Neutral Citation Number [2006] IEHC 436

THE HIGH COURT

Record Number: 2004 No. 9323P

BETWEEN

PATRICK GAFFEY A MINOR SUING BY HIS FATHER AND NEXT FRIEND, BERNARD GAFFEY

PLAINTIFF

AND

DUNDALK TOWN COUNCIL

DEFENDANT

Judgment of Mr Justice Michael Peart delivered on the 5th day of December 2006

1. On the 23rd April 2004 when this young plaintiff was nine years of age, he was playing football with his slightly older sister on a grassed open space close to where he lives in Cooley Park, Dundalk, which is a small housing estate. While doing so he injured himself when accidentally he fell into a fire hydrant which is located on this grassed area, and he sustained a bad cut to his right shin, and an avulsion fracture to his left ankle.

2. The hydrant is situated 2.6 metres from the gable end of the adjacent house, and 5.7 metres from the front building line of the houses. The lid is easily lifted since it is not of a design which permits it to be looked in place, and it is not heavy. This lid, and therefore also the hole measures 445mm x 280mm (1'5 x 11"), and the space below the lid where the water connections are, and into which the plaintiff fell is 690mm (2'3") deep. It could be described as being in the middle of the grassy area where they were playing. He had played on this area before this incident. How often is not clear. The plaintiff says that he had played there only a few times before the accident. I think that it is more probable that it was much more than a few times and that this was an area where he and others regularly played. There is no need to be specific as to how many times,

3. Prior to these children going out to play, someone in the area had obviously lifted the cast iron lid of the fire hydrant, leaving it on the grass, and exposing the hole.

4. Without realising that this hazard was present the plaintiff's left leg went down the opening followed by his right leg. His left leg received a nasty gash requiring eleven stitches. Though it was not realised until some days later, he sustained a fracture to his right ankle.

5. His father arrived shortly thereafter and lifted him out and brought him to hospital. The plaintiff was very distressed at that time.

6. The plaintiff's father has given evidence that children frequently play on this area, and also that this lid is frequently removed and left on the grass. He was aware of this happening before the plaintiff was injured and if he saw the lid off as he passed the green area he was in the habit of replacing it. Since this accident he notices it more often and replaces it. He says that he had never warned his children to watch out for the lid being off the hydrant when they were playing. Neither has he, nor any other person has ever told the defendant Council about the fact that persons unknown are removing the lid leaving the hole exposed in the grass.

7. It is not clear who lifts the lid or why, but the Court can, I think, presume that it is people in the estate of houses and not anyone from the defendant's fire department. On the occasion on which the plaintiff's engineer photographed the hole for this case, there was debris at the bottom in the form of a plastic Coca Cola bottle, some paper debris or maybe a beer can, and cigarette butts.

8. The Court has been told by Martin O'Neill, an Assistant Engineer with the defendant Town Council that it is responsible for cutting this grassed area and does so about every two weeks. The plaintiff has said that when the grass is long the hydrant cannot be seen as easily as when the grass is cut. I have no evidence as to whether on the date of this accident it had been recently cut. One way or another Mr O'Neill has stated that before this accident nobody had brought to the Council's attention any recurring problem about this lid being removed from the hydrant. He believes that the hydrant is visible to anyone playing on the grass, and that the grass would have to be very long before it would not be visible.

9. The plaintiff's engineer, Robert Burke inspected the hydrant for the purposes of his report, and I have already set out the dimensions of the hydrant as given by him. He has stated in his evidence that the lid of the hydrant is removable, and that it has to be, so that the hydrant can be accessed quickly by the fire services should the need arise. For that reason also these lids are not locked in place. He also stated that the lids on hydrants are no longer of the hinged kind where, when opened, the lid remains attached to the structure. This was in the interests of ease of access by the fire services.

10. But Mr Burke feels that the hydrant would be better placed off the grassy play area and located on the road which runs along the margin of the grassed area. There is no pavement at that point, although there is a narrow pavement at the gable wall of the house itself. The hydrant could not be placed on that pavement because it would be closer to the house than the regulations permit apparently. But he thinks that it would be better placed on the road, away from where the children play, and that there would be no particular difficulty in doing so.

11. In cross-examination, Kevin Segrave BL suggested that placing the hydrant on the road could not be a sensible suggestion since access to it in any emergency might be compromised by cars being parked on it.

12. The Court heard evidence also from Mr Pat Kelly, the Station Officer in the Fire Department of the Council. He has thirty eight years experience in that department. He regards the location of the fire hydrant on the grass as being ideal for his purposes. It is easily accessed and is unlikely to be obstructed by vehicles, and it is easy for the fire services to reach. He stated also that these hydrants are rarely constructed using a larger plinth. He also stated that if it was to be located on the road, it could be blocked by cars, and, in addition, it was his experience that when on a road these hydrants can become filled with mud and other debris from the road. These lids are of a lightweight design, and the constant passing of cars over the lid could deform it so that it is not easily removed in any emergency. In such emergencies time can be critical.

