Neutral Citation Number [2010] IEHC 129

THE HIGH COURT

2009 5290 P

BETWEEN

LOUISE ALLEN

PLAINTIFF

AND

TRABOLGAN HOLIDAY CENTRE LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Charleton delivered on the 30th day of April, 2010

1. The Occupiers' Liability Act 1995, codifies responsibility in tort by the occupiers of premises towards entrants. There are three categories; visitors, trespassers and recreational users. As with previous common law as to the liability of occupiers for injury caused to those on premises which they control, the obligations under the legislation are limited to the static condition of the land and buildings. Harm alleged to arise out of action taking place on the premises, be that a sporting event like show jumping, or the cutting down of trees for timber, are adjudged under ordinary negligence rules.

2. Under s. 3 of the Act the occupier owes a common duty of care towards a visitor. This duty is defined as an obligation to take such care as is reasonable in all the circumstances to ensure that a visitor does not suffer injury or damage by reason of any danger existing on the property. As to that duty, it is clear that merely establishing that an accident occurred on premises is not enough. The plaintiff must show that a danger existed by reason of the static condition of the premises; that in consequence of it he/she suffered injury or damage; and that the occupier did not take such care as was reasonable in the circumstances to avoid the occurrence. The duty of care so defined is at a markedly higher level than that which applies to recreational visitors, such as those exploring the countryside or historical sites, or to trespassers. A visitor is defined in s. 1(1) of the Act as a person who enters as of right, for instance a fire fighter; or someone paying to go to the theatre would be an examples of that; who is in the premises on the invitation, or with the permission of, the occupier, this would extend to both the customer of a shop and a guest coming to a private house for a meal; and those who come to a place for a recreation without charge and who are a family member, or someone invited, or are there for social reasons.

Facts

3. On the 20th August, 2008, Louise Allen, the plaintiff, claims that she slipped on a muddy and unpaved footpath at Trabolgan Holiday Centre. She was there as a paying guest on holiday, so she is a visitor and the defendant is the occupier. The defendant does not deny that she slipped, as that is obvious. Rather, the defence is that the accident was her own fault and that her version as to where she slipped is to be doubted. It is pleaded that Ms. Allen cannot demonstrate any want of care as she shows neither a danger on the premises nor any want of such care as was reasonable in the circumstances to avoid her being injured by that danger. While everyone accepts that she slipped and fell, an issue has arisen as to whether she was wearing appropriate footwear and as to whether the accident took place on the footpath leading back to her holiday chalet or on the grass immediately beside it.

4. I find myself in a position where, as a matter of probability, I feel I can accept some, but not all, of the plaintiff's evidence and that of her sister-in-law. In looking at whether I can accept some of her evidence, having rejected a piece of her evidence and that of her sister-in-law, I have carefully considered demeanour. In my judgment, the portion of the evidence of Ms. Allen and her sister-in-law which I do accept has not been undermined by the single fact which I feel constrained to hold against her. Further, the theory that she slipped on wet grass and not on the path is not backed up by evidence but is based on speculation. No one saw that happening and because when Trabolgan Holiday Centre employees came on the scene they did not ask her what had happened. This is not surprising as she was in agony.

5. Ms. Allen is a young woman who comes from Dunlavin in County Wicklow. She works in Clondalkin as a credit controller and has established an exemplary record of diligence. She has always been interested in Gaelic football. Prior to this accident, she had discontinued her playing career but was involved in coaching at a high level. She is now involved in management and some coaching by direction, as opposed to by example. This is because of the accident. When it happened, she, accompanied by her brother and her sister-in-law Gina Allen, and niece and nephew aged three years and six years, were taking a holiday break. It was a wet August. While Trabolgan was good choice, as it has many indoor activities, the outside ground was soaked. By the time photographs came to be taken on behalf of the defendant the day after the accident, the weather had changed, with brilliant sunshine in the place of the misty rainy conditions that prevailed for most of the previous day.

