

THE HIGH COURT

[1998 No. 11850 P]

BETWEEN

MATTHEW HALL

PLAINTIFF

AND
SEAMUS MEEHAN

DEFENDANT

Judgment of Gilligan J. delivered on the 17 day of December, 2004.

1. The plaintiff in these proceedings was born on 8th day of May, 1986 and he resides at Dungloe in the County of Donegal. He is presently a student at University College Galway where he is studying Arts.

2. The defendant was at all material times to these proceedings the Manager of Schoil Roisin Dungloe Co. Donegal.

3. On 4th day of June, 1992 at a time when the plaintiff was six years of age and a pupil at the defendant's school he met with an accident as a result of which he suffered personal injuries in respect of which he now claims damages against the defendant.

4. The background circumstances are that in the late 1980s the play area in the immediate surround of Schoil Roisin which was a two teacher school was in need of repair and unfortunately the school authorities were not in a position to obtain any funds from the Department of Education as a result of which various parents came together and brought in sand and soil in order to make a playing area and surrounded this area with concrete breeze blocks which were laid on their side to separate the path area immediately outside the school from the playing field area. This was voluntary work on behalf of the parents and Mrs. Langan who was the school principal at the time of this accident has given evidence that the breeze blocks would have been in position for approximately 4 – 5 years prior to the accident the subject matter of these proceedings. She accepted in evidence that the Department of Education were probably not even aware that this voluntary work had been carried out by the children's parents in order to better the school facilities in the absence of any funds being available.

5. The circumstances of the accident on 4th day of June, 1992 are that the plaintiff was running and collided with another pupil in the immediate vicinity of the concrete breeze block kerb and as a result of the collision he fell backwards onto the kerb as a result of which he suffered an internal injury to his left kidney.

6. The plaintiff pleads his case in terms that he was caused to fall and fell backwards on to one of a row of sharp edged breeze blocks which were present in the playground as a consequence whereof he suffered severe injuries loss and damage.

7. There is no dispute as to the circumstances of the accident.

8. Mrs. Hall the plaintiff's mother gave evidence that the school has now been completely renovated but she took a number of photographs of the concrete breeze blocks on 27th day of January, 1997 and I am satisfied on the evidence that these photographs which are numbered P3 – P12 represent a reasonable portrayal as to the situation that would have pertained as of the date of the accident but making some allowance for additional wear and tear and bearing in mind Mrs. Langan's evidence that these blocks had been in position since the late 1980s probably some 4 – 5 years prior to the accident occurring. Mrs. Hall described the edge of the breeze block kerb as being sharp and she also states that she expected the school facilities to be safe for her child and she was not aware when she sent him to the school that the school grounds were in an unsafe condition. She accepts that she brought her son in and out to school and that she was aware that generally the school was not in the best of condition but she did not carry out any risk assessment.

9. Ann Kelly Consulting Engineer gave evidence on the plaintiff's behalf that the kerbing in position and as shown in Mrs. Hall's photographs of 27th day of January, 1997 was of a 'make shift' variety and consisted of rough concrete blocks with rough and sharp edges. She says the type of block used was one which would have been plastered over in the course of normal building works. She states that kerbing in its environment is a smooth finished product and she describes proprietary kerbing as being light rounded kerbing. She does not believe that the breeze blocks should have been used because of the foreseeability of falls and it was likely that any injury sustained would be a more severe injury because of the sharp nature of the blocks as opposed to an injury which would be sustained if a proprietary type of kerbing had been in place. She also states that proprietary kerbing was available in 1992. She accepts that the contact point as between the plaintiff and the edge of the concrete block is of some importance in relation to the injury sustained but in her view the edging should never be sharp especially in a school playground where falls are more likely. She takes the view that the kerbing in question was unusual. She describes the edging as shown in the photographs as being broken away in places. Ms. Kelly does not accept that under British standards it is permissible to have kerb stones in situ with sharp edges. She says that if this type of product was to be used then a pre-cast concrete could have been placed in situ which would have been a different material of a smoother surface and that normally a pre-cast kerb would have a bevelled edge.

10. Ms. Kelly takes the overall view that concrete blocks of the type used are not intended to be used as kerbing but are an easy and cheap alternative and in her view had proper round edged kerbing been used then any injury sustained was likely to have been of a relatively minor nature.

11. Ms. Kelly also took photographs of the defendant's premises on 4th day of March, 2004 which show a greatly improved layout with a completely different kerbing in position.

