Neutral Citation [2015] IEHC 486

THE HIGH COURT

[2013/10891P]

BETWEEN

EOIN RYAN

PLAINTIFF

AND

THE OFFICE OF PUBLIC WORKS

DEFENDANT

JUDGMENT of Ms. Justice Murphy delivered the 21st day of July, 2015

1. The plaintiff's claim is for damages for personal injuries sustained by him on or about the 3rd April, 2013 at a children's playground in Kilkenny Castle when he tripped over a horizontal bar in a multi play unit and landed on another horizontal bar as a consequence of which he sustained a severe, potentially life threatening injury to his spleen. The plaintiff claims that at the material time he was a visitor on the premises and as such was owed a duty of reasonable care by the defendant who is the occupier of the premises. The plaintiff claims that the defendant was guilty of negligence and breach of duty; that it created a nuisance and that it was in breach of its statutory duty within the meaning of s. 3 of the Occupier's Liability Act 1995. Twenty two particulars of negligence, breach of duty, breach of statutory duty and nuisance are pleaded; essentially they fall into two main headings. Firstly, the plaintiff contends that the defendant created and maintained a hazard and secondly that they failed to warn the plaintiff either by signs or markings of the presence of the hazard. The defendant in its defence specifically pleaded that the plaintiff was not a visitor within the meaning of s. 3 of the Occupier's Liability Act 1995 and that his status was instead, that of a recreational user within the meaning of the Occupier's 1995 Act. In addition the defendant put the plaintiff on full proof of all matters alleged.

The Facts

2. On the morning of the 3rd April, 2013 the plaintiff and his then partner, Ellen Cruise, travelled into Kilkenny where they had an appointment for developmental checks on their children. They have three children, Richard, Cody and Alex. At that time the children were aged five, three and two. Having completed their business they brought the children to the playground in Kilkenny Castle as a treat. They arrived there at approximately 12.30 pm. Ms. Cruise brought the youngest child Alex to the swings while the plaintiff brought the two older boys to play on what is described as a junior multi play unit. The Court has been supplied with many photographs of the unit and for the purposes of this judgment has relied on the comprehensive booklet of photographs furnished by the plaintiffs engineer Mr. Vincent O'Hara of O'Keeffe and Partners Consulting Engineers. The main feature of the unit is a slide which can be accessed in a variety of ways. At the right of the unit as one looks at it in photograph number 2 of the booklet, one can see that the slide can be accessed by a conventional stairway. When one goes around to the other side of the unit as shown in photograph 7, one sees that the slide area can also be accessed by a more unconventional and challenging twisted ladder which leads to a platform adjacent to the slide. When one looks at photograph D in the second part of the booklet of photographs one can see that the platform can also be accessed by a climbing wall. Underneath this structure there are a further two play areas. On the left as one looks at it from the bottom of the slide there are two swinging seats connected to the uprights of the structure and on the right there are asymmetrical bars fixed to the uprights of the structure. Each bar is 40 mm in diameter and is of steel construction. The distance between the vertical uprights upon which the bars are fastened is 1250 mm, the first bar starts at 365 mm above ground level and continues at that level for 400 mm, before sloping upwards for a length 550 mm and straightening out for the final 200 mm at which point it is 565 mm above ground level. The second bar attached to the vertical uprights was 850 mm beyond the first bar and its configuration started high on the left hand side and after 200 mm sloped down before again straightening out to join the vertical upright. Both the play units under the structure are designed for smaller children. The plaintiff stationed himself at the bottom of the slide which one can see in photograph number 1 and Richard and Cody went to access the slide by means of the twisted ladder that one can see in photograph (insert).

3. This is the Court notes, quite a challenging means of access for a three year old. Richard, the elder boy, apparently successfully negotiated the ladder and while the plaintiff was waiting for him to come down the slide he noticed his younger son, Cody's legs appeared to be dangling from the platform at the top of the twisty ladder. Keeping his eyes on Cody's legs he ran under the structure in the area where the asymmetrical metal bars are placed. In doing so he tripped on the first bar and landed heavily on the second bar. He suffered a major injury to his spleen which was potentially life threatening. Fortunately his then partner reacted promptly and drove him to the emergency department at St. Luke's Hospital, Kilkenny where he arrived at approximately 1.30 pm. There, full advanced trauma life support protocols were deployed. Fortunately a splenectomy was not required and the medics were able to manage his condition conservatively. He was discharged to outpatient care on 15th April, 2013 and was seen for a follow-up CT scan on the 26th April, 2013 which showed continued resolution of the injury. While the plaintiff experienced considerable difficulties, discomfort and limitations in the months following this injury he has been fortunate in that he has now made a full recovery.

