Neutral Citation: [2014] IEHC 529

THE HIGH COURT

[2012 No. 290CA]

BETWEEN/

ZARA McCABE

PLAINTIFF

AND

SOUTH DUBLIN COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 18th November, 2014

1. This is an action for personal injuries arising from an incident which took place on 2nd June 2009 when the plaintiff's foot became caught in an opening in the surface of a footpath as she walked along Brookview Drive, Tallaght, Dublin 24 sometime around 11pm that evening. It is not in dispute but that as a result of the incident Ms. McCabe fell on her right hand and banged her head. The fundamental question which arises in this appeal from the Circuit Court is whether the local authority in question, South Dublin County Council, is liable in negligence for these injuries or whether it can invoke the traditional rule of immunity for non-feasance for this purpose.

2. The extent of the plaintiff's injuries are not seriously in doubt. Following the incident the plaintiff was in pain and was removed to Tallaght Hospital. She was later treated as an out-patient at South Tipperary General Hospital, Clonmel, Co. Tipperary. It transpired that Ms. McCabe suffered a minor fracture of her hand which required the application of a cast. The cast was removed after about a month and the injury had largely healed. While the plaintiff has certainly suffered pain and discomfort, she fortunately did not suffer any major long-term adverse effects. It must be acknowledged, however, that the injuries continue to affect her grip, her capacity to lift her young children or in using her computer. In addition, Ms. McCabe often suffers discomfort in her right hand in cold weather.

3. The dimensions of opening in question were about 8cm. by 8cm. and it was situate on the footpath opposite No. 12 Brookview Drive. The opening in question was missing its stopcock cover. It is clear from the very helpful photographs which were supplied by the plaintiff's engineer, Mr. Jack O'Reilly, that the opening presented a danger to the public at the time of the incident in question.

4. In passing, I would totally reject the suggestion made by the Council to the effect that there was some element of contributory negligence on the part of the plaintiff inasmuch as it was suggested that she was speaking on a mobile telephone at the time of the incident and that she did not keep a proper look-out as a result. While pedestrians, like all road-users are required to act prudently and reasonably and to keep a proper look-out, the perfectly common act of using a mobile telephone while walking on a footpath cannot in itself be regarded as amounting to contributory negligence. This is especially so given that the opening itself and its location was apt to catch any user of the footpath unawares.

5. Before considering any of the legal issues which arise, the underlying facts must first be considered.

6. It is common case, however, that when the existence of the opening was drawn to the Council's attention in July 2010, a joint inspection followed involving the plaintiff's engineer, Mr. O'Reilly, and Council personnel. It is agreed that the stopcock cover was found to be absent and a replacement cover was satisfactorily inserted a few days later on 30th July 2010. But what was the position before that date?

7. The Council's records establish that in November 2006 a variety of stopcock covers were repaired on Brookview Drive, including the stopcock cover at No. 12. There is a clear documentary record – which was confirmed in oral evidence by Mr. Brendan Kelly – to the effect that on 13th December 2006 the re-instatement work was inspected and found to be acceptable. Mr. Kelly expressly gave evidence to the effect that he would not have recorded this fact without having personally inspected the works to see that they were in order. I fully accept Mr. Kelly's evidence in this regard.

8. In 2007 the Council commissioned a road asset condition survey in respect of all the roads and footpaths within its functional area. The object of this survey was to identify those roads and footpaths which were thought to be in need of repair. While the survey described the footpaths in Brookview Drive as being in a "medium" state of repair, the only potential hazards which were identified was a broken water valve outside No. 24 and what was described as a "patch" outside No. 23. Critically, however, no missing stopcock cover was found outside No. 12.

9. While the principal author of the report is now, sadly deceased, the accuracy of the report was not seriously challenged at the hearing. We can therefore proceed that as of the date of the survey in 2007 the stopcock cover was not missing.

10. In January 2009 the Roadworks Control Unit of the Council received a complaint that a stopcock cover was missing outside No. 12 Brookview Drive. The Council then took steps to repair the cover and it appears that this was done on 13th February 2009. It is true that, unlike the re-instatements which took place in November 2006 and in July 2010, the Council could not produce a direct documentary record of the repair and reinstatement which was said to have taken place on that occasion. Yet there is a clear record of the report and the day book sheets (which are a form of daily record of general work done) shows that the water maintenance section were engaged in general maintenance in the Brookview area on that day.