6. At about 18.00hrs, together with her sister-in-law and niece and nephew, Louise Allen went from her holiday chalet to the central area of the holiday complex. There they booked for a family meal a bit later on in the evening. Then, the two adults and two children returned along the designated paths to their chalet in order to change for the meal. Both women were wearing jeans. Gina Allen has told me, and I accept, that she was nervous of her jeans trailing on the path where the accident occurred, because it was muddy. I regard it as probable that a similar consideration applied to Louise Allen. They went along tarmacademed paths and then took a designated path up a slight incline through some trees towards their chalet. The path was narrow and not covered in any binding agent. The sisters-in-law were almost together. Louise Allen was carrying her three year niece on her back while her nephew cavorted on ahead. I do not regard it as probable that Louise Allen diverted from the path with a small child on her back. Rather, given the state of the ground and the fact that she was carrying a child, it seems to me to be highly probable that she confined herself to the path. Her nephew, on the other hand, was probably running all over the place. Since Louise Allen was entirely involved in minding her niece, it is more probable, to my mind that, that if anyone stepped off the path it would have been her sister Gina Allen. I also regard the evidence of the two Allen ladies on this issue to be both consistent and credible.

7. Louise Allen described the accident. She said her right foot slipped on an accumulation of mud on the edge of the path and that she went over, hearing a crack. She was unable to get up and was in severe distress. Her ankle was disfigured by a complete displacement. Her sister-in-law sent her nephew for help and, in due course, her brother, and then the lifeguard at the centre Ross

Broekhuizen, arrived. The life guard rendered first aid, arranged blankets and propped her head. He was then replaced by the duty manager John Devlin, when he had to return to work. About fifty minutes later the men in the company assisted in helping paramedics carry her to an ambulance.

8. Ms. Allen said that she did not walk on the grass. Whereas as she had walked down this path before, she did not remember using it coming up to the chalet. Her right foot slipped on something that she said was not a big hole, but an accumulation of mud. Possibly because she wanted to protect the child on her back, and because of the extra weight, she fell very severely completing displacing her left ankle. I will return to this later. When seen by Trabolgan employees, she was on the grass. She says, and I think it is true, that she was moved slightly by her brother and sister-in-law for comfort's sake.

9. Nike runners were produced in court. These were what the plaintiff says she was wearing. They were white and very new looking. Her sister-in-law agreed with her evidence. In contrast, the Trabolgan duty manager remembers one of her feet being bare and the other being shod with footwear that was variously described in cross-examination as 'plimsolls' and 'rubber dollies'. Mr. Devlin's actual description in evidence was of a multi-coloured canvas upper shoe with a lace through six eyeholes and a plastic side having an underside that had virtually no grip. His description was of an unusually coloured and inexpensive canvas beach shoe. I do not think that he was making a mistake in his detailed description. It also seems to me to be probable that better footwear might have been saved, in the particular conditions, for later on. This, however, is the only aspect of the plaintiff's case that I feel unable to accept. On the remainder of what she said, I have carefully scrutinised her credibility, and that of her sister-in-law. I accept it.

Danger on the property
10. It is undoubtedly the case that there was a danger on this property. It consisted of a ditching in the site of the path in which a quantity of slimy wet mud had accumulated. Anyone putting their foot into it might easily have skidded. That danger would be increased through carrying a small child. Since Trabolgan is a family resort, the occupiers must expect people of all shapes, ages and sizes and that they would behave in the way that families do while relaxing, whether that be carrying children in a piggy back or playing on the grounds. There might be dangers in playing on wet grass, and anyone who chooses to act that way is taken to accept the danger. A path is different. It is the occupier saying: this is how you go through the premises safely. Some paths may be different, as with a rough rural footpath. They may carry clear risks for those who choose to use them. This path was not a choice. It was the way from one building to another. The accumulation of mud and wet on this path was a clear danger to any visitor that might wander along this path. In that regard I accept the evidence of Desmond Kirwan-Browne, consulting engineer.

Reasonable care
11. Then, I asked myself, was there a failure to take such care as was reasonable in all the circumstances to ensure that Ms. Allen did not suffer by reason of the danger? In my view there was. Trabolgan Holiday Centre designated a number of tarmacademed paths between the buildings and the chalets. It is clear that the plaintiff could have chosen another route, and she was questioned about this. Her answers were convincing. The footpath provided both a handy route and it was a designated walkway. Perhaps at some stage it was planned to cover that footpath. At the time of the accident it was stones and mud. Because it was cut into a slope, water would inevitably run down it. At the edges, in the event of any ditching, both mud and water would accumulate. What care is reasonable in the circumstances depends to a large extent on how visitors could reasonably be expected by the occupier to behave on the premises. Probably the plaintiff would not have slipped had she not been carrying her niece, or if she did, the fall would not have been as bad. As I have said, Trabolgan Holiday Centre must expect that kind of behaviour. A slithery path is a clear hazard to someone in those circumstances. Perfection is not called for, simply reasonable care. That would have been present had there, perhaps, been extra gravel on the path or had the path been tarmacademed across with an appropriate surface that provided grip or otherwise treated so that water could run down the slope without the accumulation of mud. This was not a case where the plaintiff embarked on the exploration of woodland and where the expectation would then have been of paving that would require appropriate care. The circumstances oblige me to look at the use to which the path was put. It was clearly designated as an appropriate means of traversing the holiday centre in all weathers. There was nothing exploratory or risk-taking about using it.