The Plaintiff's Case

4. In essence the plaintiff's case is that the placement of these bars at a low height in this location constituted a trap or hazard for the plaintiff. Furthermore, the plaintiff's engineer argued that the structure and in particular the placement of the play bars for toddlers was not in compliance with BS EN 1176 and he instanced two failures of design. Firstly, he relied on what he considered to be a breach of Article 4.2.8.5 of the British Standard for playground equipment which provides for protection against injuries due to other types of movement. It states *"the space in, on or around the equipment that can be occupied by the user should not contain any obstacles that the user is not likely to expect and which could cause injuries if hit by the user"* and notes that *"examples of such obstacles are shown in Figure 18"* of the British Standards. When one turns to Figure 18 one can see that what is to be avoided is the projection of obstacles beyond the play area into the area of movement either at head height or ankle height. It does not prohibit the placing of bars at those heights within the play structure. Secondly, the plaintiff's engineer pointed to Article 4.2.3 headed "*Accessibility for Adults*" which provides that "*equipment shall be designed to ensure that adults are able to gain access to assist children within the equipment*." Looking at the photographs which have been supplied the Court is satisfied that there are multiple points of access for an adult to assist a child within the play unit.

The Defendant's Case
5. The defendant points out that no play area is risk free. In relation to the design and construction of a play area, risk assessment, according to the Royal Society for the Prevention of Accidents (ROSPA) is about balancing risk against return. This playground was designed and installed by a company called Kompan which is a Danish company with an international reputation in this area. Following the installation of the equipment in 2008 the defendant had the playground assessed by ROSPA, an independent body with international accreditation. In the preamble to their report on this playground which was conducted on 15th July, 2008 they point out at note 3:

> *"Play is all about "doing" and by "doing" accidents will from time to time occur. Play is an essential part of a child's physical and mental development and ROSPA believes that it is essential that a level of assessed challenge and risk is provided to enable children to properly develop their survival skills. Risk assessment is all about balancing risk against return. ROSPA believes that there are instances where even high risk is acceptable provided that the risk cannot be further reduced and the development value to the child is high."*

6. They go on at paragraph 4 to state:

> *"A risk assessment is attached to this report, clients are reminded that there is no such thing as no risk, consequently no risk is as low as you can get where items are indicated as being no risk, clients may well wish to consider if any remedial action is economically justified in terms of improvement and safety, also where we have not indicated any suggested remedial action against medium or even high risk items, we feel that either these items have sufficient development value to justify the risk or that no remedial action is possible and the alternative of closing a site or removing an item of equipment poses a greater risk to the user, the operator may well wish to consider the same."*

7. In their assessment of this particular multi play unit, ROSPA certified that it was EN1176 standard compliant and it assessed it as being a unit of low risk. No alterations or remedial actions were recommended. Since that time the Court has had evidence, and accepts, that all appropriate inspections and maintenance have been carried out.

The Law
8. The plaintiff pleaded his case on the basis that he was on the premises as a visitor within the meaning of s.1 of the Occupier's Liability Act, 1995 and that as such he is owed the duty of care provided for by s. 3 of the same Act. The defendant contends that the plaintiff was present on the premises as a recreational user within the meaning of s. 1 of the 1995 Act. In the particular circumstances of this case the Court has no doubt that the plaintiff was in fact a recreational user engaged in a recreational activity, as defined in s. 1 of the Act. The defendant has provided in the grounds of Kilkenny Castle a playground which is open to the public free of charge and whose entire purpose is to provide recreational activity for children. As a recreational user, the duty owed by the defendant to the plaintiff is set out a s. 4 of the Act which provides at s. 4(1):-

> *"In respect of a danger existing on premises, an occupier owes towards a recreational user of the premises or a trespasser thereon (the person) a duty;*
>
> *(a) not to injure the person or damage the property of the person intentionally and;*
>
> *(b) not to act with reckless disregard for the person or property of the person."*

Decision of the Court
9. In order to bring himself within s. 4(1) the plaintiff must first establish that there was a danger existing on the premises. "*Danger*" in relation to any premises means a danger due the state of the premises (s. 1 Occupiers Liability Act 1995). To succeed the plaintiff must satisfy the Court that the play unit over which he tripped was inherently dangerous. The Court is not persuaded that it is. The unit is a multi play unit designed and constructed to a high standard. The bars over which the plaintiff tripped when rushing to assist his child who he perceived to be in difficulty, are designed for toddler play. They are asymmetrical and readily visible. They are confined within the play structure and do not protrude into areas of movement. In the Court's view the unit complies with the relevant British and European standards.

