

THE HIGH COURT

[2012 No. 4171 P]

BETWEEN

WILLIAM FURLONG

PLAINTIFF

AND

WEXFORD BOROUGH COUNCIL

DEFENDANT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 25th day of July, 2018

1. The plaintiff gave evidence in this case of his date of birth of 28th February, 1951 and his address at 45 Hantoon Road, Maudlintown, Wexford in the County of Wexford and is employed as a general operative.
2. The plaintiff has brought the within application against the local authority responsible for the maintenance, repair and upkeep of the roadway at the locus of the accident in question. The plaintiff claims, in particular, that the defendant, their servants and/or agents are guilty of nuisance, negligence, breach of duty, breach of statutory duty and breach of the Occupiers Liability Act, 1995.
3. The plaintiff is authorised to bring the within proceedings by the Personal Injuries Board pursuant to s. 14 of the Personal Injuries Assessment Board Act, 2003-2007 and the authorisation date of the 8th February, 2012, bears the authorisation number PI 1116201173755.
4. This Court has been asked to hear the issue of liability/causation on the case, the value of the claim in terms of damages having been agreed between the parties, subject to the issue of liability being decided by the court.
5. The defence filed requires the plaintiff to fully prove his case in relation to the accident which it is alleged it occurred on 30th November, 2009 and denies any negligence, nuisance, breach of duty including breach of statutory duty and breach of the Occupiers Liability Act, 1995 in and about the care, control, management and upkeep of the roadway.
6. In particular, the plaintiff was put on full proof that a gully on the roadway was in a defective and dangerous condition and that the defendant was guilty of misfeasance, and that rain water had gathered around the said gully which had in turn being caused to freeze creating a hazard.
7. The plaintiff was put on full proof of his claim that his motorbike was caused to skid on the said ice causing the plaintiff to be thrown from the said motorcycle and that there exists any or any alleged causal link between the personal injuries loss and damage allegedly suffered by the plaintiff, which is denied, and the alleged or any act or omission on the part of the defendant in addition to the normal general pleas.
8. Contributory negligence and particulars thereof are pleaded.
9. The plaintiff identified the view from various photographs, photograph 1 looking into the park and he was able to point out 51 Liam Mellows Park which was the third house of four houses.

Evidence of Walter Cogley for the plaintiff

10. He identified photograph 5 and described himself as a small time builder and he said that he lives on this park and that the gullies were mostly blocked up and that he had telephoned in to the Council to complain but got no response and that he had complained regarding the blocked drains. He said there was a very large amount of water that it was very dangerous and that water lodged in the dip in the road. This witness said that the water was going into the gullies and the gullies were not able to take the water away. He described his van parked in the drive and he said that when weather was very wet there were slippery roads and that the weather was not great at the time. He saw the plaintiff being picked up off the road and he took the plaintiff's bike off the road and into his driveway. The accident occurred on 30th November, 2009 and that there had been a flooding problem with two gullies and that they did not solve the problem and that two more gullies were put in by the Council and that he had been complaining about this for in excess of twelve years prior to the incident. This witness described the motorbike as ending up on the middle of the road opposite his house.
11. Mr. Alan Conlon, Engineer gave evidence on behalf of the plaintiff and he carried out an inspection at 1pm on 6th February, 2017. The report from the defendant's engineer was dated 25th September. He described photograph 4 as showing that a tree was now missing in those photographs and that there had been a single gully and two further gullies were put in at 18.7 metres into the avenue. He was shown the installed pipe for taking water out as per photographs 8 and 9 and he said there had been significant pooling outside photograph no. 7 which showed the view looking in the opposite direction.
12. Reference was made to the plaintiff's sons photographs taken on 18th November, 2017.
13. Under cross-examination it was put to this witness that there was no water ponding on the day of the inspection and he agreed with this. Mr. Paul Gaddren of Advance Cleaning Limited was using a suction tanker and he confirmed that he had worked for the Borough Council since 2002, drain cleaning and all for thirty years for the council and that he had full records for the previous five years. He dealt with the cleaning of drains and he said that he cleaned the industrial estate eleven days prior to the accident. He described the modus operandi as the council giving him a list of gullies which he had to suck out and if there was a further problem with a particular gully he let the council know.
14. This witness described the standard gully as being either three inches or four inches and he said that photographs 13 to 16 showed specific areas and if a problem arose the report went in. This witness said that if there were works in the area or heavy rainfall it would happen that the gullies were choked up and that the foreman would contact them regarding blockages on the day and he was shown the photographs from 2017 taken by the plaintiff's son and he said that soil from somewhere had gotten in the gully but that it wasn't from the road. He described himself as a director of advance cleaning for the last 33 years. He agreed that Mr. Bernard Roche, the foreman for the County Council was not present and that there was no direct evidence of this drain being cleared

and he agreed that that was correct. This witness pointed out that where the Lidl Supermarket was part of the industrial estate and he said he couldn't say more than he got no complaints about this particular part and for six hours work he showed an invoice where he was charging €640 plus VAT. It was put to this witness that it was pure hearsay for him to suggest that the gullies were cleaned that there was cleaning done whatsoever in 2017 and he said that he had documents for 2013, 2014 and up until 2017 regarding the front of Liam Mellows Road. He described this work as being carried out as once a year and that if there were blockages then extra cleaning would be done and he said he no longer had paper work that they keep the paper trail for five years.