Contributory negligence
12. The particulars pleaded in the defence of contributory negligence encompassed the plaintiff failing to exercise adequate care; failing to look where she was walking; and being the author of her own injuries. My view is that, on a muddy pathway, and with a child on her back, that the plaintiff made clear contribution towards this accident. Part of that involved footwear that did not have a proper grip.

13. In consequence, while Trabolgan Holiday Centre failed to take the care that was reasonable in all the circumstances as to the static condition of its property, and in particular allowed a danger to cause injury to Ms. Allen, her want of care must reduce the damages by 25%.

Damages
14. The plaintiff suffered a very severe ankle injury. She was in severe pain for a period of some hours after the accident. She was out of work for ten weeks returning, on crutches, because of a need to protect her employment. During the year after the accident she still had ongoing symptoms with swelling on the lateral side of her ankle and soreness on the medial side after prolonged walking. Then, her walking distance with comfort was approximately half an hour. This must have been a severe contraction of the enjoyment of her life in sport. The fracture to her ankle was healed in an anatomical position with normal congruency of the joint. This involved a skilful operation under general anaesthetic with the insertion of metal plating and screws. Rehabilitation has been difficult and is not complete.

15. As of the present time the plaintiff complains of not being able to get back fully into coaching. She says that in the morning she must warm up her ankle by doing exercises. She has had a lot of physiotherapy but, almost two years later, it is only intermittent now. After being stationery for a few hours she needs to exercise her ankle a bit before weight bearing on it. At times, there can be some swelling. Whereas she was on the usual range of medication for pain and swelling for some months, she takes little enough now.

16. I think the up to date summary and prognosis is that provided by Dr. Pegum in his report of the 15th December, 2009:-

> "Ms. Allen' ankle has improved. Her symptoms can be expected to improve further but she will probably always have an occasional twinge, especially if she runs. The tendency to ache and swell at the end of the day will subside. The only affect of the metal in place will be to make the wearing of boots uncomfortable, since there would be pressure over the plate itself. None of the other symptoms are related to the presence of metal and there appears to be very little risk of developing arthritis."

17. Nonetheless, having read the medical reports, and seen relevant photographs, and having regard to the plaintiff's evidence, which carries no trace of exaggeration, I regard this as a significant ankle fracture with some ongoing problems. It cannot be classified, however, according to the Personal Injuries Assessment Board book of quantum, as a serious and permanent condition. Given, on the other hand, the seriousness of what the plaintiff has been through, it certainly does not fit into the lowest category of a substantially recovered ankle injury.

18. I would assess the plaintiff's general damages in the sum of €50,000. That may be divided as to €30,000 to date, and because the plaintiff is young, €20,000 into the future. In addition, there are medical expenses of €7,020.

19. While the plaintiff was out of work, her employer paid her net wages. As in *Hogan v. Steele & Company Limited* [2000] 4 I.R. 587, she gave an undertaking to her employer to repay that money. It does not matter, in my view of the law, whether that undertaking was given before sickness pay was offered to her, or after she returned to work. Nor does it matter whether the undertaking was given in writing or orally. The reality is that I accept that it was given. Therefore the obligation arises. That is the only question. The figures here are somewhat uncertain. Ms. Allen was paid €8,679 during her time off sick. In addition to that, she also received about ten weekly payments under social welfare entitlement which amounted to about €1,800. These she passed onto her employer. So, she owes him €6,879 but this must be reduced as well by 25%. Total damages are therefore €63,899. So, dividing that by four and multiplying it by three, one gets the figure of €47,924.25 as the correct figure taking into account her contributory negligence.

Result
20. Therefore, there will be judgment for the plaintiff in the sum of €47,924.25 and costs will follow that event.