13. Mr Kelly stated that in the area of responsibility of the Council there were about 2500 hydrants around the town.

Liability of the defendant

14. It is certainly not clear that the defendant Town Council can be found to have been negligent. Clearly the mere fact that the plaintiff sustained an injury when he accidentally fell into a hydrant the lid of which had been removed does not mean that the Council caused this to happen, and should be held liable in negligence to pay compensation to the plaintiff. Negligence must be established.

15. There are 2500 hydrants under the control of the Town Council. Nobody told the Council about this lid being often removed and left on the grass, thereby exposing the hole. I am satisfied from the evidence of the plaintiff's engineer and the Council's engineer Mr O'Neill that there is nothing inherently dangerous about either the design of the hydrant or its location. Indeed it would appear that in the present case it is appropriately located in the interests of the houses which it may have to serve in an emergency. It cannot be against the gable end of the adjacent house because by regulation it must be a certain distance away from the wall of a house. Neither can it be located on the road itself since it might be obstructed by a car, and rendered inaccessible.

16. The best that Mr Burke for the plaintiff will say is that the hydrant might be better located on the road surface. But I am satisfied from Mr O'Neill's evidence and that of the fire officer, Mr Kelly that there are good reasons why it should not be located on the road, particularly since this grassed area was available for it to be located there. The plaintiff suggests that when the grass is long this hydrant is not clearly visible. But the evidence is that the grass is cut each fortnight, and it is submitted by Mr Segrave that in April such a frequency of cutting is reasonable and sufficient.

17. Given the large number of hydrants in the town, can it be the case that where some unknown people lift off the cover of one of these, and the Council is not even told about it happening, that the Town Council should be liable to compensate a person who falls into it? The only evidence from which negligence might be established is the assertion by Mr Burke that it would be preferable that the hydrant be located off the grassed area. He makes no complaint about the design of the hydrant, and in particular the lid which can be lifted off. In fact he has stated that it must be capable of being lifted off. There is no evidence that the design of the hydrant makes it in any way an inherent danger to which the plaintiff ought not to have been exposed. If it is suggested that the Council ought, as owner of the hydrant, to have ensured that this hydrant was never left with its lid off, then the evidence that there are some 2500 such hydrants in the town is relevant to the question of whether it would be just and reasonable that a duty of such scope be imposed under the law on the Council. It is also the fact, as already stated, that nobody made the Council aware of this recurring problem.

18. Patricia Moran SC for the plaintiff submits that in deciding to place the hydrant on this area of grass, the defendant ought to have known that this was an area in which children would be inclined to play, and that it represents a hidden trap to such children. There is no evidence from which the Court could conclude that the hydrant itself in its closed condition constitutes such a trap. The plaintiff in my view would have to go a step further and satisfy the Court that the Council ought to have foreseen that persons would from time to time remove the lid, thereby exposing the hole into which the children playing on the grass might fall. In my view that eventuality is not one reasonably foreseeable, and against which it should have taken precautions by way of notice or otherwise. Clearly it is the intervening act of some third party which has rendered an otherwise safe situation into a hazardous one.

19. A decision on the scope of the duty of care to be imposed on the Council in this regard requires a consideration of the judgment of Keane CJ in *Glencar Exploration Co. Ltd v. Mayo County Council* [2002] IR. …… in which the question of the scope of the duty of care owed by a public body such as the defendant Town Council was discussed, and there was restatement of the tests to be applied.

20. The Chief Justice referred as follows to the now notorious case of *Donoghue v. Stephenson* which needs no introduction to lawyers:

> *"The starting point is obviously the famous passage in the speech of Lord Atkin in Donoghue v. Stephenson [1932] AC 562 which, however often quoted, must be set out here again, but including an introductory passage, which is of critical importance, and is frequently omitted:*
>
> > *'At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which were called in question.'* "

21. This passage serves the useful purpose in the present case of stating elegantly what I have already alluded to, namely that simply because a person has received an injury does not mean automatically that some other person must pay compensation to the injured party.

22. The learned Chief Justice then referred to the so-called two stage test enunciated by Lord Wilberforce in *Anns v. Merton Borough Council* as being:

> *"First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. . . .*

23. Thus both proximity and foreseeability were required, followed by consideration of whether there was anything which ought to negative, reduce or limit the scope of the duty. The Chief Justice, having identified some criticisms of this test, went on to refer to a different approach. He stated:

> *"Ultimately, in Caparo Industries Plc. v. Dickman [1990] 2 AC 605, a different approach was adopted, epitomised in a passage in the judgment of Brennan J in the High Court of Australia in Sutherland Shire Council v. Heyman (1985) 60 ALR 1:*
>
> > *'It is preferable in my view that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained*

only by undefinable considerations which ought to negative, or to reduce or limit the scope of the duty, and the class of person to whom it should be owed.'