12. Dr. Denis Wood Consulting Engineer gave evidence on the defendant's behalf that he visited the school premises on 28th of April, 2004 and he had the benefit of a Polaroid photograph as taken of the general area where the accident occurred but this photograph in my view is not sufficiently distinct and quite clearly the photographs as taken by Mrs. Hall in January 1997 present a much fuller view as to the layout that pertained generally. Prior to appearing in court Dr. Wood has not seen Mrs. Hall's photographs. He takes the view that from an inspection of these photographs that the exposed edge of the concrete breeze blocks is weathered and rounded and he describes them as being laid flat. He refers to British Standard 7263 which specifies the requirements for the dimensions of concrete kerbing and he refers to series of diagrams attached to the British Standard and he is of the opinion which he accepts is a different opinion to that of Ms. Kelly that the edge of the concrete breeze kerbing is well rounded and in general terms complies with the British Standard but he accepts this standard came into being in 1994 and he is not aware as to the content of any regulation that may have been set out in any prior standard which may have applied in Great Britain in 1992.

13. Dr. Wood proffers the opinion that in his view the fundamental situation is that the plaintiff would have suffered the injury in any event as it was an internal injury and not a surface injury. He says in his view the blow had to go through the outer layers of the body and the injury would not be affected by a small change in the edging and in effect he says the plaintiff's left kidney organ impacted the kerb and he would have suffered the same injury if he fell in the same manner against the renovated kerbstone now in situ.

14. Dr. Wood accepts that a smooth surface would be ideal but he would not draw back from recommending the use of breeze blocks if they were insufficient funds available for a smooth round edged kerbing.

15. Dr. Wood in effect takes the overall view that the depth of penetration in respect of this particular injury was not influenced by a slight difference in the kerbing that was actually in position and some other form of kerbing that may have been chosen.

16. Dr. Wood describes the new kerbing from the photographs as being 2 – 3 inches in height where as the height of the concrete block on its side is a standard 4 inches. He concedes that if general improvements were being carried out he would recommend the replacement of the concrete blocks with alternative kerbing.

17. I note the description of the injury and accident as sustained by the plaintiff herein as given by Peter McLean Consultant Urologist in his report of the 23rd August, 1999 wherein he states:

"This 13 year old boy was involved in an accident while playing in the school yard. He fell and hit the sharp end of the kerb with his left loin area. This resulted in gross hematuria and hospital admission."

18. This accident occurred prior to the coming into effect of the Occupiers Liability Act, 1995. The plaintiff was an invitee on the defendant's school premises and the relevant law pertaining is that as set out in the leading case of *Indermaur v. Dames* LRICP 274 wherein Willes J. stated:

"And with respect to such a visitor at least we consider it settled law that he using reasonable care on his own part for his own safety is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know and where there is evidence of neglect the question whether such reasonable care has been taken by notice lighting guarding or otherwise and whether there was contributory negligence in the sufferer must be determined by a jury as a matter of fact."

19. In *Foley v. Musgrave* Cash & Carry unreported Supreme Court 20th December 1985 McCarthy J. took the view that the court should no longer be talking about "unusual dangers" in the type of case before the court and that the general negligence approach was to be preferred. Griffith J. while admitting that the plaintiff was an invitee took the view that the duty of the occupier was to take reasonable care in all the circumstances to see that the premises were reasonably safe for the invitee.

20. I prefer the evidence of Mrs. Hall and Ann Kelly to that of Dr. Wood in respect of the condition of the edge of the breeze block kerbing. Dr. Wood takes the view that the exposed edge is weathered and rounded. Indeed he goes as far as to state "well rounded".

21. Mrs. Hall describes the edge of the concrete block as being sharp and Ms. Kelly in her interpretation of the photograph as taken by Mrs. Hall describes the blocks as being rough with sharp edges and that in general terms the kerbing is of a makeshift variety.

22. Accordingly I take the view that the kerbing that was in place was of a makeshift variety consisting of rough concrete breeze blocks with a sharp edge and broken in places.

23. I take the view that kerbing with sharp rough edges was inappropriate for installation in a school premises where inter alia 6 year old boys would be running and as would be normal falling. Quite clearly in my view the sharp rough edge of the kerbing presented an unusual danger to school children particularly of a tender age on the defendant's school premises and further I am satisfied that this was a danger of which the defendant knew or ought reasonably to have known as it appears self evident from the photographs that if a child was to fall against the sharp rough edge of the kerb stone an injury was likely to follow and the significance of that injury would be determined by the velocity involved in the impact against the sharp edge.

24. Accordingly I find that the defendant as the occupier of the school premises was guilty of negligence and breach of duty in failing to take reasonable care to prevent damage from an unusual danger of which he knew or ought to have known.

25. Quite correctly no allegation of contributory negligence is made out against the plaintiff having regard to his tender years at the time of the accident.

26. The remaining issue is the proposition put forward by Dr. Wood that the plaintiff would as a matter of probability have suffered the internal injury he sustained whether or not he fell against the particular kerbing that was in situ or some other form of smooth well rounded kerbing that would have complied with any relevant applicable British standard at the time of the accident.

27. I take the view in this regard that from a very early stage in these proceedings it has been apparent that the plaintiff's claim relates to sustaining an internal organ injury as a result of falling backwards against the sharp edge of a concrete breeze block kerb stone. In the medical report of Mr. Peter McLean Consultant Urologist as previously referred to the injury is described as the plaintiff falling and hitting the sharp end of the kerb with his left loin and this resulting in gross haematuria and hospital admission.