15. Ms. Sinead Casey, an engineer with Wexford County Council, said that she was appointed on 11th November as borough engineer and that Tighe Ó Corcaigh had been the engineer before then but he had been transferred. This witness said she had links with the local authorities since 2003 and that the urban and county council were transformed into one authority that year.

16. She said that in the late 1990s and early years of 2000 there were complaints about ponding outside the Lidl shop and that the local authority installed two gullies in 2008 and that as far as she was aware that dealt with the problems. The foreman gave a list according to this witness to advanced cleaners in autumn and spring of worksheets and named specific areas and every twelve months it was appropriate for ordinary maintenance to be carried out but if the conditions required emergency works these would be done.

17. This witness was shown the photographs taken in 2017 and she agreed that they showed clay in the drains and that they could possibly constitute works that the rain could wash muck like that into the gullies and that it wouldn't be uncommon and she assumed that it was from a construction site. Under cross-examination this witness confirmed that she was transferred as an engineer to Wexford Borough Authority and that she had been seven years in Enniscorthy prior to 2003 that at the time of the accident she agreed she was in Enniscorthy working as an engineer.

18. This witness described how there were complaints of ponding in the late 1990s and the year 2000, and that once a claim was lodged extra gullies were provided at locations.

19. It was put to this witness that the plaintiff had sought an order for discovery but had been told that there had been no complaints and this witness replied that there were written records and that there may have been phone calls at the time.

20. This witness was shown photograph 7 and her response was that the Lidl shop was elevated over the path and that there was a low spot for a pipe to put in to try and alleviate the situation for pedestrians and she did agree that there was still some water on the footpath. This witness did not however agree that putting a yellow pipe in to alleviate the footpath problem made the roadway worse and she said the yellow pipe is an underground pipe with perforations.

21. It was put to this witness that the remedial works had not succeeded and that a tree had been cut down to stop leaves getting into the gullies and she said there had been frost and this had occurred on a wet road surface and she said that drainage stones would have been put in and the sod replaced over the pipe and that was done in ease of cleaning, otherwise a manhole would have needed at the back. She described this in some cases as being standard.

22. Mr. Ben Harte, defence engineer, said that the gully 45 metres from the junction and he said that the last gully is 44 metres. He said that the standard applied was the annual standard response to an emergency he had calculated the distances as showing loss of controlled 35 metres i.e. 9 to 10 metres back from the locus and 15 metres from the gully. He said that in relation to the absence of calculation regarding distances, he said he was not aware where the skid commenced. This witness said he was not aware why Mr. Ross or Mr. Roche were not giving evidence. It was put to this witness that remedial works didn't alleviate the problem and he said there was no problem at the moment. The defence argued that the onus on the plaintiff was to prove his case on balance of probabilities that on the evidence the plaintiff skidded on an icy road which is not actionable and he said that it was submitted that ponding in the area of gullies occurred but that he hadn't reached the area of the gullies. In terms of contributory negligence, it was argued that the plaintiff knew that ponding occurred in that area.

The plaintiff's evidence

23. The plaintiff started work at 8am and photograph 3 showed a drainage gully and two further gullies. The case was opened on the basis that the plaintiff's case is that an area was cut out and reinstated, that there was a pipe coming out under the grass to take drainage off the path towards the gully. There was a history of improper drainage and the defendants did accept that there was a problem with ponding in that area. The plaintiff indicated that it was not serviced that it was clogged and continued to pool. The plaintiff skidded, and fell and injured his shoulder, there was a scooter left at the scene. Mr. Walter Cogley who lives at no. 54 took care of the scooter. The plaintiff described that he had worked as a general operative with Wexford City Council for the last seventeen and half years and that he had done the one and half mile commute for five years on a scooter and twenty years using different bikes.

24. The plaintiff submissions, on the basis of the plaintiff's evidence and evidence adduced on his behalf and Mr. Cogley's evidence was that there was clearly a ponding problem and that despite complaints the net affects were there. This case is one of strict liability where there is a breach of statutory duty and it was pointed out that the scooter did a 90 degree turn without falling off as he came into this road and along the straight part and that the facts speak for themselves.