In Caparo, Lord Bridge summed up the approach in England as follows:

'What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there exists between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of proximity' or 'neighbourhood' and the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.'

24. The Chief Justice then reviewed the law in Ireland and in particular as it appeared from Ward v. McMaster. He referred to a passage from the judgment of Costello J. (as he then was) in the High Court as follows:

"When deciding whether a local authority exercising statutory functions is under a common law duty of care the court must firstly ascertain whether a relationship of proximity existed between the parties such that in the reasonable contemplation of the authority carelessness on their part might cause loss. But all the circumstances of the case must in addition be considered, including the statutory provisions under which the authority is acting. Of particular significance in this connection is the purpose for which the statutory powers were conferred and whether or not the plaintiff is in the class of persons which the statute was designed to assist.

It is material in all cases for the court in reaching its decision on the existence and scope of the alleged duty to consider ***whether it is just and reasonable*** *that a common law duty of care as alleged should in all the circumstances exist." (my emphasis)*

25. Of importance is the fact that the Chief Justice also referred to the judgment of McCarthy J. in the Supreme Court wherein the latter stated:

"Whilst Costello J essentially rested his conclusion on the 'fair and reasonable' test, I prefer to express the duty as arising from the proximity of the parties, the foreseeability of the damage, and the absence of any compelling exemption based upon public policy. I do not, in any fashion, seek to exclude the latter consideration, although I confess that such a consideration must be a very powerful one if it is to be used to deny an injured party his right to redress at the expense of the person or body that injured him."

26. The Chief Justice went on to state that while this statement by McCarthy J. had been seen as an endorsement of the two stage test of Lord Wilberforce, it was not necessarily so, and he went on to state that what McCarthy J. had stated was 'obiter' and concluded:

"Given the far reaching implications of adopting in this jurisdiction a principle of liability in negligence from which there has been such powerful dissent in other common law jurisdictions, I would not be prepared to hold that further consideration of the underlying principles is foreclosed by the dicta of McCarthy J in Ward v. McMaster."

27. He concluded his examination of the duty of care on a local authority by stating:

There is, in my view, no reason why courts determining whether a duty of care arises, should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J at first instance in Ward v. McMaster, by Brennan J in Sutherland Shire Council v. Heyman and by the House of Lords in Caparo Industries plc. v. Dickman. As Brennan J pointed out, there is a significant risk that any other approach will result in what he called a 'massive extension of a prima facie duty of care restrained only by undefinable considerations...'

28. This therefore is the test by which the present case should be considered. There is no difficulty in concluding that a relationship of proximity exists between the defendant and a person such as the plaintiff who resides in the estate on which this hydrant is situated. As for forseeability the question is whether it was in the reasonable contemplation of the defendant that placing the hydrant on this grassed area might cause injury to the plaintiff, given the probability that children would play there. One could say with confidence, I think, that the defendant should reasonably foresee that if the hydrant was badly designed or poorly constructed so that it presented a hazard, such children could sustain an injury. I am of the view however that the prospect that mischievous people would lift off the lid and leave it off and that a child such as the plaintiff would fall into the hydrant as a result, is too remote a prospect to be foreseeable. It requires an intervening act.

29. But even if I am wrong about that, and it was indeed foreseeable, then, under the two stage test in *Anns*, or as stated by McCarthy J*. in Ward v. McMaster*, then the plaintiff ought to recover, since there might not exist such a compelling public policy consideration as should deny the plaintiff recovery of compensation.

30. But under the Glencar test, even if I am wrong in relation to foreseeability, and both 'proximity' and 'foreseeability' are met, the Court must consider "*whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff*".

31. In this respect, the evidence that there are 2500 such hydrants in the town is important, as is the uncontested fact that neither the plaintiff's father, nor anybody else had never notified the Council of the fact that the lid of this hydrant was being removed thereby causing a danger to children playing on the grassed area.

32. It would also be relevant to consider the nature and purpose of the statutory power being exercised by the local authority in placing the hydrant where it is located. In the present case the Council are clearly obliged to place hydrants sufficiently close to houses in the area so that the fire services can be effective in an emergency. Such a duty is an important one, given the capacity for a fire to cause loss of life and serious injury. The design of the lid facilitates the easy access to the water supply in such an emergency. That would need to be balanced against the risk of possible injury by placing the hydrant on this grassed area.

33. It cannot be reasonable for the Council to have imposed upon it a duty to ensure that the lids are at all times in place on hydrants in the town – the more so in the absence of any information being given to them that lids are being removed. The Council has in place a system of inspection of hydrants on a routine basis to ensure that they are in working order, but it is quite unreal to expect that they could inspect all these installations on a daily basis. As I have stated there is no evidence that the hydrants are inherently dangerous or dangerously located. It requires the mischievous act of an intervening party to create the hazard.