28. Ms. Ann Kelly on the plaintiff's behalf takes the view that if proper round edged kerbing had been used then any injury sustained is likely to have been of a relatively minor nature.

29. The onus of proof in this regard rests with the plaintiff to satisfy the court that on the balance of probabilities the injury as sustained by him was as a result of his left loin area impacting the sharp edge of the concrete breeze kerb stone.

30. I take the view that I have to decide this particular case on its own facts and I accept that on the balance of probabilities the injury that was actually sustained by the plaintiff was caused by him falling and hitting the sharp end of the kerb with his left loin area which resulted in gross haematuria and subsequent hospital admission. I am not satisfied to accept the evidence of Dr. Wood that the same injury would have been suffered by the plaintiff if some form of well rounded kerbing that complied with any relevant British Standard had been in place instead of the kerbing that was actually in situ and I am further satisfied that there can be no comparison between the relatively minor nature of an injury that is described by Ms. Kelly that may have been sustained if a proper round edged kerbing had been used in comparison to the actual injury as sustained by this plaintiff coming into contact with the sharp edge of the

kerb. I am fortified in this view by the fact that on 8th day of June, 1992 the plaintiff still had a considerable amount of haemorrhage into his kidney and in the space surrounding the kidney and his blood count had dropped to 9.6.

31. Accordingly I am satisfied on the balance of probabilities that the injury as sustained by the plaintiff was caused by him coming into contact with the sharp edge of the concrete breeze kerb stone and I am not satisfied on the evidence to accept the proposition that the injury as suffered by the plaintiff would have been sustained in any event as a result of a similar impact with an alternative rounded kerb stone.

32. As regards quantum the accident and its aftermath was undoubtedly a traumatic experience for the plaintiff and by the time his mother came to collect him from school at 2 p.m. on the day of the accident he was in a very weak condition. He was brought straight away to Letterkenny General Hospital and at the time of his admission was passing heavily blood stained urine and was complaining of severe pain on the left side of his abdomen. Following various tests that were carried out it was clear that the plaintiff had suffered an injury to his left kidney. X-rays showed that the right kidney was entirely normal but on the left side the upper pole and mid group calyces were normal but the lower calyces showed splaying and stinging with extensive filling defect in the renal pelvis consistent with blood clot. Also the lower end of the left urethra was pushed medially indicating blood clot. As the plaintiff's condition remained stable it was decided that surgical intervention was not warranted and that his left kidney could be preserved.

33. The plaintiff was detained in hospital until the 15th June, 1992. A DSMA scan was carried out which showed differential function of 61% on the right side and 39% on the left side.

34. The plaintiff was reviewed in July 1992 at which time he appeared to be making a good clinical recovery and was again reviewed on 26th January, 1993 at which time he was totally asymptomatic.

35. The plaintiff returned to school in September 1992. I note the views of Mr. Ronald Thompson Consultant Surgeon as set out in his report on 7th March, 1999 wherein he took the view that the plaintiff suffered significant damage to his left kidney as a result of the trauma with scarring of the lower pole of the kidney but with a normal collecting system. In his view the DMSA scan indicated a 20% loss of function of the left kidney but as the plaintiff was asymptomatic no treatment was required and no serious long term ill effects are predicted. Specifically in his view there is no risk that the plaintiff will develop renal failure or secondary hypertension but he may be at increased risk of renal infection or further haematuria from minor trauma as a result of the underlying renal scarring.

36. Mr. Peter McLean Consultant Urologist in his report of 23rd day of August, 1999 confirms that he does not see hypertension as a long term factor. He takes the view that the plaintiff lost 11% of the functioning tissue of his left kidney.

37. In a more recent report of 29th April, 2004 Mr. McLean reviewed the plaintiff and confirms that from a urological standpoint he has remained asymptomatic. He found that the plaintiff's blood pressure was normal and he does not feel that the plaintiff will have any symptomatic change in regard to his urological status as far as this accident is concerned. He does however regard a loss of 11% of normal kidney as a significant loss for a young man of the plaintiff's age but he does not believe that it will interfere with his future health nor does he think that it will interfere with his life expectancy.

38. I note Mrs. Hall's concern as regards any possible future problems with the plaintiff's normal functioning right kidney but Mr. McLean deals with this aspect in his report of 23rd August, 1999 and I am satisfied on the basis of the content of the medical evidence that even if the plaintiff was to lose his normal right kidney he would be able to maintain a normal level of renal function with the amount of kidney he has on the left side.

39. I take the overall view that the plaintiff has recovered from the effects of this accident and the probabilities are that he will not suffer any adverse consequences into the future and in all the circumstances, I take the view that the appropriate figure for general damages is €40,000.

40. There will be judgment accordingly in the sum of €40,000.