjournment of this case as it had not been possible to secure the attendance of the three boys who were with the plaintiff on this occasion. In view of the conflict of evidence in relation to whether the gate was locked or unlocked, he submitted that their attendance, or at least one or more of them, would reasonably be expected to assist the plaintiff, and he had not become aware that they would not be attending to give evidence until the morning of the hearing. It appears, according to what the Court was told, that they were working on the continent laying tarmacadam.

9. I refused this adjournment having considered the potential significance of the evidence any of these boys was likely to give. I came to the conclusion that in all probability each would agree with the account given by the plaintiff, and that I could proceed to hear the case on the basis of what the plaintiff might say happened. The fact that the three other boys or any one of them might say the same thing, and were not present to do so, did not in my view cause any real prejudice to the plaintiff.

10. In spite of the conflict in the evidence given by the plaintiff and by Mr Kett I am prepared to proceed to my conclusions on the basis of accepting as a matter of probability that the gate was capable of being opened on this occasion. That is not because I do not believe that Mr Kett is an honest witness. I believe he is and I accept that he honestly and genuinely believes that this gate was locked. But I have had regard to the notes made by the medical personnel who attended the plaintiff on his admission at the Limerick Regional Hospital. Those notes taken in the immediate aftermath of the accident record that the plaintiff stated that he received an injury from a gate. That account of how the injury was sustained has been consistent from the start. I confess to being very puzzled how this could be so given the integrity of Mr Kett as a witness, but I must decide the matter on the basis of likelihood and not mathematical certainty. I have some doubts about the matter but on balance I am prepared to accept the plaintiff's evidence.

11. But that does not conclude the issue of liability in my view. The plaintiff must establish that the defendants owed a duty of care to the plaintiff, that there was a breach of that duty towards him, and that as a result of that breach injury was suffered. The ultimate question will be did the duty of care owed to the plaintiff extend to ensuring that the gate was locked. The questions of the extent of the duty of care owed and of the foreseeability of injury to the plaintiff must be considered.

12. In his judgment in the Supreme Court in *Breslin v. Corcoran*, unreported, 23rd March 2003, Mr Justice Fennelly states as follows, having first considered the well-known English authorities in the area of foreseeability of damage arising from an intervening event in *Dorset Yacht Co. Ltd. V. Home Office* [1970] AC 104 and *Smith v. Littlewoods Organisation Ltd* [1987] AC 241:

> "From all these cases I draw the following conclusion. A person is not normally liable if he has committed an act of carelessness, where the damage has been directly caused by the intervening independent act of another person, for whom he is not otherwise vicariously liable. Such liability may exist, where the damage caused by that other person was the very kind of thing which he was bound to expect and guard against and the resulting damage was likely to happen, if he did not."

13. I should follow the same reasoning in the present case in relation to the foreseeability of injury to this plaintiff.

14. I am satisfied that the plaintiff is within the category of person to whom a duty of care was owed, albeit that he was on the defendant's premises without permission. He was a trespasser. In those circumstances, the defendants are under a duty to ensure that while on the premises he was not exposed to a danger which it could be reasonably foreseen might cause him an injury. If for example there was something on the defendant's premises which was inherently dangerous and it was reasonably foreseeable that a child might be allured to it, then if injury results to such a child the defendants could be held liable. In such circumstances it would be incumbent on the defendants to ensure that access to their premises or at least to the dangerous object upon it was not possible.

15. In the present case this injury to the plaintiff did not result from contact with an object which was a trap in the usual sense. It is not a case where, for example, a dangerous and unprotected slurry pit was present and into which the plaintiff fell. It is not a case in which the plaintiff climb up onto some inherently dangerous structure or piece of machinery, and which the defendants ought to have prevented by suitable protection of same.

16. In this case there was a gate which provides access into and out of the defendant's premises. In my view there is nothing intrinsically alluring about such a gate. There is no evidence that it was in any way defective and that such a defect caused injury to the plaintiff. It did not for example fall upon him causing him this injury. It was simply a gate. I cannot regard that gate as an allurement to the plaintiff in the sense that it obliged the defendant to ensure that it was fastened with a lock at all times. As I have said, I am assuming for the purpose of this case that it was unlocked, and I am giving the plaintiff the benefit of the doubt which I have about that fact.

17. To find that it was foreseeable that a child would be injured in circumstances where another child or children either opened this unlocked gate or found it open and then proceeded to swing it back in the direction of the plaintiff would be to cast an unfair and unreasonable burden of foreseeability on the defendants and would mean that it was a requirement that at all times all gates into premises throughout the country would have to be locked at all times to ensure that no child could open it, in order to ensure that nobody was injured by this sort of action by another child.

18. In my view it would be unfair and unreasonable for a duty of care to be extended so wide. It was not reasonably foreseeable by the defendants that this gate, even if left closed but unlocked or even left slightly ajar, was a trap or potential danger to someone such as the plaintiff, or an allurement as alleged. It was an inherently safe gate without defect, and was there to enable access and egress to and from the premises in the normal way.

19. The injury which the plaintiff sustained was serious and has left him with a permanent physical deficit. But the plaintiff must realise that simply because he receives an injury in this way does not mean that the defendants are to be blamed for it. In my view even if the gate was unlocked it did not present any inherent danger to the plaintiff which the defendant was under a duty to prevent. Things may have been different if, while on the premises having entered through an unlocked gate, he had been injured by something inherently dangerous and a trap for the plaintiff, but that is not the case here.

20. With regret I must dismiss the plaintiff's claim.