34. In *Whooley v. Dublin Corporation* [1960] IR 60, the facts were somewhat similar to the present case. According to the head note of the report of that case, the plaintiff sustained personal injuries through putting her foot into an open fire hydrant box while walking at night along the footpath of a Dublin street. The lid of the hydrant box, which had apparently been removed by some mischievous person, was found on the footpath a short distance from the scene of the accident. The hydrant box was a type no longer being installed, the lid of which could be partially raised by the insertion of a stick in a slot on top of the lid. The type of hydrant in then current use by the defendant local authority had a lid which was heavier, though smaller in diameter, and was designed to be opened by a simple type of key. Both types of hydrant box were so designed as to be easily accessible to the Dublin Corporation fire brigades in case of fire and both types of lid were, consequently, capable of being removed without very great difficulty by mischievous persons. There was evidence that there were instances in which both types of lid were, to the defendants' knowledge, removed from time to time, but there was no evidence that the older type of lid was removed with an appreciably greater relative frequency than the newer type, or that it was of a type normally easily removed by children.

35. It was held in the High Court, on appeal from the Circuit Court, that the plaintiff was not entitled to recover damages for negligence against the defendants, since there was no evidence to show that the hydrant box, though old-fashioned, was of a type either intrinsically likely to be interfered with by young irresponsible children or less easily safeguarded than a more modern type against unauthorised interference by mischievous youths and adults. In so deciding, McLoughlin J. stated:

> *"It is not contended that the Corporation are not under a duty to maintain these hydrants on the footway and that they must be readily accessible for use by the Corporation fire brigade in case of fire, but reliance is placed by the plaintiff on the evidence of an engineer called on her behalf who stated that the type of hydrant and box in this case was thirty to forty years old, that the lid could be removed by a child inserting a stick or some instrument into a slot provided along one side of the lid for that purpose, and that a more modern type has a heavier, though smaller, lid without a slot but with a hole in the centre for the insertion of a simple type of key. He did not, however, suggest that this more modern type of lid was designed to make, or would make, interference by mischievous persons more difficult.*
>
> *There was evidence also by a lady that some days previous to the accident water was spurting from a hydrant without a lid in Oxford Road which, I am inclined to believe, was this same hydrant.*
>
> *For the defendant Corporation there was evidence that for paving purposes the hydrants in Oxford Road, including this particular one, were in use during that period, 21st October to 4th November, after which they were inspected and were left in proper and safe condition. There was also evidence of a turncock who was notified of the accident on the same night, shortly after its happening, and inspected this hydrant box and found nothing wrong with it. How the lid came to be replaced is not known.*
>
> *Having carefully considered all the circumstances and the authorities quoted to me by counsel I cannot find that the Corporation through its officials maintained this hydrant box in a negligent way so as to cause the plaintiff's injuries. There is, in my view, no reason for holding that this type of hydrant box is of the kind that is likely to be interfered with by young irresponsible children to the knowledge of the Corporation's officials or that any such knowledge should be imputed to them. It is my opinion that this hydrant was interfered with by some mischievous person and that no other type of hydrant which could be devised, consistent with its necessary purpose, would be safe from such malicious interference."*

36. I see no meaningful distinction between that case and the present case, and come to a similar conclusion.

37. Mc Mahon and Binchy in their work 'The Law of Torts' cite a case of *Kavanagh v. Cork Corporation* [DPIJ: Hilary and Easter Terms 1994, p. 78 at p. 80 (HC)] which involved similar facts. I have been unable in the time available to me on circuit to locate a copy of the judgment itself, but the learned authors note that in that case Keane J. (as he then was) stated that

> *"a fire hydrant, of its nature, has to be readily and quickly accessible to the fire brigade, or anyone else who has to make use of it rapidly in order to deal with an emergency. That is the whole point of it and, consequently , to have them locked in any way would obviously be more dangerous than the dangers caused by the sort of vandalism apparently common in parts of the city...".*

38. I am satisfied that the hydrant in the present case is designed in a way which facilitates, as it must, easy access to emergency services. It is located in a position which is in conformity with the regulations as to distance from any house, and that for the reasons given in evidence, it could not reasonably and safely placed on the road itself. I am also satisfied that it would not be reasonable to expect that the defendant should itself anticipate and guard against the possibility that the lid would be regularly removed from the hydrant and left on the adjoining grass, thereby exposing playing children to a hazard, even if the fact that children might play there is something which would happen. If the defendant had been notified that the lid was being removed and left off the hydrant, then the Court would have to consider how that might alter the situation, but in the present case it does not arise on the facts.

39. The plaintiff has failed to establish a breach of the duty of care on the defendant's part, and with regret the claim must be dismissed.