11. How, then, did it come to pass that there was such an opening outside No. 12 Brookview Drive in early June 2009? Two possibilities suggest themselves. First, there is the possibility that the opening was not actually repaired in February 2009, whether through oversight or otherwise. Second, there is the possibility that the opening was in fact repaired by the Council, but that before the concrete could set, the opening was removed or tampered with as a result of anti-social behaviour on the part of unknown third parties.

12. In this connection it must be observed that Mr. Derek Sergeant, a senior executive engineer attached to the Council's water department, gave evidence that there were in fact significant problems of anti-social behaviour involving the removal of the stopcock covers. Mr. Sergeant stated that these covers were very easily removed while the concrete is still fresh. The plaintiff's engineer, Mr. O'Reilly, was, however, emphatic that in the event that the opening was tampered with, one would expect nonetheless to see residual evidence of base bedding or concrete staining immediately adjacent to the cutting, with perimeter concrete also showing some distress were the opening abruptly to be removed in this fashion. Mr. O'Reilly was equally adamant that he could find no evidence of any of this when he inspected the opening in July 2010.

13. In the end I have concluded that it is unnecessary for me to make any adjudication on these disputed facts upon which there was much to be said for the evidence of both sides. I think it unlikely that the Council's records in respect of February 2009 were mistaken, yet equally the photographs supplied by Mr. O'Reilly showed no evidence of any distress or disturbance of the kind he suggested would inevitably accompany any tampering with the opening. I have arrived at this view, because irrespective of how these factual issues are resolved, the result in law is nonetheless the same.

The misfeasance/nonfeasance distinction

14. Section 2 of the Roads Act 1993 ("the 1993 Act") defines a footpath as "a road over which there is a public right of way for pedestrians only, not being a footway." Section 11 of the 1993 Act (as substituted by s. 6 of the Roads Act 2007) provides that the maintenance and repair of all such roads is a function of the relevant local authority.

15. So far as the question of liability of a local authority qua highway authority is concerned, the common law draws a clear distinction between non-feasance (*i.e.*, a failure to act to maintain the roads and footpaths) on the one hand and misfeasance (*i.e.*, the negligent repair of the road and footpath) on the other: see generally, McMahon and Binchy, *The Irish Law of Torts* (Bloomsbury, 2013) at 1026-1028.

16. This distinction was well summarised by Costello J. in *The State (Sheehan) v. Government of Ireland* [1987] I.R. 550, 554:

> "There at present exists in the law relating to the liability of road authorities for defects in public roads and footpaths a distinction between misfeasance and non-feasance. If an authority commits a positive act of negligence in the construction of a footpath or in its maintenance (that is, an act of misfeasance), it is liable to a person injured thereby. But if it merely fails to maintain a footpath so that it falls into disrepair (that is guilty merely of non-feasance) it is not liable to someone injures due to its lack of repair."

17. The Supreme Court had previously ruled to similar effect in *Kelly v. Mayo County Council* [1964] I.R. 315 where Lavery J. stated ([1964] I.R. 315, 318-319):

> "As such [highway] 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 misfeasance but not for non-feasance."

18. In *Kelly* the plaintiff was a 14 year old schoolboy who was injured when he was thrown from his bicycle. The bicycle itself had got caught into a pothole as the plaintiff cycled on a public road. It was alleged that for a few weeks prior to the accident the Council had been engaged in the drawing of stones and gravel in heavy lorries along the road where the accident had occurred. The plaintiff contended that the Council had damaged the road through excessive user, thereby creating the pot-hole. The Supreme Court rejected the plaintiff's claim that the evidence of the user of the road was such as to amount to a nuisance.

19. Lavery J. observed ([1964] I.R. 315, 321):

> "It is impossible to find here that the user of the road by the County Council was not a normal user. The fact that it may have damaged the road is irrelevant. All traffic wears and injures a road to a greater or lesser extent…The existence of pot-holes and other irregularities in the surface of public roads is within universal experience and is inevitable and the falls from a bicycle of a young boy, through riding on a rough surface, is, unfortunately, also within universal experience."

20. This issue was also considered in more recent times by Cross J. in *Loughrey v. Dún Laoghaire Corporation* [2012] IEHC 502. In that case the plaintiff was injured when she tripped on a pavement and injured herself badly. The evidence established that there was subsidence between two slabs on the pavement and that the ensuing differential in the level of the two slabs caused a tripping hazard. Cross J. posed the issue in the following terms:

> "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."

21. Cross J. found on the facts that:

> "….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."

22. It was for these reasons that Cross J. found for the plaintiff, as the case presented a clear example of misfeasance on the part of the Council.

23. In the present case the Council either did not repair the opening at all (even though it had set out to do so) or, having done so, the opening was subsequently tampered with and removed by persons unknown. On any view of these two possibilities, the Council is not liable by reason of the operation of the non-feasance rule.