25. The plaintiff described a wet and frosty morning as he turned into Liam Mellows Park which he described as a residential road and he turned into his right and his motor bike skidded and swivelled around and he tore his shoulder and the bike skidded against the park. The plaintiff described that when he fell dazed and that John Furlong was not related to him was driving behind him and had to lift him up and into his car and take him to Wexford General Hospital. The plaintiff described how his coat had to be cut off him in hospital and how he had spun on the road looking down the road to his back and that he could not keep control of the motorbike and did a fishtail turn. He described himself as lying on his back on the road passed Mr. Cogley's house.

26. The plaintiff indicated to the court that no fractures were found and that he was out of work for seventeen to eighteen weeks. The plaintiff described himself as involved in grass cutting and that while he was rostered to do graves it would cause him pain.

27. The plaintiff described how he visited the scene seven to eight months after the accident at the locus and found the gully blocked and photographs were produced in that regard. These photographs were dated the 18th November, 2017 and were taken by his son.

28. Under cross-examination the plaintiff confirmed that this was his regular route to work and that there were regularly problems on that route and that there could be one and half miles of frozen road. The plaintiff confirmed that there was no water lying until he turned into Liam Mellows Road and that it was frozen solid on the road although it was not raining that morning, it had rained the

night before. There were no potholes on that road and from Kennedy Park to Liam Mellows Road is a good stretch of road and when the water is frozen over it becomes icy and the plaintiff described himself as very careful that if you hit gravel in those circumstances you would be liable to fall off the motorbike.

29. The plaintiff described a bit further in within a couple of yards of Mr. Cogley's house the accident happened and he said he swivelled and struggled for four to five yards and went 25 yards past Mr. Cogley's house and prostrate on the road. The plaintiff indicated that he had nine years to think about how the accident occurred.

30. The plaintiff passed the bend on the road and said that could be verified. Even if there were any drains put in prior to his accident, there was still pooling and he said the drain was blocked that you would now find mud in it as well. The plaintiff is not telling any lies that although it was nine years ago he had a good memory and he does not accept that the fall was his fault.

31. Mr. John Furlong works as a foreman dealing with roadworks and gave evidence for the plaintiff.

32. Mr. Furlong referred to photograph no. 1 and said that opposite the two cars in that photograph there is a dip in the road and that when he came upon the accident he stopped his motor vehicle, put on his hazard lights and checked was the plaintiff okay and he said the road was icy at the time and he noted the gullies on the road and he said there is surface water although he did install a water gully on the road.

33. Mr. Furlong gave evidence that at the end of the double yellow lines further up the road three more gullies were put in because there were complaints of water on the footpath on the right hand side which may have been coming from the carpark. This witness said that he put in a drains trench to the grass verge and that one gully was installed nine years ago.

34. This witness said there were two additional gullies and there was ice on the road.

35. Under cross-examination it was put to this witness that he was asked six years ago for a statement and he said that he was directly behind the plaintiff and he was driving normally and he said the plaintiff was not the fastest in the world on a bike.

36. He did not agree that the drains were cleared by the advance cleaners he said that the main street was cleared, never that quay front area.

The law

37. In opening this case Mr. McGovern S.C. said that the plaintiff started work at 8.00am in the morning and he referred to photograph 3 showing a drainage gully showing one gully and two further gullies and he said they had been cut out and reinstated and that there was a pipe coming out onto the grass to take drainage off the path towards the gully and engineers met and agreed the history and there was improper drainage and that the defendant accepted there was a problem with ponding. The plaintiff says that it was not serviced that it was clogged and continued to pool. The plaintiff was described as skidding and falling and injuring his shoulder and that his scooter was left at the scene at the home of Walter Cogley who lived in no. 54 on that road and that Mr. Cogley contacted the local authority and that was nothing was done regarding the pooling of water and the defendant holds that it is nonfeasance. The plaintiff's asserts that the defence of nonfeasance only applies to road surface and not to drains and refers to *Merriman v. Dublin City Council* Costello J. which held that all drains were vested in them and where there is a breach it is one of strict liability and the defence of nonfeasance doesn't apply.

38. Further submissions were made to the effect that there was a ponding problem despite complaints and the net effect is one where the defendants are liable under statute to repair drains and they are strictly liable.

39. The defence argued that the onus of proof was on the plaintiff and that the plaintiff skidded on an icy road and that while there was ponding in the area of the gullies, he hadn't reached that area and that there was contributory negligence.

Conclusion

40. This Court found the plaintiff to be careful and truthful. Mr. John Furlong's evidence is fully accepted and the court noted that he described the plaintiff as being not exactly fast on a bike. This Court finds that Mr. Furlong made a 90 degree turn into the area of the locus without falling off his scooter and that the facts clearly speak for themselves. This Court notes that Mr. Gaddren said that the soil wasn't from the road and that is not accepted. He claimed to have cleaned the industrial estate eleven days prior to this accident but did not say he had cleaned the road in question. On the balance of probabilities, the accident was reasonably foreseeable and happened as described by the plaintiff and his witnesses. There is no issue of contributory negligence. The plaintiff is entitled to the damages agreed and costs.