10. The fact that there are risks attached to the use of playground units does not make them inherently dangerous within the meaning of the Occupiers Liability Act 1995. A child may be hit by a swing or fall from a see saw. Does that mean that the provision of such items in a playground renders the state of the premises "*dangerous*" within the meaning of the Occupiers Liability Act 1995? The Court thinks not. To hold otherwise would mean that every playground in the country represents "*a danger existing on the premises*" within the meaning of the Act.

11. The protection provided for recreational users by s. 4 of the Act is to protect them from injury or damage arising from defects in the premises which constitute a danger to users. Thus if a rotten floor gave way as a recreational user walked across it, or if he fell into an open silage pit, or if he was struck by masonry falling from a badly maintained building, he might well have a claim against the occupier on the grounds that his injury resulted from "*a danger existing on the premises*". The Court, on the evidence in this case, is satisfied that the multi play unit over which the plaintiff tripped does not constitute such a "*danger*".

12. For these reasons the plaintiff's claim falls at the first hurdle in that he has not established the basic requirement of liability, namely, that he was injured as a result of "*a danger existing on the premises*". Even if the Court is wrong in its view that the play unit in question does not constitute a "*danger*" within the meaning of s. 4(1) , the Court is satisfied that the plaintiff's claim would in any event fall at the second hurdle, that of establishing that the defendant acted with reckless disregard for his person. Section 4(1)(b). In the circumstances of this case the occupier had no reason to consider that the asymmetrical bars in the toddler play area of the unit constituted a danger. The defendant in providing this playground, including this particular unit, took all appropriate steps to ensure that it met the highest standards. They retained a company of international renown to design and construct the playground. Once completed, they had it inspected and assessed by independent experts, the Royal Society for the Prevention of Accidents (ROSPA). This particular unit had been declared to be compliant with EN 1176 by ROSPA. In such circumstances it would be a travesty to hold that the defendant had recklessly disregarded the safety of the plaintiff.

13. Finally, the plaintiff's counsel sought to rely on s. 4(4) of the 1995 Act as creating a duty of care separate to and more onerous than that created by s. 4(1). Section 4.(4) provides:

> *"Notwithstanding subsection (1), where a structure on premises is or has been provided for use primarily by recreational*

users, the occupier shall owe a duty towards such users in respect of such a structure to take reasonable care to maintain the structure in a safe condition."

Counsel for the plaintiff argued that this subsection created and imposed a general duty of care on the defendant in and about the design and construction of the play unit and that they had been in breach of that duty in placing the asymmetrical toddler bars in the location in which they are found in the unit. Counsel for the defendant argued that the duty of care created by this subsection is a duty to maintain the structure once installed, in a safe condition, so that it does not in effect become "*a danger existing on the premises*" within the meaning of s.4 (1), through lack of maintenance. The Court considers that the latter construction is more internally consistent with the overall provisions of s. 4. If an inherently dangerous playground is provided for recreational users then the occupier risks being found liable for an injury sustained by a recreational user as a result of "*a danger existing on the premises*" pursuant to s. 4(1). To succeed in his claim, the recreational user must prove the existence of the danger and reckless disregard on the part of the occupier. Once installed however, a properly constructed playground must be maintained in a safe condition by the occupier. Injury resulting from a failure to do so can render the occupier liable under ordinary negligence principles, which apply pursuant to s. 4(4). Thus if a play unit collapses, injuring a user, because of erosion or missing bolts or other maintenance failure the injured recreational user can sue for breach of the duty of care and does not have to establish recklessness on the part of the occupier.

14. Even if the Court is wrong in its construction of s. 4(4) and the general duty of care referred to applies to the design construction and installation of the play unit, as opposed merely to its maintenance, it would not alter the outcome for this plaintiff. On the facts of this case the unfortunate life threatening injury which the plaintiff sustained was not caused by any negligence or breach of duty or breach of statutory duty on the part of the defendant. This was a most unfortunate accident for which the plaintiff was responsible. His injury resulted solely from his own want of care. He allowed his three year old son to attempt to access the slide by means of the twisted ladder, on his own, without supervision or assistance. This, as one can see in the photographs, is one of the more challenging routes on the play unit and one which could be expected to cause difficulties for a three year old. While standing on the far side of the unit at the bottom of the slide, the plaintiff noticed his son's feet dangling from the platform of the unit. Understandably, he rushed to his assistance. In doing so he kept his eyes fixed on his son's feet. He ran through the unit rather than around it and focused as he was on his son he did not see the toddler bars which are clearly visible at the bottom of the unit. The Court has considerable sympathy for the predicament in which the plaintiff has found himself but that sympathy cannot be transposed into liability on the part of the defendant for that predicament. As a matter of law the Court must dismiss the plaintiff's claim.