24. If the opening was not repaired at all then the Council has no liability by reason of its inaction, even it had intended to repair the opening itself following a notification of the missing stopcock cover. It is true that, as the plaintiff argued, the Council intended to repair the opening. This in itself is not sufficient to take the case outside of the non-feasance rule, since the authorities are at one that there must be actual negligence in the actual repair of the highway before the case comes outside the scope of the nonfeasance immunity. This very point was made by Kingsmill Moore J. in *Kelly* ([1964] I.R. 315, 323), as in that case the Council had

intended to repair the pot-hole which caused the accident, but had not yet actually set about effecting this repair:

> "I think that the County Council was probably dilatory in filling up the pot-holes, no doubt because the re-surfacing of the road with tarmacadam would shortly have reached as far as the scene of the accident: but it is old and settled law that a public authority is not liable for non-feasance."

25. If, on the other hand, the opening was in fact repaired but it was subsequently removed or tampered with by persons unknown, there is equally no liability on the part of the Council. In that latter situation the most that can be said is that the Council thereafter failed to act when it knew (or ought to have known) that the opening presented a hazard to the public. Nevertheless, even in this situation, the non-feasance rule serves to bar any action in respect of this ground.

26. In sum, therefore, the Council could only have been liable if there had been evidence that it had repaired the opening and that it had done so in a negligent fashion. In those circumstances, there would have been an act of actionable misfeasance. But there was in fact no evidence to this effect and I must accordingly affirm the decision of the Circuit Court and dismiss the plaintiff's action.

Conclusions

27. No one can pretend that the non-feasance/misfeasance distinction is perfectly satisfactory or that the rule in this blunt and indiscriminate form sits easily with general principles of tort law. The rule, after all, has its origins in a decision of the English King's Bench in 1788 (*Russell v. Men of Devon (*1788) 2 Term Rep. 667) which declined to hold that a statutory duty to repair the highway was enforceable because the local parish (on whom the duty fell) was not a legal entity. Yet the "illogical distinction" between nonfeasance and misfeasance nonetheless survived the transfer of the statutory duty to repair the highways to local authorities with legal personality who could sue and be sued: see Wade and Forsyth, *Administrative Law* (Oxford, 2000) at 755.Decisions of the Supreme Court describing the rule as either "anomalous" (see *O'Brien v. Waterford County Council* [1926] I.R. 1, 8, per Murnaghan J.) or "unsatisfactory" (see *Kelly v. Mayo County Council* [1964] I.R. 315, 324 per Kingsmill Moore J.) are of long standing.

28. These considerations notwithstanding, I must nonetheless apply the law as I find it. This is especially so given that the Oireachtas has, in fact, legislated on this topic. It is often, perhaps, overlooked that the distinction between non-feasance and misfeasance was actually abolished by the enactment of s. 60(1) of the Civil Liability Act 1961 ("the 1961 Act"), but over 50 years later the commencement of that sub-section awaits the making of a Government order. That sub-section has never been brought into force by the Government and in *Sheehan* the Supreme Court rejected the argument that the Government was legally obliged to make such an order. It follows, therefore, that, for the moment, at least, as Cross J. put the matter in *Loughrey*, the distinction still retains "its ancient purity in this jurisdiction".

29. Subject only to some future challenge to its constitutionality (an issue on which I express no view), the rule nonetheless remains embedded in the fabric of the common law which was carried over into our post-Constitution legal system in December 1937 by Article 50.1 of the Constitution, even if - as the Supreme Court pointed out over 90 years ago in *O'Brien* - the rule can be regarded as anomalous and although the historical underpinning for the rule (such as it ever was) vanished no later than 1898 with the enactment in that year of the Local Government (Ireland) Act 1898 which vested all local authorities with a legal personality.

30. As such, given its historical vintage and the fact that it has remained undisturbed for over 200 years, the rule now probably lies beyond the capacity of the courts to repair or amend. If, then, the law is considered to be unsatisfactory, the remedy for this lies either with the Government (which could, should it consider it appropriate to do so, make a commencement order in respect of the s. 60(1) of the 1961 Act) or with the Oireachtas which could effect further legislative change should it think necessary to do so.

31. I arrive at this conclusion most reluctantly, because the plaintiff has clearly suffered not inconsiderable injuries by reason of an opening on a public path which was a danger to the public and which was apt to catch pedestrians unawares. I nonetheless find myself compelled by reason of the application of the nonfeasance rule to hold against the plaintiff and thereby to affirm the decision of the Circuit Court.